

Dated: January 15, 1997.  
 Warren Christopher,  
 Secretary of State.  
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## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[FHWA Docket No. MC-96-45]

#### Winter Home Heating Oil Delivery State Flexibility Program; Hours of Service

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of final determination.

**SUMMARY:** The FHWA is announcing the implementation of a Winter Home Heating Oil Delivery State Flexibility Program for motor carriers making intrastate home heating oil deliveries within a 100 air-mile radius of a central terminal or distribution point. The FHWA has selected the States of Connecticut, New Jersey, New York, and Pennsylvania to participate in the program.

**DATES:** States are authorized to begin granting exemptions under this program on January 29, 1997. This authorization expires April 30, 1997.

**FOR FURTHER INFORMATION CONTACT:** Mr. Nathan C. Root, Office of Motor Carrier Research and Standards, (202) 366-8759, or Mr. Charles Medalen, Office of the Chief Counsel, (202) 366-1354, Federal Highway Administration, DOT, 400 Seventh Street, SW., Washington, DC, 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** Section 346 of the National Highway System Designation Act of 1995 (NHS Act) (Pub. L. 104-59, 109 Stat. 568, 615, November 28, 1995, 49 U.S.C. 31136 note) requires the Secretary of Transportation to develop and implement a Winter Home Heating Oil Delivery State Flexibility Program (Heating Oil Program). Pursuant to the NHS Act, the FHWA published a notice in the Federal Register requesting comments on the development and implementation of the program and State applications to participate in the program on October 2, 1996 (61 FR 5146). The program will permit any period of 7 or 8 consecutive days to end for any driver who has been off-duty for a period of 24 or more consecutive hours for the purposes of determining maximum on-duty time under 49 CFR 395.3(b) for drivers of vehicles making intrastate home heating oil deliveries within 100 air-miles of a

central terminal or distribution point of the delivery of such oil. The NHS Act allows the Secretary to approve up to 5 States to participate in the program during the winter heating season beginning November 1, 1996, without jeopardizing Motor Carrier Safety Assistance Program (MCSAP) funding to those States. The State participants were required to meet criteria set forth in the NHS Act. This includes having a substantial number of citizens relying upon home heating oil, indicating the current hours-of-service regulations may endanger the welfare of these citizens by impeding timely deliveries of home heating oil, and ensuring that participating motor carriers maintain a level of safety equal to or greater than that produced by compliance with the current regulations through proper monitoring of their safety performance and reporting their performance to the FHWA.

Under the Heating Oil Program, the States will limit participation to those motor carriers with commercial motor vehicles (CMVs) that make intrastate home heating oil deliveries within a 100 air-mile radius of a central terminal or distribution point. The relief provided by participating States will be effective for an initial 15-day period. Each State will be able to continue in the program unless the FHWA finds that a State's continued participation is inconsistent with the NHS Act, or until April 30, 1997.

Comments on all aspects of the program were welcomed. However, the FHWA also requested comments on a number of specific issues. Namely, the 15-day and 30-day reporting and program extension requirements, the definition of a "substantial number of citizens relying on home heating oil," and the implementation plan requirements. The comment period for the Notice ended November 2, 1996.

#### Discussion of Comments

The FHWA received sixteen comments to the notice. The American Trucking Association (ATA) and National Tank Truck Carriers, Inc. (NTTC), provided comments. Four comments were received from petroleum industry associations: the Petroleum Marketers Association of America (PMAA), the Empire State Petroleum Association, the Pennsylvania Petroleum Association, and the Oil Heat Task Force (OHTF). The Wisconsin State Patrol and the Commonwealth of Massachusetts also provided comment, as did the Advocates for Highway and Auto Safety (AHAS) and two private companies. Applications for participation were

received from four States. All comments to the docket were in favor of the implementation of the Heating Oil Program with the exception of those of AHAS and Wisconsin. Massachusetts indicated that a substantial number of their citizens rely on home heating oil and that they are reviewing the October 2nd notice to determine if it is in the Commonwealth's best interest to participate. To date, no application from Massachusetts has been received by the FHWA.

#### Reporting and Program Extension Requirements

The NHS Act directs the Secretary to select up to 5 States to participate in the program for an initial period of 15 days during the winter heating season. If the Secretary finds that a State's continued participation in the program has not resulted in a significant adverse impact upon public safety, the NHS Act directs the Secretary to extend the State's participation in the program for periods of up to 30 days. Accordingly, the FHWA indicated that it would require each participating State to submit a preliminary report of its evaluation of carrier performance within 5 days after the initial 15 days. A State's participation in the program could be suspended at any time if: (1) The State had not complied with any criteria established for participation in the program; (2) The motor carriers found eligible by the State were causing a significant adverse impact upon public safety; or (3) The State elected to end its participation in the program on its own initiative.

The FHWA also indicated that it would require each participating State to submit a report of carrier performance within 5 days of the close of each 30-day reporting period. In the October 2nd notice, the FHWA asked for comments on the requirement that extensions be granted to the States after each reporting period, given the fact that program participation may be suspended at any time during the program for individual carriers or for an entire State. The applications of each State that applied for participation included plans for submitting a report at the end of the initial 15-day period, and at the end of each 30-day period for the duration of the program. The ATA and the AHAS also provided discussion on this issue.

The ATA commented that States should periodically report safety performance data to the FHWA and suggested a 60-day reporting interval to reduce the burdens on the States and the carriers participating in the program. The ATA also believed that requiring the FHWA to grant extensions to the

States after each reporting period, thereby enabling the States to continue providing the hours-of-service relief to the carriers, would add no value to the program or to public safety. "So long as the States have the ability to suspend program involvement of motor carriers that fail to meet the established safety performance levels, which the Notice clearly indicates they will, a 30-day extension requirement is simply unnecessary," said the ATA.

The AHAS commented that the NHS Act allows the FHWA to grant extensions for periods less than and up to a maximum of 30 days. The AHAS stated:

We believe that the statutory provision detailing this program clearly shows that Congress wanted the agency to keep a tight rein on this program and, accordingly, specifically provided for separate evaluation on the merits of each extension of time for state participation in order to maximize the administrative capabilities of the FHWA in ensuring public safety.

The AHAS further opposes the FHWA granting extensions in full 30-day increments. The AHAS views the granting of extensions as the FHWA's primary safeguard for protecting the public during the program. The AHAS was the only commenter to voice the opinion that extensions are necessary and should be required.

The FHWA does not believe it is necessary to require States to report to the FHWA in periods of less than 30 days. The States will be required to continuously monitor and evaluate motor carrier safety performance and have the power to remove program carriers and program drivers at any point. As the ATA pointed out, the States would be required to submit as many as 8 reports to the FHWA for a 6-month project and to *constantly* monitor motor carrier safety performance. Requiring States to report to the FHWA in periods of less than 30 days would be an unnecessary burden on all parties involved and provide no apparent and demonstrable benefit to public safety. The FHWA does recognize that reporting periods of longer than 30 days may not allow sufficient consideration of information for effective oversight in light of the short duration of the covered season.

The FHWA does agree with the AHAS's assertion that whether or not to approve extensions is a significant control the FHWA may use for protecting the public during the program. The definitive safeguard is the FHWA's ability *at any point* to terminate the program in any State. Public safety is primarily protected by each State's monitoring activities and by

the authority of each State to remove any carrier or driver from the program *at any point* or to terminate the program State-wide *at any point*.

Considering these issues, the FHWA is imposing limitations on the approval of extensions. The parameters of the program are described below. A report will be due to the FHWA from each State within 5 days following the initial 15 days of the program, and within 5 days of the end of each 30-day reporting period. For the duration of the program, motor carriers in each State will be required to promptly report to the State the details of any accident in which a program driver is involved. If the FHWA has not reviewed the State's report and affirmatively extended the program within 72 hours after the report is due, the State's program is automatically suspended until approval is granted.

The FHWA will also provide continuous program oversight by maintaining close liaison with State personnel evaluating significant information as it becomes available. If at any point the FHWA determines the program guidelines are not adhered to or the flexibility granted by the program results in a significant adverse impact on public safety, the FHWA will terminate the program. The FHWA will make such decisions on a State-by-State basis.

#### *Definition of "Substantial Number of Citizens"*

The NHS Act stipulated that, in order to be eligible to participate in the Heating Oil Program, a State must have a substantial number of citizens who rely on home heating oil for heat during winter months. The FHWA proposed in the October 2nd notice to interpret "a substantial number of citizens relying on home heating oil" to mean that at least 20 percent of the households in a State rely on home heating oil. The FHWA specifically welcomed comments upon this definition. The PMAA and the OHTF both responded that the FHWA should consider States with the highest number of citizens relying on heating oil rather than, or in addition to, the percentage. Because the FHWA received only four applications, it was unnecessary for the FHWA to use the highest number of citizens relying on heating oil in addition to the percentage of citizens to evaluate each State's ability to meet this criteria.

Each State that submitted an application, plus the Commonwealth of Massachusetts, met the 20 percent threshold. No other comments or inquiries were received on this definition. Each State that applied to the program submitted sufficient

information to establish that a substantial number of their citizens rely on home heating oil for heat during the winter months. The information submitted was based on the data presented in the October 2nd notice, derived from residential heating oil sales data maintained by the Energy Information Administration of the U.S. Department of Commerce, as well as the State's own data concerning residential heating oil use.

#### *Implementation Plan Requirements*

The October 2nd notice requested that interested and eligible States submit an application that included an implementation plan describing the conditions of eligibility for a motor carrier to participate. The plan also had to include a discussion of the means that a State would employ to monitor the performance of the participating carriers, mitigate safety risks, and evaluate the merits of the program. The FHWA requested comments on the appropriateness, suitability, or burden of these requirements.

The AHAS expressed concern that the FHWA may be prepared to accept "almost any information" regarding safety impacts and that the monitoring approaches were inadequate and inconsistent with requirements for scientific studies. No alternative methods for monitoring or evaluating the safety performance of participating motor carriers were provided in the AHAS comments. The FHWA believes the program oversight and controls described herein are adequate to safeguard the public against potential abuse. Given the nature of the program, the differences in weather patterns and seasonal conditions, the consequent multiplicity of variables, and the number and variety of participating entities, pure scientific protocols are impossible to devise. The FHWA will, however, collect as much relevant information as is reasonably possible and evaluate it in a number of ways to ascertain whether any safety effects of the limited regulatory relief can be identified and attributed.

The possible safety monitoring approaches identified in the October 2nd notice (comparing safety performance levels of motor carriers during the program to performance in previous winter(s), safety performance of other similar industries during the same period, and using a study control group among the participating motor carriers) were described in broad terms to give the States and the public an idea of possible methods that may be utilized by States to monitor and evaluate safety performance. The FHWA intended to

encourage States and the public to propose alternative monitoring methods that would ensure public safety and generate data on the merits of the program. This program will be run by the States, with little or no resources from the FHWA, except for program oversight. Intrastate operations are subject to the FHWA's jurisdiction only insofar as MCSAP funding may be jeopardized if a participating State does not adopt hours-of-service regulations for intrastate operations that are equivalent to or compatible with the Federal regulations. Adoption of a 24-hour re-start would normally constitute an unacceptable variance to the regulations under the current Tolerance Guidelines (49 CFR part 350, App. C). The FHWA has the option of rejecting any application that contains insufficient information or inadequate monitoring and evaluative strategies or otherwise fails to meet the requirements of the NHS Act.

#### *On-Duty Time Regulations Endangering Welfare of Citizens*

Section 346(b)(2) of the NHS Act provides that:

The Secretary may only approve an application of a State under this section if the Secretary finds, at a minimum, that—

\* \* \* \* \*

(2) current maximum on-duty time regulations may endanger the welfare of these citizens by impeding timely deliveries of home heating oil; . . .

The AHAS commented on this criterion with regard to the FHWA's responsibilities in reviewing State applications:

Accordingly, the Secretary must make a finding sustained by ample, credible data and other evidence that there are in fact citizens whose safety and health are directly and immediately impacted adversely by service failures in making timely deliveries of home heating oil as a causal result of hours of service constraints in intrastate transportation. Advocates regard this evidentiary standard of imminent threats to citizen safety and health to require far more than simple, generalized affidavits of state officials or of motor carriers. The FHWA in this proposal sets forth no criteria whatever for making such a determination of whether this public health and safety threat due directly and immediately to hours of service constraints in fact exists in any applicant state.

The FHWA does not agree with AHAS's interpretation of the statute. The NHS Act requires that a determination be made that current maximum on-duty time regulations "may endanger the welfare" of citizens by impeding timely deliveries. This is a much less stringent criterion than

AHAS's reading of the NHS Act suggests.

Several respondents to the docket mentioned that extended periods of cold temperatures that occur each winter cause an urgent need for home heating oil. In addition, they noted that severe and inclement weather conditions, such as ice or heavy snow falls, impede the timely delivery of home heating oil to consumers. The FHWA believes that the situations described by the applicant States provide sufficient evidence for the FHWA to determine that compliance with the hours of service requirements may endanger the welfare of citizens who must wait longer for delivery of their home heating oil as a result.

Commenters also cited emergencies declared in response to these conditions (49 CFR 390.23) as evidence that current maximum on-duty time regulations may endanger the welfare of citizens dependent on home heating oil. An emergency declared in accordance with § 390.23 relieves motor carriers providing emergency relief from compliance with all the Federal Motor Carrier Safety Regulations (49 CFR Parts 390 through 399). It is the FHWA's hope that this program may obviate the need to declare emergencies within participating States during the current winter heating season.

#### Participating States

The FHWA has reviewed and accepted applications submitted by the States of Connecticut, New Jersey, New York, and Pennsylvania. The FHWA has discussed the applications with each State applicant and slight modifications have been made to what was submitted. The FHWA has found that these States each meet the participation eligibility criteria established by the NHS Act. In separate agreements with the FHWA, each State has agreed to abide by the parameters that follow. New York has elected to pursue more stringent hours of service relief than the statute allows for this program. It has been noted where New York deviates from the parameters followed by the other participating States.

#### Parameters of the Heating Oil Program

##### *I. Definitions*

The following definitions have been established for the purposes of the Heating Oil Program:

*Accident.* Accident is defined as an occurrence involving a CMV operating on a public road in commerce which results in: (1) A fatality; (2) Bodily injury to a person who, as a result of the injury, immediately receives medical treatment away from the scene of the

accident; or (3) One or more motor vehicles incurring disabling damage as a result of the accident, requiring a motor vehicle to be transported away from the scene by a tow truck or other motor vehicle. This term also includes any unintentional discharge of home heating oil that requires the submission of DOT Form F 5800.1 (Rev. 6/89) (see 49 CFR 171.16). The term *accident* does not include an occurrence involving only boarding or alighting from the stationary motor vehicle delivering home heating oil.

##### *Deliveries of home heating oil.*

Intrastate deliveries of home heating oil to homes within a 100 air-mile radius of a central location or distribution point. Deliveries between distribution points are *not* included in this definition.

*Home heating oil.* Fuel oil used for heating homes which meets the definition of "Fuel Oil" in the Hazardous Materials Table in 49 CFR 172.101, identified as Fuel Oil No. 1, or Fuel Oil No. 2.

The definition of "accident" was taken from 49 CFR 390.5, with the addition of any spillage of home heating oil as identified by the Hazardous Materials Regulations. The FHWA believes it would be remiss not to include data on hazardous materials incidents. The FHWA has a responsibility to the safety of the environment as well as to public safety, and a change in the frequency of incidents in the loading and unloading process may also be considered as an indicator of driver fatigue. The definition of "deliveries of home heating oil" does not include loading delivery trucks from a source outside the participating State and delivering the oil only to homes within the participating State. Such deliveries are interstate in nature because of their point of origin. The definition of "home heating oil" was taken from the Federal Hazardous Materials Regulations promulgated by the Research and Special Programs Administration. The FHWA understands that only Fuel Oil No. 1 and No. 2 are used as home heating oil (6 types of fuel oil are identified in the Hazardous Materials Table, No. 1, 2, 3, 4, 5 and 6).

##### *II. Hours-of-Service Flexibility*

Participating States will accept applications from interested and eligible motor carriers. As described below, motor carriers that have been accepted will be notified by their State and will participate in the program until the program terminates or they are removed from the program by the participating State.

Connecticut, New Jersey, and Pennsylvania will permit motor carriers that have been accepted into the program to allow their drivers to re-start calculations for the 60-hour and 70-hour rules after accumulating at least 24 consecutive hours of off-duty time. New York will permit motor carriers that have been accepted into the program to allow their drivers to re-start calculations of the 60-hour and 70-hour rules after accumulating at least 36 consecutive hours of off-duty time. However, total on-duty time must not exceed 75 hours during a 7 consecutive day period (rather than 60 hours), or 80 hours during an 8 consecutive day period (rather than 70 hours) for carriers who operate 7 days a week. If New York determines an "emergency" exists, the above conditions will apply except the drivers may re-start calculations after accumulating at least 24 consecutive hours of off-duty time. Flexibility granted by States under this program will not jeopardize MCSAP funding.

Drivers who exceed the 100 air-mile radius of a central terminal or distribution point, operate CMVs for other motor carriers, or operate CMVs for a participating motor carrier in capacities not covered by the Heating Oil Program, may not participate in the program. However, if a participating driver only occasionally operates a CMV for other motor carriers or exceeds the 100 air-mile radius, it is the option of the participating State whether to allow the driver to continue participating in the program. It is the FHWA's concern that it would be difficult to take into account or predict the effect of driving experience accumulated outside the scope of this program when determining the safety performance of participating drivers and motor carriers. Participating drivers must be in full compliance with 49 CFR 395.3(b) before operating outside the constraints of this program in interstate commerce.

### III. Motor Carrier Eligibility

To be eligible to participate:

(1) Each motor carrier must certify to the State that it is actively engaged in making intrastate deliveries of home heating oil within a 100 air-mile radius of a central terminal or distribution point.

(2) Each motor carrier must not have received an "Unsatisfactory" rating from the FHWA, or a similar safety rating from the State, during the past 5 years.

(3) Each motor carrier must certify that it will provide the State with timely safety data within close proximity to the end of each reporting period. Required safety data includes a roster of drivers operating under the program, time cards

for each driver, any accident reports and/or hazardous materials incident reports pertaining to these drivers during the reporting period.

(4) Each motor carrier must certify that it will comply with all applicable regulations relating to the safety of its intrastate operations. If an emergency is declared, in accordance with 49 CFR 390.23, the FHWA requests that each motor carrier continue to abide by the conditions of this program. However, if participating motor carriers avail themselves of the emergency exemption, they must continue to abide by the reporting requirements of this program.

(5) Each motor carrier must provide to the State accident and mileage data for the winter season of each year it has operated since the 1993–1994 winter heating season. This information is required for States to determine whether motor carrier safety performance during the course of this program declines or improves. The FHWA is aware that the severity of weather conditions varies from one year to the next. However, by collecting data for previous winter seasons, accident rates for the upcoming 1996–1997 winter heating season can be compared with recent averages.

### IV. Monitoring

Each State will monitor the safety of all drivers participating in the program. Participating motor carriers must report each accident to the State within 2 days of the accident. When reporting an accident, the motor carrier must provide copies of the time cards for the previous 7 days for the driver involved. Within 5 days following any accident, the motor carrier must submit to the State a brief summary of the accident, to be maintained by the State, which includes:

- The date and time of the accident;
- The name and driver license number of the driver;
- The driver's number of hours on-duty on the day of the accident and in the period since his last 24-hour off-duty period;
- The number and extent of any injuries and/or damage to property;
- The number of fatalities; and
- Whether and to what extent any heating oil was spilled.

If data collected by a participating State indicates that the safety performance of any participating motor carrier has declined since commencement of its participation in the program, the State will immediately conduct an investigation. If the State determines that the adverse effect on safety was caused by the flexibility afforded under the program, the State

may elect to suspend individual drivers of a motor carrier from participating in the program or the motor carrier as a whole. If a State determines that multiple participating motor carriers have experienced an adverse change in their safety performance as a result of the flexibility afforded by the program, the State may terminate the entire program within its jurisdiction. In all cases, the State will promptly notify the FHWA of any corrective actions taken and the reasons for them.

### V. Dates

The Heating Oil Program will begin on January 29, 1997 and end by April 30, 1997, unless otherwise specified by the individual State. Each State will report its preliminary findings to the FHWA within 5 days of the completion of the first 15 days of the program. Each State will be able to continue in the program, unless the FHWA finds that a State's continued participation in the program is inconsistent with the NHS Act, and report program findings to the FHWA within 5 days of each 30-day reporting period. If the FHWA has not reviewed the State's report and affirmatively extended the State's program within 72 hours after the report is due, program approval is automatically suspended in the reporting State until the FHWA review is completed and approval granted.

The program shall terminate for all States by April 30, 1997. Participating States may terminate the program before April 30, 1997, but may not extend the program beyond that date. The FHWA may terminate a State's participation at any point during the program. Each State may terminate a motor carrier's or a driver's participation at any point during the program. Each State may also voluntarily terminate its own participation at any point during the program.

### VI. Reports

Each State will provide to the FHWA the results of the first 15 days of the Heating Oil Program within 5 days of the completion of the first 15 days program. The report shall include:

- The number of participating carriers
- The number of participating drivers
- A brief summary of any accident that has occurred, in accordance with Section IV above;
- The number of participating carriers and/or drivers suspended from the program; and
- A preliminary analysis of the safety record of the program to the date of the report, based on the State's experience with similar operations under the current 60-hour and 70-

hour rules (such as natural gas or power company service vehicles).

If the FHWA extends the program beyond the initial 15 days, each State will submit a similar report within 5 days at the end of every 30-day reporting period thereafter. Within 30 days of the conclusion of the program (April 30, 1997), each State will compile and report the results of the program to the FHWA and include an overall evaluation of the program.

#### VII. Final Evaluation of the Program

The NHS Act requires the FHWA to conduct an evaluation at the conclusion of the program. The principal objective of the evaluation is to provide input to a zero-base review of the need for, and the cost and benefits of, the hours-of-service regulations as they apply to home heating oil delivery operations during the winter months. The NHS Act requires the FHWA to initiate a rulemaking, based in part upon the results of the program, to determine whether to authorize State-granted waivers of the hours-of-service regulations to motor carriers transporting home heating oil during the winter months or to amend the hours-of-service regulations to provide flexibility to motor carriers delivering home heating oil during winter periods of peak demand.

Authority: 49 U.S.C. 31136(e); National Highway System Designation Act, Pub. L. 104-59, § 346, 109 Stat. 568, 615 (1995); 49 CFR 1.48.

Issued on: January 17, 1997.

Rodney E. Slater,

*Federal Highway Administrator.*

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### Maritime Administration

[Docket MSP-006/Docket S-942]

#### American President Lines; Notice of Application for a Waiver Pursuant to Section 804 of the Merchant Marine Act, 1936, as Amended

American President Lines, Ltd. (APL), by application received November 7, 1996, applied under Section 651, Subtitle B, of the Act for participation in the Maritime Security Program (MSP). In support of its participation in the MSP, APL by letter dated January 17, 1997 has applied for a waiver pursuant to section 804 of the Merchant Marine Act of 1936, as amended (Act).

On January 21, 1997, APL and MARAD entered into MSP Operating Agreements for nine vessels: APL KOREA, APL PHILIPPINES, APL

SINGAPORE, APL THAILAND, PRESIDENT ADAMS, PRESIDENT JACKSON, PRESIDENT KENNEDY, PRESIDENT POLK and PRESIDENT TRUMAN. APL, in connection with the MSA, was awarded "grandfather" rights under section 804 for its six C-11 vessels: APL KOREA, APL PHILIPPINES, APL SINGAPORE, APL THAILAND, APL JAPAN, and APL CHINA.

APL states that in its capacity both (i) as a contractor under Subtitle A of Title VI of the Act under existing Contract No. MA/MSB 417 and (ii) as an awardee of Operating Agreements and prospective contractor under the new Maritime Security Program established by Subtitle B of Title VI of the Act, APL requests a waiver of the provisions of section 804 to allow APL (or any holding company, subsidiary, affiliate or associate of APL or any transferee of any MSP Operating Agreement from APL to own, operate and/or charter up to 18 foreign-flag vessels in line haul service between the United States and foreign ports in addition to the six such vessels that the Maritime Administration (MARAD) has determined that APL is entitled to own, operate and/or charter pursuant to section 804(f)(2)(A) of the Act. The requested waiver is for the full remaining term of APL's ODS contract and for the full term of APL's MSP Operating Agreements as well as any subsequent renewals of any such Operating Agreement.

APL asserts that grant of the requested waiver is required for several reasons.

1. On the date of enactment of the Maritime Security Act of 1996 (MSA), APL moved cargo on 37 foreign-flag vessels in line haul service between the United States and foreign ports. Only six of these vessels were owned and/or operated by APL, viz., the six C-11 class vessels which are the basis for MARAD's above-noted determination that APL has an entitlement to six vessels under section 804(f)(2)(A). For historical reasons—including APL's pre-existing status as an ODS contractor subject to section 804, under which (prior to the amendments made by the MSA) it was considerably more difficult for a contractor to own and/or operate, as opposed to charter space on, foreign-flag vessels—APL's interest in the other 31 foreign-flag line haul vessels on the date of the MSA's enactment was in the form of space sharing and sailing coordination agreements. Under such agreements, APL chartered and utilized large proportions of the slot capacity of the 31 ships.

APL's position is that it is entitled under section 804(f)(2)(A) to at least 37 foreign-flag line haul vessels, based on

the six C-11s plus the 31 vessels subject to space charter agreements. A list of the 37 foreign-flag vessels is provided as follows:

Vessel name	Flag
ALIGATOR BRAVERY	Panama
ALIGATOR COLUMBUS	Panama
ALIGATOR STRENGTH	Panama
ALIGATOR WISDOM ...	Panama
OOCL SHANGHAI .....	Panama
OOCL AMERICA .....	Liberia
OOCL CALIFORNIA .....	Liberia
OOCL CHINA .....	Liberia
OOCL HONG KONG ....	Liberia
OOCL JAPAN .....	Liberia
APL CHINA .....	Marshall Islands
APL JAPAN .....	Marshall Islands
APL KOREA .....	Marshall Islands
APL PHILIPPINES .....	Marshall Islands
APL SINGAPORE .....	Marshall Islands
APL THAILAND .....	Marshall Islands
ALIGATOR AMERICA ..	Japan
ALLIGATOR GLORY ....	Liberia
ALLIGATOR PRIDE ....	Liberia
ALLIGATOR VICTORY	Panama
OOCL FAME .....	Liberia
OOCL FRONTIER .....	Great Britain
AGLE ANAHUAC .....	Liberia
TMM ACAPULCO .....	Germany
TMM CHETUMAL .....	Greece
TMM MANZANILLO .....	Greece
TMM SINALOA .....	Greece
TMM VERACRUZ .....	Liberia
ALLIGATOR INDEPENDENCE.	Panama
ALIGATOR LIBERTY ...	Japan
ALIGATOR RELIANCE	Japan
ALLIGATOR TRIUMPH	Liberia
NEDLLOYD DEJIMA ....	Netherlands
NEDLLOYD DELFT .....	Netherlands
OOCL FAIR .....	Liberia
OOCL FIDELITY .....	Liberia
OOCL FORTUNE .....	Liberia

However, MARAD determined that, with respect to the 31 vessels subject to space charter arrangements, APL would not be entitled to grandfather rights under section 804(f)(2)(A). APL states that, while it disagrees with this determination, APL is willing to pursue an alternative course—this waiver application—to obtain the authorization for foreign-flag line haul vessels that is essential to APL's success as an ODS and MSP contractor. The requested waiver for 18 vessels is equivalent to half of the 31 vessels subject to space sharing agreements, rounded up to 18 to allow three six-vessel strings in recognition of the operational need to operate line haul vessels in strings providing regular weekly port calls. That number reflects the approximate vessel equivalence of APL's share of the 31 foreign flag line haul vessels on which APL is a charterer.

In addition to the six ships grandfathered under section 804(f)(2) of rights recognized by MARAD based on