



August 27, 1998

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Docket Clerk
Room PL-40 1
U.S. Department of Transportation
401 "M" St., SW
Washington, DC 20590

DEPT. OF TRANSPORTATION
DOCKET SECTION
98 AUG 27 PM 3:43

RE: FHWA-98-3414' -4

Dear Sir or Madam:

On behalf of the Association of Waste Hazardous Materials Transporters (AWHMT), I am responding to FHWA's request for comments on the use of the "North American Uniform Out-of-Service Criteria".

The AWHMT represents companies that transport, by truck and rail, waste hazardous materials, including industrial, radioactive and hazardous wastes, in North America. The Association is a not-for-profit organization that promotes professionalism and performance standards that minimize risks to the environment, public health and safety; develops educational programs to expand public awareness about the industry; and contributes to the development of effective laws and regulations governing the industry.

The majority of hazardous materials shipments are made by motor carrier. Congress has long held that the uniform regulation of hazardous materials promotes safety. The mission of the Commercial Vehicle Safety Alliance (CVSA) is to promote uniformity in the enforcement of motor carrier safety and hazardous materials laws and regulations not only in the United States, but in Canada and Mexico as well. To aid uniform enforcement CVSA has developed criteria to guide enforcement officials, including FHWA inspectors, during their on-road inspections to recognize conditions which are sufficiently hazardous to justify restricting further operation of a vehicle or the driver. AWHMT has participated, as an industry associate, in the development of the so-called "Out-of-Service" (OOS) criteria as it pertains to hazardous materials. This experience has allowed AWHMT to witness the collaborative decision-making process that has produced a consensus guideline against which enforcement actions can be measured and which is systematically and regularly reviewed and updated as necessary. The OOS criteria do not usurp DOT motor carrier safety or hazmat regulatory authority. The OOS criteria do not preclude enforcement officials from issuing violations to drivers who have or whose vehicles have been found in violation of federal safety and hazmat requirements.

¹ 63 FR 38791 (July 20, 1998).

FHWA Use Of OOS Criteria

FHWA has recognized the value of the OOS criteria not only for use by its agents during roadside inspections, but it has prescribed penalties for violations of OOS orders based on the criteria, has made state adoption of federal OOS penalties and assurance that carriers have taken corrective action on OOS orders a condition to receiving federal funding under the Motor Carrier Safety Assistance Program (MCSAP), and uses OOS performance as a factor in determining the safety fitness of motor carriers. Clearly, FHWA benefits from having a nationally-recognized consensus standard by which to measure whether safety concerns should override those of commerce.

While the development of the OOS criteria and penalties is an important tool to ensure uniformity and therefore deserving of federal effort to communicate the criteria to the regulated community, it must be remembered that the OOS criteria are, after all, guidelines. No inspector is precluded from placing a driver and/or vehicle OOS if observed regulatory violations do not exceed the criteria thresholds or from allowing a driver and/or vehicle to proceed if the criteria thresholds are breached if safety is better served by, respectively, holding the vehicle or allowing the vehicle to proceed. Consequently, before issues arising from state follow up or failure to follow up compliance with OOS orders or FHWA use of OOS orders as a factor in determining carrier safety fitness can be addressed, more must be known about how rigidly inspectors adhere to the OOS criteria.

Key Considerations

In the meantime, we believe FHWA should ensure the following principles no matter what it determines should be the future scope and effect of the OOS criteria:

- **Disclosure:** FHWA must disclose the OOS criteria to the regulated community. We would suggest that this, at minimum, be accomplished immediately following CVSA's annual review and update of the criteria by publication in the Federal Register. This commendation may raise economic considerations for CVSA as we understand CVSA holds the copyright to the criteria and receives proceeds from sales. If this is the case, we believe CVSA should be compensated by FHWA for the service they perform to develop and maintain uniform criteria.
- **Flexibility:** CVSA has consistently maintained its commitment to review and update the OOS criteria. FHWA should take no action that would undermine the willingness or ability of CVSA or whoever has final control over the content of OOS criteria to review and make changes, if necessary, on a periodic and predictable basis.
- **International Harmonization:** CVSA's criteria are used in Canada and Mexico as well as the United States. FHWA should recognize and support the international application of the OOS criteria and take no action that would impede harmonization of such criteria across North America.

Issues

As long as a motor carrier's OOS experience is used to determine its safety fitness, FHWA must do more to inform and update the regulated community on the OOS criteria. While only a guide, the OOS criteria is an essential enforcement tool. Had CVSA not developed these criteria, we believe FHWA would have been compelled to do the same.

Given the importance of the OOS criteria, FHWA attempted to share useful information about the differences between the criteria and FHWA's annual vehicle inspection criteria. However, FHWA's subsequent decade-long failure to update this comparative analysis resulting in the admission that the analysis is "of little use" cannot be justified.² At a minimum, FHWA should commit to update this comparative analysis as needed.

FHWA seems overly concerned that, if the regulated community becomes aware of the OOS criteria, it will "undermin[e] the general principle that compliance with all applicable safety regulations is required."³ To the extent there may be some validity to this concern, FHWA bears some responsibility for putting so much emphasis on a carrier's OOS experience in determining the carrier's safety fitness. We do not, however, believe FHWA's concern will escalate because FHWA better informs the regulated community of the OOS criteria. First, the OOS is only a guideline and FHWA should inform the regulated community of that fact when it discloses the criteria. Second, nothing in FHWA's (or state's) enforcement policy precludes fines or penalties to a carrier simply because a regulatory violation does not raise to the level of a OOS criteria violation. Third, if FHWA believes that critical safety concerns are not being addressed or sufficiently addressed by the OOS criteria, FHWA should bring these concerns to CVSA's attention.

We are very concerned about FHWA's suggestion that it would consider an option to "limit the use of the criteria" simply to avoid "adoption of the criteria as regulations."⁴ FHWA does not elaborate on how it would limit the use of the criteria. However, since it is known how the OOS criteria is currently applied, is FHWA suggesting that it would not recommend the criteria to its agents during roadside inspections, or that it is prepared to change federal law concerning penalties of OOS orders based on the criteria? If "limitation" would undermine the universal acceptance or use of the criteria by state, international, and indeed, FHWA enforcement officials, we would oppose all such limitations. Likewise, we see absolutely no value in FHWA's suggestion that the CVSA's OOS criteria "be one of several acceptable sets of criteria States could use."⁵ How could such an outcome benefit safety? If there is a problem or deficiency with an OOS criterion, it should be addressed by amending the criterion, not by giving the enforcement community a range of OOS criteria options.

2 63 FR 38792 (July 20, 1998).

3 63 FR 38794 (July 20, 1998).

4 Ibid.

5 Ibid.

It is imperative that FHWA publish the OOS criteria in the Federal Register at least annually as a notice to the regulated community and include information about the development and use of the criteria. The criteria merits such periodic publication because it is a critical enforcement tool used by FHWA for a number of purposes and not all motor carriers can participate in the CVSA process, nor should they be compelled to participate in order to obtain these criteria. On the other hand, we would not support verbatim adoption of the criteria in the federal motor carrier safety regulations (FMCSRs) because the adoption would inevitably lag behind the periodic CVSA recommendations to update the criteria and it may erode the international harmonization of the criteria.

Conclusion

AWHMT believes the central issues raised by this rulemaking can be remedied without doing harm to the CVSA commitment to develop and maintain the OOS criteria by annually publishing the criteria in the Federal Register and incorporating the criteria, by reference, in the FMCSRs. We also believe the value of FHWA's comparative analysis between the OOS criteria and FHWA's annual inspection standards is only as good as FHWA's willingness to keep the analysis updated and that FHWA should recommit to this task.

We appreciate the opportunity to provide these comments and believe there is no reason why FHWA cannot move expeditiously to address these concerns.

Sincerely,

A handwritten signature in black ink that reads "Michael Comey". The signature is written in a cursive, flowing style.

Michael Comey
Chairman