

September 12, 2017

The Honorable Elaine Chao
Secretary, U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

The Honorable Daphne Jefferson
Deputy Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E., Suite 600
Washington, D.C. 20590

Re: Request for Waiver and Limited Exemption for Livestock Carriers from Department of Transportation, Federal Motor Carrier Safety Administration, Final Rule: Electronic Logging Devices and Hours of Service Supporting Documents, Final Rule 80 Fed. Reg. 78292 (Dec. 16, 2015).

Dear Secretary Chao and Deputy Administrator Jefferson

On behalf of the undersigned organizations representing the nation's livestock, poultry, aquaculture, and insect producers, processors, and transporters ("livestock haulers"), we hereby request that you grant a waiver followed by a limited exemption from compliance with the December 18, 2017, implementation date for the Final Rule on Electronic Logging Devices (ELD) and Hours of Service (HOS) 80 Fed. Reg. 78292 (Dec. 16, 2015) for livestock haulers. Furthermore, we request that you take action to address the incompatibilities between the Federal Motor Carrier Safety Administration's (FMCSA) HOS rules and the current structure and realities of the U.S. livestock industry.

As detailed below, and discussed previously with staff from FMCSA, the public interest clearly favors granting a waiver and limited exemption for livestock haulers. We are seeking this exemption because:

1. Livestock haulers are not, and will not be prepared to meet the December 18, 2017 compliance date;
2. The current ELD retail marketplace does not clearly support the needs of livestock haulers and questions remain as to whether current ELD devices can accommodate HOS exemptions currently utilized by the livestock industry, particularly given the FMCSA's recent change to its interpretation of the 150 air-mile exemption¹;
3. There is a significant lack of education and awareness by livestock haulers and the livestock farmers producers they service regarding the mandate, current

¹ FMCSA-ADO-17-009 <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/regulations/hours-service/elds/81586/usdot-eldhosexemptions.pdf>

exemptions, and the use and operation of ELDs, requiring time for adequate outreach and training to take place; and

4. Concern over the ELD mandate has exposed incompatibilities between the HOS rules and the livestock industry, and is causing disruption for livestock haulers, increasing already severe driver shortages, and endangering the health and welfare of the millions of animals transported by livestock carriers daily.

Livestock Haulers Uniquely Focus on the Safety of Both Livestock and Other Drivers

Livestock haulers are responsible for the daily transportation of millions of animals. The welfare and safety of the animals in transit, together with the safety of other drivers on the road, are the industry's top priorities. For livestock haulers, many of whom grew up on farms in rural areas and come from long family lines that raised livestock, the instinct to protect and provide for animals in their care is innate. Like the producers they service, livestock haulers have remained in rural America and are dedicated professionals focused on a specialized sector of the trucking industry that often requires long-distance transport of livestock.

Unlike their counterparts driving conventional commercial motor vehicles (CMVs), most livestock haulers have participated in additional specialized training, including the pork industry's Transport Quality Assurance (TQA) program and the beef industry's Master Cattle Transporter (MCT) program, which provide instruction on proper animal handling and transportation methods. These voluntary education programs were developed by and are offered through the U.S. Department of Agriculture's Pork Checkoff Program and Beef Checkoff Program.

The pork industry's TQA program is designed to address the driver safety and animal welfare needs of the approximately 600,000 pigs transported every day on U.S. roads. While the program is voluntary, most major packers require that any driver arriving on their property be TQA certified. For many packers, if a driver arrives at a plant and is not certified in the TQA program, he or she is required to become certified before being authorized to deliver future loads. In fact, some packing plants maintain TQA advisers on staff who are available to train any driver before leaving the plant.

The beef industry's MCT training program was designed by cattle experts and volunteers to educate haulers about low-stress safe handling and transportation methods for cattle. According to the MCT training program, proper handling and transport of cattle reduces sickness, prevents bruising, and improves the quality of meat. The training addresses the proper movement of cattle while approaching and loading a trailer, correct distribution of cattle, hauling techniques that reduce cattle stress, and how to handle emergency situations. The program also covers the impact of hot and cold weather conditions on cattle in transit and discourages transportation during certain hours of the day when they would be most vulnerable to the elements.

Transporting live fish (baitfish, food fish for processing or live delivery to wholesale or retail buyers, recreational fish for pond stocking, and ornamental fish for the water gardening hobby)

requires a driver to focus on road safety, equipment maintenance, fish health, and water quality. Moving live fish by truck also requires specialized equipment, species and delivery specific loading, and on-time delivery. Fish are loaded in pounds of live fish per gallon of transported water. Amending established stocking rates to anticipate delivery delays will dramatically increase delivered product costs which will result in lost sales, jobs, and income and farm closure. Adding deliveries will not prevent this outcome. Fish will not survive delays in transit nor can fish be off-loaded and reloaded during transit. Farmed and live fish hauler guidelines developed by the USDA's Southern Regional Aquaculture Center provide the basics for live fish transportation best management practices that are implemented across the United States.²

As reflected in FMCSA's data, the emphasis these programs place on animal welfare benefits driver safety as it encourages livestock haulers to slow down, be more aware of their surroundings and road conditions, and avoid rough-road situations that could result in animal injury.

In addition to general highway safety and accident prevention measures, these programs also focus on the primary underlying goal of the HOS rules: addressing fatigue. For example, the pork industry's TQA program educates haulers about driver fatigue prevention by stressing adequate rest, appropriate climate conditions in the cab, a healthy diet, and how to recognize the signs of fatigue.

DOT and the FMCSA Have the Authority to Grant a Waiver and Limited Exemption of the ELD Mandate

The Secretary has the authority under both Section 553(e) of the Administrative Procedure Act (APA) and 49 USC § 31315 to grant petitioners both a compliance waiver and a regulatory exemption if she finds that the exemption "is in the public interest, and it is likely to achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption."

A. Granting the Petition Will Achieve a Level of Safety Equivalent to the Level Achieved By the ELD Mandate.

Granting this petition, and maintaining the status quo for the extremely limited segment of the overall transportation economy engaged in the shipment of livestock, will achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent an exemption. Livestock haulers, such as those who participate in programs like the pork industry's TQA program or the beef industry's MCT program, have been trained and focused on

² Jensen, G.L. 1990. Transportation of Warmwater Fish: Loading Rates and Tips by Species. Southern Regional Aquaculture Center. SRAC Publication No. 393.

Jensen, G.L. 1990. Transportation of Warmwater Fish: Procedures and Loading Rates. Southern Regional Aquaculture Center. SRAC Publication No. 392.

Wynne, F.S. and W.A. Wurts. 2011. Transportation of Warmwater Fish: Equipment and Guidelines. Southern Regional Aquaculture Center. SRAC Publication No. 390.

the very issue that the HOS rules, and by implication the ELD mandate, ultimately seek to address: transportation safety associated with fatigue. These programs have resulted in marked success as indicated by major studies reviewed by FMCSA in developing its underlying HOS rules, showing that, comparatively, the livestock sector was one of the safest of the commercial hauling sectors. For instance, the Large Truck Crash Causation Study, conducted by the FMCSA and the National Highway Traffic Safety Institute, showed that of 1,123 accidents involving trucks hauling cargo, a mere five involved livestock transportation. Similarly, the report titled Trucks Involved in Fatal Accidents Factbook 2005, conducted by the Transportation Research Institute, shows that of 5,343 trucks involved in fatal accidents, livestock transporters accounted for 39, or just 0.7 percent. The ELD mandate itself, which is the subject of this petition, does nothing to improve that record of safety. Rather, it amounts to a radically inefficient exercise requiring the use of expensive and complicated technology, which is prone to failure and mistakes, in place of the proven, long-standing and cost-effective method of logging hours already used by the agency.

Since the ELD mandate provides no increased safety over the current system of written log books – and a limited waiver of the ELD mandate for livestock haulers simply maintains the status quo and provides an equivalent level of safety from one of the safest sectors of the transportation industry – DOT and FMCSA clearly have the authority to grant this petition.

B. Granting the Petition Is In the Public Interest

Granting this petition and maintaining the current status quo for the extremely limited segment of the overall transportation economy engaged in the shipment of livestock is in the public interest.

1. *Livestock haulers will not be prepared to meet the December 18, 2017 compliance date.*
 - a. *The significant lack of education and awareness among livestock haulers and the livestock farmers they serve regarding the mandate, current exemptions, and the use and operation of ELDs requires time for adequate outreach and training to take place.*

Despite its being issued nearly two years ago, awareness of this rule among livestock haulers and the industry they support is low. The relatively small size of the livestock hauling industry when compared with the overall trucking industry³ and its level of representation and engagement before FMCSA are likely factors for this lack of awareness. We have seen this trend before. Four years ago, when many of the undersigned groups engaged the DOT and FMCSA over its 30-minute rest break requirement, there was a clear lack of engagement with the livestock hauling

³ See Table 6 – “SBA Size Standards for Selected Industries,” Department of Transportation, Federal Motor Carrier Safety Administration, Final Rule: Electronic Logging Devices and Hours of Service Supporting Documents, Final Rule 80 Fed. Reg. 78292 at 78377 (Dec. 16, 2015)

industry during development of the underlying HOS rule⁴. This lack of stakeholder outreach has led to a lack of awareness within the livestock industry, particularly among livestock drivers, about the rule.

In its final rule, FMCSA recognized the need to engage directly with small entities such as livestock haulers and promised to take affirmative “steps to minimize adverse economic impacts on small entities.” One such step was a recognition that smaller trucking entities, such as livestock haulers, would “need additional information and guidance in order to comply with the regulation.” Said the agency,

To improve their understanding of the rule, FMCSA intends to conduct outreach aimed specifically at small businesses, including webinars and other presentations upon request, as needed and at no charge to the participants. These sessions will be held after the rule has published and before the rule’s compliance date. To the extent practicable, these presentations will be interactive. They will describe in plain language the compliance and reporting requirements so they are can [sic] be readily understood by the small entities that will be effected.⁵

To date, we are only aware of one directed training/educational meeting for livestock haulers in one state after a request was made by interested parties in that state. This is unfortunate and surprising given that FMCSA staff were finalizing the current rule at the same time they were engaging directly with livestock haulers regarding the 30-minute rest break rule discussions.

There are two primary impacts that this lack of stakeholder outreach and education has had on livestock haulers. First, by failing to directly address the unique nature and requirements of the livestock industry, those drivers who are aware of the program have had difficulty researching the ELD marketplace and identifying cost-effective solutions that are compatible with livestock hauling. Indeed, as discussed below, the vendors in the commercial ELD marketplace itself lack an understanding of the unique needs of the livestock industry and essential design features for their products. Second, nationwide, the average age of American truck drivers is 49⁶. For livestock haulers (like much of agriculture itself), the age is likely significantly higher. As a result, these drivers are less familiar with the use of new technology and require more time to train on ELD use. Forcing these drivers to comply with the ELD mandate without appropriate training

⁴ There is a complete absence of comments from livestock haulers in the HOS Rule’s docket. See p. 6, fn. 8 of the June 19, 2013 Request for Limited Exemption for Livestock Carriers from Department of Transportation, Federal Motor Carrier Safety Administration, Final Rule: Hours of Service of Drivers.

⁵ 80 Fed Reg 78378 Column 2.

⁶ <http://www.trucking.org/ATA%20Docs/News%20and%20Information/Reports%20Trends%20and%20Statistics/10%206%2015%20ATAs%20Driver%20Shortage%20Report%202015.pdf>

unfairly discriminates against older drivers who are otherwise more experienced and qualified to haul livestock. Furthermore, by failing to reach out to the livestock industry, industry education and certification programs such as TQA and MCT do not include ELD compliance and use in their materials. For instance, FMCSA's recent change to include livestock in its interpretation of the 150-air mile exemption for agricultural commodities, a change that the industry strongly supports and appreciates, has raised many additional questions from livestock haulers who are unsure about the mechanics of the new exemption and even if it means they are exempt from the ELD mandate itself.

Granting a waiver and limited exemption from the ELD mandate for livestock haulers will enable FMCSA to reach out to livestock haulers effectively, allow for long-standing livestock transportation safety and training programs to make needed adjustments, and provide the necessary time for training livestock haulers on the use of ELDs.

b. The current ELD retail marketplace does not clearly support the needs of livestock haulers and questions remain as to whether current ELD devices are compatible with the livestock industry.

In July and August 2017, upon learning about the ELD mandate, National Pork Producers Council staff researched the ELD retail marketplace and the compatibility of ELDs with livestock hauling. The results of this investigation revealed a number of troubling possible outcomes.

First, ELDs will likely be significantly more expensive for livestock haulers than estimated by FMCSA in its December 16, 2015 Final Rule. FMCSA estimated \$584 to purchase and install ELDs and a \$20 monthly service charge⁷. Second, it is still unclear which ELD units can meet the needs of livestock haulers. At least 38 of the 55 ELD vendors reviewed either couldn't or wouldn't answer specific questions on the compatibility of their product with livestock haulers. Of the remaining vendors, a handful acknowledged no compatibility, but hoped to have software solutions available in the future for livestock haulers. The rest seem to require that drivers physically edit their logs or keep a corresponding paper log to track agricultural exemptions⁸. The need for additional logs, of course, negates the need for ELDs in the first place. Finally, these additional logging requirements will only create more confusion in the livestock hauling industry and require additional training for livestock haulers.

Granting a waiver and limited exemption from the ELD mandate for livestock haulers will give the marketplace the time necessary to develop solutions for the specific needs of

⁷ "Never the less, the typical carrier will likely be required to spend about \$584 per CMV to purchase and install ELDs. In addition to purchase costs, carriers will also likely spend about \$20 per month per CMV for month service fees." 80 Fed Reg at 78378.

⁸ While most indicated that drivers would need to keep separate logs, some vendors suggested that drivers physically turn the units on and off.

livestock haulers and allow the industry to update training programs with compliant ELD options.

2. *Concern over the ELD mandate has exposed serious incompatibilities between the HOS Rules and the livestock industry, causing disruption for livestock haulers and exacerbating already severe driver shortages.*

As previously noted, livestock haulers are responsible for the daily transportation of millions of animals. These drivers treat the welfare and safety of the animals in their care, together with the safety of other drivers, as their top priorities. Unfortunately, confusion and possible misunderstanding over enforcement and how ELDs operate are causing significant concern within the livestock industry over apparent incompatibilities between the HOS rules and the realities of livestock hauling. Many livestock operations are located in remote, rural areas and routinely require long hauls to transport animals. These animals, when loaded onto trailers, are vulnerable to changes in temperature, especially temperature increases. Industry guidelines mandate that drivers avoid any stops while hauling livestock, especially in warmer weather, as the trailers are designed to cool the animals down while in motion. However, drivers who, for a variety of reasons, reach driving-time limits while hauling animals will face a difficult decision: compliance with animal welfare laws and guidelines or compliance with FMCSA's HOS rules.

Livestock haulers are accustomed to managing these priorities through planning, log books, and notations in those books. The emergence of ELDs is a new element to these procedures that must also be carefully implemented and managed. For many drivers, there is concern that there are those, with no understanding of or concern for animal welfare or livestock hauling, will arbitrarily penalize them for choosing the proper care of animals over pulling stopping in excessive heat or cold because of an arbitrary HOS cutoff. The lack of effective industry outreach and education compounds these concerns. As a result, we are hearing increased reports of drivers choosing to stop hauling livestock altogether to avoid this potential dilemma.

Granting a waiver and limited exemption from the ELD mandate for livestock haulers will enable FMCSA and the livestock industry to undertake the training and education necessary for livestock haulers to understand ELDs. It will also provide an opportunity for FMCSA to develop livestock specific solutions to the underlying HOS concerns of the industry.

DOT and the FMCSA Need to Continue Working with the Livestock Industry to Develop Appropriate Flexibility in the HOS Rules.

FMCSA's recent change to include livestock in its interpretation of the 150-air mile exemption for agricultural commodities is a positive development that provides much-needed flexibility for most livestock haulers. However, it doesn't fully address the struggles livestock haulers are facing. For instance, in many states the harvest season is limited to only a few months a year, despite the fact that livestock are harvested all year long. This gap in effectiveness must be corrected in order for livestock haulers to begin relying on the exemption.

Livestock haulers and the undersigned livestock industry organizations look forward to working constructively with DOT and FMCSA on additional solutions that address the unique needs of the industry while protecting the safety of our highways. Potential solutions to explore include allowing haulers to use the entire 14 hours of on-duty time for livestock transportation, especially when traveling in warmer weather. We would also encourage FMCSA to explore industry participation in the proposed Flexible Sleeper Berth Pilot and programs like it that enable livestock haulers to more effectively plan their long-distance routes to benefit animal welfare, reduce driver fatigue, and increase highway safety.

We urge you to recognize the significant harm the ELD rule will cause the livestock industry and to grant a waiver and limited exemption for livestock haulers from compliance with the final FMCSA ELD rule.

If you have any questions, please do not hesitate to Michael Formica at (202) 347-3600 or by email at formicam@nppc.org.

Sincerely,



Michael C. Formica
Assistant Vice President & Counsel, Domestic Policy
National Pork Producers Council

On behalf of the following organizations

American Beekeeping Federation
American Farm Bureau Federation
Livestock Marketing Association
National Aquaculture Association

National Cattlemen's Beef Association
National Pork Producers Council
North American Meat Institute
U.S. Cattlemen's Association