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DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****49 CFR Part 385****FMCSA Policy on Considering the Preventability of Crashes in Administrative Review Requests of Hazardous Materials Safety Permit Denials Based Upon Crash Rates in the Top 30 Percent of the National Average Under 49 CFR 385.407****AGENCY:** Federal Motor Carrier Safety Administration (FMCSA).**ACTION:** Notice of enforcement policy.

SUMMARY: FMCSA may not issue a hazardous materials safety permit (safety permit) to a motor carrier that has a crash rate, driver, vehicle or hazardous material out-of-service rate in the top 30 percent of the national average pursuant to 49 CFR 385.407. This document provides notice of FMCSA policy that it will consider preventability when a motor carrier contests the denial of a safety permit based upon a crash rate in the top thirty percent of the national average and presents compelling evidence that one or more of the crashes listed in the Motor Carrier Management Information System (MCMIS) was not preventable and thus not reflective of the motor carrier's suitability to transport the type and quantity of hazardous materials that require a safety permit. Preventability is determined by the following standard: If a driver who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable. FMCSA currently uses this standard in evaluating accident factors under its safety rating process.

DATES: *Effective Date:* September 16, 2008.

FOR FURTHER INFORMATION CONTACT: James O. Simmons, Office of Enforcement and Compliance, Hazardous Materials Division, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 493-0496 (voice), james.simmons@dot.gov (e-mail), Debra S. Straus, Office of the Chief Counsel, (202) 366-2266 (voice), or debra.straus@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION: On June 30, 2004, FMCSA issued a Final Rule containing the regulations implementing the safety permit program. 69 FR 39350. The Final Rule, codified at 49 CFR part 385, identifies who must hold a safety permit, establishes the application process for a safety permit, and the conditions that must be satisfied before FMCSA will issue a safety permit to a carrier. These conditions are set out in 49 CFR 385.407.

Background

Section 385.407 requires that a carrier have a "Satisfactory" safety rating, certify that it has a satisfactory security program, and be properly registered with the Pipeline and Hazardous Materials Safety Administration (PHMSA). 49 CFR 385.407(a)(1), 385.407(b) & (c). Section 385.407(a)(2) additionally states that:

FMCSA will not issue a safety permit to a motor carrier that: (ii) Has a crash rate in the top 30 percent of the national average as indicated in the FMCSA Motor Carrier Management Information System (MCMIS); or

(iii) Has a driver, vehicle, hazardous materials, or total out-of-service rate in the top 30 percent of the national average as indicated in the MCMIS;

The safety permit requirement became effective for motor carriers on the date after January 1, 2005, when the motor carrier was required to file a Motor Carrier Identification Report Form (MCS-150) according to a schedule set forth in 49 CFR 390.19(a). The application for the safety permit was incorporated into the MCS-150, as an expanded form entitled "MCS-150B or Combined Motor Carrier Identification Report and HM Permit Application."

On or about January 3, 2005, the Office of Enforcement and Compliance (OEC) published on its public Web site¹ the formula used to determine the national averages and the crash rates and driver, vehicle and hazmat out-of-service (OOS) rates that establish the thresholds for the "top 30 percent of the national average." The Web site also instructed motor carriers on how to calculate their own out-of-service rates. This information on calculating the national averages, crash rates and out-of-service rates was subsequently published in the **Federal Register**. 72 FR 62795 (Nov. 7, 2007).

Crash Rates

FMCSA may not issue a safety permit to a motor carrier that has a crash rate

¹ <http://www.safersys.org/HazMatRatesPost.aspx#OOSRates>.

in the top 30 percent of the national average as indicated in the MCMIS. 49 CFR 385.407(a)(2)(ii). The threshold crash rate above which a carrier falls within the worst performing or top thirty percent of the national average is recalculated every two years using the crash data from the previous two years. The cut-off for motor carrier crash rates above which a carrier will fall into the top 30 percent of the national average has remained at 0.125 since the inception of the program.

To determine the crash rate for an individual carrier that is applying for a safety permit, FMCSA examines one year of crash data. FMCSA divides the number of crashes for the previous twelve-month period by the total number of power units that the motor carrier operated during that twelve-month period. For example, if a motor carrier had 2 crashes and 10 power units, the crash rate would be 0.20 based upon a calculation of $(2 \div 10 = 0.20)$. FMCSA examines one year of data to remain consistent with FMCSA practice of reviewing one year of records during a compliance review. FMCSA does not consider a single crash to be statistically valid. Thus, crash rates will be calculated only for carriers with more than one crash in the relevant twelve-month period.

Preventability

Petitions for rulemaking filed by the Institute of Makers of Explosives and The Fertilizer Institute requested the Agency to consider crash preventability when evaluating a motor carrier's crash rate under the safety permit program, in the same manner that accident preventability is considered when a motor carrier contests an unfavorable safety rating. In the Agency's response to these petitions issued on June 21, 2007, the FMCSA Administrator agreed that the same preventability criteria used in assessing the "Accident Factor" under 49 CFR part 385, Appendix A.III.B(d), should be applied when a carrier contests denial of a safety permit application based upon its crash rate and provides compelling evidence a crash was not preventable.

The preventability standard found in Appendix A to Part 385, section III.B(d) states:

The FMCSA will continue to consider preventability when a new entrant contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating its accident factor. *Preventability will be determined according to the following standard: "If a driver who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact*

occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.” (Emphasis added.)

The intent of the safety permit program is to hold motor carriers that transport permitted materials to a higher safety standard due to the potential risks associated with transportation of these high-risk hazardous materials. In applying this standard to the safety fitness rating process, FMCSA recognizes that crashes in which the motor carrier’s driver was not at fault and could not have reasonably avoided without further risk, should not adversely reflect on the safety fitness of the motor carrier. Similarly, denial of a safety permit based upon crashes which were not preventable, does not have a reasonable correlation to the safety standard required under the safety permit program.

In the safety rating context, FMCSA considers preventability when the carrier contests the evaluation of the accident factor by presenting compelling evidence that the recordable rate is not a fair means of evaluating the carrier’s fitness under the accident factor. Similarly, FMCSA will consider preventability of crashes under the safety permit program. When a carrier contests the denial of its safety permit application based upon a crash rate that falls into the top thirty percent of the national average and submits compelling evidence that a crash or crashes listed in the MCMIS were not preventable, it should not be included in the crash rate calculation. The preventability standard that will be applied is the same standard that is used in the safety rating context.

Preventability Policy Procedures

Accordingly, FMCSA is implementing the following policy procedures: If a motor carrier’s safety permit application is denied based upon a crash rate greater than the safety permit program crash rate threshold, the carrier may submit evidence to show that one or more crashes were not preventable. In order to preserve the right to seek administrative review of FMCSA’s determination on the preventability of one or more crashes, the carrier should submit such evidence as part of a request for administrative review pursuant to § 385.423(c). The carrier should submit the request to FMCSA’s Chief Safety Officer (CSO) and the Office of Chief Counsel, and must include adequate proof that the crash or crashes in question were not preventable. The standard for determining preventability is the same

as the standard found in Appendix A to Part 385:

If a driver who exercises normal judgment and foresight could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.

It is incumbent upon the carrier to provide reliable and objective evidence that the accident was not preventable. Such evidence may include but is not limited to police reports and other verifiable government reports or law enforcement and witness statements. The issue of whether a crash was or was not preventable under the above-stated standard will be initially addressed by the FMCSA Office of Enforcement and Compliance, Hazardous Materials Division in consultation with the Office of Chief Counsel, Enforcement and Litigation Division. If the initial determination results in a finding that one or more crashes were not preventable, the safety permit application will be reprocessed with the relevant crash or crashes removed from consideration in the crash rate calculation. If removal of the crash(es) results in a crash rate calculation that falls below the crash rate cut-off for the top 30 percent of the national average and no other disqualifying factors exist, FMCSA will issue a safety permit to the carrier. If the Office of Enforcement and the Office of Chief Counsel determine that the evidence submitted does not support a finding that the crash or crashes were preventable, the motor carrier may pursue its request for administrative review by the Chief Safety Officer of the denial of its safety permit application based upon its crash rate. The request for administrative review must have been timely filed and served in accordance with the requirements of 49 CFR 385.423.

Issued on: September 10, 2008.

John H. Hill,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 605

[Docket No. FTA–2008–0015]

Final Policy Statement on FTA’s School Bus Operations Regulations

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Final policy statement.

SUMMARY: Through this notice, the Federal Transit Administration (FTA) clarifies its policy with respect to its interpretation of “tripper service” and “school bus operations” under 49 CFR part 605.

DATE: Effective Date: The effective date of this final policy statement is September 16, 2008.

ADDRESSES: Availability of the Final Policy Statement and Comments: One may access this final policy statement, the proposed policy statement, and public comments on the proposed policy statement at docket number FTA–2008–0015. For access to the docket, please visit <http://www.regulations.gov> or the Docket Operations office located in the West Building of the U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael L. Culotta, Attorney, Office of Chief Counsel, Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., 5th Floor—East Building, Washington, DC 20590. *E-mail:* Michael.Culotta@dot.gov. *Telephone:* (202) 366–1936.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

On May 19, 2008, FTA issued a Notice of Proposed Policy Statement on FTA’s School Bus Operations Regulations¹ to provide guidance in the context of the recent decision of the United States District Court for the Western District of New York in *Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin*.² As of August 6, 2008, FTA received approximately 510 comments on its proposed policy statement.

In the final policy set forth below, FTA clarifies its guidance regarding FTA’s interpretation of its school bus operations regulations. FTA shall construe the term “tripper service,” as it has historically, to include modifications to fare collection or subsidy systems, modifications to the frequency of service, and de minimus route alterations from route paths in the immediate vicinity of schools to stops

¹ 73 FR 28,790 (May 19, 2008).

² 531 F.Supp.2d 494, 507 (W.D.N.Y. 2008) (setting aside FTA’s interpretation of its school bus operations regulations under 49 CFR part 605).