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U.S. Department of Transportation
Docket Management Facility
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FMCSA-2001-11060-21

- Re: Docket No. FMCSA-2001-11060; Certification of Safety Auditors, Safety Investigators, and Safety Inspectors, Interim Final Rule; Request for Comments, 67 Fed. Reg. 12,776 (March 19, 2002)**
- Re: Docket No. NHTSA-02-11592; Notice 1, Record Keeping and Record Retention, Notice of Proposed Rule Making (NPRM), 67 Fed. Reg. 12,800 (March 19, 2002)**
- Re: Docket No. NHTSA-02-11593; Notice 1, Importation of Commercial Motor Vehicles, Notice of Proposed Rule Making (NPRM), 67 Fed. Reg. 12,806 (March 19, 2002)**

On behalf of Public Citizen, the Environmental Law Foundation ("ELF"), California Labor Federation ("Cal Labor Fed"), International Brotherhood of Teamsters ("Teamsters"), Brotherhood of Teamsters, Auto and Truck Drivers Local 70 ("Local 70"), and California Trucking Association ("CTA"), we submit the following comments on the above-listed interim final and proposed rules. On April 17, 2002, we submitted comments and evidence concerning two other interim final rules: 1) Docket No. FMCSA-98-3298; Application by Certain Mexico-Domiciled Motor Carriers To Operate Beyond United States municipalities and Commercial Zones on the United States-Mexico Border, Interim Final Rule; Request for Comments, 67 Fed. Reg. 12702 (2002); and, 2) Docket No. FMCSA-98-3299; Safety Monitoring System and Compliance Initiative for Mexico-Domiciled Motor Carriers Operating in the United States, Interim Final Rule; Request for Comments, 67 Fed. Reg. 12758 (2002). We request that our earlier comments and evidence be incorporated into this record by reference. Moreover, because the earlier two interim final rules are closely related to the latest interim final rule, and because all of them are attempting to satisfy Congressional preconditions to the processing of new

applications by Mexican motor carriers seeking U.S. operating authority, the DOT's administrative record of decision here should include all of the comments and evidence previously submitted for the earlier two interim final rules.

The federal actions being taken by the Department of Transportation will significantly increase the overall commerce by truck between Mexico and the U.S., thereby greatly increasing emissions of air pollutants beyond those amounts that would otherwise be emitted. We have previously pointed out evidence in the record supporting these facts. However, additional supporting evidence can be found in GAO Report 02-238, dated December 2001, and entitled North American Free Trade Agreement, Coordinated Operational Plan to Ensure Mexican Trucks' Compliance With U.S. Standards (hereinafter "GAO Report") at pp. 3-4, which we previously submitted under separate cover. These federal actions will also allow entry to thousands of Mexico-domiciled trucks, nearly all of which emit higher amounts of air pollutants than the U.S. trucks that they will displace. *See, e.g.*, GAO Report at p. 10 (according to Mexican registration data, in 2000 only 20 % of commercial cargo trucks registered for use on Mexican federal highway were manufactured *after* 1994; Mexican officials admitted to GAO officials that trucks manufactured in Mexico prior to 1994 were not build to U.S. emissions standards.)

The resulting increased emissions will delay timely attainment of the national primary air quality standard (NAAQS) for photochemical oxidants (ozone) in several areas in California and Texas that are currently nonattainment for that standard, and they may delay the attainment of the national primary ambient air quality standard (NAAQS) for particulates (PM10) in several areas in California that are currently nonattainment for that standard. The increased emissions from the influx of Mexico-domiciled trucks allowed by the above-listed actions will also increase the frequency or severity of existing violations of the NAAQS for ozone and particulates. Further, the increased emissions from the Mexico-domiciled trucks will cause or contribute to new violations of the recently issued NAAQS for ozone and fine particulates.

With respect to the Interim Final Rule set forth at Docket No. FMCSA-2001-11060 regarding the certification of safety auditors, the FMCSA has claimed a categorical exclusion from the National Environmental Policy Act ("NEPA"). Any claimed categorical exclusion from NEPA is inappropriate under the facts, especially since this interim final rule is a Congressional precondition to the entry of Mexico-domiciled trucks. Further, whether viewed in isolation or in conjunction with the other two interim final rules previously issued by FMCSA (Docket Nos. FMCSA-98-3298 and FMCSA-98-3299), it is clear that this latest interim rule constitutes a major federal action significantly affecting the quality of the human environment. At the very least a legally-appropriate Environmental Assessment (EA) should have been prepared.

We have previously pointed out that the EA for the prior two interim final rules is woefully inadequate and by no means supports the associated finding of no significant impact (FONSI). Even if the DOT were to abandon its claim of categorical exclusion from NEPA and

assert that the existing EA purportedly addresses the adverse environmental impacts of above-listed actions, that assertion would be erroneous. As a matter of procedure, this interim final rule needs to be reissued based upon a legally sufficient EA. Further, the existing EA is legally deficient.

We have previously enclosed and again are submitting via overnight mail (by letter of May 17, 2002), a technical report (hereinafter the "Sierra Research Report")¹, prepared by Sierra Research, a highly-regarded consulting firm that specializes in air pollution assessments on behalf of public and private clients. The authors of this report are recognized experts in the field of air pollution research, particularly from mobile sources. The resumes of the principal authors, James Lyons, Philip Heirigs, and Lori Williams, are enclosed for your consideration. We are also submitting the declaration of James Michael Lyons, Ph.D., and Exhibit 1, both of which were submitted in connection with plaintiffs' case pending in the Northern District of California (Case No. C-02-2115-CW) (hereinafter "Lyons Declaration"). This declaration adds even greater weight to the conclusions contained in the Sierra Research Report.

The Sierra Research Report and Lyons Declaration demonstrate that the above-listed actions, whether considered in isolation or as a group, constitute a major federal action significantly affecting the quality of the human environment. As such, it is an action for which FMCSA must prepare a full-fledged Environmental Impact Statement ("EIS"). Certainly this rulemaking required the preparation of a legally adequate EA and cannot go forward on the basis of a categorical exclusion.

Moreover, aside from failing to prepare an EIS, FMCSA has not prepared a conformity analysis pursuant to section 176 of the Clean Air Act, 42 U.S.C. § 7506, so as to determine the extent to which the influx of Mexico-domiciled trucks will increase emissions in nonattainment areas, the emissions reduction from other sources that will be needed to offset the increased emissions from Mexico-domiciled trucks, and the steps necessary to achieve the offsets. Since the above-listed actions do not conform to the Texas and California state implementation plans ("SIPs"), the FMCSA may not engage in or support those actions in any way. The FMCSA also cannot approve any actions by private entities (i.e., the owners and operators of the Mexico-domiciled trucks) that result in the increased emissions described above.

I. The FMCSA's Claim of Categorical Exclusion from NEPA is Erroneous and the Environmental Assessment Is Grossly Inadequate and Should Be Replaced with a Full-Fledged EIS Prior to Proceeding with the Above-Listed Actions.

Under the NEPA, 42 U.S.C. §§ 4321, et seq., when a federal agency proposes to

¹ The full title of the Sierra Research Report is "Critical Review of "Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment," Prepared by John A. Volpe Transportation Systems Center, January 2002" (Report No. SR02-04-01).

undertake a "major federal action significantly affecting the quality of the human environment," it must prepare an EIS detailing its environmental impact, any unavoidable adverse environmental effects, alternatives to the action, local short-term uses versus long-term productivity, and the commitment of any irreversible and irretrievable resources. In 1978, the Council on Environmental Quality ("CEQ") promulgated regulations that federal agencies are required to follow in implementing NEPA. 40 C.F.R. §§ 1500, et seq. In determining whether to prepare in EIS, the agency must ordinarily prepare an environmental assessment (EA). 40 C.F.R. § 1501.4(b). If the EA leads the agency to conclude that an EIS is not necessary, it must prepare a finding of no significant impact (FONSI). 40 C.F.R. § 1501.4(e).

The FMCSA has claimed a categorical exclusion from NEPA and specifically disavowed that the EA previously prepared by the DOT, entitled John A Volpe Transportation Systems Center, Safety Oversight for Mexico-Domiciled Commercial Motor Carriers, Final Programmatic Environmental Assessment (January 2002), applies to the interim final rule and proposed rules listed above. We believe that the interim final and proposed rules cannot be categorically excluded from NEPA and should instead be considered part of one overall program that is designed to satisfy Congressional preconditions for processing Mexico-domiciled truck applications. And even if the DOT attempted belatedly to apply the EA and FONSI to these rules, that decision would also be erroneous, not only because of the flawed procedures used but also because the existing EA is legally defective in numerous respects.

For example, the CEQ regulations define the term "effects" to include "[d]irect effects which are caused by the action and occur at the same time and place" and "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). In particular, "indirect effects" may include growth inducing effects . . . and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8(b). As the agency's EA apparently recognizes, the adverse air quality impacts of the increase in the number of Mexico-domiciled trucks that will come into existing ozone and particulate nonattainment areas and areas that are potentially nonattainment for ozone and fine particulates are clearly indirect effects of the above-listed actions. Yet the EA dismisses these effects, completely disregarding the technical evidence demonstrating that the increased emissions will be substantial.

The EA is also defective in terms of defining the areas that will be impacted. The CEQ regulations define the term "significantly" to require considerations of both "context" and "intensity." In considering the "context" of the action, the agency must analyze "several contexts" including both "society as a whole" and the "affected region." 40 C.F.R. § 1508.27(a).

Incredibly, the EA prepared by the FMCSA examined only the overall percentage increases in emissions *nationwide* and entirely failed to assess the air quality impact of increased emissions and increased ambient pollutant levels in those areas where the impacts of the no action and proposed action scenarios are likely to be greatest. This approach directly conflicts with the agency's obligation to consider the "affected region." The Sierra Research Report

demonstrates that many specific regions and geographic areas will be hard hit as a result of the interim final rules. This conclusion is supported by the GAO Report, which acknowledges that much of the truck traffic occurs at only a few points of entry. See GAO Report at 4 (most of northbound border crossing occurred at 5 points of entry in 2001, including Calexico and Otay Mesa in California; Texas and California handle approximately 91% of truck crossings from Mexico.)

In considering the "context" of the action, the CEQ regulations provide that "[b]oth short- and long-term effects are relevant." 40 C.F.R. § 1508.27(a). Yet as shown in the Sierra Research Report, the EA prepared by FMCSA considered only the exceedingly short-term impacts of the actions on air quality in the year 2002, *at least half of which will be over by the time that the trucks begin to move across the country*. The use of such a short time frame is preposterous in the context of regulatory decisions that will have such a long life span.

In considering the "intensity" or "severity" of the impact, the agency must examine "the degree to which the proposed action affects public health or safety," "[u]nique characteristics of the geographic area," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," and, importantly, "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27(b).

With respect to the health and safety aspects of the interim final and proposed rules, we have recently submitted for your consideration (by overnight letter of May 17, 2002) the declaration of Dale Hattis, Ph.D., and Exhibit 1, both of which were previously submitted in connection with plaintiffs' case pending in the Northern District of California (Case No. C-02-2115-CW) (hereinafter "Hattis Declaration"). The Hattis Declaration plainly shows that DOT's interim rules pose serious health risks. Indeed, Dr. Hattis expects to see an eventual annual impact of dozens of increased deaths, hundreds of additional asthma attacks, thousands of days of lost work and tens of thousands of days of restricted activity in adults each year as a result of the increased emissions from implementation of the FMCSA rules.

There are numerous additional sources of information demonstrating that the environmental impacts will be significant. For example, in addition to the Sierra Research Report, the Border Environment Cooperation Commission points out in its first state of the environment report dated January 2002 that trucks transporting goods across the border are polluting the air with serious amounts of greenhouse gases. This report should be made part of the record of proceedings. In short, the consideration of these and other critical factors in the EA prepared for FMCSA was grossly inadequate.

More particularly, Sierra Research found that the EA contained the following specific flaws:

- Failing to account for emissions differences between Mexico-domiciled-domiciled and U.S.-domiciled trucks that exist now and that will become even more significant in the future;
- Improperly assessing the air quality impact of the no action and proposed action scenarios by comparing the associated increase in emissions to total nationwide emissions from trucks;
- Failing to assess the air quality impact of increased emissions and increased ambient pollutant levels in those areas where the impacts of the no action and proposed action scenarios are likely to be greatest, which include many areas that current do not comply with existing federal air quality requirements and are likely to be out of compliance with future federal requirements;
- Failing to assess the localized air quality impacts of increased numbers of safety inspections;
- Failing to consider increases in emissions of toxic air contaminants resulting from the no action or proposed action alternatives, particularly within the context of the increase in local emissions due to increased numbers of safety inspections; and
- Failing to assess the air quality impacts of the no action and proposed action alternatives over more than a single year or beyond 2002.

The Sierra Research Report found that both the "no action" and "proposed action" alternatives examined in the EA would foreseeably result in adverse air quality impacts in two ways. First, both alternatives would "allow the direct substitution of higher-emitting Mexico-domiciled-domiciled trucks for lower-emitting U.S.-domiciled trucks for freight carrying in the United States." Second, both alternatives would "have the potential to increase overall U.S. truck traffic." Sierra Research concluded that the actions would "present a particularly significant issue in those areas of the southwestern U.S. that currently violate and are likely to continue to violate health-based federal National Ambient Air Quality Standards (NAAQS) applicable to ozone and fine PM."

We are especially concerned that the DOT's EA failed to consider and discuss the potential impacts resulting from important differences that exist between regulatory oversight of diesel engines in the United States and Mexico. For example, the major manufacturers of heavy-duty diesel engines for sale in the United States are subject to federal court consent decrees requiring the retrofitting of these engines with pollution control equipment and other measures designed to reduce pollution. We have previously submitted (via overnight mail delivery of May 17, 2002) one of these consent decrees, *United States of America v. Caterpillar, Inc.*, Civil Action 98-02544 and supporting appendices, filed July 1, 1999. The other consent decrees are available online at "<http://es.epa.gov/oeca/ore/aed/diesel/condec.html>." We ask that all of these consent decrees be made part of the record of decision.

There are at least two important issues regarding these consent decrees that were neither mentioned nor analyzed in the FMCA's EA. First, there is nothing in the record indicating that these consent decrees apply to diesel engines manufactured for sale or distribution in Mexico. The applicable Mexican official Norms make no mention whatsoever of these decrees. Second, the two major manufacturers of diesels in Mexico, Kenworth of Mexico, S.A. de C.V., and Mercedes Benz of Mexico, are not signatories to the consent decree. Certainly the EA should have analyzed these important regulatory distinctions in terms of the likely emissions differences that will result.

The EA also assumed that comparable emissions would result from Mexico-domiciled and U.S. domiciled trucks without considering whether there are any practical limitations or reasonable enforcement measures in place to ensure compliance with U.S. manufacturing standards. There are certainly practical limitations. For the upcoming and very stringent diesel emissions standards applicable in 2004 and 2007, the use of after treatment control devices by heavy-duty diesel engines will require the use of very low sulfur levels. Fuels containing in excess of 15 ppm will reduce the effectiveness of the after treatment devices and may in some cases permanently damage them. The EA had no basis to assume that very low sulfur fuels will be required or available in Mexico when the more stringent U.S. regulations come into force.

With respect to the use of enforcement measures, currently such enforcement is primarily delegated to the States. *See* GAO Report at 12, 18 (with regard to emissions inspections, US EPA relies on states to establish and enforce their own enforcement procedures). For example, the State of Texas has no pollution testing whatsoever whereas the State of California has only a modest "on road" opacity emissions testing program in place. That program in no way is designed to examine whether individual truck engines meet U.S. regulatory requirements at the time of their manufacture. Indeed, such a program would be extremely costly and might be entirely impractical. In any event, the consequences of such a program, whether as an impact or feasible mitigation measure, should have been examined in the EA and was not.

Clearly, much more work is necessary before the above listed actions may legally go into effect. The key assumptions underlying the EA are completely flawed. Contrary to the EA, existing research concludes and knowledgeable experts state that the federal actions being proposed through these regulations will indeed significantly increase U.S. truck traffic beyond historical levels. *See, e.g.,* Comment Letter of Mark J. Spalding dated April 17, 2002; GAO Report at 3-4 (since implementation of NAFTA, trade between US and Mexico has more than doubled: \$100 billion in 1994 to \$248 billion in 2000; enhanced trade has increased number of northbound truck crossing from 2.7 million in FY 1994 to more than 4.3 million in FY 2001; according to DOT, about 80,000 trucks crossed border in FY 2000, 63,000 of which were estimated to be of Mexican origin). The same is true with respect to the potential displacement of U.S. domiciled-trucks by Mexico-domiciled trucks: existing research concludes and reputable sources state that a significant displacement is likely to occur. *See Id.*; "North American Trade and Transportation Corridors: Environmental Impacts and Mitigation Strategies," prepared for

the North American Commission for Environmental Cooperation by ICF Consulting (February 21, 2001) (copy previously submitted; we ask this report to be made part of the record herein).

The Sierra Research Report and simple common sense suggest that an action that will have the effect of allowing thousands of heavily polluting Mexico-domiciled trucks to travel through some of the most seriously polluted cities in the United States -- cities that are struggling to bring air quality up to healthy levels -- will significantly affect the quality of the human environment. The FMCSA must therefore prepare a full-fledged EIS detailing the adverse environmental effects on the most affected regions of the country.

II. The Above-Listed Actions Do Not Conform to the Approved SIPs for California and Texas and Therefore Cannot Be Implemented.

Section 176 of the Clean Air Act provides that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to" a State Implementation Plan (SIP) promulgated pursuant to section 110 of the Clean Air Act. 42 U.S.C. § 7506(c)(1). The statute further defines "conformity to an implementation plan" to mean conformity to the plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards. 42 U.S.C. § 7506(c)(1)(A). It is also defined to mean that "such activities will not -- (i) cause or contribute to any new violation of any standard in any area; (ii) increase the frequency or severity of any existing violation of any standard in any area; or (iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area." 42 U.S.C. § 7506(c)(1)(B).

EPA's implementing regulations require federal agencies to make a determination that an action conforms to the relevant SIPs based upon a written conformity analysis before taking the action if the action will cause direct or indirect emissions that exceed de minimis levels. 40 C.F.R. § 51.850(b), 51.853(b), 51.854. The de minimis level of VOC and NO_x emissions vary, depending upon the extent of nonattainment. For serious areas the de minimis level is 50 tons per year (tpy). For severe areas (including Houston, Northwest Los Angeles county, Ventura county, and San Diego) it is 25 tpy, and for extreme areas (Los Angeles), it is 10 tpy. 40 C.F.R. § 51.853(b).

The Sierra Research Report graphically demonstrates the difference in emissions rates between U.S. trucks and Mexico-domiciled trucks and shows how those differences grow dramatically from 2010 to 2020 to the point at which Mexico-domiciled truck emissions will be almost 4.5 times U.S. truck emissions for both oxides of nitrogen (an ozone precursor) and particulate matter. The emissions will far exceed the de minimis thresholds set out in the EPA regulations. For example, Sierra Research has calculated that if we make the reasonable assumption that 50 percent of the U.S. trucks currently traveling through Houston are replaced by Mexico-domiciled trucks, the increase in NO_x emissions by the critical attainment year of 2007

will be 84 tons per *day*, more than three times the de minimis level for *annual* NOx emissions in a serious nonattainment area.

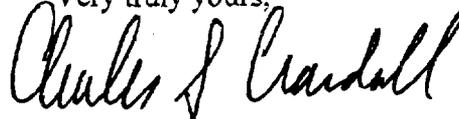
These staggeringly high increases in NOx and particulate emissions must be accounted for in the emissions budgets for Houston, Dallas/Ft Worth, San Diego, Los Angeles, San Francisco and intervening nonattainment areas, and federally enforceable offsetting emissions reductions must be located and implemented before the FMCSA and NHTSA actions may be allowed to go forward. At the very least, the agencies must prepare their own conformity analysis that assesses the impact over the years of their actions on the nonattainment areas through which the Mexico-domiciled trucks will travel.

III. Conclusion

The easily foreseeable result of implementing the above-described regulations, whether collectively or individually, is a large influx of trucks from Mexico that do not conform to the emissions standards with which U.S. trucks must by law comply. Just as foreseeable is a large increase in emissions of NOx, particulate matter, and other toxic air pollutants. Before FMCSA may lawfully allow the above-listed regulations to go into effect, the agencies must prepare an EIS detailing the adverse environmental impacts of these increases in emissions. Furthermore, the FMCSA cannot lawfully allow the regulations to go into effect until it has prepared an adequate conformity analysis under section 176 of the Clean Air Act and ensured that the actions will not cause or contribute to any new violation of any standard in any area, increase the frequency or severity of any existing violation of any standard in any area, or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

We urgently request that FMCSA not allow the above-listed actions to go into effect until the agency has complied with its legal obligations under the National Environmental Policy Act and the Clean Air Act.

Very truly yours,



CHARLES S. CRANDALL

cc: Plaintiffs' counsel and clients in Case No. C-02-2115-CW