BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

PETITION OF THE
NATIONAL ASPHALT PAVEMENT ASSOCIATION, INC.

FOR EXEMPTION FROM 30-MINUTE BREAK REQUIREMENT IN 49 C.F.R. § 395.3(a)(3)(ii) AND 12-HOUR LIMIT ON SHORT-HAUL EXCEPTION IN 49 C.F.R. § 395.1(e)(1)

Pursuant to 49 C.F.R. § 381.300 *et seq.*, the National Asphalt Pavement Association, Inc. ("NAPA") hereby petitions for exemption from:

(1) the 30-minute break requirement in the driver hours of service regulations in 49 C.F.R. § 395; and

(2) the 12-hour daily on-duty limit on the short-haul exception in 49 C.F.R. § 395.3(a)(3)(ii).

The exemptions would apply to drivers engaged in the transportation of asphalt and related materials and equipment, as defined herein. The exemptions would not have any adverse impacts on operational safety, as drivers would remain subject to the hours of service regulations in 49 C.F.R. § 395.3, and would receive sufficient rest due to the nature of their operations that limit driving to an average of six to seven hours per day or less during the paving season. The term of the requested exemption is five years, subject to renewal upon application. 49 C.F.R. § 381.300.

NAPA is the only trade association that exclusively represents the interests of the asphalt pavement material producer and paving contractor on the national level with Congress, government agencies, and other national trade and business organizations. NAPA supports an

active research program designed to answer questions about environmental issues and to improve the quality of asphalt pavements and paving techniques used in the construction of roads, streets, highways, parking lots, airports, and environmental and recreational facilities. The Association provides technical, educational, and marketing materials and information to its members, and supplies technical information to users and specifiers of paving materials. The Association, which counts nearly 1,200 companies as its members, was founded in 1955.

Asphalt pavement is a combination of approximately 95 percent stone, sand, or gravel bound together by five percent asphalt cement, a product of crude oil. Asphalt cement is heated and mixed with the aggregate at a mixing facility. The resulting asphalt pavement material is loaded into trucks for transport to the paving site. The trucks dump the pavement material into hoppers located at the front of paving machines. The asphalt is placed, then compacted using a heavy roller, which is driven over the asphalt. Traffic is generally permitted on the pavement as soon as the pavement has cooled.

Asphalt is a highly perishable product. It is loaded into the delivery truck at 280-300 degrees Fahrenheit and begins to cool immediately. If the asphalt is not delivered and placed on the paving site within two hours, the product will harden and is no longer viscous enough to be usable. For this reason, the average delivery run can be up to 30 or 40 miles from loading to paving. Drivers of asphalt delivery vehicles typically drive approximately one-third of their workday; the rest of their day is spent waiting to load or unload their vehicles and in other non-driving duties like paperwork and cleaning their trucks after each load..

Moreover, the season for asphalt paving in the United States is limited to the warmer months, which requires maximum efficiency in operations to meet demand. Construction and

resurfacing of highways, airport runways, parking lots and other facilities with asphalt improves safety and operational performance on those surfaces.

In addition to asphalt delivery trucks, there are a number of related vehicles used in the asphalt placement process that do not involve driving on public highways more than a few hours or miles per day. These include:

Water Truck – used to transport water to worksite for equipment and grading operations. The water truck is likely driven about four hours a day or less. The water truck is driven to a filling station in the morning and then taken out to project sites. Once on a project site the driver will fill all the water tanks on the equipment or wet the road grade down; after that task is completed the truck will be parked on the site. When the equipment tanks need refilling with water, the operator will generally walk back to the water truck and move the truck on site, behind barrels, up to the equipment to refill it. At the end of the day the water truck will be moved back to the filling station for the morning, or sometimes left at the paving site. The operator of this truck typically works in a laboring capacity during the duration of the work day. Drivers of water trucks are typically logging 10-11 hours of "on duty, not driving" time on their daily drivers logs and may log up to 2-3 hours of "on duty, driving time" per shift.

A water truck usually is a straight frame truck with a tank on the back; a majority of the trucks have spray bars on the rear or front for spraying water on road grade.

Tack Distributor – used to transport and distribute "tack" on the road surface before asphalt pavement is applied. The tack distributor truck is driven to a filling station in the morning and then driven out to project sites; once on project site it will apply the "tack" to the road grade before asphalt is laid. The tack distributor truck is driven on the site behind barrels on closed roads on and off throughout the work day. These trucks are "off highway" for

approximately 10 hours during their shift. The driver utilizes the "on duty, not driving" line on a Driver Log based on the FMCSA description of a "highway". These trucks are only "on highway", or "on duty, driving" for approximately two hours per day.

A tack distributor usually is a straight frame truck with a tank on the back with a spray bar.

Equipment Hauler – used to transport heavy equipment used in asphalt paving to and from the project sites. The equipment hauler is used to deliver and remove equipment from project sites; this will occur at the beginning of the work day and end of the workday once the project is complete or the work for the day is finished. Drivers of these trucks typically take 30 minutes to load/chain down a piece of equipment, and then drive for approximately one hour to the next construction site, where they again take 30 minutes to unload/unchain a piece of equipment. Equipment movers typically log approximately five to six hours of "on duty driving" time during their shift; the remainder of time (approximately five hours) is logged as "on duty, not driving."

An equipment hauler consists of the semi-tractor and trailer (lowboy trailer type). An equipment hauler might also be a water truck with a trailer in tow.

Pick-Up Sweeper (Street Sweeper) – used to sweep and vacuum project sites after milling and before paving operations begin. The pick-up sweeper might be driven 10 to 12 hours a day, but is operated typically only six hours per day on public roadways. The majority of the drive time on a pick-up sweeper is behind barrels in the work zone driven at a top speed of 10 mph. Once the pick-up sweeper has completed its operation on a project site, it will disengage its power take off unit and drive to the next project like a normal truck.

Attenuator Truck -- used at the beginning of a highway construction project and parked (without a driver) for one or two days or longer depending on the scope of work being completed. An attenuator truck is a device intended to provide a barrier for the worksite and reduce the damage to structures, vehicles, and motorists resulting from a motor vehicle collision. Impact attenuators are designed to absorb the colliding vehicle's kinetic energy. They may also be designed to redirect the vehicle away from the hazard or away from roadway machinery and workers. When these trucks are driven, they are typically moved only a few miles to be stationed in another location to be used in the same capacity. Drivers who operate these trucks are laboring on the site ("on duty, not driving") for approximately 10 hours and may drive "on highway" or "on duty, driving" no more than 30 minutes per shift.

NAPA requests that the operation of each of these types of vehicles, in addition to the typical asphalt delivery truck, be included in the definition of "transportation of asphalt and related materials and equipment" for purposes of this exemption.

Similar Exemptions

There are several existing exemptions from various provisions of the driver hours of service regulations in 49 C.F.R. Part 395 that apply to similar products. First, The Federal Motor Carrier Safety Administration granted the National Ready Mixed Concrete Association a limited exemption from the 30-minute break requirement of the driver hours of service regulations. 80 Fed. Reg. 17819 (April 2, 2015). Under this exemption, drivers operating ready-mixed concrete trucks may use 30 minutes or more of on-duty "waiting time" to satisfy the requirement for the 30-minute rest break, provided they do not perform any other work during the break.

The FMCSA noted the primary reasons for requesting the exemption were: (1) Concrete mixer drivers deliver a perishable product and spend less than 40% of their on-duty time driving;

(2) industry-wide, mixer drivers on average drive 14 miles from the ready-mixed concrete plant to the job, do not have the fatigue-inducing work conditions long-haul truckers experience; and (3) while some concrete mixer drivers will be able to take advantage of the exception from the 30-minute break for certain short-haul drivers, many drivers often work more than 12 hours in a day, and therefore cannot utilize the short haul exemption. *Id.* at 17820.

The FMCSA placed several conditions on the exemption:

1. Drivers of ready-mixed concrete trucks subject to the requirement for a 30-minute rest break in § 395.3(a)(3)(ii) may use 30 minutes or more of "waiting time" to meet the requirements for a rest break. "Waiting time" means time spent while waiting with the CMV at a job site or terminal and performing no other on duty activities during this time.

2. Drivers must have a copy of this exemption document in their possession while operating under the terms of the exemption. The exemption document must be presented to law enforcement officials upon request.

3. All motor carriers operating under this exemption must have a "Satisfactory" safety rating with FMCSA, or be "unrated." Motor carriers with "Conditional" or "Unsatisfactory" safety ratings are prohibited from using this exemption.

4. All motor carriers operating under this exemption must have Safety Measurement System (SMS) scores below FMCSA's intervention thresholds.

Id. 17820-21.

Second, the FMCSA, as directed by Congress in the Fixing America's Surface Transportation Act (FAST Act), has allowed the driver of a ready-mixed concrete truck to use the short-haul exception in 49 C.F.R. §395.1(e)(1), but with a 14-hour on-duty period instead of 12 hours. 81 Fed. Reg. 47714, 47717 (July 22, 2016). This allows the affected drivers to be exempt from the record of duty status and/or electronic logging device requirements in 49 C.F.R. § 395.8 and the supporting document requirements in 49 C.F.R. § 395.11 as long as they return to the work reporting location and are released from work within 14 consecutive hours. 49

C.F.R. § 395.1(e)(ii)(B). Drivers using the short-haul exemption are also exempt from the 30-minute break requirement in 49 C.F.R. § 395.3(a)(3)(ii).

> The exemption imposes certain conditions on the driver and motor carrier:
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> (A) the driver operates within a 100 air-mile radius of the normal work reporting location;
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> (B) the driver returns to the work reporting location and is released from work within 14 consecutive hours;
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> (C) the driver has at least 10 consecutive 8 hours off duty following each 14 hours on duty;
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> (D) the driver does not exceed 11 hours maximum driving time following 10 consecutive hours off duty; and
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> (E) the motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records that show—
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> (i) the time the driver reports for duty each day;
> (ii) the total number of hours the driver is on duty each day;
> (iii) the time the driver is released from duty each day; and
> (iv) the total time for the preceding driving week the driver is used for the first time or intermittently.

81 Fed. Reg. 47714, 47717.

Third, also as directed in the FAST Act, the FMCSA amended the definition of "transportation of construction materials and equipment" in 49 C.F.R. § 395.2. That definition provided that, for a driver who transports construction materials and equipment within a 50 air mile radius of the normal work reporting location of the driver, any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours. The FAST Act increased this to a 75 air mile radius, and the FMCSA implemented this change to conform to the statute. 81 Fed. Reg. at 47717. Operation of vehicles engaged in the transportation of asphalt and related materials and equipment is included in the definition of "transportation of construction materials and equipment" in 49 C.F.R. § 395.2, and thus drivers

of such vehicles are able to restart their weekly on-duty periods after a period of 24 consecutive hours off duty.

The same reasoning supporting the exemptions from 30-minute break time rule and allowing a 14-hour daily on-duty period for drivers of ready-mixed concrete vehicles applies to drivers engaged in the transportation of asphalt and related materials and equipment. Both are perishable products that are not useable if they are not dropped and spread within a brief delivery window. Because of this short delivery window, the routes from production facility to delivery site for both products are limited to less than 40 miles, and the time spent actually driving a commercial motor vehicle is typically only a few hours per day. Thus, in both cases, the drivers do not face the same fatigue factors as drivers of long-haul trucks, and therefore do not pose the same risk of a fatigue-related accident as long-haul drivers.

Also, while some drivers engaged in the transportation of asphalt and related materials and equipment will be able to take advantage of the exception from the 30-minute break for certain short-haul drivers, many drivers are often on duty more than 12 hours in a day and therefore cannot utilize the short haul exemption.

Granting this request will ease confusion provide clarity for operators of asphalt delivery vehicles. In petitioning for elimination of the 30-minute break requirement on October 28, 2015, the Commercial Vehicle Safety Alliance ("CVSA")[1] argued "[t]he 30-minute rest break provision is difficult to effectively enforce, as the inspector has no way of verifying whether or

[1] The CVSA is an international not-for-profit organization comprised of local, state, provincial, territorial and federal motor carrier safety officials and industry representatives from the United States, Canada, and Mexico. Its mission is to promote commercial motor vehicle safety and security by providing leadership to enforcement, industry and policy makers.

not the driver was legitimately off duty during that time or if he/she used the time to perform other work-related duties, such as fueling, inspection, or loading and unloading times."

Most important, CVSA stated that it "does not believe there is evidence that the [break] requirement improves a driver's overall CMV operational capabilities or increases safety."

The CVSA petition noted that as of October 2015, the FMSCA had issued nine exemptions from the requirement, including hazardous materials transporters, livestock haulers, concrete haulers, and the Departments of Defense and Energy. In each of these instances, the FMCSA indicated that an equivalent level of safety can be maintained under the exemption. CVSA stated that it does not oppose these exemptions, but noted that exemptions complicate the enforcement process and cause confusion and inconsistency in enforcement.

CVSA argued that removing the 30-minute break requirement "would eliminate confusion and inconsistency in enforcement, which benefits both industry and the enforcement community, while also saving both industry and the agency time and resources currently being spent on the petition process," and "without negatively impacting safety."

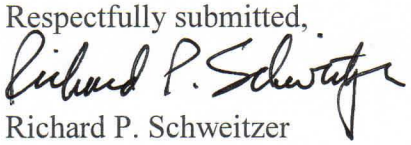
Although the prior administration denied the CVSA petition on August 9, 2016, the arguments regarding difficulty in enforcement, confusion and inconsistency remain valid today.

Thus, for the reasons stated herein, NAPA requests that drivers engaged in the transportation of asphalt and related materials and equipment be exempted from:

(1) the 30-minute break requirement in the driver hours of service regulations in 49 C.F.R. § 395; and

(2) the 12-hour daily on-duty limit on the short-haul exception in 49 C.F.R. § 395.3(a)(3)(ii).

Respectfully submitted,



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