



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety
Administration**

Office of
Chief Counsel

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***Hazardous Materials Safety
Law Division***

NOTICE OF PROBABLE VIOLATION

Date Issued: January 18, 2024

PHMSA Case No.: 23-0151-SH-SO
23-0152-SH-SO

Respondent: Battery Source
104 Genesis Pkwy
Thomasville, Georgia 31792
ATTN: Ross Glass, Vice President

No. of Alleged Violations: 2

Total Proposed Assessment: \$18,000

The Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) alleges that you have violated certain provisions of the Federal hazardous materials transportation law, 49 U.S.C. § 5101 et seq., and/or the Hazardous Materials Regulations (HMR), 49 CFR Parts 171-180. PHMSA sets forth the specific allegations in Addendum A to this Notice.

What are the maximum and minimum civil penalties that PHMSA can assess? Federal law sets a maximum civil penalty of \$96,624 (or \$225,455 if the violation results in death, serious illness or severe injury, or substantial destruction of property), and a minimum civil penalty of \$582 if the violation concerns training, for each violation of the Federal hazardous materials transportation law or the HMR. Each day of a continuing violation by a shipper or transporter of hazardous materials constitutes a separate violation for which the maximum penalty may be imposed (49 U.S.C. § 5123(a)).

What factors does PHMSA consider when proposing and assessing a civil penalty? Federal law requires PHMSA to consider certain factors when proposing and assessing a civil penalty for a violation of Federal hazardous materials transportation law or the HMR. Please refer to

Addendum B to this Notice for more information concerning these factors, which include corrective actions you take to attain and ensure compliance with the HMR.

How do I respond? You may respond to this Notice in any of three ways:

- (1) By paying the proposed assessment (49 CFR § 107.313(a)(1));
- (2) By sending an informal response, which can include a request for an informal conference (49 CFR § 107.313(a)(2)); or
- (3) By requesting a formal hearing (49 CFR § 107.313(a)(3)).

Details on these three options are provided in Addendum B to this Notice and also online at: (<https://www.phmsa.dot.gov/hazmat/field-operations/nopvresponses>). PHMSA explains its procedures for assessing civil penalties and imposing compliance orders in 49 CFR §§ 107.307 - 107.331.

When is my response due? You must respond within thirty (30) days from the date that you receive the Notice (49 CFR § 107.313(a)). I may extend the 30-day period for your response if you ask for an extension, and show good cause, within the original 30-day period (49 CFR § 107.313(c)). A response received out of time will not be considered. To assure timely receipt, **PHMSA strongly encourages you to submit your response by e-mail, fax, or express mail.**

What happens if I fail to respond? You waive your right to contest the allegations made in Addendum A to this Notice if you fail to respond within thirty (30) days of receiving it (or by the end of any extension). In that event, the Chief Counsel may find that you committed the violation(s) alleged in this Notice and assess an appropriate civil penalty.

What happens if PHMSA issues an Order assessing a civil penalty, and I fail to pay? If you fail to pay a civil penalty assessed by an Order, on the 91st day after the date of the Order you will be prohibited from conducting hazardous materials operations, in accordance with 49 CFR Part 109, Subpart E. If PHMSA issues a cease operations order and you continue to conduct hazardous materials operations, you may be subject to additional penalties, including criminal prosecution pursuant to 49 U.S.C. 5124. The prohibition shall continue until payment of the penalty has been made in full, or until PHMSA approves an acceptable payment plan.

The Case Exhibits have been supplied to you via a secure large file transfer link. If receiving the Case Exhibits in electronic format creates an undue hardship for you, please contact me.

**BRITTANY SIGRID
BESSER**

Digitally signed by BRITTANY
SIGRID BESSER
Date: 2024.01.18 12:01:59 -05'00'

Brittany S. Besser, Attorney

Enclosures: Addendum A
Addendum B
Addendum C

SERVICE BY ELECTRONIC MAIL

ADDENDUM A

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GENERAL ALLEGATIONS

General Factual Allegations/Averments

1. On June 27, 2023, PHMSA's Investigator conducted an inspection at Respondent's Battery Source #20 facility in Mobile, Alabama.
2. On June 29, 2023, PHMSA's Investigator conducted an inspection at Respondent's Battery Source #25 facility in Mobile, Alabama.
3. Eric Taylor, Manager, and Jeff Neal, Second Man, represented the company and provided necessary information and documentation.
4. Respondent is a Southeastern based chain of retail battery stores and is a filler, shipper, and carrier of Class 9 lithium batteries.
5. As an offeror and transporter of hazardous materials, Respondent is a regulated entity subject to the HMR and to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety, and PHMSA's Office of the Chief Counsel (49 U.S.C. § 5103(b) and 49 CFR § 107.301).

SPECIFIC ALLEGATIONS

Probable Violation No. 1

Offering and transporting in commerce, a hazardous material, Damaged, Defective, or Recalled (DDR), UN3480, Lithium Ion Batteries, 9, undeclared, without hazardous materials shipping papers, marking, labeling, and UN standard packaging, as prescribed by 49 CFR §§ 173.185(f), 172.200, 172.300, and 172.400, in violation of 49 CFR §§ 171.2(a), (b), (e), & (f); 173.185(f), 172.200; 172.202; 172.300; 172.301; 172.400; and 172.447.

Regulatory Standard

1. 49 CFR § 173.185(f) states, in part: "Damaged, defective, or recalled cells or batteries. Lithium cells or batteries that have been damaged or identified by the manufacturer as being defective for safety reasons, that have the potential of producing a dangerous evolution of heat, fire, or short circuit (e.g., those being returned to the manufacturer for safety reasons) may be transported by highway, rail or vessel only, and must be packaged as follows...." The requirements for transporting DDR lithium-ion batteries are outlined in the rest of the section.
2. 49 CFR § 172.301(a)(1) states: "Except as otherwise provided by this subchapter, each person who offers a hazardous material for transportation in a non-bulk packaging must mark the package with the proper shipping name and identification number (preceded by "UN", "NA" or "ID," as appropriate), as shown in the § 172.101 Hazardous Materials

Table. The identification number marking preceded by “UN”, “NA”, or “ID” as appropriate must be marked in characters at least 12 mm (0.47 inches) high. Packages with a maximum capacity of 30 liters (8 gallons) or less, 30 kg (66 pounds) maximum net mass, or cylinders with a water capacity of 60 liters (16 gallons) or less must be marked with characters at least 6 mm (0.24 inches) high. Packages with a maximum capacity of 5 liters (1.32 gallons) or less or 5 kg maximum net mass (11 pounds) or less must be marked in a size appropriate for the size of the package.”

3. 49 CFR § 172.400 states, in part: “(a) Except as specified in § 172.400a, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with labels specified for the material in the § 172.101 table and in this subpart....” The rest of the section outlines the various packagings requiring labeling.

Factual Allegations/Averments

1. During the June 27, 2023, site visit, the Investigator requested to see where lithium batteries are prepared for shipment from the store. Mr. Taylor led the Investigator to an area where the Investigator observed and photographed a stack of blue plastic bins organized by different battery types (see Inspection Report No. 23551034 at page 2 and Exhibit 2, pages 1-3, to Report No. 23551034).
2. Mr. Taylor indicated that the lithium batteries received and removed from customer electronics are placed in the observed bins and organized by battery type. Mr. Taylor indicated that the lithium batteries are then placed in individual bags and placed into a plastic storage tote, which he showed to the Investigator (see Inspection Report No. 23551034 at page 2 and Exhibit 2, pages 20-25, to Report No. 23551034).
3. Mr. Taylor indicated that the tote is shrink wrapped to a pallet, and a company-owned truck transports it and other materials on a weekly route to the company distribution center in Thomasville, Georgia for recycling. Mr. Taylor indicated that the tote is typically full enough to be added to the weekly route for shipment approximately monthly (see Inspection Report No. 23551034 at page 2)
4. Mr. Taylor indicated that both damaged and non-damaged lithium batteries are transported together using the same observed packaging (see Inspection Report No. 23551034 at page 2).
5. The Investigator observed the contents of the blue bins containing small consumer lithium batteries and observed lithium batteries indicating signs of swelling, pillowing, and cracked or bent external casing. The damage observed is indicative of damage or defect which has the potential of producing a dangerous evolution of heat, fire, or short circuit, and therefore requires transportation in accordance with 49 CFR §173.185(f) (see Inspection Report No. 23551034 at page 3 and Exhibit 2, pages 1-19, to Report No. 23551034).

6. The gray plastic storage totes used as packaging for the mixed damaged and non-damaged lithium batteries do not contain the required Class 9 lithium battery label, marking with the proper shipping name, marking identifying the contents as “Damaged/defective lithium ion battery,” and marking with the UN Identification Number (see Inspection Report No. 23551034 at page 3 and Exhibit 2, pages 20-25, to Report No. 23551034).
7. The packaging is non-UN standard, while Damaged, Defective, or Recalled lithium batteries require the use of Packing Group I rated UN standard packaging. Additionally, Mr. Taylor indicated that the packaging when shipped contains more than one battery per packaging. Mr. Taylor indicated that he was not aware of any cushioning material used. Damaged, Defective, or Recalled lithium batteries require the use of cushioning material surrounding the individual battery that is non-combustible, electrically non-conductive, and absorbent (see Inspection Report No. 23551034 at page 3 and Exhibit 2, pages 20-25, to Report No. 23551034).
8. Mr. Taylor indicated that store employees do not add any marking or labeling to the plastic totes and the totes are shrink wrapped by store employees prior to pick up for transportation. He indicated that when a filled tote is picked up, a similar tote with no marking or labeling is dropped off for use in the next shipment (see Inspection Report No. 23551034 at page 3 and Exhibit 2, pages 20-25, to Report No. 23551034).
9. Mr. Taylor indicated that he is not aware of any hazardous materials shipping papers being used by the company when transporting the lithium battery totes (see Inspection Report No. 23551034 at page 3).
10. The Investigator explained the requirements for packaging and shipping Damaged, Defective, or Recalled lithium batteries. Mr. Taylor indicated that he understood the requirements and would speak with the company’s headquarters to take the necessary actions to comply with the regulations (see Inspection Report No. 23551034 at page 3).
11. During the June 29, 2023, site visit, the Investigator requested to see where lithium batteries are prepared for shipment from the store. Mr. Neal led the Investigator to an area where the investigator observed and photographed a stack of blue plastic bins organized by different battery types (see Inspection Report No. 23551038 at page 3 and Exhibit 2, pages 1-2, to Report No. 23551038).
12. Mr. Neal indicated that the lithium batteries received and removed from customer electronics are placed in the observed bins and organized by battery type. Mr. Neal indicated that the lithium batteries are placed in individual bags, then placed into a larger bag, which is then placed into a plastic storage tote, which he showed to the Investigator (see Inspection Report No. 23551038 at page 3 and Exhibit 2, pages 15-19, to Report No. 23551038).
13. Mr. Neal indicated that the tote is shrink wrapped to a pallet, and a company-owned truck transports it and other materials on a weekly route to the company distribution center in Thomasville, Georgia for recycling. Mr. Neal indicated that the tote is added to the route approximately each week (see Inspection Report No. 23551038 at page 3).

14. Mr. Neal indicated that both damaged and non-damaged lithium batteries are transported together using the same observed packaging (see Inspection Report No. 23551038 at page 3).
15. The Investigator observed the contents of the blue bins containing small consumer lithium batteries and observed lithium batteries indicating signs of swelling, pillowing, and cracked or bent external casing. The damage observed is indicative of damage or defect which has the potential of producing a dangerous evolution of heat, fire, or short circuit, and therefore requires transportation in accordance with 49 CFR §173.185(f) (see Inspection Report No. 23551038 at page 4 and Exhibit 2, pages 2-13, to Report No. 23551038).
16. The gray plastic storage totes used as packaging for the mixed damaged and non-damaged lithium batteries do not contain the required Class 9 lithium battery label, marking with the proper shipping name, marking identifying the contents as “Damaged/defective lithium ion battery,” and marking with the UN Identification Number (see Inspection Report No. 23551038 at page 4 and Exhibit 2, pages 15-19, to Report No. 23551038).
17. The packaging is non-UN standard, while Damaged, Defective, or Recalled lithium batteries require the use of Packing Group I rated UN standard packaging. Additionally, Mr. Neal indicated that the packaging when shipped contains more than one battery per packaging. Mr. Neal indicated that the only cushioning used to fill voids would be a carboard type material, which does not satisfy the requirement to use cushioning material that is non-combustible, electrically non-conductive, and absorbent (see Inspection Report No. 23551038 at page 4 and Exhibit 2, pages 15-19, to Report No. 23551038).
18. Mr. Neal indicated that store employees do not add any marking or labeling to the plastic totes and the totes are shrink wrapped by store employees prior to pick up for transportation. He indicated that when a filled tote is picked up, a similar tote with no marking or labeling is dropped off for use in the next shipment. The observed tote contained inbound miscellaneous items which Mr. Neal indicated would be emptied and the tote would be used for the next shipment of lithium batteries (see Inspection Report No. 23551038 at page 4 and Exhibit 2, pages 15-19, to Report No. 23551038).
19. Mr. Neal indicated that he is not aware of any hazardous materials shipping papers being used by the company when transporting the lithium battery totes (see Inspection Report No. 23551038 at page 4).
20. The Investigator explained the requirements for packaging and shipping Damaged, Defective, or Recalled lithium batteries. Mr. Neal indicated that he understood the requirements and would speak with the company’s headquarters to take the necessary actions to comply with the regulations (see Inspection Report No. 23551038 at page 4).
21. Following the site visits, the Investigator spoke by telephone on July 27, 2023, with Ross Glass, Vice President, who confirmed that the company does not use hazardous materials shipping papers or any documentation of pickups for the weekly routes (see Inspection Report No. 23551034 at page 3 and Inspection Report No. 23551038 at page 4).

22. On or about June 27 and 29, 2023, Respondent offered and transported in commerce, a hazardous material, Damaged, Defective, or Recalled (DDR), UN3480, Lithium Ion Batteries, 9, undeclared, without hazardous materials shipping papers, marking, labeling, and UN standard packaging, as prescribed by 49 CFR §§ 173.185(f), 172.200, 172.300, and 172.400, in violation of 49 CFR §§ 171.2(a), (b), (e), & (f); 173.185(f), 172.200; 172.202; 172.300; 172.301; 172.400; and 172.447.

- Please see Inspection/Investigation Report Number 23551034 at pages 2-7, and Inspection/Investigation Report Number 23551038 at pages 3-8, and the exhibits that accompany these reports, which are incorporated herein.

Probable Violation No. 2

Allowing an employee to perform a function subject to the requirements of federal hazardous materials regulations when the employee had not received initial hazardous materials general awareness, function-specific, safety, and security awareness training as prescribed by 49 CFR §§ 172.704(c)(1), in violation of 49 CFR §§ 171.2(a), (b) & (e), 172.702(a), 172.704(a)(1), (2), (3), (4) & (c)(1).

Regulatory Standard

1. 49 CFR §172.702 states: “Applicability and responsibility for training and testing.
(a) A hazmat employer shall ensure that each of its hazmat employees is trained in accordance with the requirements prescribed in this subpart.
(b) Except as provided in §172.704(c)(1), a hazmat employee who performs any function subject to the requirements of this subchapter may not perform that function unless instructed in the requirements of this subchapter that apply to that function. It is the duty of each hazmat employer to comply with the applicable requirements of this subchapter and to thoroughly instruct each hazmat employee in relation thereto.”
2. 49 CFR § 172.704 states, in part, the types of training a hazmat employee must receive, as well as the associated recordkeeping requirements for the trainings.

Factual Allegations/Averments

1. During the June 27, 2023, site visit, the Investigator requested to see where lithium batteries are prepared for shipment from the store. Mr. Taylor led the Investigator to an area where the Investigator observed and photographed a stack of blue plastic bins organized by different battery types (see Inspection Report No. 23551034 at page 8 and Exhibit 2, pages 1-3, to Report No. 23551034).

2. Mr. Taylor indicated that the lithium batteries received and removed from customer electronics are placed in the observed bins and organized by battery type. Mr. Taylor indicated that the lithium batteries are then placed in individual bags and placed into a plastic storage tote, which he showed to the Investigator (see Inspection Report No. 23551034 at page 2 and Exhibit 2, pages 20-25, to Report No. 23551034).
3. Mr. Taylor indicated that the tote is shrink wrapped to a pallet, and a company-owned truck transports it and other materials on a weekly route to the company distribution center in Thomasville, Georgia for recycling. Mr. Taylor indicated that the tote is typically full enough to be added to the weekly route for shipment approximately monthly (see Inspection Report No. 23551034 at page 8).
4. Mr. Taylor indicated that both damaged and non-damaged lithium batteries are transported together using the same observed packaging (see Inspection Report No. 23551034 at page 8).
5. The Investigator observed the contents of the blue bins containing small consumer lithium batteries and observed lithium batteries indicating signs of swelling, pillowing, and cracked or bent external casing. The damage observed is indicative of damage or defect which has the potential of producing a dangerous evolution of heat, fire, or short circuit, and therefore requires transportation in accordance with 49 CFR §173.185(f) (see Inspection Report No. 23551034 at page 9 and Exhibit 2, pages 1-19, to Report No. 23551034).
6. Mr. Taylor indicated that he is not aware of any hazardous materials shipping papers being used by the company when transporting the lithium battery totes (see Inspection Report No. 23551034 at page 9).
7. The Investigator requested hazardous materials training documents for employees who perform hazardous materials transportation functions, including the filling and preparation of packaging for shipping Damaged, Defective, or Recalled lithium batteries. Mr. Taylor indicated that he and other employees at the store have not received hazardous materials training, and Mr. Taylor was unable to provide any documentation of hazardous materials training (see Inspection Report No. 23551034 at page 9).
8. The Investigator discussed the requirements to provide initial and recurrent hazardous materials training to all employees who prepare Damaged, Defective, or Recalled lithium battery packaging for transportation. Mr. Taylor indicated that he understood the requirements and would speak with the company's headquarters to take the necessary actions to comply with the regulations (see Inspection Report No. 23551034 at page 9).
9. During the June 29, 2023, site visit, the Investigator requested to see where lithium batteries are prepared for shipment from the store. Mr. Neal led the Investigator to an area where the Investigator observed and photographed a stack of blue plastic bins organized by different battery types (see Inspection Report No. 23551038 at page 9 and Exhibit 2, pages 1-2, to Report No. 23551038).

10. Mr. Neal indicated that the lithium batteries received and removed from customer electronics are placed in the observed bins and organized by battery type. Mr. Neal indicated that the lithium batteries are placed in individual bags, then placed into a larger bag, which is then placed into a plastic storage tote, which he showed to the Investigator (see Inspection Report No. 23551038 at page 9 and Exhibit 2, pages 15-19, to Report No. 23551038).
11. Mr. Neal indicated that the tote is shrink wrapped to a pallet, and a company-owned truck transports it and other materials on a weekly route to the company distribution center in Thomasville, Georgia for recycling. Mr. Neal indicated that the tote is added to the route approximately each week (see Inspection Report No. 23551038 at page 9).
12. Mr. Neal indicated that both damaged and non-damaged lithium batteries are transported together using the same observed packaging (see Inspection Report No. 23551038 at page 9).
13. The Investigator observed the contents of the blue bins containing small consumer lithium batteries and observed lithium batteries indicating signs of swelling, pillowing, and cracked or bent external casing. The damage observed is indicative of damage or defect which has the potential of producing a dangerous evolution of heat, fire, or short circuit, and therefore requires transportation in accordance with 49 CFR §173.185(f) (see Inspection Report No. 23551038 at page 10 and Exhibit 2, pages 2-13, to Report No. 23551038).
14. Mr. Neal indicated that he is not aware of any hazardous materials shipping papers being used by the company when transporting the lithium battery totes (see Inspection Report No. 23551038 at page 10).
15. The Investigator requested hazardous materials training documents for employees who perform hazardous materials transportation functions including the filling and preparation of packaging for shipping Damaged, Defective, or Recalled lithium batteries. Mr. Neal indicated that he remembers taking some initial training on safe handling of batteries but did not recall any training specific to packaging or handling of hazardous materials in preparation for transportation. He was not able to provide documentation of any training (see Inspection Report No. 23551038 at page 10).
16. The Investigator discussed the requirements to provide initial and recurrent hazardous materials training to all employees who prepare Damaged, Defective, or Recalled lithium battery packaging for transportation. Mr. Neal indicated that he understood the requirements and would speak with the company's headquarters to take the necessary actions to comply with the regulations (see Inspection Report No. 23551038 at page 10).
23. Following the site visit, the Investigator spoke by telephone on July 27, 2023, with Ross Glass, Vice President, who confirmed that the company does not use hazardous materials shipping papers or any documentation of pickups for the weekly routes (see Inspection Report No. 23551034 at page 9 and Inspection Report No. 23551038 at page 10).

17. On or about June 27 and 29, 2023, Respondent allowed an employee to perform a function subject to the requirements of federal hazardous materials regulations when the employee had not received initial hazardous materials general awareness, function-specific, safety, and security awareness training as prescribed by 49 CFR §§ 172.704(c)(1), in violation of 49 CFR §§ 171.2(a), (b) & (e), 172.702(a), 172.704(a)(1), (2), (3), (4) & (c)(1).

- Please see Inspection/Investigation Report Number 23551034 at pages 8-11, and Inspection/Investigation Report Number 23551038 at pages 9-12, and the exhibits that accompany these reports, which are incorporated herein.

FACTS ALREADY CONSIDERED (UNDER 49 CFR § 107.331) IN SETTING PROPOSED PENALTIES

Prior Violations:

When setting a civil penalty, PHMSA will review the respondent's compliance history and determine if there are any finally-adjudicated violations of the HMR initiated within the previous six years. Only cases or tickets that have been finally-adjudicated will be considered (i.e., the ticket has been paid, a final order has been issued, or all appeal remedies have been exhausted or expired). PHMSA will include prior violations that were initiated within six years of the present case; a case or ticket will be considered to have been initiated on the date of the exit briefing for both the prior case and the present case. If multiple cases are combined into a single Notice of Probable Violation or ticket, the oldest exit briefing will be used to determine the six-year period. If a situation arises where no exit briefing is issued, the date of the Notice of Probable Violation or Ticket will be used to determine the six-year period. PHMSA may consider prior violations of the Hazardous Materials Regulations from other DOT Operating Administrations.

The general standards for increasing a baseline proposed penalty on the basis of prior violations are as follows (49 CFR Part 107, Subpart D, Appendix A):

1. For each prior civil or criminal enforcement case—25 percent increase over the pre-mitigation recommended baseline penalty.
2. For each prior ticket—10 percent increase over the pre-mitigation recommended baseline penalty.
3. If a respondent is cited for operating under an expired special permit and previously operated under an expired special permit (as determined in a finally-adjudicated civil, criminal, or administrative enforcement case or a ticket), PHMSA will increase the civil penalty 100 percent.

4. If a respondent is cited for the exact same violation that it has been previously cited for within the six-year period (in a finally-adjudicated civil, criminal, or administrative enforcement case or a ticket), PHMSA will increase the baseline for that violation by 100 percent. This increase will apply only when the present violation is identical to the previous violation and applies only to the specific violation that has occurred.

5. A baseline proposed penalty (both for each individual violation and the combined total) will not be increased more than 100 percent on the basis of prior violations.

PHMSA's records do not contain any prior violations by Respondent at these facilities, and PHMSA did not consider any prior violations in determining the proposed assessment for the violation in this Notice.

Penalty Increases for Multiple Counts:

PHMSA generally will treat multiple occurrences that violate a single regulatory provision as separate violations and assess the applicable baseline penalty for each distinct occurrence of the violation. PHMSA will generally consider multiple shipments or, in the case of package testers, multiple package designs, to be multiple occurrences; and each shipment or package design may constitute a separate violation.

PHMSA, however, will exercise its discretion in each case to determine the appropriateness of combining into a single violation what could otherwise be alleged as separate violations and applying a single penalty for multiple counts or days of a violation, increased by 25 percent for each additional instance, as directed by 49 U.S.C. 5123(c). For example, PHMSA may treat a single shipment containing three items or packages that violate the same regulatory provision as a single violation and apply a single baseline penalty with a 50 percent increase for the two additional items or packages; and PHMSA may treat minor variations in a package design for a package tester as a single violation and apply a single baseline penalty with a 25 percent increase for each additional variation in design.

When aggravating circumstances exist for a particular violation, PHMSA may handle multiple instances of a single regulatory violation separately, each meriting a separate baseline or increase the civil penalty by 25 percent for each additional instance. Aggravating factors may include increased safety risks, continued violation after receiving notice, or separate and distinct acts. For example, if the multiple occurrences each require their own distinct action, then PHMSA may count each violation separately (e.g., failure to obtain approvals for separate fireworks devices) (49 CFR Part 107, Subpart D, Appendix A).

Corrective Action:

An important purpose of PHMSA's enforcement program is to bring the regulated community into compliance with the HMR, and to promote ongoing efforts by that community to maintain compliance. In determining the final penalty assessment, PHMSA considers documented

evidence of actions taken by a Respondent to correct violations and ensure that they do not recur (49 CFR § 107.331(g)).

In its August 2023 letter, Respondent addressed the actions it has taken to correct the violations alleged in this Notice and to prevent future violations of the HMR. Respondent described and documented its corrective action as follows:

- Violation No.1: Respondent will now be using Call2Recycle DOT SP 20549 packaging for transportation of damaged lithium batteries. The special permit packaging exempts the user from shipping paper and hazardous materials training requirements and allows for transportation of Damaged, Defective, or Recalled lithium batteries in the pre-marked and labeled PG I packaging. For non-damaged small lithium batteries, Respondent indicated that it will be using strong rigid outer packaging marked with the lithium battery and cargo aircraft only markings in accordance with the small battery exception in §173.185(c) (see Inspection Report No. 23551034 at page 12, and Exhibit 3 to Report No. 23551034, and Inspection Report No. 23551038 at page 13, and Exhibit 3 to Report No. 23551038).
- Violation No.2: Respondent provided training certificates verifying that employees have taken Call2Recycle's training on the use of the special permit packaging (see Inspection Report No. 23551034 at page 12, and Exhibit 3 to Report No. 23551034, and Inspection Report No. 23551038 at page 13, and Exhibit 3 to Report No. 23551038).

Based on this information and documentation, the proposed penalty has been reduced by 25% (as indicated below).

Financial Status

Under 49 CFR §107.331 (e) and (f), the proposed penalty may be reduced if Respondent demonstrates that it is unable to pay that penalty, or if payment of the proposed penalty would affect Respondent's ability to continue in business. Respondent's poor financial condition may be a basis for reducing the proposed penalty; a healthy financial condition is *not* a basis for increasing the penalty.

PHMSA has no information that indicates that Respondent is unable to pay the proposed penalty or that payment of the proposed penalty will affect Respondent's ability to continue in business. If Respondent wishes its financial condition to be considered in assessing a penalty for the violation(s) alleged in this Notice, it must provide current financial information (i.e., copies of Respondent's three most current Federal tax returns, an income statement, and a current balance sheet [preferably certified]).

TOTAL CIVIL PENALTY PROPOSED

Probable Violation	Baseline Penalty	Increase for Priors	Corrective Action	Proposed Penalty
1	\$20,000	+\$0	-\$5,000	\$15,000
2	\$4,000	+\$0	-\$1,000	\$3,000
TOTAL	\$24,000	+\$0	-\$6,000	\$18,000

ADDENDUM B

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Addendum B (NOPV)

**DEPARTMENT OF TRANSPORTATION
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION**

How do I respond to this Notice of Probable Violation (Notice)?

You may respond to this Notice in any of three ways:

- (1) Pay the proposed assessment (49 C.F.R. § 107.315);
- (2) Send an informal response, which can include a request for an informal conference (§ 107.317); or
- (3) Request a formal hearing (§ 107.319).

How do I pay the proposed assessment?

You pay the proposed assessment by:

- (1) Sending a wire transfer, through the Federal Reserve Communications System (Fedwire), to the U.S. Treasury account (49 C.F.R. § 89.21(b)(3)). Addendum C contains the instructions for sending wire transfers. Questions concerning wire transfers should be directed to: DOT/PHMSA/MMAC, AMK-325/HQ-RM 181 6500 S MacArthur Blvd., Oklahoma City, OK 73169 (Telephone No. (405) 954-9309).

Or

- (2) Sending a certified check or money order if the penalty amount is \$10,000 or less. The certified check or money order must be payable to the "U.S. Department of Transportation" and must be mailed to: DOT/PHMSA/MMAC, AMK-325/HQ-RM 181 6500 S MacArthur Blvd., Oklahoma City, OK 73169 (Telephone No. (405) 954-9309).

Or

- (3) Using a credit card via the Internet. To pay electronically with a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/public/form/start/1078346>

Addendum B (NOPV)

Where do I send my response?

You must address your informal response or formal hearing request to the attorney who issued the Notice at the following address:

Pipeline and Hazardous Materials Safety Administration
Office of the Chief Counsel (PHC-10)
Room E26-105
U.S. Department of Transportation
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

When is my response due? (§ 107.313)

You must respond to the Notice within thirty (30) days of the date you receive it. The attorney who issued the Notice may extend the 30-day period for your response if you ask for an extension, and show good cause, within the original 30-day period.

What happens if I do not respond? (§ 107.313)

If you fail to respond to the Notice within thirty (30) days of receiving it (or by the end of any extension), you will waive your right to contest the allegations made in Addendum A to the Notice. In addition, the Chief Counsel will issue a default Order finding the facts as alleged in the Notice and assessing the civil penalty as outlined within that notice.

May I propose a compromise offer? (§ 107.327)

Yes. At any time before an order is issued and referred to the Attorney General for collection, you may propose to compromise a civil penalty case by submitting a specific compromise offer amount to the attorney handling the case (§ 107.327). The Chief Counsel may also propose a compromise.

If a compromise is agreeable to all parties, the attorney handling the case will forward a compromise agreement to you for signature. This document will outline the terms of the joint agreement and you must return a signed original to the attorney handling the case within 30 days. After this agreement has been returned it will be signed by the assigned attorney and presented to the Chief Counsel with a request that the Chief Counsel adopt the terms of that agreement by issuing a Compromise Order (49 C.F.R. § 107.327(a)(1)). The terms of the agreement constitute an offer of compromise until accepted by the Chief Counsel. When you agree to a compromise, you give up your right to appeal the order issued by the Chief Counsel.

Addendum B (NOPV)

What should I include in my informal response? (§107.317)

Your informal response must contain written explanations, information or arguments that respond to the allegation(s), the amount of the proposed civil penalty, or the terms of a proposed compliance order. Provide complete documentation of your explanations and arguments. No specific format is required for an informal response.

May I request an informal conference? (§ 107.317)

Yes. You may request an informal conference as part of your informal response. Please describe the issues you want to discuss during the conference. After receiving your request, the attorney handling the case will contact you to arrange the conference. Normally the conference will be held by telephone, and the attorney handling the case and the inspector who conducted the compliance inspection will participate in the conference.

What happens after I submit an informal response to the Notice?

We will hold an informal conference if you have asked for one. Based on the Notice, the evidence supporting the Notice, any written explanations, information and documentation that you provide, and matters presented at a conference, the Chief Counsel decides the case. The Chief Counsel may issue an order finding all or some of the violation(s) alleged in the Notice or may withdraw all or some of the alleged violation(s). If the Chief Counsel finds violation(s), the order will assess a civil penalty.

How do I appeal an order? (§ 107.325)

You may appeal an order to PHMSA's

Administrator. How do I request a formal hearing? (§ 107.319)

You must request a formal hearing within 30 days of the date that you receive the Notice. If you are granted an extension of time to respond to the Notice, you must submit a formal hearing request by the end of the extended time period. If you do not request a formal hearing within the specified time, you will waive your right to a formal hearing.

Your request for a formal administrative hearing must include the following:

- (1) The name and address of the respondent and any other person submitting the request;
- (2) A statement of which allegations of violations are not in dispute; and
- (3) A description of the issues that you will raise at the hearing. (The Administrative Law Judge will decide whether issues not raised in the request may be raised at the hearing.)

Addendum B (NOPV)

After receiving a request for a hearing that complies with these requirements, the Chief Counsel will request an Administrative Law Judge from the DOT Office of Hearings to preside over the hearing. Once an Administrative Law Judge is assigned, all further matters in the proceeding will be conducted by the Administrative Law Judge. Either you or PHMSA may appeal the decision of the Administrative Law Judge to PHMSA's Administrator.

How does PHMSA determine if I have committed a violation?

This is a civil penalty case and PHMSA uses the "knowingly" standard, which is defined in the Federal hazardous materials transportation law (See 49 U.S.C. 5123(a)(1)), in all civil penalty cases. The standard for a violation is similar to "negligence". After considering all the available information (including the additional information you provide in your response to the Notice), PHMSA must find either that (1) you had actual knowledge of the facts giving rise to the violation, or (2) you had imputed knowledge, of the facts giving rise to the violation, in that a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge. PHMSA does not need to find that you actually knew about, or intended to violate, requirements in the Federal hazardous material transportation law or the HMR.

What factors does PHMSA consider when proposing and assessing a civil penalty? (§ 107.331)

PHMSA considers the following factors when proposing and assessing a civil penalty for a violation of the regulations:

- (1) The nature and circumstances of the violation(s);
- (2) The extent and gravity of the violation(s);
- (3) The degree of your culpability;
- (4) Your history, if any, of prior offenses;
- (5) Your ability to pay the penalty;
- (6) The effect of the penalty on your ability to continue in business;
- (7) The size of your business, and
- (8) Other matters as justice may require.

The nature and the timeliness of any corrective action you take to prevent future violations of a similar nature will be considered under item No. 8. However, you must submit documented evidence of that corrective action to the PHMSA attorney. If you have submitted documented evidence regarding any of these factors during PHMSA's investigation of the alleged violation(s), and that documentation is referenced in the Notice or accompanying Inspection/Investigation Report, you do not need to resubmit it.

Addendum B (NOPV)

Under the Small Business Regulatory Enforcement Fairness Act (SBREFA), PHMSA must consider the rights of small entities in enforcement actions. PHMSA's hazardous materials enforcement program has been designed to consider small businesses and the penalties that PHMSA proposes and assesses are generally considered appropriate for small businesses. PHMSA takes into consideration the size of the company when proposing and assessing a civil penalty.

However, special consideration may not be given to a small business if:

- (1) The small business has not corrected its violation(s) within a reasonable time;
- (2) The small business has committed one or more prior violations of the HMR;
- (3) The violations involve willful conduct;
- (4) The violations pose serious threats to health, safety or the environment; or
- (5) The small business has not made a good faith effort to comply with the law.

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. Our objective is to ensure a fair regulatory enforcement environment.

You have a right to contact the Small Business Administration's national Ombudsman at 1-888- REG-FAIR (1-888-734-3247) or <https://www.sba.gov/ombudsman> regarding the fairness of the compliance and enforcement activities by this agency.

The Pipeline and Hazardous Materials Safety Administration strictly forbids retaliatory acts by its employees. As such, you should feel confident that you will not be penalized for expressing your concerns about compliance and enforcement activities.

Where can I find more information on how PHMSA handles hazardous materials enforcement cases?

A more detailed discussion of these procedures is in 49 C.F.R. §§ 107.301 through 107.333. These procedures are also on the Office of the Chief Counsel's home page at <http://www.phmsa.dot.gov/org/office-of-chief-counsel>.

ADDENDUM C

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**INSTRUCTIONS FOR ELECTRONIC FUNDS TRANSFER TO
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION,
U.S. DEPARTMENT OF TRANSPORTATION**

1. <u>RECEIVER’S ABA NO.</u> 021030004	2. <u>TYPE SUBTYPE</u> (provided by sending bank)
3. <u>SENDING BANK ARB NO.</u> (provided by sending bank)	4. <u>SENDING BANK REF NO.</u> (provided by sending bank)
5. <u>AMOUNT</u>	6. <u>SENDING BANK NAME</u> (provided by sending bank)
7. <u>RECEIVER NAME:</u> TREAS NYC	8. <u>PRODUCT CODE</u> (Normally CTR, or sending bank)
9. <u>BENEFICIAL (BNF)- AGENCY LOCATION CODE</u> BNF=/AC-69140001	10. <u>REASONS FOR PAYMENT</u> <i>Example:</i> PHMSA Payment for Case #/Ticket

INSTRUCTIONS: You, as sender of the wire transfer, must provide the sending bank with the information for Block (1), (5), (7), (9), and (10). The information provided in blocks (1), (7), and (9) are constant and remain the same for all wire transfers to the Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #1 - RECEIVER ABA NO. - “021030004”. Ensure the sending bank enters this nine digit identification number; it represents the routing symbol for the U.S. Treasury at the Federal Reserve Bank in New York.

Block #5 - AMOUNT - You as the sender provide the amount of the transfer. Please be sure the transfer amount is punctuated with commas and a decimal point. **EXAMPLE:** **\$10,000.00**

Block #7 - RECEIVER NAME- “TREAS NYC.” Ensure the sending bank enters this abbreviation, which must be used for all wire transfer to the Treasury Department.

Block #9 - BENEFICIAL - AGENCY LOCATION CODE - “BNF=/AC-69140001” Ensure the sending bank enters this information. This is the Agency Location Code for Pipeline and Hazardous Materials Safety Administration, Department of Transportation

Block #10 - REASON FOR PAYMENT – “AC-Payment for PHMSA Case#” To ensure your wire transfer is credited properly, enter the case number/ticket number or Pipeline Assessment number.”

Note: - A wire transfer must comply with the format and instructions or the Department cannot accept the wire transfer. You, as the sender, can assist this process by notifying, at the time you send the wire transfer, the General Accounting Division at (405) 954-9309.