



U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

November 14, 2011

1200 New Jersey Avenue, SE
Washington, DC 20590

Refer to: MC-ECC

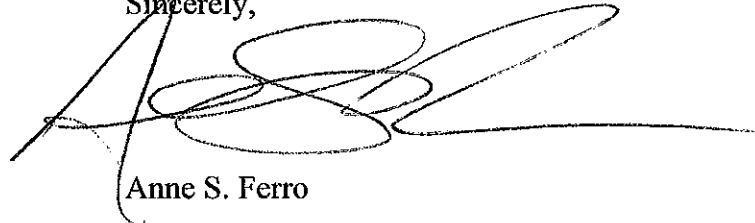
Ms. Cynthia Hilton
The Institute of Makers of Explosives
1120 19th Street, NW, Suite 310
Washington, DC 20036

Dear Ms. Hilton:

This letter is in response to the petition for rulemaking filed by the Institute of Makers of Explosives, the Agricultural Retailers Association, the American Pyrotechnics Association, the National Association of Chemical Distributors, and the National Tank Truck Carriers, Inc., dated December 21, 2010. The petition requested that the Federal Motor Carrier Safety Administration (FMCSA) modify the Hazardous Materials Safety Permit regulations to ensure that safe, qualified carriers are able to continue transporting permitted hazardous materials and to eliminate perceived biases in the program.

The FMCSA has completed its review and grants the petition for rulemaking. However, the Agency has determined that this rulemaking should not be initiated until the Safety Fitness Determination (SFD) final rule is published, as it will be used as the basis for initiating this rule. The SFD notice of proposed rulemaking is scheduled to be published in April of 2012, and the publication date of the final rule will be determined based on the nature and scope of comments to the proposed rule. The enclosed decision and order explains in detail the reasons for our conclusions.

Sincerely,



Anne S. Ferro

Enclosure

cc: Agricultural Retailers Association
American Pyrotechnics Association
National Association of Chemical Distributors
✓ National Tank Truck Association

BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
DECISION ON PETITION FOR RULEMAKING

DECIDED: November 14, 2011

On December 21, 2010, the Institute of Makers of Explosives, the Agricultural Retailers Association, the American Pyrotechnics Association, the National Association of Chemical Distributors, and the National Tank Truck Carriers, Inc., (hereinafter collectively the Petitioners) submitted a petition for rulemaking to modify the regulations governing the hazardous materials safety permit (HMSP).

The Petitioners stated that the proposed modifications are necessary to ensure that qualified carriers are able to continue transporting permitted hazardous materials and to eliminate certain biases currently present in the program. To address this problem, the Petitioners seek amendments to eliminate the fluctuations in the eligibility standards that are caused by periodic adjustments in the motor carrier out-of-service (OOS) rates; average the present eligibility criteria to ensure that 70 percent of hazardous materials motor carriers would be able to qualify for the HMSP; and eliminate impacts on different types of hazardous materials carriers such as less-than-truckload carriers.

In accordance with 49 CFR 389.33, the Agency makes the following decision concerning the petition:

ANALYSIS

The HMSP program became effective on a rolling basis starting January 1, 2005. Pursuant to § 385.407, the Federal Motor Carrier Safety Administration (FMCSA) may not issue an HMSP to a carrier when its crash rate, or driver, vehicle or hazardous materials OOS rates are in the top, or worst-performing, 30 percent of the national average. Since the inception of the HMSP program, FMCSA has calculated the threshold crash rate, and driver, vehicle and hazardous materials OOS rates every two years based on the national average crash and OOS rates from the preceding two years. The two-year recalculations have resulted in varying thresholds for HMSP eligibility. As some of the OOS thresholds decreased, industry representatives expressed concern that the fluctuating program requirements created uncertainty and were increasingly difficult for motor carriers to meet and sustain.

While the crash rate and vehicle OOS rate remained constant from 2005 through 2010, the driver and hazardous materials OOS rates steadily declined. In 2011, the crash rate per million miles fell for the first time from 0.125 to 0.114. In 2011, both the driver and hazardous materials OOS rates also fell to all-time lows of 7.14 percent and 3.45 percent, respectively. While these falling

rates reflect the improving safety performance of the motor carrier industry as a whole, hazardous materials carriers assert that the fluctuating standard makes it difficult to both predict and address their safety performance for the ensuing two-year safety permit cycle. As a result of this concern, FMCSA, announced in a Federal Register notice on September 22, 2010 (75 Fed. Reg. 57696), that it was revising the date from which the crash and OOS rates would be recalculated. Effective October 1, 2010, the two-year period for recalculating the rates would be measured by the fiscal year (October 1 to September 30) instead of the calendar year (January 1 to December 31) in order to provide carriers several months notice before the new rates became effective. Nevertheless, as safety performance improves and the threshold rates continue to decrease, a motor carrier eligible for its safety permit in the present two-year cycle could be ineligible for a permit in the next cycle without any change in its safety profile.

Petitioners further contends that the Agency's individual consideration of each of the crash and OOS rates has the cumulative effect of barring more than the worst 30 percent of carriers from obtaining an HMSP. While Petitioners may be correct in this assertion, the present rule requires that a carrier meet the threshold rate in each of the categories and does not rely on or require a cumulative safety performance profile.

In order to address these concerns, the Petitioners suggested a multi-faceted approach for regulatory changes. These are presented below with FMCSA's respective position on each recommendation.

1. Eliminate the fluctuating eligibility criteria problem by promulgating a rule that fixes the rates at the average of each OOS rate set since 2005 without biennial adjustments. The Petitioners suggest that FMCSA could minimize the impact of a change in one or more of the OOS rates that serve as HMSP eligibility criteria by combining and averaging these rates over a rolling period of time, such as every six years.

FMCSA Response: The Agency recognizes that the decreasing crash and OOS rates, especially in the hazardous materials category could result in unanticipated impacts to carriers and agrees that further analysis would be useful in order to develop appropriate options. The Agency will consider this in the notice of proposed rulemaking (NPRM).

2. Aggregate and average the OOS rates of the three criteria for an individual motor carrier. A motor carrier with exceptionally low OOS rates in two categories and an OOS rate slightly above the disqualification threshold in the third category could still qualify for the HMSP.

FMCSA Response: The Agency will consider this in the NPRM.

3. Ensure that a motor carrier with an exceptionally high OOS rate in one or more categories remains ineligible to obtain an HMSP. The Petitioner contends that FMCSA could continue to disqualify carriers with driver, vehicle or hazardous materials OOS rates in the top 10 percent.

FMCSA Response: The Agency will conduct analysis on this recommendation and include the results in the NPRM.

4. Consider eliminating the first year “free-pass” by harmonizing the calculation of disqualification rates with the policy to be used in the Safety Measurement System (SMS) where two years of inspection data will be used and newer data will be more heavily weighted.

FMCSA Response: Consistent with SMS, the Agency will consider changing the calculation time period to match the pending Safety Fitness Determination (SFD) rule, when finalized.

5. Consider using the Inspection Selection System (ISS) as part of the formula to evaluate the carrier’s hazardous materials OOS rate.

FMCSA Response: The Agency will consider proposing this in the NPRM.

6. Vehicle miles traveled (VMT) should be combined with power units as a normalizing factor used to calculate crash rates under the HMSP program. The Petitioners draw a parallel to the SMS.

FMCSA Response: The Agency agrees to conduct analysis using VMT, similar to the SMS, and consider this in the NPRM.

7. Exclude non-preventable crashes in its initial calculation of a carrier’s crash rate, rather than forcing the carrier to come forward to challenge the inclusion of each crash on a case-by-case basis.

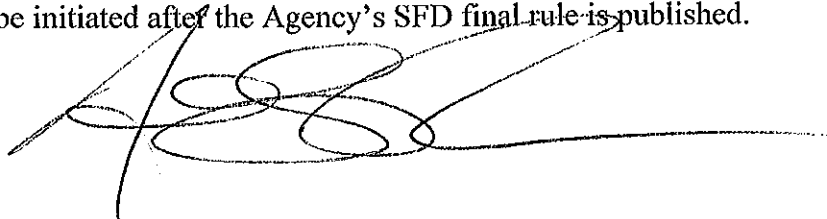
FMCSA Response: It is anticipated that the SFD rulemaking will be establishing a process for determining crash accountability. The Agency will use the process adopted in that rulemaking.

The Agency recognizes the need to re-visit the HMSP rules and examine the issues raised by Petitioners, especially in light of SMS implementation and the impending SFD rulemaking. It would, however, be premature for FMCSA to move forward with an HMSP rulemaking without first finalizing the SFD process and, therefore, ensuring that changes to the HMSP rule are consistent with the standards established in the SFD rulemaking.

CONCLUSION

The FMCSA acknowledges the need to re-examine the HMSP program. Therefore, the request for consideration of the issues raised in the petitioner's letter of December 21, 2010, is granted.

It is hereby ordered that the petition for rulemaking filed by the Institute of Makers of Explosives, the Agricultural Retailers Association, the American Pyrotechnics Association, the National Association of Chemical Distributors, and the National Tank Truck Carriers, Inc., is granted. A rulemaking will be initiated after the Agency's SFD final rule is published.

A handwritten signature in black ink, appearing to read 'Anne S. Ferro', is written over the text of the order. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Anne S. Ferro
Administrator