

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

In the Matter of:

East Fork Enterprises, Inc.

Respondent.

**PHMSA Case No. 03-501-SB-SW
DMS Docket No. RSPA-2005-20270**

DECISION ON APPEAL

I. Procedural History

On December 30, 2004, the Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA),¹ U.S. Department of Transportation (DOT), issued an Order² to East Fork Enterprises, Inc., (Respondent) finding that Respondent had knowingly committed three violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a civil penalty in the amount of \$4,770. Specifically, the Order found that Respondent had offered a hazardous material for transportation in commerce without preparing a proper hazardous material shipping paper³ in a non-bulk packaging, which Respondent had not

¹ Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline transportation and hazardous materials transportation. *See* Section 108 of the Norman Y. Mineta Research and Special Programs Improvement Act (Public Law 108-426, 118 Stat. 2423-2429 (November 30, 2004)); *see also* 70 Fed. Reg. 8299 (February 18, 2005), re-delegating the hazardous materials safety functions from the Research and Special Programs Administration (RSPA) to the Administrator, PHMSA. For ease of reading and clarity, when an action occurred at RSPA, this Decision will refer to PHMSA.

² DMS Docket Number RSPA-2005-20270-1 at <http://dms.dot.gov>.

³ Violation 1: 49 C.F.R. §§ 171.2(a); 172.200(a); 172.202(a)-(c); 172.204(a), (d); 172.604(a)-(b); and 173.22(a)(1).

marked with the proper shipping name for the material⁴ and had not labeled with a hazard class warning label.⁵

The Order reduced the civil penalty originally proposed in the Notice of Probable Violation (Notice) from \$6,570⁶ to \$4,770. In a letter dated January 17, 2005, and received January 25, 2005, Respondent filed a timely appeal of the Order.

II. Summary

In this appeal, East Fork Enterprises, Inc. (Respondent), located in Sunnyvale, Texas, requests a further reduction in the civil penalty to \$750 on the following grounds: (1) the violations Respondent committed were brought to PHMSA's attention by another citizen; (2) the Chief Counsel failed to take into account Respondent's preemptive curative efforts; and (3) any penalty amount above the minimum of \$750 is arbitrary and excessive in light of compromise offers made by PHMSA. The Chief Counsel correctly determined Respondent knowingly committed three violations of the Hazardous Materials Regulations; however a misinterpretation of the sequence of events may have caused the Chief Counsel to fail to give some evidence sufficient weight when assessing the civil penalty. As discussed below, Respondent's appeal is granted in part and denied in part.

III. Background

This enforcement case arose out of a complaint made by Roger Edwards Antiques, in Auburn, Maine, alleging a foreign producer of wood finishing products was importing and distributing products in the United States in violation of the HMR. Upon further investigation, PHMSA determined Respondent was a distributor of the product in the United States. On April

⁴ Violation 2: 49 C.F.R. §§ 171.2(a); 172.301(a); and 173.22(a).

⁵ Violation 3: 49 C.F.R. §§ 171.2(a) and 172.400(a).

29, 2003, an inspector conducted a compliance inspection of Respondent's facilities. Mr. Larry Boyd (owner) represented Respondent and provided the documentation requested by the inspector.

During the inspection, the inspector observed one gallon containers of "Supreme Wax Polish" unpackaged and on display in a sales showroom. The containers bore a "Highly Flammable" cautionary label, the name "Jacobean Wax" and the manufacturer's name, Fiddes & Son Limited. Respondent informed the inspector it had recently offered this material via UPS ground transportation for shipment to Roger Edwards Antiques in Auburn, Maine, and produced a shipping invoice, dated March 11, 2003. This invoice indicated the shipment contained thirty-two 400 ml containers of Fiddes Wax Rugger Brown and four 5 L containers of Fiddes Wax Jacobean. Mr. Boyd could not locate the UPS receipt for this shipment and explained the invoice constituted the complete description of the material being shipped.

The Material Safety Data Sheet (MSDS) provided by Mr. Boyd for the Supreme Wax Polish line of products indicated the proper shipping description for Fiddes & Son Supreme Wax products is Paint Related Material, 3, UN1263, PG II.

On June 9, 2003, an inspector visited Roger Edwards Antiques to follow-up on the complaint and to obtain additional evidence regarding Respondent's March 11, 2003 shipment.⁷ The inspector observed the two packages described on Respondent's shipping invoice of March 11, 2003. The package containing four 5 L containers of Jacobean Supreme Wax Polish had not been labeled with the hazard class label for Paint Related Material specified in column 6 of the

⁶ The Notice and Order state that the proposed assessment in the Notice was \$9,320; however, the sum of the proposed assessments for the three violations (\$4,050, \$1,020, and \$1,500, respectively) is only \$6,570. The proposed assessment included a \$1,380 reduction for Respondent's corrective actions.

⁷ This Decision on Appeals makes findings of fact, which are different from those in the Order. The Order states the inspection of Respondent's facilities followed the visit to Roger Edwards Antiques; however, a close examination of the Inspection/Investigation Report shows the inspection of Respondent's facilities preceded the visit to Roger Edwards Antiques.

Hazardous Materials Table and had not been marked with the proper shipping name or the UN identification number.

In its appeal, Respondent admits the three violations but contests the amount of the penalty. Respondent emphasizes it began corrective action prior to the April 29, 2003 inspection. For example, Respondent's staff completed hazardous materials training on April 23, 2003. Respondent ensured all staff who potentially could be involved in the shipping process received training.

Respondent appears to have initiated additional corrective action after the inspection. Respondent contacted its vendors to ensure its proper name (following a name change) is on all shipping documents and to verify its vendors have included Respondent as an authorized user under the vendors' contracts for emergency response services. Respondent obtained labels, placards, a "Title 49 manual", and prepared pre-printed labels for its shipping papers and invoices. Respondent verified its carriers have the appropriate certification to carry hazardous materials and prepared a form letter for signature by carriers to show Respondent provided placards. Respondent maintains a stock of appropriate packaging for all hazardous materials shipments. Finally, Respondent instituted a company policy requiring two employees to verify each shipment meets the HMR by following a checklist before shipping.

IV. Discussion

Respondent requests a reduction in the total penalty to \$750, assessing only the minimum penalty of \$250 for each of the three violations. First, Respondent argues PHMSA should lower the fine because the violations Respondent committed were brought to PHMSA's attention by a public citizen "not out of a magnanimous devotion to public safety, but, rather, a far less noble

pursuit.”⁸ Respondent also contends the Chief Counsel, in her Order, failed to take into account Respondent’s corrective action taken prior to the inspector’s visit to its facilities. Finally, Respondent asserts any penalty amount above the minimum of \$750 is arbitrary and excessive in light of offers of compromise made by the Office of Chief Counsel.

As Respondent states, a complaint prompted this investigation; however, the complaint was not against Respondent. The inspection of Respondent’s facilities was conducted in the same manner as other routine unannounced inspections of hazardous materials shippers. As Respondent correctly notes, the motivations of the person who filed the complaint do not mitigate incorrect shipping procedures and are not relevant to Respondent’s culpability or the amount of this penalty.

Respondent argues the Chief Counsel failed to consider the small volume of hazardous material at issue under the “extent and gravity of the violation” factor when considering the penalty reduction. In assessing civil penalties, the Chief Counsel uses the Guidelines for Civil Penalties (Guidelines), which provide initial baselines for determining civil penalties. Respondent notes that the authorizing statute requires the Chief Counsel to consider “(1) the nature, circumstances, extent, and gravity of the violation; (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and (3) other matters that justice requires.” 49 U.S.C. § 5123. The Order states the Chief Counsel carefully considered Respondent’s corrective actions and the overall gravity of the violations. The Order also specifically states the Chief Counsel took each of the above statutory criteria into account in assessing the penalty. I find nothing in the record to indicate the Chief Counsel did not consider the small volume of hazardous material. On the contrary, the baseline assessment for Violation 3 (\$2,250) is significantly less than the \$5,000

⁸ Appeal, DMS Docket No. RSPA-2005-20270-2 at <http://dms.dot.gov>.

baseline suggested in the Guidelines for Civil Penalties. Furthermore, a violation for an undeclared shipment, which carries a baseline penalty of \$15,000, could have been charged since the evidence indicates that the shipment bore no markings of any sort to indicate the shipment contained hazardous materials. The choice of charges and the reduced baseline penalty for Violation 3 suggest the Chief Counsel considered the small volume in determining an appropriate penalty.

	Baseline Range	Midrange Baseline for PG II	Notice Baseline	Notice – Proposed Penalty	Order
Violation 1: Failure to provide a hazardous materials shipping paper (or <i>Undeclared shipment</i>)	3,000-6,000 15,000+	4,500	4,500	4,050 (reduced for corrective action)	2,700 (further reduced for additional evidence of corrective action and for financial hardship)
Violation 2: Failure to mark with shipping name and identification number	3,000-6,000	4,500	1,200	1,080 (reduced for corrective action)	720 (further reduced for additional evidence of corrective action and for financial hardship)
Violation 3: Failure to label	5,000		2,250	1,500 (reduced for corrective action)	1350 (further reduced for financial hardship)

In considering the statutory factors, however, the Chief Counsel incorrectly states the inspection at Roger Edwards Antiques occurred prior to any corrective action by Respondent. The Order is unclear as to what weight, if any, the Chief Counsel placed on the relative timing of events. The Guidelines identify corrective action as mitigation which occurs following an inspection. Actions taken based on one's own recognition of a failure to follow the HMR generally result in a reduction of the baseline penalty, prior to any reductions for corrective actions taken in response to an inspection. Respondent's correspondence shows repeated efforts

to clarify that it had begun taking actions to ensure compliance prior to the inspection.⁹ Because neither the Order nor any other correspondence from the Office of Chief Counsel addresses the timing of Respondent's curative actions, the Chief Counsel may not have given the appropriate weight to that evidence. Therefore, in the interest of justice, I have adjusted the civil penalty to ensure Respondent is given appropriate credit for initiating its corrective response without prompting by PHMSA.

Respondent asserts any penalty more than the minimum \$250 per violation is arbitrary and excessive. Respondent cites the offers of compromise as evidence of arbitrariness. As the Decision maker issuing the Order, the Chief Counsel does not consider offers of compromise when evaluating the record. Instead, she reviews the record (excluding any offers of compromise made by her staff), weighs the statutory factors, and determines the appropriate amount of the civil penalty based on the information available. An offer of compromise is an informal offer and, by its very nature, reflects the desire of a party to settle a dispute quickly. Therefore, the offer amount may be lower than the amount the Chief Counsel ultimately determines to be an appropriate penalty based on a full review of the record and in consultation with the Guidelines. The mere fact that the offers of compromise were different from the penalty assessed in the Order is not sufficient to demonstrate the Chief Counsel was arbitrary in her assessment, particularly when the assessment is well within the Guidelines.

The Chief Counsel must analyze the statutory factors in each case independently. The Chief Counsel's determination that the violations warrant more than a minimum penalty is not without basis. For example, the Guidelines indicate that the improper shipping of a packing group II material is more serious than of a packing group III material. In addition, some types of

⁹ In addition to the training mentioned in Respondent's appeal, Respondent stated in previous correspondence with the Chief Counsel that Respondent had ceased shipping hazardous materials until was in full compliance.

violations pose a more serious or immediate threat to safety, and the penalties reflect that relative danger. Failing to identify a hazardous material in transportation is particularly dangerous; therefore, the Chief Counsel’s application of the Guidelines and refusal to impose a minimum penalty was reasonable. The Chief Counsel appropriately considered the statutory factors in this case, used the Guidelines to set baselines, and reduced the penalty for corrective action and financial hardship.

V. Findings

Based on the foregoing factors, I find the Chief Counsel took into consideration and carefully applied the statutory requirements before assessing a civil penalty of \$4,770. The Chief Counsel correctly determined Respondent committed three violations of the HMR. Furthermore, the Chief Counsel gave due consideration to the statutory factors in assessing the penalties; therefore, I find the penalties are not arbitrary or excessive. However, due to a misinterpretation of the record, the Chief Counsel may have failed to give appropriate weight to an important piece of evidence in assessing the penalty. I find a reduction in the baseline penalties appropriate as outlined in the chart below.¹⁰

	Order – Baseline	Order –Penalty (after reduction for corrective action) ¹¹	Revised Baseline ¹²	Revised Penalty (after reduction for corrective action)
Violation 1	4,500	3,375	3,000	2,250
Violation 2	1,200	900	800	600
Violation 3	2,250	1,687	2,250	1,350
Total	\$7,950	\$5,962	\$6,050	\$4,200

¹⁰ Changes to the baseline are made prior to reductions for corrective action and financial situation.

¹¹ The penalties stated in the Order reflect a twenty percent (20%) reduction due to the financial hardship the full penalty would cause. These values are the penalties assessed prior to the reduction for financial hardship.

¹² In order to credit Respondent for its efforts to correct its shipment problems prior to the inspection, I reduced the baseline penalties for Violations 1 and 2 to the minimum suggested penalty for those types of violations (usually applied to violations involving shipments of packing group III materials). Because the baseline imposed for Violation 3 is already substantially below the baseline recommended in the Guidelines, further reduction is not appropriate. Penalties are assessed primarily to encourage compliance, but another important function is to provide a deterrent effect. The assessment of civil penalties ensures that the hazardous materials regulations have “teeth” and encourage continued compliance by Respondent and other shippers like Respondent.

After reviewing Respondent's financial records, the Chief Counsel determined an additional reduction was necessary to compensate for the financial hardship a penalty of \$5,962 would cause. The Chief Counsel, therefore, reduced the penalty to \$4,770. After reviewing Respondent's financial records, I find an additional reduction of approximately forty percent (40%) on the basis of financial hardship is necessary.

After considering the nature and circumstances of these violations, their extent and gravity, Respondent's culpability, Respondent's ability to pay, the effect of a civil penalty on Respondent's ability to continue in business, and all other relevant factors, I assess a civil penalty of \$2,500. Respondent's appeal is granted insofar as the Chief Counsel failed to consider evidence regarding the timing of Respondent's curative actions and is denied as to all other matters raised.

VI. Payment

Respondent must pay this \$2,500 civil penalty within 30 days of the date of this Decision on Appeal. See Addendum A for payment information.

VII. Final Administrative Action

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



Brigham A. McCown
Acting Administrator

Date Issued: MAR 28 2006

Enclosure

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of March, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

East Fork Enterprises, Inc.
613 E. Highway 80
Mesquite, TX 75182
ATTN: Mr. Lawrence Boyd, President

Original Order with Enclosures
Certified Mail Return Receipt

Mr. Doug Smith, Enforcement Officer
Office of Hazardous Materials Enforcement
400 Seventh Street, S.W.
Washington, D.C. 20590-0001

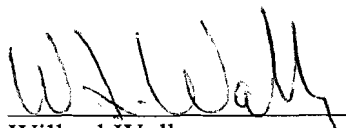
One Copy
Internal E-Mail

Mr. Billy Hines, Chief
Office of Hazardous Materials Enforcement
Southwestern Region Office
8701 S. Gessner Road, Suite 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



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=/ALC-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.