

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration**

[Docket No. FAA–2019–0945]

Agency Information Collection**Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Bird/Other Wildlife Strike Report****AGENCY:** Federal Aviation Administration (FAA), DOT**ACTION:** Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on November 25, 2019. The collection involves voluntary reporting of bird/other wildlife strike information following a wildlife strike incident with aircraft. This data becomes part of the publicly available National Wildlife Strike Database. Strike reports provide critical information that allows the FAA to determine high-risk species, track national trends, evaluate the FAA's wildlife hazard management program, and provide scientific foundation for regulatory guidance. Additionally, this essential information allows engine and airframe manufacturers to evaluate the effectiveness of aircraft components. It also helps airports identify and mitigate hazardous species and the location of wildlife attractants, affords a better understanding of strike dynamics, and provides key metrics for an airport to evaluate the effectiveness of its wildlife management program.

DATES: Written comments should be submitted by March 23, 2020.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to oir_submission@omb.eop.gov, or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: John Weller by email at: john.weller@faa.gov; phone: (202) 267–3778.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0045.*Title:* Bird/Other Wildlife Strike Report.*Form Numbers:* FAA Form 5200–7.*Type of Review:* This review is for a renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on November 25, 2019 (84 FR 64948). 14 CFR 139.337, Wildlife Hazard Management, requires the FAA to collect wildlife strike data to develop standards and monitor hazards to aviation. Data identify wildlife strike control requirements and provide in-service data on aircraft component failure. Pilots, airport operations staff, aircraft and airport maintenance personnel, air traffic controllers, wildlife biologists, and anyone else having knowledge of a strike report incidents to the FAA, primarily using the web version of FAA Form 5200–7. The data becomes part of the publicly available National Wildlife Strike Database used to enhance safety by airports, airlines, engine and airframe manufacturers, and the FAA. Overall, the number of strikes annually reported to the FAA has increased from 1,850 in 1990 to more than 16,000 in 2018.

Respondents: Approximately 16,020 airport operations staff, pilots, air traffic controllers, wildlife biologists, aircraft and airport maintenance personnel, and others having knowledge of a strike.

Frequency: Information is collected as needed.

Estimated Average Burden per Response: 5 minutes.

Estimated Total Annual Burden: 1,335 hours.

Issued in Washington, DC, on February 14, 2020.

John Weller,

National Wildlife Biologist, Airport Safety and Operations Division, Office of Airports Safety and Standards.

[FR Doc. 2020–03453 Filed 2–20–20; 8:45 am]

BILLING CODE 4910–13–P**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration**

[FHWA Docket No. FHWA–2019–0040]

Surface Transportation Project Delivery Program; Florida DOT Audit #3 Report**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).**ACTION:** Notice, request for comment.

SUMMARY: The Surface Transportation Project Delivery Program allows a State to assume FHWA's environmental responsibilities for review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely responsible and liable for the responsibilities it has assumed, in lieu of FHWA. This program mandates annual audits during each of the first 4 years to ensure the State's compliance with program requirements. This is the third audit of the Florida Department of Transportation's (FDOT) performance of its responsibilities under the Surface Transportation Project Delivery Program (National Environmental Policy Act (NEPA) Assignment Program). This notice announces and solicits comments on the third audit report for FDOT.

DATES: Comments must be received on or before March 23, 2020.

ADDRESSES: Mail or hand deliver comments to Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590. You may also submit comments electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. Anyone can search the

electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). The DOT posts these comments, without edits, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy.

FOR FURTHER INFORMATION CONTACT: Ms. Marisel Lopez Cruz, Office of Project Development and Environmental Review, (407) 867-6402, marisel.lopez-cruz@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, or Mr. David Sett, Office of the Chief Counsel, (404) 562-3676, david.sett@dot.gov, Federal Highway Administration, U.S. Department of Transportation, 60 Forsyth Street SW, Atlanta, GA 30303. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

An electronic copy of this notice may be downloaded from the specific docket page at www.regulations.gov.

Background

The Surface Transportation Project Delivery Program, codified at 23 U.S.C. 327, commonly known as the NEPA Assignment Program, allows a State to assume FHWA's responsibilities for environmental review, consultation, and compliance for Federal highway projects. When a State assumes these Federal responsibilities, the State becomes solely liable for carrying out the responsibilities it has assumed, in lieu of FHWA. Effective December 14, 2016, FDOT assumed FHWA's responsibilities for environmental review and the responsibilities for reviews under other Federal environmental requirements.

Section 327(g) of Title 23, U.S.C., requires the Secretary to conduct annual audits to ensure compliance with the memorandum of understanding during each of the first 4 years of State participation and, after the fourth year, monitor compliance. The results of each audit must be made available for public comment. The second audit report was published in the **Federal Register** on November 29, 2019, at 84 FR 65891. This notice announces the availability of the third audit report for FDOT and solicits comments on the same.

Authority: Section 1313 of Public Law 112-141; Section 6005 of Public Law 109-59; 23 U.S.C. 327; 23 CFR 773.

Issued on: February 13, 2020.

Nicole R. Nason,

Administrator, Federal Highway Administration.

Surface Transportation Project Delivery Program

Draft FHWA Audit #3 of the Florida Department of Transportation May 2018 to April 2019

Executive Summary

This is the third audit of the Florida Department of Transportation's (FDOT) assumption of National Environmental Policy Act (NEPA) responsibilities under the Surface Transportation Project Delivery Program. Under the authority of 23 U.S.C. 327, FDOT and the Federal Highway Administration (FHWA) executed a memorandum of understanding (MOU) on December 14, 2016, whereby FHWA assigned, and FDOT assumed, FHWA's NEPA responsibilities and liabilities for Federal-aid highway projects and other related environmental reviews for transportation projects in Florida.

The FHWA formed a team in January 2019 to conduct an audit of FDOT's performance according to the terms of the MOU. The team held internal meetings to prepare for an on-site visit to the Florida Division and FDOT offices. Prior to the on-site visit, the team reviewed FDOT's 2019 Project Development & Environment (PD&E) Manual and NEPA project files, FDOT's response to FHWA's pre-audit information request (PAIR), and FDOT's NEPA Assignment Self Assessment Summary Report. The team presented initial project file observations to FDOT Office of Environmental Management (OEM) on August 1, 2019. The team conducted interviews with FDOT and prepared preliminary audit results from September 23-26, 2019. The team presented these preliminary observations to FDOT OEM leadership on September 27, 2019.

The FDOT continues to develop, revise, and implement procedures and processes required to carry out the NEPA Assignment Program. Overall, the team found that FDOT is committed to delivering a successful NEPA Program. This report describes numerous successful practices and one non-compliance observation. The FDOT has carried out the responsibilities it has assumed in keeping with the intent of the MOU and FDOT's application. Through this report, FHWA is notifying FDOT of the one non-compliance observation that requires FDOT to take

corrective action. By addressing the observation in this report, FDOT will continue to assure a successful program. The report concludes with the status of FHWA's non-compliance observations from the first and second audit reviews, including any FDOT self-imposed corrective actions.

Background

The purpose of the audits performed under the authority of 23 U.S.C. 327 is to assess a State's compliance with the provisions of the MOU as well as all applicable Federal statutes, regulations, policies, and guidance. The FHWA's review and oversight obligation entails the need to collect information to evaluate the success of the NEPA Assignment Program; to evaluate a State's progress toward achieving its performance measures as specified in the MOU; and to collect information for the administration of the NEPA Assignment Program. This report summarizes the results of the third audit in Florida and includes a summary discussion that describes progress since the last audit. Following this audit, FHWA will conduct one more annual NEPA Assignment Program audit.

Scope and Methodology

The overall scope of this audit review is defined both in statute (23 U.S.C. 327) and the MOU (Part 11). An audit generally is defined as an official and careful examination and verification of accounts and records, especially of financial accounts, by an independent unbiased body. With regard to accounts or financial records, audits may follow a prescribed process or methodology and be conducted by "auditors" who have special training in those processes or methods. The FHWA considers this review to meet the definition of an audit because it is an unbiased, independent, official, and careful examination and verification of records and information about FDOT's assumption of environmental responsibilities.

The team consisted of NEPA subject matter experts (SME) from FHWA offices in Texas, Georgia, and Headquarters, as well as staff from FHWA's Florida Division. The diverse composition of the team, as well as the process of developing the review report and publishing it in the **Federal Register**, are intended to make this audit an unbiased official action taken by FHWA.

The team conducted a careful examination of FDOT policies, guidance, and manuals pertaining to NEPA responsibilities, as well as a representative sample of FDOT's project files. Other documents, such as the

August 2019 PAIR responses and FDOT's August 2019 Self Assessment Summary Report, also informed this review. In addition, the team interviewed FDOT staff in person and via video conference. This review is organized around the six NEPA Assignment Program elements: Program management; documentation and records management; quality assurance/quality control (QA/QC); legal sufficiency; performance measurement; and training program. In addition, the team considered three cross-cutting focus areas: (1) Interchange Access Requests (IAR); (2) project authorizations; and (3) permanent Emergency Repair (ER) projects.

The team defined the timeframe for highway project environmental approvals subject to this third audit to be between May 2018 and April 2019, when 616 projects were approved. The team drew judgmental samples totaling 23 projects from data in FDOT's online file system, Statewide Environmental Project Tracker (SWEPT). In the context of this report, descriptions of environmental documents are consistent with FDOT's Project Development and Environment Manual. The FHWA judgmentally selected all Type 2 Categorical Exclusions (CEs) (21 projects) and all Environmental Assessments (EA) with Findings of No Significant Impacts (2 projects). The audit team selected all IARs that were pending for approval during the audit period (five projects) to determine if they were following protocols for environmental review. The team reviewed all project authorization files in the audit period (252 project files) downloaded from FHWA Fiscal Management Information System (FMIS) to determine if the NEPA certification was completed for these projects prior to the authorization. For permanent ER projects, FHWA judgmentally sampled 41 projects in SWEPT and FMIS and identified those with construction contracts to determine if the NEPA was completed prior to authorization and if the NEPA scope was consistent with the contract.

The team submitted a PAIR to FDOT that contained 20 questions covering all 6 NEPA Assignment Program elements. The FDOT responses to the PAIR were used to develop specific follow-up questions for the on-site interviews with FDOT staff.

The team conducted a total of 18 interviews. Interview participants included staff from five FDOT District offices, Districts 3 through 7, and the FDOT Central Office. The team interviewed FDOT legal, financial, planning, and environmental staff.

The team compared FDOT policies and procedures (including the published 2019 Project Development & Environment PD&E Manual) for the audit focus areas to the information obtained during interviews and project file reviews to determine if FDOT's performance of its MOU responsibilities are in accordance with FDOT policies and procedures and Federal requirements. Individual observations were documented during interviews and reviews and combined under the six NEPA Assignment Program elements. The audit results are described below by program element.

Overall Audit Opinion

The team recognizes that FDOT's efforts have included implementing the requirements of the MOU by: Processing and approving projects; refining policies, procedures, and guidance documents; refining the SWEPT tracking system for "official project files"; training staff; implementing a QA/QC Plan; and conducting a self assessment for monitoring compliance with the assumed responsibilities. The team found evidence of FDOT's continuing efforts to train staff in clarifying the roles and responsibilities of FDOT staff, and in educating staff in an effort to assure compliance with all of the assigned responsibilities.

During the third audit, the team identified numerous successful practices and one non-compliance observation that FDOT will need to address through corrective actions. These results came from a review of FDOT procedures, Self Assessment, PAIR responses, project files, and interviews with FDOT personnel.

The FDOT has carried out the responsibilities it has assumed consistent with the intent of the MOU and FDOT's application. The team finds that FDOT is in substantial compliance with the terms of the MOU. By addressing the observations in this report, FDOT will continue to assure a successful program.

Successful Practices and Observations

Successful practices are practices that the team believes are positive, and encourages FDOT to consider continuing or expanding those programs in the future. The team identified numerous successful practices in this report. Observations are items the team would like to draw FDOT's attention to, which may improve processes, procedures, and/or outcomes. The team identified no observations in this report.

A non-compliance observation is an instance where the team finds the State is not in compliance or is deficient with

regard to a Federal regulation, statute, guidance, policy, State procedure, or the MOU. Non-compliance may also include instances where the State has failed to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities they have assumed. The FHWA expects the State to develop and implement corrective actions to address all non-compliance observations. The team identified one non-compliance observation during this third audit.

The team acknowledges that sharing initial results during the site visit closeout and sharing the draft audit report with FDOT provides them the opportunity to clarify any observation, as needed, and/or begin implementing corrective actions to improve the program. The FHWA will also consider actions taken by FDOT to address these observations as part of the scope of Audit #4.

The Audit Report addresses all six MOU program elements as separate discussions.

Program Management

Successful Practices

The team learned through interviews that FDOT has a strong process for addressing its Self Assessment corrective actions. The process includes creating an action plan, dedicating staff to the plan, and identifying timeframes for follow up. The FHWA confirmed in FDOT's Self Assessment documentation that FDOT provides a status regarding its "opportunities for improvement" which includes a strong process for corrective actions and a corrective action status update section.

As FDOT's NEPA Assignment Program matures, communication continues to improve between FDOT's SMEs, consultants, and FDOT's District staff. Through interviews the team confirmed the improved communication. For example, some districts invite environmental staff to the District Interchange Review Committee meetings to discuss IAR projects early in the process. The team encourages FDOT to implement this practice statewide. Another example of good communication is the process that OEM uses to implement new FHWA guidance. When new guidance is issued and FDOT changes its process, it communicates with the districts through changes in the manuals, periodic meetings, and training. During the audit, the team confirmed broad awareness of how FDOT chose to implement the FHWA June 12, 2018, *Additional Flexibilities in CEs* memorandum.

The team learned that the enhancements to the SWEPT system continue to create efficiencies for the NEPA Assignment Program implementation and FDOT continues to dedicate resources to improve SWEPT. Interviewees stated that these investments have resulted in more consistent documentation from the districts. Additional enhancements to SWEPT include cross references to FDOT's PD&E manual and updates to the Type 1 CE, Type 2 CE, and reevaluation forms. The FDOT OEM now has direct responsibility and control for SWEPT updates, which allows for quicker revisions to SWEPT to adapt to its changing needs. For example, when FDOT implemented its process for documenting legal sufficiency determinations, modifications to SWEPT were needed to allow users to specify the type of legal sufficiency review being performed, such as for an Environmental Impact Statement or a Section 4(f) evaluation. The FDOT expeditiously addressed this need and now SWEPT permits users to distinguish type of document being reviewed for legal sufficiency.

The SWEPT is considered by FDOT staff to be a significant program level QA/QC tool as it requires input of needed information prior to allowing the project to advance further. For example, a project cannot advance to FDOT OEM for QA/QC review until the QA/QC review is completed at the district level by the Environmental Administrator and the Engineering Administrator. Another example of SWEPT's QA/QC control is the environmental certification process. The environmental certification document is used to document NEPA completion to authorize Federal funding in subsequent project phases. The SWEPT will generate the environmental certification only after NEPA has been approved.

Quality Assurance/Quality Control

Successful Practice

During interviews, FDOT staff presented the Electronic Review Comments internal review platform as a tool that allows continuous engagement among environmental staff and SMEs. This tool allows continuous QC as the environmental project is developed.

Legal Sufficiency

The team's review of FDOT's legal sufficiency program found that FDOT has continued to structure the legal sufficiency process for the NEPA Assignment Program by having in-house counsel, as well as outside counsel with NEPA experience, available. The FDOT

has made one legal sufficiency Section 4(f) determination during the audit time frame, implementing the internal procedures that were previously developed. The FDOT's Office of General Counsel (OGC) continues to participate in monthly coordination meetings and topic-specific meetings with OEM and the districts. It also reviews other environmental documents when requested for legal input. There remains close collaboration throughout the process amongst and between OGC, OEM, and the district attorneys.

Successful Practice

The SWEPT has a form that has the capability to document the legal sufficiency finding within the system. This tool ensures that proper documentation is captured in the project file without the need for additional supporting documentation.

Training Program

The FDOT's training program continues to be exemplary. The FDOT has continued to focus resources ensuring staff, other agencies, and consultants are adequately trained. In the last year, FDOT again trained over 2,000 people in their NEPA process, endangered species, traffic analysis, cultural resources, and noise technical areas. Through information presented in the FDOT Self Assessment and through interviews of FDOT staff, the review team learned of the variety in and growth of FDOT's environmental training program.

The FDOT OEM promotes staff awareness of its Self Assessments through multiple notices to districts, a statewide Self Assessment kick-off Webinar, and the use of Self Assessment computer-based training courses. Through information presented in the FDOT Self Assessment and through interviews of FDOT staff, the team learned that FDOT is one of the few NEPA assignment States to internally promote its self assessments.

Successful Practice

The team learned through interviews of OEM staff that FDOT has increased its environmental training outreach to multiple disciplines. The Transportation Symposium has included environmental review training on a wide spectrum of topics. This year, the number of environmental training courses at the symposium increased by about 50 percent and were targeted to individuals from a broad range of disciplines.

The team also learned that FDOT's YouTube channel includes a variety of environmental training Webinars and

videos. The FDOT has migrated its Web trainings to YouTube so that trainings are available and accessible to staff and the public through the MyFDOT channel.

Performance Measures

Based on information reported in FDOT's 2019 Self Assessment Summary Report, FDOT is meeting or exceeding all performance measures.

Documentation and Records Management

The team reviewed the environmental documentation for 41 permanent repair projects to determine if the NEPA was completed prior to authorization and if the NEPA scope was consistent with the contract. All 41 permanent ER projects were determined compliant.

The team reviewed all IAR projects (five projects) to determine if FDOT was following protocols for environmental review. The projects selected for the IAR file review had NEPA documents that were still under development; therefore, no conclusions could be drawn from the project file review.

Successful Practice

The FDOT Central Office has procedures that ensure IAR projects receive NEPA review as part of the FHWA IAR approval. Systems Planning staff have been trained in SWEPT and verify that the NEPA documentation supports FHWA's NEPA review expectations for IAR projects.

Non-Compliance Observation #1: Some FDOT Project Files Contain Insufficient Documentation To Support the Project Authorization, Environmental Analysis, or Decision

The team reviewed environmental documentation for 21 Type 2 CEs and 2 EAs to determine if the environmental review met Federal requirements. The team found CEs missing U.S. Coast Guard permits and Endangered Species Act consultation documentation (two projects). Finally, at the time FDOT prepared a Finding of No Significant Impact, the review team determined the scope of the EA was inconsistent with the State Transportation Improvement Program.

The team also reviewed 252 Project Authorization files to determine if the NEPA certification was completed for these projects prior to the authorization. The team found that some Project Authorizations did not have documentation verifying that NEPA was completed (18 projects).

The team's observations on the environmental documentation and on the Project Authorization files were

shared with FDOT for its consideration and initial responses. The team received responses from FDOT either resolving the observation or verifying missing documentation and/or procedural deficiencies. While these projects were found non-compliant at the time of the review, the missing documents have subsequently been uploaded by FDOT or FDOT committed to implementing a process improvement to address these concerns.

Update from 2017 Audit #1, Non-Compliance Observation #1 and 2018 Audit #2, Non-Compliance Observation #1: Some FDOT Project Files Contain Insufficient Documentation To Support the Environmental Analysis or Decision

The FHWA reported a non-compliance observation related to some FDOT project files that lacked documentation to support the environmental analysis or decision as part of Audit #1 and Audit #2. The FDOT and FHWA have productively worked together to resolve documentation issues from these previous audits. The FDOT continues to implement process improvements to address noted procedural deficiencies. These improvements will be considered during the next audit.

The FHWA and FDOT have also been working together through previous audits to mutually understand FDOT's implementation of reasonable assurance that the project impacts would not be significant when full compliance for a project is not possible by the time the NEPA decision has been prepared. Through the interviews and project file reviews, the team received clarification from FDOT regarding the differences in the applicability of standard specifications and special provisions when addressing endangered species impacts and consultation, and how these tools support reasonable assurances of no significant impacts to support the NEPA decision. In addition, the team learned that FDOT provided training and clarifications internally to ensure reasonable assurance is appropriately applied during NEPA document development.

Finalizing This Report

The FHWA provided a draft of the audit report to FDOT for a 14-day review and comment period. The team considered FDOT's comments in this draft audit report. The FHWA is publishing this notice in the **Federal Register** for a 30-day comment period in accordance with 23 U.S.C. 327(g). No later than 60 days after the close of the comment period, FHWA will address all comments submitted to finalize this

draft audit report pursuant to 23 U.S.C. 327(g)(2)(B). Subsequently, FHWA will publish the final audit report in the **Federal Register**.

The FHWA will consider the results of this audit in preparing the scope of the next annual audit. The next audit report will include a summary that describes the status of FDOT's corrective and other actions taken in response to this audit's conclusions.

[FR Doc. 2020-03465 Filed 2-20-20; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA-2016-0097; PD-38(R)]

Hazardous Materials: California Meal and Rest Break Requirements

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Dismissal of petition for reconsideration of an administrative determination of preemption.

Petitioner: The California Labor Commissioner.

Local Law Affected: California Labor Code, Sections 226.7, 512, and 516; California Code of Regulations (CCR), title 8, section 11090.

Applicable Federal Requirements: Federal Hazardous Material Transportation Law (HMTA), 49 U.S.C. 5101 *et seq.*, and the Hazardous Materials Regulations (HMR), 49 CFR parts 171-180.

Mode Affected: Highway.

SUMMARY: On September 21, 2018, in response to a petition from the National Tank Truck Carriers, Inc. (NTTC), PHMSA published a determination that California's meal and rest break rules (MRB Rules) are preempted, under 49 U.S.C. 5125, as applied to drivers of motor vehicles transporting hazardous materials. The California Labor Commissioner's petition for reconsideration of that decision is denied on the grounds of mootness. After PHMSA issued its preemption determination, and after the request for reconsideration was filed, the Federal Motor Carrier Safety Administration (FMCSA) determined that the MRB Rules are preempted, under 49 U.S.C. 31141, as applied to property-carrying commercial motor vehicles drivers covered by FMCSA's hours of service regulations. FMCSA's decision covers a broader group of drivers than PHMSA's decision, including NTTC's members. Accordingly, granting the California

Labor Commissioner's petition for reconsideration will not change the fact that the MRB Rules cannot be enforced against NTTC's members.

FOR FURTHER INFORMATION CONTACT: Vincent Lopez, Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590; Telephone No. 202-366-4400; Facsimile No. 202-366-7041.

SUPPLEMENTARY INFORMATION:

I. Background

A. PHMSA Proceeding

NTTC applied to PHMSA for a determination on whether Federal Hazardous Material Transportation Law, 49 U.S.C. 5101 *et seq.*, preempts the MRB Rules, as applied to the transportation of hazardous materials.

Section 5125 of 49 U.S.C. contains express preemption provisions relevant to this proceeding. In particular, subsection (a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted—unless the non-federal requirement is authorized by another federal law or DOT grants a waiver of preemption under section 5125(e)—if:

(1) Complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.¹

PHMSA preemption determinations do not address issues of preemption arising under the Commerce Clause, the Fifth Amendment or other provisions of the Constitution, or statutes other than the Federal Hazardous Material Transportation Law, unless it is necessary to do so in order to determine

¹ These two paragraphs set forth the "dual compliance" and "obstacle" criteria that are based on U.S. Supreme Court decisions on preemption. See *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978). PHMSA's predecessor agency, the Research and Special Programs Administration, applied these criteria in issuing inconsistency rulings under the original preemption provisions in Section 112(a) of the Hazardous Materials Transportation Act, Public Law 93-633, 88 Stat. 2161 (Jan. 3, 1975).