



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: November 26, 2024

PHMSA Case No.: 24-0169-SH-SW

Respondent: Houston Chemical
41095 Park 290 Drive
Waller, TX 77484
ATTN: Stuart Musslewhite, CEO

No. of Alleged Violations: 3 (+ 1 Quality Control Item)

Total Proposed Assessment: \$4,867

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 \$99,756 (or \$232,762 if the violation results in death, serious illness or severe injury, or substantial destruction of property), and a minimum civil penalty of \$601 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.**

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 will be supplied to you in a PDF format using DOT's Secure Large File Transfer System via the link in an email to follow, which will be active for the next 30 days. If receiving the Case Exhibits in electronic format creates an undue hardship for you, please contact me.

SAMANTHA
ANN VRSCAK

Digitally signed by SAMANTHA ANN VRSCAK
Date: 2024.11.26 12:19:46 -05'00'

Samantha Vrscak, Attorney

Enclosures: Addendum A
Addendum B
Addendum C

cc: Steve Simons, Operations Manager (steve@houstonchem.com)
Austin Wheat, Plant Manager (austin@houstonchem.com)

SERVICE BY ELECTRONIC MAIL

ADDENDUM A

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GENERAL ALLEGATIONS

General Factual Allegations/Averments

1. On July 17, 2024, PHMSA's Investigators conducted an inspection at Respondent's facility in Waller, Texas.
2. Steve Simons, Operations Manager, and Austin Wheat, Plant Manager, represented the company and provided necessary information and documentation.
3. Respondent is a distributor and blender of chemicals for the oilfield industry. Respondent ships Class 3, 8, and Division 5.1 hazardous materials in intermediate bulk containers (IBCs), drums, boxes, and pails by highway using commercial carriers and company-owned vehicles.
4. 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 for transportation in commerce, a hazardous material, while failing to mark the proper shipping name and identification number on the package, in violation of 49 CFR §§ 171.2(a), (b), and (e); 172.300(a); and 172.301(a)(1).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by the HMR must perform that function in accordance with the HMR.
2. Pursuant to 49 CFR § 171.2(b), each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of the HMR, or an exemption or special permit, approval, or registration issued under the HMR or under subchapter A of this chapter.
3. Pursuant to 49 CFR § 171.2(e), no person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of the HMR or an exemption or special permit, approval, or registration issued under the HMR or subchapter A of this chapter.

4. Pursuant to 49 CFR § 172.300(a), each person who offers a hazardous material for transportation shall mark each package, freight container, and transport vehicle containing the hazardous material in the manner required by this subpart.
5. Pursuant to 49 CFR § 172.301(a)(1), except as otherwise provided by the HMR, each person who offers a hazardous material for transportation in 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 HMT. 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.

Factual Allegations/Averments

1. During the inspection, PHMSA’s Investigators observed and photographed six UN standard 5-gallon plastic pails in Respondent’s staging area, closed and ready for shipment. The pails had a manufacturer’s label indicating the product contained within was “Coval Ultimate Top Coat Gloss.” The manufacturer’s label also displayed a small Class 3, Flammable Liquid hazardous materials label. There were no additional markings, such as the proper shipping name or UN identification number, or labels on the pail. (See Report No. 24602009, page 2; Exhibit 2).
2. PHMSA’s Investigators asked Respondent’s representative if any additional markings or labels were added to the pails prior to shipment. In an oral interview, Respondent’s representative confirmed that no additional markings or labels were applied to the packages prior to shipment. (See Report No. 24602009, page 2; Exhibit 3).
3. The safety data sheet (SDS) for “Ultimate Top Coat,” confirmed the material was hazardous and regulated as UN1139, Coating Solution, 3, Packing Group II. (See Report No. 24602009, pages 2-3; Exhibit 5).
4. Respondent provided the following shipping papers showing it had offered for transportation in commerce UN1139, Coating Solution, 3, PGII, packaged in the same manner as described above and without the proper shipping name or UN identification number on the packages (See Report No. 24602009, page 3; Exhibit 4):
 - a. Bill of lading #D2089873-0-1, dated 12/29/2023 – shipment of 40 pails of UN1139, Coating Solution, 3, PGII, from Respondent’s facility to Nikka Corp – Doraville, in Atlanta, GA.
 - b. Bill of lading #10741953-6, dated 07/16/2024 – shipment of 18 pails of UN1139, Coating Solution, 3, PGII, from Respondent’s facility to Resinous Flooring Supply LLC in Tulsa, OK.

5. On or about December 29, 2023, and July 16, 2024, Respondent offered for transportation in commerce, a Packing Group II hazardous material, while failing to mark the proper shipping name and identification number on the package, in violation of 49 CFR §§ 171.2(a), (b), and (e); 172.300(a); and 172.301(a)(1).

- Please see Inspection/Investigation Report Number 24602009 at pages 3-4, and the exhibits that accompany this report, which are incorporated herein.

Probable Violation No. 2

Offering for transportation in commerce, a hazardous material, when the UN standard packaging had not been closed according to the packaging manufacturer or distributor's closure instructions, in violation of 49 CFR §§ 171.2(a), (b), and (e), 173.1(b), 173.22(a)(4), and 173.24(f)(2).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by the HMR must perform that function in accordance with the HMR.
2. Pursuant to 49 CFR § 171.2(b), each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of the HMR.
3. Pursuant to 49 CFR § 171.2(e), no person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by the applicable requirements of the HMR.
4. Pursuant to 49 CFR § 173.1(b), a shipment of hazardous materials that is not prepared in accordance with the HMR may not be offered for transportation by air, highway, rail, or water.
5. Pursuant to 49 CFR § 173.22(a)(4)(i), for a DOT specification or UN standard packaging subject to the requirements of Part 178 of the HMR, a person must perform all functions necessary to bring the package into compliance with parts 173 and 178 of the HMR, as identified by the packaging manufacturer or subsequent distributor, such as applying closures consistent with the manufacturer's closure instructions.
6. Pursuant to 49 CFR § 173.24(f)(2), except as otherwise provided in the HMR, a closure (including gaskets or other closure components, if any) used on a specification packaging must conform to all applicable requirements of the specification and must be closed in accordance with information, as applicable, provided by the manufacturer's notification required by § 178.2 of the HMR.

Factual Allegations/Averments

1. During the inspection, PHMSA's Investigators observed and photographed 275-gallon UN31HA1 intermediate bulk containers (IBCs), which were used by Respondent to package and ship hazardous materials. (See Report No. 24602009, page 5; Exhibits 2-4).
2. PHMSA's Investigators asked how the IBCs were closed prior to transportation. In an oral interview, Respondent's employee, Jaime Gurolla, explained the IBCs were closed with a standard IBC tool, which he showed to investigators. The IBC tool did not have any way to measure torque. When asked by the investigators whether the IBCs were required to be closed to a specific torque value, Gurolla said he did not know. He also confirmed that the IBC tool could not be set to a repeatable torque. (See Report No. 24602009, page 5; Exhibits 2-3).
3. Respondent provided PHMSA's Investigators with the packaging distributor's closure notification for the IBCs. The closure notification stated that the UN31HA1 IBCs used by Respondent, Mauser SM Series with a 6-inch cap, must be closed by tightening the cap with a torque wrench set to a minimum of 70 ft-lbs. (See Report No. 24602009, page 5; Exhibits 2, 6).
4. Respondent also provided the following shipping papers in which it offered for transportation in commerce UN1791, Hypochlorite Solutions, 8, PGIII, packaged in 275-gallon UN31HA1 IBCs and closed in the same manner as described above (See Report No. 24602009, page 6; Exhibit 4):
 - a. Invoice #2208366S, dated 5/28/24 – shipment of one IBC of UN1791, Hypochlorite Solutions, 8, PGIII, to Texas Outhouse in Houston, TX.
 - b. Invoice #2208437S, dated 6/5/24 – shipment of one IBC of UN1791, Hypochlorite Solutions, 8, PGIII, to Texas Outhouse in Houston, TX.
 - c. Invoice #2208541S, dated 6/26/24 – shipment of one IBC of UN1791, Hypochlorite Solutions, 8, PGIII, to Texas Outhouse in Houston, TX.
5. The SDS for the material confirmed the material was hazardous and regulated as UN1791, Hypochlorite Solutions, 8, PGIII. (See Report No. 24602009, page 6; Exhibit 5).
6. On or about May 28, and June 5 and 26, 2024, Respondent offered for transportation in commerce, a hazardous material, when the UN standard packaging had not been closed according to the packaging manufacturer or distributor's closure instructions, in violation of 49 CFR §§ 171.2(a), (b), and (e), 173.1(b), 173.22(a)(4), and 173.24(f)(2).

- Please see Inspection/Investigation Report Number 24602009 at pages 5-6, and the exhibits that accompany this report, which are incorporated herein.

Probable Violation No. 3

Offering for transportation in commerce, a hazardous substance, with shipping papers that did not include “RQ” to designate a reportable quantity of the hazardous substance before or after the basic shipping description, in violation of 49 CFR §§ 171.2(a), (b), and (e); 171.8; 172.200(a); and 172.203(c)(2).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by the HMR must perform that function in accordance with the HMR.
2. Pursuant to 49 CFR § 171.2(b), each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of the HMR.
3. Pursuant to 49 CFR § 171.2(e), no person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by the applicable requirements of the HMR.
4. Pursuant to 49 CFR § 171.8, a “hazardous substance,” for the purposes of the HMR, means a material, including its mixtures and solutions, that (1) is listed in the appendix A to § 172.101 of the HMR; (2) is in a quantity, in one package, which equals or exceeds the reportable quantity (RQ) listed in the appendix A to § 172.101 of the HMR; and (3) when in a mixture or solutions, for other than radionuclides, is in a concentration by weight which equals or exceeds the concentration corresponding to the RQ of the material. For materials with a reportable quantity of 100lbs. (45.4 kgs.), the applicable concentration by weight is 0.2 percent.
5. Pursuant to 49 CFR § 172.200(a), except as otherwise provided in this subpart, each person who offers a hazardous material for transportation shall describe the hazardous material on the shipping paper in the manner described by this subpart.
6. Pursuant to 49 CFR § 172.203(c)(2), for shipping papers describing hazardous substances, the letters “RQ” must be entered on the shipping paper either before or after the basic description required by § 172.202 for each hazardous substance (see definition in § 171.8 of the HMR). For example, “RQ, UN1098, Ally alcohol, 6.1, I, Toxic-inhalation hazard, Zone B;” or “UN3077, Environmentally hazardous substances, solid, n.o.s., 9, III, RQ (Adipic acid).”

Factual Allegations/Averments

1. As part of the inspection, PHMSA’s Investigators reviewed Respondent’s shipping papers that showed the shipment of 12.5% sodium hypochlorite solution, or UN1791,

Hypochlorite Solutions, 8, PGIII. The shipping papers described the material in the following manner (See Report No. 24602009, page 7; Exhibit 4):

- a. Invoice #2208366S, dated 5/28/24 – shipment of one IBC, weighing 2,700lbs., of “UN1791, Hypochlorite Solutions, 8, PGIII,” to Texas Outhouse in Houston, TX.
 - b. Invoice #2208437S, dated 6/5/24 – shipment of one IBC, weighing 2,700lbs., of “UN1791, Hypochlorite Solutions, 8, PGIII,” to Texas Outhouse in Houston, TX.
2. The SDS for the material, sodium hypochlorite solution 12.5%, confirmed the material was hazardous and regulated as UN1791, Hypochlorite Solutions, 8, PGIII. The SDS also indicated that the material was a hazardous substance in certain quantities. (See Report No. 24602009, page 7; Exhibit 5).
3. According to Table 1 of Appendix A to § 172.101, Hazardous Substances Other than Radionuclides. sodium hypochlorite is a hazardous substance with a reportable quantity (RQ) of 100lbs. (45.4 kg.). Further, the concentration of sodium hypochlorite in the solution, 12.5%, exceeded the 0.2% required to be considered a hazardous substance, so long as the weight of the sodium hypochlorite in each package met or exceeded the RQ of 100lbs. (See Exhibit 5 to Report No. 2402009).
4. The weight of each IBC containing UN1791, Hypochlorite Solutions, 8, PGIII was listed as 2,700lbs on Respondent’s shipping papers. In assessing the sodium hypochlorite as 12.5% by weight, the amount of sodium hypochlorite present in the IBCs was approximately 337.5lbs, exceeding the reportable quantity of 100lbs. Thus, the shipping papers were required to include “RQ,” before or after the basic shipping description of the hazardous material, indicating that the material also met the definition of a hazardous substance under the HMR. (See Exhibit 4 of Report No. 2402009).
5. On or about May 28 and June 5, 2024, Respondent offered for transportation in commerce, a hazardous substance, with shipping papers that did not include “RQ” to designate a reportable quantity of the hazardous substance before or after the basic shipping description, in violation of 49 CFR §§ 171.2(a), (b), and (e); 171.8; 172.200(a); and 172.203(c)(2).

- Please see Inspection/Investigation Report Number 24602009 at pages 7-8, and the exhibits that accompany this report, which are incorporated herein.

Quality Control Item No. 1

Offering for transportation in commerce, a hazardous material, while affixing an incorrectly sized hazardous materials label on the package, in violation of 49 CFR §§ 171.2(a), (b), and (e); 172.400(a)(1); and 172.407(c)(1).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by the HMR must perform that function in accordance with the HMR.
2. Pursuant to 49 CFR § 171.2(b), each person who offers a hazardous material for transportation in commerce must comply with all applicable requirements of the HMR, or an exemption or special permit, approval, or registration issued under the HMR or under subchapter A of this chapter.
3. Pursuant to 49 CFR § 171.2(e), no person may offer or accept a hazardous material for transportation in commerce unless the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of the HMR or an exemption or special permit, approval, or registration issued under the HMR or subchapter A of this chapter.
4. Pursuant to 49 CFR § 172.400(a)(1), except as specified in § 172.400a, each person who offers for transportation or transports a hazardous material in a non-bulk package, shall label the package or containment device with labels specified for the material in the § 172.101 table and in this subpart.
5. Pursuant to 49 CFR § 172.407(c)(1), each diamond (square-on-point) label prescribed in this subpart must be at least 100 mm (3.9 inches) on each side with each side having a solid line inner border approximately 5 mm (.2 inches) inside and parallel to the edge. The 5 mm (.2 inches) measurement is from the outside edge of the label to the outside of the solid line forming the inner border.

Factual Allegations/Averments

1. During the inspection, PHMSA's Investigators observed and photographed six UN standard 5-gallon plastic pails in Respondent's staging area, closed and ready for shipment. The pails had a manufacturer's label indicating the product contained within was "Coval Ultimate Top Coat Gloss." The manufacturer's label also displayed a small Class 3, Flammable Liquid hazardous materials label. There were no additional markings, such as the proper shipping name or UN identification number, or labels on the pail. (See Report No. 24602009, page 2; Exhibit 2).
2. PHMSA's Investigators asked Respondent's representative if any additional markings or labels were added to the pails prior to shipment. In an oral interview, Respondent's representative confirmed that no additional markings or labels were applied to the packages prior to shipment. (See Report No. 24602009, page 2; Exhibit 3).
3. The investigators also noted that Class 3 hazardous materials label did not appear to meet the size specification requirements of 49 CFR § 172.407(c)(1), which was to have at least 100 mm (3.9 inches) on each side. In an oral interview, Respondent's representative confirmed the hazardous materials label was not standard-sized because it was reduced to fit on the manufacturer's label. (See Report No. 24602009, page 2; Exhibit 3).

4. The SDS for “Ultimate Top Coat,” confirmed the material was hazardous and regulated as UN1139, Coating Solution, 3, Packing Group II. (See Report No. 24602009, pages 2-3; Exhibit 5).
5. Respondent provided the following shipping papers showing it had offered for transportation in commerce UN1139, Coating Solution, 3, PGII, packaged in the same manner as described above and without a properly sized hazardous materials label on the packages (See Report No. 24602009, page 3; Exhibit 4):
 - a. Bill of lading #D2089873-0-1, dated 12/29/2023 – shipment of 40 pails of UN1139, Coating Solution, 3, PGII, from Respondent’s facility to Nikka Corp – Doraville, in Atlanta, GA.
 - b. Bill of lading #10741953-6, dated 07/16/2024 – shipment of 18 pails of UN1139, Coating Solution, 3, PGII, from Respondent’s facility to Resinous Flooring Supply LLC in Tulsa, OK.
6. Following the exit briefing, Respondent provided photographs of the pails with labels with size specifications that complied with the HMR. (See Exhibit 7 to Report No. 24602009).
7. On or about December 29, 2023, and July 16, 2024, Respondent offered for transportation in commerce, a hazardous material, while affixing an incorrectly sized hazardous materials label on the package, in violation of 49 CFR §§ 171.2(a), (b), and (e); 172.400(a)(1); and 172.407(c)(1).

- Please see Inspection/Investigation Report Number 24602009 at pages 3-4, 9, and the exhibits that accompany this report, 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 recurred.
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.

According to PHMSA's records, Respondent has committed the following prior violations in cases initiated within the past six calendar years:

1. PHMSA Ticket No. 19T-0137-SH-SW – Ticket, closed on April 18, 2019, in which Respondent paid a \$800 civil penalty for failing to include the total quantity of hazardous materials shipped on shipping papers and failing to provide initial security awareness training.

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 email correspondence on July 30, August 22, and August 23, 2024, 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 provided photos showing it was now including the proper shipping name and UN identification number on its 5-gallon pails, as well as training records of its employees.
- Violation No.2: Respondent provided training records for its hazmat employees on proper closure procedures, as well as proof of purchase of torque wrenches to properly close its packagings.
- Violation No.3: Respondent included a copy of its shipping papers with "RQ" entered before or after the basic shipping description for hazardous substances.

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	\$4,500	+\$450 [10% increase]	-\$1,238 [25% decrease]	\$3,712
2	\$800	+\$80 [10% increase]	-\$220 [25% decrease]	\$660
3	\$600	\$60 [10% increase]	-\$165 [25% decrease]	\$495
QC1	\$0	\$0	\$0	\$0
TOTAL	\$5,900	+\$590	-\$1,623	\$4,867

ADDENDUM B

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**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>

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.

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.)

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.

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.