



Billing Code: 4910-60-P

**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 107 and 109**

**[Docket No. PHMSA-2012-0258 (HM-258A)]**

**RIN 2137- AE97**

**Hazardous Materials: Failure to Pay Civil Penalties**

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

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** PHMSA proposes to amend the hazardous materials procedural found under our regulations. Specifically, this proposed action would prohibit a person who fails to pay a civil penalty as ordered, or fails to abide by a payment agreement, from performing activities regulated by the Hazardous Materials Regulations until payment is made.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Fax:** 1-202-493-2251.
- **Mail:** Docket Management System; U.S. Department of Transportation, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590-0001.

- Hand Delivery: To the U.S. Department of Transportation, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: Include the agency name and docket number PHMSA-2012-0258 (HM-258A) or the Regulatory Identification Number (RIN) 2137-AE97 for this notice of proposed rulemaking at the beginning of your comment. Please note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or you may visit <http://www.regulations.gov>.

Docket: For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov> or DOT's Docket Operations Office (see ADDRESSES).

**FOR FURTHER INFORMATION CONTACT:** Tyler Patterson, Office of Chief Counsel, telephone (202) 366-0505, Pipeline and Hazardous Materials Safety Administration, US Department of Transportation, 1200 New Jersey Ave., SE, Washington, DC 20590-0001.

## SUPPLEMENTARY INFORMATION:

### Table of Contents

- I. Overview of Penalty Procedures
  - A. Pipeline and Hazardous Materials Safety Administration
  - B. Federal Aviation Administration
  - C. Federal Motor Carrier Safety Administration
  - D. Federal Railroad Administration
- II. Overview of Mandated Changes to the Penalty Procedures
- III. Discussion of Rulemaking Proposals
- IV. Regulatory Analyses and Notices
  - A. Statutory/Legal Authority for this Rulemaking
  - B. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures
  - C. Executive Order 13132
  - D. Executive Order 13175
  - E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies
  - F. Paperwork Reduction Act
  - G. Regulatory Identifier Number (RIN)
  - H. Unfunded Mandates Reform Act
  - I. Executive Order 13609 and International Trade Analysis
  - J. Environmental Assessment
  - K. Privacy Act

#### **I. Overview of Penalty Procedures**

Under authority delegated by the Secretary, four agencies within the Department of Transportation (DOT) enforce the Hazardous Materials Regulations (HMR), 49 CFR Parts 171–180, and other regulations, approvals, special permits, and orders issued under Federal Hazardous Material Transportation Law (Hazmat Law), 49 U.S.C. 5101 et seq.; the Federal Aviation Administration (FAA), 49 CFR 1.83(d); the Federal Motor Carrier Safety Administration (FMCSA), 49 CFR 1.87(d); the Federal Railroad Administration (FRA), 49 CFR 1.89(j); and the Pipeline and Hazardous Materials Safety Administration (PHMSA), 49 CFR 1.97(b).

Although the United States Coast Guard (USCG) also is authorized to enforce the

HMR in connection with certain transportation or shipment of hazardous materials by water, nothing in this proposed rule affects USCG's enforcement authority with respect to transportation of hazardous materials by water. The authority originated with the Secretary and was first delegated to USCG prior to 2003, when USCG was made part of the Department of Homeland Security. Enforcement authority over "bulk transportation of hazardous materials that are loaded or carried on board a vessel without benefit of containers or labels, and received and handled by the vessel without mark or count, and regulations and exemptions governing ship's stores and supplies" was also transferred in 2003 to the USCG. DHS Delegation No. 0170, Sec. 2(99) & 2(100); see also 6 U.S.C. §§ 457 and 551(d)(2). DOT will continue to coordinate its inspections, investigations, and enforcement actions with the USCG, through a Memorandum of Understanding (MOU) or otherwise, to avoid duplicative or conflicting efforts.

The rules of practice for hazardous materials penalty proceedings are governed by each agency's delegated regulatory authority. Each agency affected by this proposed rule will have the authority to apply these proposed provisions as an augmentation of its current enforcement and debt collection practices after an enforcement action has been fully adjudicated and the entity ordered to pay a penalty has failed to do so.

A. Pipeline and Hazardous Materials Safety Administration

PHMSA's enforcement procedures related to violation(s) of the HMR are described in 49 CFR Part 107, Subpart D. Violations that do not substantially impact safety are handled through the ticket process under 49 CFR § 107.310 and would be exempt from this proposed rule. For other hazardous materials violations, PHMSA begins the process of assessing civil penalties by serving a notice of probable violation (NOPV)

on a person alleging the violation of hazardous materials operations.

As directed in 49 CFR § 107.311, the NOPV must include the following information: (1) a citation of the provision(s) of the HMR, order, or special permit which PHMSA believes the respondent has violated, (2) a statement of the factual allegations upon which the demand for remedial action or civil penalty is based, (3) a statement of the respondent's right to present written or oral explanations, information, and arguments in answer to the allegations and in mitigation of the sanction sought in the notice of probable violation, (4) a statement of the respondent's right to request a hearing and the procedures for requesting a hearing, and (5) the proposed civil penalty and payment information. Once the matter is fully adjudicated or a settlement is reached, PHMSA issues an order. Orders outline the terms and outcome of the enforcement action, including the final penalty amount due, and they describe any payment arrangements made between the agency and the respondent. This proposed rule would affect only those respondents who violate the payment terms of an order.

**B. Federal Aviation Administration**

FAA's enforcement procedures related to the violation(s) of the HMR are described in 14 CFR Part 13. FAA begins the process of assessing civil penalties by issuing a notice of proposed civil penalty as described in 14 CFR § 13.16(f). Once the matter is fully adjudicated or a settlement is reached, the FAA issues an order assessing a civil penalty and establishing payment terms. This proposed rule would affect only those persons who violate the payment terms of an order (for violations of the HMR) issued under 14 CFR § 13.16(c).

### C. Federal Motor Carrier Safety Administration

FMCSA's enforcement procedures related to violation(s) of the HMR or the Federal Motor Carrier Safety Regulations (FMCSR; 49 CFR Part 397) are described in 49 CFR Part 386. FMCSA begins the process of assessing civil penalties by issuing a notice of claim (NOC), as described in 49 CFR § 386.11(c). Each NOC sets forth the facts alleged, states the provisions of the regulations allegedly violated by the respondent, proposes a civil penalty, and indicates the time, form, and manner whereby the respondent may pay, contest, or otherwise seek resolution of the claim. Once the matter is fully adjudicated or a settlement is reached, FMCSA issues a final agency order. The order sets the payment terms and final penalty amount. This proposed rule would affect only those respondents who violate the payment terms of an order (for violations of the HMR) issued under 49 CFR Part 386.

### D. Federal Railroad Administration

The FRA's enforcement procedures related to violations of the HMR are described in 49 CFR Part 209, Subpart B. FRA begins the process of assessing civil penalties by issuing an NOPV. The NOPV includes a statement of the provisions that the respondent is believed to have violated, a statement of the factual allegations, notice of the amount of the civil penalty proposed to be assessed, and a description of the response options available to the respondent. Once the matter is fully adjudicated or a settlement is reached, FRA issues an order setting the payment terms of the assessed penalty, if applicable. This proposed rule would affect only those respondents who violate the payment terms of an order (for violations of the HMR) issued under 49 CFR Part 209, Subpart B.

## **II. Overview of Mandated Changes to the Penalty Procedures**

Section 33010 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (Public Law 112–141, 126 Stat. 405, at 837) amended 49 U.S.C. § 5123 to prohibit a person from engaging in business operations involving the transportation of hazardous materials (i.e., hazardous materials operations) if that person has failed to either pay a civil penalty assessed under Chapter 51 of title 49, or failed to arrange and abide by a payment plan, beginning on the 91<sup>st</sup> day after the payment due date specified by the order or payment plan, unless the person has filed a formal administrative or judicial appeal of the penalty.

Section 33010 of MAP-21 provides an exception to the prohibition on hazardous materials operations after nonpayment of penalties for debtors in Chapter 11 bankruptcy. The express language of the statutory exception states that the prohibition “shall not apply to any person who is unable to pay a civil penalty because such person is a debtor in a case under chapter 11 of title 11.” PHMSA believes that the Congress, in creating the bankruptcy exception, did not intend to exempt all Chapter 11 debtors from the prohibition on hazardous materials operations after nonpayment of penalties. Congress recognized that the determination of whether a Chapter 11 debtor is able to pay certain debts is within the jurisdiction of the bankruptcy court. PHMSA interprets the statutory language as requiring the agency to seek a determination from the bankruptcy court of a debtor’s ability to pay a civil penalty claim prior to imposing the prohibition on hazardous materials operation after nonpayment of penalties.

Under the automatic stay provisions of the Bankruptcy Code, a petition filed in bankruptcy “operates as a stay, applicable to all entities of... the commencement or

continuation...of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case....” 11 U.S.C. § 362(a). However, “the filing of a petition...does not operate as a stay ... of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power...and ... of the enforcement of a judgment, other than a monetary judgment, obtained in an action or proceeding by a governmental unit to enforce such unit’s police or regulatory power.” 11 U.S.C 362(b)(4).

In determining whether an agency action fits within the exemption of section 362(b)(4), the courts have developed the “public policy” test, which distinguishes between governmental proceedings aimed at accomplishing public policy and those aimed at protecting the government’s pecuniary interest in the debtor’s property. See Eddleman v. U.S. Department of Labor, 923 F. 2d 782 (10th Cir. 1991); and NLRB v. Edward Cooper Painting, Inc., 804 F. 2d 934 (6th Cir. 1986). Agency proceedings under Section 33010 of MAP-21 are designed to bring about the public policy of enforcing compliance with the Hazmat Law and the HMR. As a result, filing for bankruptcy protection under Chapter 11 or any other chapter does not automatically relieve a person from its regulatory or payment obligations.

Section 33010 of MAP-21 does not address or instruct DOT to prohibit hazardous materials operations by those persons who have not paid penalties assessed prior to the granting of this authority. Without specific instruction on retroactivity, the presumption against retroactive application prevents PHMSA from applying Section 33010 MAP-21 to respondents whose final order was issued prior to the issuance of a final rule.

Consequently, provisions of this proposed rule, once finalized, will apply to all final agency orders that assess penalties issued on or after the effective date of the final rule.

### **III. Discussion of Rulemaking Proposals**

This notice of proposed rulemaking (NPRM) amends 49 CFR Part 109 to implement the authority granted under Section 33010 to MAP-21's amendment to 49 U.S.C. § 5123 to prohibit a person from engaging in hazardous materials operations upon failure to pay a civil penalty. Specifically, we propose to adopt a new Subpart E to Part 109 setting forth procedures to require a person who is delinquent in paying civil penalties to cease hazardous materials operations until payment has been made or an acceptable payment plan has been arranged. We also propose to add procedural requirements to ensure that a person subject to the prohibition is notified in writing and given an opportunity to respond before being required to cease hazardous materials operations.

Under the provisions of this NPRM, the agency which issued the final order outlining the terms and outcome of an enforcement action will send the respondent a Cessation of Operations Order (COO) if payment has not been received within 45 calendar days after the payment due date or a payment plan installment date as specified in the final order. The COO would notify the respondent that it must cease hazardous materials operations on the 91<sup>st</sup> calendar day after failing to make payment in accordance with the agency's final order or payment plan arrangement, unless payment is made. A respondent will be allowed to appeal the COO within 20 days of receipt of the order according to the procedures set forth by the agency issuing the COO.

As discussed above, section 33010 of MAP-21 specifically states that the prohibition on hazardous materials operations shall not apply to a person unable to pay

civil penalties because such person is a debtor in a case under chapter 11 of the Bankruptcy Code. Such a person must provide the enforcing agency with the following information about its bankruptcy proceeding: (1) the chapter of the Bankruptcy Code under which the bankruptcy proceeding is filed (i.e., Chapter 7 or 11); (2) the bankruptcy case number; (3) the court in which the bankruptcy proceeding was filed; and (4) any other information requested by the agency to determine a debtor's bankruptcy status. This information will enable the agency to verify debtor status and to work with the bankruptcy court, if needed, to assess the debtor's ability to pay penalties when determining whether to prohibit hazardous materials operations.

PHMSA, FAA, FMCSA, and FRA caution regulated entities not to construe the right to appeal a COO as an opportunity to re-argue the merits of the penalty assessment. They will have had ample opportunity to address these concerns at earlier stages in the enforcement process. The only information sufficient to prevent the prohibition on hazardous material operations after nonpayment of penalties would be proof of payment, proof of bankruptcy debtor status and an inability to pay, or an Emergency Stay issued by a Federal Circuit Court with jurisdiction over these matters. Additionally, at the discretion of the agency, upon appeal by the Respondent, the agency can rescind the COO if an agreeable payment plan has been arranged. Persons that continue to conduct regulated activities in violation of the COO will be subject to additional penalties, including criminal prosecution pursuant to 49 U.S.C. § 5124. PHMSA is providing a comment period of 60 days on this proposed rule.

#### **IV. Regulatory Analyses and Notices**

##### **A. Statutory/Legal Authority for this Rulemaking**

This proposed rule is published under the authority of 49 U.S.C. § 5103(b), which authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce and under the authority of 49 U.S.C. § 5121(e). This proposed rule would revise certain civil enforcement authority to enable the appropriate DOT administration to issue a Cessation of Operations Order (COO) to a person who fails to pay civil penalties for violations of the HMR assessed pursuant to 49 CFR § 107.311 (PHMSA), 49 CFR Part 209, Subpart B (FRA), 49 CFR Part 386 (FMCSA), and 14 CFR Part 13 (FAA). The proposed rule carries out a statutory mandate and clarifies DOT's roles and responsibilities in ensuring that hazardous materials are being safely transported and in enhancing the regulated community's compliance with regulatory requirements.

##### **B. Executive Order 13610, Executive Order 13563, Executive Order 12866, and DOT Regulatory Policies and Procedures**

This NPRM is not considered a significant regulatory action under section 3(f) Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget (OMB). The proposed rule is not considered a significant rule under the Regulatory Policies and Procedures order issued by the U.S. Department of Transportation (44 FR 11034).

Executive Order 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review that were established in Executive Order 12866 Regulatory Planning and Review of September 30, 1993. Executive Order 13563,

issued January 18, 2011, notes that our nation's current regulatory system must not only protect public health, welfare, safety, and our environment but also promote economic growth, innovation, competitiveness, and job creation. Further, this executive order urges government agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. In addition, federal agencies are asked to periodically review existing significant regulations, retrospectively analyze rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and modify, streamline, expand, or repeal regulatory requirements in accordance with what has been learned.

Executive Order 13610, issued May 10, 2012, urges agencies to conduct retrospective analyses of existing rules to examine whether they remain justified and whether they should be modified or streamlined in light of changed circumstances, including the rise of new technologies.

By building off of each other, these three Executive Orders require agencies to regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." PHMSA is proposing no changes to the HMR which govern the transportation of hazmat thus the changes do not carry any additional compliance requirements or costs for entities that must comply with the HMR. The changes in this proposed rule will affect entities after they have violated the HMR in ways that substantially impact safety, a civil penalty has been assessed and the entities are delinquent in the payment of the finally adjudicated administrative penalties. Of the estimated 200,000 entities that PHMSA regulates, a limited number are subject to civil penalty assessments in a given year for violations related to the HMR. Fewer still

disregard agency orders requiring payment of civil penalties. Since 2010, on average, only 10 companies per year have been referred for debt collection after being 90 days overdue on their civil penalty assessments for PHMSA enforcement actions. An entity that receives a COO and fails to pay its penalty will incur costs associated with the cessation of activities regulated under the HMR. However, this cost is associated with non-compliance. Companies in compliance with the HMR will not bear any costs.

C. Executive Order 13132

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). Pursuant to 49 U.S.C. § 5125(i), the preemption provisions in Hazmat Law do “not apply to any procedure . . . utilized by a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.” Accordingly, this proposed rule has no preemptive effect on State, local, or Indian tribe enforcement procedures and penalties, and preparation of a federalism assessment is not warranted.

D. Executive Order 13175

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this proposed rule does not have tribal implications and does not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies

The Regulatory Flexibility Act (5 U.S.C. §§ 601 et seq.) requires an agency to

review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have significant impact on a substantial number of small entities. Based on the assessment in the preliminary regulatory evaluation, I hereby certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule applies to offerors and carriers of hazardous materials, some of which are small entities; however, there will not be any economic impact on any person who complies with the Hazmat Law and the regulations and orders issued under that law.

Potentially affected small entities. The provisions in this proposed rule will apply to persons who perform, or cause to be performed, functions related to the transportation of hazardous materials in commerce. This includes offerors of hazardous material and persons in physical control of a hazardous material during transportation in commerce. Such persons may primarily include motor carriers, air carriers, vessel operators, rail carriers, temporary storage facilities, and intermodal transfer facilities. Unless alternative definitions have been established by the agency in consultation with the Small Business Administration, the definition of “small business” has the same meaning as under the Small Business Act (15 CFR parts 631–657c). Therefore, because no such special definition has been established, PHMSA employs the thresholds (published in 13 CFR 121.201) of 1,500 employees for air carriers (NAICS Subgroup 481), 500 employees for rail carriers (NAICS Subgroup 482), 500 employees for vessel operators (NAICS Subgroup 483), \$18.5 million in revenues for motor carriers (NAICS Subgroup 484), and \$18.5 million in revenues for warehousing and storage companies (NAICS Subgroup

493). Of the approximately 200,000 entities to which this final rule would apply (104,000 of which are motor carriers), we estimate that about 90 percent are small entities.

Potential cost impacts. This proposed rule amends 49 CFR Part 109, which contains regulations on the process for collecting civil penalties. These regulations are not part of the HMR, which govern the transportation of hazmat, thus they do not carry any additional compliance requirements or costs for entities that must comply with the HMR.

Alternate proposals for small business. Because this proposed rule addresses a Congressional mandate, we have limited latitude in defining alternative courses of action. Taking no action would be inconsistent with Congress' direction and undesirable from the standpoint of safety and enforcement. Failure to implement the new authority will substantially impact safety because entities that ignore assessed civil penalties for violations of the HMR will continue to conduct hazardous materials operations.

#### F. Paperwork Reduction Act

PHMSA has analyzed this proposed rule in accordance with the Paperwork Reduction Act of 1995 (PRA). The PRA requires Federal agencies to minimize the paperwork burden imposed on the American public by ensuring maximum utility and quality of federal information, ensuring the use of information technology to improve government performance, and improving the federal government's accountability for managing information collection activities. This proposed rule contains no new information collection requirements subject to the PRA.

#### G. Regulation Identifier Number (RIN)

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 contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### H. Unfunded Mandates Reform Act

This proposed rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. PHMSA has concluded that the proposed rule will not impose annual expenditures of \$141.3 million on State, local, or tribal governments or the private sector, and thus does not require an Unfunded Mandates Act analysis.

#### I. Executive Order 13609 and International Trade Analysis

Under E.O. 13609, agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Public Law 96-39), as amended by the Uruguay Round Agreements Act (Public Law 103-465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing

for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we have assessed the effects of the proposed rule to ensure that it does not cause unnecessary obstacles to foreign trade. Accordingly, this rulemaking is consistent with E.O. 13609 and PHMSA's obligations under the Trade Agreement Act, as amended.

#### J. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. §§ 4321 – 4375, requires Federal agencies to analyze proposed actions to determine whether an action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations require Federal agencies to conduct an environmental review considering (1) the need for the proposed action; (2) alternatives to the proposed action; (3) probable environmental impacts of the proposed action and alternatives; and (4) the agencies and persons consulted during the consideration process. 40 CFR § 1508.9(b).

##### 1. Purpose and Need

In § 33010 of MAP-21, Congress required the Secretary to issue regulations to require a person who is delinquent in paying civil penalties to cease any activity regulated under the Hazmat Law until payment has been made or until an acceptable payment plan has been arranged. PHMSA believes that persons who fail to comply with the Hazmat Law and fail to pay civil penalties are not fit to transport hazardous materials, as they are more likely to jeopardize public safety and/or the environment. The proposed rule and

underlying legislation may encourage companies that disregard the HMR to exit the hazardous materials arena because continuing hazardous materials transportation after a COO is punishable by additional penalties and criminal prosecution. This tool will greatly enhance the enforcement and debt collection tools available to PHMSA, FAA, FMCSA, and FRA, without impacting entities that comply with final orders, the Hazmat Law, and the HMR. See Background section of the preamble to this final rule, *supra*.

## 2. Alternatives

In MAP-21's amendments to 49 U.S.C. § 5123(i), Congress specifies that a person that "fails to pay a civil penalty assessed under this chapter, or fails to arrange and abide by an acceptable payment plan for such civil penalty, may not conduct any activity regulated under this chapter beginning on the 91st day after the date specified by order of the Secretary for payment of such penalty." Congress also provided limited exceptions for debtors in a case under chapter 11 of title 11 and persons who have filed an appeal of an order. Because this final rule simply carries out a prescriptive Congressional mandate, PHMSA did not consider alternatives.

CEQ regulations suggest that agencies consider the alternative of no-action. 40 CFR §§ 1502.14(d) and 1508.25(b). Although the purpose of this rulemaking is to carry out the above-described mandate in MAP-21, PHMSA will consider the environmental impacts of the no-action alternative.

## 3. Analysis of Environmental Impacts

The goal of this proposed rule is to prevent violators of the HMR from ignoring enforcement proceedings and continuing to conduct business subject to the HMR. PHMSA believes that such companies are not fit to conduct hazardous materials

transportation and may be more likely to commit further violations that could endanger the public and the environment. For these reasons, PHMSA believes that the proposed rule could decrease the likelihood of hazardous materials incidents.

A release of hazardous materials could result in a myriad of environmental and human health consequences such as fires, explosions, asphyxiation, contamination of marine environments, exposure of increased levels of radioactivity, etc. If hazardous material shipments are not properly marked, labeled, packaged, and handled, as dictated by the HMR, risk of release and exposure increases. Incidents occurring during aircraft or vessel transportation are more likely to threaten human health and the environment. Emergency responders are also at greater risk and are less effective at responding to incidents when hazardous materials shipments do not comply with prescribed communication requirements. PHMSA believes that this proposed rule will further strengthen DOT's ability to ensure compliance with the HMR, which decreases the likelihood of a hazardous materials release, enhancing safety and environmental protection.

If PHMSA were to select the "no action" alternative, contrary to Congressional intent, entities that had been found to have violated the HMR and made no effort to pay a civil penalty for more than 90 days would be able to continue to perform functions subject to the HMR, including preparing hazardous materials for shipment and shipping hazardous materials in commerce. PHMSA believes allowing delinquent adjudicated violators to continue to engage in regulated activities while showing disregard for regulations and/or regulatory enforcement orders would weaken PHMSA's ability to ensure compliance with the HMR.

4. Agencies and Persons consulted

In drafting this proposed rule, PHMSA consulted with FAA, FMCSA, and FRA.

Our determination is that this action would result in a generalized positive impact on the human environment, but not significant to such a degree as would warrant a detailed discussion of any impact(s); and would result in no negative impacts to the human environment because this action affects violators of the HMR. PHMSA encourages comments from members of the public and stakeholders about possible environmental impacts.

K. Privacy Act

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or you may visit <http://www.dot.gov/privacy.html>.

List of Subjects

49 CFR Part 107

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

49 CFR Part 109

Definitions, Inspections and investigations, Emergency orders, Imminent hazards, Remedies generally.

In consideration of the foregoing, we are proposing to amend 49 CFR Chapter I as follows:

**PART 107 – HAZARDOUS MATERIALS PROGRAM PROCEDURES**

1. The authority citation for part 107 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101-410 section 4 (28 U.S.C. 2461 note); Pub. L. 104-121 sections 212-213; Pub. L. 104-134 section 31001; Pub. L. 112-141 section 33006; 49 CFR 1.81 and 1.97.

2. In Subpart D, add new § 107.338 to read as follows:

**§ 107.338 Prohibition of Hazardous Materials Operations.**

As provided for in Subpart E of part 109 of this subchapter, a person who fails to pay a civil penalty in accordance with agreed upon installments or in full within prescribed time lines, is prohibited from conducting hazardous materials operations and shall immediately cease all hazardous materials operations.

**PART 109 –DEPARTMENT OF TRANSPORTATION HAZARDOUS MATERIAL PROCEDURAL REGULATIONS**

3. The authority citation for part 109 is revised to read as follows:

Authority: 49 U.S.C. 5101-5128, 44701; Pub. L. 101-410 section 4 (28 U.S.C. 2461 note); Pub. L. 104-121 sections 212-213; Pub. L. 104-134 section 31001; 49 CFR 1.81, 1.97.

4. Revise the part heading to read as shown above.
5. Add new Subpart E, Prohibition on Hazardous Materials Operations After Nonpayment of Penalties to read as follows:

**Subpart E - Prohibition on Hazardous Materials Operations After Nonpayment of**

## **Penalties**

### **Secs.**

§ 109.101 Prohibition of Hazardous Materials Operations.

§ 109.103 Notice of Nonpayment of Penalties.

## **Subpart E - Prohibition on Hazardous Materials Operations After Nonpayment of**

### **Penalties**

§ 109.101 Prohibition of Hazardous Materials Operations.

(a) Definition of hazardous materials operations. For the purposes of this subpart, hazardous materials operations means any activity regulated under the Federal hazardous material transportation law, this subchapter or subchapter C of this chapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter C of this chapter.

(b) Failure to pay civil penalty in full. A respondent that fails to pay a hazardous material civil penalty in full within 90 days after the date specified for payment by an order of the Pipeline and Hazardous Materials Safety Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, or Federal Aviation Administration is prohibited from conducting hazardous materials operations and shall immediately cease all hazardous materials operations beginning on the next day (i.e., the 91<sup>st</sup>). The prohibition shall continue until payment of the penalty has been made in full or at the discretion of the agency issuing the order an acceptable payment plan has been arranged.

(c) Civil penalties paid in installments. On a case by case basis, a respondent may be allowed to pay a civil penalty pursuant to a payment plan, which may consist of installment payments. If the respondent fails to make an installment payment contained in the payment plan on the agreed upon schedule, the payment plan shall be null and void and the full outstanding balance of the civil penalty shall be payable immediately. A respondent that fails to pay the full outstanding balance of its civil penalty within 90 days after the date of the missed installment payment shall be prohibited from conducting hazardous materials operations beginning on the next day (i.e., the 91<sup>st</sup>). The prohibition shall continue until payment of the outstanding balance of the civil penalty has been made in full, including any incurred interest or until at the discretion of the agency issuing the order another acceptable payment plan has been arranged.

(d) Appeals to Federal Court. If the respondent appeals an agency order issued pursuant to § 109.103 to a Federal Circuit Court of Appeals, the terms and payment due date of the order are not stayed unless the Court so specifies.

(e) Applicability to ticketing. This section does not apply to a respondent who fails to pay a civil penalty assessed by a ticket issued pursuant to § 107.310 of this subchapter.

(f) Applicability to debtors. This section does not apply to a respondent who is unable to pay a civil penalty because the respondent is a debtor in a case under chapter 11, title 11, United States Code. A respondent who is a debtor in a case under chapter 11, title 11, United States Code must provide the following information to the agency decision maker identified in the original agency order or on its certificate of service.

(1) The chapter of the Bankruptcy Code under which the bankruptcy proceeding is

filed;

- (2) The bankruptcy case number;
- (3) The court in which the bankruptcy proceeding was filed; and
- (4) Any other information requested by the agency to determine a debtor's

bankruptcy status.

(g) Penalties for Prohibited Hazardous Materials Operations. A respondent that continues to conduct hazardous materials operations in violation of this section may be subject to additional penalties, including criminal prosecution pursuant to 49 U.S.C. § 5124.

§ 109.103 Notice of Nonpayment of Penalties.

(a) If a full payment of a civil penalty, or an installment payment as part of agreed upon payment plan, has not been made within 45 days after the date specified for payment by the final agency order, the agency may issue a cessation of hazardous materials operations order to the respondent.

(b) The cessation of hazardous materials operations order issued under this section shall include the following information:

(1) A citation to the statutory provision or regulation the respondent was found to have violated and to the terms of the order or agreement requiring payment;

(2) A statement indicating that if the respondent fails to pay the full outstanding balance of the civil penalty within 90 days after the payment due date, the respondent shall be prohibited from conducting any activity regulated under the Federal hazardous material transportation law, this subchapter or subchapter C of this chapter, or an exemption or special permit, approval, or registration issued under this subchapter or under subchapter

C of this chapter;

(3) A statement describing the respondent's options for responding to the order which will include an option to file an appeal for reconsideration of the cessation of operations order within 20 days of receipt of the order; and

(4) A description of the manner in which the respondent can make payment of any money due the United States as a result of the proceeding (i.e., the full outstanding balance of the civil penalty).

(c) The cessation of hazardous materials operation order will be delivered by personal service, unless such service is impossible or impractical. If personal service is impossible or impractical then service may be made by certified mail or commercial express service. If a respondent's principal place of business is in a foreign country, it will be delivered to the respondent's designated agent (as prepared in accordance with § 105.40 of this subchapter).

Issued in Washington, DC on September 16, 2013, under authority delegated in 49 CFR Part 106.

Magdy El-Sibaie  
Associate Administrator for Hazardous Materials Safety  
Pipeline and Hazardous Materials Safety Administration

[FR Doc. 2013-22952 Filed 09/23/2013 at 8:45 am; Publication Date: 09/24/2013]