



# Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003

November 29, 2017

Elaine Chao, Secretary  
U.S. Department of Transportation  
120 New Jersey Ave., SE  
Washington, DC 20590

Daphne Jefferson, Deputy Administrator  
Federal Motor Carrier Safety Administration  
1200 New Jersey Ave., SE, Suite 600  
Washington, DC 20590

## **SUBMITTED VIA REGULATIONS.GOV**

**RE: Docket No. FMCSA-2017-0297  
Request for Comment on the National Pork Producers Council's Application for  
Exemption to Electronic Logging Devices**

Dear Secretary Chao and Deputy Administrator Jefferson,

The Animal Welfare Institute (AWI) submits these comments in opposition to granting the National Pork Producers Council's (NPPC) application for exemption to the Federal Motor Carrier Safety Administration's (FMCSA) new electronic logging device (ELD) requirement. AWI was established in 1951 to reduce the suffering caused by humans to all animals, including livestock in transportation systems. AWI and its members are concerned that granting this exemption will risk animal welfare by allowing livestock carriers to haul animals for excessive amounts of time with no repercussions. AWI opposes long-haul transport of farm animals that causes pain and distress, and supports enforcement of the Hours of Service regulations and the Twenty-Eight Hour Law. AWI asks FMCSA to deny NPPC's petition and implement the ELD mandate as planned.

### **1. The NPPC Seeks an Exemption Because the Use of ELDs Exposes Noncompliance with HOS and the 28-Hour Law.**

NPPC seeks an exemption to the ELD rule, and in the process, obfuscates the issue. While NPPC argues that the rule is incompatible with the livestock hauling industry because it will result in more offloading of livestock and have potential negative animal welfare impacts – that simply is not the issue. As FMCSA knows, the ELD mandate merely requires that carriers track hours using an approved ELD – it does not change the number of hours a carrier is allowed to be on duty or drive. NPPC and its supporters oppose the rule because it exposes the fact that livestock haulers are routinely violating Hours of Service (HOS) regulations and the 28-Hour Law. 49 C.F.R. § 395.3(a) (HOS for property-carrying vehicles); 49 U.S.C § 80502 (prohibiting certain animals

from being transported by a carrier for more than 28 consecutive hours without being unloaded for rest, water, and food).

Commenters concerned about increased offloading and animal suffering because of the ELD rule<sup>1</sup> simply seek to distract FMCSA from the truth – carriers are failing to plan routes that are in compliance with HOS rules and the 28-Hour Law. Implementation of the ELD mandate allows FMCSA and carriers to efficiently track travel time compliance, which will have a positive impact on animal welfare and driver safety.

**2. Granting this petition will *not* achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation.**

While NPPC’s petition argues at length that the exemption should be granted, NPPC fails to adequately explain what *more efficient or effective* system they have in place that maintains a level of safety *equal to or exceeding* the level without the exemption. 49 C.F.R. § 381.305. NPPC’s bare assertion that this burden is met and that FMCSA has authority to grant the exemption is insufficient.

FMCSA engaged in a lengthy and thorough rulemaking process to determine whether ELDs were a necessary, technologically feasible, cost-effective, and efficient way of increasing commercial motor vehicle (CMV) safety. The rulemaking addresses years of contentious litigation on the matter as well. Ultimately, FMCSA determined that the rule was necessary, feasible, and would increase CMV safety at a reasonably acceptable cost. 80 Fed. Reg. 78,293–94.

Petitioners argue the burden established in § 381.305 is met by explaining that *some* livestock haulers they represent participate in additional voluntary training programs meant to address safety, animal welfare, and sleepy driving. They also argue that DOT did not demonstrate that the ELD mandate does not provide increase safety over paper logs. These arguments simply do not mesh with FMCSA’s rulemaking determinations. FMCSA was aware of the fact that many industry participants have voluntary additional safety measurements in place to address an astonishing array of circumstances unique to haulers in various industries. Despite these programs, FMCSA found that requiring ELDs would increase safety overall by *increasing compliance with HOS*. 80 Fed. Reg. 78,292–93. Petitioners have not demonstrated that these safety programs and current tracking devices increase compliance with HOS at a rate equal to or exceeding the level without the burden, and therefore their petition should be denied.

**3. Granting the NPPC’s Application for a Two-Year Exemption Would Violate the APA.**

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<sup>1</sup> *E.g.* Comment from Jonita Sommers on FMCSA Proposed Rule: Hours of Service of Drivers; Exemption Applications: National Pork Producers Council (posted Nov. 27, 2017) <https://www.regulations.gov/document?D=FMCSA-2017-0297-0341> (conflating the ELD mandate with HOS requirements); *e.g.* Comment from Anne Peterson (posted Nov. 21 2017) <https://www.regulations.gov/document?D=FMCSA-2017-0297-0308> (arguing that animal welfare will be negatively affected by the ELD rule); *e.g.* Comment from Tracy Boomsma (posted Nov. 14, 2017) <https://www.regulations.gov/document?D=FMCSA-2017-0297-0235> (erroneously arguing that the ELD mandate requires haulers to offload cattle).

Granting NPPC's exemption amounts to a new rule because it applies a new standard to an industry as a whole without proper procedure under the Administrative Procedure Act (APA). 5 U.S.C. §§ 551–559, 701–706 (2012). FMCSA is engaging in “rulemaking” because it is engaging in the process of “amending . . . a rule” 5 U.S.C. § 551(5). The APA defines a “rule” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing . . . procedure . . . of an agency.” *Id.* § 551(4).

The APA requires that new rules undergo notice of proposed rulemakings to be published in the Federal Register. *Id.* § 553(b). If FMCSA granted NPPC an exemption, it would violate the APA because it has the effect or essentially amends a rule, has future effect, or prescribes law or policy. *Id.* §§ 551(1); (4). Granting a prospective exemption to an entire sector is essentially amending the new ELD mandate and prescribing law or policy by changing the effective date and holding one industry from a different standard than others subject to the rule. This is different from other exemptions granted by the agency because it is broader in scope. Other exemptions have been granted in the past to single carriers, small groups, or groups of individual drivers, but not for an entire industry. Because this exemption creates a new rule without notice and comment it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* § 706(a).

Under the APA, an agency is also required to provide at least a 30-day comment period on a new rule so that interested parties may participate and make concerns known. *Id.* § 553(c). While FMCSA allowed a comment period on the two-year exemption proposal and noticed it in the Federal Register, the process provided was ultimately flawed. Before the comment period closed, FMCSA granted a 90-day “waiver” to the ELD mandate for agricultural carriers. FMCSA violated the APA when it granted this waiver because it interfered with an active comment period. The comment period is a procedural mandate meant to provide the public with notice and an opportunity to be heard. *Id.* Because the comment period was flawed, and because FMCSA already made a determination that the rule was necessary to improve CMV safety, a new rule granting an exemption to an entire industry without a reasoned basis would be without observance of procedure required by law, *id.* § 706(2)(D), and arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, *id.* § 706(2)(A).

#### **4. FMCSA's Temporary Waiver to the Entire Agriculture Industry Violates FMCSA's Regulations and the APA.**

On November 20, 2017, FMCSA issued a press release granting a “temporary waiver” from the ELD requirement for transporters of agricultural commodities. While FMCSA has discretionary power to grant waivers to their regulations if conditions under 49 C.F.R. § 381.210(c) are met, these conditions were not met. This regulation requires submission of: a written request including the unique non-emergency event for the waiver to be used, the total number of drivers and CMVs operated under the waiver, and an explanation of how the carrier could achieve a level of safety equivalent to or greater than the level of safety obtain by complying with the regulation. *Id.* NPPC's petition does not include the required information nor does it meet the burden of establishing the level of safety is met. Because FMCSA did not observe procedure required by law, it violated the APA. 5 U.S.C. § 706(2)(D).

## **Conclusion**

The ELD mandate is the next step in improving safety on our roads. The current paper log system is outdated, and allows CMVs to skirt the law – putting animals and humans at risk. Implementation of the ELD mandate will increase safety of our roads by increasing compliance with the HOS requirements. As such, AWI respectfully requests that FMCSA deny the NPPC's petition for exemption to the ELD mandate and continue with full implementation of the rule as specified in the Federal Register.

Sincerely,

*Erin Thompson*

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Animal Welfare Institute