

period for the waiver is usually a holiday week-end with heavier than normal week-end traffic. They also asserted that the limited time period for the waiver is potentially confusing for law enforcement, and that there is no difference in the level of danger imposed by 500 pounds of explosives during the waiver period than there is at any other time during the year. The States of Indiana, Tennessee, South Carolina, and Wisconsin had similar comments. The MMVA also noted that this is the third year that these drivers have been required to obtain CDLs with a hazardous materials endorsement, thus the industry can no longer claim surprise at the requirement. The Idaho Transportation Department, in its comments, notes that the question of compensation does not justify a waiver of the CDL requirements. Moreover, the pyrotechnics industry's assertion that its drivers must pass a hazardous materials test covering all hazardous materials, when they in fact transport only one type, could also be advanced by those drivers who solely transport fertilizer, propane, or any other single type of hazardous material. Arguably, those drivers could also demand a waiver from the CDL standards.

The American Trucking Associations, Inc. (ATA), also provided comments in opposition to the waiver. The ATA asserted that the FHWA had not met the statutory two-pronged test required before the agency can issue a waiver [49 U.S.C. 31136(e)]. Absent that finding, the ATA stated that issuing a waiver would be unlawful. The Association also found the proposed waiver irrational from a safety perspective, noting that transportation of 500 pounds of explosives within a 300-mile radius over a seven day period could add up to thousands of miles and numerous movements. Moreover, the ATA found it irrational to issue waivers to inexperienced drivers who only operate on a part-time basis. Finally, the ATA strenuously opposed the waiver of alcohol and controlled substances testing.

The National Association of Independent Insurers (NAII) opposed the proposal for similar reasons. "Our concern is that if the petition is granted, operators who have not proven their competency, knowledge, or experience will be transporting highly hazardous incendiary materials with low flash points, on the national highway system. By petitioner's own admission, these drivers are seasonal part-timers rather than highway professionals. NAII is of the opinion that no exceptions should ever be made in the driver qualification requirements for the hauling of

hazardous materials. Not only are the lives of the drivers hauling the pyrotechnics at risk, but the general public is also needlessly exposed."

The American Pyrotechnics Association filed reply comments to the docket on June 20, 1995. Although these comments were filed after the docket closed, it is FHWA policy to give consideration to comments it can reasonably review and analyze before a decision is made. The APA took issue with the assertion that the "freight industry" stood ready to deliver fireworks materials, and contended that that alternative is just not practically available. The petitioners also stressed its position that the requirement to pass a largely irrelevant test placed a substantial burden in preparation time on people who were committing themselves to employment for only a few days a year for a few hundred dollars in compensation. The APA concluded that most of the part-time employees would simply opt to stay home. The APA reiterated its argument that the people engaged in the display of fireworks on the 4th of July are very safety conscious and that it was unaware of "any transportation incidents over a twenty-year period involving fireworks in the size and type of vehicle described in this petition."

FHWA Response to the Comments

The provisions of the CMVSA outlining the CDL regulations were specific and prescriptive. Congress, as a means to ensure the safety and qualification of drivers of commercial vehicles, not only mandated that minimum Federal testing standards be established for the operation of CMVs, but also required that each person receiving a CDL pass the written and driving test for the operation of a CMV which complies with the minimum Federal standards. Moreover, Congress expressly outlined requirements for those individuals who transport hazardous materials. Transporters of hazardous materials are required, by statute, to have a working knowledge of the hazardous materials regulations, the handling of hazardous materials, the operation of emergency equipment used in response to emergencies arising out of the transportation of hazardous material, and the appropriate response procedures to be followed in such emergencies. The intent behind these requirements was to maximize highway safety.

In addition to the enforcement of the CDL requirements, the FHWA is also charged with the statutory duty to issue a waiver from any of its requirements only if such waiver is in the public

interest and consistent with the safe operation of commercial motor vehicles. If the agency cannot make a compelling finding that the statutory requirement is satisfied, it cannot lawfully issue a waiver.² Again, the paramount goal behind this requirement is highway safety.

The FHWA acknowledges that neither those in favor of the proposed waiver, nor those opposed, offer any meaningful scientific or other data regarding accident rates or the safety risk of transporting limited quantities of hazardous materials by these part-time drivers. Both experienced and inexperienced operators drive pickup trucks and vans every day in every location without benefit of a CDL. The nature of a cargo of fireworks has little, if any, effect on vehicle handling. Moreover, the likelihood of any explosion from properly packaged fireworks in highway collisions is minimal and was not even addressed by any of the commenters, nor was any mention offered of a single incident where the presence of fireworks in a pickup truck or van was a contributing or aggravating factor in a highway accident. The United States Court of Appeals has ruled that prior safe driving history, in and of itself, is not an adequate basis for making a waiver determination. The statutory standard, as interpreted by the Court, is that the agency may grant a waiver only after determining such an action is consistent with the safe operation of CMVs. [See *Advocates for Highway and Auto Safety v. FHWA*, 28 F.3d 1288, 1294 (D.C. Cir. 1994)]. Consequently, the decision of the FHWA must be the one that most reasonably fulfills that charge.

Grant of Alternate Relief

The FHWA, based upon the information presented in response to the docket comments, has concluded that some relief from certain testing requirements is justified in this instance, and therefore will allow States, at their discretion, to dispense with the requirement that part-time drivers for the pyrotechnics industry take the FHWA endorsement test for hazardous materials. In lieu of this testing requirement, States may only accept the training requirements outlined in 49 CFR 172.704, if the State believes that this training adequately prepares drivers meeting the other requirements of the waiver to deal with fireworks and the potential dangers posed by their transportation and use.

²See *Buck v. U.S. Department of Transportation*, U.S. Court of Appeals for the D.C. Circuit, No 94-1094, decided June 13, 1995.