No. 07-1327

(No date for oral argument has been set)

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

WILLIAM B. TRESCOTT

Petitioner,

v.

THE FEDERAL HIGHWAY ADMINISTRATION,
THE SECRETARY OF TRANSPORATION,
and THE UNITED STATES

Respondents.

On Petition for Review of a Final Rule Issued by
the respondent Federal Highway Administration

INITIAL BRIEF FOR PETITIONER

William B. Trescott
8028 Farm to Market Road 457
Bay City, Texas 77414
(979) 244-3134

I seek a review of the rules governing commercial motor vehicle size and weight. By arbitrarily denying to truckers such as myself the use of safety devices known to provide protection from workplace death and injury, the rules endanger my life and limb as well as violate Congressional and statutory mandates.

PETITIONER'S CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS AND RELATED CASES (D.C. CIR. R. 28(a)(1))

Pursuant to D.C. Circuit Rule 28(a)(1) (and Federal Rule of Appellate Procedure 26.1), petitioner certifies as follows:

A. Parties

I, William B. Trescott, a private citizen who has not issued debt securities to the public, am a trucker by trade endangered by the below mentioned rules whom the Department of Commerce has issued five patents for safer intermodal technology which have been diminished in value by these rules, and who participated in this rulemaking being petitioned for review for the purpose of protecting the lives of myself and others.

Respondents are the Federal Highway Administration, the Secretary of Transportation, and The United States.

B. Rulings Under Review

I seek a review of the Size and Weight Enforcement and Regulations Final Rule (Docket No. FHWA–2006–24134, RIN 2125–AF17) entered in the Federal Register on February 20, 2007 at 72 FR 7741.

C. Related Cases

This case has never been before this court or any other court. However, a closely related case was formerly before this court. In January

2006, I filed a petition for writ of mandamus, No. 06-5004, to compel District Court to rule *in re Trescott v. Mineta* which was denied by this court on February 24th, 2006.

In *Trescott v. Mineta,* No. 05cv00678, I filed suit under *The Federal Railroad Safety Act of 1970,* 49 U.S.C. § 20104(c), to compel Secretary of Transportation Norman Mineta to implement Section 5001 of *The Intermodal Surface Transportation Efficiency Act of 1991*, 49 U.S.C. § 302(e), a bill which Secretary Mineta personally sponsored himself when he was Chairman of the House Transportation Committee.[1] District Court dismissed my case on the grounds that I lacked standing.

Respectfully submitted,

_____

William B. Trescott
8028 Farm to Market Road 457
Bay City, Texas 77414
(979) 244-3134

[1] Norman Mineta's predecessor, Rodney Slater, pledged to reduce truck fatalities by 50% within ten years after *petitioner* gave Secretary of Transportation Federico Peña two videos showing how truck fatalities could be reduced. Secretary Slater was head of Secretary Peña's Office of Motor Carriers at the time. The meeting was at the invitation of the Owner Operator Independent Drivers Association in 1994.

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MISCELLANEOUS

GLOSSARY

C.F.R.	Code of Federal Regulations
DOT	Department of Transportation
FARS	Fatality Analysis Reporting System
FHWA	Federal Highway Administration
FMCSA	Federal Motor Carrier Safety Administration
F.R.	Federal Register
GM	General Motors
MCSIA	The Motor Carrier Safety Improvement Act of 1999
NCSA	National Center for Statistics and Analysis (NHTSA)
NHTSA	National Highway Traffic Safety Administration
NPRM	Notice of Proposed Rulemaking
P.L.	Public Law
RV	Recreational Vehicle
SAFETEA–LU	The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SUV	sport utility vehicle
U.S.C.	United States Code

JURISDICTION

Pursuant to *The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144), *The Energy Policy Act of 2005* (Pub. L. 109–58, 119 Stat. 544), and *The Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006* (Pub. L. 109–115, 119 Stat. 2396), on February 20th, 2007 the Federal Highway Administration issued a Size and Weight Enforcement and Regulations Final Rule entered at 72 FR 7741. Section 104 of *The Motor Carrier Safety Improvement Act of 1999* (P.L. 106-159), 49 U.S.C. 113, Section 5001 of *The Intermodal Surface Transportation Efficiency Act of 1991*, 49 U.S.C. § 302(e), *The Federal Railroad Safety Act of 1970*, 49 U.S.C. 20103-20104, *The Regulatory Flexibility Act* (Pub. L. 96–354), 5 U.S.C. 601–612, and 49 U.S.C. § 31113(b) prohibit this rulemaking. *Petitioner* filed a timely petition for reconsideration on March 8th, 2007 and withdrew it on August 14th, 2007. This court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(3)(A), to compel obedience to the statutes.

STATUTES AND REGULATIONS

Pertinent statutes and regulations can be found in Appendix B.

STATEMENT OF ISSUES

Whether the commercial motor vehicle size and weight regulations are arbitrary and capricious and contrary to law because they—

(a) ban certain safety devices on the basis of the size and weight of the devices rather than a scientific assessment of their efficacy in reducing death and injury;

(b) ban certain heavy duty suspension components on the basis of the size and weight of the components rather than a scientific assessment of their efficacy in reducing or eliminating highway damage caused by heavy vehicles;

(c) ban certain safety devices and heavy duty suspension components allowed on recreational vehicles under 23 C.F.R. 658.5, and recommended in Department Of Labor safety standards for industrial vehicles, 29 C.F.R. 1910.178(a)(2)(Appendix A-4.2 & 7.1), and required by *The Rail Safety Enforcement and Review Act of 1992* (Pub. L. 102-36549)(49 C.F.R. Parts 229 and 238).

(d) were promulgated in excess of statutory jurisdiction without observance of procedure required by law. 5 U.S.C. § 706(2)(D).

STATEMENT OF THE CASE

Section 101 of *The Motor Carrier Safety Improvement Act of 1999* amended the United States Code as follows:

> "SAFETY AS HIGHEST PRIORITY.—In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as its highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation". 49 U.S.C. § 113(b).

Section 104 directs the Secretary of the Department of Transportation as follows:

> "SAFETY GOALS—In conjunction with existing federally required strategic planning efforts, the Secretary shall develop a long term strategy for improving commercial motor vehicle operator and carrier safety. The strategy shall include an annual plan and schedule for achieving, at a minimum, the following goals: (1) Reducing the number and rates of crashes, injuries, and fatalities involving commercial motor vehicles…and (4) Improving research efforts to enhance and promote commercial motor vehicle, operator, and carrier safety and performance.".

Section 3(7) (findings) states:

> "meaningful measures to improve safety must be implemented expeditiously to prevent increases in motor carrier crashes, injuries, and fatalities.".

The Federal Highway Administration has refused to carry out the above mandates by ordering prohibitions or restrictions on the enforcement of commercial motor vehicle size and weight rules upon intermodal rail vehicles

as required under 49 U.S.C. § 20104(a) even though research carried out under 49 U.S.C. § 20103 has revealed an emergency situation involving preventable loss of life—that trucks used as locomotives are prohibited from complying with locomotive safety standards. 69 FR 63891 *et seq*.

Congress established a procedural requirement that only a "person with professional experience in motor carrier safety" may promulgate rules related to motor carriers or motor carrier safety. 49 U.S.C. §§ 113(c)&(f)(1). Motor carrier related regulations coming from any other type of person are therefore "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Americans may not be deprived "of life, liberty, or property, without due process of law." 14th Amendment.

The Federal Highway Administration's refusal to promote the development of a national intermodal transportation system as mandated by Congress in Section 5001 of *The Intermodal Surface Transportation Efficiency Act of 1991*, P.L. 102-240, 49 U.S.C. § 302(e), has weakened the Nation's ability to compete in the global economy and obtain optimum yield from the Nation's transportation resources. It is in the public interest to enhance commercial motor vehicle safety. 49 U.S.C. § 31131(b).

I. BACKGROUND

A. The Federal Aid Act of 1956

The truck size and weight limits that went into effect in 1956 and not substantially changed since the Motor Carrier Act of 1980, were adopted long before there was a clear scientific understanding of the causes of highway damage and the means of preventing it. The first intermodal transportation company capable of competing with the long haul trucking industry, *Sea-Land*, began operation in 1956—not coincidentally the same year that the Federal Aid Act imposed size and weight restrictions on the Defense Highway System. This meant that from the beginning, intermodal vehicles with safety devices that made them heavier than ordinary trucks, such as The Chesapeake and Ohio Railway's bimodal "*Railvan*," which equally un-coincidentally also began service in 1956, were banned within months of their debut if they were to carry the same amount of cargo as long haul trucks.

The Secretary of Defense in 1956 who supervised construction of the Defense Highway System was Charles E. Wilson, the former President and Chief Executive Officer of General Motors—the nation's largest truck

manufacturer—a company accused of making illegal campaign contributions.[2]

Allegedly to reduce the cost of building bridges, the Federal Aid Act of 1956 required states to impose industry wide weight and width limits for trucks of 72,000 pounds (later increased to 80,000 in 1980) and eight feet wide (later increased to 8½ feet in 1980) as a condition of receiving Federal highway funds without regard for how this would affect the development of intermodal vehicles that did not normally travel over bridges. Increased wear and tear resulting from a proliferation of long haul trucks is believed to have caused an Interstate Highway bridge in St. Paul Minnesota to collapse prematurely due to structural fatigue, causing a dozen fatalities. A-7.

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[2] In *On a Clear Day You Can See General Motors*, the late GM Vice President John Z. Delorean wrote,

> "General Motors took its place in the line with scores of other American businesses in promoting what I think are, at the very least, improper political campaign contributions from its top executives. The system was far more secretive than the outright corporate political gifts for which a number of major corporations have paid fines and their top executives have been fined or sentenced to jail.
>
> "...once an executive reached upper management levels (divisional or corporate), it was decided for him how much he would contribute and to whom it would go...
>
> "The sums were big. For a GM vice president, it was maybe as much as $3,000 [half the annual income for a typical American family] in a presidential campaign...
>
> "I participated in the system several times at Pontiac [from 1956 to 1969]…"(J. Patrick Wright, 1979, pp. 69 & 70).

General Motors Vice President Roger Kyes is quoted as saying,

> "We take care of you at bonus time. When you make this contribution, you get it back as part of your bonus. And if you don't make it, then you aren't going to get that much bonus." (*Id.* at 70)

It is well known that intermodal vehicles carry their cargo externally in large shipping containers. For this reason, they usually have heavy external frames to support these containers. Most long haul trucks, by contrast, have lightweight internal frames and pull van trailers having no frames at all. Intermodal containers must be capable of supporting many times their own weight when stacked aboard ships. Ordinary truck cargo bodies need only be strong enough to support the weight of snow in winter. Even intermodal vehicles that do not carry containers weigh more than ordinary trucks because of special equipment, such as the *Railvan's* retractable railroad wheels. Yet, these same additional features that add weight improve safety and efficiency and prevent pavement damage by eliminating the need to travel long distances on the highway. In the unlikely event that a car happens to collide with an intermodal vehicle on the short local route that it operates, the crash is less likely to be fatal because of its lower speed and because heavy external frames can prevent underride. Truck trailers with cargo decks high above the ground lacking external frames are known to decapitate motorists when their car bumpers pass underneath.

Industry wide national size and weight limits have never been imposed on any other segment of the transportation industry. States do not lose federal

funding for seaports if a particular harbor allows a ship to dock that is too wide to fit through the Panama Canal, for instance. Nor do states lose funding for aviation if an airport allows a particularly large plane to land with wings that extend beyond the edges of a runway. Yet, a state could lose some highway funding if it allows an intermodal vehicle to travel out of a terminal area for repairs or maintenance without a permit. 23 U.S.C. § 141(b)(2).

B. *The Motor Carrier Act of 1980*

Because the *Motor Carrier Act of 1935* regulated the trucking industry as a public utility with significant barriers to entry, shippers had only a few carriers to choose from in 1956—allowing truckers to easily negotiate a limitation on cargo size and weight to comply with the vehicle size and weight limits imposed by the *Federal Aid Act*. The *1956 Railvan* convertible railcar, which functioned as a small, heavy, single axle truck trailer when it was driven off the tracks, could legally operate on the highways by carrying less cargo. By eliminating most barriers to entry, *The Motor Carrier Act of 1980* (P.L. 96-296) robbed truckers of their ability to negotiate the size and weight of their loads. In the presence of cut-throat competition in a ruinously competitive industry, shippers were given the power to dictate how large and heavy truck cargo would be. A larger improved version of the *Railvan* called

the *Roadrailer*, which uses detachable rail wheels rather than retractable ones, has not succeeded in competition because it is required by law to carry eight hundred pounds less cargo than an ordinary truck trailer.

C. *The Negotiated Rates Act of 1993*

By relieving shippers from their obligation to pay filed tariff rates and because transportation workers are exempt from the *Fair Labor Standards Act*, 29 U.S.C. § 213(b), the *Negotiated Rates Act of 1993* (P.L. 103-180), set off a price war that led to a 9% increase in the number of trucks registered in just two years from 1992 to 1994.[3] Instead of the usual one to two year apprenticeship required by most interstate trucking companies before deregulation, the new truck drivers attended government subsidized truck driving schools funded through the *Job Training Partnership Act* (P.L. 97-300). Because the new trucks had no signs or special markings like high school driver training cars do to distinguish them from trucks driven by skilled professionals, motorists perceived an alarming increase in the number of trucks ominously zooming out of control close beside them, violating their safety zone and tailgating, along with a dramatic 15% increase in the number[4] of motorist fatalities—killing an additional five hundred per year.

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[3] *Large Truck Crash Facts 2000, FMCSA, 2002, p. 4*
[4] *Id at 16*

To protect themselves, motorists began replacing their smaller cars with large heavy sport utility vehicles (SUV's) having bumpers the same height as truck bumpers. SUV registrations rose only 49% in the thirteen years from 1982 to 1995, then skyrocketed 160% in just seven years from 1995 to 2002.[5] While it is not possible to compare apples with oranges, any person with common sense will recognize that if skilled professionals killed 3,335 motorists driving mostly compact cars without air bags or seat belts in 1992 and government subsidized truck driving school graduates killed 4,066 motorists driving large heavy SUV's despite air bags, seat belts, and much improved trauma care in 1998,[6] trucking diploma mills are a serious threat to public safety (see *Advocates for Highway and Auto Safety v. FMCSA*, DC Court of Appeals, No. 04-1233, December 2, 2005). A thousand more motorists now die each year in SUV rollover crashes—more than double 1995 levels.[7] Many also die due to the increased stopping distance,[8] collision weight, and air pollution caused by these larger personal vehicles (see *Massachusetts v. EPA*, 549 U. S. ___(2007)). The need to secure an overseas

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[5] *An Analysis of FARS and Exposure Data 1982-2002,* Anders Longthorne, Umesh Shankar, NCSA, 2004, p. 7
[6] *Large Truck Crash Facts 2000, FMCSA, 2002*
[7] *Longthorne, Shankar* at 11 & 20
[8] *Id. at 10*

oil supply to feed these gas hungry personal trucks has set off an orgy of violence in Iraq.

D. *The Motor Carrier Safety Improvement Act of 1999*

Cut throat competition altered professional ethics in trucking. Just as an airline pilot would be willing to work any number of hours to prevent a terrorist from flying his plane and a doctor would be willing to work any number of hours to prevent a quack from treating his patients, skilled professional truckers felt compelled to violate speed limits and hours of service regulations to protect the public from unqualified trainees attempting to steal their jobs. When states stepped up law enforcement to try to restore order, the experts did not respond well to what they perceived as stupid people wearing blue shirts threatening them with guns. Many bought insurance policies [9] to protect themselves from police harassment in the same way that other small businessmen protect their businesses from fire and flood—thus passing the costs of law enforcement onto their customers in the form of higher freight rates. Violating the law was the only means skilled professionals had to prevent their incomes from falling. The average wage of those foolish enough to obey the law fell from $40,000 per year in 1978 to

[9] such as from Pre-Paid Legal Services of Ada, Oklahoma, www.prepaidlegal.com

$28,000 in 1997.[10] Technical advances that might have made them more competitive, such as intermodalism, became impossible to develop because states began searching trucks without search warrants to stop trucks from operating with safety defects that the trainees lacked the skill to detect—leaving the skilled self-employed professionals without any means of protecting their trade secrets. When the National Highway Traffic Safety Administration issued an order requiring trucks to be equipped with computerized anti-lock brakes in 1997 to make them easier for unskilled trainees to attempt to drive, 49 C.F.R. § 571.121 (S5.3.6.1), 61 F.R. 27294, the number of single vehicle trucker crash fatalities skyrocketed 21% in just one year, A-6, and truckers began voting with their feet, increasing driver turnover at larger trucking companies to more than 120% per year.[11]

After these blunders, Congress noticed that most competitive industries do not suffer such high rates of death and injury as trucking. This is because most large businesses employ industrial safety professionals to prevent on the job injuries by improving the ergonomics of the workplace. To restore order and make the trucking industry as safe as other industries, Section 101 of the

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[10] (1997 dollars) *Sweatshops on Wheels*, Michael Belzer, Oxford University Press, 2000, p.122-3

[11] American Trucking Associations

Motor Carrier Safety Improvement Act of 1999 (MCSIA), Pub. L. 106-159, 113 Stat. 1748, required that a person possessing "professional experience in motor carrier safety" carry out the duties and powers related to motor carrier safety vested in the Secretary. 49 U.S.C. § 113(f). In a final rule published on October 19, 1999, driver and vehicle safety inspection functions were transferred without public comment from the Federal Highway Administration (FHWA) to the new Federal Motor Carrier Safety Administration (FMCSA). 64 FR 56270. Not transferred, but remaining within FHWA in violation of the statute, was enforcement of commercial motor vehicle size and weight laws and regulations affecting the safe design of trucks—making it impossible for the new FMCSA Administrator to conduct the usual practice of the industrial safety profession—improving the ergonomics of the workplace.

To make matters worse, President Bush appointed impostors to head FMCSA who had never driven a truck for a living, much less worked as motor carrier safety professionals as required by statute, 49 U.S.C. § 113(c), who were then confirmed without the usual adversarial hearings in the Senate. While the President's appointees had professional experience in related fields (a trucking company executive, a police chief, and a motor carrier enforcement officer), none had accumulated the hundreds of thousands of crash free

miles and numerous safety awards driving commercial vehicles a motor carrier safety professional would normally need to qualify for employment advising other truckers on matters concerning their personal safety. The industrial safety profession requires a knowledge of ergonomics and working conditions having nothing in common with business administration or law enforcement. Despite record high rates of seat belt use and several lawsuits to prevent it,[12] the impostors caused the number of truck drivers killed on the job to increase 17% between 2002 and 2005. A-6. Truck driver fatalities in multi-vehicle crashes rose 36% in only three years—a 30% real increase even after adjusting for changes in tonnage and miles driven.

II. THE MARCH 2002 AND EARLIER FINAL RULES

A. The Secretary's Failure to Protect Driver Health

49 U.S.C. § 31136(a) states:

> "[T]he Secretary of Transportation shall prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles. At a minimum, the regulations shall ensure that
>
> (1) commercial motor vehicles are maintained, equipped, loaded, and operated safely;

[12] *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218, D.C. Cir. 2004; *Advocates for Highway and Auto Safety v. FMCSA*, DC Court of Appeals, No. 04-1233, Dec. 2005; *OOIDA v. FMCSA*, DC Court of Appeals, No. 06-1035, July 2007.

> (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely;
> (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and
> (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators."

This Court previously ruled,

> "It may be the case, for example, that driving for extended periods of time and sleep deprivation cause drivers long-term back problems, or harm drivers' immune systems. The agency may of course think that these and other effects on drivers are not problematic (or are outweighed by other considerations, like cost), but if so it was incumbent on it to say so in the rule and to explain why."
> *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218 (D.C. Cir. 2004).

1. Intermodalism

In the final rule governing *Truck Length and Width Exclusive Devices*, March 29th, 2002, intermodal vehicles having safety devices that negate the need to drive for extended periods of time were not even mentioned. 67 F.R. 15102-11. Only passing reference was given to intermodal operations generally. *Id.* at 15103,10, & 11. A passing reference to relevant factors is insufficient. *Missouri Pub. Service Commission v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000).

2. Collision Resistance

The California Department of Transportation observed that "trailer

manufacturers have designed for maximum width, with no allowance for protection of the load or trailer." 65 F.R. 50474. Yet, only mirrors were exempt from the three inch width restriction. Other safety devices, such as rear view video cameras, crash absorbent body panels, and wheels positioned outward from the side of the vehicle to enhance stability, improve maneuverability, and reduce stopping distance were not considered. The deliberations appeared to have no scientific basis.[13] As the Supreme Court stated in *Motor Vehicle Manufacturers v. State Farm*, an agency's rule normally is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41–44 (1983). *Id.* at 43.

> To defend its decision, the FHWA explained that:
>
> "Since the AASHTO [American Association of State Highway and Transportation Officials] policy from 1946 provided the basis for the original 96-inch width legislation, the FHWA determined that the subsequently issued AASHTO definition was an acceptable basis on which to revise agency policy." 67 F.R. 15102.

Nowhere in the MCSIA does Congress instruct the Secretary to consider the

[13] "Virginia favored a 12-inch limit for mirrors. California and Minnesota favored a 10-inch limit. The Port Authority of New York and New Jersey favored an 8-inch limit. Iowa favored a 6-inch limit. Oregon and Nebraska favored a 5-inch limit, and Georgia and Missouri favored a 3-inch limit." 65 F.R. 50475.

opinions of state transportation officials (AASHTO) except to develop innovative methods of improving motor carrier compliance with traffic laws (Section 220). 49 U.S.C. 31131 note. Instead, Congress instructs the Secretary to consult with persons with expertise on: crash causation and prevention; commercial motor vehicles, drivers, and carriers, including passenger carriers; highways and noncommercial motor vehicles and drivers; Federal and State highway and motor carrier safety programs; research methods and statistical analysis; and other relevant topics (Section 224). 49 U.S.C. 31100 note.

3. Stopping Ability & Roll Over Protection

> "In January 1975, PACCAR (a truck manufacturer), the American Trucking Associations (ATA), and the Truck Equipment and Body Distributors Association (TEBDA) sued [NHTSA], challenging the stopping distance requirements in Standard No. 121, which they believed required the use of antilock brake systems. Specifically, the petitioners challenged the 245-foot stopping distance standard for heavy trucks, which was subsequently increased to 293 feet."
>
> 60 F.R. 13215.

Statistical evidence suggests that the brake systems designed to meet this standard killed three thousand Americans by the time the court invalidated it in 1978 on the grounds that it was neither reasonable nor practicable.[14]

[14] *Large Truck Crash Facts; Paccar v. NHTSA*, 573 F.2d 632 (9th Cir. 1978), cert. denied, 439 U.S. 862 (1978) Id. at 640.

In answer to the court's demands, NHTSA designed a *braking-in-a-curve* test. 49 C.F.R. § 571.121(S5.3.6.1). 61 F.R. 27294.

> "The agency's limited testing of single unit trucks to the braking-in-a-curve maneuver revealed no specific safety problems…the agency is concerned that **certain vehicles, especially ones with a high center of gravity, might be prone to roll over** or otherwise lose control during such tests." (emphasis added) 60 F.R. 13231.
>
> "The agency also proposed to allow a manufacturer to conduct the braking-in-a-curve test with a roll bar structure weighing up to an additional 1,000 pounds to protect the driver…" 60 F.R. 13234.

Anyone with common sense will recognize that if a helmeted test driver wearing a four point harness needs a one thousand pound roll bar to be safe, then ordinary unprotected truckers do as well. The provision that some vehicles are not required to pass the test at 30 mph suggests that the Secretary is aware that some tractor-trailers either cannot stay in their lanes or are likely to roll over and are not as safe as single unit vehicles.

> "[F]ifth wheel height, differences in suspension components, and tire inflation can all cause trailers to tilt, lean, or both." 65 F.R. 50476.
>
> "[S]ingle unit trucks are far less likely to be involved in fatal accidents than combination trucks (i.e., trailers and semitrailers)." 61 F.R. 2006.
>
> "[T]ruck tractors typically travel approximately five times more annual miles than single-unit trucks... This substantially larger use proportionally increases a truck tractor's exposure to risk…truck tractors typically operate on roads that have comparatively higher posted speed limits and vehicle operating speeds than the roads on which single-unit trucks and many buses generally operate." 60 F.R. 13230.

It is well known that many roads have lanes that are only 10 feet wide. Common sense suggests that any driver who has the skill to keep an 8½ foot wide truck in a 10 foot lane will also be able to keep a 10½ foot wide intermodal vehicle in a 12 foot lane. Since straddling lanes is illegal in most states and 10½ foot wide trucks cannot legally drive in 10 foot lanes without a permit, FHWA must provide a reasoned argument why it should be illegal for 10½ foot wide trucks that do not lean or off-track to drive in 12 foot lanes when it allows 8½ foot wide trucks that both lean and off-track to drive in 10 foot lanes. If a lower, wider short haul single-unit intermodal vehicle can do the same job as a more dangerous top heavy long haul truck and still pass the *braking-in-a-curve* test, then the agency must provide a reasoned argument why it should be illegal. Government agencies must make a ‘‘rational connection between the facts found and the choice made.’’ *State Farm* at 43.

> “[I]f the width of a vehicle is, in fact, the characteristic that is found to require regulation for safety purposes (analogously to the spacing of headlamps in Standard 108 or the width of a head restraint in Standard 202), there should be no doubt of NHTSA's authority to regulate it.”
> 60 F.R. 13224.

The court must inquire whether this rulemaking was within the scope of the Federal Highway Administration’s authority. *PPG Industries v. Harrison* 587 F2d 237.

B. The Secretary's Failure to Reduce Highway Damage

1. Weight vs. Distance

It is well known that according to the laws of physics, the stress on a planar surface, such as a highway, varies by the fourth power of the weight.[15] The relative percentage of Highway Damage (%HD) caused by an intermodal vehicle compared to a long haul truck can therefore be precisely calculated with the following formula:

$$\%HD = 100(IW/TW)^4 ID/TD$$

IW = intermodal vehicle weight; TW = truck weight
ID = intermodal vehicle distance; TD = truck distance

Thus, if an intermodal vehicle weighs 160,000 pounds, twice as much as an ordinary 80,000 pound 18 wheeler, it will do less highway damage [16] unless it travels more than one sixteenth the distance. If it weighs 20% more, it will do less highway damage unless it travels more than half the distance.

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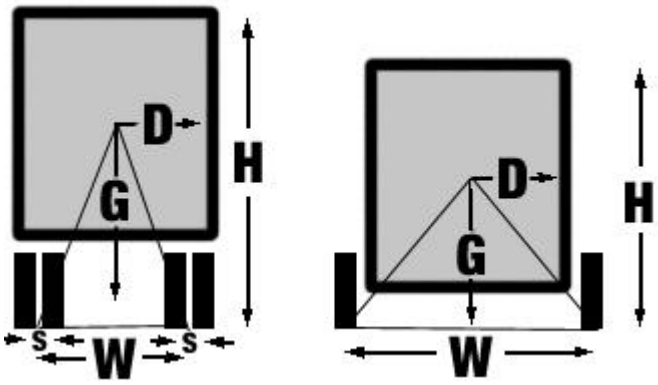
[15] "A pavement that can withstand 1 million passages of an 18,000-lb. standard axle before reaching a specified terminal serviceability rating can also withstand 16 million passages of a 9,000-lb. axle before reaching the same rating"—*Regulation of Weights, Lengths, and Widths of Commercial motor Vehicles*, TRB, 2002, p. 58.

[16] Heavier trucks have additional axles and more resilient suspension components that protect roads from damage. If cargo weighing 20,000 pounds is loaded onto a 10,000 pound six wheeler, the highway wear and tear will be three times greater than if the same cargo is loaded into a 30,000 pound 18 wheeler because the 20,000 pound rear axle of the six wheeler does sixteen times as much damage as each of the four 10,000 pound rear axles of the 18 wheeler. Adding additional axles to an 18 wheeler similarly reduces highway damage despite the fact that the vehicle's gross weight increases slightly.

2. Height vs. Width

Persons with professional experience in motor carrier safety understand that the relative amounts of highway damage caused by an unstable top heavy truck compared to a safer low profile truck can be calculated with the following formulae:



Load Transfer Ratio = DH/GW

Highway Damage Multiplier = $(1 + DH/GW)^4$

D = Deceleration [ft/sec²]; G = Gravitational constant [g = 32 ft/sec²];
W = Track Width; H = Height.

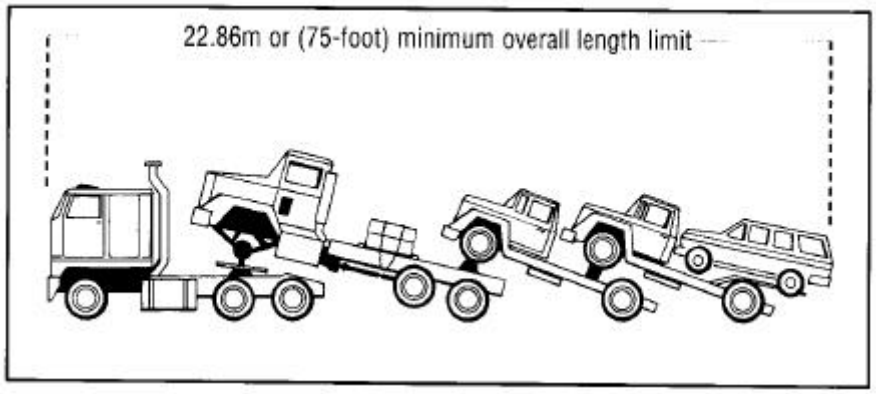
If the Load Transfer Ratio is greater than one, the truck will roll over rather than slide sideways in a collision avoidance maneuver, possibly killing its driver. If the Load Transfer Ratio is less than one, the truck will safely slide sideways during the evasive maneuver rather than roll over and the weight on the outside tires will be increased by the amount of the Load Transfer Ratio. The increase in highway wear and tear caused by severely overloaded tires

skidding on the highway surface is calculated by multiplying ordinary wear and tear by the Highway Damage Multiplier. Thus, the damage caused by a top heavy long haul truck speeding around a curve or swerving to avoid a crash will be sixteen times greater than if the same truck performed the maneuver at slow speed, while the damage caused by a 9½ foot tall vehicle with a 9½ foot wide track width will be only five times greater than the damage done at slow speed. Because even a small amount of load transfer due to sway in a high profile vehicle significantly increases highway damage *i.e.* a 10% load transfer results in a 50% increase in highway damage and a 20% load transfer from one side to the other doubles the highway damage, even small amounts of sway, such as when an inexperienced driver is weaving from side to side, can significantly increase wear and tear on highways and bridges. A-7.

III. THE FEBRUARY 2007 FINAL RULE

When a bill I wrote, Presidential Candidate Ron Paul's *'The Safer Truck Act'* (HR 2083, 107th Congress; HR 1248, 108th Congress), was refused a hearing even though it appeared that most members of the House

Transportation Committee would vote for it,[17] a loophole was hidden in a 550 page energy bill, *The Energy Policy Act of 2005* (Pub. L. 109–58, 119 Stat. 832) to amend the truck size and weight laws in Section 127 of Title 23 over the Chairman's objection. Rather than legalize hybrid power trains and safety features on intermodal vehicles,[18] the Chairman of the House Transportation Committee sent a letter, A-1, "to inform" the Acting Secretary that FHWA should allow obsolete long haul truck tractors to be delivered more cheaply in longer saddlemount combinations than are permitted in Section 4141 of the *SAFETEA–LU*, Pub. L. 109–59, A-2, as illustrated below:



Federal Size Regulations for Commercial Vehicles, FHWA-MC-96-03, p.11

[17] No truck safety hearing was held by Republicans between 2002 and 2007, but a motor carrier safety hearing was held under Democratic leadership July 11th, 2007 exactly 120 days to the day after my petition to reconsider was received March 13th because the Secretary was required to respond within 120 days. 49 U.S.C. § 30162(d).

[18] Secretary of Transportation Norman Y. Mineta, former Chairman of the House Transportation Committee, sponsor of *The Intermodal Surface Transportation Efficiency Act*, PL 102-240, 49 U.S.C. § 302(e), unexpectedly resigned during the rulemaking.

States may prohibit commercial motor vehicle combinations with more than two trailing units. 49 U.S.C. § 31111(c). The February 20th, 2007 final rule, B-13, requires states to permit three trailing units. 72 F.R. 7748.

23 C.F.R. § 658.13(e)(1)(iii).

While the University of Michigan Transportation Research Institute correctly asserted that a 97 foot long combination would exhibit a 23% reduction in rearward amplification [19] compared to a similar combination only 75 feet long,[20] 72 F.R. 7743, the Automobile Carriers Conference neglected to mention in their citation that if the tandem axles of a trailing unit both touch the ground, such as if a very long chassis is not carried at a steep enough

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[19] Rearward Amplification = (S+L)W/2D; Sway Resistance = BW/A; where S equals (1) one half of the average tire tread width of a towed unit having single tires or (2) the average separation between centers of the inner and outer tires of a towed unit having dual tires, L equals the distance between the extreme of any group of two or more consecutive axles, W equals the overall gross weight on an axle or a group of two or more consecutive axles, D equals the distance between an axle or the center of a group of consecutive axles and the point of articulation by which the towed unit is attached to the tow vehicle, B equals the wheel base as measured between the center of the rear axle or group of non steerable rear axles and (1) the front axle or center of a group of steerable front axles of a tow vehicle or (2) the point of articulation by which a towed unit is attached to a tow vehicle, A equals the articulated length from the point of articulation by which a towed unit is attached to (1) the front axle or center of a group of steerable front axles of a tow vehicle or (2) a second point of articulation, and the Rearward Amplification of a towed unit to which a second towed unit is attached has added to it the Rearward Amplification of the second towed unit multiplied by A/B.

[20] Section 4141 was intended to eliminate the use of the *high mount* when transporting very long RV & bus chassis—a dangerous type of saddlemount where the engine of a trailing chassis is attached high up near the engine of the chassis in front to shorten the length of the combination, making it top heavy. The length increase from 75 feet to 97 feet allows the trailing units to be mounted lower down to increase stability when the third chassis is carried on a fullmount.

angle (see 2nd vehicle illustrated above), its rearward amplification will be 300% greater. Therefore, Congressman Reichert's assertion, A-3, that "…this rule conflicts with the plain language . . . which for safety reasons imposes a length restriction of 75 ft." is correct because combinations having a sway resistance to rearward amplification ratio of less than ten to one are usually considered unsafe. Courts should not accord any deference to a "scientific model" that does not bear a "rational relationship to the characteristics of the data to which it is applied," *City of Waukesha v. EPA,* 320 F.3d 228, 248 (D.C. Cir. 2003) (citations omitted); *Sierra Club v. Costle,* 657 F.2d at 333, or that is "so oversimplified that the agency's conclusions from it are unreasonable." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 535. FHWA's reliance on the Automobile Carriers Conference to support the Chairman's reading of the statute when a qualified FMCSA Administrator, after mathematical analysis, would have reached the opposite conclusion, calls into question FHWA's competence to promulgate rules related to motor carrier safety.

The agency appears to have been pressured by the Committee Chairman who controlled its funding to deliberately violate the statute. While other congressmen and senators also sent letters, they did so only in their

proper role as representatives of their constituents. The Chairman's letter did not have a constituent letter attached, leading the agency to question his motives,[21] as well as those of other Republicans, A-5.

SUMMARY OF ARGUMENT

The Federal Highway Administration's assertions that commercial motor vehicle safety is not related to motor carrier safety, that commercial motor vehicles are "different" than the vehicles used by motor carriers, that recreational vehicles used for commercial purposes are not commercial vehicles, that trucks towing campers are commercial vehicles, that divisible loads are non divisible loads, and that saddlemounts without fullmounts are saddlemounts with fullmounts make this agency action arbitrary and capricious because it relied on factors that Congress has not intended for it to consider (such as the opinions of individual congressmen), it has entirely failed to consider an important aspect of the problem (such as stability calculations), and because its decision is so implausible that it could not be ascribed to a difference in view or a product of agency expertise. *United States v. Garner* (1985) 767 F2d 104.

[21] The New York Times alleged that from 2000 to 2006, the trucking industry directed more than $14 million in campaign contributions to Republicans and its donations and lobbying fees were about $37 million from 2000 to 2005. (Stephen Labaton, Dec. 3, 2006)

Agency action is invalid if based, even in part, on pressure from Congressional sources; this is especially law where invasive Congressional source has financial leverage on involved agency... in form of post enactment statements communicated directly and indirectly by Congressmen.

Texas Medial Assoc. v. Mathews (1976, WD Tex) 408 F Supp 303.

STANDARD OF REVIEW

The court reviews the rules to determine whether they are arbitrary and capricious, an abuse of discretion, in excess of statutory jurisdiction, without observance of procedure required by law, or otherwise not in accordance with the law, 5 U.S.C. § 706(2), and if so found, to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).

STANDING

The Secretary failed to respond to my petition to reconsider within 120 days as required under 49 U.S.C. § 30162(d) even though the House Subcommittee on Surface Transportation held a motor carrier safety hearing exactly 120 days to the day after my petition to reconsider was received by the Secretary on March 13th.

A trucker by trade endangered by the aforementioned rules, I participated in this rulemaking to save the lives of myself and others. The rules diminish the value of five patents granted to me for safer intermodal technology by not allowing motor vehicle safety features necessary to the

operation of intermodal vehicles that the Department of Commerce has ruled are useful.[22] 49 U.S.C. § 30102(a)(8). 35 U.S.C. 101. Despite being directly referred to several times in the February 20th, 2007 final rule as "The commenter" under the heading "*FHWA Authority*" on page 7745 of Vol. 72 of the Federal Record in a lengthy discussion of my objections, B-10, the Secretary failed to prescribe the needed motor vehicle safety standards. As a small entity adversely affected by final agency action, I am entitled to judicial review. 5 U.S.C. § 611(a)(1).

While *Trescott v. Mineta* has been mooted by subsequent developments being petitioned for review in the present case and therefore should not be appealed, in the recent *Massachusetts v. EPA*, the Supreme Court reaffirmed, quoting *Lujan* v. *Defenders of Wildlife*, 504 U. S., at 572,

> "…a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' …the right to challenge agency action unlawfully withheld, [such as 42 U.S.C.] § 7607(b)(1)—'can assert that right without meeting all the normal standards for redressability and immediacy,' *ibid.* When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. *Ibid*".
>
> *Massachusetts v. EPA*, 549 U. S. ___(2007) (slip op., at 14).

District Court did not adequately consider my standing as a person who had

[22] U.S. Patents 6,494,313; 6,776,299; 6,840,724; 6,910,844; & 7,070,062

been granted a patent on railroad technology.[23] A patent is more than a procedural right. It is an Article I exclusive right granting a quasi-sovereign [24] interest—the ability to control the behavior of licensees. 35 U.S.C. §§ 271(d)(2) & 296(a). B-4.

In *Massachusetts,* the Chief Justice stated,

> The Court, in effect, takes what has always been regarded as a *necessary* condition for *parens patriae* standing—a quasi-sovereign interest—and converts it into a *sufficient* showing for purposes of Article III (Roberts slip op., at 5).

Therefore, I also claim standing as a representative of railroad employees likely to be protected by the safety features of my inventions as allowed under 49 U.S.C. § 20104(c). *Yakus v. United States,* 321 US 414.

ARGUMENT

THE TRUCK SIZE AND WEIGHT REGULATIONS ARE CONTRARY TO LAW BECAUSE THEY FAIL TO SATISFY STATUATORY MANDATES THAT THE SECRETARY SHALL DEVELOP A LONG TERM STRATEGY FOR IMPROVING COMMERCIAL MOTOR VEHICLE OPERATOR AND CARRIER SAFETY AND PROMOTE THE DEVELOPMENT OF A NATIONAL INTERMODAL TRANSPORTATION SYSTEM—AND THEY ARE ARBITRARY AND CAPRICIOUS BECAUSE THEY FAIL TO CONSIDER STATUATORILY MANDATED FACTORS AND CONTRAVENE STATUTES & REGULATIONS HAVING JOINT OVERLAPPING AUTHORITY.

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[23] US Pat. No. 6,776,299—*Automatic Intermodal Railway Car Coupler*

[24] sovereign: *adj*.—"possessing supreme excellence or efficacy," *Funk & Wagnall's Standard Desk Dictionary*

I. Commercial motor vehicle size and weight limits are related to motor carrier safety

The Federal Highway Administration's assertions that "The commercial motor vehicle size and weight program . . . is not a regulation of motor carriers or their drivers," and that the size and weight limits of the February 20th, 2007 final rule merely "affect the dimensions of the vehicles operated by these entities," 72 FR 7746, B-11, are false. According to the Fatality Analysis Reporting System, A-6, 803 truck drivers were killed in crashes in 2005, the highest number since 1989 when most long haul trucks were cabovers—a 16 year high. Deregulation of vehicle length, 49 U.S.C. § 31111(b)(1)(B), allowed truckers to reposition their cabs to a safer place behind the engine, cutting fatality rates in half, but weight restrictions remaining in Part 658 of the February 20th, 2007 final rule continue to ban roll over protection whenever they are required to carry ordinary amounts of cargo. An agency's explanation may not run counter to the evidence before it. *Chemical Mfrs. Association v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000).

A. Truckers have a right to roll over protection

In Public Citizen's *The Hidden Failures of Belts in Rollover Crashes*,

a Ford Motor Company engineer stated,[25]

> "**It is obvious that occupants that are restrained in upright positions are more susceptible to injury from a collapsed roof than unrestrained occupants who are free to tumble about the interior of the vehicle. It seems unjust to penalize people wearing effective restraint systems by exposing them to more severe injuries than they might expect with no restraints**."

As long ago as 1968, Ford thought that the minimum roof crush standard should be two times the weight of the vehicle (*Id*.). Due to state laws requiring them, seat belt use among truckers is at an all time high. Is it merely chance that a 23% increase in seat belt use [26] has coincided with a 17% increase in fatalities? No one argues that truckers should stop wearing seat belts, but if state laws require them and roll over protection is needed for seat belts to be safe, then truckers have a 14th Amendment right to equip their trucks with stronger cabs or roll bars without being penalized.

> **"Six out of ten occupants who suffer serious or fatal injuries in rollovers inside the vehicle are wearing a safety belt"**[27].
>
> **"...more than 70 percent of serious spinal injuries experienced in a rollover by belted occupants are caused by impact with the roof"**[28].

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[25] Asa Tapley, Tab C. Turner, Laura MacCleery, Morgan Lynn, Matt Pelkey, and Ed Ricci, Jr., April 2004, http://www.citizen.org/documents/belt_report.pdf, p. 9
[26] As reported by truckinginfo.com 12/7/2006
[27] Occupant Fatalities in Vehicles with Rollover by Year, Restraint Use, Ejection, and Vehicle Body Type. FARS 1991-2001, Washington, DC, NHTSA, Sept 2003
[28] Near and Far-Side Adult Front Passenger Kinematics in a Vehicle Rollover, SAE Technical Paper 2001-01-0176, SAE 2001 World Congress, Detroit, March 5-8, 2001

B. Weight limits must be changed

The Federal Highway Administration's assertions that "the vehicle weight limits for Interstate highways are statutory (23 U.S.C. 127), as are the vehicle width and length limits on the National Network (49 U.S.C. 31111-31115)…None of them can be changed by FHWA," 72 FR 7745, B-10, are also false. "…the Secretary may make decisions necessary to accommodate specialized equipment…" 49 U.S.C. § 31111(g). Section 127(a)(1) of Title 23 unambiguously states:

> **"**No funds shall be apportioned…to any State which does not permit…**a gross weight of <u>at least</u> eighty thousand pounds** for vehicle combinations of five axles or more**"** (emphasis added)

Section 127(a)(2) further states the "overall maximum gross weight … shall be ... produced by application of the following mathematical formula: [29]

$$W = 500 \left(\frac{LN}{N-1} + 12N + 36\right)"$$

This means the statutory maximum gross weight for a modern intermodal vehicle as increased by Section 756 of *The Energy Policy Act of 2005* (119 STAT. 832) is <u>87,400 pounds</u>—not 80,000 pounds as found in 23 C.F.R. § 658.17(b). The ambiguous 80,000 pound limit in Subsection 127(a)(2)(2) the

[29] where W equals overall gross weight on any group of two or more consecutive axles, L equals distance in feet between the extreme of any group of two or more consecutive axles, and N equals number of axles in the group under consideration

Agency previously relied on is now seen to apply only to some vehicles in service before September 1st, 1989. B-3. Therefore, for 14th Amendment reasons, Section 658.17(b) must be vacated to agree with 23 U.S.C. § 127(a)(1) so that truckers can equip their trucks with roll over protection without suffering an economic disadvantage. An agency's refusal to exercise its discretion based on its belief that it had no power to do otherwise may be independently reviewed by the court. *Bargmann v. Helms,* 715 F2d. 638.

C. Width limits must be changed

The Federal Highway Administration's assertions that "motor carrier safety functions that were delegated to the FMCSA in the 1999 final rule... are very different from the commercial motor vehicle size and weight limitations" and "The commercial motor vehicle size and weight program is different from the motor carrier and motor carrier safety duties carried out by the FMCSA," and "It does not involve the type of motor carrier or motor carrier safety oversight that Congress intended to be delegated to the FMCSA in the MCSIA provisions," 72 FR 7745-6, B-10 & 11, are also false. All Chapter 311 powers related to motor carrier safety, including § 31113, have been transferred to FMCSA. 49 U.S.C. § 113(f). Persons with professional experience in motor carrier safety understand that the maximum safe

deceleration or stopping ability of trucks is related to vehicle height and width by the following mathematical formula:

$$\text{Maximum Safe Deceleration [ft/sec}^2\text{]} = WG/H$$

W = Track width; H = Height;
G = Gravitational constant [g = 32 ft/sec^2].

If a truck's tires have enough friction to stop faster than the maximum safe deceleration, the tires become a tripping mechanism that will cause it to roll over rather than slide sideways during an evasive maneuver, possibly killing its driver. Truckers who fear rolling over may be reluctant to swerve to avoid hitting cars. Commercial motor vehicle size and weight is related to motor carrier safety because commercial motor vehicle stopping ability and roll over protection is related to motor carrier safety. FMCSA's Vehicle and Roadside Operations Division redundantly duplicates FHWA's size and weight program and has just issued a final rule regulating the weight of some commercial motor vehicles. 49 CFR § 393.48(d). 72 FR 9870 (March 6th, 2007).

D. The Secretary must transfer FHWA's powers to FMCSA

By retaining Chapter 311 powers prohibited under 49 U.S.C. § 113(f), FHWA has prevented FMCSA from carrying out "meaningful measures" to improve roll over protection. *The Regulatory Flexibility Act* (Pub. L. 96–354), 5 U.S.C. §§ 601 *et seq.*, restrains FMCSA from arbitrarily reducing

cargo weight to permit heavier safety devices because that would have an economic impact on small entities using older vehicles lacking such features. Allowing higher gross weight without restricting cargo weight would not be a "meaningful measure" because unscrupulous shippers would just load more cargo to gain a competitive advantage instead of letting their drivers install safety devices. Similarly, if the National Highway Traffic Safety Administration mandated stronger cabs without an increase in track width to compensate for the additional weight high up in the roof of the vehicle, the increased stopping distance or likelihood of roll over would negate the safety benefit. Only the FMCSA Administrator has the statutorily required expertise and the authority to promulgate both cargo weight limits and performance based safety standards. The Secretary is not authorized to regulate the manufacture of commercial motor vehicles, 49 U.S.C. § 31147(b), therefore only FMCSA has the authority to regulate commercial motor vehicle size and weight. The Secretary's refusal of to eliminate redundant management positions in FHWA's organizational structure by transferring these powers and authorities to FMCSA in the October 19, 1999 final rule, 64 FR 56270, is a violation of the law that in 2005 cost the lives of approximately four hundred truckers who could have been saved by improved roll over protection.

II. Only vehicles regulated by FMCSA are commercial motor vehicles

FHWA violated *The Regulatory Flexibility Act* by changing the definition of commercial motor vehicle in Section 658.5, 72 FR 7748, to replace a performance based standard with a design standard without describing significant alternatives in its *initial flexibility analysis*. 71 FR 25520. 5 U.S.C. § 603(c)(3). Self propelled recreational vehicles used for commercial purposes, such as lodging for railroad signalmen or transporting ten or more track workers, are no longer to be considered commercial vehicles, while truck tractors used to tow large 5th wheel campers are to be considered commercial vehicles even if they are never used in commerce. Each *final flexibility analysis*, 72 FR 7746, B-11, is required to contain "a statement of the factual, policy, and **legal reasons** for selecting the alternative adopted in the final rule." 5 U.S.C. § 604(a)(2) (emphasis added).

Anyone with common sense will recognize that only vehicles used for commerce are commercial vehicles and only vehicles used for recreation are recreational vehicles.

> …**commercial motor vehicle means…[a] vehicle used on the highways in commerce**… 49 U.S.C. § 31101(1) (emphasis added, internal quotes omitted).

> *Commercial motor vehicle* (CMV) means a motor vehicle or combination of motor vehicles used **in commerce** to transport passengers or property… 49 CFR 383.5 (emphasis added).

Although the Motor Carrier Safety Administrator is required to *consult* with the Highway Administrator, 49 U.S.C. § 113(i), because the definition of *commercial motor vehicle* is found in Chapter 311 and commercial motor vehicles are, without doubt, related to motor carriers, and a decision by the FMCSA Administrator involving a duty or power specified in Chapter 311 is administratively final, 49 U.S.C. § 113(h), FMCSA has the exclusive authority to regulate commercial motor vehicles "except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999." 49 U.S.C. § 113(f)(1) (emphasis added). Because "transfer, collection, or delivery" provided by an agent of a rail or water carrier is not a type of "Commerce with foreign Nations and among the several States" the Federal Government was given authority to regulate in Article I, Congress has prohibited the Secretary from regulating intermodal vehicles in a terminal area. 49 U.S.C. §§ 13503(b)(1) & 13506(a)(11). B-6. Therefore, an intermodal vehicle as defined in 49 U.S.C. §§ 10102(6)(A) & (9)(A), B-5, is exempt from regulation just as a farm vehicle is. 49 U.S.C. § 13506(a)(4).

B-6. Therefore, only vehicles regulated by FMCSA can reasonably be considered commercial motor vehicles for the purposes of Section 658.5. Service that is actually rendered, and not the intent with which a carrier performs its work is determinative of nature of carriage. *Trowbridge v. Kansas C. & W. B. R.* (1915) 192 Mo App 52, 179 SW 777.

A. Safety devices must be considered

FHWA's assertion that hybrid vehicles "address issues that were not raised in the NPRM, and are therefore outside the scope of this rulemaking," 72 FR 7745, B-10, is non-sequitur. Any reasonable person will agree that if the definition of "commercial motor vehicle" is changed, then all vehicles defined as commercial motor vehicles during the rulemaking are within the scope of the rulemaking. The change in the definition of Commercial Motor Vehicle to eliminate the Federal role in regulating the width of Recreational Vehicles in Section 658.15(c)(2)(vacated), B-9, to allow wider sunshades is arbitrary and capricious because FHWA failed to consider eliminating its role in regulating the width of safety devices such as roll bars, rear view video cameras, collision posts, crash absorbent body panels, and axles with a greater track width to improve maneuverability and stopping ability when Congress transferred that authority to FMCSA under 49 U.S.C. § 113(f)(1).

Why should safety devices on trucks be banned while awnings and sunshades on RV's are legal? Why should dangerous saddlemount combinations with three trailing units be considered specialized equipment, § 658.13, when safer intermodal vehicles having no trailing units are not? Specifically, the final rule failed to answer the *petitioner's* question raised during the rulemaking:

> … why it should be legal for an unskilled motorist, lacking any training whatsoever, to operate a ten or eleven foot wide intermodal rail vehicle for recreational purposes without any kind of permit, when it is illegal for an experienced professional to drive the same vehicle even with a permit—or why, to perform the same function, skilled professionals should be required to drive primitive, top-heavy 1950's era 18 wheelers lacking needed safety features when unskilled motorists without any qualifications are allowed to operate modern vehicles?

More exacting scrutiny is useful where an agency has demonstrated undue bias toward a particular private interest, where the agency has had a history of ad hoc and inconsistent judgments on a particular question. *Natural Resources Defense Council, Inc. v. SEC* (1979) 606 F2d 1031.

1. Railroad safety standards

In 1992, Congress enacted *The Rail Safety Enforcement and Review Act* (P.L. 102-365). The Federal Railroad Administration agreed that locomotive crashworthiness protection is necessary because in train collisions and derailments from 1995 to 1997, 26 locomotive cab occupants were killed and 289 were injured in freight and passenger train accidents in the United

States, a yearly average of 105 casualties. 69 F.R. 63891 (November 2, 2004). Therefore, locomotive Safety Standard S-580 includes the use of collision posts and wide-nose cab configurations of greater strength (49 C.F.R. Part 229). 69 F.R. 63894. "Wide-nose" in this context means a hood which does not "span substantially less than the full width of the locomotive." 69 F.R. 63898.

Common sense suggests that because 1,992 truckers were killed with 94,000 injured during the same three year period, a fatality rate seventy five times higher with three hundred times the number of injuries,[30] A-6, intermodal vehicles being used as locomotives to move trains will require the same safety features as other locomotives if their operators are to be safe when performing this function. The cabs of 8½ foot wide trucks would be considered "narrow-nose" if they were mounted on locomotives, therefore the cabs of intermodal vehicles will logically need to be heavier and wider than ordinary truck cabs if they are to comply with Standard S-580 when the vehicles are being used as locomotives.

> "Crew members who lack confidence in the safety measures employed may be inclined to jump from a locomotive prior to a collision, resulting in a high probability of serious injury or death."
>
> 69 F.R. 63892

[30] Traffic Safety Facts 1995-1997 Large Trucks, www-nrd.nhtsa.dot.gov

2. Industrial safety standards

It is well known that intermodal containers are often stacked on ships and barges, therefore intermodal vehicles will need a stronger cab and wider wheelbase than normal trucks when they are being used as industrial vehicles, traveling over uneven ground around docks and seaports while carrying containers stacked in this manner.

> "[W]hen the vehicle's line of action or the vehicle/load combination falls outside the stability triangle, the vehicle is unstable and may tip over." 29 C.F.R. § 1910.178(a)(2)(Appendix A-4.2 & 7.1).

> "High Lift Rider trucks shall be fitted with an overhead guard." 29 C.F.R. § 1910.178(e).

As the Supreme Court stated in *Motor Vehicle Manufacturers v. State Farm*, an agency's rule normally is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41–44 (1983). *Id.* at 43.

3. The 14th Amendment

Although 49 U.S.C. § 31113(c) and 23 C.F.R. §§ 658.15(c) & 658.17(h) allow states to issue special use permits for oversize loads and Section 4007 of *The Transportation Equity Act for the 21st Century* amended 49 U.S.C. 31315 & § 31136(e) concerning authority to grant waivers from the

Federal Motor Carrier Safety Regulations to persons seeking regulatory relief, requiring states to issue "*permits*" for safety devices when workers in other industries need no such waivers to be safe in their workplaces violates the equal protection clause. We do not ban commercial airliners just because unskilled motorists can't fly planes. If an unskilled truck driving school graduate lacks the ability to keep a wider vehicle in its lane and violates a state law prohibiting lane egress,[31] then it is the driver and not the vehicle which ought to be regulated. Limiting safety devices to only a few drivers with permits creates problems in manufacturing. Motor vehicles must be produced in large numbers on an assembly line if they are to sell at a reasonable price. If safer vehicles are to be affordable, they must be available to all those endangered who possess the skill to drive them. Manufacturers are unwilling to invest huge amounts of capital in plant and equipment if they fear their investment can instantly be made worthless at the whim of an unskilled government employee. "[M]anufacturers are entitled to testing criteria that they can rely on with certainty." *Paccar v. NHTSA*, 573 F.2d 632 (9th Cir. 1978), 439 U.S. 862 (1978) *Id.* at 644.

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[31] Texas TRC § 545.060—DRIVING ON ROADWAY LANED FOR TRAFFIC.
(a) An operator on a roadway divided into two or more clearly marked lanes for traffic:
(1) shall drive as nearly as practical entirely within a single lane; and
(2) may not move from the lane unless that movement can be made safely.

B. The Americans with Disabilities Act must be considered

It is well known that most small businesses lack truck loading docks and that even fewer are equipped with rail loading docks. It is also well known that if a business raises the floor of its facility above the ground so as to receive truck or rail deliveries in a loading dock, Section 303(a)(2) of *The Americans with Disabilities Act* (P.L. 101-336), B-8, requires that the building also be equipped with an expensive elevator or wheelchair accessible ramp. Anyone with common sense will recognize that banning a technology that permits loading and unloading at ground level without a loading dock, such as when cargo is carried between a truck's wheels rather than on top of them, significantly raises the cost of shipping and receiving goods for the handicapped since intermodal containers sitting on the ground are wheelchair accessible while truck trailers with cargo decks high above the ground are obviously not. The needs of the handicapped must be considered. *Peter Pan v. FMCSA.*, DC Court of Appeals (No. 05-1436, December 2006).

C. Environmental effects must be considered

The *National Environmental Policy Act of 1969* (42 U.S.C. 4321-4347), B-11, requires FHWA to determine if this proposed action will have an effect on the quality of the environment. Intermodalism and hybrid power

trains reduce Diesel exhaust particulates known to cause asthma in children. Limiting the weight of batteries used to store energy captured during braking increases engine idling and the emissions of vehicles with hybrid power trains. A hybrid power train allows movement at low speed without the use of the engine to reduce engine idling. Limiting the weight of an idle reduction system to only 400 pounds, 23 C.F.R. § 658.17(n)(2), increases harm to the environment. Optiidle™ technology [32] can interfere with drivers' sleep if their engines start and stop during the night.

Because steel wheels roll more efficiently than rubber tires do and only the front of a train has to fight the wind, trains typically get three times better fuel economy than trucks with proportionately lower emissions.[33] Big trucks frighten motorists, so they buy larger personal vehicles than they otherwise would, further exacerbating the problems of air pollution and dependence on foreign oil (p.21). The complete absence of any discussion of a statutorily mandated factor makes the agency's reasoning arbitrary and capricious. *United Mine Workers v. Dole*, 870 F.2d 662, 673 (D.C. Cir. 1989).

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[32] A feature that starts and stops computerized truck engines to maintain heat and air conditioning inside a truck's cab. While most drivers become used to their engines automatically starting and stopping, others trying to sleep in trucks parked nearby are sometimes disturbed.

[33] "[E]very ton-mile of freight that moves by rail instead of truck reduces GHG [greenhouse gas] emissions by two thirds or more." Edward R. Hamberger, Association of American Railroads, before the House Transportation Committee May 16th, 2007

D. Issues of joint overlapping authority must be resolved

In any industry, professionals differ from employees in that they have clients and customers rather than a boss telling them what to do. Being self employed, professionals have greater latitude to exercise independent judgment and they are liable for malpractice if they make mistakes. While it is understood that an unskilled motorist such as a motor carrier enforcement officer, corporate safety director, or engineer can memorize second hand information about commercial motor vehicle safety, mnemonics are not a substitute for the "professional experience" required by Section 101 of the *Motor Carrier Safety Improvement Act of 1999*. 49 U.S.C. § 113(c).

> "…**a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant**." *Duncan v. Walker*, 533 U.S. 167, 174 (2001)

If Congress intended that unskilled government employees should be allowed to promulgate regulations related to motor carrier safety, the use of the word "professional" in the statutory construction would have been superfluous.

While it might appear to an unskilled person that a corporate safety director or a motor carrier enforcement officer does the same job as a motor carrier safety professional, they are in fact opposites. Enforcement officers fine truckers for being over width or over weight if they dare to install safety

devices recommended by safety professionals. Safety directors only allow safety devices that maximize profits.[34] *Cf. State Farm*, 463 U.S. at 49 ("[S]urely it is not enough that the regulated industry has eschewed a given safety device."). Anyone with common sense will recognize that an expert driving an 18 wheeler, flying an airliner, or commanding a cruise ship, is not going to listen to, much less pay for, the advice of an unskilled person with a conflict of interest who can't even drive a silly little police car or lawn mower safely. An unskilled person in a blue shirt threatening an expert with a gun is at best an extreme form of personnel management, not industrial safety. A search without a search warrant is at best a form of industrial quality control, not ergonomics. Most safety defects detected by police can easily be

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[34] Safety administrators employ Game Theory to achieve a Nash Equilibrium between the cost of insurance and jury awards on one hand and wages and safety devices on the other. Profit is maximized when marginal costs are approximately equal. Safety professionals consider such calculations unethical because highway safety is not a game and large "*kiddy car*" trucking companies must deliberately kill a number of motorists and pedestrians each year if they are to minimize labor costs.

Although there are few economies of scale in trucking, large profits are possible because safety has greater Neumann-Morgenstern Utility to the skilled professional sitting behind the wheel of his own truck than to the unskilled administrator sitting safely behind a desk as long as the unskilled trainees being hired are not fully informed of the danger.

Obviously, trainees would recognize unsafe working conditions if safer vehicles became available. It is suspected that the President appointed unskilled administrators to impersonate safety professionals at FMCSA so that trucking industry productivity could be maximized by violating 49 U.S.C. § 113(b)—which for a public official obligated to protect public safety, is tantamount to murder. Evidence that a Nash Equilibrium has been achieved is the steady fatality rate of 5,000 victims per year and declining real wages despite dramatic improvements in technology, suggesting that an intelligent force is keeping fatality rates constant rather than reducing them as required by the MCSIA.

prevented by simply allowing truckers to purchase more heavily built vehicles that are less prone to break down. Most damage done to roads and bridges by trucks can easily be mitigated by simply allowing truckers to install adequate shock absorbers.[35] If cars had to obey the same weight limits that trucks do, they would weigh no more than three hundred pounds.[36]

While it is well known that employees are sometimes called professionals to improve their morale and the President may get away with appointing unqualified administrators as long as the Senate Commerce Committee is willing to confirm them without proper hearings, courts cannot allow rules to stand if they were promulgated by someone other than a person whom Congress intended. *PPG Industries v. Harrison* 587 F2d 237. FMCSA is now the Office of Motor Carriers, not FHWA. The Federal Highway Administration's decision to replace references in the regulations to the old Office of Motor Carriers and its officials by references to FHWA, 72 FR 7741, is contrary to law because Congress intended that "a person with professional experience in motor carrier safety" should have this

---

[35] When the spring rate of an air ride suspension matches the harmonic frequency of a bridge, A-7, the truck and bridge bounce up and down uncontrollably in a phenomenon known as *bridge bounce*. Spring ride trucks lacking shock absorbers cause a washboard surface on unpaved and asphalt roads. By reducing spring rates, shock absorbers reduce highway damage—even more so if computer controlled.

[36] Transporting 50,000 pounds of cargo on a 30,000 pound 18 wheeler is equivalent to a 500 pound family of four riding on a 300 pound go-cart.

authority "except as otherwise delegated by the Secretary to any agency of the Department of Transportation **other than** the Federal Highway Administration, **as of October 8, 1999**." 49 U.S.C. § 113(f)(1) (emphasis added). A duty or power specified in Subsection (f)(1) may only be transferred to another part of the Department when specifically provided by law. 49 U.S.C. § 113(g).

1. Highway funding

FHWA's argument that it's commercial motor vehicle size and weight program is related only to the Federal-aid highway program and nothing else, 72 FR 7746, B-11, is specious. It doesn't matter what funding programs the size and weight of trucks is related to. Congress has unequivocally stated that safety is the highest priority. 49 U.S.C. § 113(b). The FMCSA Administrator is to consult with the FHWA administrator and nothing more. 49 U.S.C. § 113(i). The issue raised here is whether FHWA should be required to build safe roads to accommodate safe trucks or whether FMCSA should allow trucks to operate without needed safety devices so that FHWA can get away with building inadequate roads and bridges. The obvious alternative to weight and width limitations is for FHWA to build stronger wider roads. An 10½ foot wide intermodal vehicle that requires a 12 foot

wide lane ten miles long will inflict wear and tear on only 120 foot-miles of pavement and few if any bridges. An 8½ foot wide long haul truck traveling 1,000 miles in a 10 foot lane inflicts wear and tear on 10,000 foot-miles of pavement and many bridges. Wider roads could therefore reduce the long term cost of the Federal-aid program by extending bridge and pavement life.[37]

> "A 51,000-pound tridem-axle weight limit would provide for the legal transportation of 40-foot containers loaded to maximum international weight limits. Because a tridem-axle weight limit of 51,000 pounds would have adverse infrastructure and safety impacts, a 44,000-pound tridem-axle weight limit was also analyzed. Under these limits a six-axle tractor semitrailer combination could operate at 90,000 pounds. In addition, this tridem-axle weight limit could provide a productivity increase for short wheelbase straight trucks."
>
> 64 F.R. 2700.

Agencies must explain rejection of reasonable alternatives. *Public Citizen v. Steed*, 733 F.2d 93, 99 (D.C. Cir. 1984).

2. Vehicle weight

While FHWA may claim the moral high ground in allowing states to issue overweight permits to snow plows and other emergency response vehicles, 23 C.F.R. § 658.5, 72 FR 7748, B-13, anyone with common sense will recognize that if salt and sand really were "*loads which cannot be easily*

[37] "A single intermodal train can take 280 trucks off the highways…and reduce the cost of maintaining existing roads." Edward R. Hamberger, Association of American Railroads, before the House Transportation Committee May 16th, 2007

dismantled or divided" intended by Congress to be included in Section 127(a)(2)(2) of Title 23, then beach bullies would break their feet kicking sand castles! Why should sand be considered a *non-divisible* load when an "*ocean transport container*" included in Section 127(a)(2)(2) bearing a customs seal is not? An infant in a sand box can divide a pail of sand. Dividing a load bearing a customs seal violates federal law. 19 C.F.R. § 18.4a(d)(2). One need only compare the obvious care taken by FMCSA in its sixteen page size and weight rulemaking on the question of surge brakes alone, 72 FR 9855-71, 49 CFR § 393.48(d), with the mere eight pages devoted by FHWA to explain more than a dozen nonsensical definitions and modifications to Sections 657.1,3,11,16,17,19 and Sections 658.5,13,15,17, & 23, to recognize that this is an unhappy agency under pressure from Congressional sources to violate statutes. 72 FR 7747-8. B-12 & 13.

The significant difference between 23 C.F.R. § 658.17(b) and 23 U.S.C. § 127(a)(1), with which it shares joint overlapping authority, is that Section 127(a)(1) allows a performance based standard to determine maximum allowable gross weight that encourages truckers to equip their vehicles with additional axles and brakes, while § 658.17(b) imposes an arbitrary limit of 80,000 pounds that penalizes truckers if they equip their

trucks with needed safety devices (or idle reduction systems weighing more than 400 pounds). Vacatur of § 658.17(b) will therefore save lives by allowing additional safety features and more effective environmental protection systems without damaging any roads or bridges.

3. Vehicle length & width

In light of "the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation" stated in Section 101 of *The Motor Carrier Safety Improvement Act*, 49 U.S.C. § 113(b) (emphasis added), the Court should consider whether the "*safe*" and the "*efficient*" of 49 U.S.C. § 31113(b), B-7, ought to be given equal weight. If size and weight authority were to remain with FHWA, the statutory language "*the Secretary decides is necessary*" would seem to unreasonably permit the scientific calculations of experts to be maliciously overruled—violating the due process clause because Congress mandated that only a person with "professional experience in motor carrier safety" is allowed to promulgate rules related to motor carrier safety. The significant difference between 23 C.F.R. § 658.15 and 49 U.S.C. § 31113, with which it shares joint overlapping authority, is that Section 31113 gives the Secretary (and therefore the FMCSA Administrator) broad discretion to

exclude safety devices from the calculation of width, while Section 658.15 as promulgated by FHWA bans intermodal vehicles and needed safety equipment. Why should a regulation be promulgated under Title 23 if its authority comes from Title 49?

Half hearted reform is not enough. This Court has heard case after case [38] about truckers' hours of service and driver qualifications—all symptoms of this underlying problem. Rules thrown out by this Court are simply repromulgated with minor changes. Remand to FHWA or to a FMCSA administrator who lacks the statutorily required qualifications would only result in a repromulgation of the present rules, causing thousands of needless additional highway deaths. In an ominous development, H.R.3248, a highway bill with more than four hundred earmarks, would require states to permit saddlemount combinations even less safe than allowed by FHWA. If such long combination vehicles are legalized, then safety features such as roll bars and stronger cabs become even more vital. Truckers need safer modern vehicles today—not five years from now. Vacatur of § 658.15 is needed to assure manufacturers that the arbitrary distinction between load-bearing vs.

[38] *Public Citizen v. FMCSA*, 374 F.3d 1209, 1218, D.C. Cir. 2004; *Advocates for Highway and Auto Safety v. FMCSA*, DC Court of Appeals, No. 04-1233, Dec. 2005; *OOIDA v. FMCSA*, DC Court of Appeals, No. 06-1035, July 2007.

non-load-bearing safety devices found in § 658.5, B-8, has been permanently eliminated. "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150-51 (D.C. Cir. 1993)(quoting *International Union, UMW v. Federal Mine Safety & Health Admin.,* 920 F.2d 960, 967 (D.C. Cir. 1990)). Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake. *Telecommunications Research & Action Center v. FCC* (1984) 750 F2d 70.

CONCLUSION

The Court should permanently vacate those parts of the Code of Federal Regulations promulgated under Title 23 that lack statutory authority under Title 23 of the United States Code, including Sections 658.5, 658.15, & 658.17(b), with remand to the Federal Motor Carrier Safety Administration for promulgation of performance based safety standards under Title 49 for cargo weight, lateral stability, intermodalism, hybrid power trains, axles with increased track width,

and modern safety devices.

Respectfully Submitted

_____

William B. Trescott

Author of:
So You Want to Drive a Truck?
Sargent Texas Reckless Driving Video
How to Succeed as an Owner-Operator
The Secretary of Transportation's Message to Truckers
Creation of a Minority Group—The New Danger in America's Trucks
Congressman Ron Paul's *'The Safer Truck Act'*
(HR 1248, 108th Congress; HR 2083, 107th Congress)
Inventor of:
Self-loading Vehicle for Shipping Containers
(U.S. Pats. 6,910,844 & 6,840,724)
Automatic Intermodal Railway Car Coupler
(U.S. Pats. 6,776,299 & 7,070,062)
Child Safe Stackable Shelf Bin
(U.S. Pat. 6,494,313)
www.truckingvideo.com
8028 Farm to Market Road 457
Bay City, Texas 77414
(979) 244-3134

APPENDIX A

ADDENDUM

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S10-060724-020

2006 JUL 20 A 9:45

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

Don Young
Chairman

Lloyd A. Jones, Chief of Staff
Elizabeth Megginson, Chief Counsel

James L. Oberstar
Ranking Democratic Member

David Heymsfeld, Democratic Chief of Staff

July 18, 2006

FHWA-2006-24134-26

The Honorable Maria Cino
Acting Secretary
U.S. Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

Dear Secretary Cino:

I write to inform you that the recent proposed rule for Federal Highway Administration (FHWA) Size and Weight Enforcement and Regulations (Federal Register Vol. 71, No. 83, May 1, 2006), and specifically the references to drive-away saddlemount with fullmount vehicle transporter combinations, accurately reflects the Congressional intent of section 4141 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA: LU) (P.L. 109-59).

In Conference Committee negotiations on SAFETEA: LU, the Conferees adopted the House language regarding the new definition and length limitation for drive-away saddlemounts with fullmount vehicle transporter combinations. As the Chairman of this Committee, I was directly involved in the development of this language during the three years leading up to passage of SAFETEA: LU. It was our intention that the term "drive-away saddlemount vehicle transporter combination" would include all saddlemount combinations, with or without fullmount.

I appreciate your attention to this matter during the ongoing implementation efforts of the Department.

Sincerely,

DON YOUNG
Chairman

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144)

SEC. 4141. DRIVEAWAY SADDLEMOUNT VEHICLES.

(a) Definition- Section 31111(a) title 49, United States Code, is amended by adding at the end the following:

> `(4) DRIVE-AWAY SADDLEMOUNT WITH FULLMOUNT VEHICLE TRANSPORTER COMBINATION- The term `drive-away saddlemount with fullmount vehicle transporter combination' means a vehicle combination designed and specifically used to tow up to 3 trucks or truck tractors, each connected by a saddle to the frame or fifth-wheel of the forward vehicle of the truck or truck tractor in front of it.'.

(b) General Limitations- Section 31111(b)(1) of such title is amended--

> (1) by redesignating subparagraphs (D) and (E) as subparagraphs (E) and (F), respectively; and
>
> (2) by inserting after subparagraph (C) the following:
>
> > `(D) imposes a vehicle length limitation of not less than or more than 97 feet on a driveaway saddlemount with fullmount vehicle transporter combinations;'.

HR 3248, SEC. 301 *

(s) Driveaway Saddlemount Vehicle-

(1) DEFINITION- Section 31111(a)(4) of title 49, United States Code, is amended--

> (A) in the paragraph heading by striking `DRIVE-AWAY SADDLEMOUNT WITH FULLMOUNT' and inserting `DRIVEAWAY SADDLEMOUNT';
>
> (B) by striking `drive-away saddlemount with fullmount' and inserting `driveaway saddlemount'; and
>
> (C) by inserting `Such combination may include one fullmount.' after the period at the end.

(2) IN GENERAL- Section 31111(b)(1)(D) of such title is amended by striking `a driveaway saddlemount with fullmount' and inserting `all driveaway saddlemount'.

***** may become law by date of the oral arguments

412909

DAVID G. REICHERT
8TH DISTRICT, WASHINGTON

COMMITTEE ON
TRANSPORTATION

COMMITTEE ON
HOMELAND SECURITY

COMMITTEE ON SCIENCE

Congress of the United States
House of Representatives
Washington, DC 20515–4708

WASHINGTON OFFICE
1223 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–4708
TELEPHONE: (202) 225–7761
FAX: (202) 225–4282

DISTRICT OFFICE
2737 78TH AVENUE, SE, SUITE 202
MERCER ISLAND, WA 98040
TELEPHONE: (206) 275–3438
TOLL FREE: (877) 920–9208
FAX: (206) 275–3437
www.house.gov/reichert

August 28, 2006

J. Richard Copka
Administrator
Federal Highway Administration
400 Seventh Street, SW
Washington, DC 20590

-29

Re: FHWA-2006-24134, RIN 2125-AF17 (SAFETEA-LU Legislation)

Dear Administrator Copka:

I am concerned that the Federal Highway Administration has proposed a rule clarification to 23 CFR § 658.13 that permits drive-away saddlemount combinations without fullmounts to be as long as 97 feet. I am deeply concerned that this rule conflicts with the plain language of the federal statute authorizing the rule, which, for safety reasons, imposes a length restriction of 75 feet upon such vehicle combinations.

The proposed regulations are the result of the SAFETEA-LU Act (P.L. 109-59). This law, the relevant portion of which is now codified at 49 USC § 31111, provides that a state "may not prescribe or enforce a regulation of commerce" that "imposes a vehicle length limitation of **not less than or more than 97 feet** on a driveaway saddlemount **with fullmount** vehicle transporter combinations." 49 U.S.C. § 31111(b)(1)(D) (emphasis added).

This federal law does not specifically address driveway saddlemounts that lack "full mounts". Therefore, the corresponding proposed regulation at 23 CFR §658.13 that prohibits states from imposing a length limit of less or more than 97 feet on both driveaway saddlemounts with and without fullmounts exceeds the directive of the statute which relates only to driveaway saddlemounts with fullmounts. The proposed regulation goes beyond the language of the statute by applying the 97 feet length to saddlements without fullmounts despite the plain language of the legislation.

The distinction between a driveaway saddlemount with a fullmount and one without a fullmount is significant. In one type, which is known as a "regular" saddlemount, each of the three towed (or carried) vehicles in the combination has at least one wheel on the ground. In the other type, which is known as a "fullmount" saddlemount, one vehicle (typically the last in line) has no wheels on the ground, which tends to make the entire vehicle combination more stable.

It is my understanding that Washington and possibly other states, have already interpreted the federal law as applying only to drive-away saddlemounts with fullmounts. As the federal law does not relate to drive-away saddlemounts without fullmounts, this interpretation is reasonable and consistent with the federal law.

Because of the significant public policy safety concerns related to the less stable driveaway saddlemounts without fullmounts, I urge the Federal Highway Administration to adopt a regulation that conforms with the statutory language of SAFETEA-LU and impose the 97 feet regulation only upon driveaway saddlemounts with fullmounts.

Sincerely,

David G. Reichert
Member of Congress

415729

Congress of the United States
Washington, DC 20515

2006 SEP 26 P 3:56

September 22, 2006

The Honorable Maria Cino
Acting Secretary
U.S. Department of Transportation
400 7th Street, S.W.
Washington, DC 20590

FHWA-2006-24134-30

Dear Secretary Cino,

We are writing to commend the U.S. Department of Transportation (DOT) on the proposed rule for Federal Highway Administration (FHWA) Size and Weight Enforcement and Regulations (Federal Register Vol. 71, No. 83, May 1, 2006). We believe that this new rule will further improve industry safety, reduce miles driven, improve fuel consumption, and reduce congestion on our highways while emitting fewer pollutants. We strongly encourage the Department to adopt this rule in its current form.

We were involved in the debate surrounding the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (P.L. 109-59). In fact, in partnership with several of our colleagues in the House, we sent a letter to the leadership of the Transportation and Infrastructure Committee in support of the language ultimately contained in Section 4141 of SAFETEA-LU. The clear congressional intent of that section was that the term "drive-away saddlemount vehicle transporter combination" would include all saddlemount combinations, with or without a fullmount. The language of the final rule should continue to reflect this intent.

We appreciate your attention to this matter. We look forward to the final rule being published in the near future.

Sincerely,

Paul Ryan
Member of Congress

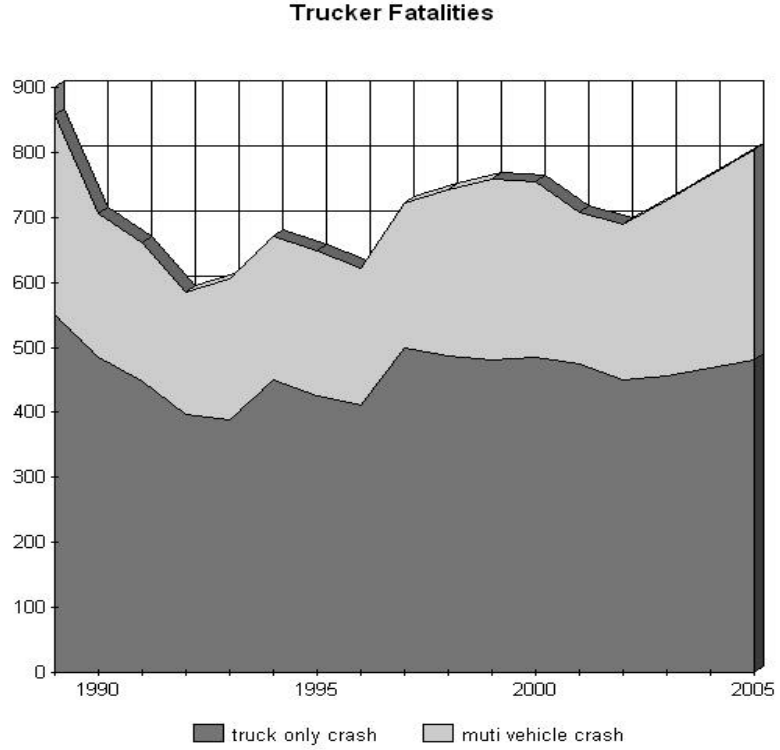
Michael Burgess
Member of Congress

Kenny Marchant
Member of Congress

Large Truck Occupants by Crash Type

Source: **Fatality Analysis Reporting System**, http://www-fars.nhtsa.dot.gov/finalreport.cfm?title=Trends&stateid=0&year=2005&title2=Large_Truck_Related

Year	Single Vehicle	Multiple Vehicle	Total	Other	Non motorists	Total
1994	451	219	670	4,013	461	5,144
1995	425	223	648	3,846	424	4,918
1996	412	209	621	4,087	434	5,142
1997	499	224	723	4,223	452	5,398
1998	486	256	742	4,215	438	5,395
1999	480	279	759	4,180	441	5,380
2000	484	270	754	4,114	414	5,282
2001	474	234	708	3,962	441	5,111
2002	449	240	689	3,886	364	4,939
2003	457	269	726	3,919	391	5,036
2004	469	297	766	4,042	427	5,235
2005	480	323	803	3,944	465	5,212



Fatal occupational injuries by occupation and event or exposure, 2005

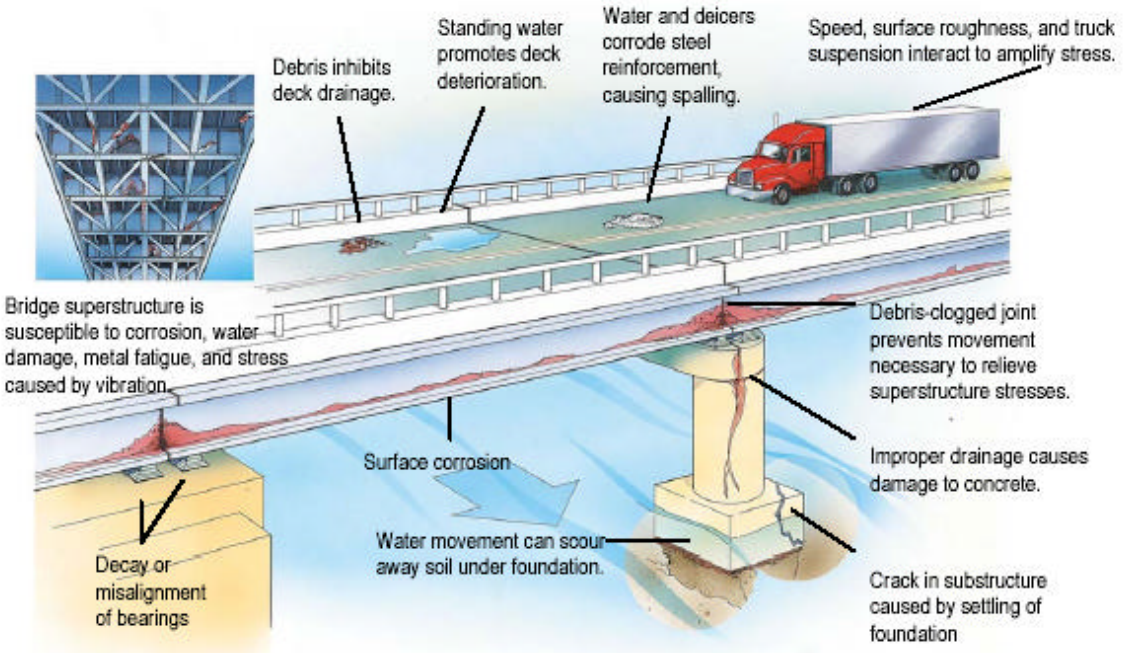
Source: **Bureau of Labor Statistics,** http://stats.bls.gov/iif/oshwc/cfoi/cftb0209.pdf

Total	Trans. incidents	Violent acts	Contact with equipment	Falls	Harmful substances	Fires and explosions
831	667	19	89	27	19	9

831 of the 5702 fatal occupational injuries in 2005 were heavy truck drivers —one in seven.

Federal Highway Administration's Oversight of Structurally Deficient Bridges

Statement of
The Honorable Calvin L. Scovel III
Inspector General
U.S. Department of Transportation
Before the Committee on Transportation and Infrastructure
United States House of Representatives
Wednesday, September 5, 2007, p. 4



Source: Illustration by Jana Brenning. Copyright Jana Brenning. Reprinted with permission. Illustration first appeared in *Scientific American*, March 1993.

APPENDIX B

STATUTES AND REGULATIONS

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* authorities upon which I chiefly rely are marked with asterisks

5 U.S.C. § 603.—Initial regulatory flexibility analysis
(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as - …

(3) the use of performance rather than design standards; and
(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

5 U.S.C. § 611(a)(1).— For any rule subject to this chapter, a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 601, 604, 605(b), 608(b), and 610 in accordance with chapter 7.

23 U.S.C. § 127(a) In General.—
(1) No funds shall be apportioned in any fiscal year under section 104(b)(1) of this title to any State which does not permit the use of The Dwight D. Eisenhower System of Interstate and Defense Highways within its boundaries by vehicles with a weight of twenty thousand pounds carried on any one axle, including enforcement tolerances, or with a tandem axle weight of thirty-four thousand pounds, including enforcement tolerances, or a gross weight of at least eighty thousand pounds for vehicle combinations of five axles or more.
(2) However, the maximum gross weight to be allowed by any State for vehicles using The Dwight D. Eisenhower System of Interstate and Defense Highways shall be twenty thousand pounds carried on one axle, including enforcement tolerances, and a tandem axle weight of thirty-four thousand pounds, including enforcement tolerances and with an overall maximum gross weight, including enforcement tolerances, on a group of two or more consecutive axles produced by application of the following formula:

$$W = 500\left(\frac{LN}{N-1} + 12N + 36\right)$$

where W equals overall gross weight on any group of two or more consecutive axles to the nearest five hundred pounds, L equals distance in feet between the extreme of any group of two or more consecutive axles, and N equals number of axles in group under consideration, except that two consecutive sets of tandem axles may carry a gross load of thirty-four thousand pounds each providing the overall distance between the first and last axles of such consecutive sets of tandem axles

(1) is thirty-six feet or more, or

(2) in the case of a motor vehicle hauling any tank trailer, dump trailer, or ocean transport container before September 1, 1989, is 30 feet or more: Provided, That such overall gross weight may not exceed eighty thousand pounds, including all enforcement tolerances, except for vehicles using Interstate Route 29 between Sioux City, Iowa, and the border between Iowa and South Dakota or vehicles using Interstate Route 129 between Sioux City, Iowa, and the border between Iowa and Nebraska, and except for those vehicles and loads which cannot be easily dismantled or divided and which have been issued special permits in accordance with applicable State laws, or the corresponding maximum weights permitted for vehicles using the public highways of such State under laws or regulations established by appropriate State authority in effect on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles on any vehicle (other than a vehicle comprised of a motor vehicle hauling any tank trailer, dump trailer, or ocean transport container on or after September 1, 1989), on the date of enactment of the Federal-Aid Highway Amendments of 1974, whichever is the greater.

23 U.S.C. § 141(b)(2).— If a State fails to certify as required by subsection (b) of this section or if the Secretary determines that a State is not adequately enforcing all State laws respecting such maximum vehicle size and weights, notwithstanding such a certification, then Federal-aid highway funds apportioned to such State for such fiscal year shall be reduced by amounts equal to 10 per centum of the amount which would otherwise be apportioned to such State under section 104 of this title.

35 U.S.C. 101.—Inventions patentable
Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

35 U.S.C. § 271(d).— No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent;

35 U.S.C. § 296(a).— In General.--Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity, for infringement of a patent under section 271, or for any other violation under this title.

49 U.S.C. § 113. Federal Motor Carrier Safety Administration

``(a) In General.--The Federal Motor Carrier Safety Administration shall be an administration of the Department of Transportation.

``(b) Safety as Highest Priority.--In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

``(c) Administrator.--The head of the Administration shall be the Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be an individual with professional experience in motor carrier safety. The Administrator shall report directly to the Secretary of Transportation.

``(f) Powers and Duties.--The Administrator shall carry out--

``(1) duties and powers related to motor carriers or motor

carrier safety vested in the Secretary by chapters 5, 51, 55, 57, 59, 133 through 149, 311, 313, 315, and 317 and by section 18 of the Noise Control Act of 1972 (42 U.S.C. 4917; 86 Stat. 1249-1250); except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999; and

``(2) additional duties and powers prescribed by the Secretary.

``(g) Limitation on Transfer of Powers and Duties.--A duty or power specified in subsection (f)(1) may only be transferred to another part of the Department when specifically provided by law.

``(h) Effect of Certain Decisions.--A decision of the Administrator involving a duty or power specified in subsection (f)(1) and involving notice and hearing required by law is administratively final.

``(i) Consultation.--The Administrator shall consult with the Federal Highway Administrator and with the National Highway Traffic Safety Administrator on matters related to highway and motor carrier safety.".

49 U.S.C. § 302(e).—(e) Intermodal Transportation.--It is the policy of the United States Government to encourage and promote development of a national intermodal transportation system in the United States to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources.

49 U.S.C. § 10102.—

(6) "railroad" includes -

(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad; …

(9) "transportation" includes -

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; …

49 U.S.C. § 13503(b)(1) In general.--Except to the extent provided by paragraph (2) of this subsection, neither the Secretary nor the Board has jurisdiction under this subchapter over transportation by motor vehicle provided in a terminal area when the transportation--

(A) is a transfer, collection, or delivery; and

(B) is provided by a person as an agent or under other arrangement for-

(i) a rail carrier subject to jurisdiction under chapter 105 of this title;

(ii) a motor carrier subject to jurisdiction under this subchapter;

(iii) a water carrier subject to jurisdiction under subchapter II of this chapter; or

(iv) a freight forwarder subject to jurisdiction under subchapter III of this chapter.

49 U.S.C. § 13506(a) In General.--Neither the Secretary nor the Board has jurisdiction under this part over-- …

(4) a motor vehicle controlled and operated by a farmer and transporting-- (A) the farmer's agricultural or horticultural commodities and products; or (B) supplies to the farm of the farmer; …

(11) transportation of used pallets and used empty shipping containers (including intermodal cargo containers), and other used shipping devices (other than containers or devices used in the transportation of motor vehicles or parts of motor vehicles);

49 U.S.C. § 20104(c) Civil Actions To Compel Issuance of Orders.--An employee of a railroad carrier engaged in interstate or foreign commerce who may be exposed to imminent physical injury during that employment because of the Secretary's failure, without any reasonable basis, to issue an order under subsection (a) of this section, or the employee's authorized representative, may bring a civil action against the Secretary in a district court of the United States to compel the Secretary to issue an order. …

49 U.S.C. § 31101(1).—"commercial motor vehicle" means (except in section 31106) a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle -

(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater;

(B) is designed to transport more than 10 passengers including the driver; or

(C) is used in transporting material found by the Secretary of Transportation

to be hazardous under section 5103 of this title and transported in a quantity requiring placarding under regulations prescribed by the Secretary under section 5103.

49 U.S.C. § 31111.— Length limitations…

(b) General Limitations.--

(1) Except as provided in this section, a State may not prescribe or enforce a regulation of commerce that--…

(B) imposes an overall length limitation on a commercial motor vehicle operating in a truck tractor-semitrailer or truck tractor-semitrailer-trailer combination;…

(c) Maxi-Cube and Vehicle Combination Limitations.--A State may not prohibit a maxi-cube vehicle or a commercial motor vehicle combination consisting of a truck tractor and 2 trailing units on any segment of the Dwight D. Eisenhower System of Interstate and Defense Highways (except a segment exempted under subsection (f) of this section) and those classes of qualifying Federal-aid Primary System highways designated by the Secretary under subsection (e) of this section.

49 U.S.C. § 31113.—

(a) General Limitations. -

(1) Except as provided in subsection

(e) of this section, a State (except Hawaii) may not prescribe or enforce a regulation of commerce that imposes a vehicle width limitation of more or less than 102 inches …

(b) Exclusion of Safety and Energy Conservation Devices. - Width calculated under this section does not include a safety or energy conservation device the Secretary decides is necessary for safe and efficient operation of a commercial motor vehicle.

(c) Special Use Permits. - A State may grant a special use permit to a commercial motor vehicle that is more than 102 inches in width.

49 U.S.C. § 31147(b) Regulating the Manufacturing of Vehicles.--This subchapter does not authorize the Secretary to regulate the manufacture of commercial motor vehicles for any purpose, including fuel economy, safety, or emission control.

***The Americans with Disabilities Act,* P.L. 101-336**
SEC. 303. NEW CONSTRUCTION AND ALTERATIONS IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES.

(a) APPLICATION OF TERM- Except as provided in subsection (b), as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) includes--…

> (2) … a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. …

19 CFR 18.4a(d).—Containers or road vehicles which are not approved under the provisions of a Customs Convention may be accepted for transport under Customs seal only if the port director at the port of origin is satisfied that (1) the container or road vehicle can be effectively sealed and (2) no goods can be removed from or introduced into the container or road vehicle without obvious damage to it or without breaking the seal.

23 CFR § 658.5 Definitions. (2004)…

Commercial motor vehicle. For purposes of this regulation, a motor vehicle designed or regularly used to carry freight, merchandise, or more than ten passengers, whether loaded or empty, including buses, but not including vehicles used for vanpools, or vehicles built and operated as recreational vehicles.

…

Special mobile equipment. Every self-propelled vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including military equipment, farm equipment, implements of husbandry, road construction or maintenance machinery, and emergency apparatus which includes fire and police emergency equipment. This list is partial and not exclusive of such other vehicles as may fall within the general terms of this definition.

…

Width exclusive devices. Devices excluded from the measurement of vehicle width. Such devices shall not be designed or used to carry cargo.

23 CFR § 658.15 Width. (2004)
(a) No State shall impose a width limitation of more or less than 102 inches, or its approximate metric equivalent, 2.6 meters (102.36 inches) on a vehicle operating on the National Network, except for the State of Hawaii, which is allowed to keep the State's 108-inch width maximum by virtue of section 416(a) of the STAA.
(b) The provisions of paragraph (a) of this section do not apply to special mobile equipment as defined in §658.5.
(c) Notwithstanding the provisions of this section or any other provision of law, the following are applicable:

(1) A State may grant special use permits to motor vehicles, including manufactured housing, that exceed 102 inches in width; and
(2) A State may allow recreational vehicles with safety and/or non-cargo carrying appurtenances extending beyond 3 inches from the side of the vehicle to operate without a special use over-width permit.

23 CFR § 658.17(b).—The maximum gross vehicle weight shall be 80,000 pounds except where lower gross vehicle weight is dictated by the bridge formula.

49 CFR § 383.5.—*Commercial motor vehicle* (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

(a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or
(b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more); or
(c) Is designed to transport 16 or more passengers, including the driver; or
(d) Is of any size and is used in the transportation of *hazardous materials* as defined in this section.

operational characteristics if the unit is temporarily broken down, should provide sufficient proof. FHWA agrees with several commenters that there will be little or no incentive for a driver to install and transport a non-working APU. We also believe that there would be little need to require a driver to provide proof of weight and operability unless the vehicle is over the weight thresholds specified in the regulations. Additionally, we agree that the increased weight must be allowed in addition to any enforcement tolerances that are currently authorized under Federal law.

It is important to note that section 756 of the Energy Policy Act of 2005 which amended 23 U.S.C. 127 does not preempt State enforcement of its weight limits on all highways; rather, it prevents the FHWA from imposing funding sanctions if a State authorizes the 400 lb. weight limit on their Interstate system. Therefore, it remains for each State to decide whether it will allow the increased weight limits for APUs. However, a State must adhere to the provisions of section 658.17 if it chooses to allow the additional weight.

Section 658.23 LCV Freeze; Cargo-carrying Unit Freeze

The NPRM proposed to replace obsolete references to the Office of Motor Carriers with references to the FHWA. In drafting the replacement regulatory text in the NPRM, the FHWA inadvertently changed the word ''must'' to ''may'' in the last sentence of subsection (c). We did not propose, nor did we intend, to change the substantive requirements contained in this subsection. The FHWA did not receive any comments in response to the proposals contained in this section. Therefore we have corrected the regulatory text to reflect the current regulatory requirements and to update the obsolete references to the Office of Motor Carriers.

Appendix A to 23 CFR Part 658—National Network—Federally-Designated Routes

The FHWA proposed to change route designations within the State of New Mexico on certain portions of the National Network. The State of New Mexico submitted a comment clarifying the changes to route number designations for routes on its portion of the National Network. These changes are numerical only and will not add or remove routes from the original network. Additional changes include: changing NM 491 to U.S. 491; changing U.S. 516 to NM 516, and; deleting U.S. 666 in its entirety. The FHWA is therefore amending Appendix A to reflect these route number changes.

Appendix B to 23 CFR Part 658—Grandfathered Semitrailer Lengths

One commenter pointed out that Appendix B refers to 23 CFR 658.13(h), which no longer exists, and suggests making the appropriate modifications to correct the error.

FHWA Response: As stated in the NPRM, the FHWA is aware that section 658.13 was reorganized in a previous rulemaking action, at 67 FR 15110, March 29, 2002, and that the provisions that formerly appeared in paragraph (h) are now found in paragraph (g). Therefore, the FHWA is adopting the language proposed in the NPRM to correct this error.

Miscellaneous Comments

General Comments on FHWA's Size and Weight Program

Several individuals submitted general comments on the FHWA's size and weight program. Among the comments were suggestions to eliminate double and triple vehicle combinations on the highways, restricting the length of landscape trucks and trailers, mandating pavement standards to provide for 10 ton-per-axle weight limits in all weather conditions, allowing 90,000 lbs. gross weight on six axle tractor-semitrailers, and generally revising section 658.15 and section 658.17 to accommodate larger, heavier, hybrid vehicles that are currently not allowed on the Interstates or National Network.

FHWA Response: These comments address issues that were not raised in the NPRM, and are therefore outside the scope of this rulemaking. Additionally, the vehicle weight limits for Interstate highways are statutory (23 U.S.C. 127), as are the vehicle width and length limits on the National Network (49 U.S.C. 31111-31115). None of them can be changed by FHWA.

FHWA Authority

One commenter questions the FHWA's legal authority to amend the regulations as proposed in the NPRM. The commenter indicates several of the proposals, including those that propose to replace references in the regulations to the old Office of Motor Carriers with references to the FHWA, are illegal because section 101(a) of the Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106–159, 113 Stat. 1748) (MCSIA) requires the Federal Motor Carrier Safety Administrator to carry out any duties and powers related to motor carriers or motor carrier safety. He indicates that after the creation of FMCSA, various driver and vehicle safety inspection functions were transferred from FHWA's Office of Motor Carriers to FMCSA in a final rule published on October 19, 1999 (64 FR 56270), but that the final rule failed to transfer, and maintained within the FHWA in violation of the statute, the enforcement of commercial motor vehicle size and weight laws and regulations affecting the safe design of trucks.

The FHWA disagrees with the commenter's interpretation of the provisions of the MCSIA and its alleged effect on FHWA's authority over the commercial vehicle size and weight program. The provision in question is now codified at 49 U.S.C. 113(f)(1). This provision, which describes the powers and duties of the Federal Motor Carrier Administrator, reads as follows:

> ''(f) Powers and Duties.—The Administrator shall carry out—(1) duties and powers *related to motor carriers or motor carrier safety* vested in the Secretary by chapters 5, 51, 55, 57, 59, 133 through 149, *311,* 313, 315, and 317 and by section 18 of the Noise Control Act of 1972 (42 U.S.C. 4917; 86 Stat. 1249–1250); except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999 * * *'' (emphasis added)

For purposes of this discussion, it is clear that the FMCSA's Administrator is delegated by statute the duties and powers related to motor carriers and motor carrier safety vested in the Secretary by, among other provisions, chapter 311 of title 49, United States Code. However, we note that this statutory delegation is limited to duties and powers ''related to motor carriers and motor carrier safety'' in that chapter. This clearly refers to the motor carrier and motor carrier safety functions that were delegated to the FMCSA in the 1999 final rule cited by the commenter (64 FR 56270), which are very different from the commercial motor vehicle size and weight limitations, duties, and functions, which are in part located in 49 U.S.C. Chapter 311, and which remained delegated to the FHWA. Duties and powers under other subchapters of chapter 311 which are related to motor carrier and motor carrier safety functions such as the Motor Carrier Safety Assistance Program and State grants, and the Federal Motor Carrier Safety Regulations that affect motor carriers and drivers, were delegated to the FMCSA by the 1999 final rule. Duties and powers relating to the commercial motor vehicle size and weight limitations, which are

established by law, not only in Chapter 311 of title 49 United States Code, but also in Chapter 1 of title 23 U.S.C. (sections 127 and 141), remained delegated to the FHWA Administrator (see 71 FR 30828).

The commercial motor vehicle size and weight program is different from the motor carrier and motor carrier safety duties carried out by the FMCSA, and serve to establish limitations which the States are required to implement and enforce in order to protect and preserve the infrastructure and overall highway safety in highways that have received Federal assistance for construction and maintenance. It is not a regulation of motor carriers or their drivers, although these limitations affect the dimensions of the vehicles operated by these entities. The commercial motor vehicle size and weight program, including its regulation of the State's authority over vehicle limitations, is directly related to the Federal-aid highway program and Federal-aid highway funding. It does not involve the type of motor carrier or motor carrier safety oversight that Congress intended to be delegated to the FMCSA in the MCSIA provisions. As a result, it has appropriately remained delegated to the FHWA, as part of this agency's duties to administer the Federal-aid highway program and highway safety.

Finally, we note that Congress is fully aware that the commercial vehicle size and weight program remained in FHWA. As part of recent major highway program reauthorization acts and related oversight, congressional committees have requested and received information on FHWA's implementation of changes to the size and weight program. The Department would surely have received direction from Congress during all the years since the enactment of the MCSIA if Congress had intended this program to be delegated to an agency other than the FHWA.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 and would not be significant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. This rule will not adversely affect, in a material way, any sector of the economy. This action changes out-dated references to offices within the FHWA and updates the current regulations to reflect changes made by the Congress in SAFETEA–LU and other recent legislation. Additionally, this action would add various definitions; correct obsolete references, definitions, and footnotes; eliminate redundant provisions; amend numerical route changes to the National Highway designations; and incorporate a statutorily mandated weight limit provision. There will not be any additional costs incurred by any affected group as a result of this rule. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees or loan programs. Consequently, a regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), we have evaluated the effects of this action on small entities and have determined that the action would not have a significant economic impact on a substantial number of small entities. The FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has preliminarily determined that this proposed action would not warrant the preparation of a federalism assessment. Any federalism implications arising from this rule are attributable to SAFETEA–LU sections 4112 and 4141. The FHWA has determined that this proposed action would not affect the States' ability to discharge traditional State government functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

Unfunded Mandates Reform Act of 1995

This rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48). This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any one year. (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, the FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and tribal governments and the private sector.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this proposed action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not cause any environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. The FHWA does not anticipate that this action would affect a taking of private property or otherwise have taking implications under Executive Order 12630.

National Environmental Policy Act

The FHWA has analyzed this action for the purposes of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of the environment.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the

action would not have substantial direct effects on one or more Indian tribes; would not impose substantial compliance costs on Indian tribal governments; and will not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory section listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this section with the Unified Agenda.

List of Subjects in 23 CFR Parts 657 and 658

Grants Program—transportation, Highways and roads, Motor carriers.

Issued on: February 13, 2007.

J. Richard Capka,

Federal Highway Administrator.

■ In consideration of the foregoing, the FHWA amends Chapter I of title 23, Code of Federal Regulations, by revising Parts 657 and 658, respectively, as set forth below:

PART 657—CERTIFICATION OF SIZE AND WEIGHT ENFORCEMENT

■ 1. Revise the authority citation for part 657 to read as follows:

Authority: 23 U.S.C. 127, 141 and 315; 49 U.S.C. 31111, 31113 and 31114; sec. 1023, Pub. L. 102–240, 105 Stat. 1914; and 49 CFR 1.48(b)(19), (b)(23), (c)(1) and (c)(19).

■ 2. Revise § 657.1 to read as follows:

§ 657.1 Purpose.

To prescribe requirements for administering a program of vehicle size and weight enforcement on the Interstate System, and those routes which, prior to October 1, 1991, were designated as part of the Federal-aid primary, Federal-aid secondary, or Federal-aid urban systems, including the required annual certification by the State.

■ 3. Revise § 657.3 to read as follows:

§ 657.3 Definitions.

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. As used in this part:

Enforcing or *Enforcement* means all actions by the State to obtain compliance with size and weight requirements by all vehicles operating on the Interstate System and those roads which, prior to October 1, 1991, were designated as part of the Federal-aid Primary, Federal-aid Secondary, or Federal-aid Urban Systems.

Urbanized area means an area with a population of 50,000 or more.

■ 4. Revise the first sentence of paragraph (a) and revise paragraph (b) of § 657.11 to read as follows:

§ 657.11 Evaluation of operations.

(a) The State shall submit its enforcement plan or annual update to the FHWA Division Office by July 1 of each year. * * *

(b) The FHWA shall review the State's operation under the accepted plan on a continuing basis and shall prepare an evaluation report annually. The State will be advised of the results of the evaluation and of any needed changes in the plan itself or in its implementation. Copies of the evaluation reports and subsequent modifications resulting from the evaluation shall be forwarded to the FHWA's Office of Operations.

■ 5. Revise paragraphs (b), (e), and (f)(3)(iii) of § 657.15 to read as follows:

§ 657.15 Certification content.

* * * * *

(b) A statement by the Governor of the State, or an official designated by the Governor, that all State size and weight limits are being enforced on the Interstate System and those routes which, prior to October 1, 1991, were designated as part of the Federal-aid Primary, Urban, and Secondary Systems, and that the State is enforcing and complying with the provisions of 23 U.S.C. 127(d) and 49 U.S.C. 31112. Urbanized areas not subject to State jurisdiction shall be identified. The statement shall include an analysis of enforcement efforts in such areas.

* * * * *

(e) A copy of any State law or regulation pertaining to vehicle sizes and weights adopted since the State's last certification and an analysis of the changes made.

* * * * *

(f) * * *

(3) * * *

(iii) *Permits.* The number of permits issued for overweight loads shall be reported. The reported numbers shall specify permits for divisible and nondivisible loads and whether issued on a trip or annual basis.

■ 6. Revise § 657.17 to read as follows:

§ 657.17 Certification submittal.

(a) The Governor, or an official designated by the Governor, shall submit the certification to the FHWA division office prior to January 1 of each year.

(b) The FHWA division office shall forward the original certification to the FHWA's Office of Operations and one copy to the Office of Chief Counsel. Copies of appropriate evaluations and/or comments shall accompany any transmittal.

■ 7. Revise § 657.19 to read as follows:

§ 657.19 Effect of failure to certify or to enforce State laws adequately.

If a State fails to certify as required by this regulation or if the Secretary determines that a State is not adequately enforcing all State laws respecting maximum vehicle sizes and weights on the Interstate System and those routes which, prior to October 1, 1991, were designated as part of the Federal-aid primary, Federal-aid secondary or Federal-aid urban systems, notwithstanding the State's certification, the Federal-aid funds for the National Highway System apportioned to the State for the next fiscal year shall be reduced by an amount equal to 10 percent of the amount which would otherwise be apportioned to the State under 23 U.S.C. 104, and/or by the amount required pursuant to 23 U.S.C. 127.

PART 658—TRUCK SIZE AND WEIGHT, ROUTE DESIGNATIONS—LENGTH, WIDTH AND WEIGHT LIMITATIONS

■ 8. The authority citation for part 658 is revised to read as follows:

Authority: 23 U.S.C. 127 and 315; 49 U.S.C. 31111, 31112, and 31114; sec. 347, Pub. L. 108–7, 117 Stat. 419; sec, 756, Pub. L. 109–58, 119 Stat. 829; sec. 1309, Pub. L. 109–59, 119 Stat. 1219; sec. 115, Pub. L. 109–115, 119 Stat. 2408; 49 CFR 1.48(b)(19) and (c)(19).

■ 9. Amend § 658.5 by revising the definitions of ''commercial motor vehicle'' and paragraph (2) of the definition of ''nondivisible load or vehicle''; and adding definitions of ''drive-away saddlemount vehicle transporter combinations'' and ''over-the-road bus'' to read as follows:

§ 658.5 Definitions.

* * * * *

Commercial motor vehicle. For purposes of this regulation, a motor vehicle designed or regularly used to carry freight, merchandise, or more than ten passengers, whether loaded or empty, including buses, but not including vehicles used for vanpools, or recreational vehicles operating under their own power.

Drive-away saddlemount vehicle transporter combination. The term drive-away saddlemount vehicle transporter combination means a vehicle combination designed and specifically used to tow up to 3 trucks or truck tractors, each connected by a saddle to the frame or fifth wheel of the forward vehicle of the truck tractor in front of it. Such combinations may include up to one fullmount.

* * * * *

Nondivisible load or vehicle.

(1) * * *

(2) A State may treat as nondivisible loads or vehicles: emergency response vehicles, including those loaded with salt, sand, chemicals or a combination thereof, with or without a plow or blade attached in front, and being used for the purpose of spreading the material on highways that are or may become slick or icy; casks designed for the transport of spent nuclear materials; and military vehicles transporting marked military equipment or materiel.

Over-the-road bus. The term over-the-road bus means a bus characterized by an elevated passenger deck located over a baggage compartment, and typically operating on the Interstate System or roads previously designated as making up the Federal-aid Primary System.

* * * * *

■ 10. Amend § 658.13 by revising paragraph (e)(1)(iii) and adding paragraph (h) to read as follows:

§ 658.13 Length.

* * * * *

(e) * * *

(1) * * *

(iii) Drive-away saddlemount vehicle transporter combinations are considered to be specialized equipment. No State shall impose an overall length limit of less or more than 97 feet on such combinations. This provision applies to drive-away saddlemount combinations with up to three saddlemounted vehicles. Such combinations may include one fullmount. Saddlemount combinations must also comply with the applicable motor carrier safety regulations at 49 CFR parts 390–399.

* * * * *

(h) Truck-tractors, pulling 2 trailers or semitrailers, used to transport custom harvester equipment during harvest months within the State of Nebraska may not exceed 81 feet 6 inches.

■ 11. Revise paragraph (c) of § 658.15 to read as follows:

§ 658.15 Width.

* * * * *

(c) Notwithstanding the provisions of this section or any other provision of law, a State may grant special use permits to motor vehicles, including manufactured housing, that exceed 102 inches in width.

■ 12. Revise paragraph (k) and add paragraph (n) of section § 658.17 to read as follows:

§ 658.17 Weight.

* * * * *

(k) Any over-the-road bus, or any vehicle which is regularly and exclusively used as an intrastate public agency transit passenger bus, is excluded from the axle weight limits in paragraphs (c) through (e) of this section until October 1, 2009. Any State that has enforced, in the period beginning October 6, 1992, and ending November 30, 2005, a single axle weight limitation of 20,000 pounds or greater but less than 24,000 pounds may not enforce a single axle weight limit on these vehicles of less than 24,000 lbs.

* * * * *

(n) Any vehicle subject to this subpart that utilizes an auxiliary power or idle reduction technology unit in order to promote reduction of fuel use and emissions because of engine idling, may be allowed up to an additional 400 lbs. total in gross, axle, tandem, or bridge formula weight limits.

(1) To be eligible for this exception, the operator of the vehicle must be able to prove:

(i) By written certification, the weight of the APU; and

(ii) By demonstration or certification, that the idle reduction technology is fully functional at all times.

(2) Certification of the weight of the APU must be available to law enforcement officers if the vehicle is found in violation of applicable weight laws. The additional weight allowed cannot exceed 400 lbs. or the weight certified, whichever is less.

■ 13. Revise paragraphs (c) and (e) of § 658.23 to read as follows:

§ 658.23 LCV freeze; cargo-carrying unit freeze.

* * * * *

(c) For specific safety purposes and road construction, a State may make minor adjustments of a temporary and emergency nature to route designation and vehicle operating restrictions applicable to combinations subject to 23 U.S.C. 127(d) and 49 U.S.C. 31112 and in effect on June 1, 1991 (July 6, 1991, for Alaska). Minor adjustments which last 30 days or less may be made without notifying the FHWA. Minor adjustments which exceed 30 days require approval of the FHWA. When such adjustments are needed, a State must submit to the FHWA, by the end of the 30th day, a written description of the emergency, the date on which it began, and the date on which it is expected to conclude. If the adjustment involves alternate route designations, the State shall describe the new route on which vehicles otherwise subject to the freeze imposed by 23 U.S.C. 127(d) and 49 U.S.C. 31112 are allowed to operate. To the extent possible, the geometric and pavement design characteristics of the alternate route should be equivalent to those of the highway section which is temporarily unavailable. If the adjustment involves vehicle operating restrictions, the State shall list the restrictions that have been removed or modified. If the adjustment is approved, the FHWA will publish the notice of adjustment, with an expiration date, in the **Federal Register**. Requests for extension of time beyond the originally established conclusion date shall be subject to the same approval and publications process as the original request. If upon consultation with the FHWA a decision is reached that minor adjustments made by a State are not legitimately attributable to road or bridge construction or safety, the FHWA will inform the State, and the original conditions of the freeze must be reimposed immediately. Failure to do so may subject the State to a penalty pursuant to 23 U.S.C. 141.

* * * * *

(e) States further restricting or prohibiting the operation of vehicles subject to 23 U.S.C. 127(d) and 49 U.S.C. 31112 after June 1, 1991, shall notify the FHWA within 30 days after the restriction is effective. The FHWA will publish the restriction in the **Federal Register** as an amendment to appendix C to this part. Failure to provide such notification may subject the State to a penalty pursuant to 23 U.S.C. 141.

* * * * *

Appendix A to Section 658—National Network—Federally Designated Routes

■ 14. Amend appendix A to part 658 as follows:

■ A. By removing the words ''[The federally-designated routes on the National Network consist of the Interstate System, except as noted, and