

VIA COURIER DELIVERY

June 19, 2013

The Honorable Ray LaHood
Secretary, U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

The Honorable Anne Ferro
Administrator
Federal Motor Carrier Safety Administration
1200 New Jersey Avenue, S.E., Suite 600
Washington, D.C. 20590

Re: Request for Limited Exemption for Livestock Carriers from Department of Transportation, Federal Motor Carrier Safety Administration, Final Rule: Hours of Service of Drivers, Final Rule 76 Fed. Reg. 81134 (Dec. 27, 2011).

Dear Secretary LaHood and Administrator Ferro;

On behalf of the undersigned national and regional organizations representing national and regional livestock and poultry producers, processors, and transporters, we hereby request that you utilize your authority under both the Administrative Procedures Act and USC Title 49 - Transportation, to expedite the consideration of this request and grant an immediate 90 day waiver and exemption from compliance with the 30 minute Rest Break requirement of the Federal Motor Carrier Safety Administration's (FMCSA) Dec. 27, 2011, Final Rule on Hours of Service of Drivers (Hours of Service Rule) 49 C.F.R. § 395.3(a)(3)(ii) for drivers engaged in the transportation of livestock.

As detailed further below, and as discussed with your staff at a meeting of livestock industry stakeholders on May 29, 2013, the public interest clearly favors granting a waiver and exemption for livestock transporters from the 30 minute rest break regulation set to take effect July 1, 2013. We are seeking this exemption because complying with the 30 minute rest break rule will cause livestock producers and their drivers irreparable harm, will place the health and welfare of the livestock in their care at risk, and will provide no apparent increased benefit to public safety (and will likely decrease public safety), while forcing the livestock industry and their drivers to choose between the humane handling of animals or complying with a FMCSA regulation requiring a 30 minute rest break.

Livestock Producers Take Their Responsibility for the Safety of their Animals and Other Drivers Seriously

Livestock producers are responsible for the transportation of millions of animals on the road every day. The welfare and safety of the animals in transit is their top priority. Many livestock producers seek additional training to learn proper animal handling and transportation methods by participating in programs such as the Pork Industry's Transport Quality Assurance (TQA) Program and the Master Cattle Transporter (MCT) program under the National Beef Quality Assurance training program. These programs are voluntary education programs that were

developed and offered through the United States Department of Agriculture's Pork Checkoff Program and Beef Checkoff Program. For pork, the program is designed to help address the driver safety and animal welfare needs of the approximately 600,000 pigs that are transported every day on U.S. roads. In reality though, it is more than just voluntary. For instance, most major packers require that any driver arriving on their property be TQA certified. Some companies, such as Hormel Foods, also require that, in addition to drivers, all caretakers on the farm be TQA certified. For many packers, if a driver arrives at a plant and is not certified in the TQA program, he or she is required to become certified before that driver is authorized to deliver future loads. In fact, some packing plants maintain TQA advisors on staff who will train any driver before leaving the plant.

Likewise, the MCT training program was created by cattle industry experts and volunteers who worked together to develop low-stress safe handling and transportation methods for cattle. The program is offered to the 800,000 cattle raisers across the United States in effort to improve the overall animal handling and transportation safety of cattle. According to the MCT training program, proper handling and transport of cattle can reduce sickness in calves, prevent bruises, and improve the quality of the meat from these animals. The training program discusses the proper movement of cattle up to and on to the trailer, distributing cattle correctly on the trailer, hauling techniques that reduce cattle stress, and how to handle emergency situations. The program also focuses on the impact of hot and cold weather conditions on cattle in transit and discourages transportation during certain hours of the day when cattle would be most vulnerable to the elements. While knowledge and compliance with transportation laws is the responsibility of each producer, this training program is designed to ensure greater consistency and usage of best production practices across the cattle industry.

i. Animal Welfare Is A Primary Concern and a National Priority

For livestock producers, many whom come from long family lines who raised livestock, the need to protect and provide for the animals in their care is literally in their blood. Many started raising livestock as young children, went on to obtain animal science or veterinary degrees, and have stayed in rural America and dedicated their life to providing food and raising and caring for the welfare of their livestock. This dedication to the welfare of animals as an important fundamental goal of their livelihood is present throughout the industry, and it's a goal they strive to achieve throughout the animal's life.

ii Welfare Implications Associated With Transportation

The necessary process of transporting livestock, whether to slaughter, transfer of ownership, or for purposes of breeding or simply finding forage or feed, is a significant concern for anyone obligated to care for and protect livestock. Animals in transportation have the potential to face an assortment of various stresses, from traffic accidents to variations in temperature, humidity, and weather conditions, farmers and the drivers who transport their livestock are responsible for the safety and well being of all the animals in their care.

During summer months, exposure to heat is one of the greatest concerns in maintaining an animal's well-being. Famed animal welfare expert Temple Grandin, Ph.D., has made clear that when transporting pigs, a primary goal is to keep them cool because they can easily

overheat¹. More specifically, pigs cannot sweat and are subject to heat stress even on a mild day. Similarly, the MCT Guide recommends that when extreme heat conditions exist (when temperature and humidity create a heat index greater than or equal to 100 degrees Fahrenheit) cattle are placed at significant health risk. Furthermore, when cattle are stressed in extreme heat conditions, they are more likely to become non-ambulatory, sick, and even die. If cattle must be transported during times of high temperature and humidity, it is recommended the driver not stop at all.² Internal trailer temperatures will rapidly increase when the vehicle stops moving due to loss of significant airflow through the trailer and heat production from the animals.

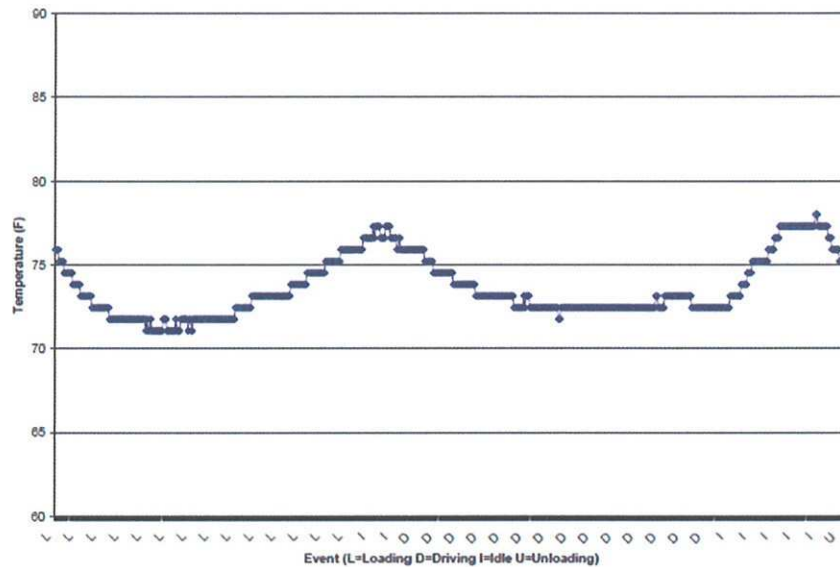


Figure 2a. Changes in air temperature (F) during a typical transportation experience in the summer of 2004. Data from such streams are summarized in Figure 1a. Outside air temperature was 67.65 to 69.71 F (19.80 to 20.95 C) during the transport experience. The truck contained 168 pigs of about 115 kg. On the x axis, L = Loading, I = Idle, D = Driving, U = Unloading.

¹ Lowering Stress To Improve Meat Quality and Animal Welfare In Pigs. www.grandin.com/meat/pigs/pig.meat.html, See also <http://www.noble.org/ag/livestock/monitorheatstress/>. Noble has a chart showing the fluctuating temperature conditions at which severe heat impacts occur.

² “Master Cattle Transporter Guide”, National Beef Quality Assurance Program, <http://www.bqa.org/bqamastercattletransporter.aspx>

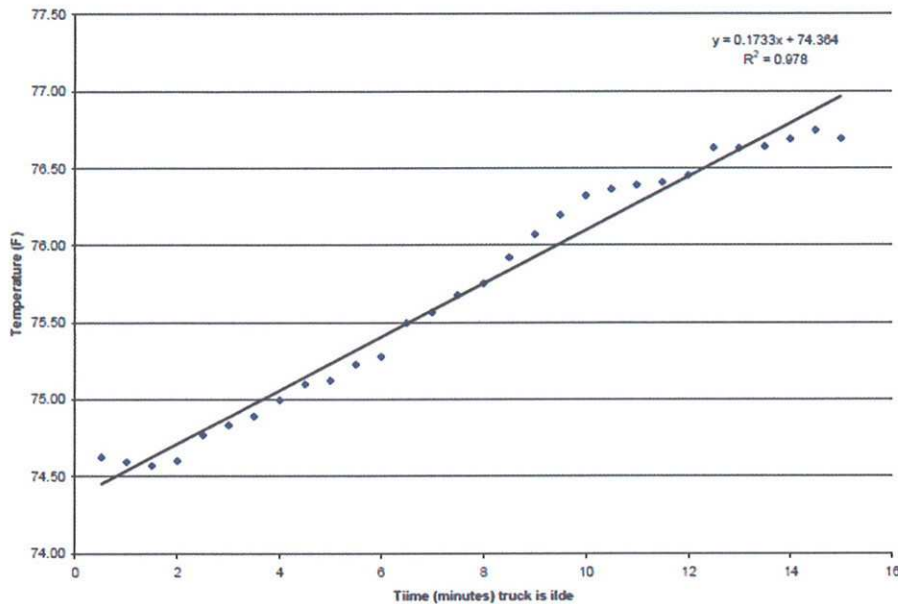


Figure 3. Time that a straight-deck, double-decked trailer remains idle (not moving) while 168 pigs are inside and the associated rise in inside air temperature (F). These data are based on an average of 18 trucks that had temperature sensors inside the trailer during periods of idle time.

Extreme heat can lead to the death of animals³. For swine, when heat stress occurs, a pig's body temperature rises to a level it cannot control through its normal panting mechanisms. A pig in distress will make deep, gasping sounds. Absent immediate and careful attention, it can easily die.⁴

As a result, basic animal welfare requirements dictate that trucks hauling livestock avoid stopping in temperatures more than 80 degrees.⁵ In fact, the pork industry takes this concern so seriously that standards dictate that a truck carrying livestock should only stop during high temperatures when the animals will either be immediately unloaded or a safety issue compels it. If stopped, drivers need to stay with the animals and provide them water to help cool their bodies⁶.

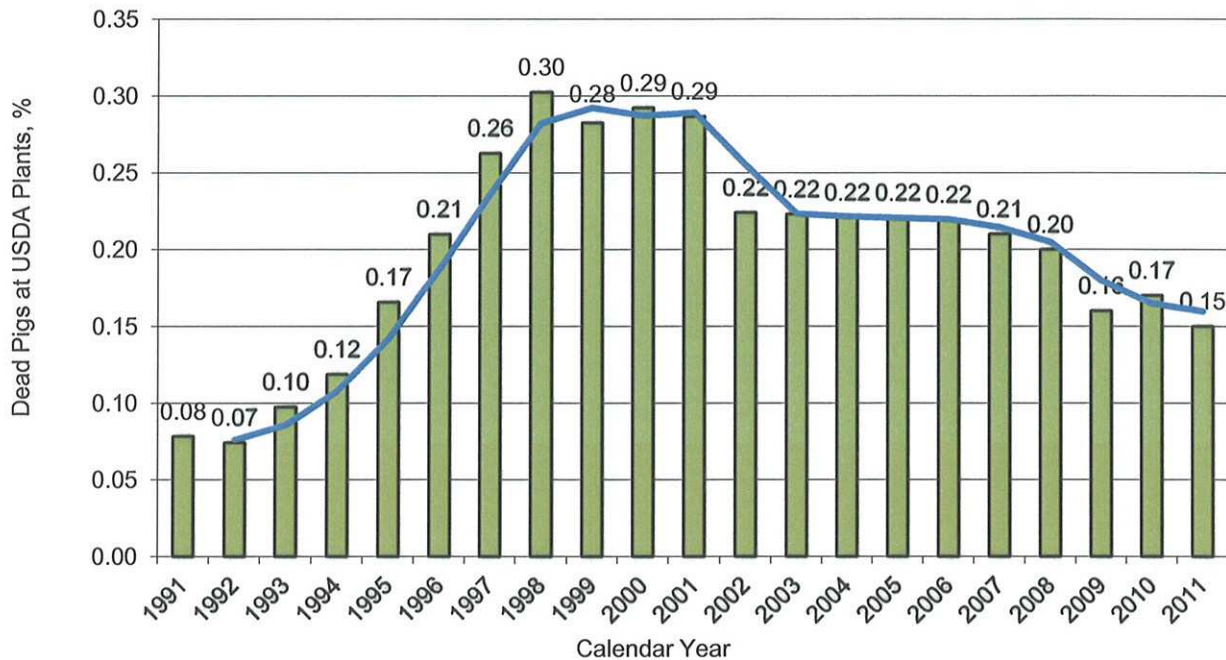
The impact of these actions is evident, with mortality losses during transportation dropping significantly. According to USDA data, prior to TQA, pig mortality during transportation hovered between 0.29 and 0.3 percent. Since TQA's adoption, that number was cut fully in half, to 0.15 percent of pigs arriving at the packer dead and is continuing to trend downward from there.

³ http://www.ars.usda.gov/research/publications/publications.htm?seq_no_115=247208&pf=1

⁴ National Pork Board, Transportation Quality Assurance Handbook, <http://www.pork.org/filelibrary/TQAAdvisor/TQA4Manual.pdf>

⁵ Grandin, Temple Welfare of Pigs During Transport

⁶ National Pork Board, Transportation Quality Assurance Handbook, Page 21, <http://www.pork.org/filelibrary/TQAAdvisor/TQA4Manual.pdf>



In its response to comments as part of the Final Rule on the 30 minute rest break, FMCSA responded that the concern over an increased risk of animal deaths by livestock haulers due to a 30 minute rest break was “overstated,” comparing the ability to keep an animal confined for up to 28 hours under a different statute, and concluding that “Under these circumstances, it is difficult to see how a half-hour break taken no later than 8 hours after the driver comes on duty – and presumably much longer than that after the animals were loaded – could have dire consequences.” 76 *Fed. Reg.* 81145 column 3.

As indicated above, FMCSA focus during the rulemaking on the maximum hours allowed for animals was misplaced and reflected an incomplete understanding of the challenges that drivers, farmers, and the animals in their care, face during hot summer months, and the significant impacts associated with not only stopping for a 30 minute break in summer conditions, but the associated prohibition under the same FMCSA rule on the driver spending time ensuring the welfare of the animals in their care.

The potential for harm is real, and it is FMCSA that appears to be understating the risks attendant to such a delay. This impact extends beyond death losses to heat stress. Some livestock may arrive at their destination so heat stressed they cannot move. While some hogs will recover, some may not and they will be euthanized as a result and removed from the food system. Since TQAs adoption, the pork industry has seen the total number of animals that either die en-route or will need to be euthanized drop by nearly 750,000 a year. While other factors have certainly played some role in this remarkable improvement, TQA is the industry’s primary tool and its incompatibility with the current FMCSA’s 30 minute break rule will set this progress back significantly. For cattle, non-ambulatory livestock are strictly banned from entering the food system, and we go to great lengths to make sure that only healthy cattle are destined for human consumption. That being said, the common goal is to safely load, transport, and unload the cattle as efficiently as possible so they will spend the least amount of time possible on the

trailer. Many cattle are transported hundreds of miles and in some cases over one thousand miles from cow-calf operations in the southern and eastern states, as well as the northern and the western states, to feed yards in the Midwest. For long hauls it is recommended that the driver check the cattle after two hours on the road and then every four hours after that. The MCT Guide further recommends keeping stops as short as possible and to avoid stopping in extreme heat or cold weather conditions.⁷

iii Addressing Transportation Safety

In addition to addressing the welfare needs of the animals they are transporting, TQA certified drivers also learn to recognize and prevent driver fatigue in addition to training on general highway safety and accident prevention measures. The significant focus on preventing driver fatigue provides guidance to ensure drivers obtain adequate rest, ensure appropriate climatic conditions in the cab, eat a healthy diet, and learn to recognize the signs of fatigue.

FMCSA Hours of Service for Drivers Rule: 30 Minute Rest Break

On Dec. 29, 2010, in order to promote safety, and to protect driver health, the FMCSA published a Notice of Proposed Rulemaking regarding the Hours of Service of Drivers transporting goods that proposed a requirement for drivers to have a mandatory periodic 30 minute “off duty” rest break 75 *Fed. Reg.* 82170. That proposal was ultimately finalized with slight changes nearly a year later on Dec. 27, 2011⁸.

Under the final rule, the FMCSA has included a requirement that:

49 CFR § 395.3 Maximum driving time for property-carrying vehicles.

(a) . . . no motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle . . . unless the driver complies with the following requirements:

⁷ Master Cattle Transporter Guide”, National Beef Quality Assurance Program, <http://www.bqa.org/bqamastercattletransporter.aspx>

⁸ While FMCSA received nearly 30,000 comments on the proposal, there were very few from stakeholders in the livestock industry who were not following the rulemaking generally, and as such did not receive adequate notice of it. The FMCSA was also confused by its applicability to them in light of the existing general motor carrier transportation exemptions under 49 USC § 13506(a)(4) regarding “a motor vehicle controlled and operated by a farmer and transporting the farmer’s agricultural or horticultural commodities and products” and (6)(A) “transportation by motor vehicle of ordinary livestock.” Indeed, a stakeholder unfamiliar with DOT’s authorities and procedures would reasonably be confused over the applicability of this regulation given FMCSA’s statements in the Dec 29, 2010 proposal regarding its uniform applicability to most drivers that “FMCSA notes that there are special provisions (some regulatory, some statutory) for farmers . . .” 75 *Fed. Reg.* 82185, column 1. In its final rule it restated the existence and applicability of these exemptions: “As FMCSA stated in the NPRM, the HOS rules are not one-size-fits-all. There are multiple exemptions and exceptions, some statutory, some regulatory (many cited by the commenters themselves). This final rule does not change existing regulatory exemptions or exceptions, and it cannot change statutory exemptions.” 76 *Fed. Reg.* 81165, column 1. If the broad exemption for ordinary livestock transported in a motor vehicle under 49 USC § 13506(a)(6)(A) is applicable to the 30 Minute Break Rule, then we request that FMCSA directly acknowledge this.

(3) *Driving time and rest breaks.*

(ii) *Rest breaks.* After June 30, 2013, driving is not permitted if more than 8 hours have passed since the end of the driver's last off-duty or sleeper-berth period of at least 30 minutes.

Furthermore, the FMCSA's rule also clarifies the narrow circumstances that qualify as an off duty rest break, and in doing so make clear that for livestock producers this time effectively does not include any time other than (i) "Time spent resting in or on a parked vehicle", or (ii) "Time spent resting in a *sleeper berth*" and specifically does not include time spent waiting for loading or unloading of the vehicle, time spent inspecting or servicing the vehicle or, "performing any other work in the capacity, employ, or service, of a motor carrier", or "Performing any compensated work for a person who is not a motor carrier." (49 CFR § 395.2)

DOT and the FMCSA Have the Authority to Grant the Petition

The Secretary has the authority under both Section 553(e) of the Administrative Procedure Act (APA) and 49 USC § 31315 to grant petitioners both a compliance waiver and a regulatory exemption. Furthermore, federal law and the department's own regulation allow for the petition to be granted in an expedited manner, without the customary need for prior publication and opportunity for comment.

1. Authority to Grant Both A Waiver and An Exemption

Where the Secretary finds "it is in the public interest, and it is likely to achieve a level of safety equivalent to or greater than the level of safety obtained in the absence of a waiver" he is authorized to grant a waiver (1) for a period not in excess of 3 months; (2) limited in scope and circumstances; (3) for nonemergency and unique events; and (4) subject to such conditions as the Secretary may impose. 49 USC § 3135(a). Similarly, the Secretary is also authorized to grant an exemption from a regulation where he finds that the exemption would "likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption."

2. Authority To Grant Petition In An Expedited Fashion

As a general matter, prior to the effective date of any rule or request to grant a petition, the APA requires at least 30 days public notice, unless the agency's action "recognizes an exemption" or "it is otherwise provided by the agency for good cause found and published with the rule." Accordingly, DOT's regulations governing the filing of petitions clearly recognize the necessity of acting in an expedited manner on a petition for exemption where good cause exists.

"Good cause is not defined within the provisions of the APA; therefore, the inquiry into whether good cause has been properly invoked must proceed on a case-by-case basis, with a sensitivity to the totality of the factors at play". *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 332 (1990) aff'd, 925 F.2d 1454 (Fed. Cir. 1991). "Generally, this "good cause" exception to notice and comment rulemaking, is to be 'narrowly construed and only reluctantly

countenanced.” *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C.Cir.1992) (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C.Cir.1980)). “It is an important safety valve to be used where delay would do real harm,” *U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979), “excus[ing] notice and comment in emergency situations,” *Am. Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153, 1156 (D.C.Cir.1981), see also *Jifry v. F.A.A.*, 370 F.3d 1174, 1179 (D.C. Cir. 2004), or where “it would otherwise be contrary to public policy.” *Mack Trucks, Inc. v. E.P.A.*, 682 F.3d 87, 94 (D.C. Cir. 2012).

Furthermore, good cause has been found to exist when the delay created by the notice and comment requirements would result in serious damage to important interests, *Nat’l Fed’n of Fed. Emp. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982) which can be construed to include the potential harm to a party such as the stability of a program, threat to the welfare of employees or those under a parties care, lack of accurate information, threat of litigation where there is a lack of specific direction and guidance that would “create confusion, economic harm, and disruption.” *American Fed’n of Gov’t Employees v. Block*, 655 F.2d 1153, 1157 (D.C.Cir.1981). See also, generally, *Woods Psychiatric Inst. v. United States*, 20 Cl. Ct. 324, 333 (1990) *aff’d*, 925 F.2d 1454 (Fed. Cir. 1991).

As discussed below, as currently adopted, the 30 minute Rest Break rule will conflict with long standing industry practices developed to ensure the welfare of animals during warm days, will conflict with the FMCSA’s current final rule on July 1, 2013. This is creating substantial confusion and concern for the livestock industry, which will face not just economic harm and supply disruption, but will be placed in a situation where they are forced to choose between two competing federal legal requirements and the complete loss of stability in a USDA backed program designed to address both animal welfare and roadway safety.

The Public Interest Favors Granting the Petition

As discussed, there is broad public interest in ensuring both transportation safety and animal welfare. For the livestock industry, good cause exists to grant the petition and provide an immediate waiver from the July 1, 2013, compliance deadline, because it will avoid the confusion, economic harm, and instability that comes with forcing a major segment of the U.S. economy to choose between two competing and conflicting federal programs.

Further, granting the petition, and maintaining the current status quo for the limited segment of the overall transportation economy engaged in the shipment of livestock, will likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. Livestock haulers, such as those who participate in programs like TQA, have, for a significant time, been trained and focused on the very issue that this rule seeks to address: transportation safety associated with fatigue. And for all intents and purposes, that has been a record of marked success. Indeed, the major studies that the FMCSA reviewed as it developed its final rule, showed that comparatively, the livestock sector was one of the safest. For instance, the Large Truck Crash Causation Study conducted by the FMCSA and the National Highway Traffic Safety Institute, showed that of 1123 studied accidents involving trucks hauling cargo, a mere five involved livestock transportation. Similarly, the report Trucks Involved In Fatal Accidents Factbook, 2005 conducted by the Transportation Research Institute, shows that of 5343 trucks involved in fatal accidents studied, livestock transporters accounted for 39, or just

0.7 percent. However, the reliance, and therefore participation, in programs like TQA will be severely impacted by the confusion associated with drivers being required to meet two competing and often times mutually exclusive federal requirements.

Granting an immediate 90 day waiver would directly address the most pressing issue facing livestock carriers and their compliance with the 30 minute break rule: the dangerous conditions caused by summer heat. In doing so, the FMCSA would also provide itself the necessary time to seek further, more detailed information and studies regarding the animal welfare impacts of the 30 minute break rule as well as the potential safety impacts associated with a longer term exemption from compliance. This would create an additional opportunity for FMCSA to work collaboratively with both livestock stakeholders and USDA in the review of data and, if necessary, the development of a future rulemaking that narrowly addresses the many competing challenges posed by the 30 minute break rule for drivers hauling livestock

Finally, it is in the public interest to encourage more collaborative programs that achieve multiple fundamental goals such as animal welfare and transportation safety needs, rather than creating a system that has the potential to decrease not only efficient government but also safety and overall trust in the ability of government to act in the best interest of society broadly.

For all the reasons stated, we urge you to recognize the pressing time frame and the good cause conditions that exist and grant this petition for an immediate 90 day waiver from compliance and an exemption from compliance with the final FMCSA 30 minute break rule.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Michael Formica
Chief Environmental Counsel
National Pork Producers Council, on behalf of

Agricultural & Food Transporters Conference – ATA
American Farm Bureau Federation
American Feed Industry Association
American Meat Institute
Livestock Marketing Association
National Cattlemen’s Beef Association
National Chicken Council
National Milk Producers Federation
National Pork Producers Council
National Turkey Federation
North American Meat Association
Professional Rodeo Cowboys Association
U.S. Poultry & Egg Association

Cc: The Honorable Thomas Vilsack
Secretary, United States Department of Agriculture

The Honorable John Rockefeller IV
Chairman, Senate Committee on Commerce, Science, and Transportation
United States Senate

The Honorable John Thune
Ranking Member, Senate Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Bill Shuster
Chairman, House Committee on Transportation and Infrastructure
United States House of Representatives

The Honorable Nick Rahall
Ranking Member, House Committee on Transportation and Infrastructure
United States House of Representatives

The Honorable Debbie Stabenow
Chairwoman, Senate Committee on Agriculture, Nutrition and Forestry
United States Senate

The Honorable Thad Cochran
Ranking Member, Senate Committee on Agriculture, Nutrition and Forestry
United States Senate

The Honorable Frank Lucas
Chairman, House Committee on Agriculture
United States House of Representatives

The Honorable Collin Peterson
Ranking Member, House Committee on Agriculture
United States House of Representatives

Docket Clerk
Office of the General Counsel
United States Department of Transportation