



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA-2012-0183]

Hours of Service of Drivers of Commercial Motor Vehicles; Regulatory Guidance for Oilfield Exception

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

ACTION: Notice of regulatory guidance; response to public comments.

SUMMARY: FMCSA responds to the public comments to its June 5, 2012, notice of regulatory guidance concerning the hours-of-service requirements for oilfield operations, and the Agency announces its decision to retain the 2012 guidance. On June 5, 2012, FMCSA updated its April 4, 1997, regulatory guidance to explain the applicability of the “Oilfield operations” exceptions in 49 CFR 395.1(d) to the “Hours of Service [HOS] of Drivers” regulations, and requested comments on the additional language. FMCSA also held three “listening sessions” in Pennsylvania, Colorado, and Texas to accept public comments for the docket. Following a review of all comments, the Agency has determined that no further elaboration on the regulatory guidance is needed, at this time, and the Agency will continue to monitor the use of the two HOS oilfield exceptions in 49 CFR 395.1(d). The Agency also calls attention to 49 CFR part 381, which provides procedures for persons to apply for individual or class exemptions from certain regulations provided the exemption would achieve a level of safety that is equivalent to, or greater than, the level of safety that would be achieved absent the exemption. Therefore, motor carriers that believe the current oilfield operations

exceptions do not provide sufficient relief for their operations should consider submitting an application for an exemption to the Agency describing an alternative that would ensure the requisite level of safety.

DATES: This regulatory guidance was effective June 5, 2012, as announced in the **Federal Register** on June 5, 2012 (77 FR 33098).

ADDRESSES: For access to the docket to read background documents or comments received, go to www.regulations.gov at any time or to the ground floor, room W12-140, USDOT Building, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, phone (202) 366-4325, e-mail MCPSD@dot.gov.

SUPPLEMENTARY INFORMATION:

Legal Basis

The Motor Carrier Act of 1935 provides that “The Secretary of Transportation may prescribe requirements for (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation” [49 U.S.C. 31502(b)].

The Motor Carrier Safety Act of 1984 (MCSA) confers on the Secretary the authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary to prescribe safety standards for commercial motor vehicles (CMVs). At a

minimum, the regulations must ensure that (1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMVs is adequate to enable them to operate the vehicles safely and the periodic physical examinations required of such operators are performed by medical examiners who have received training in physical and medical examination standards and, after the national registry maintained by FMCSA under section 31149(d) is established, are listed on such registry; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operator [49 U.S.C. 31136(a)]. The Act also grants the Secretary broad power to "prescribe recordkeeping and reporting requirements" and to "perform other acts the Secretary considers appropriate" [49 U.S.C. 31133(a)(8) and (10)].

The Administrator of FMCSA has been delegated the authority to carry out the functions vested in the Secretary by the Motor Carrier Act of 1935 [49 CFR 1.87(i)] and the MCSA [§ 1.87(f)].

Background

The Interstate Commerce Commission (ICC), which originally had jurisdiction over CMV highway safety, first heard requests for an oilfield exemption when the earliest HOS rules were issued in 1939. The Commission declined to grant the request, which was based on economic hardships, stating that "...important as these considerations are, they do not overcome our primary duty to prescribe maximum hours which will be reasonably safe" (Ex Parte No. MC-2, 11 M.C.C. 206, January 27, 1939).

In 1962, the ICC revisited the HOS rules. The Commission considered testimony from oilfield equipment suppliers and operators that provided specialized oilfield

equipment requiring special training. The ICC approved a 24-hour restart provision for operators of this equipment. This provision allowed drivers to restart the 70-hours of on-duty time (in 8 consecutive days) during which driving was allowed. The record also indicates that this restart provision was intended to apply to operators employed exclusively in the transportation of equipment for use in servicing the well operations. In other words, the restart was to be available to two groups of drivers – operators of specialized oilfield equipment requiring special training and drivers exclusively transporting oilfield equipment. [Ex Parte No. MC-40 (Sub-No.1), 89 M.C.C. 28-30, March 29, 1962]. This restart provision was codified on April 13, 1962 (27 FR 3553) as § 195.3(d), and later recodified as § 395.1(d)(1). Neither the original nor the recodified regulatory language mentioned specially designed vehicles or specially trained drivers, although the ICC’s March 29 report discussed both.

Approximately 5 months after granting the 24-hour restart, the ICC granted without comment the “waiting time” exception now codified at § 395.1(d)(2), using the “specially constructed” and “specially trained” phrases (27 FR 8119; August 15, 1962). Although the ICC provided no discussion of the reasons for the “waiting time” exception, the **Federal Register** notice included a long list of petitions from industry groups and equipment manufacturers that were filed after the March 29 decision. The petitions themselves, filed more than 50 years ago, are no longer available, and the ICC was terminated in December 1995 [Pub. L. 104-88, 109 Stat. 803, Dec. 29, 1995].

The oilfield “waiting time” exception (referring to specially constructed vehicles and specially trained drivers) was codified in 49 CFR 195.2 as part of the definition of “on duty time.” [§ 195.2(a)(9)]. The 24-hour restart exception, referring to the broader group

servicing the oilfield sites, was codified in 49 CFR 195.3, which governed “Maximum driving and on-duty time” [§ 195.3(d)].

In a 1992 technical amendment published in the **Federal Register** as part of a broader final rule, the 24-hour restart and waiting-time provisions were transferred to become today’s § 395.1(d)(1) and (2) [57 FR 33638; July 30, 1992].

On April 4, 1997 (62 FR 16420), the Federal Highway Administration (FHWA) – the Agency responsible for motor carrier safety until the establishment of FMCSA – published “Regulatory Guidance for the Federal Motor Carrier Safety Regulations” which provided interpretive guidance material for the Federal Motor Carrier Safety Regulations. The FHWA consolidated previously issued interpretations and regulatory guidance materials and developed concise interpretive guidance in question and answer form for each part of the FMCSRs. The 1997 notice included several questions and answers concerning oilfield operations.

Reason for This Notice

A significant increase in oil and gas drilling operations in many States has resulted in a major increase in CMV traffic to move oilfield equipment, and transport large quantities of supplies, especially water and sand, to the sites. The operators of many of these vehicles and law enforcement officials have raised questions about the applicability of § 395.1(d).

Section 395.1(d) provides two separate exceptions to the HOS rules, with the two exceptions applying to different operators. Section 395.1(d)(1) states that for drivers of

CMVs used exclusively in the transportation of oilfield equipment, including the stringing and picking up of pipe used in pipelines, and servicing of the field operations of the natural gas and oil industry, any period of 8 consecutive days may end with the beginning of any off-duty period of 24 or more consecutive hours. This is commonly referred to as a “24-hour restart” of the 70 hours in 8 days total on-duty time limit in § 395.3(b).

Section 395.1(d)(2) states, in part, that in the case of specially trained drivers of CMVs that are specially constructed to service oil wells, “on-duty time shall not include waiting time at a natural gas or oil well site.” Under the definition of “On duty time” in § 395.2, drivers who are standing by at an oil well site until their services are needed would normally be considered on-duty, thereby reducing the hours that they would have available to drive a CMV within the HOS-rule limits. This exception is often referred to as the “oilfield waiting time” provision.

On June 5, 2012, FMCSA updated its regulatory guidance on these oilfield provisions in the **Federal Register** (77 FR 33098). Updates were made to Questions 6 and 8 to 49 CFR 395.1, which had been published on April 4, 1997. Although the updated guidance was effective upon publication, FMCSA announced that it would accept comments to the public docket until August 6, 2012, to “...determine whether any further clarification of these regulatory provisions is necessary” (77 FR 33099).

The Agency later extended the public comment period until October 5, 2012, to include comments made at public “listening sessions” to be held in August and September (Denver, CO, August 17; Coraopolis, PA, August 21; Dallas, TX, September 27) (77 FR 46640, August 6, 2012). Approximately 15 people spoke at each of the listening sessions. Transcripts of these sessions have been filed in docket FMCSA-2012-0183 at

www.regulations.gov.

General Comments

Written comments to the docket were filed by 81 individuals or associations. In some instances, the same comments were presented at one or more of the listening sessions. Of the 81 comments, seven were filed by the American Trucking Associations, Inc. (ATA) and State-level motor carrier associations. Nine comments were filed by other major trade associations such as the American Petroleum Institute (API), National Association of Manufacturers (NAM), International Association of Drilling Contractors (IADC), and similar organizations. About 29 comments were identifiable with individual motor carriers, well site operators, and equipment suppliers. One comment was filed by the Advocates for Highway and Auto Safety (Advocates), a public safety advocacy organization. In addition, letters co-signed by 14 U.S. senators and 63 congressmen were submitted to the docket, expressing concerns similar to those of other parties in written and verbal comments. The remaining comments were filed by drivers or could not otherwise be classified.

Administrative Procedure Act (APA)

Comments

Many of the commenting associations claimed that the revisions to Questions 6 and 8 to 49 CFR 395.1 were a major departure from long-standing Agency interpretations, and that their content was contrary to 49 CFR 395.1(d). At least, they argued, the revised regulatory guidance should have been subjected to the full “notice and comment” provisions of the APA.

FMCSA Response

As explained in the Agency's 2012 **Federal Register** notice, FMCSA amended Questions 6 and 8 because of reports it had received that § 395.1(d) was being inconsistently enforced in States with substantial oil and gas drilling operations. A significant increase in such operations in many States has generated major increases in CMV traffic to move drilling equipment and related supplies, such as water and sand, to the well sites.

Prior to the recent surge, oil and gas production was conducted at isolated locations without the heavy traffic in vehicles hauling sand and water that is required by hydraulic fracturing (or "fracking") operations. Traditional production methods appear to have created no particular need for enforcement activity and thus generated little or no controversy. As drilling operations began in States having little prior experience with oil and gas exploration and the volume of traffic to and from fracking sites increased, State and local officials received more and more reports of safety problems. Enforcement efforts intensified, leading to inquiries about the status of sand and water delivery trucks under § 395.1(d).

Contrary to the assertion of some commenters, there has been no "long standing" interpretation that operators of water and sand delivery trucks are eligible for the "waiting time" provision. The ICC's 1962 decisions did not address the issue at all. However, the party that submitted the inquiry now listed as Question 10 in the Agency's guidance, which deals explicitly with the transportation of sand and water and was published in 1997, clearly assumed that such operations are part of the "servicing of the field operations of the natural gas and oil industry," and inquired whether the 24-hour restart provision in § 395.1(d)(1) would apply under certain conditions.

FMCSA agreed with the submitter that drivers used exclusively to transport sand and water to service field operations were eligible for the restart exception, and replied accordingly [62 FR 16370, 16420, April 4, 1997]. The statement in Question 6 – also adopted in 1997 – that “[w]ater servicing companies, whose operations are exclusive to servicing the natural gas and oil industry, are also covered by the provisions of § 395.1(d),” must be read in conjunction with the more explicit discussion of such companies in Question 10, where their eligibility for the 24-hour restart is affirmed (i.e., § 395.1(d)(1)).

Nothing in these Questions and Answers suggests that drivers of trucks delivering sand and water are eligible for the waiting time exception (i.e., § 395.1(d)(2)), nor has FMCSA ever issued guidance to that effect. Because interpretations of § 395.1(d) did not specifically address the applicability of the waiting time provision to operators of vehicles such as sand and water delivery trucks, the States appear to have evolved inconsistent enforcement practices. In other cases a lack of enforcement of the § 395.1(d) provisions may have given carriers and drivers the misimpression that their assumptions about applicability were accurate.

The regulatory guidance issued in 2012 is the first specifically clarifying that trucks delivering supplies (including sand and water) and equipment to the well sites are not eligible for the “waiting time” provision of § 395.1(d)(2). The guidance is consistent with the regulation itself and prior guidance, and does not represent a change in the enforcement policies of many (though not all) States. Thus, the guidance was not a reversal of any long-standing interpretation or policy. Only in those States that allowed the sand and water trucks to utilize the “waiting time” exception, without any basis in

regulatory language or FMCSA guidance, would carriers and drivers have perceived this national clarification as a change.

Comments to the docket and at the listening sessions made it clear that prior discussions of the § 395.1(d) provisions had not been precise enough to clarify which of the two separate sub-section exceptions (“24-hour restart” and “waiting time”) were being addressed. For example, inquiries about mechanical modifications of sand and water delivery trucks centered around whether the modifications helped to prove that the vehicle was used “exclusively” in oilfield operations and therefore eligible for the “24-hour restart” provision of § 395.1(d)(1). It may not have been clear to all commenters that these discussions were not about eligibility for the “waiting time” exception, which is different than that for the “24 hour restart.”

Changes Needed in the Regulation

Comments

Many commenters asked FMCSA to “rescind” the 2012 guidance and undertake a full rulemaking to revise § 395.1(d). They offered a variety of suggestions as to the provisions of a revised regulatory section.

FMCSA Response

Rescission of the 2012 guidance – even if justified, which is not the case, as the above discussion demonstrates – would result in inconsistent compliance and enforcement. It would be unclear, pending the completion of a notice-and-comment procedure, whether or not operators of sand and water delivery trucks would be eligible for the § 395.1(d)(2) “waiting time” provision, potentially leading to a return to inconsistent enforcement.

FMCSA does not believe that a rulemaking process is necessary. A fair reading of the Agency's prior guidance in this area demonstrates that the 2012 revision simply clarified a point that had been implicit in FMCSA's Questions and Answers for more than 15 years.

Cost and Economic Impact Issues

Comments

Numerous commenters stated that compliance with the 2012 regulatory guidance would result in significant cost increases for them to hire additional drivers who would be needed to cover the hours currently worked by drivers incorrectly using the "waiting time" exception to exceed the 14-hour "driving window" established by § 395.3.

FMCSA Response

It is possible that some motor carriers that have not been fully complying with the § 395.1(d) provisions may need to employ additional drivers if existing schedules have generated overly-long periods of wakefulness for some drivers. In comments to the docket and at the listening sessions, some drivers and carriers acknowledged that deliveries of sand and water may be delayed at the well sites, resulting in a duty day well beyond 14 hours.

Section 395.3(a)(2) is specifically intended to prevent driving a CMV after the 14th hour after the driver came on duty, whatever his or her intervening activities. The HOS rules issued in the last decade included substantial evidence supporting the need to limit excessive hours of driving and work, which can lead to fatigued driving. The rationale for the 14-hour driving window applies with particular force to drivers using the "waiting time" exception in § 395.1(d)(2). There is no indication that the "waiting time" exception

in § 395.1(d)(2) was ever intended to allow driving after long periods of time had elapsed since the start of the duty day. The history of the oilfield regulatory language, as explained in the **Background** section of this notice, makes it clear that § 395.1(d)(2) was intended for use by persons who are primarily specialized equipment operators but who occasionally drive a CMV, as opposed to individuals whose primary job is to drive delivery vehicles, even if those vehicles might have simple modifications to help them make deliveries in rough oilfield terrain.

If some motor carriers had to hire additional drivers to operate within the § 395.1(d) provisions, that would merely place them on par (“level the playing field”) with motor carriers that have been in compliance all along.

Road and Well-site Safety Issues

Comments

Several commenters claimed that a lack of safety evidence exists to justify what they deemed to be a major regulatory change.

FMCSA Response

Because the 2012 notice changed neither the regulation nor the substance of the Agency’s regulatory guidance, no statistical evaluation of the clarified guidance was needed, as would be required in a notice-and-comment rulemaking. Allowing drivers of trucks making routine deliveries of sand and water to oilfields to utilize the “waiting time” exception would enable them to resume driving immediately after waiting for many hours and then unloading, which has never been the case with operators of specialized equipment who drive only occasionally, despite the “waiting” time exception. Any such reading of § 395.1(d) is neither consistent with the history of the oilfield exceptions nor

justified by modern research on fatigue.

Future Activity

FMCSA believes the 2012 amendment of the regulatory guidance has resolved most of the confusion regarding applicability of § 395.1(d) to oilfield operations. As with any regulation, unique situations may arise that require further regulatory guidance of an informal or formal nature, and FMCSA will consider those scenarios on a case-by-case basis.

The Agency will continue to monitor use and impacts of this HOS exception within the substantial constraints of existing data collection systems of records.

Consideration of Regulatory Alternatives: 49 CFR Part 381 Exemptions

FMCSA acknowledges the concerns of the commenters and participants in the three listening sessions. While the guidance is consistent with the underlying regulations, the Agency believes there are options available to the oil and natural gas industries that could be used to address their needs for hours-of-service flexibility.

FMCSA calls attention to the provisions of 49 CFR Part 391, “Subpart C – Procedures for Applying for Exemptions.” Sections 381.300-.381.331 explain a procedure through which any affected persons or classes of persons may apply for an exemption from the HOS rules, among others, if the applicant can justify that operation under the proposed exemption would “...achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulations...” [§ 381.310 (b)(5)]. Exemptions may be granted for a maximum 2-year period and may be renewed. Therefore, motor carriers that believe the current oilfield operations exceptions do not provide sufficient relief for their operations should consider

submitting an application for an exemption to the Agency describing an alternative that would ensure the requisite level of safety.

The Agency emphasizes the exemption process is an effective process for addressing issues concerning specific motor carriers and in some instances, segments of the industry. The process includes an opportunity for notice-and-comment to ensure transparency and public participation as the Agency considers an exemption application from an individual carrier, group of carriers, or an association submitting the request on behalf of the industry.

The Agency invites interested parties to visit www.regulations.gov for previously published Federal Register notices concerning exemptions to see examples of how the Agency notifies the public about the exemption applications, complete copies of the exemption applications, the types of public comments received in response to the notices, and the Agency's response to the public comments and final decisions.

Issued on: August 5, 2013

Anne S. Ferro
Administrator

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