



DEPARTMENT OF TRANSPORTATION

[4910-EX-P]

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2019-0093]

Hours of Service of Drivers: Turfgrass Producers International; Application for Exemption

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

ACTION: Notice of final disposition; denial of application for exemption as moot.

SUMMARY: FMCSA announces its decision to deny as moot the application of Turfgrass Producers International (TPI) to extend the hours-of-service (HOS) exemption for “agricultural commodities” to drivers transporting turfgrass sod. FMCSA has analyzed the application, public comments, and applicable law and has determined that turfgrass sod is an agricultural commodity already subject to the HOS exemption.

DATES: FMCSA denies this application for exemption effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES:

Docket: For access to the docket to read background documents or comments, go to www.regulations.gov at any time or visit Room W12-140 on the ground level of the U.S. Department of Transportation, West Building, 1200 New Jersey Avenue, S.E., Washington, D.C., between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The online Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to help inform its rulemaking process. DOT posts these comments, without

edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: For information concerning this notice, contact La Tonya Mimms, Chief, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle; Telephone: (202) 366-4325; E-mail: MCPSD@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION

I. Public Participation

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to www.regulations.gov and insert the docket number, “FMCSA-2019-0093 in the “Keyword” box and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must

provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted, and provide an opportunity for public comment on the request.

The Agency reviews the safety analyses, if any, and public comments submitted and determines whether granting the exemption would likely achieve a level of safety equivalent to or greater than the level that would be achieved by the current regulation (49 CFR 381.305). The Agency publishes its decision in the Federal Register (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption and the regulatory provision from which the exemption is granted. The notice must specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemption

Turfgrass Producers International (TPI) represents natural grass seed and sod farmers throughout the United States and abroad. TPI says it has promoted the benefits of natural grass for 51 years and has members in over 46 States and 25 countries that produce natural grass seed and sod. The natural grass product that farming members produce is delivered to urban and suburban areas where it is used for landscape services, home construction, and recreational industries, among others.

TPI requests an exemption that would allow drivers transporting turfgrass sod to operate under the same HOS exemption provided for drivers transporting “agricultural commodities,” as defined in 49 CFR 395.2. The agricultural commodities exemption is codified in 49 CFR 395.1(k)(1).

TPI asserts that its sod-producing members are concerned that the definition of “agricultural commodity” in 49 CFR 395.2 does not include sod and that the motor carriers cannot take advantage of the HOS relief provided by 49 CFR 395.1(k)(1), despite the similarities between sod and the other commodities that are considered agricultural in nature.

According to TPI’s application, turfgrass sod is recognized as a perishable agricultural commodity by the U.S. Department of Agriculture and, like many other agricultural commodities, is planted and harvested annually. Sod is cultivated and managed with techniques and equipment similar to those used for other agricultural crops and is subject to the same impacts of weather, weed infestations, insect pests, and plant disease. Similarly, once harvested for sale, it is also subject to perishing in transport. Specifically, sod often loses its color, moisture, and vigor due to transplant shock and can die if palletted too long. Sod’s perishability depends on many of the same factors that impact the transportation of other agricultural commodities, including temperature, desiccation, oxygen and light deprivation, increased respiration, carbon starvation, etc., all of which negatively impact the quality of turfgrass sod.

TPI asserts that the lack of the HOS exemption available to drivers transporting other agricultural commodities will heavily impact sod haulers’ business. Their inability to deliver their perishable product to market in a timely manner will result in a decrease in the amount of product they can ship and an increase in the amount of product that either perishes in transport or is damaged in transport, resulting in customers who refuse delivery or are otherwise not satisfied with sod quality at delivery. If granted, TPI

estimates that the exemption would cover between 2,400 drivers (400 farm baseline) and 10,428 drivers (1,738 farm maximum).

IV. Public Comment

On June 19, 2019, FMCSA published notice of this application and requested public comment (84 FR 28621). Forty-six comments were received, all favoring the exemption. The commenters argued that because sod is a perishable product it requires flexibility when being transported and for that reason should be classified as an agricultural commodity. Commenter Preston Cavanaugh stated that “Grass sod is considered an agricultural commodity by the U.S. Department of Agriculture, U.S. Environmental Protection Agency, Internal Revenue Service, Social Security Administration, Occupational Safety and Health Administrations, U.S. Department of Labor, and many [S]tate departments of agriculture.” Commenter Kim Allen Boling stated, “Employees on sod farms are considered to be agricultural workers under the Federal Wage & Hour rules....”

V. Method to Ensure an Equivalent or Greater Level of Safety

To ensure an equivalent level of safety, TPI proposes to educate natural grass sod haulers on the existing safety regulations regarding the operation of commercial motor vehicles. TPI contends that nothing about its weight, stacking configuration, etc., makes natural grass sod any less safe to haul than other agricultural commodities, as demonstrated by the proven safety record of drivers hauling sod grass.

VI. FMCSA Analysis

FMCSA has analyzed the TPI application, public comments, and applicable law and has determined that turfgrass sod is an agricultural commodity already subject to the HOS exemption. We therefore deny as moot TPI's request for an exemption.

Congress adopted the current definition of "agricultural commodity" in 2007, as currently restated in 49 CFR § 395.2: "*Agricultural commodity* means any agricultural commodity, non-processed food, feed, fiber, or livestock (including livestock as defined in sec. 602 of the Emergency Livestock Feed Assistance Act of 1988 [7 U.S.C. 1471] and insects)."

The Agricultural Trade Act of 1978 defines *Agricultural commodity* as "any agricultural commodity, food, feed, fiber, or livestock (including livestock as it is defined in [the Emergency Livestock Feed Assistance Act of 1988] *and any product thereof*" (emphasis added). In 49 CFR § 395.2, "*Agricultural commodity*" is defined, in part, as "any agricultural commodity." The term "any agricultural commodity" is facially quite broad, and FMCSA concludes that that breadth encompasses sod grass. The Agency notes the common characteristics of sod and other agricultural commodities as further evidenced by arguments from commenters who point out that grass sod is considered an agricultural commodity by the U.S. Department of Agriculture, U.S. Environmental Protection Agency, Internal Revenue Service, Social Security Administration, Occupational Safety and Health Administrations, U.S. Department of Labor, and many State departments of agriculture.

Because FMCSA has determined that sod is an agricultural commodity and an exemption is not required, FMCSA does not address other statutory requirements for the grant of an exemption application.

FMCSA acknowledges its ongoing rulemaking to determine whether, and, if so, to what extent the definitions of “agricultural commodity” and “livestock” should be revised or otherwise clarified. *See* Hours of Service of Drivers; Definition of Agricultural Commodity Advance Notice of Proposed Rulemaking (ANPRM) [84 FR 36559, July 29, 2019]. The July 2019 ANPRM was prompted by indications that the current definitions of these terms may not be understood or enforced consistently. The Agency’s decision today to interpret agricultural commodity as already including sod grass for purposes of resolving TPI’s exemption request is thus interim in nature and does not foreclose a revised or even contrary conclusion as a result of the related rulemaking.

VII. FMCSA Decision

The FMCSA has evaluated TPI’s application for exemption, and the public comments, and made the decision to deny the application. The exemption is denied as moot because sod grass is already an agricultural commodity for purposes of the HOS exemption at 49 CFR 395.1(k)(1).

James A. Mullen,
Deputy Administrator.