

DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Part 395

**Hours of Service; Limited 90-Day Waiver for the Distribution of
Anhydrous Ammonia in Agricultural Operations**

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; grant of waiver.

SUMMARY: FMCSA grants a limited 90-day waiver from the Federal hours-of-service (HOS) regulations for the transportation of anhydrous ammonia from any distribution point to a local farm retailer or to the ultimate consumer, and from a local farm retailer to the ultimate consumer, as long as the transportation takes place within a 100 air-mile radius of the retail or wholesale distribution point. This waiver extends the agricultural operations exemption established by section 345 of the National Highway System Designation Act of 1995, as amended by the sections 4115 and 4130 of the Safe, Accountable, Flexible, Efficient Transportation Equity: A Legacy for Users (SAFETEA-LU) to certain motor carriers engaged in the distribution of anhydrous ammonia during the 2010 spring planting season. The Agency has determined that the waiver would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption, based on the terms and conditions imposed. This waiver preempts inconsistent State and local requirements applicable to interstate commerce.

DATES: The waiver is effective (INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER). The waiver expires on (INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER).

FOR FURTHER INFORMATION CONTACT: Thomas L. Yager, Chief, Driver and Carrier Operations Division, Office of Bus and Truck Standards and Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave. SE, Washington, DC 20590. E-mail: MCPSD@dot.gov. Phone (202) 366-4325.

SUPPLEMENTARY INFORMATION:

Legal Basis

The Transportation Equity Act for the 21st Century (TEA-21) (Public Law 105-178, 112 Stat. 107, June 9, 1998) provides the Secretary of Transportation (the Secretary) the authority to grant waivers from any of the Federal Motor Carrier Safety Regulations (FMCSRs) issued under Chapter 313 of Title 49 of the United States Code or 49 U.S.C. 31136, to a person(s) seeking regulatory relief. (49 U.S.C. 31136, 31315(a)) The Secretary must make a determination that the waiver is in the public interest, and that it is likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. Individual waivers may only be granted to a person for a specific unique, non-emergency event, for a period up to three months. TEA-21 authorizes the Secretary to grant waivers without requesting public comment, and without providing public notice. The Administrator of FMCSA has been delegated authority under 49 CFR 1.73(g) to carry out the functions vested in the Secretary by 49 U.S.C. chapter 311, subchapters I and III, relating to commercial motor vehicle programs and safety regulation.

Background

The FMCSA has been contacted by members of Congress concerning the Agency's interpretation of the agricultural exemption provided in section 345(a) of the National Highway System (NHS) Designation Act of 1995, Pub. L. 104-59, November 28, 1995, 109 Stat. 568, 613, 49 U.S.C. 31136 note. Constituents engaged in the transportation of farm supplies – particularly anhydrous ammonia – contacted the members to express concerns that the Agency's implementation of the agricultural exemption results in the exclusion of certain distribution activities from the regulatory relief intended by Congress.

As amended by SAFETEA-LU, the agricultural provision reads as follows:

Transportation of agricultural commodities and farm supplies.--

Regulations prescribed by the Secretary under sections 31136 and 31502 regarding maximum driving and on-duty time for drivers used by motor carriers shall not apply during planting and harvest periods, as determined by each State, to drivers transporting agricultural commodities or farm supplies for agricultural purposes in a State if such transportation is limited to an area within a 100 air mile radius from the source of the commodities or the distribution point for the farm supplies.

The Agency has long understood that limited farm storage capacity necessitates a "just in time" delivery system from retail distributors of farm supplies to farms (or other locations where the farm supply product will be used) during the busy planting and harvesting seasons. Longstanding FMCSA guidance on its HOS regulations has

consistently allowed that the agricultural operations exemption applies to the transportation of farm supplies from the local farm retailer to the ultimate consumer within a 100 air-mile radius. FMCSA's interpretation, however, has not extended the HOS exemption to deliveries from wholesalers located at port or terminal facilities to either local farm retailers or farms. (See Question 33, 49 CFR 395.1 on the Agency's website: www.fmcsa.dot.gov.) Question 33 reads as follows:

Question 33: How is "point of origin" defined for the purpose of §395.1(k)?

Guidance: The term "point of origin" is not used in the NHS Designation Act; the statutory term is "source of the [agricultural] commodities." The exemption created by the Act applies to two types of transportation. The first type is transportation from the source of the agricultural commodity - where the product is grown or raised - to a location within a 100 air-mile radius of the source. The second type is transportation from a retail distribution point of the farm supply to a location (farm or other location where the farm supply product would be used) within a 100 air-mile radius of the retail distribution point.

The legislative history of the agricultural exemption indicates it was intended to only apply to retail store deliveries. Thus, it is clear Congress intended to limit this exemption to retail distributors of farm supplies.

Second-stage movements, such as grain hauled from an elevator (or sugar beets from a cold storage facility) to a processing plant, are more likely to fall outside the exempt radius. Similarly, the exemption does not apply to a wholesaler's transportation of an agricultural chemical to a local cooperative because this is not a retail delivery to an ultimate consumer, even if it is within the 100 air-mile radius.

The Agency's re-examination of the issue has made it clear that the exclusive emphasis of the Agency's regulatory guidance on deliveries from local retailers to the ultimate farm consumer may not reflect today's economic reality. Like farms, local retailers have limited storage capacity and therefore must constantly replenish their supplies during the planting and harvesting seasons. They are part of the "just in time" distribution system that extends from a wholesaler to the ultimate consumer of the supplies.

Given this reality, FMCSA has determined that it is in the public interest to issue a waiver to provide regulatory relief for the transportation of anhydrous ammonia during the 2010 spring planting season. This action is in the public interest because it provides limited regulatory relief to facilitate planting activities that will ultimately result in the production of agricultural commodities at prices to which consumers have become accustomed, without compromising safety.

This waiver extends the agricultural operations exemption from the Federal HOS regulations to motor carriers in the distribution system, provided that: 1) the motor carrier is delivering anhydrous ammonia; 2) none of the transportation movements within the

distribution chain exceed a 100 air-mile radius - whether from the retail or wholesale distribution point; and 3) the motor carrier has a “satisfactory” safety rating or is unrated; motor carriers with “conditional” or “unsatisfactory” safety ratings are prohibited from taking advantage of the waiver. Therefore, the waiver allows motor carriers with a satisfactory safety rating or unrated motor carriers to use the HOS exemption when their drivers are delivering anhydrous ammonia from any distribution point to a local farm retailer or to the ultimate consumer, and from a local farm retailer to the ultimate consumer, as long as the transportation takes place within a 100 air-mile radius of the retail or wholesale distribution point. This waiver is effective immediately.

Safety Determination

The FMCSA compared safety performance data for agricultural carriers currently operating under the statutory HOS exemption provided by the NHS, as amended, with non-agricultural carriers that are not exempt from HOS regulations to determine whether the waiver would be likely to achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained in the absence of the waiver. The data were collected as part of a study, “Agricultural Commodity and Utility Carriers Hours of Service Exemption Analysis.” The final report from the study will be published later this year.

The study was conducted in two phases. Phase 1 compares the safety performance of agricultural and non-agricultural carriers for the period 2005 through 2008, and also examines two additional industries, livestock and utility carriers, whose operations were not exempt from HOS regulations prior to the passage of SAFETEA-

LU.¹ The Phase 1 analysis used carrier registration, inspection and crash data from FMCSA's Motor Carrier Management Information System (MCMIS). The study used cargo classification information on the FMCSA Motor Carrier Identification Report (Form MCS-150) in MCMIS to identify the carrier's industry group (agricultural, livestock, or utility carrier), and used MCS-150 information to identify carriers operating within and beyond a 100-air-mile radius. The operating radius information was used to create two agricultural carrier subgroups: 1) agricultural carriers with 100 percent of drivers operating within a 100-air-mile radius; and 2) agricultural carriers with 100 percent of drivers operating beyond a 100-air-mile radius. The analysis used the first subgroup as representative of agricultural carriers exempt from the HOS requirements, and the second subgroup as representative of agricultural carriers not exempt from the HOS requirements.

For the Phase 2 analysis, inspection data of agricultural commodity and utility carriers (which are also exempt from HOS regulations) was collected during an FMCSA special study of a sample of states. These data included only those inspections occurring during the states' planting and harvesting seasons and indicated both the commodity being transported and whether the driver was operating within or beyond the 100-air-mile radius exempt from HOS regulations. The Phase 2 analysis assessed the safety performance of the HOS exempt agricultural commodity and utility service carriers identified in the survey in comparison with non-HOS exempt carriers based on their out of service (OOS) violation rates and crash rates.

¹ Section 4130(a).

For the purposes of considering whether to issue a limited waiver, FMCSA focused on the crash rate data from the study. The Agency did not place as much of an emphasis on the OOS rates because there were no HOS violation data to consider given that the agricultural carriers for which data were available were operating under a statutory exemption from the HOS rule. Differences between the OOS rates for other issues such as driver qualifications and vehicle defects and deficiencies, while important in considering overall safety management controls of the carriers, were not necessarily related to the potential safety impact of the waiver.

The Phase 1 analysis indicates that nationally, agricultural carriers operating within a 100-air-mile radius had lower crash rates per 100 power units than those operating beyond this radius, except for in 2008, when there was no difference in the crash rates.

To provide additional validation of the crash analysis, which uses power unit data reported on the Form MCS-150, a separate analysis was performed using data only for carriers domiciled in states participating in the Performance and Registration Information Systems Management (PRISM) program that enforces MCS-150 updating.² PRISM links state motor vehicle registration systems with carrier safety data in order to identify unsafe commercial motor carriers. The PRISM state carriers are required to update their MCS-150 annually. By contrast, non-PRISM state carriers are required by FMCSA to update

² Current PRISM states that enforce the MCS-150 updating requirement are Alabama, Arizona, Arkansas, Connecticut, Georgia, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia.

their MCS-150 biennially. As a result, the PRISM state data are considered more current and reliable than non-PRISM state data where there is no direct implication for not updating the data. Data from PRISM states that enforce MCS-150 updating show that agricultural carriers operating within a 100-air-mile radius had more varied results, with crash rates higher than carriers operating beyond a 100-air-mile radius in 2008, lower in 2006 and 2007, and nearly the same in 2005.

The Phase 2 analysis indicates that in the four states participating in the survey (ID, KS, MD, MI), agricultural carriers that were subject to the HOS requirements had higher crash rates per 100 power units than agricultural carriers exempt from the HOS requirements.

FMCSA Determination

In consideration of the above, FMCSA has determined that it is in the public interest to provide a limited waiver from the Federal HOS regulations for interstate motor carriers engaged in the distribution of anhydrous ammonia during the 2010 spring planting season. A review of the available crash data comparing motor carriers currently operating under the NHS exemption from the HOS regulations provides a basis for determining that a limited waiver would achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption, based on the terms and conditions imposed.

Terms and Conditions of the Waiver

The FMCSA is providing a waiver from the requirements of 49 CFR Part 395 concerning the HOS requirements for drivers of property-carrying vehicles for certain

motor carriers engaged in the distribution of anhydrous ammonia during the 2010 spring planting season.

This waiver extends the agricultural operations exemption from the Federal HOS regulations to motor carriers in the distribution system, provided that: 1) the motor carrier is delivering anhydrous ammonia; 2) none of the transportation movements within the distribution chain exceed a 100 air-mile radius – whether from the retail or wholesale distribution point; and 3) the motor carrier has a “satisfactory” safety rating or is “unrated;” motor carriers with “conditional” or “unsatisfactory” safety ratings are prohibited from taking advantage of the waiver.

The waiver allows “unrated” motor carriers and those with a satisfactory safety rating to use the HOS exemption when their drivers are delivering anhydrous ammonia from any distribution point to a local farm retailer or to the ultimate consumer, and from a local farm retailer to the ultimate consumer, as long as the transportation takes place within a 100 air-mile radius of the retail or wholesale distribution point.

Safety Rating

Motor carriers that have received compliance reviews are required to have a “satisfactory” rating. The compliance review is an on-site examination of a motor carrier’s operations, including records on drivers’ hours of service, maintenance and inspection, driver qualification, commercial driver’s license requirements, financial responsibility, accidents, hazardous materials, and other safety and transportation records to determine whether a motor carrier meets the safety fitness standard. The assignment of a “satisfactory” rating means the motor carrier has in place adequate safety management controls to comply with the Federal safety regulations, and that the safety

management controls are appropriate for the size and type of operation of the motor carrier.

The FMCSA will also allow "unrated" carriers to take advantage of the waiver. Unrated motor carriers are those that have not received a compliance review. The FMCSA is allowing unrated motor carriers to participate because it would be unfair to exclude them simply because they were not selected by the Agency for a compliance review. The absence of a compliance review is in no way an indication that the carrier has done anything wrong or has safety problems.

The Agency is not allowing motor carriers with conditional or unsatisfactory ratings to participate because both of those ratings indicate that the carrier has safety management control problems. There is little reason to believe that carriers rated either unsatisfactory or conditional could be relied upon to comply with the terms and conditions of the waiver.

Accident and Hazardous Materials Reporting Requirement

Within 10 business days following an accident (as defined in 49 CFR 390.5) or any unintentional discharge of anhydrous ammonia that requires the submission of the Department of Transportation Hazardous Materials Incident Report (DOT Form F 5800.1) (see 49 CFR 171.16) involving any of the motor carrier's CMVs, irrespective of whether the CMV was being operated by a participating driver, the motor carrier must submit the following information:

- (a) Date of the accident;

(b) City or town in which the accident occurred, or city or town closest to the scene of the accident;

(c) Driver's name and license number;

- (d) Vehicle number and State license number;
- (e) Number of injuries;
- (f) Number of fatalities;
- (g) Whether hazardous materials, other than fuel spilled from the fuel tanks of the motor vehicles involved in the accident, were released;
- (h) The police-reported cause of the accident;
- (i) Whether the driver was cited for violating any traffic laws, motor carrier safety regulations, or hazardous materials discharge; and
- (j) Whether the driver was operating under the waiver, and if so, an estimate of the total driving time, on-duty time for the day of the accident and each of the seven calendar days prior to the accident.

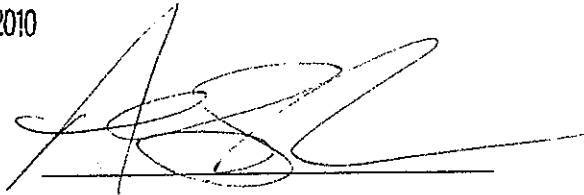
Duration of the Waiver

The waiver is effective upon publication in the Federal Register and is valid until [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], unless revoked earlier by the FMCSA. The exemption preempts inconsistent State or local requirements applicable to interstate commerce.

Safety Oversight of Carriers Operating Under the Waiver

The FMCSA expects that any motor carrier operating under the terms and conditions of the waiver will maintain its safety record. However, should any deterioration occur, the FMCSA will, consistent with the statutory requirements of TEA-21, take all steps necessary to protect the public interest. Use of the waiver is voluntary, and the FMCSA will immediately revoke the waiver for any interstate motor carrier or driver for failure to comply with the terms and conditions waiver

Issued on: MAR 17 2010

A handwritten signature in black ink, appearing to read 'A. Ferro', is written over a horizontal line. The signature is stylized and cursive.

Anne S. Ferro
Administrator