



Comment Tracking Number ldt-pw09-b1ac

February 6, 2023

U.S. Department of Transportation,
Dockets Operations
1200 New Jersey Avenue SE,
West Building, Ground Floor, Room W12-140,
Washington, DC 20590-0001.

RE: Docket No. FMCSA-2022-0028 Clarification to the Applicability of Emergency Exemptions: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation: Notice of Proposed Rulemaking.

Submitted Electronically

Introduction

EMA is a federation of 47 state and regional trade associations representing family-owned and operated small business energy marketers throughout the United States. Energy Marketers are motor carriers who transport petroleum products in U.S. DOT specification cargo tank vehicles to wholesale and retail customers. Energy marketers operate exclusively below the terminal rack, delivering fuel from the terminal rack or intermediate bulk storage directly to end-users. EMA members are a vital link in the downstream petroleum distribution chain. EMA members supply 80 percent of all finished petroleum products sold nationwide including gasoline, diesel fuel, biofuels, heating fuel, jet fuel, kerosene, racing fuel and lubricating oils and operate approximately 60,000 retail gasoline stations nationwide. EMA members also supply heating fuel to more than 5 million homes and businesses.

EMA works very closely with the Federal Motor Carrier Safety Administration (FMCSA) and state emergency response authorities during declared emergencies to ensure the continuity of the petroleum distribution chain. Emergency declaration waivers are an essential to maintain petroleum distribution continuity throughout the declared emergency.

Comments

EMA thanks the FMCSA for the opportunity to submit the following comments on the above referenced Notice of Proposed Rulemaking (NPRM). EMA is concerned that that the FMCSA is going beyond a mere clarification of the applicability of emergency exemptions and instead is making substantive changes that will make it more difficult for energy marketers to address fuel supply shortages during a declared emergency.

Time Period for State Waiver Relief

The FMCSA is proposing to reduce the duration of the waiver as well as the scope of regulations waived for declarations of emergency declared by a state governor. The NPRM would reduce the duration of the waiver from 30 days to just 5 days. In addition, governors would no longer be able to renew their own waivers. Instead, the power to renew a governor's waiver is retained by the FMCSA.

First, EMA is concerned that the reduction of the automatic waiver from 30 days to 5 days for state declarations may not be sufficient time for full recovery from a declared emergency. In the petroleum marketing industry, disaster recovery time typically takes 2 to 3 times longer than the duration of the disaster itself. When petroleum supply is disrupted, the HOS waiver is essential to restore the flow of finished petroleum products to downstream users. The HOS waiver increases the number of loads that can be delivered and the distance traveled to reach far off supply during emergency declarations.

The Federal Motor Carrier Safety Regulations (FMCSR) requires CDL drivers operating under an HOS waiver to take a 10-hour break when moving from emergency relief efforts to normal operations; or when a combination of emergency relief and normal operations, equals or exceeds 14 hours. This limitation, combined with the weekly 60/70 hours duty limit over 7/8 days for CDL drivers makes it difficult for energy marketers to immediately resume normal deliveries once the emergency ends. Many drivers are unavailable to make regularly scheduled deliveries because they are required to take their 32-hour off duty period in order to restart their work week after the emergency period ends. Since not all drivers are on the same weekly work schedule, their return is staggered over a period of several weeks hindering the return to a normal delivery schedule. During this period, petroleum will continue to be in short supply due to lack of drivers. In addition, when a terminal or pipeline outage occurs, resulting in a supply disruption, normal inventories of finished fuel products take time to work their way back through the distribution chain to storage terminals. Return to normal inventories could take up to three weeks after the emergency period is over. Finally, a shorter 5-day state waiver period would encourage consumer fuel hoarding and long lines at the pump, further limiting supply. Maintaining fuel supply during a declared emergency is vital to recovery efforts. However, a 5-day period is insufficient time for supply to return to normal levels. EMA supports maintaining the current 30-day automatic waiver period for state declared emergencies to maintain supply during and after a declared emergency.

Scope of Regulatory Relief

The NPRM would reduce regulatory relief under a state issued waiver from all provisions in sections 390 to 399, to only the hours-of-service requirements for CDL drivers under section 395.3. EMA agrees with the FMCSA that not all of the requirements for drivers and equipment under sections 390 to 399 ought to be automatically waived during a declared emergency. Clearly, those provisions in the FMCSR concerning safe operations, prohibition against alcohol and drug use, requirement for equipment inspection and maintenance, out of service orders, etc. can be eliminated from the automatic waiver list. However, the additional provisions that should be waived in some cases depends on the unique characteristics of the emergency. For example, during the COVID pandemic, the FMCSA waived requirements for CDL licensing renewal, driver retraining, medical exam and qualification among others provisions. FMCSR requirements that are not normally waived in practice. However, CDL drivers were unable to comply with these administrative requirements due to the closure of DMVs, medical offices and training facilities nationwide. Delaying these administrative requirements was essential in order to maintain adequate supply and distribution of petroleum products for the duration of the COVID emergency declaration. Governors should not lose the flexibility to issue similar waivers when conditions merit. Governors need these tools to address local emergencies and are in a unique position to determine when they are needed and for how long.

EMA believes the NPRM offers no clear justification for reducing the duration and scope of automatic emergency waivers issued by a governor, while leaving in place the 30-day duration and automatic waiver of sections 390 -399 for presidential and FMCSA declarations. Governors are able to narrowly tailor the duration and scope of emergency waivers they issue under current FMCSR regulations, and often do. The NPRM provides no evidence of an abuse of state waiver authority that would justify the FMCSA's drastic reduction in duration of the waiver period and the scope of the regulations waived by a governor. Nor is reduction in safety a justification for stripping governors waiver authority. If that were so, both the presidential and FMCSA waiver

authority would face similar limitations, but they do not. The FMCSA confirms in the text of the NPRM that “The agency has no information that suggests that past or existing emergency exemptions have in fact negatively impacted road safety.” Lacking adequate justification, the duration and scope of state emergency waivers should not be restricted.

Definition Changes

“Emergency Relief” - The FMCSA is proposing to modify the definition of “*emergency relief*” to clarify that emergency regulatory relief under 390.23 does not apply to economic conditions caused by market forces including shortages of supplies or drivers unless such conditions or events cause an immediate threat to human life. EMA opposes this modification because it is too restrictive to ensure that energy supply will continue during a declared emergency. Many of the FMCSA’s waivers issued during the COVID pandemic specifically cited the shortage of petroleum supplies along with a shortage of drivers delivering supply as the underlying justification for nationwide emergency waiver. The FMCSA, through these waivers, recognized the imminent threat to life that would result should petroleum supply be disrupted in such a significant way. While a steady petroleum supply is vital to the economy and for emergency relief, it is not always immediately obvious to determine when the loss of supply would rise to the level of “life threatening” in the absence of a nationwide emergency. Lack of gasoline to transport an ill family member to a hospital in an emergency may qualify as life threatening, if the patient’s condition is acute. Also, evacuation of people from the path of a hurricane would seem to qualify as life threatening. But, would the inability to buy groceries due to lack of gasoline supply or the lack of fuel needed to commute to work to earn the money to buy groceries constitute an immediate threat to human life? Eventually, these scenarios could be life threatening depending on the duration of gasoline supply disruption and the nature of the emergency.

The fact of the matter is that gasoline and diesel fuel along with other finished petroleum products are essential to accomplish the most basic life sustaining functions people undertake every day. These routine functions keep people fed, clothed and housed. When gasoline prices rise precipitously or supply is scarce due to a terminal shutdown, pipeline disruption or oil embargo, there is significant impact on the economy that can threaten human life in a myriad of ways. The threat may not seem as immanent as being in the path of a hurricane, but it can just as lethal if people can’t get to where they need to go due to lack of fuel. It would be short sighted of the FMCSA not to recognize the threat to human life that economic conditions can cause in the absence of a natural or man-made disaster. EMA urges the FMCSA maintain needed flexibility in the waiver process by factoring in market force impact on the economy when weighing emergency declarations.

Residential Heating Fuel – EMA has no objections to the proposal to move the definition of “*residential heating fuel*” from section 390.23 to the definition sections in 390.5T and 390.5. However, the definition should be expanded to include liquid renewable fuels, specifically “*biodiesel blends*.” Biomass-based diesel derived from soybeans and other renewable non fossil fuel sources are blended into heating oil at increasing rates to reduced carbon intensity. These blends are increasingly distinguished from neat, unblended heating oil as their Volumatic content increase. It would be helpful to include biodiesel blends in the definition of residential heating fuel for the sake of clarity.

Communication Through FMCSA Emergency Declaration Mailbox

EMA has worked closely with the FMCSA over the years with respect to emergency declarations involving fuel supply disruptions, particularly during the pandemic. Many of EMA’s communications with FMCSA have occurred over the phone or via email with key contacts. Often, multiple communications are needed back and forth to report fuel supply conditions on the ground and identify geographic areas in need, among other factors required to support an emergency declaration. Fuel supply shortages develop quickly and can rapidly spread across wide areas, often far from the location of the declared emergency.

EMA is concerned that by requiring declaration requests to be sent to a generic email address will remove the immediacy needed to obtain waivers in rapidly developing situations, such as petroleum supply disruptions. Instead, the FMCSA should identify key FMCSA contacts responsible for waiver requests and provide their names, phone numbers and individual emails to facilitate the waiver process. Sending requests to a generic mailbox, with no point of contact during a developing emergency does not reassure the sender that the request has been received or acted on. It is very likely that the generic email will be bypassed in any event in favor of phone contact to obtain the certainty of action needed during an emergency. For all the reasons above, EMA urges FMCSA to maintain direct phone contact as a method of communication to request waivers.

Request for an Extension of the Comment Period

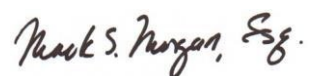
Once again, EMA requests a 30-day extension of the comment period to allow all stakeholders to respond to the NPRM. EMA has learned that many state emergency response authorities were unaware of the NPRM until very late in the comment period. The proposed changes would have a significant impact on these stakeholders and the motor carriers in their jurisdictions and their views should be heard.

Conclusion

EMA thanks the FMCSA for the opportunity to comment on the proposed rule which would significantly reduce the authority of state emergency response authorities to issue automatic waivers of FMCSR provisions. We urge the FMCSA to maintain the current 30-day duration and extension period for state emergency declarations. EMA supports narrowing the scope of regulations automatically waived under a state emergency declaration. Safe operation requirements such as the prohibition against drug and alcohol use should not be waived. However, driver medical certificate renewals, CDL licensure renewals and other administrative requirements should remain waivable in order to maintain the flexibility state governors need to address local emergencies.

Please feel free to contact me should you have questions or require additional information.

Sincerely,



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