an environmental assessment will be prepared for the subsequent final rule.

d. *Unfunded Mandates Act* . The final rule does not impose an enforceable duty among the private sector and, therefore, are not a Federal private sector mandate and are not subject to the requirements of Section 202 or 205 of the Unfunded Mandates Reform Act (Pub. L. 104–4, 109 Stat. 48, 2 U.S.C. 1501 *et seq.*). We have also found under Section 203 of the Act, that small governments will not be significantly or uniquely affected by this rulemaking.

List of Subjects in 33 CFR Part 334

Danger zones, Navigation (water), Restricted areas, Waterways.

■ For the reasons set out in the preamble, the Corps amends 33 CFR part 334 as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS

■ 1. The authority citation for 33 CFR part 334 continues to read as follows:

Authority: 40 Stat. 266 (33 U.S.C. 1) and 40 Stat. 892 (33 U.S.C. 3).

§ 334.786 [Removed]

■ 2. Remove § 334.786.

Dated: August 14, 2009.

Michael G. Ensch,

Chief, Operations, Directorate of Civil Works.

[FR Doc. E9–20295 Filed 8–26–09; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 390

Regulatory Guidance Concerning Applicability of the Federal Motor Carrier Safety Regulations to Mobile Cranes Operated in Interstate Commerce

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of regulatory guidance.

SUMMARY: The FMCSA announces a revision of the regulatory guidance concerning the applicability of the Federal Motor Carrier Safety Regulations (FMCSRs) to mobile cranes operated in interstate commerce. The regulatory guidance is presented in a question-and-answer format. The guidance is generally applicable to drivers, commercial motor vehicles (CMVs), and motor carrier operations subject to the FMCSRs. All prior interpretations and regulatory guidance concerning the applicability of the FMCSRs to operations of mobile cranes in interstate commerce issued in the Federal Register, as well as memoranda and letters, may no longer be relied upon as authoritative if they are inconsistent with the guidance published today. This guidance will provide the motor carrier industry and Federal, State, and local law enforcement officials with uniform information for assessing the applicability of the FMCSRs to the operations of mobile cranes.

DATES: *Effective Date:* This regulatory guidance is effective on August 27, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, (202) 366–5370, Federal Motor Carrier Safety Administration, 1200 New Jersey Ave., SE., Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Legal Basis

The Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, October 30, 1984) (the 1984 Act) provides authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary to prescribe regulations on CMV safety. The regulations shall prescribe minimum safety standards for CMVs. At a minimum, the regulations shall ensure that—(1) CMVs are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMV's do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMV is adequate to enable them to operate the vehicles safely; and (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators. (49 U.S.C. 31136(a)) Section 211 of the 1984 Act also grants the Secretary broad power, in carrying out motor carrier safety statutes and regulations, to ''prescribe recordkeeping and reporting requirements'' and to ''perform other acts the Secretary considers appropriate.'' (49 U.S.C. 31133(a)(8) and (10))

The Administrator of FMCSA has been delegated authority under 49 CFR 1.73(g) to carry out the functions vested in the Secretary of Transportation by 49 U.S.C. chapter 311, subchapters I and III, relating to commercial motor vehicle programs and safety regulation.

This document provides regulatory guidance to the public with respect to the applicability of the Federal Motor Carrier Safety Regulations (FMCSRs) to the operations of mobile cranes in interstate commerce.

Members of the motor carrier industry and other interested parties may also access the guidance in this document through the FMCSA's Internet site at *http://www.fmcsa.dot.gov*.

Specific questions addressing any of the interpretive material published in this document should be directed to the contact person listed earlier under **FOR FURTHER INFORMATION CONTACT**, or the FMCSA Division Office in each State.

Basis for the Notice

The CMVs are defined in 49 CFR 390.5 as any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle—

(1) Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater; or

(2) Is designed or used to transport more than 8 passengers (including the driver) for compensation; or

(3) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; or

(4) Is used in transporting material found by the Secretary of Transportation to be hazardous under 49 U.S.C. 5103 and transported in a quantity requiring placarding under regulations prescribed by the Secretary under 49 CFR, subtitle B, chapter I, subchapter C.

Paragraph (1) of the definition applies to the vehicles that are the subject of this notice.

Question 9 under 49 CFR 390.5 of the existing regulatory guidance concerns the applicability of the FMCSRs to mobile cranes. The current guidance was published in the November 17, 1993 **Federal Register** (58 FR 60734) and again in the April 4, 1997 **Federal Register** (62 FR 16370). It reads as follows:

Question 9: Are mobile cranes operating in interstate commerce subject to the FMCSRs?

Guidance: Yes, the definition of CMV encompasses mobile cranes.

In a September 21, 2000, decision concerning a civil penalty enforcement case entitled *In the Matter of Williams Equipment Corporation* (Docket No. FHWA–1997–2433), the Acting Chief Safety Officer (CSO) of FMCSA found this regulatory guidance ''unpersuasive.'' The Acting CSO cited *Christensen* v. *Harris County,* 120 S.Ct. 1655, 1657 (2000):

> Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference. They are 'entitled to respect,' but only to the extent that they are persuasive [citation omitted], which is not the case here. [Emphasis supplied in *Williams Equipment* omitted.]

Although the Acting CSO assigned *Williams Equipment* for hearing, the matter was settled without a decision on its merits.

On June 1, 2006, the Kansas Corporation Commission (KCC) issued an Order Addressing Jurisdiction to Midwest Crane and Rigging. The KCC found that Midwest Crane and Rigging is a ''motor carrier'' as defined in Kansas statutes and is subject to Kansas safety regulations. Therefore, the KCC had jurisdiction over Midwest Crane. In arriving at that conclusion the KCC first determined that the self-propelled cranes were motor vehicles under Kansas statute. Midwest Crane petitioned for reconsideration before the KCC, but, on July 17, 2006, the KCC issued an Order on Reconsideration that left in place its findings. Midwest Crane then appealed to the Kansas courts. On July 3, 2007, the District Court of Shawnee County, Kansas, Division Seven, vacated the KCC's Order Addressing Jurisdiction and remanded the case to the KCC to reopen the hearing to attempt to develop facts for the record. The District Court stated,

> No statute or regulation was provided to explain the rationale of classifying of self-propelled cranes as motor carriers. Instead the [Commission] relies upon a ''guidance answer'' posted on the [FMCSA] website, without providing a basis or qualification for such classification. The qualifications and rationales for the ''guidance answer'' are similarly unknown. *(Midwest Crane and Rigging* v. *Kansas Corporation Commission,* Case No. 06–C–1213, Memorandum Opinion and Entry of Judgment, July 3, 2007, at 11.)

In its response to a June 5, 2007, Notice of Claim issued by the Kansas Division Administrator of the FMCSA, Midwest Crane continued to contend it was not a private motor carrier subject to FMCSA's jurisdiction. The firm reasoned that a mobile crane is a unified device that includes a transporting mechanism, that the crane and its transporting mechanism operate as in integrated units, and that there is no vehicle that exists separately from the crane.

On August 1, 2008, the Field Administrator for the FMCSA Midwestern Service Center filed a Motion for Final Order. Midwest Crane answered the Motion on September 15, 2008, continuing to assert that a crane is a unified device and not a commercial motor vehicle. The matter was then referred to the FMCSA CSO who issued Decision FMCSA–2007–29184 on March 30, 2009.

In the Decision, the CSO noted that the Agency had not responded to the former Acting CSO's concerns in 2000, so the matter of FMCSA's jurisdiction over operators of self-propelled cranes previously was not clear. For that reason, no civil penalty was imposed on Midwest Crane. However, the Agency noted that Federal case law provides a straightforward precedent for the regulatory guidance. In *Harshman* v. *Well Service, Inc.,* (248 F.Supp. 953, 958 (D.C. Pa, 1964), aff'd per curiam, 355 F.2d 206 (3rd Cir. 1965), the United States District Court for the Western District of Pennsylvania found that firms operating cement pump trucks, which, like cranes, contained equipment permanently mounted upon specially constructed vehicles, to be private carriers of property. The Court noted that:

> It is fair to say that whenever those pump trucks moved in interstate commerce * * * the prime purpose * * * of such movement was to transport the pumping equipment * * * to and from a job site. Plaintiffs contend that there is no such 'property' transported by the trucks, since, by their view, the pumping equipment has to be viewed as 'unitized' in the truck itself. This view I regard as highly unrealistic. The pumping equipment has nothing to do with the mechanical function of the trucks. Had it not been permanently affixed to the truck chassis, it is scarcely imaginable that plaintiffs would contest its classification in the category of 'property' for transportation. It was permanently affixed, however, thereby enhancing the comparative safety with which it could be transported on the public highways. It would be ironic in the extreme if I were to interpret this laudable safety measure as removing the defendant from the ambit of the Interstate Commerce Commission's power to regulate the safety of operations of carriers in interstate commerce. The pumping equipment * * * carried on the pump trucks did constitute 'property', was owned by the defendant, and was transported in interstate commerce in furtherance of defendant's commercial enterprise.

The CSO noted that similarly, with respect to *Midwest Crane,* the primary purpose of the movement of the vehicles in interstate commerce is to transport the crane apparatus, which was permanently affixed to the vehicles, to and from job sites to perform a commercial service. Enhancing the safety with which this equipment may be transported should not remove the motor carrier from the jurisdiction of the Agency charged with regulating the safety of CMVs. The mobile cranes of concern have gross vehicle weight ratings of from 56,000 pounds to 129,000 pounds, far more than the minimum 26,001 pounds required to meet the definition of a CMV for purposes of the alcohol- and drug-testing requirements, or the minimum 10,001 pounds required to meet the definition of a CMV with regard to other FMCSR requirements.

The CSO stated that clearly, self-propelled cranes should not be removed from the Agency's jurisdiction merely because the cranes are permanently affixed to the vehicles on which they reside. To allow these vehicles to remain outside the reach of the safety arm of this Agency would put the motoring public at great risk. Accordingly, self-propelled cranes are commercial motor vehicles and the motor carriers that operate them are private motor carriers subject to FMCSA's jurisdiction.

For the reasons presented above, FMCSA revises the Question 9 of the Regulatory Guidance to Section 390.5 of the FMCSRs, published online at *http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.asp?chunkKey=0901633480023260*.

Regulatory Guidance

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

Sections Interpreted

Section 390.5 Definitions

Replace Question 9 to read as follows:

Question 9: Are mobile cranes operating in interstate commerce considered CMVs, and are they subject to the FMCSRs?

Guidance: The definition of CMV encompasses mobile cranes. Unlike the off-road motorized construction equipment discussed in Guidance Questions 7 and 8 above, mobile cranes are readily capable of traveling at highway speeds, over extended distances, and in the mixed traffic of public highways. Although the functions a crane performs are distinct from the transportation provided by a truck, the ready mobility of the crane depends on its permanent integration with a truck chassis. The truck chassis is equipped with wheels, tires, brakes, a suspension system, and other components. The mobile crane itself, like an empty CMV (*see* Guidance Question 6), is considered property.

Issued on: August 19, 2009.

Rose A. McMurray,

Acting Deputy Administrator.

[FR Doc. E9–20618 Filed 8–26–09; 8:45 am]

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