



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: 5/20/2024

PHMSA Case No.: 24-0021-SH-CE

Respondent: Henkel US Operations Corporation
1 Henkel Way
Rocky Hill, Connecticut 06067
ATTN: Pernille Lind Olsen, President (Pernille.Olsen@henkel.com)

Facility inspected: 23343 Sherwood Avenue, Warren,
Michigan 48091

No. of Alleged Violations: 3

Total Proposed Assessment: \$3,825

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.**

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.

SAFIYA AKUA
HAMIT BORIE
Digitally signed by SAFIYA
AKUA HAMIT BORIE
Date: 2024.05.20 16:37:32
-04'00'

Safiya Borie, Attorney

Enclosures: Addendum A
Addendum B
Addendum C

cc: Dale Tuscany, Director of Operations (Dale.Tuscany@henkel.com)

SERVICE BY ELECTRONIC MAIL

GENERAL ALLEGATIONS

General Factual Allegations/Averments

1. On September 12, 2023, PHMSA's Investigator conducted an inspection at Respondent's facility in Warren, Michigan.
2. Dale Tuscany, Director of Operations, and Amy Pasut, Logistics, represented the company and provided necessary information and documentation.
3. Respondent is a blender, filler, and shipper of class 6.1, 8, and 9 hazardous materials in UN standard drums, boxes and intermediate bulk containers (IBCs) via commercial carrier.
4. As a shipper 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 ALLEGATIONSProbable Violation No. 1

Allowing an employee to perform a function, subject to the requirements of the HMR, when the hazmat employee had not received recurrent hazmat training to include general awareness, function specific, safety and security awareness training, and hazmat training records were not created and maintained, in violation of 49 CFR §§ 171.2(a); 172.702(a)&(b); 172.704(a)(1), (2),(3), (4) & (5); 172.704(c)(2); and 172.704(d).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by this subchapter must perform that function in accordance with the HMR.
2. Pursuant to 49 CFR § 172.702(a), a hazmat employer shall ensure that each of its hazmat employees is trained in accordance with the requirements prescribed in this subpart.
3. Pursuant to 49 CFR § 172.702(b), 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.
4. Pursuant to 49 CFR § 172.704(a)(1)-(5), hazmat employee training must include general awareness/familiarization training, function-specific training, safety training, security awareness training, and in-depth security training (each hazmat employee of a person required to have a security plan in accordance with subpart I of this part who handles hazardous materials covered by the plan, performs a regulated function related to the hazardous materials covered by the plan, or is responsible for implementing the plan must be trained concerning the security plan and its implementation).
5. Pursuant to 49 CFR § 172.704(c)(2), a hazmat employee must receive the training required by this subpart at least once every three years. For in-depth security training required under paragraph (a)(5) of this section, a hazmat employee must be trained at least once every three years or, if the security plan for which training is required is revised during the three-year recurrent training cycle, within 90 days of implementation of the revised plan.
6. Pursuant to 49 CFR § 172.704(d), each hazmat employer must create and retain a record of current training of each hazmat employee, inclusive of the preceding three years, in accordance with this section for as long as that employee is employed by that employer as a hazmat employee and for 90 days thereafter. The record must include:
 - The hazmat employee's name;

- The most recent training completion date of the hazmat employee's training;
- A description, copy, or the location of the training materials used to meet the requirements in paragraph (a) of this section;
- The name and address of the person providing the training; and
- Certification that the hazmat employee has been trained and tested, as required by this subpart.

Factual Allegations/Averments

1. During the inspection of Respondent's facility in Des Moines, Iowa on September 12, 2023, Respondent's representative provided PHMSA's investigator with copies of the hazmat training records for four hazmat employees: Dave Grzywa, who packages, handles, and prepares shipping papers for hazardous materials; and Jason Patrick, Roberto Ferrante, and Ben Katan who package and handle hazardous materials. (See Exhibit 2 to Report No. 23549033).
 - a. The training records for Dave Grzywa, shows the latest General Awareness, Function Specific, and Security Awareness training occurred on February 19, 2020; and the latest Safety and In-Depth Security training occurred on June 30, 2022, and May 14, 2021, respectively.
 - i. The documentation did not contain the required certification statement.
 - b. The training records for Jason Patrick shows the latest in-depth security training occurred on 5/14/2021.
 - i. The documentation did not contain the required certification statement.
 - c. The training records for Roberto Ferrante shows the latest in-depth security training occurred on 5/14/2021.
 - i. The documentation did not contain the required certification statement.
 - d. The training records for Ben Katan shows the latest in-depth security training occurred on 5/14/2021.
 - i. The documentation did not contain the required certification statement.
2. Respondent's representative provided PHMSA's investigator with copies shipping papers for Respondent's recent shipments of hazardous materials in commerce that were package, handled, loaded, or had shipping papers prepared by the four hazmat employees. (See Exhibit 3 to Report No. 23549033).
 - a. Carrier BOL No 02875600037248160, dated June 30, 2022 – a shipment of ten pails of "UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (contains

- Fluorozirconic acid and Chromium Sulphate), Class 8, PG II” from Respondent’s facility to 4 Arie Regev Street, Netanya, M 42504, IL.
- b. Carrier BOL No 02875600037446455, dated November 28, 2022 – a shipment of six pails of “UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (contains Fluorozirconic acid and Chromium Sulphate), Class 8, PG II” from Respondent’s facility to 6200 Millcreek Dr, Mississauga, ON L5N 0B5 Canada.
 - c. Air Waybill No 620164501973, dated March 29, 2023 – a shipment of one fibreboard box of “UN1814, Potassium hydroxide solution, 8, PG II” from Respondent’s facility to 1298 Daegeum-Ro, Geumwang-eup, Eum, Chungcheongbuk-do 27632, South Korea.
 - d. Carrier BOL No 02875600038120680, dated September 12, 2023 – a shipment of one cargo tank of “UN3287, Toxic liquid, inorganic, n.o.s. (contains Sodium nitrite), Class 6.1, PG III, RQ” from Respondent’s facility to 11000 State Route 347, East Liberty, OH 43319.
 - e. Carrier BOL No 02875600038120555, dated September 12, 2023 – a shipment of two pails of “UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (contains Fluorozirconic acid and Chromium Sulphate), Class 8, PG II,” from Respondent’s facility to 420 N 2200 W Dock 1, Salt Lake City, UT 84116.
3. Respondent’s representative provided PHMSA’s investigator with copies of the safety data sheets for the products shipped, indicating that they are hazardous materials. (See Exhibits 4-6 to Report No. 23549033).
- a. Safety data sheet for BONDERITE M-CR T 5900 ADD CHROMATE COATING, dated 3/21/2019 – Section 14: UN1814, Potassium hydroxide, solution, 8, PGII. (See Exhibit 4 to Report No. 23549033).
 - b. Safety data sheet for BONDERITE M-AD 131 ACCELERATOR, dated 3/30/2023 – Section 14: UN3287, Toxic liquid, inorganic, n.o.s. (Sodium nitrite), 6.1, PGIII. (See Exhibit 5 to Report No. 23549033).
 - c. Safety data sheet for BONDERITE M-CR T 5900 AERO CHROMATE COATING, dated 1/25/2021 – Section 14: UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (Fluorozirconic acid, Chromium sulphate), 8, PGII. (See Exhibit 6 to Report No. 23549033).

On or about September 12, 2023, Respondent allowed an employee to perform a function, subject to the requirements of the HMR, when the hazmat employee had not received recurrent hazmat training to include general awareness, function specific, safety and security awareness training, and hazmat training records were not created and maintained, in violation of the HMR.

- Please see Inspection/Investigation Report Number 23549033 at pages 3-7, and the exhibits that accompany this report, which are incorporated herein.

Probable Violation No. 2

Offering for transportation in commerce, a hazardous material, while failing to mark the package with an adequate size identification number, in violation of 49 CFR §§ 171.2(a), 171.8, 173.25(a)(2), and 172.301(a).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter.
2. Pursuant to 49 CFR § 171.8, overpack, except as provided in subpart K of part 178 of this subchapter, means an enclosure that is used by a single consignor to provide protection or convenience in handling of a package or to consolidate two or more packages. Overpack does not include a transport vehicle, freight container, or aircraft unit load device. Examples of overpacks are one or more packages:
 - Placed or stacked onto a load board such as a pallet and secured by strapping, shrink wrapping, stretch wrapping, or other suitable means; or
 - Placed in a protective outer packaging such as a box or crate.
3. Pursuant to 49 CFR § 173.25(a)(2), authorized packages containing hazardous materials may be offered for transportation in an overpack as defined in § 171.8 of this subchapter, if the overpack is marked with the proper shipping name and identification number, when applicable, and is labeled as required by this subchapter for each hazardous material contained therein, unless marking and labels representative of each hazardous material in the overpack are visible.
4. Pursuant to 49 CFR § 172.301(a), 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.

Factual Allegations/Averments

1. During inspection of Respondent's facility in Warren, Michigan on September 12, 2023, PHMSA's investigator observed and photographed fiberboard box overpacks that had been prepared and awaiting shipment. (See Exhibit 7 to Report No. 23549033).
 - a. The photographs show boxes displaying the hazard class 8 corrosive label, the word "Overpack," and the UN identification number and proper shipping name "UN3264, Corrosive liquid, acidic, inorganic, n.o.s.(contains Fluorozirconic acid and Chromium Sulphate)."
 - b. The photographs show that the UN identification number measures approximately 4 mm in height, which is less than the minimum required 6 mm size for the 19.5 kg capacity pails.
2. Respondent's representative provided PHMSA's investigator with copies of shipping papers for Respondent's previous shipments of this material in commerce. (See Exhibit 3 to Report No. 23549033).
 - a. Carrier BOL No 02875600037248160, dated June 30, 2022 – a shipment of ten pails of "UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (contains Fluorozirconic acid and Chromium Sulphate), Class 8, PG II" from Respondent's facility to 4 Arie Regev Street, Netanya, M 42504, IL.
 - b. Carrier BOL No 02875600037446455, dated November 28, 2022 – a shipment of six pails of "UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (contains Fluorozirconic acid and Chromium Sulphate), Class 8, PG II" from Respondent's facility to 6200 Millcreek Dr, Mississauga, ON L5N 0B5 Canada.
 - c. Carrier BOL No 02875600038120555, dated September 12, 2023 – a shipment of two pails of "UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (contains Fluorozirconic acid and Chromium Sulphate), Class 8, PG II," from Respondent's facility to 420 N 2200 W Dock 1, Salt Lake City, UT 84116.
3. Respondent's representative provided PHMSA's investigator with a copy of the safety data sheet for the material, indicating that it is a hazardous material. (See Exhibits 6 to Report No. 23549033).
 - a. Safety data sheet for BONDERITE M-CR T 5900 AERO CHROMATE COATING, dated 1/25/2021 – Section 14: UN3264, Corrosive liquid, acidic, inorganic, n.o.s. (Fluorozirconic acid, Chromium sulphate), 8, PGII. (See Exhibit 6 to Report No. 23549033).

On or about September 12, 2023, offered for transportation in commerce, a hazardous material, while failing to mark the package with an adequate size identification number g, in violation of the HMR.

- Please see Inspection/Investigation Report Number 23549033 at pages 8-11, and the exhibits that accompany this report, which are incorporated herein.

Probable Violation No. 3

Offering for transportation in commerce, a hazardous material, while failing to include the letters “RQ” on the shipping papers, in violation of 49 CFR §§ 171.2(a), 171.8 and 172.203(c)(2).

Regulatory Standard

1. Pursuant to 49 CFR § 171.2(a), each person who performs a function covered by this subchapter must perform that function in accordance with this subchapter.
2. Pursuant to 49 CFR § 171.8, hazardous substance for the purposes of this subchapter, means a material, including its mixtures and solutions, that:
 - Is listed in the appendix A to § 172.101 of this subchapter;
 - Is in a quantity, in one package, which equals or exceeds the reportable quantity (RQ) listed in the appendix A to § 172.101 of this subchapter; and
 - When in a mixture or solution:
 - i. is in a concentration by weight which equals or exceeds the concentration corresponding to the RQ of the material as show in the following table:

<u>RQ pounds (kilograms)</u>	<u>Concentration by weight</u>	
	<u>Percent</u>	<u>PPM</u>
5000 (2270)	10	100,000
1000 (454)	2	20,000
100 (45.4)	0.2	2,000
10 (4.54)	0.02	200
1 (0.454)	0.002	20

3. Pursuant to Appendix A 49 CFR § 172.101:

<u>Hazardous substance</u>	<u>Reportable quantity (RQ)</u>
	<u>Pounds (kilograms)</u>
Chromic acid	10 (4.54)

4. Pursuant to 49 CFR § 172.203(c)(2), 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 this subchapter). For example: “RQ, UN 1098, Allyl alcohol, 6.1, I, Toxic-inhalation hazard, Zone B”; or “UN 3077, Environmentally hazardous substances, solid, n.o.s., 9, III, RQ (Adipic acid).”

Factual Allegations/Averments

1. During inspection of Respondent’s facility in Warren, Michigan on September 12, 2023, Respondent’s representative provided PHMSA’s investigator with copies of hazardous waste manifests for Respondent’s previous waste shipments in commerce. (See Exhibit 8 to Report No. 23549033).
 - a. Manifest Tracking Number 025271399 JJK, dated May 10, 2023 – a shipment of one drum of “UN1755, Waste, Chromic acid solution, 8, PGII” totaling 69 kg and one tote of “UN1755, Waste, Chromic acid solution, 8, PGII” totaling 834 kg from Respondent’s facility to 35850 Schneider Ct, Avon, OH 44011.
 - i. Chromic Acid is listed in Appendix A to the 172.101 Hazardous Materials Table and has a reportable quantity of 10lbs (4.53 kg).
2. Respondent’s representative provided the hazardous waste profile for the material. (See Exhibit 9 to Report No. 23549033).
 - a. Waste Profile Sheet Approval Number A230210-010, dated 2/13/2023 – Chemical Composition: Carbon black (1-5%), Chromic acid (10%), Water 85%).
 - b. The solution contains 10% chromic acid, so the total quantity of chromic acid in the 69 kg and 834 kg shipments is 6.9 kg and 83.4 kg , respectively (69 kg x 0.1 = 6.9kg and 834 kg x 0.1 = 83.4 kg), which both exceed the 10 lbs (4.54 kg) reportable quantity.
 - c. In addition, the concentration corresponding to a reportable quantity of 10 lbs is 0.02%, and the concentration of chromic acid in the solution (10%) exceeds this reportable quantity.

On or about May 10, 2023, Respondent offered for transportation in commerce, a hazardous material, while failing to include the letters “RQ” on the shipping papers, in violation of the HMR.

- Please see Inspection/Investigation Report Number 23549033 at pages 12-14, 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.

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

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 October 3, 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 has provided a copy of the training and complete hazmat training record. (See Exhibit 10 to Report No. 23549033).
 - Based on this information and documentation, the proposed penalty has been reduced by 25% (as indicated below).
- Violation No.2: Respondent has provided a one-point lesson and work instruction as well as diagrams to assist the employees in marking preparation. (See Exhibit 10 to Report No. 23549033).
 - Based on this information and documentation, the proposed penalty has been reduced by 25% (as indicated below).
- Violation No.3: Respondent has created a new process with the waste vendor to verify the information and apply RQ appropriately. (See Exhibit 10 to Report No. 23549033).
 - 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	\$4,000	\$0 [0% increase]	(\$1,000) [25% reduction]	\$3,000
2	\$500	\$0 [0% increase]	\$125 [25% reduction]	\$375
3	\$600	\$0 [0% increase]	\$150 [25% reduction]	\$450
TOTAL	\$5,100	\$0	(\$1,275)	\$3,825

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.)

Addendum B

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: PHMSA Payment for Case #/Ticket</i>

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.