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

In the Matter of: New York Environmental Services Corporation, Respondent.	RSPA Case No. 01-630-SB-EA

DECISION ON APPEAL

I. Background

On August, 20, 2002, the Office of Chief Counsel of the Research and Special Programs Administration (RSPA)[1] issued an Order (Order) to New York Environmental Services Corporation (Respondent) finding Respondent had committed the following violation of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171-180, and assessing a penalty in the amount of $5,400:

> Offering for transportation in commerce a hazardous material, regulated medical waste, in non-bulk packagings that were not designed, constructed, maintained, filled, closed, and their contents limited so that the effectiveness of the package would not be substantially reduced and there would be no identifiable release of hazardous materials to the environment, in violation of 49 C.F.R. §§ 171.2(a), 173.24(b), and 173.134(b)(3)(ii).

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[1] This case, however, is no longer before RSPA for decision. Effective February 20, 2005, the Pipeline and Hazardous Materials Safety Administration (PHMSA) was created to further the highest degree of safety in pipeline 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) redelegating the hazardous materials safety functions to the Administrator, PHMSA.

The Order, which is incorporated by reference, modified the $7,020 civil penalty originally proposed in the October 16, 2001, Notice of Probable Violation (NOPV), which included a reduction of $1,980 for corrective actions taken by Respondent. In accordance with PHMSA's[2] regulations, Respondent had 20 days from receipt of the Order to appeal to this office. According to the return receipt provided by the United States Postal Service, Respondent received the Order on August 23, 2002. Thus, in order to be considered timely, Respondent was required to ensure its appeal was filed by September 15, 2002, as defined in 49 C.F.R. §107.1. The date stamp on the appeal, however, shows PHMSA did not receive this appeal until September 25, 2002 – well after the 20-day statutory deadline.

Under normal circumstances, this appeal would be considered untimely. However, during the time period when Respondent submitted this appeal, delivery of mail to Federal agencies through the U.S. Postal Service was significantly delayed due to anthrax-related security concerns. Given the unique circumstances, this appeal is considered timely submitted.

II. Discussion

In its appeal, Respondent contends the civil penalty is "excessive and unnecessary" and requests it be revoked. As discussed more fully below, Respondent's appeal must be denied.

This enforcement action arose out of a compliance inspection conducted at Phoenix Services Management Corporation (Phoenix Services) in Baltimore, Maryland on July 16, 2001. During the compliance inspection, the inspector observed regulated

[2] For ease of reading and clarity, when an action occurred at RSPA, this order will refer to PHMSA.

medical waste (RMW) shipments, including an incoming shipment from Respondent. The inspector photographed packagings that were not fully closed and sealed. He also noted at least two packagings were soaked with blood and leaking. A Phoenix Services representative provided the inspector with a copy of the shipping paper for the shipment in question. The shipping paper, dated July 11, 2001, showed Respondent as the shipper of record.

On July 30, 2001, the inspector interviewed Mr. Russell Hilton, Respondent's General Manager, by telephone. The inspector asked Mr. Hilton about the process Respondent used to prepare its shipments of RMW. Mr. Hilton explained it received RMW from its customers and processed most of its RMW in its facility. According to Mr. Hilton, Respondent collected and stored all RMW in a refrigerated trailer, which were then reloaded onto a regular truck and shipped to Phoenix Services for incineration. He also explained Respondent's employees were instructed to repackage any containers not meeting DOT packaging specifications. Finally, he expressed his belief that the packagings observed by the inspector at Phoenix Services may have been damaged because of the temperature changes they experienced when they were transferred from the refrigerated trailers to the regular trucks and transported to Phoenix Services.

Based on the July 16, 2001 inspection at Phoenix Services and the July 30, 2001 telephone interview with Mr. Hilton, PHMSA's inspector determined Respondent had committed one violation of the HMR. Specifically, the inspector found Respondent offered for transportation, in commerce, a hazardous material, regulated medical waste, in packagings not conforming to the requirements of §§173.24(b) and 173.134(b)(3)(ii), in violation of 49 C.F.R. §§ 171.2(a), 173.22(a)(2), 173.24(b) and 173.134(b)(3)(ii).

Respondent appeals the Order of August 23, 2002, alleging the civil penalty is excessive and unnecessary and should be revoked. First, Respondent contends it was not responsible for educating its own customers on the proper packaging of the RMW shipments. Rather, Respondent states, as the "intermediate handler" for its customers, it relied on all of the other parties involved in packaging the RMW to properly package it before it arrived at Respondent's facility. Respondent further claims it knew "all boxes were in DOT approved containers and left the facility in sound condition." In essence, Respondent contends it should be excepted from the packaging requirements in the HMR because it relied on its customers' compliance with the HMR.

The HMR prohibits any person from accepting or offering for transportation, in commerce, a hazardous material unless "the hazardous material is properly...packaged" (49 C.F.R. §171.2(a)). The shipping paper dated July 11, 2001 and provided by Phoenix Services to the inspector, shows Respondent was the shipper of record for the shipment in question. Respondent has not disputed the fact it was the shipper of record, nor has it disputed the fact it offered the shipment for transportation, in commerce.

The regulations clearly prohibit *any* person, including Respondent, from offering for transportation, or even accepting, hazardous materials not packaged in accordance with the HMR. The record shows Respondent, as an intermediate handler, accepted RMW shipments from its customers, stored those packagings in a refrigerated trailer, and then offered them for transportation by shipping them to Phoenix Services in Baltimore, Maryland. While Respondent was not necessarily responsible for the RMW shipments before they reached Respondent's facilities, once Respondent accepted and transported those shipments, Respondent was subject to the HMR and its packaging requirements.

Thus, Respondent's first argument on appeal is not an appropriate basis for a dismissal of the violation.

Next, Respondent contends the penalties should be removed because it was prohibited from opening any containers it received from its customers by the New York State Department of Environmental Conservation (NYSDEC). Therefore, Respondent argues, it had to rely on its customers to properly package the RMW and could not have known it had been improperly packaged.

Respondent's second argument is also an inappropriate basis for a dismissal of the violation. The crux of Respondent's second argument is it could not have known the RMW was improperly packaged because it was not permitted by NYSDEC to open the containers. Respondent's argument is flawed, however, because the record shows Respondent was most likely aware of previous incidents in which RMW packagings were damaged in a similar manner. For example, throughout this enforcement action, Respondent has stated it believes the problems in the packagings observed by the inspector were caused by the temperature changes encountered after Respondent stored them in refrigerated trailers and then transferred to and transported them in regular trucks.

In addition, the record contains several instances showing Respondent had most likely been aware of this problem for some time before this enforcement action was initiated. For example, in the July 30, 2001 interview by the inspector, Mr. Hilton speculated the problems were caused by the variations in temperature, as discussed above. Additionally, in a letter dated October 27, 2001, Respondent advised PHMSA's Chief Counsel's office of its "continuing dialogue" with NYSDEC about "their refrigeration requirements that result in serious deterioration of packaging of RMW" and

"these issues came to a head **five years ago** when Canadian RMW was shipped in refrigerated trailers until they entered the US and were transferred to non-refrigerated trailers in MA" (emphasis added).

As shown above, it is apparent Respondent knew or should have known of the problems associated with its methods of storing and transporting RMW well before this enforcement action was initiated. As such, Respondent should have been exploring *and* implementing alternative methods when it initially discovered the problem. Respondent has argued it was unable to comply with the HMR's packaging requirements because of NYSDEC's permit restrictions. However, Respondent has, in its correspondence with PHMSA, offered several proposals to prevent future violations. It appears, therefore, Respondent was most likely knew or should have known of better methods of transporting the RMW which would not have conflicted with NYSDEC's prohibitions on opening the packages. Thus, based on Respondent's apparent prior knowledge of the packaging failures and of alternative methods, its second argument is rejected.

For these reasons, Respondent's appeal is denied and Respondent is assessed a civil penalty of $5,400.

III. Findings

There is no justification to grant Respondent's appeal. The civil penalty of $5,400 is appropriate in light of 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. Therefore, the Order of August 20, 2002 is affirmed as being substantiated by

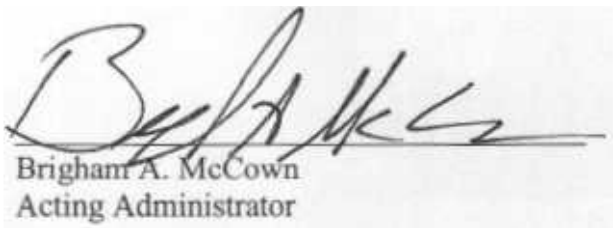
the record and was issued in accordance with the assessment criteria prescribed in 49 C.F.R. § 107.331.

IV. Payment

Due Date. Respondent must pay this $5,400 civil penalty within 30 days of the date of this Action on Appeal. See Addendum A for payment information.

V. Final Administrative Action

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



Brigham A. McCown
Acting Administrator

Date Issued: 09-19-05

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the 19TH day of SEPT. , 2005, the undersigned served in the following manner the designated copies of this Decision of Appeal with attached addendums to each party listed below:

New York Environmental Services Corporation 31 Lower River Road P.O. Box 576 Oneonta, NY 13820 ATTN: Mr. Russell Hilton, General Manager	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 (without enclosures) Personal Delivery
Ms. Colleen Abbenhaus, Chief Office of Hazardous Materials Enforcement, Eastern Region Office 820 Bear Tavern Rd., Ste. 306 West Trenton, NJ 08628	One Copy (without enclosures) First Class Mail
Tina Mun, Esq. Pipeline and Hazardous Materials Safety Administration Office of the Chief Counsel 400 Seventh Street, S.W., Room 8417 Washington, D.C. 20590-0001	One Copy Personal Delivery
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

Tina Mun

ADDENDUM A
PAYMENT INFORMATION

Due Date. Respondent must pay this $5,400 civil penalty within 30 days of the date of this Action on Appeal.

Payment Method. Respondent must pay the civil penalty by wire transfer. Detailed instructions or sending a wire transfer through the Federal Reserve Communication System (Fedwire) to the account of the U.S. Treasury are contained in the enclosure to this Action on Appeal. Please direct questions concerning wire transfers to:

Financial Operations Divisions (AMZ-120)
Federal Aviation Administration
Mike Monroney Aeronautical Center
P.O. Box 25082
Oklahoma City, OK 73125
Telephone No.: (405) 954-8893

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 Action on Appeal. 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 this Action on Appeal.

Treasury Department Collection. FAA's Financial Operations Division may also refer this debt and associated charges to the Department of the 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 to an offset. The debtor has 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 Action on Appeal constitutes written notification of these procedural rights.