

NEW YORK STATE DEPARTMENT OF TRANSPORTATION

COMMENTS OF THE
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.

IN RESPONSE TO THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION
REQUEST FOR COMMENTS ON PROPOSED RULE ON THE REGULATION OF
THE USE OF HIGHWAYS BY LARGE TRUCKS, REASONABLE ACCESS,
NO. TRN-34-09-00021-P

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The Owner-Operator Independent Drivers Association, Inc. (“OOIDA”) hereby submits its comments in response to the Notice of Proposed Rulemaking, I.D. No. TRN-34-09-00021-P, published by the New York State Department of Transportation (“NYSDOT”) in the August 26, 2009 New York State Register, Vol. XXXI, Issue 34 (the “Notice”).

INTRODUCTION

In June of 2008, the NYSDOT issued draft regulations aimed at keeping large trucks off State roads. The proposal required large trucks to stay on the national network of highways unless a State access highway or other State road was the “exclusive” road providing access to a specific terminal, facility, or other pickup/delivery site, or unless use of a State road was “reasonably necessary” to access such a terminal, facility, or site. The proposed regulations listed 14 factors to be considered in determining whether the use of any State road was reasonably necessary. The FHWA and FMCSA at the U.S. Department of Transportation reviewed the proposed regulations and found that many of the 14 factors conflict with applicable Federal regulations because denial of access to State roads must be based upon safety or engineering considerations. Thus, factors such as proximity to residential areas, schools, lakes or riverfronts, or the presence of pedestrians and bicycles, all of which were included in the 14 factors, could not properly be considered by the NYSDOT as reasons to ban large trucks from State roads.

To avoid Federal preemption of the nonconforming regulations, in October of 2008

NYSDOT issued revised proposed regulations that eliminated those 14 factors as well as mandatory language requiring primary use of the national network. The newly-proposed regulation instead “recommends. . .[a] hierarchy” in road usage that is similar to the mandatory hierarchy contained in the original, and also defines a “reasonable alternative route” for purposes of determining whether use of a State road is acceptable in a particular case as a route that is at least 25 miles shorter than the shortest alternative on the national network of highways. The NYSDOT also identified 7 out of the 64 State highways originally being considered, all in the Finger Lakes region of the State, as “Reasonable Access Highways” on which large truck traffic would be limited. At the same time, recognizing the reality that large trucks are necessary to transport the goods that flow to and from this region, large trucks are expressly allowed on the 7 identified State roads in numerous situations. Perhaps because of the many reasons for trucks legitimately being on those roads, neither the original nor the revised regulation contain any enforcement provisions, nor has the NYSDOT indicated how it can or will determine whether or not any particular large truck is using the State roads improperly.

The NYSDOT has sought public feedback on its proposal. According to the NYSDOT’s Draft Final Environmental Assessment issued in November of 2008 (“Environmental Assessment”), at 1-18, nearly half of those supporting the truck restrictions were specifically concerned with municipal solid waste trucks hauling non-local trash to landfills in the Finger Lakes area, not with large trucks generally. Further, out of approximately 400 written responses, about two-thirds opposed the regulation. *Id.* at 1-19. Notwithstanding the volume and nature of those negative responses, plus subsequent vigorous and well thought out written opposition to the proposal, the NYSDOT has now, in August of 2009, published a formal request for public comments on proposed regulations that are identical to the draft issued last October.

The Owner-Operator Independent Drivers Association, Inc. is a not-for-profit trade association incorporated in the state of Missouri with its principal place of business located at 1 NW OOIDA Drive, Grain Valley, Missouri 64029. OOIDA is the largest trade association representing the interests of independent owner-operators and professional truck drivers on all issues that affect small business truckers. OOIDA actively promotes the views of small business truckers before a broad variety of forums, including federal and state administrative agencies, legislatures, courts, other trade associations, and private businesses, in an ongoing effort to obtain equitable and safe working conditions for these commercial truck drivers.

OOIDA's nearly 157,000 members collectively own and operate approximately 240,000 heavy-duty trucks. Approximately 3,475 OOIDA members live in New York and at least two of OOIDA's members, Terry Button and Lou Esposito, who live in the Finger Lakes region, have already been actively involved on an individual basis in opposing the proposed regulations. Many other OOIDA members haul freight through and within the State of New York, including the Finger Lakes region. Thus, any regulation limiting large truck access to New York State roads, even the 7 roads now proposed, could have a significant adverse impact upon their day-to-day operations.

OOIDA believes that NYSDOT's proposed truck ban is at best misguided and at worst a violation of Federal regulations that will have serious adverse economic consequences for the Finger Lakes region and the State of New York. As discussed more fully below, although NYSDOT has inserted some safety and engineering language into both the Environmental Assessment and the Notice, it is clear that the agency is still acting based upon quality of life considerations. Moreover, because of its true motivation, NYSDOT has not realistically weighed the economic costs of these truck restrictions against the ephemeral benefits to local residents and businesses. NYSDOT has also

failed to explain (in the regulations or commentary) how it can enforce the regulations without violating the U.S. Constitution when large trucks may legally be on the restricted roads for numerous reasons. NYSDOT would be better advised to focus its efforts upon a solution directed more narrowly to the only real problem here, the large number of non-local trash trucks using these roads to get to landfills in the Finger Lakes region. If NYSDOT insists nevertheless upon a broader approach, then the agency should turn away from its punitive regulatory approach and instead focus on the development of incentives that will lure large trucks off the restricted State roads and onto the national network of highways.

DISCUSSION

I. NYSDOT is still acting based upon improper considerations.

In the original June 2008 draft regulations, the NYSDOT listed 14 criteria that could be used to determine whether the use of a State road was reasonably necessary. After reviewing the regulation, the FHWA and FMCSA advised NYSDOT in a September 19, 2008 letter that 8 of those 14 criteria failed to comply with 23 C.F.R. §§ 658.5 and 658.19, which require denials of access to be grounded in either safety or engineering analyses. The nonconforming criteria – the presence of at-grade intersections, pedestrian crossings, and school buildings; use by bicyclists; close proximity to residential areas, watershed, riverfronts, or lakes; creation of noise impacts; and an all-inclusive “other factors that have a bearing upon the use of the highway by trucks and other highway users or persons in close proximity to the highway” – were directed largely to the quality of life for those who live or operate businesses along State highways, not to safety and engineering problems that may legitimately be considered in analyzing proposed restrictions on large truck use of State roads. While these criteria have been deleted from the revised text of the proposed regulations, it is

apparent that these factors, rather than safety of engineering considerations, are still motivating NYSDOT to focus truck restrictions on these particular Finger Lakes roads.

For example, in the Environmental Assessment issued after the revised regulations, at 1-7, NYSDOT rejects the Null or No Action Alternative even though past methods for dealing with large truck traffic “are sound from an engineering perspective, [because] they have not adequately addressed the concerns of stakeholders, which include adjacent property owners, and multimodal users, such as pedestrians and bicyclists. The concerns expressed by these stakeholders relate to quality of life and are not quantified using engineering data.” Consistent with this admission, the stated objectives/purposes of the regulations include the reduction of large truck traffic in community or village settings and improving the quality of life of communities affected by large trucks. *See id.* In short, NYSDOT, by its own admissions is still acting primarily based upon “quality of life” considerations.

It is not sufficient for NYSDOT to state that “Large truck traffic results in an increased potential for severe accidents, increased noise and visual disruptions, and increased emission levels, and increased wear on highway infrastructure,” to convert quality of life concerns into a safety and engineering issue for these particular roads. *Id.* at 1-7. Obviously, to the extent that this statement is true, it would apply to truck usage on any road. Nor do the distinctions drawn by NYSDOT between these Finger Lakes routes and other State roads – these routes service through trucks, an economic advantage may be gained by using these roads, and there’s a high level of public concern regarding the number of large trucks on these roads – implicate safety or engineering concerns. *Id.*

Although NYSDOT’s recent request for comments claims that the 7 identified routes “can be restricted on the basis of safety and engineering. . .,” there is no evidence in the Environmental

Assessment or the Notice itself that any technical safety and engineering findings support this conclusion.¹ Further, other statements in NYSDOT's Notice reveal its real purpose to be the creation of a higher quality of life for Finger Lakes residents. In summarizing the Regulatory Impact Statement, the Notice provides that the proposed rule recognizes that highways "must accommodate the economic, historical, natural and unique characteristics of communities. . .," balancing the needs of local communities with the need for trucks to deliver goods. The Regulatory Flexibility Analysis portion of the Notice reaffirms this emphasis on non-safety and non-engineering matters:

The proposed rule will benefit businesses associated with outdoor recreation, tourism, shopping, dining, and lodging along specified Reasonable Access Highways. The Finger Lakes area is one of New York State's premier tourism areas and there are approximately 36 Bed and Breakfasts and 119 restaurants located along specified Reasonable Access Highways. A reduction in large truck traffic will contribute to an environment conducive to these activities.

The fact that eliminating large truck traffic might also reduce the number of severe accidents, reduce emission levels, and reduce wear-and-tear on the involved highways does not raise legitimate safety or engineering concerns justifying restrictions on the 7 chosen roads because the same can be said for truck traffic on any road, including the national network of highways that NYSDOT wants to shift the trucks to.

II. NYSDOT has not realistically weighed the costs of truck restrictions against anticipated benefits.

NYSDOT concluded in its Environmental Assessment, at 1-17, that the economic impact of these truck restrictions will be minimal, pegging the estimated annual increase in fuel, toll, and operating costs for large trucks at \$4.2 million. Although NYSDOT identified only \$1.6 million in

¹ The New York State Motor Truck Association has made a broad FOIL request for documents that would reveal the NYSDOT's actual decision-making process. To date, however, most of the responsive documents have not been produced.

annual quantifiable economic benefits from accident reduction and reduced wear and tear on the identified roads, it ultimately concluded that the additional \$4.2 million will be more than offset by the quality of life benefits for the affected communities. *Id.* In July of 2009, the New York State Motor Truck Association provided NYSDOT with a report issued by the Capitol Hill Research Center in Albany, New York (“Capitol Research”) that evaluates NYSDOT’s analysis. This report, *New York State Department of Transportation’s Large Truck Policy: The Unreasonable Impact of the Reasonable Access Highway Regulation*, Capitol Hill Research Center (Feb. 26, 2009, updated July 6, 2009) (“*Unreasonable Impact Report*” or “*Report*”), which was provided to NYSDOT, concluded that the actual dollar cost of the regulation was grossly underestimated by NYSDOT, a finding that OOIDA supports. OOIDA believes, for the reasons set forth in the *Unreasonable Impact Report* that the potential costs of the proposed truck restrictions to the trucking industry, to New York’s economy, and to the Finger Lakes region would far outweigh any benefits obtained.

The more egregious errors made by NYSDOT that are identified in the *Report* will only be summarized here. First, the NYSDOT limited its cost estimate to the cost per mile for the portion of the trucking industry that travels upon the 7 routes under consideration. As explained in the *Report*, “The Department fails completely to consider its impact on all other industries throughout the region and the state. Even in its limited scope of the Finger Lakes Region, the proposed regulation will be far more costly to the trucking industry and businesses that depend on it than the Department anticipates in a geographic area that has already been impacted far more heavily than the rest of the state by the current recession.” In other words, NYSDOT failed to consider that industries other than “truckers” depend upon truck transport, the “multiplier effect” throughout the economy of added costs in one segment, and the impact on businesses outside the Finger Lakes region that must react to

increased freight costs, either by increasing prices or absorbing costs. The *Report* uses case studies from the agricultural and forest products industries, which are the largest business enterprises in this geographic region, as well as the trucking industry, to demonstrate that when the collateral effects of the truck restrictions are considered the financial impact will be far greater than NYSDOT has estimated.

The *Report* also correctly points out that NYSDOT has made almost no attempt to quantify the benefits of the truck restrictions, since it believes that the quality of life improvements for those who live on or conduct business along the 7 restricted highways can not be quantified in terms of dollars. See Environmental Assessment, 1-17. The only benefits actually given a number are safety benefits of \$.4 million attributed to accident reduction and a \$1.2 million reduction in local costs for road maintenance. NYSDOT simply assumes that the other more ephemeral benefits (welfare/quality of life, noise and air quality, visual/aesthetics) will sufficiently outweigh the economic costs of compliance for the trucking industry.

Although the Notice mentions comments from NYSMTA, it totally ignores the Capitol Research *Report* and once again places the increased cost of the rule at \$4.2 million. The Notice also fails for the most part to attribute any dollar values to the benefits of the rule. Instead, the Notice vaguely references as benefits the creation of an environment conducive to outdoor recreation, tourism, shopping, dining, and lodging along the 7 restricted routes and the reduction in quality of life complaints from residents. Further, the Notice also lacks any discussion of how and why such unquantifiable benefits would outweigh even the unrealistically low economic cost impact that NYSDOT attributes to the rule.

While consideration of and response to public comments is not mandatory prior to issuance

of a formal rulemaking notice, one must ask why public feedback was requested if the NYSDOT was not going to consider the information provided and make changes to its proposed regulation to reflect those comments. In any case, NYSDOT can not ignore Capital Research's analysis at this stage in the proceeding. New York's Administrative Procedure Act, Section 202.5(b), requires an agency to publish an assessment of public comments before a rule is adopted. That assessment must include an analysis of the issues raised and significant alternative suggested by comments, and description of any changes made to the rule as a result of the comments, and if those alternatives were not incorporated into the rule an explanation of reasons why not. *Id.* Thus, NYSDOT must examine the relevant and persuasive data and argument presented in the *Unreasonable Impact Report* and articulate a reasonable explanation for rejecting it. *Id.*; *Medical Soc'y of the State of New York v. Levin*, 185 Misc.2d 536, 712 N.Y.S.2d 745 (2000). The failure to consider and explain the rejection of such data constitutes arbitrary and capricious administrative action that cannot stand.

III. It is not clear that NYSDOT can enforce the regulation without violating the constitutional rights of truckers.

In response to concerns raised by the public about the methods that would be used to enforce the proposed rule, NYSDOT said in its Environmental Assessment only that it would “[d]esignate and sign specific highways.” Appendix E, E-11. Informational signage will let truckers know when they are on a restricted access road, but it does not let affected parties know how violations of the posted restrictions will be enforced. We do not know what enforcement methods will be used or what penalties will be imposed for violations

Methods of enforcement are especially problematic. Although the proposed regulation states a preference for use of national network highways, large trucks are allowed on State roads, including

the restricted State highways, for a variety of reasons. Large trucks may use State roads when this is the only route providing access to terminals and facilities for food, fuel, repairs and rest. *See* Section 8000.13(b)(2). They may use State roads to make pickups/deliveries. *See* Section 8000.12(b)&(c). They may use State roads when those roads provide a “reasonable alternative route” as defined by the regulation. *See* Section 8000.12(b)(2), 12(c)(2); 8000.13(b)(1). They may use State roads from a freight terminal if those roads provide the shortest trip to the truck’s next freight terminal destination or to the national network. *See* Section 8000.13(b)(3). Finally, they may use State roads if the national network is unavailable because of highway closures, weather conditions, and the like. *See* Section 8000.13(b)(4).

If large trucks may lawfully be on restricted State roads for so many reasons, it is unclear how those charged with enforcing this regulation will ever have a valid reason to believe that a particular truck has violated the regulation. Unless law enforcement officers want to follow a truck from its origin to its destination as it travels through the Finger Lakes region, the only alternative is to randomly stop trucks on the designated State highways to interrogate their drivers regarding their point of origin, intended destination, and reason for being on the State roads instead of the national network. Such a procedure not only raises a safety issue because of the limited number of safe places where a truck can be stopped, but may well violate the Fourth Amendment to the United States Constitution, as applied to State police by the Fourteenth Amendment, which requires law enforcement officers to have reasonable suspicion that a law is or has been violated in order to make a traffic stop. *Terry v. Ohio*, 392 U.S. 1 (1968); *New York v. Spencer*, 84 N.Y.2d 749, 646 N.E.2d 785, 622 N.Y.S.2d 483 (1995). In other words, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably

warrant that intrusion.” *Id.* at 21. The fact that a large truck is on a signed road, by itself, will not provide the requisite “specific and articulable facts” suggesting a violation when trucks may legally be on the restricted roads for so many reasons.

IV. The only issue of legitimate concern here is non-local trash trucks.

The feedback received by NYSDOT to its initial truck restriction proposal reveals that the truck-related concern of many Finger Lakes residents is the number of non-local trash trucks that are hauling solid waste to landfills in the Finger Lakes area. Indeed, nearly half of the people submitting letters or e-mails supporting the proposed regulation were specifically concerned with these trucks alone, not with large trucks generally. *See* Environmental Assessment, 1-18. Because NYSDOT claims not to have legislative authority to regulate trucks based upon the cargo being carried (Appendix H, H-3), it rejected any alternative focused exclusively upon trucks carrying trash.

However, this alone does not justify banning all large trucks from certain State highways in the Finger Lakes region. All large trucking operations should not be penalized because of a problem created by a small segment of the trucks using these roads. To the contrary, it means that NYSDOT should seek statutory authority to specifically regulate such trash trucks. Other states, such as Rhode Island, ban trucks from bringing trash generated or collected outside of the State into certain landfills. *See, e.g.*, R.I. General Laws, Section 23-19-13.1. New York could do the same. The State could also use the authority it does have to manage trash more effectively. Indeed, the legislature did just that when it created the Oneida-Herkimer Solid Waste Management Authority, a public benefit corporation empowered to collect, process, and dispose of solid waste generated in those two counties. *See* N. Y. Pub. Auth. Law §2049–aa *et seq.* (1995). The statute gave those counties authority to require “that all solid waste ... be delivered to a specified solid waste

management-resource recovery facility.” §2049–tt(3).

NYSDOT should also develop incentives to encourage trash trucks to use the national network and State highways other than the 7 restricted State roads whenever feasible. A carrot is often more effective than a stick in modifying behavior. Thus, trash trucks could be exempted from all or some part of the highway use tax when using the preferred roads. Other types of vehicles, such as trucks transporting mail for the U.S. Postal Service, trucks transporting household goods, and trucks used by farmers to transport agricultural products they have grown, have already been exempted from the tax. N.Y. Tax Law, § 504. Other vehicles, such as trucks used almost exclusively to carry milk, woodchips, or logs, qualify under certain circumstances for a substantially reduced highway use tax rate. N.Y. Tax Law, § 503-b. Trash trucks could be encouraged to change their behavior if they qualified for a tax rate reduction for miles driven on preferred routes.

NYSDOT should also work with other State agencies to get them to focus more resources on solutions that will more directly remedy the narrow problem at hand. For example, landfills could be required to expand their hours of operation to help spread out the truck traffic. Increased recycling efforts and imposition of restrictions on non-recyclable packaging by the agencies responsible for such matters are also approaches that would help ease the trash truck problem in the Finger Lakes area, with added environmental benefits.

V. NYSDOT should adopt an incentive approach that would encourage all large trucks to use other roads, instead of a system that bans such trucks from certain State roads.

As described by NYSDOT in its Notice, the proposed rule will not affect local delivery or pickups of property from businesses and consumers in the Finger Lakes region because it “applies only to ‘through’ trucks.” These highways “service through trucks shipping freight from

origins/destinations south and south east to destinations/origins west. . .” Environmental Assessment, 1-7. A regulation that primarily impacts through trucks, particularly those coming from or going to other States or Canada, by making them use longer and costlier routes than local trucks, may well violate the Commerce Clause of the United States Constitution. Article I, Sec. 8, Cl. 3. The Commerce Clause precludes state legislation that unduly burdens interstate commerce, particularly where, as here, it is discriminatory on its face.

Such state action should not be taken or permitted where reasonable non-discriminatory alternatives exist. In addition to the various narrowly-tailored actions aimed at non-local trash trucks discussed above, there are other incentives NYSDOT could provide to encourage all large trucks to use other routes. Ohio experienced an increase in truck traffic on the Ohio Turnpike when they reduced tolls for large trucks using that highway. Since NYSDOT has identified avoidance of tolls as an economic incentive for trucks to use the 7 restricted State highways, substantial E-Z pass discounts could be used to lure large trucks back onto the New York Thruway and other toll roads. In addition, large trucks could be exempted from the highway use tax for miles driven on national network highways and other preferred roads. The R-Permit program, which limits the roads that may be used by oversize or overweight vehicles, presents another avenue that could be expanded to keep certain large trucks off the restricted State highways. All of these actions will help to divert traffic from State roads in the Finger Lakes region without unduly penalizing the truck drivers who are only trying to keep commerce moving in this part of the State.

CONCLUSION

For all the reasons discussed above, NYSDOT should abandon its current plan to restrict large-truck traffic on State roads in the Finger Lakes region of the State. This, of course, does not

mean that the agency should not continue in its attempts to lessen truck traffic on these roads. However, it should focus its efforts more narrowly on restrictions on non-local trash trucks. It should also focus its efforts on less punitive measures to divert all large trucks from these State roads, such as financial incentives that would encourage truckers to use the New York thruway and the national network wherever possible. Development of other alternatives is essential because the currently-proposed regulations are not reasonably enforceable and are likely to harm the already-fragile economy of the Finger Lakes region specifically and the State of New York generally.

Respectfully submitted,



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