

Time to Call BS: Why Safety Groups Sued DOT Over Backover Rule Delay

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Last week, a consortium of safety groups and advocates decided it had had enough of the delay tactics in publishing a final rule establishing a rear visibility standard and [sued the Department of Transportation](#).

“We are going through the motions of trying to put pressure on the system to cough out the rule,” says attorney Henry Jasny of [Advocates for Highway and Auto Safety](#). “We’ve got a new Secretary of Transportation, and to help him along we figured we’d get the court involved.”

The petitioners before the U.S. Court Of Appeals’ Second Circuit in New York includes three organizations – [KidsAndCars](#), [Advocates for Highway and Auto Safety](#) and [Consumers Union](#) – and two New York residents who have backed over their children – Sue Auriemma of Manhasset and pediatrician Greg Gulbransen of Syosset. The 2008 Cameron Gulbransen Kids Transportation Safety Act was named for two-year old Cameron Gulbransen, who was killed when his father accidentally backed over him in the family’s driveway. It required the agency to issue a Final Rule amending Federal Motor Vehicle Safety Standard (FMVSS) 111, the rearview mirror standard, to, for the first time, define what a driver sees in the rear when backing up to detect pedestrians immediately behind his or her vehicle. The law forced the agency to address a significant design flaw – especially in SUVs – of expanded blind zones caused by the vehicle’s height and bulk. Dramatic pictures from KidsAndCars shows as many as 62 children arrayed directly behind an SUV that would be unseen by driver checking the rearview mirrors.

The original statutory deadline was February 28, 2011, but the Final Rule has been delayed four times, and now is on track to be completed four years after the deadline. In one of his last acts, former Secretary of Transportation Ray LaHood sent another letter to Congress delaying the issuance of a Final Rule until January 2015. (The new Secretary of Transportation, former Charlotte, North Carolina Mayor Anthony Foxx, started in July.)

The lawsuit alleges that “DOT’s failure to promulgate the regulation constitutes “agency action unlawfully withheld or unreasonably delayed” under the Administrative Procedure Act.” The group is asking the Court to order DOT to issue a final rear visibility rule within ninety days.

While the frustration over repeated delays had been mounting, if there was a tipping point, it was April 18, at the Advocates for Highway and Auto Safety annual board meeting, recalls Janette Fennell of KidsAndCars. LaHood was among the guest speakers, and when the floor opened for questions, Fennell was ready with hers: Why hadn’t NHTSA published a Final Rule on the rear visibility standard?

“He basically said: ‘Well, you know, it’s complicated,’” Fennell recalled. “The bottom line was that we just needed to be patient – he actually said that. I said, ‘With all due respect, I have been patient. I’ve been working on this for 15 years and the only thing that is happening is kids are dying.’”

Indeed, Fennell has been the lead advocate on this issue – collecting her own data, asking NHTSA to resolve the problem, educating Congress, organizing victims’ families and acting as a media source. In fact, the week before the board meeting, KidAndCars and Advocates held a press event in Washington D.C. to remind the public that the rule was still in limbo. The speakers included Rep. Peter King of New York, Rep. Jan Schakowsky of Chicago, Ill. and Ellen Adams, whose one-year old daughter, Ashleigh was killed in a September 2005 backover incident. Matthew Adams didn’t see that his daughter had wandered out of the family’s Florida home and behind his SUV as he backed out of the driveway. Several years later, grief-stricken, Mathew Adams committed suicide.

Fennell said that after LaHood’s response sunk in, auto safety advocates began to talk. Mounting a lawsuit against the federal government is complicated, she says. Public Citizen’s litigation group took over the lawyering, looking for a federal jurisdiction in which they could make a solid claim for standing. They eventually settled on New York, where Auriemma and Gulbransen reside, and where Consumers Union is headquartered.

“This was a last resort,” she says. “But, what more could we do?”

It’s Not Really That Complicated

The agency has long resisted writing a rear visibility rule, rationalizing that the deaths and injuries happened in private driveways, not the public roadways under its jurisdiction. During the lost (Administrator Nicole) Nason years, as the backover issue began to gather speed, the agency and automakers thought they might get by with public education

campaign, promoting National Safe Kids Worldwide's "Spot the Tot" campaign. But advocates finally persuaded Congress to pass legislation compelling the agency to define the parameters of rear visibility.

In 2009, the agency published an Advance Notice of Proposed Rulemaking, which detailed its various research efforts in rear visibility systems. In December 2010, a Notice of Proposed Rulemaking followed. It defined the rear area to be made visible as "a width of 10 feet (5 feet to either side of a rearward extension of the vehicle's centerline) and a length of 20 feet extending backward from a transverse vertical plane tangent to the rearmost point on the rear bumper," as this "encompasses the highest risk area for children and other pedestrians to be struck." As part of the compliance test, child-sized objects within that area must be visible to drivers when they are driving backward. The performance standard would most likely compel automakers to install rear-mounted cameras and in-board vehicle displays. At the time, the agency reckoned that it would make the statutory deadline.

But, with days to go, it re-opened the comment period and told Congress it would be turning in its homework by December 31, 2011. The agency needed more time to consider comments on the test procedures, and do more research, analysis, blah, blah. Six weeks shy of that deadline, it sent a Final Rule to the Office of Management and Budget (OMB), where it languished. Instead of the required 90-day review, OMB kept it for 19 months, while LaHood gave himself another couple of extensions, mumbling something about complexities. The rule was definitely going to get done by February 2012. Then the rule was definitely, *definitely* going to get done by December 2102. Fast forward to June, when DOT took the Final Rule back from OMB and told Congress it was moving "expeditiously toward issuing final requirements."

(Ray's dictionary is apparently a little different than the one we use at **The Safety Record Blog**. Ours defines "expeditious" as: characterized by promptness, quick.)

The new expeditious deadline will put the rule only four years off schedule – June 2015 – when it will absolutely, no-kidding be published. They mean it this time. Maybe.

Jasny says that LaHood wasn't the hold-up.

"It was in OMB for so long, it seems it's a fiscal issue — either the OMB doesn't want to add a new expensive rule or they don't like the cost-benefit analysis," Jasny says.

The advocates met with OMB to discuss the delays – and so did the industry.

Nonetheless, for the purposes of the lawsuit, it doesn't matter what OMB likes or doesn't like. It was the responsibility of the Department of Transportation to promulgate a rule within three years or show why that deadline couldn't be met, Jasny says.

The petition casts doubt on the DOT claims that more time is needed to assess the field data from the Special Crash Investigations:

"It is unclear why the rulemaking 'cannot' be completed without additional anecdotal data, given that the agency has already spent years studying the problem and is quite familiar with the various technologies and their relative effectiveness," the petition says. "None of DOT's previous letters to Congress even mentioned the Special Crash Investigations Program, much less suggested that it was indispensable. In fact, in crafting the proposed rule, DOT *already considered* the Special Crash Investigations data. If a rule cannot be issued without *reexamining* data from this program, then the rule can never be issued at all, for new crashes will continue to generate additional data. Permitting repeated extensions on such a basis would render the congressional criterion for extension of the deadline — as well as the statutory deadline itself — a nullity. An agency can always gather more data, conduct more studies, and further 'refine' its understanding before acting."

Forget the Kids; Win the News Cycle

Meanwhile, in June, as LaHood granted his department another extension and departed, the agency published a notice of its intent to change up the NCAP a little – Electronic Stability Control would no longer be a Recommended Advanced Technology in the ratings because it was mandated, but rearview cameras would. NHTSA was quite clear that this would be no substitute:

"The agency would like to emphasize that any change to NCAP to encourage the installation of rearview video systems to assist drivers in avoiding backover crashes is separate from the agency's consideration of appropriate amendments to FMVSS No. 111."

NHTSA made no public announcement of this proposal in June. But, in late September, the evening before the advocates announced their lawsuit, NHTSA issued a press release in advance of publishing a Federal Register Notice of its decision to add rearview video systems to its list of recommended features.

But, hey, don't connect the two.

"It felt like: You aren't going to give us the rule, but you are going to throw us a bone. How do you recommend something you won't regulate?" Fennell asks.

Meanwhile, the little bodies pile up.

In the 2010 Notice of Proposed Rulemaking to amend FMVSS 111, the agency estimated that each year 292 die and another 18,000 are injured – 3,000 seriously – by drivers backing up. Children under age five account for about 44 percent of the fatalities. If the vehicle is a pick-up truck, a minivan or an SUV, a backover is four times more likely to result in a fatality.

According to KidsAndCars' data, each week at least 50 children are backed over by vehicles; 48 require hospital emergency room treatment; and two children are killed. In more than 70 percent of cases involving children, the driver is a direct relative of the victim. Very young children are disproportionately affected by many vehicles' poor rearward visibility. KidsAndCars.org reported that 80 percent of the fatalities involve children age 3 and under; 43 percent of those are 1 year-old.

In its June request for comments on the agency's proposal to add rearview cameras to its list of recommended advance technologies, NHTSA published new figures:

"Backover crashes cause a significant number of fatalities and injuries each year because drivers cannot see the area behind the vehicle where pedestrians can be located. The currently available information indicates that vehicles with a GVWR of 10,000 lbs. or less alone are involved in approximately 202 fatalities and 14,000 injuries per year."

As an aside, NHTSA explained in a footnote:

"These figures differ from the NPRM to amend FMVSS No. 111 because these figures have been updated with the latest information on the backover crash problem. As backover crashes often do not occur on public roads a large portion of the available information on this crash problem comes from the "Not-in-Traffic Surveillance" or "NiTS" system. At the time of the NPRM, only 1 year of NiTS data was available. However, the database was most recently updated in October 2012 with additional years of data. Combined with the information from other NHTSA databases, the agency now estimates the target population to be approximately 202 fatalities and 14,000 injuries per year."

Where are this data? One place they are not: the docket to amend FMVSS 111.

And now, the government will have to make its case in a federal courtroom.

So, will everyone drag their feet long enough to make sure automakers aren't inconvenienced by a mandate until most of them include this safety feature voluntarily? While Honda has already made it standard on vehicles as basic as a Civic and will standardize rearview cameras fleetwide by next year, other automakers are making a bundle on this inexpensive option. Take the Ford F150 – the number-one selling vehicle in the U.S. this year; in order to get a rear-view camera, you have to jump to the third highest trim level and pay Ford another 10 grand over the base model.

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