Corrective action taken by a violator to prevent a recurrence of similar violations is a major consideration under "other matters that justice requires." Application of the statutory assessment criteria may increase or decrease the baseline penalty amount or range. The two economic criteria, however, are only used to decrease penalties and are not used to increase penalties. Conversely, a violator's history of prior violations is used only to increase a penalty.

As discussed more fully below, 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.

RSPA is aware of a recent decision by the United States Court of Appeals for the District of Columbia Circuit ruling that a Federal Communications Commission (FCC) civil penalty schedule used in its forfeiture proceedings may not be published as a policy statement, but must be issued as a rule in accordance with the public notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553 (b), (c). United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). RSPA has reviewed the Court's decision, as well as the FCC schedule and procedures that were the subject of the ruling, and believes that the ruling is not applicable to the RSPA guidelines.

A respondent has no right to be heard in an FCC forfeiture proceeding other than by the FCC Bureau that initiates the forfeiture action. The Bureau begins a proceeding by issuing a forfeiture order. 47 CFR 1.80(f). The respondent is permitted a written reply, and the Bureau issues a final administrative determination. Id. A hearing before an ALJ may be held, but solely at the Bureau's discretion, 47 CFR 1.80(g); the regulations themselves state that normally the matter will be heard by an ALJ only when it arises in conjunction with other proceedings for which a formal hearing is required, *id.* When a hearing is held, the decision of the ALJ is subject to Bureau review and approval. 47 CFR 1.273, 1.282. The FCC schedule governs the Bureau's penalty determination, whether following a respondent's written reply or in reviewing an ALJ decision. Thus, a respondent, even where it fully exercised its procedural rights, would

be assessed a penalty determined according to a methodology that it had no opportunity to contest. It is firmly established that a standard must be issued as a rule if it is "finally determinative" of a respondent's obligations. *E.g., Brock* v. *Cathedral Bluffs Shale Oil Co.,* 796 F.2d 533, 537 (D.C. Cir. 1986).

In contrast, the RSPA guidelines are used by the RSPA Office of the Associate Administrator for Hazardous Materials Safety (OHMS), at a staff, level to assist in developing recommended proposed penalties in enforcement cases. On receiving an NOPV setting forth the penalty, a respondent may demand a formal hearing before an ALJ. 49 CFR 107.319. The OHMS and RSPA's Office of Chief Counsel will employ the guidelines to determine the penalty for which it will argue before the ALJ; nonetheless, the ALJ is not bound by the guidelines, and retains his or her essential discretion.

An ALJ decision that is not appealed is a final administrative action. 49 CFR 107.323. A decision that is appealed is reviewed by the RSPA Administrator. 49 CFR 107.325. On review of an ALJ decision, the Administrator, as well, is not bound by the OHMS guidelines. Accordingly, the guidelines do not "finally determin[e]" a respondent's penalty obligation; a respondent that objects to the proposed penalty has the right to contest the penalty fully before the administrative decisionmaker. The administrative decisionmaker remains "free to exercise his [or her] informed discretion." Guardian Fed. Savings & Loan Ass'n v. Federal Savings & Loan Ins. Corp., 589 F.2d 658, 666, 668 (D.C. Cir. 1978).

In addition, the FCC schedule and the RSPA guidelines differ significantly in the degree to which they permit deviation in their use. The *USTA* court, citing the proposition that the policy/rule distinction turns on "an agency's intention to bind itself to a particular legal policy position," 28 F.3d 1234, found that in over 300 cases, the FCC followed its fine schedule essentially without exception, *id.* at 1234–35.

The OHMS guidelines, as opposed to a penalty schedule, consist of a listing of violations and the baseline penalty, or range of penalties, proposed for each as of November 16, 1994, as well as an explanation of the methodology OHMS generally uses to modify the baseline proposed penalty on the basis of casespecific factors required to be considered under 49 U.S.C. 5123(c) and 49 CFR 107.331. The guidelines presuppose flexibility in their application; beyond that, the OHMS or, where respondent has waived formal hearing, the order of the Chief Counsel imposing a penalty, often has gone beyond the boundaries of the guidelines as warranted by particular evidence from or arguments of a respondent. RSPA expects to publish revised guidelines annually.

II. 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, was not subject to review by the Office of Management and Budget. This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). The economic impact of this final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 ("Federalism"). The Federal hazardous materials transportation law contains an express preemption provision (49 U.S.C. 5125(b)(1)) that preempts State, local, and Indian tribe requirements on certain covered subjects unless they are "substantively the same" as the HMR. Covered subjects are:

(i) The designation, description, and classification of hazardous materials;

(ii) The packing, repacking, handling, labeling, marking, and placarding of hazardous materials;

(iii) The preparation, execution, and use of shipping documents pertaining to hazardous materials and requirements respecting the number, content, and placement of such documents;

(iv) The written notification, recording, and reporting of the unintentional release in transportation of hazardous materials; or

(v) The design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous materials. The Federal hazardous materials transportation law (49 U.S.C. 5125(b)(2)), as amended, provides that if DOT issues a regulation concerning any of the covered subjects after November 16, 1990, DOT must determine and publish in the Federal **Register** the effective date of Federal preemption. The effective date may not be earlier than the 90th day following