

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Part 106****[Docket No. RSP-1, Notice No. 95-15]****RIN 2137-AC75****Direct Final Rule Procedure; Petitions for Rulemaking****AGENCY:** Research and Special Programs Administration (RSPA), DOT.**ACTION:** Notice of proposed rulemaking (NPRM).

SUMMARY: To further the goals of Executive Order 12866 on Regulatory Planning and Review, and in response to the recommendations of the National Performance Review and the Administrative Conference of the United States, RSPA is proposing to implement a new and more efficient procedure for adopting noncontroversial rules. This "direct final rule" procedure involves issuing a final rule that provides notice and an opportunity to comment, with a statement that if RSPA does not receive a significant adverse comment or notice of an intent to file a significant adverse comment, the rule will become effective on a specified date without further publication of the text of the rule. RSPA would publish a subsequent document in the Federal Register to confirm that no significant adverse comment was received, and reiterate the effective date. If a significant adverse comment or notice of an intent to file a significant adverse comment were received, RSPA would publish a document in the Federal Register before the effective date of the direct final rule withdrawing the rule or a part of the rule.

RSPA also proposes to amend its rulemaking procedures to: Specify in more detail the required contents of a petition for rulemaking; and provide that petitions for rulemaking and petitions for reconsideration will be reviewed and acted upon by the Associate Administrator and that decisions of the Associate Administrator may be appealed to the Administrator.

DATES: Comments must be submitted no later than February 16, 1995.

ADDRESSES: Address comments to the Dockets Unit (DHM-30), RSPA, U.S. Department of Transportation, Washington, DC 20590-0001. Comments should identify the docket and notice number and be submitted, when possible, in five copies. Persons wishing to receive confirmation of receipt of their comments should

include a self-addressed, stamped postcard. The Dockets Unit is located in Room 8421 of the Nassif Building, 400 Seventh Street S.W., Washington, DC 20590-0001. Office hours are 8:30 am to 5:00 pm Monday through Friday, except on public holidays when the office is closed.

FOR FURTHER INFORMATION CONTACT:

Nancy E. Machado, Office of the Chief Counsel, RSPA, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001; Telephone (202) 366-4400.

SUPPLEMENTARY INFORMATION:

In Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735; October 4, 1993), the President set forth the Administration's regulatory philosophy and principles. The Executive Order contemplates an efficient and effective rulemaking process, including the conservation of limited government resources for carrying out its regulatory functions. Furthermore, "Improving Regulatory Systems," an Accompanying Report of the National Performance Review, recognized the need to streamline the regulatory process and recommended the use of "direct final" rulemaking procedures to reduce needless double review of noncontroversial rules.

The former Administrative Conference of the United States (ACUS) adopted Recommendation 95-4, "Procedures for Noncontroversial and Expedited Rulemaking," which endorses direct final rulemaking as a procedure that can expedite rules in appropriate cases. (See 60 FR 43108; August 18, 1995.) ACUS studied the efficiency, adequacy and fairness of the administrative procedures used by Federal agencies in carrying out administrative programs, and made recommendations for improvements to the agencies, collectively or individually, and to the President, Congress, and the Judicial Conference of the United States. ACUS found direct final rulemaking appropriate where a rule is expected to generate no significant adverse comment. ACUS defined a significant adverse comment as one where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change.

Under the direct final rulemaking procedure, an agency would issue a final rule with a statement that, if the agency received no significant adverse comments, the rule becomes effective automatically at a specified time after publication of the direct final rule

without going through another round of intra- and inter-agency review. If a significant adverse comment were received, the agency would withdraw the rule before the effective date and issue a notice of proposed rulemaking. As noted in the report, "this approach avoids the second round of clearances and review, which otherwise delays rules, wastes time, and should be superfluous * * * Theoretically, the second review ought to be very quick, but clearing any document through numerous government offices takes time. The paper shuffling also wastes reviewers' time by requiring them to look at something twice when once would have sufficed." ("Improving Regulatory Systems," p. 42.)

In responding to both the letter and the spirit of the Executive Order and the NPR Recommendations, the Secretary of Transportation has directed administrations within the Department of Transportation to focus on improvements that can be made in the way in which they propose and adopt regulations.

RSPA is proposing to adopt a new § 106.39 that provides for the use of direct final rule procedures for noncontroversial rules, such as minor, substantive changes to regulations; incorporation by reference of the latest edition of technical or industry standards; extensions of compliance dates; and other noncontroversial rules. RSPA intends to continue issuing certain final rules with no opportunity for comment; these include editorial changes and designation of hazardous substances as hazardous materials, as required by the Comprehensive Environmental Response, Compensation, and Liability Act. RSPA solicits comment on the advisability of using direct final rules for these categories of rules, as well as suggestions for other types of rules that could be issued as direct final rules.

When RSPA believes that a rulemaking in these categories is unlikely to result in significant adverse comment, it would use the direct final rule procedure. The direct final rule would advise the public that no significant adverse comments are anticipated and unless significant adverse comment or intent to submit a significant adverse comment is received, in writing, within a certain period of time (generally 60 days), the rule will become effective on a specified date (generally 90 days after publication). If no significant adverse comments are received, RSPA would issue a subsequent document advising the public that no significant adverse comments were received, and that the

rule will become, or did become, effective on the date previously specified in the direct final rule. Direct final rules would not be subject to petitions for reconsideration under 49 CFR 106.35.

If RSPA received a significant adverse comment or notice of intent to file a significant adverse comment, RSPA would publish a document in the Federal Register withdrawing the direct final rule, in whole or in part. If RSPA believed it could incorporate the adverse comment in a subsequent direct final rulemaking, without generating further significant adverse comment, it could do so. If RSPA believed that the significant adverse comment raised an issue serious enough to warrant a substantive response in a notice-and-comment process, it could publish a notice of proposed rulemaking, following the procedures provided in 49 CFR 106.11–106.29. Publishing the rule as a proposal gives an opportunity to comment to persons who may not have commented earlier because they wanted the rule to go into effect immediately. If a significant adverse comment applies to part of a rule and that part can be severed from the remainder of the rule (for example where a rule deletes several unrelated regulations), RSPA would adopt as final those parts of the rule that were not the subject of a significant adverse comment.

RSPA is proposing to adopt ACUS's definition of "significant adverse comment." (The U.S. Coast Guard adopted this definition in its recently issued final rule on direct final rulemaking, 60 FR 49222; Sept. 22, 1995.) Specifically, a significant adverse comment would be one that explains why the rule would be inappropriate, including a challenge to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. Comments that are frivolous or insubstantial would not be considered adverse under this procedure. A comment recommending a rule change in addition to the rule would not be considered a significant adverse comment, unless the commenter states why the rule would be ineffective without the additional change.

RSPA would amend § 106.3 to clarify that RSPA's Chief Counsel has the delegated authority to conduct rulemaking proceedings. This authority has been delegated to the Chief Counsel in RSPA Order 1100.2A (May 19, 1992.) Specifically, the Chief Counsel has been delegated authority to "develop and issue rulemaking documents, other than final rules, for procedural rules, such as

enforcement, preemption, general definitions, etc."

RSPA also proposes to amend § 106.17 to clarify the procedures for participation by interested parties in the rulemaking process.

RSPA also is proposing to amend § 106.31 to specify in more detail the required contents of a petition for rulemaking. In this way, RSPA hopes to provide clear guidance to those who would like to participate in the rulemaking process by availing themselves of this mechanism. Establishing clear procedures will reduce the number of incomplete petitions filed with RSPA; furthermore, well-prepared, detailed petitions will ease RSPA's job and enable it to process petitions in a timely and efficient manner. In particular, proposed § 106.31(c) would state that, if the proposed action has a potential impact on the regulated industry or other entities, the Associate Administrator may request the petitioner to submit information and data concerning that impact to assist in rulemaking analyses required under Executive Orders 12866 and 12612, the Regulatory Flexibility Act, the Paperwork Reduction Act and the National Environmental Policy Act. This proposal is consistent with ACUS Recommendation 86–6, Petitions for Rulemaking, which suggests how agencies may improve the handling of petitions for the issuance of rules. See 51 FR 46985; Dec. 30, 1986.

RSPA also proposes to amend 49 CFR 106.31, 106.33, 106.35 and 106.37 to provide that petitions for rulemaking and petitions for reconsideration be filed with the appropriate Associate Administrator, who will review and issue determinations granting or denying the petitions in whole or part. RSPA also proposes to add a new § 106.38 to provide that any interested party may appeal a decision of the Associate Administrator, issued under § 106.33 or § 106.37, to the Administrator.

Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget. The rule is not considered a significant rule under the Regulatory Policies and Procedures of the Department of Transportation [44 FR 11034]. Because of the minimal economic impact of this proposed rule, preparation of a regulatory impact

analysis or a regulatory evaluation is not warranted.

Executive Order 12612

This action has been analyzed in accordance with Executive Order 12612 ("Federalism"), and RSPA has determined that preparation of a federalism assessment is not warranted.

Regulatory Flexibility Act

I certify that this proposal will not, if promulgated, have a significant economic impact on a substantial number of small entities. This certification is subject to modification as a result of a review of comments received in response to this proposal.

Paperwork Reduction Act

There are no information collection requirements in this proposed rule.

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 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 106

Administrative practice and procedure, Hazardous materials transportation, Oil, Pipeline safety.

In consideration of the foregoing, 49 CFR Part 106 is proposed to be amended as follows:

PART 106—RULEMAKING PROCEDURES

1. The authority citation for part 106 would continue to read as follows:

Authority: 33 U.S.C. 1321; 49 U.S.C. 5101–5127, 40113, 60101–60125; 49 CFR 1.53.

§§ 106.31, 106.33, 106.35, 106.37 **[Amended]**

2. Sections 106.31(a), 106.33, 106.35(b), (c), and (d) and 106.37 would be amended by adding the word "Associate" immediately before the word "Administrator" wherever it appears.

3. In § 106.3, a new paragraph (d) would be added to read as follows:

§ 106.3 Delegations.

* * * * *

(d) Chief Counsel.

4. In § 106.17, paragraph (a) would be revised to read as follows:

§ 106.17 Participation by interested persons.

(a) Any interested person may participate in rulemaking proceedings by submitting comments in writing containing information, views or arguments in accordance with instructions for participation in the rulemaking document.

* * * * *

5. In § 106.31, paragraph (b) would be revised and new paragraphs (c) and (d) would be added to read as follows:

§ 106.31 Petitions for rulemaking.

* * * * *

(b) Each petition filed under this section must—

(1) Summarize the proposed action and explain its purpose;

(2) State the text of the proposed rule or amendment, or specify the rule proposed to be repealed;

(3) Explain the petitioner's interest in the proposed action and the interest of any party the petitioner represents; and

(4) Provide information and arguments that support the proposed action, including relevant technical, scientific or other data as available to the petitioner, and any specific known cases that illustrate the need for the proposed action.

(c) If the potential impact of the proposed action is substantial, and information and data related to that impact are available to the petitioner, the Associate Administrator may request the petitioner to provide—

(1) The costs and benefits to society and identifiable groups within society, quantifiable and otherwise;

(2) The direct effects (including preemption effects) of the proposed action on States, on the relationship between the Federal Government and the States, and on the distribution of power and responsibilities among the various levels of government;

(3) The regulatory burden on small businesses, small organizations and small governmental jurisdictions;

(4) The recordkeeping and reporting requirements and to whom they would apply; and

(5) Impacts on the quality of the natural and social environments.

(d) The Associate Administrator may return a petition that does not comply

with the requirements of this section, accompanied by a written statement indicating the deficiencies in the petition.

6. Section 106.35 would be amended by revising the first sentence of paragraph (a) to read as follows:

§ 106.35 Petitions for reconsideration.

(a) Except as provided in § 106.39(d), any interested person may petition the Associate Administrator for reconsideration of any regulation issued under this part. * * *

* * * * *

7. Part 106 would be amended by adding a new § 106.38 to read as follows:

§ 106.38 Appeals.

(a) Any interested person may appeal a decision of the Associate Administrator, issued under § 106.33 or § 106.37, to the Administrator.

(b) An appeal must be received within 20 days of service of written notice to petitioner of the Associate Administrator's decision, or within 20 days from the date of publication of the Associate Administrator's decision in the Federal Register.

(c) It is requested, but not required, that three copies of the appeal be submitted to the Administrator.

(d) Unless the Administrator otherwise provides, the filing of an appeal under this section does not stay the effectiveness of any rule.

8. Part 106 would be amended by adding a new § 106.39 to read as follows:

§ 106.39 Direct final rulemaking.

(a) Where practicable, RSPA will use direct final rulemaking to issue the following types of rules:

(1) Minor, substantive changes to regulations;

(2) Incorporation by reference of the latest edition of technical or industry standards;

(3) Extensions of compliance dates; and

(4) Other noncontroversial rules where RSPA determines that use of direct final rulemaking is in the public interest and that a regulation is unlikely to result in adverse comment.

(b) The direct final rule document that is published in the Federal Register will

state that unless RSPA receives a significant adverse comment, or notice of intent to file a significant adverse comment, within a specified time, generally 60 days after publication, the rule will become effective on a specified date, generally 90 days after publication.

(c) For purposes of this section, a significant adverse comment is one which explains why the rule would be inappropriate, including a challenge to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. Comments that are frivolous or insubstantial will not be considered adverse under this procedure. A comment recommending a rule change in addition to the rule will not be considered a significant adverse comment, unless the commenter states why the rule would be ineffective without the additional change.

(d) If no significant adverse comment or notice of intent to file a significant adverse comment is received, RSPA will issue a subsequent document advising the public of that fact and that the rule will become, or did become, effective on the date previously specified. Direct final rules issued under this section are not subject to petitions for reconsideration under § 106.35.

(e) If RSPA receives a significant adverse comment or notice of intent to file a significant adverse document, RSPA will publish a document in the Federal Register withdrawing the direct final rule in whole or in part, and may incorporate the adverse comment into a subsequent direct final rule or may publish a notice of proposed rulemaking. A notice of proposed rulemaking will provide an opportunity for public comment, generally a minimum of 60 days, and will be processed in accordance with §§ 106.11–106.29.

Issued in Washington, D.C. under the authority delegated in 49 CFR part 1.53 and RSPA Order 1100.2A (May 19, 1992).

Dated: December 12, 1995.

Judith S. Kaleta,

Chief Counsel.

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