

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

In re AMERICAN TRUCKING ASSOCIATIONS, INC.,  
Petitioner.

RAY LAHOOD, SECRETARY OF THE UNITED STATES  
DEPARTMENT OF TRANSPORTATION,  
THE UNITED STATES DEPARTMENT OF TRANSPORTATION, AND THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION,  
Respondents.

---

**PETITION FOR A WRIT OF MANDAMUS AND FOR  
RELIEF FROM AGENCY ACTION UNLAWFULLY WITHHELD**

---

Robert Digges, Jr.  
(rdigges@trucking.org)  
Vice President & Deputy General Counsel  
AMERICAN TRUCKING  
ASSOCIATIONS, INC.  
950 North Glebe Road  
Arlington, VA 22203  
Tel. (703) 838-1865

Erika Z. Jones  
(ejones@mayerbrown.com)  
Adam C. Sloane  
(asloane@mayerbrown.com)  
MAYER BROWN LLP  
1999 K Street, N.W.  
Washington, DC 20006  
Tel. (202) 263-3000

*COUNSEL TO AMERICAN TRUCKING ASSOCIATIONS, INC.*

***IN RE: AMERICAN TRUCKING ASSOCIATIONS, INC.***  
**PETITION FOR A WRIT OF MANDAMUS**

**RELIEF SOUGHT**

American Trucking Associations, Inc. (“ATA”) hereby petitions for a writ of mandamus directing the Federal Motor Carrier Safety Administration (“FMCSA”) to issue (i) a Notice of Proposed of Rulemaking (“NPRM”) within sixty days after the issuance of the writ and (ii) a final rule no later than six months after the issuance of the NPRM, for regulations on “supporting documents” in conformance with the requirements set forth in Section 113 of the Hazardous Materials Transportation Act of 1994 (“HMTA” or “the Act”), Pub. L. No. 103-311, § 113, 108 Stat. 1673, 1676.

**ISSUE PRESENTED**

The HMTA was enacted on August 26, 1994. In Section 113 of the HMTA, Congress mandated that, within eighteen months of the HMTA’s date of enactment, the Secretary of Transportation must promulgate regulations on specified matters relating to the “supporting documents” that motor carriers and commercial truck drivers must maintain to verify that drivers have conformed to hours-of-service regulations. Section 113 further directed the Secretary to include a definition of “supporting documents” in such regulations. Despite Congress’s clear and unequivocal command that such regulations be issued no later than nearly *fourteen* years ago, neither the Secretary nor FMCSA—the agency to which

the Secretary’s authority with regard to commercial motor vehicle safety and hours-of-service regulations is delegated—has promulgated the “supporting documents” regulations.

The issue raised in this petition is whether, in light of the failure to promulgate such regulations, this Court should issue a writ of mandamus compelling the Secretary and/or FMCSA to issue a NPRM and a final rule for such regulations.

### **INTRODUCTION**

More than fifteen years ago, Congress directed the Secretary of Transportation to promulgate regulations on the “supporting documents” that motor carriers and commercial truck drivers must maintain to verify that drivers have conformed to hours-of-service regulations. Congress specified that such regulations were to be enacted within *eighteen months* of the date of the enactment of the HMTA. *See* HMTA, Pub. L. No. 103-311, § 113, 108 Stat. at 1676. The HMTA was enacted on August 26, 1994.

The Secretary and the agency to which his authority to promulgate such regulations is delegated, the FMCSA, have yet to issue the supporting documents regulations.<sup>1</sup> Despite the absence of the regulations mandated by Congress in the

---

<sup>1</sup> FMCSA is the agency of the United States Department of Transportation with the responsibility for issuing the regulations. *See, e.g., Pub. Citizen v. FMCSA*, 374 F.3d 1209, 1211 (D.C. Cir. 2004) (“The FMCSA, created by statute in 1999, is

HMTA, local law enforcement officials and Federal and State inspectors have continued to require motor carriers and drivers to maintain and produce “supporting documents,” and these officials have sanctioned carriers and drivers for alleged failures to maintain and produce such documents.

Because the supporting documents regulations were never promulgated, these enforcement activities have been carried on in a regulatory vacuum in which carriers and drivers remain uncertain about what documents to keep and how to maintain them. This petition requests that the Court enforce Congress’s unequivocal command that the regulations be issued, thereby enhancing public safety, subjecting rules about supporting documents to public notice and comment, and ensuring that motor carriers and truck drivers are fairly apprised of the requirements to which they will be subject.

### **STATUTORY BACKGROUND**

Section 113 of the HMTA directed the Secretary of Transportation to prescribe regulations amending the hours-of-service regulations at part 395 of title

---

the agency charged with promulgating [hours-of-service] rules regulating drivers of commercial motor vehicles.”); *Darrell Andrews Trucking, Inc. v. FMCSA*, 296 F.3d 1120, 1122 n.1 (D.C. Cir. 2002) (stating that motor carrier regulatory authority was transferred from the Interstate Commerce Commission to the Department of Transportation, which delegated the authority to the Federal Highway Administration and that FMCSA, which was created in 1999, “has now taken over those responsibilities.”) For the sake of simplicity, we will generally refer to FMCSA as the agency that should have issued these regulations and that has failed to do so.

49 of the Code of Federal Regulations. Section 113 specified that the regulations were to establish requirements for the supporting documents that motor carriers must maintain in order to establish compliance with the hours-of-service regulations. The HMTA directed that such regulations include:

(1) A description of identification items (which include either driver name or vehicle number) that shall be part of a written or electronic document to enable such written or electronic document to be used by a motor carrier or by an enforcement officer as a supporting document to verify the accuracy of a driver's record of duty status.

(2) A provision specifying the number, type, and frequency of supporting documents that must be retained by a motor carrier so as to allow verification of the accuracy of such documents at a reasonable cost, to the driver and the motor carrier, of record acquisition and retention.

(3) A provision specifying the period during which supporting documents shall be retained by the motor carrier. The period shall be at least 6 months from the date of a document's receipt.

(4) A provision to authorize, on a case-by-case basis, motor carrier self-compliance systems that ensure driver compliance with hours of service requirements and allow Federal and State enforcement officers the opportunity to conduct independent audits of such systems to validate compliance with section 395.8(k) of title 49, Code of Federal Regulations (or successor regulations thereto). Such authorization may also be provided by the Secretary to a group of motor carriers that meet specific conditions that may be established by regulation by the Secretary and that are subject to audit by Federal and State enforcement officers.

(5) A provision to allow a waiver, on a case-by-case basis, of certain requirements of section 395.8(k) of title 49, Code of Federal Regulations (or successor regulations thereto), when sufficient supporting documentation is provided directly and at a satisfactory frequency to enforcement personnel by an intelligent vehicle-highway system, as defined by section 6059 of the Intelligent Vehicle-Highway Systems Act of 1991 (23 U.S.C. 307 note). Such waiver may also be allowed for a group of motor carriers that meet specific conditions that may be established by regulation by the Secretary.

HMTA, § 113(b). The HMTA defined “supporting document” as “any document that is generated or received by a motor carrier or commercial motor vehicle driver in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver’s record of duty status.” *Id.*, § 113(c).<sup>2</sup>

The HMTA set a firm deadline for the proposal and promulgation of regulations, stating that “[s]uch regulations shall be proposed not later than 12 months after the date of enactment of this Act and shall be issued and become effective not later than 18 months after such date of enactment.” *Id.*, § 113(a)(2).

### **JURISDICTION AND APPLICABLE LAW**

This Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2341, *et seq.* The Hobbs Act provides this Court with exclusive jurisdiction to review orders, regulations, and rules issued under authority that previously rested with the

---

<sup>2</sup> The text of HMTA Section 113 is set forth in the addendum to this petition.

Interstate Commerce Commission (“ICC”) and that was transferred to the United States Department of Transportation (“DOT”) under the Transportation Act (49 U.S.C. § 351(a)). As this Court explained in *Center for Auto Safety v. Skinner*, 936 F.2d 1315 (D.C. Cir. 1991),

[t]he Department of Transportation Act provides that DOT actions taken pursuant to authority transferred from another department or agency ‘shall be subject to judicial review to the same extent and in the same manner as if such . . . actions had been [performed] by the department or agency exercising such functions, powers, and duties immediately preceding their transfer.’ 49 U.S.C. App. § 1653(c). When Congress transferred authority over motor carrier safety from the ICC to DOT in 1966, ICC actions were reviewed by three-judge district courts. *See* 28 U.S.C. § 2325 (1970), *repealed* by Pub. L. No. 93-584, § 7, 88 Stat. 1918 (1975). In 1975, Congress amended the Hobbs Act to eliminate the three-judge panels and provide for exclusive review of ICC actions in the courts of appeals. *See* 28 U.S.C. §2342(5). Because the Center challenges a regulation issued pursuant to authority transferred from the ICC and ICC regulations are now subject to review in the courts of appeals, the plain language of § 1653(c) compels the conclusion that the challenged regulation is subject to review in the courts of appeals.

*Id.* at 1315-1316. *See also Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 164 (D.C. Cir. 1997) (“When Congress created the Department of Transportation in 1966, it transferred authority to it from several different agencies, including the Interstate Commerce Commission (“ICC”). Among the functions transferred was the ICC’s ‘duty. . . [t]o regulate . . . qualifications and maximum hours of service

of employees, and safety of operation and equipment’ with respect to motor carriers. Congress provided that actions taken pursuant to this transferred authority would be subject to judicial review as though the transfer had never occurred.”) (alterations in original; citations omitted).

Under the Hobbs Act, therefore, this Court has jurisdiction over the present petition. In directing in Section 113 of the HMTA that the supporting documents regulations be cast as amendments to part 395 of title 49 of the Code of Federal Regulations, Congress clearly evinced its intent that the regulations would broadly relate to truckers’ hours of service and would, as such, fall within the general category of motor carrier safety, a subject matter that previously was regulated by the ICC and that was transferred to DOT. *See Darrell Andrews Trucking*, 296 F.3d at 1122 n.1 (“Motor carriers were initially regulated by the [ICC]. In 1966, Congress transferred regulatory authority to the Department of Transportation, which delegated it to the Federal Highway Administration (FHWA) . . . . The FMCSA . . . has now taken over those responsibilities . . . .”) (citation omitted); *see also Owner-Operator Indep. Drivers Ass’n v. FMCSA*, 494 F.3d 188, 193 (D.C. Cir. 2007) (“*OOIDA*”) (“The federal government has regulated the hours of service (HOS) of commercial motor vehicle operators since the late 1930s, when the Interstate Commerce Commission (ICC) promulgated the first HOS regulations under the authority of the Motor Carrier Act of 1935. Jurisdiction over HOS

regulations passed from the ICC to the Federal Highway Administration (FHWA) in 1995, and then to the newly created Federal Motor Carrier Safety Administration (FMCSA) in 2000.”) (citation omitted); *Aulenback*, 103 F.3d at 164-165.

In this connection, it bears noting that this Court has accorded direct review of FMCSA regulatory action with regard to hours-of-service regulations in past cases. *See OOIDA*, 494 F.3d 188; *Pub. Citizen*, 374 F.3d 1209. Similarly, Darrell Andrews Trucking secured direct review of a FMCSA assignment of a safety rating that was predicated, in substantial part, on an interpretation of motor carrier supporting documents requirements. *Darrell Andrews Trucking*, 296 F.3d 1120.<sup>3</sup>

Because this Court would have jurisdiction over challenges to a final rule on the supporting documents requirements—if such a rule had ever been promulgated—this Court also has jurisdiction to compel FMCSA to issue those regulations. *See Telecommunications Research and Action Ctr. v. FCC*, 750 F.2d 70, 72 (D.C. Cir. 1984) (“*TRAC*”); *see also In re Bluewater Network*, 234 F.3d 1305, 1310-1311 (D.C. Cir. 2000) (“Where a statute commits final agency action to review by this court, we also retain exclusive jurisdiction ‘to hear suits seeking

---

<sup>3</sup> The requirements at issue in *Darrell Andrews Trucking* were imposed in an adjudicatory proceeding. In that case, the Court noted with clear disapproval FMCSA’s failure to issue the supporting documents regulation mandated in the HMTA. *See Darrell Andrews Trucking*, 296 F.3d at 1130.

relief that might affect [our] future statutory power of review.’ This includes mandamus actions challenging an agency’s unreasonable delay.”) (citing *TRAC*, 750 F.2d at 72).

Under the Administrative Procedure Act (“APA”), this Court may “compel agency action unlawfully withheld.” 5 U.S.C. § 706(1). As we show below, the failure of FMCSA to issue the supporting documents regulations constitutes “agency action unlawfully withheld.” Accordingly, FMCSA should be ordered to commence a rulemaking and issue a Notice of Proposed Rulemaking (“NPRM”) within sixty days of a final decision in this Court, and to issue a final regulation within six months of the issuance of the NPRM.

### **THE PARTIES**

Petitioner American Trucking Associations, Inc. (“ATA”) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA has approximately 2,500 direct motor carrier and industry supplier members and, through its affiliated organizations, represents more than 30,000 companies of every type and class of motor carrier operation. ATA regularly advocates the interests of the trucking industry before the United States Supreme Court, this Court, and other courts. ATA has a strong interest in the federal regulatory system governing commercial drivers’ hours of service. Driver hours-

of-service requirements impact motor carrier and public safety and carry significant financial consequences for trucking companies. ATA's members and ATA, on behalf of its members, have a direct interest in the promulgation of supporting documents regulations that reflect sound public policy, advance public safety, impose costs that are reasonable to drivers and motor carriers (as expressly required by Section 113(a)(2) of the HMTA), and meet the operational needs of the trucking industry, enabling motor carriers to serve the needs of the American economy.

Respondent The Honorable Ray LaHood is the Secretary of respondent DOT. Respondent FMCSA is an agency of DOT that is responsible for implementing DOT's commercial vehicle safety obligations.

### **PETITIONER'S STANDING**

ATA submits that its standing is self-evident. An association, like ATA, "has standing to sue under Article III of the Constitution of the United States only if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 542 (D.C. Cir. 2003) (citations omitted).

ATA satisfies the *first* requirement for organizational standing because its member carriers would be directly regulated by any supporting document regulations. Any such regulations would immediately and directly affect the requirements for documentation that they must collect and maintain, as well as the requirements regarding how such documents must be kept and the period for which they must be retained. Supporting documents regulations also would determine the kinds of conduct for which ATA members could face regulatory sanctions. Thus, the regulations would have immediate and direct effects on ATA member motor carriers. These effects would be economic—relating to the costs of record collection, maintenance, and preservation—and regulatory—relating to the steps that carriers would have to take to comply with the regulations and to the sanctions for failures to comply.

Further, in the absence of the supporting documents regulations sought in this petition, ATA member motor carriers would continue to face uncertainty about the supporting documents that they are required to maintain and how those documents should be kept in the normal course of business. Because, as shown in *Darrell Andrews Trucking*, even in the absence of the regulations sought by ATA through this petition, Federal and State authorities inspect supporting documents to ascertain whether motor carriers are in compliance with hours-of-service regulations and other requirements, the failure to issue regulations that finally

settle open questions about the documents that carriers must keep is causing ongoing economic harm to motor carriers and is forcing them to choose, on a daily basis, between incurring potentially unnecessary expenses to assure that they have retained necessary supporting documents or exposing themselves to substantial risks that they will be found in violation of supporting documents requirements.<sup>4</sup>

With regard to the *second* requirement for organizational standing, the interests that ATA seeks to protect in this suit are germane to ATA's purpose. As noted above, ATA is an association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. To that end, ATA frequently participates in agency proceedings and in Federal courts on a range of issues germane to the trucking, including hours-of-service issues. Thus, ATA intervened and participated in *OOIDA*, 494 F.3d 188, and *Public Citizen*, 374 F.3d 1209; and appeared as *amicus curiae* in *Darrell Andrews Trucking, Inc.*, 296 F.3d 1120.

---

<sup>4</sup> As explained in further detail below, notwithstanding the failure to issue the supporting documents regulations, Federal regulators are authorized by statute to inspect motor carriers to assure compliance with hours-of-service regulations. In addition, as also explained below, the Federal Highway Administration promulgated a regulation in 1982 requiring carriers to maintain supporting documents for at least six months.

Finally, with regard to the *third* requirement for organizational standing, neither the claim asserted nor the relief requested require the participation of an ATA member in this lawsuit.

### **FACTUAL BACKGROUND**

Hours-of-service rules were first issued in the 1930s. *See OOIDA*, 494 F.3d at 193. “Since that time,” according to the Federal Highway Administration (“FHWA”), “drivers have had the responsibility to prepare a [Record of Duty Service (“RODS”)].” Hours of Service of Drivers; Supporting Documents, 63 Fed. Reg. 19,457, 19,458 (Apr. 20, 1998). A principal purpose of the RODS is to enable law enforcement officers and inspectors to determine readily whether drivers are in compliance with hours-of-service regulations. *See id.* To check the accuracy of RODS, Federal regulators are “authorized, by statute, to inspect and copy any record, and to inspect any property, or equipment of a carrier, lessor, association, or other person [subject to applicable law], as long as these actions were made in furtherance of an investigation and regardless of whether or not the records were required to be maintained by the [Federal] regulations or orders.” *Id.*

Over the years, *carriers* inspected RODS for accuracy by examining various kinds of documents that, in the normal course of business, came into their or their drivers’ possession. *Id.* (detailing broad range of documents used by motor carriers). In 1982, the FHWA (which then had regulatory responsibility for hours-

of-service regulation and oversight) promulgated a final rule mandating the prevalent existing carrier “practice of maintaining ‘RODS supporting documents’ as a part of its regulatory oversight” of motor carriers. *Id.* at 19,459. Specifically, FHWA required “motor carriers operating in interstate commerce to retain supporting documents, along with drivers’ records of duty status, for at least six months from the date of receipt. The FHWA did not define the term ‘supporting document’ in that final rule.” *Id.* (citation omitted; citing 49 C.F.R. § 395.8(k)). Nearly eleven years later, FHWA published regulatory guidance that provided examples of supporting documents that carriers should retain. *Id.* (citing guidance published at 58 Fed. Reg. 60,734 (Nov. 17, 1993)).

The next year, the HMTA was enacted. As noted above, Section 113 of the HMTA directed the Secretary of Transportation to prescribe regulations amending 49 C.F.R. part 395 to specify, among other things, the number, type, and frequency of supporting documents that motor carriers must retain to verify the accuracy of RODS, and the period for which such supporting documents must be retained. HMTA, § 113(b)(2) &(3). Section 113 also required that the regulations include a provision to authorize, on a case-by-case basis, motor carrier self-compliance systems, and a provision to allow a waiver, on a case-by-case basis, of certain requirements of 49 C.F.R. § 395.8(k) “when sufficient supporting documentation is provided directly and at a satisfactory frequency to enforcement personnel by an

intelligent vehicle-highway system, as defined by section 6059 of the Intelligent Vehicle-Highway Systems Act of 1991 (23 U.S.C. 307 note).” HMTA, § 113(b)(4) and (5).

The stated purposes of the statutory requirement to promulgate supporting document regulations were

to improve—

(A) compliance by commercial motor vehicle drivers and motor carriers with hours of service requirements; and

(B) the effectiveness and efficiency of Federal and State enforcement officers reviewing such compliance.

HMTA, § 113(a)(1). A salutary additional result of the regulations—if they had ever been promulgated—would have been to clarify and settle for motor carriers and drivers the types of supporting documents that they were required to retain, the manner in which such records should be kept, and the period for which they should be retained.

Congress directed that the Secretary propose supporting documents regulations “not later than 12 months after the date of enactment of [the HMTA]” and that the regulations “be issued and become effective not later than 18 months after such date of enactment.” HMTA § 113(a)(2). The HMTA was enacted on August 26, 1994. *See generally* HMTA.

Although in 1998 FHWA tardily issued a NPRM for the supporting documents regulations (*see* 63 Fed. Reg. 19,457), and in 2004 FMCSA still more tardily issued a supplemental notice of proposed rulemaking (“SNPRM”) (*see* Hours of Service of Drivers; Supporting Documents 69 Fed. Reg. 63,997 (Nov. 3, 2004)), neither FHWA nor FMCSA ever issued a final rule. *See Darrell Andrews Trucking*, 296 F.3d at 1126 (NPRM was “never finalized in a promulgated rule”). Indeed, FMCSA withdrew the SNPRM in October 2007. *See* Hours of Service of Drivers; Supporting Documents, 72 Fed. Reg. 60,614 (Oct. 25, 2007). Thus, despite the fact that in 2002, this Court characterized the failure to issue the supporting documents regulations as “inexplicab[le]” (*Darrell Andrews Trucking*, 296 F.3d at 1130), Congress’s mandate remains unfulfilled.

As a result, ATA now turns to this Court to compel the action that Congress so long ago demanded.

### **WHY THE WRIT SHOULD ISSUE**

FMCSA’s failure to issue the supporting documents regulations is contrary to the plain language of the controlling statutes and, therefore, constitutes agency action “unlawfully withheld.” 5 U.S.C. § 706(1). Consequently, this Court should order that the rules be issued promptly. Specifically, ATA requests that the Court order FMCSA to publish a NPRM for a supporting documents regulation no later

than sixty days following the issuance of the writ in this case and to issue a final rule no later than six months after the publication of the NPRM.

**I. FMCSA’S FAILURE TO ISSUE THE SUPPORTING DOCUMENTS REGULATION IS UNLAWFUL**

The HMTA required the Secretary of Transportation to issue supporting documents regulations within the time frame expressly set forth in the statute. Specifically, the statute unambiguously directed the Secretary to issue supporting document regulations no later than eighteen months after the statute’s date of enactment. Because the HMTA was enacted August 26, 1994, the regulations should have been promulgated no later than February 26, 1996.<sup>5</sup>

The failure of the Secretary or FMCSA—the agency to which his authority has been delegated—to promulgate the regulation is unlawful. *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) (“Where the language [of a statute] is clear, that is the end of judicial inquiry in all but the most extraordinary circumstances.”) (internal quotation marks omitted). This Court has applied these plain language principles to cases in which petitioners sought relief

---

<sup>5</sup> The fact that nearly fourteen years have elapsed since the due date for promulgation of the regulations does not render this petition untimely. “This court has repeatedly refused to hold that actions seeking relief under 5 U.S.C. § 706(1) to ‘compel agency action unlawfully withheld or unreasonably delayed’ are time-barred if initiated more than six years after an agency fails to meet a statutory deadline.” *Wilderness Soc’y v. Norton*, 434 F.3d 584, 588 (D.C. Cir. 2006). *See also In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000) (despite fact that statutory deadline had been missed by nine years, the court found the petition was timely).

from agency inaction. *See, e.g., Natural Res. Def. Council. v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (“*NRDC*”). In such instances, this Court has refused to allow agencies to ignore statutory deadlines that are unambiguous. *See, e.g., N. States Power Co. v. Dep’t of Energy*, 128 F.3d 754, 756-57 (D.C. Cir. 1997).

The language of the HMTA is clear and compulsory, and leaves no room for the exercise of agency discretion. The HMTA repeatedly uses the word “shall” in directing the Secretary to issue the regulations, specifying the deadlines for a proposed rule and a final rule, and describing the required contents of the regulations. *See* HMTA, § 113(a)(1) (“The Secretary of Transportation *shall* prescribe regulations amending part 395”) (emphasis added); § 113(a)(2) (“Such regulations *shall* be proposed not later than 12 months after the date of enactment of this Act and *shall* be issued and become effective not later than 18 months after such date of enactment. In prescribing the regulations, the Secretary of Transportation *shall* ensure that compliance can be achieved at a cost that is reasonable to drivers and motor carriers.”) (emphasis added); § 113(b) (“Such regulations *shall* include the following:”) (emphasis added).

Thus, the HMTA imposes a clear, mandatory duty on the agency to promulgate specified final rules by a date-certain: eighteen months from the date of enactment of the HMTA. *See Ind. Mich. Power Co. v. Dep’t of Energy*, 88 F.3d 1272, 1274-1277 (D.C. Cir. 1996); *NRDC*, 983 F.2d at 261, 266; *Sierra Club v.*

*Thomas*, 828 F.2d 783, 787-788 (D.C. Cir. 1987). The failure to issue the regulations, therefore, is a violation of a clear-cut duty and, hence, is unlawful.

**II. ATA IS ENTITLED TO AN ORDER COMPELLING FMCSA TO PROMULGATE SUPPORTING DOCUMENTS REGULATIONS IN CONFORMANCE WITH THE DICTATES OF THE HMTA**

Because the failure to promulgate the supporting documents violates clear statutory requirements, this Court should order FMCSA to promulgate the regulations, as required by the express terms of the APA. *See* 5 U.S.C. § 706(1) (“The reviewing court shall . . . compel agency action unlawfully withheld . . .”). This Court has taken such action in other cases involving agency violations of mandatory duties imposed by clear statutory language. *See N. States Power*, 128 F.3d at 756-759 (issuing writ of mandamus); *NRDC*, 983 F.2d 259 (ordering EPA to issue rules mandated by plain language of statute).

**A. The Traditional Mandamus Factors Support The Issuance Of A Writ.**

In considering petitions to compel agency action under circumstances similar to those here, this Court has typically applied a traditional mandamus analysis and granted relief. *See Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 814-815 (D.C. Cir. 2001); *N. States Power*, 128 F.3d at 758-759.

Mandamus relief is appropriate where (1) the respondent has a clear duty to act; (2) the petitioner has a clear right to relief; and (3) there is no other adequate remedy. *N. States Power*, 128 F.3d at 758.

The *first* criterion is met because, as shown above, the HMTA imposes a mandatory duty on the agency to issue supporting documents regulations. *See supra* at 17-19.

The *second* criterion is met both because FMCSA has violated its clear duty and because the APA provides that courts “shall” order agency action unlawfully withheld. *See N. States Power*, 128 F.3d at 758; 5 U.S.C. § 706(1).

The *third* criterion is met because ATA has no other judicial or administrative remedy. *N. States Power*, 128 F.3d at 758. For one thing, in the absence of mandamus relief, agency inaction would allow the agency to evade judicial review through the usual review process. *See TRAC*, 750 F.2d at 76 (court may issue writs to “protect its prospective jurisdiction” and resolve claims of unreasonable delay because the “the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes”). Moreover, although ATA has attempted to persuade FMCSA to issue supporting documents regulations, there are no formal means for challenging FMCSA’s failure to initiate a rulemaking in the face of ATA’s requests. *See Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984) (writ issues where no alternative exists “other than awaiting the Secretary’s [action]—precisely the thing which [petitioner] claims that she should not have to do in light of the statute’s commands”).

Thus, the three criteria for the issuance of a writ of mandamus have been met in this case.

**B. The TRAC Criteria Support The Issuance Of A Writ.**

“In the case of agency inaction, we not only must satisfy ourselves that there indeed exists [a duty to act], but that the agency has ‘unreasonably delayed’ the contemplated action.” *In re Bluewater Network*, 234 F.3d at 1315. The analysis of whether an agency has “unreasonably delayed” action proceeds under the six criteria set forth in *TRAC*:

(1) the time agencies take to make decisions must be governed by a ‘rule of reason’; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; (6) the court need not ‘find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.’

*In re Bluewater Network*, 234 F.3d at 1315 (quoting *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 549 (D.C. Cir. 1999)). In considering the *TRAC* criteria, it bears noting that in *In re Bluewater Network*, where—as here—there was a clear violation of a specific statutory deadline, the Court did not exhaustively

analyze the specific *TRAC* criteria, noting only that agency failed to dispute petitioners' arguments with regard to them. *See* 234 F.3d at 1316. Nevertheless, as we now show, the *TRAC* criteria clearly support the issuance of a writ of mandamus here.

With regard to the *first two TRAC* criteria, Congress has supplied a “timetable” for the issuance of the supporting documents regulations, and, under the second *TRAC* criterion, this timetable may be deemed to supply the “rule of reason” governing the time for FMCSA to issue the regulation. *In re Bluewater Network*, 234 F.3d at 1315. Under that timetable, FMCSA’s regulatory action is nearly *fourteen years* overdue (*see supra* at 17 & note 5). Moreover, under any “rule of reason,” thirteen years surely is a manifestly unreasonable delay.

With regard to the *third TRAC* criterion, although the failure to issue the regulations also is causing ongoing economic harm to carriers and truckers, the delay at issue here is “in the sphere of” “human health and welfare.” *In re Bluewater Network*, 234 F.3d at 1315. Section 113 of the HMTA was expressly intended to foster compliance with hours-of-service requirements. *See* HMTA, § 113(a)(1)(A). And hours-of-service requirements are primarily designed to be safety regulations. *See, e.g., OOIDA*, 494 F.3d at 193 (“In order to ensure highway safety and protect driver health, Congress has charged the Federal Motor Carrier

Safety Administration with regulating the hours of commercial motor vehicle operators.”). Thus, the third *TRAC* criterion supports the issuance of a writ.

As for the *fourth TRAC* criterion, ATA is aware of no other FMCSA initiatives of a higher or competing priority that would be substantially hindered by an order directing FMCSA finally to do what Congress commanded should be done nearly fourteen years ago. Thus, this *TRAC* criterion supports ATA’s petition, as well.

With regard to the *fifth TRAC* criterion, the interests that have been and continue to be prejudiced by delay are significant. Motor carriers and drivers remain uncertain about the supporting documents requirements, and this uncertainty has effects on the day-to-day operations of trucking enterprises throughout the country, who are forced to retain any record that could possibly be used to verify a driver’s RODS. Uncertainty about supporting documents requirements also may affect law enforcement officials. All the while, as this uncertainty reigns, motor carriers remain subject to compliance reviews and inspections that require them to produce supporting documents and that expose them to a variety of sanctions for failures to maintain whatever documents are deemed to be required by Federal, State, and local enforcement officials. Moreover, to the extent that the failure to issue the supporting documents regulations frustrates the goals set forth in Section 113(a)(1), the public interest is

being compromised by FMCSA's inaction. Thus, this criterion supports the relief sought by ATA here.

Because *the sixth TRAC* criterion does not set forth a factor that the Court must weigh in deciding whether to issue a writ of mandamus compelling agency action, consideration of it is unnecessary in this case. It bears noting, however, that seven years after this Court expressed its bewilderment at FMCSA's then six-year failure to meet the statutory deadline, the agency still has not acted. *See Darrell Andrews Trucking*, 296 F.3d at 1130 (stating that "[d]espite Congress' 1994 direction that the FMCSA issue a regulation elucidating the term's coverage, the agency has still inexplicably failed to act").<sup>6</sup>

\* \* \*

Thus, the traditional mandamus factors and the *TRAC* criteria overwhelmingly support the issuance of a writ of mandamus in this case.

---

<sup>6</sup> The term to which the Court referred in *Darrell Andrews Trucking* was the term "supporting documents."

## CONCLUSION

For the foregoing reasons, ATA requests that the Court issue a writ of mandamus to compel FMCSA to promulgate a supporting documents NPRM no later than sixty days after the issuance of the writ in this case, and to promulgate a final rule in conformance with the dictates of Section 113 of the HMTA no later than six months after the publication of a NPRM.

Respectfully submitted,

Robert Digges, Jr.  
(rdigges@trucking.org)  
Vice President & Deputy General Counsel  
AMERICAN TRUCKING  
ASSOCIATIONS, INC.  
950 North Glebe Road  
Arlington, VA 22203  
Tel. (703) 838-1865

---

Erika Z. Jones  
(ejones@mayerbrown.com)  
Adam C. Sloane  
(asloane@mayerbrown.com)  
MAYER BROWN LLP  
1999 K Street, N.W.  
Washington, DC 20006  
Tel. (202) 263-3000

*Counsel for Petitioner American Trucking Associations, Inc.*

## **ADDENDUM**

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. PARTIES AND AMICI**

Petitioner is American Trucking Associations, Inc. (“ATA”). ATA is represented in this matter by Robert Digges, Jr., ATA’s Vice President and Deputy General Counsel, and Erika Z. Jones and Adam C. Sloane of Mayer Brown LLP, 1999 K Street, N.W., Washington, DC 20006. ATA’s Rule 26.1 disclosure follows this certificate.

Respondents are the Honorable Ray LaHood in his official capacity as Secretary of the United States Department of Transportation; the United States Department of Transportation; and the Federal Motor Carrier Safety Administration, an agency of the United States Department of Transportation.

Petitioner is unaware of any *amici* or intervenors.

### **B. Rulings Under Review**

This is a petition for a writ of mandamus to challenge agency action unlawfully withheld. There are no rulings under review.

### **C. Related Cases.**

ATA is unaware of any related cases previously before this Court or any other court.

## **RULE 26.1 CORPORATE DISCLOSURE STATEMENT**

American Trucking Associations, Inc. (“ATA”) is a trade association of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the national trucking industry. ATA has no parent companies, and no publicly-held company owns a 10% or greater ownership interest in ATA.

## STATUTORY ADDENDUM

Pub. L. No. 103-311, § 113, 108 Stat. 1673, states:

### **Sec. 113. DRIVER'S RECORD OF DUTY STATUS.**

(a) IN GENERAL.—

(1) The Secretary of Transportation shall prescribe regulations amending part 395 of title 49, Code of Federal Regulations, to improve—

(A) compliance by commercial motor vehicle drivers and motor carriers with hours of service requirements; and

(B) the effectiveness and efficiency of Federal and State enforcement officers reviewing such compliance.

(2) Such regulations shall be proposed not later than 12 months after the date of enactment of this Act and shall be issued and become effective not later than 18 months after such date of enactment. In prescribing the regulations, the Secretary of Transportation shall ensure that compliance can be achieved at a cost that is reasonable to drivers and motor carriers.

(b) CONTENTS OF REGULATIONS.—Such regulations shall include the following:

(1) A description of identification items (which include either driver name or vehicle number) that shall be part of a written or electronic document to enable such written or electronic document to be used by a motor carrier or by an enforcement officer as a supporting document to verify the accuracy of a driver's record of duty status.

(2) A provision specifying the number, type, and frequency of supporting documents that must be retained by a motor carrier so as to allow verification of the accuracy of such documents at a reasonable cost, to the driver and the motor carrier, of record acquisition and retention.

(3) A provision specifying the period during which supporting documents shall be retained by the motor carrier. The period shall be at least 6 months from the date of a document's receipt.

(4) A provision to authorize, on a case-by-case basis, motor carrier self-compliance systems that ensure driver compliance with hours of service requirements and allow Federal and State enforcement officers the opportunity to conduct independent audits of such systems to validate compliance with section 395.8(k) of title 49, Code of Federal Regulations

(or successor regulations thereto). Such authorization may also be provided by the Secretary to a group of motor carriers that meet specific conditions that may be established by regulation by the Secretary and that are subject to audit by Federal and State enforcement officers.

(5) A provision to allow a waiver, on a case-by-case basis, of certain requirements of section 395.8(k) of title 49, Code of Federal Regulations (or successor regulations thereto), when sufficient supporting documentation is provided directly and at a satisfactory frequency to enforcement personnel by an intelligent vehicle-highway system, as defined by section 6059 of the Intelligent Vehicle-Highway Systems Act of 1991 (23 U.S.C. 307 note). Such waiver may also be allowed for a group of motor carriers that meet specific conditions that may be established by regulation by the Secretary.

(c) SUPPORTING DOCUMENT DEFINED.—For purposes of this section, a supporting document is any document that is generated or received by a motor carrier or commercial motor vehicle driver in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver’s record of duty status.

**5 U.S.C. § 706 states in pertinent part:**

**§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed . . . .

**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of January, 2010, I caused two copies of the foregoing to be served by overnight air courier upon each of the following:

The Honorable Ray LaHood  
Secretary of Transportation  
1200 New Jersey Avenue, S.E.  
West Building, 9th Floor  
Washington, DC 20590

The Honorable Anne C. Ferro  
Administrator  
Federal Motor Carrier Safety Administration  
1200 New Jersey Avenue, S.E.  
West Building, 6th Floor  
Washington, DC 20590

The Honorable Eric H. Holder, Jr.  
Attorney General  
Department of Justice  
Robert F. Kennedy Building  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-2000

---

Adam C. Sloane