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# Pennsylvania Farm Bureau

510 S. 31st Street • P.O. Box 8736 • Camp Hill, PA 17001-8736 •

Phone (717) 761-2740 • FAX 731-3515 • [www.pfb.com](http://www.pfb.com)

**DATE:** February 23, 2010

**TO:** James M. Smith, Regulatory Analyst  
Independent Regulatory Review Commission

Michael J. Stephens, Regulatory Analyst  
Independent Regulatory Review Commission

**FROM:** John J. Bell, Governmental Affairs Counsel  
Pennsylvania Farm Bureau

**RE:** Response to your request for Pennsylvania Farm Bureau's interpretation of FMCSA's February 23, 2010 memorandum from Ann G. Gawalt to Tim Cotter<sup>1</sup>

INDEPENDENT REGULATORY  
REVIEW COMMISSION

2010 FEB 24 AM 9:12

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## VIA EMAIL TRANSMISSION

This memorandum is responding to your request earlier today for our interpretation of the aforementioned FMCSA memo as it relates to comments contained in our February 18 letter to the Commission, which urged and recommended that the Commission disapprove the Department of Transportation's final form rulemaking on intrastate motor carrier safety requirements.

In essence, we do not believe the FMCSA memo provides any meaningful clarification to the exclusions from regulation that may apply to agricultural vehicles, agricultural vehicle drivers or farmers. And even assuming the FMCSA memo is to be read in its most positive light, the memo does not diminish our the concerns expressed in our February 18 letter with respect to other agricultural vehicles (specifically trucks) that will likely become subject to regulation under the proposed rulemaking.

The FMCSA memo only strengthens our belief, and should provide further justification to the Commission that the proposed rulemaking needs be disapproved, in order for federal and state officials to make a more proactive, cooperative and open effort to provide clearer, more definitive and more sensible regulatory guidance to farmers.

### *The tractor issue.*

The FMCSA memo makes a reference to "farm tractors" in the context of its discussion of certain off-road construction vehicles that FMCSA considers to be excluded from the definition from commercial motor vehicles.<sup>2</sup>

<sup>1</sup> Hereafter this memorandum will be referred to as the "FMCSA memo."

<sup>2</sup> Exclusion from the definition of "commercial motor vehicles" would have the legal effect of excluding such vehicles from all of the federal motor carrier safety regulations' requirements.

Appendix A<sup>3</sup> contains the specific language of the questions and answers that are contained in Questions 7 and 8 of FMCSA's interpretation to 390.5, referenced in the FMCSA memo.<sup>4</sup> A more careful reading of the answers to Questions 7 and 8 shows the answers to expressly state that the exclusion only applies:

1. When the vehicle is "operated at construction sites"; and
2. When the vehicle "is not used in furtherance of a transportation purpose".<sup>5</sup>

Furthermore the answers to Questions 7 and 8 expressly state that the definition of off-road motorized construction equipment is to be narrowly construed to apply only to vehicles that are not used in furtherance of a transportation purpose. Certainly, the qualifying reference to "off-road construction vehicle itself suggests that the exclusion is limited and narrow in scope to motorized construction equipment, and more specifically to "tractors" that are part of highway or building construction, not to farming.

The inference that the exclusion applies only to equipment used in the course of construction is furthered by the fact that FMCSA's interpretive guidance on § 390.5 specifically uses the term "farm" in response to one another question providing guidance on the applicability of § 390.5's provisions.<sup>6</sup>

While the FMCSA memo discusses "farm tractors" in the same breadth of discussion of exemption of off-road construction vehicles, this discussion does not give us due comfort that implements of husbandry and the "transportation purposes" commonly associated with implements of husbandry will be excluded from the definition of "commercial motor vehicles." If FMCSA truly intended all vehicles not designed for highway use from the definition, it could have easily, clearly and straightforwardly stated this in the regulations or interpretive guidelines. But such an expression is glaringly absent.

Additionally, in light of action taken by FMCSA in its 2007 audit to specifically identify 67 Pa. Code 231.2's exclusion of implements of husbandry and farm trucks exempt from registration from the intrastate motor carrier safety regulations as "deficient" and FMCSA's apparent insistence that this exclusion be eliminated under the threat of withholding federal funds, we are skeptical that the suggested exemption for implements in the FMCSA memo will be broadly applied. We strongly believe the proposed rulemaking needs to more

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<sup>3</sup> FMCSA's interpretative guidelines for § 390.5 are found on the Internet at: <http://www.fmcsa.dot.gov/rules-regulations/administration/fmcsr/fmcsrruletext.aspx?chunkkey=0901633480023260>.

<sup>4</sup> We would note there is no express exclusion for "off-road vehicles" or "off-road construction vehicles" in 49 CFR 390.5. As we have noted in our February 18 letter, the only criteria expressed in § 390.5 to determine whether a vehicle is a "commercial motor vehicle" are that the vehicle exceeds a threshold weight and the vehicle is "used on a highway". This language contrasts from provisions found in other federal laws that have used and defined "highway motor vehicle" as vehicles designed for highway use and have expressly excluded vehicles not designed for highway use (i.e. implements of husbandry) from the definition.

<sup>5</sup> We can only guess that a "transportation purpose" is intended to mean the transportation of property or passengers, which is the overriding focus of the federal motor carrier safety regulations. See 49 CFR 390.3(a). If our guess is correct, the common uses of farm tractors, i.e. the towing of trailers to haul fertilizer, harvested farm products, non-motorized farm implements and other materials around the farm would not qualify for the exclusion.

<sup>6</sup> See Question 1.

expressly state in the body of the regulations that implements of husbandry and their drivers are not to be regulated, as is contained currently in the state motor carrier safety regulations.<sup>7</sup>

***We would still have significant concerns, even if “tractors” are not regulated.***

Even if the broadest interpretation of the FMCSA memo is applied and the scope of FMCSA’s “construction tractor” exclusion is interpreted to extend to all Pennsylvania implements of husbandry, we would still have serious concerns with respect to the proposed rulemaking’s applicability in the use of farm trucks around the farm, particularly with respect to the use of trucks in combination with trailers. Farmers will still have the ominous task of trying to determine what applies and what does not apply in the fog of the federal regulations provisions. Neither the FMCSA memo nor its application in the context of the generic provision of the proposed rulemaking offer to farmers any concrete guidance or relief from the federal standards, and farmers will still need to work through the confusing mishmash of federal regulations to figure out what applies and what does not. All of this effort will need to be done without any improvement to safety of vehicles on the road.

Many trucks (particularly trucks exempt from registration) are used around the farm to tow implements and trailers to complete the various agricultural tasks. While interpretations that confirm continuation of the current exemption provided to implements of husbandry will be a help, farmers will still face significant legal and practical obstacles in trying to comply with whatever regulations that do apply while trying to viably manage their farm.

We continue to believe it is imperative for the proposed rulemaking itself to work through the fog of federal regulations to expressly provide what does and does not apply. And we believe the spirit of the Regulatory Review Act requires the Department of Transportation to do this. The proposed rulemaking offers no assistance in this regard.

***Federal regulatory jurisdiction and relevance to the proposed rulemaking.***

From the time that Pennsylvania Department of Transportation was initially notified of “deficiencies” in Pennsylvania’s intrastate regulations and throughout the Department’s consideration, drafting and finalization of the proposed rulemaking, the Department has consistently represented:

- FMCSA’s pressure to withhold federal funds is the overriding basis behind the change in intrastate regulations being pursued in the proposed rulemaking.
- State officials would not be actively seeking any change to the current provisions of intrastate regulations if there were no risk of loss of federal funds in maintaining the intrastate regulations in their current form.

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<sup>7</sup> We should also note that the FMCSA memo itself, unlike memos normally drafted and distributed, does not identify subject matter that the memo is trying to address. Readers are left to guess what the memo is really trying to accomplish or how (or if) this memo is supposed to be read in the context of what states must and must not do in their regulation of intrastate motor vehicles.

- The Department has no alternative to doing what it proposes to do in the proposed rulemaking.

The FMCSA memo states that the agency lacks any meaningful authority to regulate agricultural transportation. The FMCSA memo strikingly contradicts the representations the Department has made throughout the regulatory process. Basic logic would lead reasonable persons to either conclude that the Department seriously failed in correctly understanding the changes to current regulations that FMCSA was demanding; or that FMCSA had misunderstood and misapplied its authority initially in its review and audit of Pennsylvania's intrastate regulations and are now conceding that it had legally overreached in its demands of regulatory changes on Pennsylvania.

The discussion of federal regulatory jurisdiction over agricultural transportation expressed in the FMCSA memo raises serious questions about the legal or practical necessity for Pennsylvania to change any of its current provisions that relieve farmers and agricultural vehicle drivers from the needless and onerous requirements of commercial truck regulation. And the Department has offered no compelling need or reason for the changes in the proposed rulemaking, other than potential loss of federal funds.

The FMCSA memo's concession that FMCSA lacks regulatory authority with respect to the regulation of agricultural transportation should give the Commission even greater cause to disapprove the proposed rulemaking.

***The FMCSA memo shows the avenues for relief to Pennsylvania Farms were not fully explored.***

We would also note that the FMCSA memo identified an avenue of regulatory pursuit that was clearly not pursued by the Department in its proposed rulemaking. The memo expressly recognizes the legal authority of states to exempt intrastate commercial vehicles at or below 26,000 pounds – including combination vehicles – from any or all of the federal motor carrier safety requirements. While we do not believe the incorporation of this exemption would necessarily satisfy all of our concerns with the proposed rulemaking, incorporation of this exemption would, relatively speaking, have been “better” than the proposed rulemaking's final-form version.

The truth of the matter is that while Pennsylvania may have had the authority to apply this exemption to agricultural vehicles, the Department of Transportation failed to do so. Again, serious issues are raised with respect to the adequacy of effort in attempting to provide a less onerous alternative to the regulations the Department is offering in final form.

### ***Conclusion.***

We believe that the FMCSA memo gives the Commission even greater cause and justification under the principles prescribed in the Regulatory Review Act to disapprove. And we continue to urge the Commission to do so.

## **APPENDIX A**

### **FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION INTERPRETIVE GUIDANCE FOR 49 CFR 390.5**

**Question 7:** Does off-road motorized construction equipment meet the definitions of “motor vehicle” and “commercial motor vehicle” as used in § 383.5 and 390.5?

**Guidance:** No. Off-road motorized construction equipment is outside the scope of these definitions: (1) When operated at construction sites; and (2) when operated on a public road open to unrestricted public travel, provided the equipment is not used in furtherance of a transportation purpose. Occasionally driving such equipment on a public road to reach or leave a construction site does not amount to furtherance of a transportation purpose. Since construction equipment is not designed to operate in traffic, it should be accompanied by escort vehicles or in some other way separated from the public traffic. This equipment may also be subject to State or local permit requirements with regard to escort vehicles, special markings, time of day, day of the week, and/or the specific route.

**Question 8:** What types of equipment are included in the category of off-road motorized construction equipment?

**Guidance:** The definition of off-road motorized construction equipment is to be narrowly construed and limited to equipment which, by its design and function is obviously not intended for use, nor is it used on a public road in furtherance of a transportation purpose. Examples of such equipment include motor scrapers, backhoes, motor graders, compactors, tractors, trenchers, bulldozers and railroad track maintenance cranes.

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**From:** Smith, James M.  
**Sent:** Wednesday, February 24, 2010 7:25 AM  
**To:** IRRC  
**Subject:** FW: Federal Interpretation  
**Attachments:** Amts to Intrastate MC Regs-Memo to IRRC-23 Feb 2010.pdf

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**From:** John Bell [mailto:JJBELL@pfb.com]  
**Sent:** Tuesday, February 23, 2010 9:20 PM  
**To:** Smith, James M.; Stephens, Michael J.  
**Cc:** Gary Swan; Joel Rotz; Kristina Watson; Samuel Kieffer  
**Subject:** Re: Federal Interpretation

**Date:** February 23, 2010

**To:** James M. Smith, Regulatory Analyst  
Independent Regulatory Review Commission

Michael J. Stephens, Regulatory Analyst  
Independent Regulatory Review Commission

**Re:** Response to your request for our interpretation of FMCSA document of February 23 to Tim Cotter re farm issues

James and Michael,

Attached would be our response. Please let me know if you have any additional questions.

Sincerely,

John

John J. Bell  
Governmental Affairs Counsel  
Pennsylvania Farm Bureau  
Telephone: (717) 731-3547  
FAX: (717) 731-3575  
Email: [jjbell@pfb.com](mailto:jjbell@pfb.com)

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**From:** "Smith, James M." <[jsmith@irrc.state.pa.us](mailto:jsmith@irrc.state.pa.us)>  
**To:** "John Bell" <[JJBELL@pfb.com](mailto:JJBELL@pfb.com)>, "Joel Rotz" <[JBROTZ@pfb.com](mailto:JBROTZ@pfb.com)>  
**CC:** "Stephens, Michael J." <[Mstephens@IRRC.STATE.PA.US](mailto:Mstephens@IRRC.STATE.PA.US)>  
**Date:** 2/23/2010 12:48 PM

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2010 FEB 24 AM 9:12  
INDEPENDENT REGULATORY  
REVIEW COMMISSION

**Subject:** Federal Interpretation

John and Joel –

FYI we just met with the Department and others. They just received the attached document from the FMCSA before the meeting. We expect it probably only resolves a portion of your concern, although we are still reading it ourselves. The document is available on our website under IRRC #2745 at the bottom under "Related Documents."

(<http://www.irrc.state.pa.us/Regulations/RegInfo.cfm?IRRCNo=2745> )

Although we are in the blackout period, IRRC can ask for information from the public during the blackout period. So, we are requesting the PFB interpretation of this document as it relates to your comment asking for disapproval of the final-form regulation.

Thanks,

Jim

James M. Smith  
Regulatory Analyst  
717-783-5439  
[jsmith@irrc.state.pa.us](mailto:jsmith@irrc.state.pa.us)

Independent Regulatory Review Commission  
333 Market Street, 14th Floor  
Harrisburg, PA 17101  
717-783-5417  
[www.irrc.state.pa.us](http://www.irrc.state.pa.us)

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