

**BEFORE THE
DEPARTMENT OF TRANSPORTATION**

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

DOCKET NO. FMCSA-97-2180

FEDERAL MOTOR CARRIER SAFETY REGULATIONS:

HAZARDOUS MATERIALS SAFETY PERMITS

**COMMENTS OF THE NATIONAL SMALL SHIPMENTS
TRAFFIC CONFERENCE, INC.**

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I. INTRODUCTION

These Comments are being filed by The National Small Shipments Traffic Conference, Inc. ("NASSTRAC"), in response to the Supplemental Notice of Proposed Rulemaking issued August 19, 2003 by the Federal Motor Carrier Safety Administration, published at 68 Fed. Reg. 49737.

II. INTEREST OF NASSTRAC

NASSTRAC's members are predominantly shippers and receivers of freight. NASSTRAC's regular members include many Fortune 500 companies, with extensive logistics operations in North America and worldwide, as well as many smaller shippers. NASSTRAC also includes motor carriers and intermediaries as associate members.

NASSTRAC's members have devoted increased attention and resources to enhanced security in the aftermath of the terrorist attacks on September 11, 2001. However, economic security is also important to NASSTRAC. It should be noted that legislation creating the Department of Homeland Security includes, as part of the new Department's primary mission, to "ensure that the overall economic security of the United States is not diminished by efforts, activities and programs aimed at securing the homeland." In other words, Congress has determined that security regulation may go too far when it undermines the nation's economy, and a showing of benefits exceeding costs is necessary even where security issues are involved.

In its SNPRM, FMCSA relies on a cost-benefit analysis using \$25 billion, the "lowest estimate reported on the most costly terrorist attack ever – the September 11th attacks," as a baseline figure in calculating the benefit of the proposed safety permit program. There are several problems with this approach.

First, the September 11th attacks did not involve the transportation of hazmat. (If carrying combustible fuel is considered hazardous materials transportation, every motor vehicle in America is now subject to the HMR.) Second, the safety permit program would have done nothing to prevent those attacks. Third, DOT has records of incidents involving hazmat violations by motor carriers, and it should look to those records for guidance, rather than to the “most costly terrorist attack ever.” Fourth, if the benefits of avoiding another September 11 are to be the basis for future cost-benefit analyses – and this is not the first rulemaking proceeding to take that approach – cost-benefit analyses will cease to have any value. Any regulation, no matter how misguided, costly, burdensome or ineffective, can be justified by regulators using avoiding another September 11 as a baseline.

Moreover, NASSTRAC is concerned that the adverse impacts of the tendency of government to underestimate the costs of individual regulatory initiatives are being compounded by the failure of any agency to consider the cumulative costs of the many new regulations aimed at enhancing security in the post-9/11 era, which are on top of the costs of new government initiatives in the areas of health, safety and the environment. Large corporations are finding the compliance costs increasingly difficult to bear, and the ability of smaller companies even to keep track of their obligations, let alone fulfill them, is being strained to the breaking point. And yet, as noted, a cost-benefit analysis based on the benefits of avoiding another 9/11 can be used by many agencies to “support” a virtually unlimited number of new regulatory requirements.

These considerations are not of concern only to motor carriers. More than 70% of the nation’s freight is transported by motor carriers, who serve not just the members of

NASSTRAC but also thousands of other shippers. It is not an exaggeration to say that truck transportation is critical to the strength of the U.S. economy.

NASSTRAC members who ship the affected commodities take seriously the danger that carriers may simply stop transporting these commodities, many of which are important components in U.S. manufacturing. NASSTRAC members are also concerned about the possibility that the security measures proposed here might be applied to other hazmat shipments as FMCSA develops new regulations in its HM-232 series of proceedings.

NASSTRAC strongly opposes expansion of the safety permit program beyond its present scope (i.e., under "Option 2" or "Option 3" in the SNPRM). For reasons detailed below, the proposed regulations are not warranted in their entirety even for the Option 1 commodities.

III. SPECIFIC COMMENTS

The foregoing considerations suggest that FMCSA should attempt to regulate with as light a hand as possible in this area, particularly given FMCSA's own recognition of the questionable need for regulation. As the SNPRM notes, DOT has on three occasions sought Congressional relief from the safety permit provisions of 49 U.S.C. § 5109, on the ground that pervasive state permit requirements and existing federal programs provide adequate protection.

Against this backdrop, the need for revision of the proposed regulations is clear. As currently formulated, they impose excessive burdens and produce limited benefits.

There is No Need for a New Form

Assuming the need for additional permits for carriers of the designated commodities, there is no need for creation of a new Form MCS-150B. It will simplify compliance for carriers, law enforcement and shippers if the existing Form MCS-150 is simply expanded to include the new permit. The relevant portions of the form can be left blank for carriers who never transport the relevant commodities, and filled in for carriers who do transport those commodities. Alternatively, the safety permit program could be implemented in conjunction with the hazardous material registration form required by RSPA.

Shipping Papers and Shipper Obligations

NASSTRAC supports FMCSA's decision not to require the carrier's safety permit number to appear on shipping papers. As a practical matter, most bills of lading are prepared by shippers, and many are computer generated. The burdens of attempting to customize bills of lading on a per-shipment basis could be considerable.

NASSTRAC also supports FMCSA's decision to leave to another occasion (evidently a proceeding initiated by RSPA) implementation of the statutory requirement that shippers may offer a designated commodity "only if the carrier has a safety permit." This requirement may be met in less burdensome ways (e.g., attaching permits to contracts with a requirement that the carrier notify the shipper immediately of any change in its status), or in more burdensome ways (e.g., requiring that shippers confirm carrier permit status every time a shipment of a designated commodity is tendered). NASSTRAC would not support the latter approach.

Written Route Plans and Communication with Drivers

NASSTRAC opposes the requirement of written route plans. If the intent is to permit law enforcement to identify vehicles that are off course, and therefore potentially suspicious, a review of the origin(s) and destination(s) in the shipping papers should suffice.

If, in contrast, the intent is to require carriers to identify, street by street and intersection by intersection, their routes, complete with meal and rest breaks, the requirement is overkill. Not only will the burdens on carriers and drivers be inordinate, but the benefit to anyone is difficult to discern.

The provision for amendments to the written route plan when required by law enforcement or emergency conditions is of little help if the route plan must be hyper-detailed. What are emergency conditions? Why isn't a delay that threatens a driver's ability to meet a delivery deadline, or could strand the vehicle due to hours of service requirements, an adequate reason deviating from the planned route?

NASSTRAC also has doubts about value and viability of the requirement for communications between drivers and carriers at least every two hours (all deviations from written route plans would also necessitate communication between the driver and carrier), with law enforcement to be notified if three hours elapses without a communication.

Obviously, this requirement is also inconsistent with federal hours of service regulations if it is interpreted to apply to other than on-duty time. But even assuming this change is made, the requirement assumes communication capabilities that are far from universal, and can be acquired only at considerable expense.

In addition, what law enforcement authorities are to be contacted, and where? And what does FMCSA expect law enforcement to do about the communication gap? It is a virtual certainty that more than 99 times out of 100, the lapse will be due to a breakdown in communications gear, or gaps in cell phone coverage, or weather conditions, or human error. How is law enforcement to identify the rare situation involving lapses due to criminal activity – whether thieves or terrorists – without checking every incident?

If there is something happening on a particular run that makes a driver or carrier fear that something has gone wrong, that driver or carrier will have every incentive to contact law enforcement without being required to do so. And law enforcement may respond more expeditiously to such calls than to those mandated by the proposed regulations, which will quickly become regarded as nuisance calls.

Safety Ratings

NASSTRAC supports the requirement of satisfactory safety ratings. Many NASSTRAC members' contracts impose such a requirement as a prerequisite for general transportation service, even if no hazardous materials are involved. However, we note that a carrier with a long history of satisfactory ratings may be issued a conditional rating after a compliance review identifying defects that can be corrected quickly. In keeping with the need to avoid undermining carriers' willingness to transport hazardous materials, FMCSA should act promptly to restore satisfactory ratings to carriers that have re-established their entitlement to that rating.

State Programs

FMCSA seems to be trying to have it both ways with respect to state programs. On the one hand, it regards compliance with state programs as a potentially satisfactory

basis for issuing a federal safety permit. On the other hand, FMCSA says that state programs are so variable that achieving uniformity, either through federal preemption or through the adoption of minimum standards all states must meet, is seen as impossible.

NASSTRAC and its members submit that uniformity should be maximized, for the benefit of carriers, law enforcement and shippers. However, the foregoing comments indicate that there are aspects of these proposed regulations that should be revised or abandoned. To the extent that similar (or other) excessively burdensome or counterproductive requirements exist at the state level, it is a misguided form of federalism to forego the opportunity to address them in this proceeding.

IV. CONCLUSION

NASSTRAC and its members support enhanced safety and security, and have devoted countless hours and resources to improvements in these areas, both before and (with heightened intensity) after September 11, 2001. Nevertheless, we do not believe anything that can be done should be done, regardless of cost. We recognize that FMCSA does not believe this either, and commend the agency's efforts to develop balanced rules, consistent with the mandate of Congress. However, there remain features of the proposed regulations that impose excessive burdens and produce inadequate (or nonexistent)

benefits. Therefore, further changes are necessary before the final rules are issued in this proceeding.

Respectfully submitted,

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