

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: March 30, 2011.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 390, and 395

[Docket No. FMCSA-2010-0167]

RIN 2126-AB20

Electronic On-Board Recorders and Hours of Service Supporting Documents

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

ACTION: Notice; request for additional public comment.

SUMMARY: On February 1, 2011, FMCSA published a notice of proposed rulemaking (NPRM), which proposed that electronic on-board recorders (EOBR) be required for commercial motor vehicle (CMV) operators who must keep records of duty status (RODS) (EOBR 2). In the EOBR 2 NPRM and in a predecessor EOBR rulemaking published on April 5, 2010 (EOBR 1), the Agency advised that it is required by statute to ensure that electronic devices are not used to harass CMV drivers, although they can be used by motor carriers to monitor productivity. The Agency believes it satisfactorily addressed the statutory requirement in both its EOBR rulemaking proceedings. In light of recent litigation challenging the Agency's treatment of driver harassment in EOBR 1, however, FMCSA wishes to ensure that interested parties have a full opportunity to address this issue in the active EOBR 2 rulemaking.

DATES: Comments must be received on or before May 23, 2011.

ADDRESSES: You may submit comments identified by the Federal Docket Management System Number (FDMS) in the heading of this document by any of the following methods. Do not submit the same comments by more than one method. However, to allow effective public participation before the comment period deadline, the Agency encourages use of the Web site that is listed first. It will provide the most efficient and

timely method of receiving and processing your comments.

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Fax:** 1-202-493-2251.

- **Mail:** Docket Management Facility; U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

- **Hand Delivery:** Ground floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number for this regulatory action. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Refer to the Privacy Act heading on <http://www.regulations.gov> for further information.

Privacy Act: Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT Privacy Act system of records notice for the FDMS in the **Federal Register** published on January 17, 2008 (73 FR 3316) at <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

FOR FURTHER INFORMATION CONTACT: *For technical issues:* Ms. Deborah M. Freund, Vehicle and Roadside Operations Division, Office of Bus and Truck Standards and Operations, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001 or by telephone at (202) 366-5370. *For legal issues:* Mr. Charles Fromm, Assistant Chief Counsel for Enforcement and Litigation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001 or by telephone at (202) 366-3551.

SUPPLEMENTARY INFORMATION:

Regulatory Background and Authority

On April 5, 2010, the Agency issued a final rule (EOBR 1) (75 FR 17208) that provides new technical requirements for electronic on-board recorders (EOBR). The EOBR 1 final rule also requires the limited, remedial use of EOBRs for motor carriers with significant hours-of-service (HOS) violations. The EOBR 1 final rule requires a motor carrier found to have a 10 percent violation rate for

any HOS regulation listed in Appendix C of 49 CFR part 385 during a single compliance review to install and use EOBRs on all of its CMVs for a period of 2 years. The compliance date for the rule is June 4, 2012.

Subsequently, on February 1, 2011, the Agency published an NPRM that proposed to expand the scope of EOBR 1 to a broader population of motor carriers (EOBR 2) (76 FR 5537). Under the EOBR 2 NPRM, within 3 years of the effective date of the final rule, all motor carriers currently required to maintain RODS for HOS recordkeeping would be required to use EOBRs. In both EOBR rulemakings, FMCSA explained that DOT is directed by 49 U.S.C. 31137(a) to consider driver harassment in promulgating an EOBR rule. Section 31137(a) provides:

If the Secretary of Transportation prescribes a regulation about the use of monitoring devices on commercial motor vehicles to increase compliance by operators of the vehicles with hours of service regulations of the Secretary, the regulation shall ensure that the devices are not used to harass vehicle operators. However, the devices may be used to monitor productivity of the operators.

Although the Agency is not aware of any legislative history or case law concerning 49 U.S.C. 31137(a), FMCSA assessed this provision in the context of all existing legal authorities, permissible productivity monitoring, and related public comments. Based on these considerations, the Agency understands the term "harass" in Section 31137(a) to refer to harassment of drivers resulting from invasion of their privacy and has so interpreted the statutory language. FMCSA has addressed that pertinent statutory concern in this context in both the EOBR 2 NPRM (76 FR at 5552) and the EOBR 1 final rule (75 FR at 17220-21).

First, Section 31137(a) expressly permits use of EOBRs to monitor driver productivity. As a result, the statute permits carriers to use the devices for productivity-related purposes, which could include maintaining contact with drivers, monitoring driver progress, determining delivery and work schedules, and even requiring drivers to return to duty, so long as the drivers would not be put in violation of the HOS or other regulations. Section 31137(a) also expressly contemplates the use of monitoring devices to increase compliance with HOS regulations. As a result, the statute permits carriers to use the devices to monitor when, and for how long, drivers are in a particular duty status. Although some drivers might perceive such monitoring as a form of harassment,

FMCSA construes Section 31137(a) to permit these activities, either because they “monitor productivity,” which is expressly permitted under the statute, or because they use an EOBR to “increase compliance * * * with hours of service regulations,” and thus are outside the meaning of “harass” under Section 31137(a).

Second, as FMCSA construes Section 31137(a), the Agency is not required, in the EOBR rulemakings, to protect against any and all possible harassment that is not related to EOBRs. Rather, its duty is to ensure that the monitoring devices required by the Agency do not increase the harassment of drivers, not to ensure that the devices decrease any previously-existing potential for driver harassment that might have occurred in the absence of such monitoring devices when paper records were the exclusive required means of recording and reporting driver duty status. Accordingly, in exercising its obligations under Section 31137(a), FMCSA may appropriately take into account all existing authorities prohibiting potential harassment of drivers in determining whether the Agency must enact *new* protections against harassment specifically for monitoring devices.

Other existing regulatory and statutory provisions already prohibit carriers from attempting to use EOBRs to harass drivers for ostensible productivity reasons that are actually illegal or illegitimate. For example, 49 CFR 392.3 prohibits motor carriers from requiring ill or fatigued drivers to drive. Accordingly, carriers cannot use EOBRs to monitor a driver’s hours to see if the driver has driving time remaining, and then nonetheless force a driver who is fatigued or ill to return to work. Similarly, 49 CFR part 395 sets forth HOS regulations for CMV drivers. Section 395.3 prohibits a carrier from permitting or requiring any driver to violate these regulations. Section 395.8 also subjects a carrier, as well as a driver, to prosecution for making false reports of duty status. As a result, carriers are forbidden from requiring a driver to manipulate an EOBR to violate HOS regulations or to use an EOBR to otherwise violate those regulations. Further, employer retaliation against a driver who refused to modify his accurate HOS records in response to carrier harassment would be illegal under 49 U.S.C. 31105(a), which prohibits retaliation against employees for filing safety complaints or refusing to operate vehicles in violation of safety regulations, based on unsafe vehicle conditions, or where an employee accurately reports hours on duty. Thus,

even if the “harassment” contemplated by Section 31137(a) extended to these types of scenarios, previously-existing statutes and regulations already address these concerns, and the Agency need not adopt new regulations or limit the capabilities of EOBRs to mitigate them. Rather, as explained above, FMCSA focused its obligations under Section 31137(a) on privacy concerns because those issues represented potential for harassment that both arose for the first time with EOBRs and which were not addressed by previously-existing statutes or regulations.

Furthermore, the EOBRs required by the Agency do not *increase* the potential for carriers to harass drivers for ostensible productivity reasons that are actually illegal or illegitimate, beyond the potential that already exists with paper records. The EOBRs required by the Agency do *not* require the immediate, real-time transmittal of driver duty status data to carriers, which might arguably increase the potential for driver harassment. Rather, under EOBR 1, drivers are required only to submit their duty status data to carriers within three days after it is recorded, *see* 49 CFR 395.16(m), and under EOBR 2 drivers would be subject to the same requirement. Thus, other than the driver privacy concerns noted and addressed by FMCSA, the Agency perceives no other form of “harassment” under Section 31137(a) that is implicated by monitoring devices themselves that must be addressed by the Agency. Indeed, commenters to EOBR 1 said that EOBRs could actually limit carrier harassment with respect to HOS rules. These commenters stated that EOBRs would force carriers that might otherwise harass drivers by coercing them to violate HOS rules to dramatically reduce such practices. Given the accuracy of EOBRs compared to paper logs, where such violations occur, they would be easier to detect and document to prove employer harassment.

Third, driver comments submitted to both the EOBR 1 and EOBR 2 dockets largely focused on the potential for harassment in the privacy context. Their concerns focused primarily on the potential invasion of privacy by the government (*e.g.*, vehicle tracking) and on how data collected would be safeguarded, used, and disseminated (*e.g.*, in post-accident litigation or in personal litigation such as divorce proceedings).

Based on the factors above, the Agency has determined that the statute requires it to protect against privacy invasion in the EOBR rulemakings. In its EOBR 1 rulemaking and in the EOBR

2 NPRM, the Agency took specific steps to ensure that EOBRs are not used to violate driver privacy or to otherwise harass drivers in the privacy context. The Agency also included additional consideration of this issue in the Privacy Impact Analysis conducted in support of each EOBR rulemaking initiative. For example, the technical specifications for the devices mandated in EOBR 1 and proposed for use in EOBR 2 do not require that an EOBR track the precise street address or location of a driver, but that it only record the nearest city, town or village and state when it records the driver’s location (75 FR at 17220 and 76 FR at 5545). And FMCSA requires an EOBR to record a driver’s location at no more than 60 minute intervals, having specifically rejected the “real time” 1-minute intervals proposed in the EOBR 1 NPRM as potentially invading drivers’ privacy. While devices with such real time capability are already available on the market, FMCSA does not read Section 31137(a) as a mandate to prohibit motor carriers from voluntarily using these devices, or their enhanced functionality. The Agency understands Section 31137(a) to require FMCSA to ensure that the devices *the Agency itself* requires are not used to harass drivers; the statute does not require the Agency to prohibit private parties from voluntarily adopting technologies that have capabilities beyond those required by the Agency-mandated EOBRs. Also, EOBR 1 does include provisions to ensure information collected is not misused. *See* Privacy Impact Assessment at 7 (FMCSA–2004–18940–1156).

Recently, however, the Owner-Operator Independent Drivers Association (OOIDA) challenged the EOBR I final rule in a lawsuit brought in the United States Court of Appeals for the Seventh Circuit. In that case, *Owner-Operator Independent Drivers Ass’n v. U.S. Dep’t of Transp.* (Case No. 10–2340) (7th Cir.), OOIDA raised several concerns relating to EOBRs and their potential for harassment. During oral argument on February 7, 2011, the Court specifically noted these concerns.

The EOBR 1 rule is a final Agency action and currently remains under review by the Seventh Circuit. Accordingly, it is not subject to further comment or consideration on harassment or any other matter. The Agency believes that it has appropriately interpreted Section 31137(a) to require the Agency, in the EOBR rulemakings, to protect drivers from harassment resulting from invasion of their privacy. To ensure no misunderstanding on the issue,

however, the Agency seeks to maximize the opportunity for public participation on harassment by inviting further comment during the open EOBR 2 rulemaking.

By notice published on March 10, 2011 (76 FR 13121), the Agency has already extended the public comment period for the EOBR 2 NPRM to May 23, 2011. The Agency encourages interested parties to take advantage of this extended comment period to submit comment on the issues set forth in this notice. As indicated in the March 10 extension notice, the Agency will also accept and consider comments on all issues within the scope of the NPRM.

Request for Comments: FMCSA encourages all interested parties to submit comments, including supporting data, information or examples, regarding the use of EOBRs for purposes of driver harassment. In particular, the Agency encourages commenters to address the following:

- Experiences drivers have had regarding harassment, including coercion by carriers to evade the HOS regulations;
- Whether such carrier activity would be permitted as productivity monitoring or would be barred by other statutory or regulatory provisions;
- Whether use of EOBRs would impact the ability of carriers, shippers, and other parties to harass or coerce drivers to violate HOS requirements;
- The effectiveness of mechanisms currently available under 49 CFR 392.3, 49 CFR part 395 and 49 U.S.C. 31105(a) to protect against carrier coercion; and
- Whether additional regulations or guidance from FMCSA are necessary to ensure EOBR devices are not used to harass vehicle operators.

Issued on: April 7, 2011.

Anne S. Ferro,
Administrator.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2010-0077; MO 92210-0-0008]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List Spring Mountains Acastus Checkerspot Butterfly as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to list the Spring Mountains acastus checkerspot butterfly (*Chlosyne acastus robusta*) as endangered under the Endangered Species Act of 1973, as amended (Act). Based on our review, we find that the petition presents substantial scientific or commercial information indicating that listing the Spring Mountains acastus checkerspot butterfly as endangered or threatened may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the Spring Mountains acastus checkerspot butterfly as endangered or threatened is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this subspecies. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

DATES: To allow us adequate time to conduct this review, we request that we receive information on or before June 13, 2011. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section below), the deadline for submitting an electronic comment is Eastern Standard Time on this date. After June 13, 2011, you must submit information directly to the Nevada Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

ADDRESSES: You may submit information by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Keyword box, enter Docket No. FWS-R8-ES-2010-0077, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on "Send a Comment or Submission."

- *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R8-ES-2010-0077; Division of Policy and Directives Management; U.S. Fish and Wildlife

Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We will post all information we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

FOR FURTHER INFORMATION CONTACT: Jill Ralston, Deputy State Supervisor, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office, 4701 North Torrey Pines Drive, Las Vegas, NV 89130; by telephone 702-515-5230; or by facsimile to 702-515-5231. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Request for Information

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the Spring Mountains acastus checkerspot butterfly from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

- (1) The subspecies' biology, range, and population trends, including:
 - (a) Habitat requirements for feeding, breeding, and sheltering;
 - (b) Genetics and taxonomy;
 - (c) Historical and current range, including distribution patterns;
 - (d) Historical and current population levels, and current and projected trends; and
 - (e) Past and ongoing conservation measures for the subspecies, its habitat, or both.

- (2) The factors that are the basis for making a listing/delisting/downlisting determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

- (a) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (b) Overutilization for commercial, recreational, scientific, or educational purposes;
- (c) Disease or predation;
- (d) The inadequacy of existing regulatory mechanisms; or
- (e) Other natural or manmade factors affecting its continued existence.