

**BEFORE THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION  
OFFICE OF THE ADMINISTRATOR**

**In the Matter of:**

**Three Rivers Fireworks  
Respondent.**

**PHMSA Case No. 05-0119-SE-SW  
DMS Docket No. PHMSA-2006-21489-3**

**DECISION ON APPEAL**

**I. Procedural History**

On July 8, 2005, the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA), U.S. Department of Transportation (DOT), issued a Default Order<sup>1</sup> to Three Rivers Fireworks (Respondent), finding the company had knowingly committed five violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180. The Default Order, which is incorporated by reference, assessed the \$7,295 civil penalty proposed in the Notice of Probable Violation (Notice), dated April 4, 2005. In a letter dated July 28, 2005, Respondent timely filed an appeal of the Default Order.

**II. Summary**

In this appeal, Respondent requests that PHMSA reduce the penalty in consideration of Respondent's status as a sole proprietorship and the economic harm the penalty will do to the owner. Respondent also states it was unaware of the HMR. Neither contention satisfies the standard for appeal from a Default Order.

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<sup>1</sup> DMS Docket Number PHMSA-2006-21489-1 at <http://dms.dot.gov>.

### **III. Background**

This case arises from a January 4, 2005 compliance inspection performed at a fireworks distributor's facilities in Silsbee, Texas. During the inspection, the inspector observed and photographed approximately 2,828 kg (6,234 lbs) of fireworks being unloaded from a truck owned by Respondent. The truck was not placarded. The driver of the truck indicated he was a part-time employee of Respondent. The driver did not have any shipping papers for the shipment of fireworks he delivered.

To follow-up on the observed shipment, the inspector met with Respondent in Beaumont, Texas, on January 7, 2005. Respondent stated it did not have a security plan, had not provided hazardous materials training to its employees, and had not registered as an offeror or transporter of hazardous materials. At the conclusion of the inspection, the inspector provided Respondent with an exit briefing outlining the probable violations.

Respondent replied to the exit briefing by letter date-stamped February 10, 2005. Respondent stated it would no longer transport fireworks in quantities of 1,000 pounds or over and, accordingly, did not need a security plan and was not required to use placards. Respondent registered as an offeror and transporter of hazardous materials. Respondent also provided a copy of a properly prepared shipping paper for a shipment of 875 pounds of fireworks. Respondent provided records certifying its employees had received hazardous materials training, including security awareness training.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, on April 4, 2005, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, proposing a civil penalty in the amount of \$7,295 for five violations of the HMR. The proposed penalty reflected a \$7,905

reduction for Respondent's corrective actions, the small size of its business, and its financial condition.

The Notice stated, "If you fail to respond to this Notice within thirty (30) days of receiving it ... you will waive your right to contest the allegations made ... and the Chief Counsel may find the facts alleged in this Notice and assess an appropriate civil penalty." Because Respondent failed to respond to the Notice, the Chief Counsel issued a Default Order on July 8, 2005, finding Respondent had committed five violations of the HMR and assessing a \$7,295 civil penalty.

#### **IV. Discussion**

Respondent appeals the Default Order, challenging the magnitude of the fine. Respondent states it is not using the delivery truck and no longer employs the driver. Respondent contends that the owner is the sole employee; that the civil penalty will impose financial hardship on the owner; and that Respondent was unaware of the HMR.

Respondent bears the burden of proof when challenging a Default Order. Respondent must demonstrate it was not in default when it failed to respond to the Notice. A default is a failure to participate in a proceeding when required to do so after receiving proper service. The return receipt for the Notice indicated Respondent received the Notice on May 1, 2005.

Respondent did not offer any explanation for its failure to respond to the Notice. A default judgment against a party may stand where the respondent had notice and chose not to participate in the proceeding.<sup>2</sup> Because Respondent failed to participate within the required time limit, it is not entitled to be heard at this time.

In any case, Respondent did not submit any new information with its appeal. The Chief Counsel took Respondent's evidence of corrective action into account in assessing the civil

penalty. In addition, the Chief Counsel granted a substantial reduction based on Respondent's small size and the apparent hardship the baseline penalty of \$15,200.00 would cause.

Respondent did not submit any financial information to support the claim the company could not pay the reduced penalty of \$7,295.00 or would be unable to continue in business.

**V. Findings**

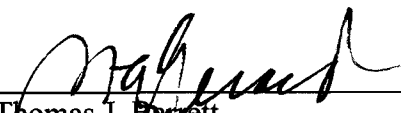
I find that Respondent waived its opportunity to contest the allegations in the Notice when it failed to respond and that it has offered no basis for granting its appeal and withdrawing the civil penalties previously assessed. I, therefore, order Respondent's appeal be denied. I order Respondent to pay the civil penalty of \$7,295.

**VI. Payment**

Respondent must pay the \$7,295 civil penalty within 30 days of the date of this Decision on Appeal (or in accordance with any other payment schedule Respondent may arrange through PHMSA's Office of Chief Counsel. See Addendum A for payment information.

**VII. Final Administrative Action**

This Decision on Appeal constitutes the final administrative action in this proceeding.

  
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Thomas J. Barrett  
Administrator

Date Issued: OCT 24 2006

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

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<sup>2</sup> See, e.g., In re Swift Chemical Company, Inc., DMS Docket No. RSPA-04-18449-2 (Sept. 19, 2005).

**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_ day of OCT 24, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Three Rivers Fireworks  
4179 North China Road  
Beaumont, TX 77713  
ATTN: June Herrington, Owner

Original Order  
Certified Mail Return Receipt

Krista L. Edwards, Esq.  
Chief Counsel  
USDOT/PHMSA  
400 Seventh St., S.W.  
Washington, D.C. 20590

One Copy  
Internal E-Mail

Ray LaMagdelaine  
Enforcement Officer  
USDOT/PHMSA/OHMS  
400 Seventh Street, S.W.  
Washington, D.C. 20590

One Copy  
Internal E-Mail

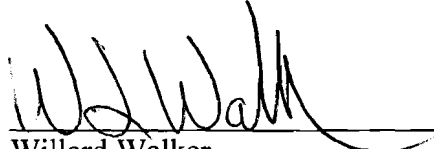
Mr. Billy Hines, Jr.,  
Southwestern Region Chief  
USDOT/PHMSA/OHMS  
Southwestern Region Office  
8701 S. Gessner Road, Ste. 1110  
Houston, TX 77074

One Copy  
Internal E-Mail

U.S. DOT Dockets  
U.S. Department of Transportation  
400 Seventh Street, S.W., RM PL-401  
Washington D.C. 20590

One Copy  
Personal Delivery

OCT 24 2006

  
Willard Walker

Payment Method.

Respondent must pay the civil penalty by one of the following: (1) wire transfer, (2) certified check or money order, or (3) credit card via the Internet.

(1) Wire Transfer.

Detailed instructions for sending a wire transfer through the Federal Reserve Communications System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Order. Please direct questions concerning wire transfers to:

AMZ-300  
Federal Aviation Administration  
Mike Monroney Aeronautical Center  
P.O. Box 25082  
Oklahoma City, OK 73125  
Telephone (405) 954-8893

(2) Check or Money Order.

Make check or money order payable to "U.S. Department of Transportation" (include the Ref. No. of this case on the check or money order) and send to:

AMZ-300  
Federal Aviation Administration  
Mike Monroney Aeronautical Center  
P.O. Box 25082  
Oklahoma City, OK 73125.

(3) Credit Card.

To pay electronically using a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

Interest and Administrative Charges.

If Respondent pays the civil penalty by the due date, no interest will be charged. If Respondent does not pay by that date, the FAA's Financial Operations Division will start collection activities and may assess interest, a late-payment penalty, and administrative charges under 31 U.S.C. § 3717, 31 C.F.R. § 901.9, and 49 C.F.R. § 89.23.

The rate of interest is determined under the above authorities. Interest accrues from the date of this Order. A late-payment penalty of six percent (6%) per year applies to any portion of the debt that is more than 90 days past due. The late-payment penalty is calculated from the date Respondent receives the Order.

Treasury Department Collection.

FAA's Financial Operations Division may also refer this debt and associated charges to the U.S. Department of Treasury for collection. The Department of the Treasury may offset these amounts against any payment due Respondent. 31 C.F.R. § 901.3.

Under the Debt Collection Act (see 31 U.S.C. § 3716(a)), a debtor has certain procedural rights prior to an offset. You, as the debtor, have the right to be notified of: (1) the nature and amount of the debt; (2) the agency's intention to collect the debt by offset; (3) the right to inspect and copy the agency records pertaining to the debt; (4) the right to request a review within the agency of the indebtedness and (5) the right to enter into a written agreement with the agency to repay the debt. This Order constitutes written notification of these procedural rights.

**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=/ALC-69-14-0001	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, it must be used for all wire transfer to the Treasury Department.

**Block #9** - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/AC-69-14-0001" 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) 954-8893.