

**Before the
United States House of Representatives
Committee on Transportation and Infrastructure's
Subcommittee on Railroads, Pipelines and Hazardous Materials**

**Statement of Robert Petrancosta
on behalf of the
American Trucking Associations, Inc. (ATA)**

***Reauthorization of the Department of Transportation's
Hazardous Materials Safety Program***

May 14, 2009

Mr. Chairman and Members of the Committee:

Thank you, Mr. Chairman and members of the House Transportation and Infrastructure Subcommittee on Railroads, Pipelines and Hazardous Materials for the opportunity to testify on the reauthorization of the Department of Transportation's (DOT) hazardous materials safety program. My name is Robert Petrancosta, and I am the Vice President of Safety for Con-way Freight, a trucking company headquartered in Ann Arbor, Michigan. Con-way is a less-than-truckload motor carrier that operates more than 8,500 trucks and employs over 17,000 individuals. Con-way transports over 56,000 shipments each day and approximately 2,000 of these shipments are regulated hazardous materials.

Today, I appear before you representing not just my company, but also the American Trucking Associations (ATA). ATA is the national trade association of the trucking industry and through its affiliated state trucking associations, affiliated conferences and other organizations, ATA represents more than 37,000 trucking companies throughout the United States. I am proud to serve as a member of ATA's Safety Policy Committee and the past Chairman of ATA's Hazardous Materials Policy Committee.

The trucking industry is the backbone of this nation's economy accounting for more than 80% of the nation's freight bill with nearly 9 million Americans working in trucking-related jobs. The trucking industry delivers virtually all of the consumer goods in the United States and the lion's share of essential hazardous materials, such as pharmaceuticals to treat the ill, chemicals to purify water, fuel to power our cars and heat our homes, pesticides and fertilizers to help feed the world, and military supplies to

protect our troops. These hazardous materials are essential to support our quality of life and their safe and efficient transportation is critical to this Nation's economic well being.

The safety and security record for the transportation of hazardous materials is impressive. Each day there are approximately 1,000,000 shipments of hazardous materials in the United States.¹ 94% of these shipments move by truck.² The rate of serious incidents involving the transportation of hazardous materials by motor carrier is just 0.0001%, and the percentage of incidents involving injuries is 0.00002% or two one-hundred thousandths of one percent.³

We support the Pipeline and Hazardous Materials Safety Administration's (PHMSA) leadership in regulating hazardous materials transportation. PHMSA has implemented an enterprise approach to hazardous materials regulation and communicates on a regular basis with key stakeholders, including safety advocates, emergency responders, carriers and shippers. The agency has embraced a risk-based, data driven approach to balance the need to ensure the safe and secure transportation of hazardous materials with the need to ensure that these vital commodities move efficiently in commerce. PHMSA also has earned the respect of the international community and a PHMSA staff member currently serves as the Chairman of the United Nations Subcommittee on the Transportation of Dangerous Goods. Congress should ensure that PHMSA maintains its status as the lead regulatory agency for hazardous materials transportation both at home and abroad.

While the existing statutory framework and regulations governing hazardous materials transportation have a proven track record, I appear before you today to highlight specific recommendations to further improve the safe, secure and efficient transportation of hazardous materials.

The remainder of my testimony highlights six key issues for Congress to address as it considers the reauthorization of the federal hazardous materials transportation law:

- Eliminating duplicative and redundant security background checks;
- Improving state hazmat permitting systems;
- Ensuring equitable enforcement of the hazmat regulations;
- Enhancing safety by increasing DOT's preemption authority; and
- Resolving jurisdictional issues concerning the Occupational Safety and Health Administration (OSHA) and DOT's regulation of hazmat handling; and
- Regulating the transportation of flammable materials in cargo tank wetlines.

¹ See Hazardous Materials Cooperative Research Act of 2009, H.R. 1013, 111th Congress (February 12, 2009).

² See Research and Special Programs Administration, Office of Hazardous Materials Safety, *Hazardous Materials Shipments* (October 1998).

³ See U.S. Department of Transportation, Hazardous Materials Information System (May 1, 2009). Note many "serious incidents" do not involve injuries, as highway closures and certain releases of hazardous materials are classified as "serious incidents" even though no one is injured.

I. Redundant Background Checks

Duplicative background checks and redundant credentials have caused a dramatic reduction in the number of qualified drivers that are available to transport hazardous materials. Prior to the initiation of the Transportation Security Administration's (TSA) background check program, there were more than 2.7 million drivers that had obtained Hazardous Materials Endorsements (HME) to their Commercial Drivers Licenses (CDL).⁴ We estimate that the number of HME holders will fall to 1.6 million by the Spring of 2010 – the end of the first 5-year cycle. This 41% reduction in qualified drivers is not the result of individuals failing the background check -- less than 1% fail the check -- but rather is a result of the onerous process associated with obtaining this credential and the fact that drivers often must obtain multiple credentials that entail expensive, duplicative federal background checks.

Drivers that transport hazardous materials must submit to a fingerprint-based background check to obtain HME to their CDL. This credential costs approximately \$100, requires multiple visits to the licensing agency to complete the process and involves a delay of several weeks before the credential is issued. Many of these drivers also access port facilities and therefore must obtain a Transportation Worker Identification Credential (TWIC) – these drivers receive a discount if they have already been through an HME check, but still must pay an additional \$105.25 for the second credential.⁵ We estimate the cost of obtaining federal credentials for Con-way's drivers to be approximately \$250,000.

We recently learned that the city of Doraville, Georgia has imposed a security background check for individuals that access the Doraville petroleum loading facilities. Under this program, Doraville collects fingerprints, transmits the prints to the federal government, receives a criminal history report, and then issues a Doraville credential at a cost of \$100. The background check performed is identical to the check performed by TSA under the HME and TWIC programs. Unfortunately, Doraville has refused to recognize the HME or the TWIC as an acceptable credential. The ability of states and municipalities to subject hazmat drivers to redundant criminal history background checks could easily become an unbearable financial burden to hazmat drivers that operate in hundreds of cities throughout the country. The Doraville credential is a revenue raiser for the City, but provides no additional security. Congress should preempt these duplicative background check requirements imposed by states and political subdivisions.

⁴ See Testimony of Asst. Director Justin Oberman, TSA Threat Detection and Credentialing Office, before the House Subcommittee on Economic Security, Infrastructure Protection, and Cybersecurity (November 5, 2005).

⁵ Additional background checks and credentials are required for drivers that access airports, drivers that deliver freight to Canada and Mexico, and drivers that haul freight for the Department of Defense. See Exhibit 1 for a chart depicting the various background checks and credentials that should be harmonized.

To address the problem of redundant security background checks for drivers transporting hazardous materials, Congress should enact a risk-based approach to background checks. This approach has four elements. The federal government should:

1. Recognize that not all hazardous materials are security sensitive. Paint, food coloring, and pharmaceuticals are not weapons of mass destruction. Congress should require the Department of Homeland Security (DHS) to work with DOT to identify a list of security sensitive hazardous materials that are truly weaponizable.
2. Require individuals that transport security sensitive hazardous materials to undergo a fingerprint-based background check and obtain a TWIC as evidence of their fitness to transport these hazardous materials of concern.
3. Continue to perform name-based background checks for drivers seeking to obtain or renew their hazardous materials endorsements to their CDL.
4. Ensure that the TWIC is the only security credential required for transportation workers and preempt other state and local background checks and credentials when applied to drivers transporting hazardous materials.

If enacted, the legislation – referred to as the Safe Truckers Act – would reduce the cost of background checks for drivers while not impacting the secure transportation of hazardous materials. We recognize that jurisdiction over this issue is shared in the House between the Transportation and Infrastructure Committee and the Committee on Homeland Security. We encourage the two Committees to work together to secure passage of this much-needed legislation. The background check reforms envisioned under the Safe Truckers Act will put money back in the pockets of America’s truck drivers, help preserve scarce government resources, and maintain the highest standards of security.

II. Uniform Permitting Program

Individual states have imposed more than 40 separate hazardous materials permitting programs.⁶ These motor carrier permitting requirements are triggered based upon the type of hazardous material being transported through the state. Some states have more than one permit, depending upon the types of hazardous materials being transported. Compliance with these separate programs is an enormous administrative burden for trucking companies that operate in multiple states, as it is extremely difficult to identify and monitor changes to these different permitting programs. For some smaller trucking companies, it is difficult to predict which states they may travel through and whether they will transport particular types of hazardous materials through that state in a given year.

⁶ See Exhibit 2, a map depicting the states with individual permit programs applicable to the transportation of hazardous materials.

There is a solution. ATA supports the implementation of the “Uniform Program,” which is currently administered by seven states (*i.e.*, IL, MI, MN, NV, OH, OK, and WV). The Uniform Program is a “base state” permitting program that ensures participating states will continue to receive the revenue they have come to rely upon under their individual permitting programs. Moreover the program ensures that the fees states assess are fairly apportioned and are dedicated to improving hazardous materials transportation safety.

The implementation of the Uniform Program would reduce state expenses, as the inspection and administrative functions would be shared by all participating states. The implementation of the program also would reduce the administrative burden on the regulated industry.

To transition from the current individual permits to the Uniform Program, Congress should enact a carrot and stick approach. Initially, Congress should provide grants to help states convert their computers and other administrative functions to be compatible with the Uniform Program. Congress should then select a date certain whereby separate state permitting programs would be preempted.

III. Equitable Enforcement

The hazardous materials regulations (HMRs) consist of more than 500 pages of regulatory text. Regulatory requirements vary depending upon the types and quantities of materials being transported. The complexity of these regulations makes it very difficult to train drivers who are called upon to transport many different types of hazardous materials. Con-way has a robust driver training program. We estimate that we spend more than \$700,000 training our hazmat employees to operate in compliance with the HMRs. However, we will never be able to train our drivers to catch every mistake that is made by our customers.

Primary compliance with the HMRs rests with the shipper of the materials, who must properly classify the material, select appropriate packaging, mark and label the package and prepare a compliant hazardous materials shipping paper. Each of these “pre-transportation” activities occurs before the carrier arrives to load hazardous materials packages on the truck. Because most violations of the HMRs are discovered during roadside inspections, drivers and motor carriers frequently receive citations for violations of the HMRs that they did not cause and cannot reasonably be expected to discover.

For example, a carrier should not be held responsible for transporting undeclared hazardous materials, where a shipper neither labels the package nor presents a hazardous materials shipping paper to the carrier prior to transportation. A driver cannot be expected to catch shippers that intentionally conceal the transportation of hazardous materials. Similarly, where a shipper tenders a package of *boron trifluoride diethyl etherate* and indicates on the shipping paper that the chemical is corrosive, but fails to denote that the chemical also has a subsidiary hazard of flammable, it is not realistic to

expect the driver picking up the package to research the chemical and catch the shipper's mistake in failing to also list the subsidiary hazard on the shipping paper.

To address this inequity, Congress should distinguish between functions that are normally performed by a shipper and functions that are the responsibility of the carrier, and clarify that a carrier is not responsible for violations that result from pre-transportation functions performed by another person, unless the carrier has actual knowledge of the violation. While carriers must remain responsible for the correct performance of hazardous materials functions under their control (*e.g.*, blocking and bracing, placarding, segregation of incompatible hazard classes), they cannot be expected to correct shippers' mistakes in the performance of pre-transportation functions. The issuance of violations to carriers for activities that are performed by others does nothing to address the compliance and safety problems created by the responsible party. This results in continuing behavior that is not in accordance with the regulations and the failure to correct unsafe hazardous materials transportation conditions.

Congress should enact a provision that removes a carrier's liability for violations of pre-transportation functions that are performed by a shipper, unless the carrier has actual knowledge of the violation.

IV. Uniform Regulations Across Jurisdictions

Motor carriers that transport hazardous materials necessarily operate in multiple jurisdictions. Non-uniform regulations force carriers to bypass certain jurisdictions, resulting in a delay in the delivery of hazardous materials and increased vehicle miles traveled.⁷ Statistically, the more time hazardous materials spend in transportation or the more miles they must travel, the more likely it is that they will be involved in an incident. Non-uniform regulations also make it difficult to train workers that perform their duties in multiple jurisdictions. This leads to increase incidents of non-compliance and associated fines for failure to comply with unique regulatory requirements that vary from state-to-state.

Congress recognized that differing regulatory requirements confounds motor carriers ability to operate in compliance and compromises safety where incentives are created to avoid transporting hazardous materials in the most direct and expeditious manner possible. To this end, Congress explicitly provided preemptive authority to DOT.

Congress should continue to strengthen DOT's ability to ensure uniform regulations covering the transportation of hazardous materials by eliminating the exemption to preemption in section 5125(h). This provision, which was added in 2005, removed all preemptive limitations to State enforcement authority. One example of the overly broad nature of this exemption is that it could be invoked to prevent DOT from

⁷ This results in additional fuel consumed and an increase in carbon emissions, in addition to the increased safety risks caused by diversion.

preempting a state requirement that motor carriers be held liable for the release of hazardous materials even if they do not cause or otherwise contribute to the release. Is it fair to hold the motor carrier responsible where a drunk driver crashes into a cargo tank and causes a release of hazardous materials, through no fault of the carrier? Massachusetts has pending legislation that would impose this type of liability upon motor carriers. DOT must have the authority to preempt these types of inequitable enforcement schemes, which frustrate interstate commerce, will unnecessarily increase insurance premiums and the cost of transporting hazardous materials, and could result in motor carriers deciding not to transport hazardous materials through certain jurisdictions.

V. OSHA's Overlapping Jurisdiction

ATA supports a modification to the joint regulatory authority that OSHA and DOT exercise with respect to the transportation of hazardous materials. This overlapping jurisdiction erodes the regulatory uniformity necessary for the safe and efficient transportation of hazardous materials and makes it difficult to train drivers that must perform their duties in multiple jurisdictions.

Unlike DOT, OSHA does not have the authority to ensure uniform regulations. In fact, states are encouraged to enact more stringent worker protection regulations than the federal baseline established by OSHA, which leads to a myriad of differing regulatory requirements across jurisdictional lines. This type of regulatory framework may work well for employees at fixed facilities, but is problematic for transportation companies, whose employees work in multiple states.

The potential problems associated with OSHA's overlapping jurisdiction became obvious last year when OSHA proposed revisions to its explosives standard. If promulgated as proposed, this standard would be inconsistent with DOT's regulations in a number of areas covering the transportation of hazardous materials. Some of these inconsistencies include: different fire extinguisher standards, requirements to move fixed refueling facilities, trailer modifications, and segregation requirements.

ATA is concerned about employee safety and supports a compromise solution that would ensure uniform regulations, while preserving OSHA's role in addressing potential unsafe conditions for employees. To implement this solution, Congress should eliminate the overlapping jurisdiction by deleting the jurisdictional provision in 5107(g) and simultaneously requiring the Secretary of Labor to identify any gaps in the hazardous materials regulations that create an unsafe condition for employees and then notify the Secretary of Transportation. Upon such notification the Secretary of Transportation should be required to address these unsafe conditions.

VI. Wetlines

Wetlines refer to the product piping underneath cargo tank trucks that transport gasoline and other flammable liquids. ATA opposes a legislative mandate for the

installation of costly equipment to purge residual product from wetlines for the reasons discussed below.

In 1998, following a fatal accident, the National Transportation Safety Board (NTSB) issued a recommendation to DOT to prohibit the transport of flammable materials in wetlines to reduce the risk of serious injuries from the release of product in the event that a car crashes into a tank truck. In 2004, the Research and Special Programs Administration (RSPA), predecessor to PHMSA proposed a rule to regulate flammable liquids in wetlines. The proposed rule would have required tank trucks to install a device that pumped any residual liquid back into the tank prior to transportation. Based upon its analysis of data from incidents attributable to wetlines and the costs associated with requiring equipment to evacuate product from wetlines, PHMSA concluded that the costs of the proposed regulation exceeded its benefits and properly withdrew the proposed rule.⁸

The industry's safety record demonstrates that a mandate for wetlines-purging equipment is simply not justified. An examination of DOT's hazmat incident database reveals that over the past 6 years there has not been a single wetlines incident that has resulted in a fatality or injury.⁹ Since 1990, incident data reveals that 7 fatalities and 2 minor injuries, at most, could be classified as wetlines related incidents. By contrast, more than 50,000 cargo tank shipments of flammable liquids occur each day and over 300 million shipments have occurred since 1990.

A Congressional mandate to regulate cargo tank wetlines would significantly increase equipment and operational costs for the tank truck segment of the trucking industry. In 2004, we estimated that 26,000 vehicles would be impacted at a cost of \$3,000 each. This figure did not include the costs associated with the "downtime" during the retrofit process, nor did it include the cost of hiring and training additional personnel responsible for maintaining wetlines purging equipment. From an operations standpoint, carrier efficiency would decrease as a result of delays at loading facilities waiting for wetlines to be purged. System malfunctions would further erode carrier efficiency.

We urge Congress to rely on the experts at PHMSA with respect to the wetlines issue and not take action to overturn the regulatory process and mandate a technology that would not appreciably increase the safe transportation of hazardous materials, but would impose significant costs on an industry that is struggling in this difficult economic environment.

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⁸ RSPA responded to an NTSB recommendation, proposed a solution to a perceived problem, accepted comments, analyzed the data, and then properly concluded that the costs of the proposed solution far exceeded its benefits.

⁹ PHMSA Incident Reporting Data provided to ATA on April 28, 2009. In fact, there have been only two wetlines incidents since 2002.

In closing we would like to recognize that while the existing federal hazardous materials law and its accompanying regulations go a long way towards ensuring the safe, secure and efficient movement of hazardous materials, there is room for improvement. As Congress moves to reauthorize the federal hazardous materials transportation law it is critically important to ensure uniformity across jurisdictional lines. This is the theme that runs through the priority issues highlighted in this testimony.

ATA and Con-way greatly appreciate this opportunity to offer our insight into measures to improve the safe, secure and efficient transportation of hazardous materials. Thank you for allowing me to testify. I am pleased to answer any questions you and the other members of the Subcommittee may have.

Exhibit 1

Program	Cost to Driver	Purpose
Hazardous Materials Endorsement (HME)	\$94 ¹⁰	Federal Security Credential for Transportation of Hazardous Materials (TSA)
Transportation Worker Identification Credential (TWIC)	\$132.50 ¹¹	Federal Security Credential for Access to Port Facilities (TSA)
Secure Identification Display Area (SIDA)	\$29 ¹²	Federal Security Credential for Access to Airport Facilities (TSA)
Air Cargo Security Threat Assessment	\$28 ¹³	Federal Security Credential for Access to Air Cargo (TSA)
Free and Secure Trade (FAST)	\$50 ¹⁴	Federal Security Credential for Border Crossing (CBP)
Florida Uniform Port Access Credential (FUPAC)	\$85 ¹⁵	State Security Credential for Access to Florida Ports (Florida)
Doraville Petroleum Facility Access Credential	\$100 ¹⁶	Local Security Credential for Access to Local Petroleum Loading Facilities (Doraville City Council)

¹⁰ Includes \$22 FBI database search fee, \$34 TSA threat assessment fee, and \$38 information collection fee (TSA contractor). States that manage their own information/fingerprint collection are authorized by TSA to establish separate fees, which range from \$70 to \$133.

¹¹ Includes \$43.25 enrollment fee, \$72 for card production/security threat assessment fees, and \$17.25 (discounted amount)* for the FBI fee. Applicants with an HME or FAST card will not be charged the \$17.25 FBI fee and will receive a \$10 discount for the card production/STA.

¹² Includes \$22 FBI database search fee, \$2 clearinghouse facilitation fee, and \$5 electronic collection fee or \$7 manual collection fee.

¹³ Fee to include collection, clearinghouse facilitation costs, OPM and FBI fees.

¹⁴ Includes check against criminal and immigrant databases in U.S. and Canada and issuance of RFID tag.

¹⁵ Includes \$24 FBI database search fee, \$33 information collection fee, and \$28 for the State Department of Highway Safety to support access related system expenditures.

¹⁶ Two-year credential required to access petroleum terminals located in Doraville. City refuses to accept HME or TWIC.

