

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Part 107**

[Docket No. HM-207E, Amdt No. 107-36]

RIN 2137-AC70

Hazardous Materials Pilot Ticketing Program**AGENCY:** Research and Special Programs Administration (RSPA), DOT.**ACTION:** Final rule.

SUMMARY: To streamline administrative procedures, cut costs, and reduce regulatory burdens on persons subject to Federal hazardous materials transportation law, RSPA is implementing a pilot program for ticketing of certain hazardous materials transportation violations. RSPA will issue tickets for violations that have little or no direct impacts on safety. Persons receiving a ticket may pay the ticket, respond informally to RSPA or request a formal hearing before a Department of Transportation Administrative Law Judge (ALJ). Penalties will be substantially reduced for persons who elect to pay the amounts assessed in the tickets.

This final rule is consistent with the recommendation in the National Performance Review (DOT02.01) to streamline the enforcement process by implementing pilot programs to offer greater flexibility in enforcement methods. RSPA's pilot ticketing program will cut costs, simplify the processing of certain Hazardous Materials Regulations (HMR) violations, and achieve compliance through more efficient and effective processes. The pilot ticketing program allows recipients to more easily respond to allegations of HMR violations.

EFFECTIVE DATE: May 15, 1996.

FOR FURTHER INFORMATION CONTACT: John J. O'Connell, Jr., Director, Office of Hazardous Materials Enforcement, (202) 366-4700; or Nancy E. Machado, Office of the Chief Counsel, (202) 366-4400, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW, Washington DC 20590-0001.

SUPPLEMENTARY INFORMATION:**I. Background**

The Research and Special Programs Administration (RSPA) is the administration within the Department of Transportation (DOT) primarily responsible for implementing the Federal hazardous material

transportation law (Federal hazmat law), 49 U.S.C. 5101-5127. RSPA does this by issuing and enforcing the Hazardous Materials Regulations (HMR), 49 CFR Parts 171-180. Under delegations from the Secretary of Transportation [49 CFR Part 1], the authority for enforcement under Federal hazardous materials transportation law (Federal hazmat law), 49 U.S.C. 5101-5127, is shared by RSPA and each of the four modal administrations: the Federal Highway Administration, the Federal Railroad Administration, the Federal Aviation Administration, and the United States Coast Guard. RSPA has primary jurisdiction over packaging manufacturers, reconditioners, and retesters (except with respect to bulk packagings, which are the responsibility of the applicable modal administration) and a shared authority over shippers of hazardous materials. RSPA does not enforce regulations applicable exclusively to motor carriers, rail carriers, air carriers or vessel carriers.

RSPA's Office of the Chief Counsel (OCC) may initiate administrative proceedings for violations of the HMR, and these proceedings may result in a civil penalty, an order directing compliance actions, or both. 49 CFR 107.307. Administrative proceedings are initiated by mailing a notice of probable violation (NOPV) to a person believed to have violated the HMR. 49 CFR 107.311. The notice specifies the alleged violation(s) of the HMR, states the proposed penalty, and includes a copy of the inspection/investigation report. Within 30 days of receiving the notice, the recipient of the notice may admit the allegations by paying the proposed penalty, make an informal response, or request a formal hearing. 49 CFR 107.313, 107.315.

The recipient who chooses to respond informally submits a written response to the OCC to contest the alleged violations or the proposed penalty. The OCC considers the inspection report, the response, and any additional evidence obtained to determine whether the recipient committed the alleged violations and, if so, the appropriate penalty in accordance with the statutory criteria for penalty determination, 49 U.S.C. 5123(c). See also RSPA's civil penalty guidelines at 60 FR 12139 [March 6, 1995]. If the recipient requests an informal conference, an opportunity is provided to supplement the written response in person or by telephone with the OCC attorney and the inspector. Information obtained by the OCC during the informal conference becomes part of the case file. The Chief Counsel then issues an order finding a violation or violations and, for each violation found,

assesses a civil penalty. The order may be appealed to the RSPA Administrator. See generally 49 CFR 107.317, 107.325(b).

Alternatively, the recipient may request a formal administrative hearing on the record before an ALJ from DOT's Office of Hearings. At the conclusion of the hearing, the ALJ determines whether the alleged violations have been committed and, if so, imposes a penalty in accordance with the statutory assessment criteria. Either party may appeal a decision of the ALJ to the RSPA Administrator. See generally 49 CFR 107.319, 107.325(a).

At any time during an informal or a formal proceeding, RSPA and the recipient of the notice may agree upon an appropriate resolution of the case. 49 CFR 107.327.

II. Proposed Rule

On August 21, 1995, RSPA published a notice of proposed rulemaking (NPRM) under Docket HM-207E [60 FR 43430] seeking public comment on a proposal to implement a pilot program for ticketing certain violations of the HMR. On October 17, 1995, RSPA extended the comment period for an additional 30 days. See 60 FR 53729.

Under the proposed rule, the Associate Administrator for Hazardous Materials Safety would be authorized to issue tickets for certain HMR violations that are currently handled through the civil penalty process. Violations eligible for inclusion in the pilot ticketing program would be those that do not have a substantial impact on safety. Because this program is designed to ease administrative and regulatory burdens on persons subject to enforcement proceedings under the HMR, violations currently eligible, under 49 CFR 107.309, for letters of warning generally would not be included in the pilot ticketing program.

The NPRM contained a proposal for a two-year pilot program. At the end of two years, RSPA would evaluate the program in terms of cost savings, time savings, and impact on the effectiveness of its compliance program. The proposed rule also suggested a number of violations for inclusion in the pilot ticketing program, including, among others, operating under an expired exemption, failing to register, failing to maintain training records, and failing to file incident reports. RSPA indicated that, based on comments received and experience gained through administration of the pilot ticketing program, additional types of violations might be added to the program. These violations would not be processed under the pilot ticketing program if

more serious violations also are alleged. Furthermore, a previous ticketing violation will be considered a "prior" violation in the event of a future violation of the HMR by the same party.

In the proposed rule, RSPA indicated an expectation that the Associate Administrator for Hazardous Materials Safety would delegate ticketing authority to the Director, Office of Hazardous Materials Enforcement (OHME), who may redelegate that authority. RSPA field inspectors would conduct inspections as at present. Supervisory inspectors then would evaluate field inspector reports and issue tickets to parties when appropriate. Consequently, tickets would not be issued on the spot by inspectors following an inspection but would be issued shortly thereafter. The ticketing process would be limited to those cases involving violations identified as meeting safety risk criteria for ticketing established by the Associate Administrator.

A ticket would include a statement of the facts supporting the alleged violation. In addition, the ticket would set forth the maximum penalty provided by statute, the proposed penalty determined according to the RSPA civil penalty guidelines, see 60 FR 12139 [March 6, 1995], and the ticket penalty amount. The ticket would state that the recipient must pay the penalty or request a hearing within 30 days of receipt of the ticket.

RSPA proposed that the civil penalty contained in the ticket would be substantially less than the penalty that would be proposed under current procedures or that could be imposed by an ALJ at a hearing. RSPA also stated that if the recipient pays the ticket amount and states that action to correct the violation has been taken, the matter would be closed and there would be no further agency action. If the recipient elects not to pay the ticket and requests a hearing, RSPA would forward the case file to a Coast Guard Hearing Officer who would review the case in accordance with Coast Guard procedures set forth at 33 CFR 1.07. The Hearing Officer would not be bound by the reduced penalty amount in the ticket and could impose a civil penalty as high as the proposed penalty determined under RSPA's civil penalty guidelines. The Hearing Officer's factual findings and legal conclusions in a particular case would apply solely to that case. A person could appeal the decision of the Hearing Officer to the Commandant, United States Coast Guard.

RSPA also stated in the proposed rule that a recipient would waive a right to

a hearing by failing to respond to the ticket within 30 days. Moreover, failure to respond would be deemed an admission of the violation, and the reduced penalty would be owed to RSPA. An unpaid penalty or a penalty imposed by the Coast Guard Hearing Officer or the Commandant on appeal would constitute a debt owed to the United States Government.

III. Discussion of Comments

RSPA received 31 written comments on the NPRM. The comments were submitted by chemical manufacturing companies, trade associations, transporters and private individuals. Commenters uniformly supported RSPA's efforts to streamline administrative procedures, cut costs and reduce regulatory burdens.

Approximately half of the commenters supported RSPA's proposal but with various recommended changes. The remainder opposed the proposal, and some suggested alternative means of improving current enforcement procedures.

The commenters predominantly addressed the following issues: (1) Violations under the pilot ticketing program; (2) authority to issue tickets; (3) the time-frame for issuing a ticket; (4) the time-frame for responding to a ticket; (5) the option to respond informally; (6) processing by Coast Guard Hearing Officers; (7) civil penalty amounts; and (8) reduced cost/burden.

A detailed discussion of the comments, and RSPA's response to them, is provided in the following summary.

A. Violations Under the Pilot Ticketing Program

1. Impact on Safety

RSPA received numerous comments concerning RSPA's statement in the NPRM that, under the pilot ticketing program, it would issue tickets for violations that do not have "substantial impacts" on safety. RSPA stated that these violations might include, among others, operating under an expired exemption, failing to register, failing to maintain training records, and failing to file incident reports.

The commenters generally questioned why the agency would expend limited resources on enforcing regulations that do not have substantial impacts on safety. Several suggested that the regulations in question either be eliminated or that enforcement efforts with respect to violations of those regulations be limited to the issuance of warning letters.

RSPA disagrees that these regulations should be deleted from the HMR or that

enforcement actions should be limited to warning letters. The registration, exemption renewal and training record requirements are mandated by Federal hazmat law, which also mandates that a civil penalty be imposed for violations of any provisions of that law or the HMR. In addition, although violations of these regulations, in and of themselves, may not have a substantial or direct impact on safety, their enforcement has important, indirect effects on safety.

An exemption is an official authorization to do something, for a two-year period, that is not authorized under the HMR. 49 U.S.C. 5117(a)(2). See also 49 CFR 107.119(a). Renewal is necessary to keep the exemption in effect and to allow RSPA to ascertain that practices authorized under the exemption still provide an equal or greater level of safety than the HMR. As part of the renewal process, an application must contain all relevant shipping and accident experience related to activities under an exemption. 49 U.S.C. 5117(b). See also 49 CFR 107.105(a)(5).

The failure of hazardous materials offerors or transporters to register with RSPA, when required, affects RSPA's ability to identify and monitor those who are subject to the registration requirements. It also affects RSPA's ability to collect fees that are distributed for public sector planning and training for States, Indian tribes and local communities, to deal with hazardous materials emergencies, particularly those involving transportation. See 49 U.S.C. 5108(g); 49 CFR Part 110. These State and local programs affect safety. Failure to register directly affects these programs.

Failing to maintain training records, similarly, does not directly impact safety. Nevertheless, training records are the means of verifying that hazmat employees have been trained to recognize and identify hazardous materials, have knowledge of specific requirements of the HMR applicable to functions they perform, and have knowledge of emergency response information, self-protection measures and accident prevention methods and procedures. Federal hazmat law states:

After completing the training, each hazmat employer shall certify, with documentation the Secretary of Transportation may require by regulation, that the hazmat employees of the employer have received training and have been tested on appropriate transportation areas of responsibility * * *

49 U.S.C. 5107(c). See also 49 CFR 172.704(d). Unquestionably, the training required under the HMR directly impacts safety, and the training records

requirement enables verification that the training is being conducted.

Generally, failing to file incident reports also does not directly impact safety. Nonetheless, RSPA requires that incident reports be filed as a means for it to evaluate the effectiveness of its regulatory program and to determine the need for regulatory changes to address new or emerging hazardous materials transportation safety problems. The requirement to file incident reports directly supports RSPA's safety initiatives and is one of the only means for RSPA to obtain detailed information concerning hazardous materials incidents.

As supported by the above discussion, RSPA does not agree that regulations that do not have a direct or substantial impact on safety, in and of themselves, necessarily should be deleted from the HMR or enforced only through the issuance of warning letters.

2. Definitive List of Violations Subject to Ticketing

Five commenters asked that RSPA establish a definitive list of violations subject to the pilot ticketing program. RSPA believes that there is a legitimate need for flexibility during the initial two years of this program. Consequently, RSPA will not establish a definitive list of violations, but will begin the program by addressing the violations discussed above. Based on experience gained through administration of the pilot ticketing program, additional types of violations may be added or certain types of violations deleted from the program. At the end of the two-year pilot program, RSPA will evaluate the program in terms of cost savings, time savings, and effectiveness.

Finally, at the request of one commenter, RSPA wishes to clarify that tickets will not be issued for violations it believes to be willful.

B. Authority To Issue Tickets

One commenter asked that RSPA clarify who would issue tickets under the pilot program. Another commenter expressed concern that RSPA might delegate ticketing authority to "others," including States. The NPRM indicated that the Associate Administrator for Hazardous Materials Safety would issue tickets. It is common practice to provide authority in regulations to the highest level agency official responsible for a particular program. It is then that official's choice whether to retain that authority or to delegate it. Presently, it is contemplated that the Associate Administrator will delegate this authority to the Director, OHME, who will delegate this authority to OHME

supervisory inspectors. RSPA does not intend to delegate ticket-writing authority to any entity outside the agency. Although States, local governments and Indian tribes often incorporate the HMR by reference into their own regulations, they usually do not incorporate RSPA's procedural regulations but instead use their own existing procedures for handling violations of State and local and Indian tribe regulations.

Three commenters also expressed concern that the proposed pilot ticketing program would lead to a ticket-writing frenzy by RSPA inspectors, who would find it easy to write tickets in order to provide a tangible record of the inspectors' enforcement activities. One of the three commenters stated that the program may encourage inspectors to focus on "perceived non-threatening technical violations that have in the past often been cooperatively and summarily addressed."

RSPA does not require its inspectors to initiate a certain number of enforcement actions, and job performance is not measured by the number of enforcement actions that result from their inspections. Also, at the inspector level, discovery of ticketing or other types of violations results in the same amount of work for that inspector. Consequently, there is no incentive for an inspector to focus on ticketing violations to the exclusion of other, more serious violations.

C. Time-Frame for Issuing a Ticket

Several commenters were concerned that the NPRM did not specify a time-frame within which tickets would be issued after the agency's discovery of an apparent violation. One commenter suggested that RSPA issue tickets within 60 days of discovery of an apparent violation. RSPA agrees that establishing a goal for the timely issuance of tickets would be useful to both the agency and the regulated community. Consequently, RSPA will endeavor to issue tickets as expeditiously as possible, generally within 60 days after an apparent violation has been discovered.

D. Time-Frame for Responding to a Ticket

In the NPRM, RSPA proposed to require a response to a ticket within 30 days of the date the ticket was received. Several commenters remarked that the 30-day time period was too short and asked that it be extended to either 45 or 60 days in order to allow sufficient time for the ticket recipient to investigate the violations alleged in the ticket. One commenter remarked that 30 days would not be sufficient time for a ticket

to "find its way through [an] organization to the right place to be either appealed or paid." Others cited mail delays, holidays and business travel as reasons why the response time should be longer than 30 days. RSPA agrees that a 30-day response time may be too short in some instances and, therefore, agrees that 45 days is a more suitable time-frame for responding to a ticket.

E. Option to Respond Informally; Processing by Coast Guard Hearing Officers

Numerous commenters objected to the two limited options for responding to a ticket, as proposed in the NPRM. RSPA proposed to allow persons to either pay the ticket or to request a hearing before a Coast Guard Hearing Officer who would review the case in accordance with Coast Guard procedures. One commenter strongly recommended that DOT consider an intermediate option for resolving tickets prior to burdensome, costly, last-resort court proceedings. Another stated that the two-year pilot program is worthwhile, but that the proposed rule should be modified to ensure that due process rights are preserved where there is a reasonable basis to dispute alleged violations. This commenter asked that RSPA's pilot ticketing program include procedures for filing an informal response or request for hearing under RSPA's current informal response and hearing procedures at 49 CFR 107.317 and 49 CFR 107.319, respectively. The commenter added that the informal response option eliminates the need to engage an attorney and to go through the costly hearing process.

Many of these same commenters, in addition to others, also objected to RSPA's proposal to forward cases to Coast Guard Hearing Officers for processing under Coast Guard procedures where a person elects not to pay a ticket and requests a hearing. These objections were based on the fact RSPA's proposal would require the industry to familiarize itself with a new set of procedures, thereby increasing the regulatory burden on the industry. Also, many commenters questioned the Coast Guard's familiarity with the HMR to the extent it applies to transportation other than by water. One commenter stated that RSPA's proposal should be modified to include the right to appeal to the RSPA Administrator, rather than to the Commandant of the Coast Guard, in order to have some uniformity in penalty amounts for similar violations. Another commenter stated that the OCC and DOT's ALJs are well qualified to evaluate the substance of HMR

violations and to assess appropriate penalty levels and should be involved in the pilot ticketing program rather than the Coast Guard.

RSPA does not agree with those commenters who question Coast Guard Hearing Officers' ability to efficiently process RSPA ticketing cases. The HMR requirements with respect to exemption renewal, registration, incident reporting and training records apply to, among others, carriers by vessel. Nevertheless, after reviewing all the comments, RSPA has decided that it would be more efficient and cost-effective, and in the interest of the industry and the agency, to keep the pilot ticketing program within RSPA and to use essentially the same current procedures outlined above, if a person elects to contest a ticket. Specifically, if a person elects to contest a ticket, that person may do so, within 45 days of receiving the ticket, by making an informal response under 49 CFR 107.317 or requesting a formal hearing under 49 CFR 107.319.

The ticket will be the functional equivalent of an NOPV, and contested matters will be handled by the OCC as at present. The OCC will not be bound by the reduced penalty amount shown on the ticket and could impose a penalty as high as the proposed penalty determined under RSPA's civil penalty guidelines, which is also shown on the ticket. In no case will the OCC seek a penalty greater than the highest penalty amount shown on the ticket.

Anyone choosing to contest a ticket will have the case processed by the OCC as at present. In this way, RSPA provides a streamlined process for those who do not wish to contest an alleged violation and leaves the present system intact for those who wish to contest an alleged violation and avail themselves of the current, familiar procedures.

F. Civil Penalty Amounts

1. Amount of Penalty Reductions

RSPA stated in the NPRM that penalties under the pilot ticketing program would be "substantially less than the penalty that would be proposed under current procedures or that could be imposed by an ALJ at a hearing." Several commenters noted that RSPA did not quantify the percentage or dollar amount of the reduced penalties. Two commenters stated that the key to a successful pilot ticketing program is substantially reduced penalties that serve as an inducement for companies to accept civil penalty responsibility in return for eliminating costs associated with contesting the violation. Commenters suggested that penalties assessed under the pilot ticketing

program be at least 50 percent less than the penalties that would be assessed under current procedures.

RSPA agrees that penalties under the pilot ticketing program should be sufficiently low to provide an incentive to pay. Therefore, RSPA will continue to calculate a penalty as it does under its current procedures and guidelines, but it will reduce that penalty by 50 percent where the violation at issue is processed under this program. Nevertheless, the ticketing program is a pilot program and RSPA later may decide to reduce ticketing penalties by more or by less than 50 percent of the penalty calculated under current procedures and guidelines, based on experience with the program. In no case will a penalty be less than \$250.

One commenter suggested that RSPA waive or reduce penalties even further when ticket recipients demonstrate compliance, within a specific time period, with the HMR. Federal hazmat law requires that a penalty be assessed where a violation of the regulations occurs. Specifically, Section 5123 of Federal hazmat law states:

A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least \$250 but not more than \$25,000 for each violation.

49 U.S.C. 5123.

2. Incentives to Pay or Not Pay Tickets

Several commenters voiced concern regarding RSPA's proposal to assess penalties under the pilot ticketing program that are substantially less than the penalties that would be proposed under current procedures or that could be imposed by an ALJ at a hearing. They stated that the disparity in civil penalty amounts, plus the threat of having the penalty increase if a person contests a ticket, serves to create an economic incentive to simply pay the ticket despite the violation history that doing so would create. Several other commenters reached the opposite conclusion and stated that the disparity would not create an economic incentive to pay the ticket because paying the penalty would affect one's violation history and could result in higher penalties for future violations. Instead, these commenters predicted a rise in the numbers of hearings and suggested that, to avoid this result, RSPA not count ticketing violations as prior violations. Some commenters also voiced concern that lower penalties would provide an economic incentive for companies not to comply with the HMR; in other words, it would cost less to pay the penalty than to comply with the HMR.

RSPA does not agree that reduced penalties for ticketing violations will be an economic incentive to pay tickets at the expense of one's violation history. The pilot ticketing program, with its reduced penalties, provides a streamlined procedure for those who might not dispute that a violation has occurred—for example, failure to register or to renew an exemption—but who would dispute the proposed penalty, under current procedures, as too high. Under the pilot ticketing program, these people have the option of admitting the violation and paying a substantially lower civil penalty. Because RSPA has decided, in response to numerous comments, to authorize an informal response and to leave the pilot ticketing program within RSPA, those who dispute a ticket can choose to make an informal response or they may request a formal hearing and the case will be handled under current OCC procedures. Consequently, lower ticket penalties provide an opportunity for those who do not contest the violation but who would contest the amount of the penalty under current procedures to pay lower ticket penalties and avoid OCC involvement. Nevertheless, any person who receives a ticket may choose to have the case processed under existing OCC procedures.

Likewise, RSPA does not agree that counting ticketing violations as prior violations in future cases will result in an increased number of requests for formal hearings, or even in an increase in the number of informal responses. Under current OCC procedures, the violations that have been identified for processing under the pilot ticketing program already count as prior violations. Indeed, Federal hazmat law requires RSPA to consider violation histories when assessing civil penalties. 49 U.S.C. 5123.

In the NPRM, RSPA proposed to continue counting ticketing violations as prior violations, and RSPA reaffirms that position here. Nevertheless, RSPA agrees that ticketing violations should be given less weight, in the event of future violations, than more serious non-ticketing violations. Therefore, RSPA intends initially to give prior ticketing violations only one-half the weight of prior non-ticketing violations. In the future, RSPA may decide to give more or less weight to ticketing violations as it gains experience with this pilot program.

Finally, RSPA does not agree that lower ticket penalties will provide an economic incentive for people not to comply with the HMR. The amount of the penalty, the violation history that will result from non-compliance, and

the processing of repeat violations by the OCC should be incentive enough to comply with the HMR.

3. Penalty Guidelines

Two commenters questioned whether using RSPA's March 6, 1995 civil penalty guidelines as proposed in the NPRM is contrary to RSPA's own pronouncements regarding the meaning and use of its guidelines. One commenter noted that RSPA proposed to have the ticket include "the proposed penalty determined according to the RSPA civil penalty guidelines" but that RSPA stated in the preamble to the guidelines that they were "merely informational, [and] not finally determinative of any issues or rights, and do not have the force of law." 60 FR 12139. The commenter questioned whether utilizing the penalty guidelines to discourage ticket recipients from contesting alleged violations converts those guidelines into determinative rules under *United States Telephone Association v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) and *Used Equipment Sales, Inc. v. Department of Transportation*, 54 F.3d 862 (D.C. Cir. 1995).

RSPA did not intend to imply in the NPRM that the penalty guidelines would be used in any way that differs from current procedure. As noted in the preamble to the penalty guidelines:

These guidelines are a preliminary assessment tool used by RSPA personnel, and they create no rights in any party. They contain baseline amounts or ranges for violations that frequently have been cited in RSPA hazmat NOPVs. When a violation not described in the guidelines is encountered, it sometimes is possible to determine a baseline penalty by analogy to a similar violation in the guidelines.

Even when the guidelines are applicable to a violation, the use of the guidelines is only a starting point. They promote consistency and generally are used to provide some standard for imposing similar penalties in similar cases. However, no two cases are identical, and ritualistic use of the guidelines would produce arbitrary results and, most significantly, would ignore the statutory mandate to consider several specific assessment criteria. Therefore, regardless of whether the guidelines are used to determine a baseline amount for a violation, RSPA enforcement and legal personnel must apply the statutory assessment criteria to all relevant information in the record concerning any alleged violation and the apparent violator. These criteria are in 49 U.S.C. 5123 and 49 CFR 107.331.

* * * the guidelines are not binding on RSPA or Department of Transportation personnel. Enforcement personnel and staff attorneys generally use the guidelines as a starting point for penalty assessment. However, they, the Chief Counsel, administrative law judges (ALJs) and the

RSPA Administrator may deviate from the guidelines where appropriate, and are legally bound only by the statutory assessment criteria.

60 FR 12139. At the time the penalty guidelines final rule and the NPRM in this matter were published, RSPA was aware of the D.C. Circuit Court opinion in *United States Telephone Ass'n v. FCC*, cited above. RSPA reviewed the *FCC* case and discussed, in the preamble to the penalty guidelines final rule, why the penalty guidelines are a policy statement and, therefore, not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See 60 FR 12139.

In fact, RSPA published its guidelines as an informational appendix to its rules and not as a regulation. Also, RSPA does not use its guidelines in a rote fashion to automatically determine a proposed penalty but instead applies the statutory criteria and the guidelines to all of the particular evidence in each case to arrive at a proposed penalty. Consequently, use of RSPA's penalty guidelines as a starting point when assessing civil penalties either under current procedures or under the pilot ticketing program does not turn the guidelines into rules that would require notice and comment. RSPA's actions are consistent with both of the cited cases.

G. Reduced Cost/Burden

A significant number of commenters stated that the pilot ticketing program, as proposed, would not accomplish RSPA's stated goals of streamlining administrative procedures, cutting costs and reducing regulatory burdens on persons subject to the HMR. These commenters said that the pilot ticketing program, as proposed, could be counterproductive and would ultimately create another layer of administrative procedures, add costs and increase regulatory burdens on the industry. Many commenters thought that the pilot ticketing program, as proposed, would unnecessarily complicate the enforcement process for ticketing violations. Many commenters stated that they did not see any real savings to either the Federal Government or the regulated industry under the proposal.

As discussed above, RSPA agrees that the pilot ticketing program, as proposed, would have added another layer of procedures and might not have resulted in the cost savings RSPA originally anticipated. Consequently, RSPA has modified the proposal as outlined above, *i.e.*, RSPA will keep the pilot ticketing program within the agency and will continue to have the OCC process contested cases under current

procedures. RSPA believes that this streamlined procedure will result in the cost savings and reduced regulatory burden that RSPA originally anticipated when it published its proposal.

Specifically, anyone who opts to pay a ticket will realize immediate cost savings in that the proposed penalty will be half of what it would have been under current procedures. Also, the ticket recipient avoids the need to make a detailed written response to the agency (other than a statement of corrective action) and avoids the subsequent written and oral communications that arise during OCC processing of cases. The formal hearing process is bypassed, and legal fees are avoided. Furthermore, there is no OCC or post-ticket OHME involvement in the enforcement action where a ticket recipient opts to pay a ticket. The OCC avoids having to issue an NOPV, hold an informal conference, respond to compromise offers, issue an order, participate in ALJ proceedings, draft a decision on appeal, and issue a close-out letter. OHME avoids involvement in the informal conference and formal hearings, and will not have to interact with the OCC on factual and technical issues.

Where a ticket is contested, current procedures would apply. Nevertheless, there will be some savings to the OCC who will not be required to issue an NOPV but can rely on the ticket to have provided notice of the alleged violations to the ticket recipient. Furthermore, when the OCC receives a case from OHME, the package will not only contain the ticket but a response to the ticket which may set forth corrective action and may contain a compromise offer. This information will allow the OCC to begin processing the case at a more advanced stage than otherwise would be the case and will reduce overall processing time.

H. Miscellaneous

In discussing the pilot ticketing program, one commenter made two statements that require a response. First, the commenter stated that the NPRM is silent on the consequences of paying a civil penalty without "the requested admission of guilt." RSPA does not require an admission of guilt either under the pilot ticketing program or under current procedures. In either case, when a person pays a civil penalty, the case is closed and counts as a prior violation in the event of a future violation of the HMR. No admission of guilt is required.

The same commenter questioned whether the agency will require evidence of corrective action under the

pilot ticketing program. RSPA currently requests and encourages persons who have violated the HMR to submit evidence of corrective action to the agency. RSPA will continue this practice under the pilot ticketing program. The exit briefing form that RSPA inspectors leave with a person at the end of an inspection contains language encouraging the submission of documented corrective action to the agency as soon as possible. The ticket, like an NOPV, will also contain similar language. In the event that a ticket is paid but no evidence of corrective action has been submitted, the agency will send a letter to the ticket recipient again encouraging the submission of documented corrective action—just as it does in non-ticketing cases where payment is made in response to an NOPV. Under current procedures, RSPA receives some documented corrective action in virtually all of its enforcement cases.

Several commenters also questioned the relationship between RSPA's pilot ticketing program and tickets issued for violations of State and Federal motor carrier safety regulations. As stated above, the authority for enforcement under Federal hazmat law, 49 U.S.C. 5101–5127, is shared by RSPA and each of the four modal administrations. RSPA has primary jurisdiction over packaging manufacturers, reconditioners and retesters (except with respect to single-mode bulk packagings, which are primarily the responsibility of the applicable modal administration) and a shared authority over shippers of hazardous materials. RSPA does not enforce Federal or State motor carrier safety regulations. To the extent that motor carriers are affected by RSPA's pilot ticketing program, it generally will be because of: (1) Their shipper activities; (2) their failure to comply with the HMR's carrier incident reporting requirements; or (3) their failure to comply with the HMR's registration requirements.

IV. Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and therefore is not subject to review by the Office of Management and Budget. The rule is not significant according to the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

The changes adopted in this rule do not result in any additional costs to persons subject to the HMR, but result

in modest cost savings to a small number of them and to the agency. Because of the minimal economic impact of this rule, preparation of a regulatory impact analysis or a regulatory evaluation is not warranted.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 12612 ("Federalism") and does not have sufficient Federalism impacts to warrant the preparation of a federalism assessment.

Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. This rule does not impose any new requirements on persons subject to the HMR; thus, there are no direct or indirect adverse economic impacts for small units of government, businesses or other organizations.

Paperwork Reduction Act

There are no new information collection requirements in this final rule.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 107

Administrative practice and procedure, Hazardous materials transportation, Packaging and containers, Penalties, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Part 107 is amended as follows:

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

1. The authority citation for Part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

2. In § 107.307, paragraph (a) is revised to read as follows:

§ 107.307 General.

(a) When the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel have reason to believe that a person is knowingly engaging or has knowingly engaged in

conduct which is a violation of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any exemption, or order issued thereunder, for which the Associate Administrator for Hazardous Materials Safety or the Office of the Chief Counsel exercise enforcement authority, they may—

(1) Issue a warning letter, as provided in § 107.309;

(2) Initiate proceedings to assess a civil penalty, as provided in either §§ 107.310 or 107.311;

(3) Issue an order directing compliance, regardless of whether a warning letter has been issued or a civil penalty assessed; and

(4) Seek any other remedy available under the Federal hazardous material transportation law.

* * * * *

§ 107.307 [Amended]

3. In addition, in § 107.307, in paragraph (b), the wording "Office of Chief Counsel" is revised to read "the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel".

§ 107.309 [Amended]

4. In § 107.309, at the beginning of paragraph (a), the wording "In addition to the initiation of proceedings under § 107.307 for the imposition of sanctions or other remedies, the" is revised to read "The".

5. Section 107.310 is added to read as follows:

§ 107.310 Ticketing.

(a) For an alleged violation that does not have a direct or substantial impact on safety, the Associate Administrator for Hazardous Materials Safety may issue a ticket.

(b) The Associate Administrator for Hazardous Materials Safety issues a ticket by mailing it by certified or registered mail to the person alleged to have committed the violation. The ticket includes:

(1) A statement of the facts on which the Associate Administrator bases the conclusion that the person has committed the alleged violation;

(2) The maximum penalty provided for by statute, the proposed full penalty determined according to RSPA's civil penalty guidelines and the statutory criteria for penalty assessment, and the ticket penalty amount; and

(3) A statement that within 45 days of receipt of the ticket, the person must pay the penalty in accordance with paragraph (d) of this section, make an informal response under § 107.317, or

request a formal administrative hearing under § 107.319.

(c) If the person makes an informal response or requests a formal administrative hearing, the Associate Administrator for Hazardous Materials Safety forwards the inspection report, ticket and response to the Office of the Chief Counsel for processing under §§ 107.307–107.339, except that the Office of the Chief Counsel will not issue a Notice of Probable Violation under § 107.311. The Office of the Chief Counsel may impose a civil penalty that does not exceed the proposed full penalty set forth in the ticket.

(d) Payment of the ticket penalty amount must be made in accordance with the instructions on the ticket.

(e) If within 45 days of receiving the ticket the person does not pay the ticket amount, make an informal response, or request a formal administrative hearing, the person has waived the right to make an informal response or request a hearing, has admitted the violation and owes the ticket penalty amount to RSPA.

6. In § 107.311, paragraph (a) is revised to read as follows:

§ 107.311 Notice of probable violation.

(a) The Office of Chief Counsel may serve a notice of probable violation on

a person alleging the violation of one or more provisions of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any exemption, or order issued thereunder.

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Issued in Washington, DC on February 12, 1996 under authority delegated in 49 CFR part 1.

Kelley S. Coyner,

Acting Deputy Administrator, Research and Special Programs Administration.

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