PART 1180—[AMENDED]

1. Section 1180.20(f)(1) is revised to read as set forth below.

§ 1180.20 Guidelines and standards for conservation projects.

* * * * *

(f) *Limits for Federal funding.* (1) IMS normally makes a conservation grant which obligates no more than $25,000 in Federal funds. Unless otherwise provided by law, if the Director determines that exceptional circumstance warrant, the Director, consistent with the policy direction of the Board, may award a conservation grant which obligates an amount in excess of $25,000 in Federal funds. IMS may establish a maximum award level for exceptional project grants for a particular fiscal year through information made available in guidelines or other material distributed to all applicants.

* * * * *

§ 1180.77 [Amended]

2. Section 1180.77 is amended by removing paragraph (l) and redesignating paragraph (m) as paragraph (l).

[FR Doc. 91-5640 Filed 3-8-91; 8:45 am]

BILLING CODE 7036-01-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 90-469; RM-7428]

Radio Broadcasting Services; Tuscaloosa, AL

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 288C3 for Channel 288A at Tuscaloosa, Alabama, and modifies the license of New South Radio, Inc., for Station WACT-FM, as requested, to specify operation on the higher powered channel, thereby providing that community with an additional expanded coverage area FM service. See 55 FR 45623, October 30, 1990. Coordinates used for Channel 288C3 at Tuscaloosa are 33-20-00 and 87-25-39. With this action, the proceeding is terminated.

EFFECTIVE DATE: April 22, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90-469, adopted February 26, 1991, and released March 6, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Alabama, is amended by removing Channel 288A and adding Channel 288C3 at Tuscaloosa.

Federal Communications Commission.

Andrew J. Rhodes,

Acting Chief, Allocations Branch, Policy and Rules Divisioin, Mass Media Bureau.

[FR Doc. 91-5698 Filed 3-8-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 90-440; RM 7452]

Radio Broadcasting Services; Central Valley, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 257C3 for Channel 257A at Central Valley, California, and modifies the license of Quality Broadcasters of California, L.P., for Station KNNN(FM), as requested, to specify operation on the higher powered channel, thereby providing that community with an expanded coverage area FM service. *See* 55 FR 42029, October 17, 1990. Coordinates used for Channel 257C3 at Central Valley are 40-33-46 and 122-27-07. With this action, the proceeding is terminated.

EFFECTIVE DATE: April 22, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket 90-440, adopted February 26, 1991, and released March 6, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by removing Channel 257A and adding Channel 257C3 at Central Valley.

Federal Communications Commission.

Andrew J. Rhodes,

Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-5699 Filed 3-8-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 90-577; RM-7507]

Radio Broadcasting Services; Georgetown, KY

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document substitutes Channel 277A for Channel 276A at Georgetown, Kentucky, and modifies the license of Station WTKT(FM) to specify operation on the alternate Class A channel, at the request of Kentucky Radio Limited Partners. See 55 FR 49924, December 3, 1990. Channel 277A can be allotted to Georgetown in compliance with the Commission's minimum distance separation requirements at Station WTKT's currently licensed site, with a site restriction of 10.8 kilometers (6.7 miles) south of the community. The coordinates for Channel 277A at Georgetown are North Latitude 38-06-57 and West Longitude 84-31-19. With this action, this proceeding is terminated.

EFFECTIVE DATE: April 22, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90–577, adopted February 25, 1991, and released March 6, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Kentucky, is amended by removing Channel 276A and adding Channel 277A at Georgetown.

Federal Communications Commission.

Andrew J. Rhodes,

Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–5702 Filed 3–8–91; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 386

[FHWA Docket No. 90–5]

RIN 2125–AC36

Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings; Penalties for Failure To Comply With Notices and Orders Issued Under the Authority of 49 U.S.C. 521(b)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: This action implements section 213(b) of the Motor Carrier Safety Act of 1984 by adding a penalty schedule to 49 CFR part 386 applicable to failure to comply with notices and orders issued under the authority of section 521(b) of title 49, United States Code. These penalties apply in addition to other civil forfeiture assessments for violations of the Federal Motor Carrier Safety Regulations (FMCSR) charged in Notices of Claim or Notices of Investigation. This action also makes some conforming amendments to the Rules of Practice for Motor Carrier and Hazardous Materials Proceedings contained in part 386 to permit the use of these rules in adjudicating the assessment of the new penalties.

EFFECTIVE DATE: This final rule is effective April 10, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Paul L. Brennan, Office of the Chief Counsel, (202) 366–0834, or Mr. Sam Rea, Office of Motor Carrier Safety Field Operations, (202) 366–1795, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

The FHWA issued a notice on March 27, 1990 (55 FR 11,224) proposing to amend part 386 of title 49, Code of Federal Regulations, by adding a penalty schedule for violations of notices and orders authorized in 49 U.S.C. 521(b) and by making other conforming amendments to the Rules of Practice for Motor Carrier and Hazardous Materials Proceedings.

The Motor Carrier Safety Act of 1984 (Pub. L. 98–554, October 30, 1984, 98 Stat. 2832) (MCSA) amended section 521(b) of title 49, United States Code, by substantially changing the civil and criminal penalties that may be charged for violations of motor carrier safety regulations issued under the authority of MCSA and 49 U.S.C. 3102. The section was further amended in the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99–570, 100 Stat. 3207–184) to provide for penalties for violations of regulations issued under that authority. The March 27, 1990 notice of proposed rulemaking enumerated the five categories of civil penalties for safety violations with corresponding maximum amounts for each category now authorized by section 521(b). That section also established criminal penalties for knowing and willful violations of the same regulations.

Paragraph (7) of section 521(b), also added in the 1984 MCSA, authorized the issuance of notices and orders, and specifically directed the Secretary to establish additional penalties for their violation:

> "The Secretary shall issue regulations establishing penalty schedules designed to induce timely compliance for persons failing to comply promptly with the requirements set forth in any notices and orders under this subsection."

Notices and Orders

In the March 27 notice of proposed rulemaking, the FHWA identified the following four types of notices or orders authorized or required by section 521(b):

- Notice to Abate
- Notice to Post
- Final Orders
- Out-of-Service Orders

Each of these notices and orders were discussed separately in the NPRM together with the penalties proposed.

The FHWA further proposed to provide for procedural due process in the assessment and collection of these penalties by using the existing Rules of Practice for Motor Carrier and Hazardous Materials Proceedings in part 386 for that purpose. Amendments to part 386 are necessary to accommodate this process and were accordingly proposed in the NPRM.

Comments

The FHWA received a total of eleven responses to the NPRM, but six were from associative entities representing a fair cross-section of the motor carrier industry. They included the American Trucking Associations (ATA), the American Bus Association (ABA), the National Private Truck Council (NPTC), the International Brotherhood of Teamsters (IBT), the Transportation Lawyers Association (TLA), and the Regular Common Carrier Conference (which endorsed the comments of the TLA). Also commenting were three trucking companies and two individuals with long industry experience. The comments were generally supportive of the FHWA's efforts to enhance enforcement of the safety regulations, but the two individual commenters and two of the trucking companies expressed concern that too much emphasis is placed on punishment rather than on positive encouragement and education to bring about voluntary compliance.

The FHWA is aware that a satisfactory level of compliance with the Federal Motor Carrier Safety Regulations (FMCSR) and the Hazardous Materials Regulations (HMR) depends to a very large extent on the voluntary cooperation of carriers and drivers in the industry. The FHWA also recognizes that in enacting the Motor Carrier Safety Act of 1984 (MCSA), Congress was sending a strong signal that it was not satisfied with reliance on voluntary compliance. This position has been made even more apparent in subsequent oversight hearings and legislative reports.

Voluntary compliance and stepped up enforcement may very well be sufficient to improve the safety practice of those carriers who violate the safety regulations through misunderstanding, shortsightedness, negligence or simple convenience. There are still carriers and drivers, however, who will not comply voluntarily and who continue to engage in unsafe practices even after they have been prosecuted for safety violations, i.e., those who treat penalties as a cost of doing business without regard for safety consequences, or those who simply ignore the regulations because they believe the chances of getting caught are negligible and the consequences tolerable. In issuing this rule, the FHWA is carrying out the express intent of Congress in the MCSA to compel compliance by these recalcitrant and persistent violators of the safety regulations.

These penalties will be an effective supplement to FHWA's motor carrier safety enforcement policy, which is to impose progressively higher penalties against repeat violators leading to operational shut down in appropriate cases.

a. Notice to Abate

Summary of comments. The area of most concern to the commenters is the Notice to Abate and the effect of failure to comply therewith. Some believe the FHWA may have exceeded its authority by fixing penalties for accumulated noncompliance at levels higher than the maximum set by Congress in section 213 of the MCSA (49 U.S.C. 521[b]). For instance, the American Bus Association agrees with FHWA's position that it has the power to set a penalty where none has been established by Congress, but the ABA contends that penalties for failing to abate violations of the FMCSR are limited to levels fixed by Congress in the MCSA for the violations of the FMCSR themselves. Similarly, the TLA suggests that penalties for failing to abate violations must be "capped" at the maximum allowable for the underlying violation. The TLA also believes that to fix an abatement penalty at three times the statutory fine (e.g., that proposed for paperwork violations) for the violations left unabated is punitive rather than designed to "induce compliance," as required by section 521(b)(7). The TLA further points out the need for specificity in abatement notices, without which due process problems inevitably arise. The TLA and the NPTC also believe the rule should contain a provision for consideration of good faith efforts to abate.

FHWA Response. The FHWA reiterates its position expressed in the NPRM that in section 521(b)(7), Congress authorized the establishment of a penalty schedule for violations of notices and orders issued under section 521(b). The FHWA continues to believe that the requirement for fixing a reasonable time for abatement contemplated that there would be an additional penalty imposed under section 521(b) for failing to comply. The requirement to comply with a notice or order is separate, apart and in addition to the requirement to comply with the safety regulations themselves. Consequently, the failure to comply with such a notice or order in itself constitutes a violation, which is distinct from violations of the FMCSR, and for which no specific penalty is presently prescribed in section 521(b).

Nevertheless, the FHWA recognizes the problems inherent in both the comprehension of a distinct schedule of penalties for failing to abate violations for which another statutory schedule of penalties applies and in the level of enforcement effort required to follow up on abatement notices. Therefore, in this final rule, the notice to abate will be treated in two separate categories, the more serious of which will overlap to some extent into the area of Out-of-Service Orders.

Abatement of safety violations may require several things on the part of the offending carrier. In routine cases of noncompliance, abatement will merely require that the carrier cease violating the regulations. In other instances, the noncompliance may be more ingrained and some practices may have to be curtailed to root out the cause of the violations. For example, an audit of a carrier's records discloses an inordinate amount of hours of service violations by drivers on particular runs. Investigation reveals that it is nearly impossible for drivers to complete that run within the allowable driving time or on-duty time. As the carrier shows no intention to make any changes in the run, abatement of the violations may require a direction to the carrier to cease scheduling drivers on that run. In this instance, the abatement notice is more akin to an out-of-service order, and the abatement violation, failure to cease the scheduling of drivers as directed, is clearly distinct from the underlying hours of service violations.

Conversely, abatement of safety violations may require affirmative steps to be taken by the carrier to assure compliance with the regulations. For example, roadside inspection reports may indicate that a carrier's equipment is being poorly maintained, and a subsequent audit reveals that the carrier has no effective system for assuring that routine maintenance is performed. An abatement notice may direct the carrier to retain a mechanic or to designate someone with responsibility for scheduling and verifying maintenance operations. It may also require reports to be prepared and additional records to be maintained, which can be reviewed at a later date to determine whether there was compliance with the abatement notice. Failure to take the steps as directed in the abatement notice would result in a violation of that notice.

Notice of claim abatement. In routine cases, therefore, claim letters (notices of claim) will contain abatement notices directing the respondent named in the notice to abate the violations for which penalties have been assessed in the claim. The notice of claim may defer the payment of part of an assessed penalty or even refrain from any assessment of a penalty on the condition that the violations are timely abated. The abatement notice in the claim letter will provide a reasonable time for abatement and advise that failure to abate as directed will require immediate payment of the deferred portion of the payment or will be considered an aggravating factor in any future claim for the same or similar violations.

Notice of investigation abatement. In other cases, where more will be required to assure compliance than mere avoidance of cited violations, a proceeding will be initiated by Notice of Investigation (NOI). This proceeding will assess penalties for cited violations and order specific actions within prescribed time frames to be taken by the carrier to avoid future noncompliance. The NOI will provide the respondent carrier with the opportunity to contest both the penalties assessed and the terms of the included compliance order (notice of abatement). It is contemplated that many such proceedings will result in the negotiation of consent orders. Compare 49 U.S.C. 506 (1983). Such negotiations should provide ample opportunity for consideration of good faith efforts and how they might affect the level of penalty.

b. Penalties

Summary of comments. Several commenters believe, as noted above, that the penalties for violations of abatement notices were limited to the maximum amount fixed by Congress on the underlying violations. The International Brotherhood of Teamsters,

on the other hand, thinks the FHWA made a good case for progressively higher penalties, but sees no logic in placing a cap on such penalties. The IBT recognizes the problem of using scarce resources to perform the follow-up reviews, and finds it unlikely that FHWA would be back during the time that penalties for failure to comply with abatement notices were still accumulating. Therefore, the cap would be meaningless because the maximum would almost always be reached before a follow-up review was conducted. The IBT also questions FHWA's will to impose the high monetary penalties that would naturally attach to failures to abate in those areas where no maximum is proposed.

The American Trucking Associations believes the penalties proposed for violations of out-of-service orders are not in line with those proposed by a committee of the Commercial Motor Vehicle Safety Alliance (and subsequently adopted by CVSA at its October, 1990 meeting) in its efforts to devise uniform sanctions for motor carrier safety violations for use by States operating under the Motor Carrier Safety Assistance Program MCSAP). In the interest of uniformity, therefore, the ATA suggested that FHWA's penalties be adjusted accordingly.

FHWA Response. As noted above, the FHWA interprets section 521(b)(7) as authorizing a new category of penalties separate and apart from those provided in paragraph (2) of section 521(b), but agrees with the commenters that the imposition of progressively higher penalties for failing to abate already cited violations is not practical. Consequently, the proposal for gradually increasing per diem penalties for violations of recordkeeping requirements is being dropped from the final rule in favor of the alternative discussed above. In other words, failure to comply with a notice to abate may result in a higher payment or may negate any mitigating factors which ordinarily would cause the penalties to be set at lower than the maximum levels on subsequent violations. The order (compliance or consent) resulting from the NOI proceeding, which directs certain actions to be curtailed to abate violations, will set the specific penalty for violation of each term of the order. These violations are considered "serious patterns of safety violations" and hence the penalties assessed will be in the same range as statutorily prescribed.

Citation and assessment of penalties for violations of safety regulations, coupled with direction to correct the violations by taking actions specified in the notice, eliminates the argument of isolated instances in the face of continued transgressions. Therefore, penalties will be in the ranges set for patterns of safety violations provided in section 521(b)[2][A], i.e., up to $1,000 per day to a maximum of $10,000. This is consistent with those commenters who suggested that the penalties for failing to abate bear some relationship to the penalties set by Congress in the 1984 act.

Accordingly, the final rule makes no distinctions among failing to abate the various types of violations (e.g., patterns of safety violations, substantial health and safety violations, and commercial drivers license violations). The final rule also contains a specific reference to the consideration of good faith efforts in the assessment of penalties for failure to abate.

With respect to the penalties for violations of out-of-service orders, the FHWA believes its proposal was fairly consistent with the penalties adopted by the CVSA; however, some adjustments are made in the final rule in the interest of uniformity. It must be understood that the penalty schedule adopted by the CVSA is merely a recommendation to the member states and is, at present, a long way from being universally accepted. The "uniform sanctions" adopted by the CVSA, moreover, apply almost exclusively to roadside enforcement, where, in many jurisdictions, it is only the driver against whom fines may be imposed. The penalties adopted by FHWA in this final rule contemplate enforcement against carriers as well, through evidence obtained during investigations or audits at a carrier's place of business, for requiring or permitting drivers to operate after they or their vehicles have been placed out-of-service. Furthermore, there is no corresponding violation in the CVSA scheme of things to a violation of an administrative shut down order, which under the FHWA proposal, carries the heaviest penalty.

The FHWA intends to demonstrate in this rule its full agreement with the CVSA that violations of out-of-service orders on the roadside constitute imminent hazards warranting heavy penalties against those responsible for willfully exposing the public to such grave risks to highway safety. The FHWA will continue to work with the CVSA and the individual States through the Motor Carrier Safety Assistance Program to adopt and vigorously enforce these penalties.

c. Other Comments

The International Brotherhood of Teamsters offers some interesting comments on the relative levels of penalties assessed against drivers and carriers for violations of out-of-service orders, indicating that the NPRM did not adequately account for motivation, culpability and practicality. The IBT agrees that a 10:1 ratio in the level of penalties for carriers as opposed to drivers for violation of driver out-of-service orders is appropriate, and recommends that the same ratio apply to violations of vehicle out-of-service orders. In the latter case, the IBT believes the proposed penalty of $2,000 is too high for a driver and too low for a carrier. Similarly, the IBT finds fault with FHWA's reasoning that false certification of repairs was the same as no certification. The IBT correctly observes that if FHWA could establish false certification, then the appropriate presumption should be that the repairs were not made and the out-of-service order was willfully violated, jeopardizing both the unwitting driver and the public.

The ATA makes a somewhat different observation about certifications, believing that it is often the failure of the driver to deliver the out-of-service inspection report to the employing carrier that is the cause of no certification of repairs being returned. Both the IBT and the ATA observe problems in the way the proposal dealt with owner-operators. The ATA observes that the problem of failing to account for out-of-service inspection reports was particularly acute for carriers utilizing owner-operators, while the IBT finds fault in the part of the proposed penalty schedule that treats owner-operators the same as drivers. The Teamsters recommend that FHWA make an effort to address the problem of defining the scope of the term "independent owner-operator," citing a recent National Transportation Safety Board report finding that the term is not so easily defined as it might seem.

In the area of definitions, the TLA and the NPTC recommend that FHWA better define the term "immediate destination" as it is used in connection with permissible activity by a carrier after it has been ordered to shut down all or part of its operations.

Finally, the TLA makes two other points which need clarification in the final rule. First, the time within which to comply with a notice to abate should not begin to run until contested violations have been resolved. Second, the revision of the reply procedure in § 386.14 appears to have reduced a respondent's options with respect to seeking to negotiate a settlement of the claim while preserving the right to a hearing.

FHWA Response. The FHWA agrees with the IBT comments about the relative level of penalties for violations of out-of-service orders and, as noted in the response to the ATA comments under "Penalties" above, the levels have been adjusted accordingly in the final rule. The FHWA also agrees with the IBT's observation about the effect of falsification of repair certification, and that has been treated as presumption of violation of an out-of-service order in the final rule. With respect to the treatment of owner-operators, the final rule has made an adjustment which distinguishes between owner-operators who are under lease to carrier and therefore treated as "employees" in the Federal Motor Carrier Safety Regulations, and those operating under their own authority or in their own interests. The final rule also contains a definition of "immediate destination" as used in section 386(b)(2) referring to what is required to comply with an order to cease all or part of a carrier's operations. The proposed conforming amendments to the procedural rules in part 386 have also been revised to clarify the points raised by the TLA regarding abatement of contested violations and a respondent's option to negotiate a settlement without losing the right to a hearing.

d. Remaining Issues

The only comments received on the penalties proposed for failing to comply with Notices to Post and Final Orders are favorable and they are being included in the final rule as proposed in the NPRM.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The FHWA has determined that this document does not contain a major rule under Executive Order 12291 or a significant regulation under the regulatory policies and procedures of the Department of Transportation. The proposals contained in this document would not result in an annual effect on the economy of $100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. The economic impacts of this rulemaking that will occur are primarily mandated by the statutory provisions themselves. A regulatory evaluation is not required because of the ministerial nature of this action.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354), the agency has evaluated the effects of this rule on small entities. Based on the evaluation, the FHWA certifies that this rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities apply to this program.

Paperwork Reduction Act

This rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 386

Administrative practice and procedure, Civil forfeiture, Hazardous materials transportation, Highway safety, Highways and roads, Motor carriers, Motor vehicle safety, Penalties.

Issued on: March 1, 1991.

T.D. Larson,

Administrator.

The FHWA hereby amends 49 CFR chapter III, part 386, as follows:

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER SAFETY AND HAZARDOUS MATERIALS PROCEEDINGS

1. The authority citation for part 386 is revised to read as follows:

Authority: Title XII of Public Law 99–570, 100 Stat. 3207–170 (49 U.S.C. App. 2701 *et seq.*); Title II of Public Law 98–554, 98 Stat. 2829 (49 U.S.C. App. 2501 *et seq.*); Public Law 97–449; 96 Stat. 2413 (49 U.S.C. 104(c)(2), 501 *et seq.*, 3101 *et seq.*); Public Law 93–633, 88 Stat. 2156 (49 U.S.C. App. 1801 *et seq.*); Public Law 97–261, 96 Stat. 1121 (49 U.S.C. 10927, note); Public Law 96–296, 94 Stat. 820 (49 U.S.C. 10927, note); 49 CFR 1.45, 1.48.

2. Section 386.2 is amended by revising the definition of "Associate Administrator" and by adding in alphabetical order, three new definitions, as follows:

§ 386.2 Definitions.

Abate or abatement means to discontinue regulatory violations by refraining from or taking actions identified in a notice to correct noncompliance.

* * * * *

Associate Administrator means the Associate Administrator for Motor Carriers of the Federal Highway Administration or his/her authorized delegate.

* * * * *

Compliance Order means a written direction to a respondent under this part requiring the performance of certain acts which, based upon the findings in the proceeding, are considered necessary to bring respondent into compliance with the regulations found to have been violated.

Consent Order means a compliance order which has been agreed to by respondent in the settlement of a civil forfeiture proceeding.

* * * * *

3. Section 386.11 is amended by revising paragraphs (b) introductory text, (b)(2), (c) heading and introductory text, and (c)(3) and by adding paragraph (c)(4) to read as follows:

§ 386.11 Commencement of proceedings.

* * * * *

(b) *Civil forfeitures.* These proceedings are commenced by the issuance of a Claim Letter or a Notice of Investigation.

* * * * *

(2) In addition to the information required by paragraph (b)(1) of this section, the letter may contain such other matters as the FHWA deems appropriate, including a notice to abate.

* * * * *

(c) *Notice of investigation.* This is a notice to respondent that FHWA has discovered violations of the Federal Motor Carrier Safety regulations or Hazardous Materials Regulations under circumstances which may require a compliance order and/or monetary penalty. The proposed form of the compliance order will be included in the notice. The Associate Administrator may issue a Notice of Investigation in his or her own discretion or upon a complaint filed pursuant to § 386.12.

* * * * *

(3) A Claim Letter may be combined with a Notice of Investigation in a single proceeding. In such proceeding, the 30-day reply period in paragraph (c)(1) of this section shall apply.

(4) A notice to abate contained in a Claim Letter or Notice of Investigation shall specify what must be done by the respondent, a reasonable time within which abatement must be achieved, and that failure to abate subjects the respondent to additional penalties as prescribed in subpart G of this part.

4. Section 386.14 is amended by revising paragraphs (a), (b)(1), (b)(2), (b)(3), (c), and (e) and by adding new a paragraph (f) to read as follows:

§ 386.14 Replies and request for hearing: Civil forfeiture proceedings.

(a) *Time for reply.* The respondent must reply within 15 days after a Claim Letter is served, or 30 days after a Notice of Investigation is received.

(b) * * *

(1) An admission or denial of each allegation of the claim or notice and a concise statement of facts constituting each defense;

(2) If the respondent contests the claim or notice, a request for an oral hearing or notice of intent to submit evidence without an oral hearing must be contained in the reply. A request for a hearing must list all material facts believed to be in dispute. Failure to request a hearing within 15 days after the Claim Letter is served, or 30 days in the case of a Notice of Investigation, shall constitute a waiver of any right to a hearing;

(3) A statement of whether the respondent wishes to negotiate the terms of payment or settlement of the amount claimed, or the terms and conditions of the order; and

* * * * *

(c) *Submission of evidence.* If a notice of intent to submit evidence without oral hearing is filed, or if no hearing is requested under paragraph (b)(2) of this section, and the respondent contests the claim or the contents of the notice, all evidence must be served in written form no later than the 40th day following service of the Claim Letter or Notice of Investigation.

Evidence must be served in the form specified in § 386.49.

* * * * *

(e) *Failure to reply or request a hearing.* If the respondent does not reply to a Claim Letter within the time prescribed in this section, the Claim Letter becomes the final agency order in the proceeding 25 days after it is served. When no reply to the Notice of Investigation is received, the Associate Administrator may, on motion of any party, issue a final order in the proceeding.

(f) *Non-compliance with final order.* Failure to pay the civil penalty as directed in a final order constitutes a violation of that order subjecting the respondent to an additional penalty as prescribed in subpart G of this part.

§ 386.15 [Removed and Reserved]

5. Section 386.15 is removed and reserved.

6. Section 386.16 is amended by revising paragraphs (c)(1) introductory text, (c)(1)(v), and by adding paragraph (c)(1)(vi), and by removing the word "and" after the semicolon in paragraph (c)(1)(iv) to read as follows:

§ 386.16 Action on petitions or replies.

* * * * *

(c) *Settlement of civil forfeitures.* (1) When negotiations produce an agreement as to the amount or terms of payment of a civil penalty or the terms and conditions of an order, a settlement agreement shall be drawn and signed by the respondent and the Associate Administrator. Such settlement agreement must contain the following:

* * * * *

(v) A statement that the agreement is not binding on the agency until executed by the Associate Administrator; and

(vi) A statement that failure to pay in accordance with the terms of the agreement which has been adopted as a Final Order will result in the loss of any reductions in penalties for claims found to be valid, and the original amount claimed will be due immediately.

* * * * *

§§ 386.21 and 386.22 [Redesignated as §§ 386.22 and 386.23]

7. Subpart C of part 386 is amended by revising the subpart heading; by redesignating §§ 386.21 and 386.22 as §§ 386.22 and 386.23, respectively; by adding a new § 386.21; and by revising paragraphs (a) introductory text and (b) in newly designated § 386.23 as follows:

Subpart C—Compliance and Consent Orders

§ 386.21 Compliance order.

(a) When a respondent contests a Notice of Investigation or fails to reply to such notice, the final order disposing of the proceeding may contain a compliance order.

(b) A compliance order shall be executed by the Associate Administrator and shall contain the following:

(1) A statement of jurisdictional facts;

(2) Findings of facts, or reference thereto in an accompanying decision, as determined by a hearing officer or by the Associate Administrator upon respondent's failure to reply to the notice, which establish the violations charged;

(3) A specific direction to the respondent to comply with the regulations violated within time limits provided;

(4) Other directions to the respondent to take reasonable measures, in the time and manner specified, to assure future compliance;

(5) A statement of the consequences for failure to meet the terms of the order;

(6) Provision that the Notice of Investigation and the final decision of the hearing officer or Associate Administrator may be used to construe the terms of the order; and

(7) A statement that the order constitutes final agency action, subject to review as provided in 49 U.S.C. 521(b)(8) for violations of regulations issued under the authority of 49 U.S.C. 3102, the Motor Carrier Safety Act of 1984 or 12002, 12003, 12004, 12005(b), or 12008(d)(2) of the Commercial Motor Vehicle Safety Act of 1986; or as provided in 5 U.S.C. 701 *et seq.*, for violations of regulations issued under the authority of 49 U.S.C. App. 1804 (hazardous materials proceedings) or 49 U.S.C. 10947 note (financial responsibility proceedings).

(c) *Notice of Imminent Hazard.* A compliance order may also contain notice that further violations of the same regulations may constitute an imminent hazard subjecting respondent to an order under subpart F of this part.

§ 386.23 Content of consent order.

(a) Every agreement filed with the Associate Administrator under § 386.22 must contain:

* * * * *

(b) A consent order may also contain any of the provisions enumerated in § 386.21—Compliance Order.

Subpart F—Injunctions and Imminent Hazards

8. Section 386.72 is amended by adding a sentence at the end of paragraph (b)(2) and by adding paragraphs (b)(3) and (b)(4) to read as follows:

§ 386.72 Imminent hazard.

* * * * *

(b) * * *

(2) * * * An order to an employer to cease all or part of its operations shall not prevent vehicles in transit at the time the order is served from proceeding to their immediate destinations, unless any such vehicle or its driver is specifically ordered out of service forthwith. However, vehicles and drivers proceeding to their immediate destination shall be subject to compliance upon arrival.

(3) For purposes of this section the term "immediate destination" is the next scheduled stop of the vehicle already in motion where the cargo on board can be safely secured.

(4) Failure to comply immediately with an order issued under this section shall subject the motor carrier employer or driver to penalties prescribed in subpart G of this part.

9. Part 386 is amended by adding a new subpart G, to read as follows:

Subpart G—Penalties

Subpart G—Penalties

§ 386.81 General.

(a) The maximum amounts of civil penalties that can be imposed for regulatory violations subject to the civil forfeiture proceedings in this Part are set in the statutes authorizing the regulations. The determination of the actual civil penalties assessed in each proceeding is based on those defined limits and consideration of information available at the time the claim is made concerning the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. In adjudicating the claims and notices under the administrative procedures herein, additional information may be developed regarding those factors that may affect the final amount of the claim.

(b) When assessing penalties for violations of notices and orders or settling claims based on these assessments, consideration will be given to good faith efforts to achieve compliance with the terms of the notices and orders.

§ 386.82 Civil penalties for violations of notices and orders.

(a) Additional civil penalties are chargeable for violations of notices and orders which are issued under civil forfeiture proceedings pursuant to 49 U.S.C. 521(b). These notices and orders are as follows:

(1) Notice to abate—§ 386.11 (b)(2) and (c)(1)(iv);

(2) Notice to post—§ 386.11(b)(3);

(3) Final order—§ 386.14(f); and

(4) Out-of-service order—§ 386.72(b)(3).

(b) A schedule of these additional penalties is provided in the appendix A to this part. All the penalties are maximums, and discretion will be retained to meet special circumstances by setting penalties for violations of notices and orders, in some cases, at less than the maximum.

(c) Claims for penalties provided in this section and in the appendix A to this part shall be made through the civil forfeiture proceedings contained in this part. The issues to be decided in such proceedings will be limited to whether violations of notices and orders occurred as claimed and the appropriate penalty for such violations. Nothing contained herein shall be construed to authorize the reopening of a matter already finally adjudicated under this part.

10. Part 386 is amended by adding an appendix to read as follows:

Appendix A to Part 386—Penalty Schedule; Violations of Notices and Orders

I. Notice to Abate

a. *Violation*—failure to cease violations of the regulations in the time prescribed in the notice.

(The time within which to comply with a notice to abate shall not begin to run with respect to contested violations, i.e., where there are material issues in dispute under § 386.14, until such time as the violation has been established.)

Penalty—reinstatement of any deferred assessment or payment of a penalty or portion thereof.

b. *Violation*—failure to comply with specific actions prescribed in a notice of investigation, compliance order or consent order, other than cessation of violations of the regulations, which were determined to be essential to abatement of future violations.

Penalty—$1,000 per violation per day.

Maximum—$10,000.

II. Notice to Post

Violation—Failure to post notice of violation (i.e., notice of investigation) as prescribed.

Penalty—$500 (A separate violation may be charged each time a failure to post as ordered is discovered.)

III. Final Order

Violation—Failure to comply with final agency order, i.e., failure to pay the penalty assessed therein after notice and opportunity for hearing within time prescribed in the order.

Penalty—Automatic waiver of any reduction in the original claim found to be valid, and immediate restoration to the full amount assessed in the Claim Letter or Notice of Investigation.

IV. Out-of-Service Order

a. *Violation*—Operation of a commercial vehicle by a driver during the period the driver was placed out of service.

Penalty—Up to $1,000 per violation.

(For purposes of this violation, the term "driver" means an operator of a commercial motor vehicle, including an independent contractor who, while in the course of operating a commercial motor vehicle, is employed or used by another person.)

b. *Violation*—Requiring or permitting a driver to operate a commercial vehicle during the period the driver was placed out of service.

Penalty—Up to $10,000 per violation.

(This violation applies to motor carriers, including an independent contractor who is not a "driver," as defined under paragraph IVa above.)

c. *Violation*—Operation of a commercial motor vehicle by a driver after the vehicle was placed out of service and before the required repairs are made.

Penalty—$1,000 each time the vehicle is so operated.

(This violation applies to drivers as defined in IVa above.)

d. *Violation*—Requiring or permitting the operation of a commercial motor vehicle placed out of service before the required repairs are made.

Penalty—Up to $10,000 each time the vehicle is so operated after notice of the defect is received.

(This violation applies to motor carriers, including an independent owner-operator who is not a "driver," as defined in IVa above.)

e. *Violation*—Failure to return written certification of correction as required by the out-of-service order.

Penalty—Up to $500 per violation.

f. *Violation*—Knowingly falsifies written certification of correction required by the out-of-service order.

Penalty—Considered the same as the violations described in paragraphs IVc and IVd above, and subject to the same penalties.

Note: Falsification of certification may also result in criminal prosecution under 18 U.S.C. 1001.

g. *Violation*—Operating in violation of an order issued under § 386.72(b) to cease all or part of the employer's commercial motor vehicle operations, i.e., failure to cease operations as ordered.

Penalty—Up to $10,000 per day the operation continues after the effective date and time of the order to cease.

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National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 81-11; Notice 30]

RIN 2127-AD18

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final rule.

SUMMARY: This notice amends the humidity test procedures for replaceable bulb and integral beam headlamps specified in paragraph S8.7 of Motor Vehicle Safety Standard No. 108. The requirements remain unchanged, except that a photometric test is no longer required following completion of the humidity test. The purpose of the rule is to improve the repeatability of the humidity test. It accomplishes this by specifying the test fixture to be used, the position of the lamp in the test chamber, and the velocity of the air flow during the humidity test. This completes rulemaking pursuant to grants of petitions for rulemaking submitted by Hella K.G., Robert Bosch, and Koito Mfg. Co.

DATE: The effective date of the amendment is September 9, 1991.

FOR FURTHER INFORMATION CONTACT: Jere Medlin, Office of Vehicle Safety Standards, NHTSA (202-366-5276).

SUPPLEMENTARY INFORMATION:

Background

On June 2, 1983, NHTSA amended Motor Vehicle Safety Standard No. 108, Lamps, Reflective Devices, and Associated Equipment (49 CFR 571.108) to permit headlamps other than sealed beam units (48 FR 24690). One of the tests specified for headlamps with replaceable bulbs concerned resistance to humidity (now paragraph S8.7 of Standard No. 108). Shortly after the issuance of those amendments, some parties expressed concerns about that test. This rulemaking action responds to those concerns.

Hella Petition

On July 11, 1983, Hella KG of the Federal Republic of Germany petitioned for reconsideration of the amendments. Because the agency did not receive the petition until more than 30 days following publication of the amendment in the **Federal Register**, NHTSA treated it as a petition for rulemaking pursuant to 49 CFR part 552, in accordance with the provision in its regulations on petitions for reconsideration regarding timeliness, 49 CFR 553.35(a). The portion of the petition relevant to this rulemaking action concerned the appropriateness of the humidity test procedures for vented headlamps. Specifically, Hella viewed the test as inappropriate, and stated that modified dust and moisture requirements should be substituted for it. While the agency did not agree, it was concerned about the effect of the test on vented headlamps. NHTSA believed that venting of headlamps affected the performance of lamps with plastic lenses in Standard No. 108's internal heat test, and thus might be desirable for some headlamp system designs. The agency wished to be able to distinguish inferior venting systems from superior ones. Therefore, NHTSA granted this aspect of the Hella petition, insofar as it related to a closer study of tests for ventilated headlamp systems, and initiated research on this subject.

Bosch Petition

On October 21, 1985, Robert Bosch GmbH, a headlamp manufacturer in Stuttgart, Germany, petitioned for a modification in the humidity test for replaceable bulb headlamps. In its view, the test did not fully account for actual operating conditions typical of vented headlamps. As a result of the heat generated in the test, the air in the interior of the lamp expands, with pressure compensation occurring through the ventilation openings. When the lamp cools, air enters the headlamp interior carrying moisture which is deposited in the interior of the headlamp. If there is no flow of air within the humidity test box, the 1-hour soak period is insufficient "to establish a well-balanced proportion between the humidity inside the headlamp and the outside conditions". Accordingly, Bosch argued that for judging compliance of vented headlamps "it is necessary that there is a flow of air inside the test box during the soak period". It believed that a flow of between 3 and 6 feet per second (2 to 4 m.p.h.) would be sufficient, when directed to the headlamp from the front.

NHTSA granted both the Hella and Bosch petitions on March 18, 1987 (52 FR 8482). Shortly thereafter, on April 30, 1987, Koito Manufacturing Co. Ltd., a headlamp manufacturer in Japan, filed its own supporting petition for rulemaking to amend the humidity test. This petition was granted on July 14, 1989.

Koito Petition

Koito submitted test data on humidity and dust tests for many designs of vented headlamps. It found that if vents to eliminate water accumulation are too large, dust intrudes into the headlamps. Conversely, if the vents are too small, the lamps do not pass the humidity test. From the Koito test data, it appeared that headlamps could be designed to pass a humidity test with axial flow of air over the headlamp of between 2 m.p.h. and 4 m.p.h., the values recommended by Bosch, although without supporting data at that time. Koito's data indicate that by modifying the existing humidity test procedure to specify air flow velocity, the repeatability of the humidity test is improved.

Proposed Changes in Test Procedures

As NHTSA stated in March 1987, it had initiated its own test program on humidity testing, and submitted a copy of its test work to Docket 81-11; Notice 22. It had verified that moisture in lamps affects photometric performance. This test work led to further test programs to eliminate instances of inconsistent test results. On the basis of these tests, NHTSA developed the changes that it proposed in the humidity test in a notice published on November 27, 1989 (54 FR 48776).

The first change proposed was to the initial high-humidity "soak period". Currently, a 5-day high-humidity conditioning period is specified for headlamps before the low-humidity (dry-box) test is conducted. The high-humidity test consists of 20 on-off cycles during each of which the headlamp is energized for 1 hour and de-energized for 5 hours. NHTSA's research has demonstrated that headlamps cool off within 2 hours, so 3 hours of unproductive "off time" can be eliminated from each cycle without affecting the test results. Accordingly, it proposed that the high-humidity soak period consist of 24 cycles of 3 hours each, with the headlamps activated for 1 hour and deactivated for 2 hours. The specification of 24 consecutive cycles allows the test to start and end at the same time of day.

The agency had also tentatively concluded that repeatability would be improved by specification of a special