

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

In the Matter of:

**Wilckens Paints (Hellas) S.A.,
Respondent**

**PHMSA Case No. 05-0092-SD-SW
Docket No. PHMSA-2008-0062-2**

ORDER OF THE CHIEF COUNSEL

This matter is before the Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) for a determination regarding the Notice of Probable Violation (Notice) issued to Wilckens Paints (Hellas), S.A., (Respondent) on March 11, 2005. The Notice formally initiated proceedings for three violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171–180. The Notice advised Respondent that PHMSA proposed to assess a civil penalty in the amount of \$16,500 for: (1) offering a hazardous material (toxic liquid, flammable, organic, n.o.s., 6.1, UN 2929, PG II) for transportation in commerce in a packaging that was not certified to a UN standard, in violation of 49 C.F.R. §§ 171.2(a) and (c), 173.22(a)(2), 173.24(c), 173.202(c) and 173.203(c), and IMDG Code sections 4.1.3.1 and 4.1.4.1; (2) offering a hazardous material (paint, 3, UN 1263, PG II) for transportation in commerce without a hazardous materials label, in violation of 49 C.F.R. §§ 171.2(a) and 172.400(a), and IMDG Code section 5.2.2.1.1; and (3) offering a hazardous material (paint, 3, UN 1263, PG II) for transportation in commerce without marking the proper shipping name and UN number on each packaging, in violation of 49 C.F.R. §§ 171.2(a), 172.300(a) and 172.301(a), and IMDG Code Section 3.1.2 and Section 3.2.1.

Background

Because Respondent offers hazardous materials for transportation to and within the United States, Respondent is subject to the jurisdiction of the Secretary of Transportation, PHMSA's Associate Administrator for Hazardous Materials Safety, and PHMSA's Office of Chief Counsel.¹

On January 7, 2005, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Continental Industrial Coatings, Inc. (CIC), in Belle Chase, Louisiana. During the inspection, the inspector observed pallets of non-specification 20-liter drums containing a variety of paints. CIC provided copies of the Material Safety Data Sheets (MSDS) for four colors of paint. The MSDS for three of the four colors indicate that the paints are described as "paint, 3, UN 1263, PG II." The MSDS for SD Marine Paint, orange, indicate that the paint is described as "toxic liquid, flammable, organic, n.o.s., 6.1, UN 2929, PG II."

The photographs taken by the inspector illustrate that some of the containers of "paint, UN 1263" were marked with the UN identification number and proper shipping name, but others were not. Some of the packages containing "paint, UN 1263" did not have a Hazard Class 3 label, and none of the packages containing "toxic liquid, flammable, organic, n.o.s., UN2929" had a Division 6.1 label. The photographs also illustrate that the packagings were not marked or certified to a UN standard.

CIC also provided copies of the shipping documents accompanying the shipment of pallets of paints. The documents show that Respondent had shipped the paints from Greece to the United States on the MSC Barbara. The shipping line appears to have prepared the shipping paper.

¹ See 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

On January 7, 2005, the inspector faxed an exit briefing to Respondent, describing the probable violations. The exit briefing explained Respondent's opportunity to respond to the facts alleged in the exit briefing and to submit evidence of corrective action. Respondent admitted it did not ship the paints in UN standard packagings, did not mark the proper shipping name on the packages, and did not place the appropriate hazard labels on the packages.

Based on a preliminary assessment of the apparent nature, circumstances, extent, and gravity of the probable violations in the inspector's report, the Office of Chief Counsel issued the Notice to Respondent on March 11, 2005, proposing a civil penalty in the amount of \$16,500 for three violations of the HMR. The Notice did not give any reductions for corrective actions.

The case now comes before the Chief Counsel for decision.

Discussion

The HMR requires offerors of hazard class 3 and division 6.1 materials to use UN standard packagings (49 CFR Part 172, Subparts A and B, and 49 CFR Part 173), to mark the proper shipping name on the package (49 CFR Part 172, Subpart D), and to place the appropriate hazard label(s) on the package (49 CFR Part 172, Subpart E).

The HMR also provides that “[n]otwithstanding the provisions of this subchapter, a material that is packaged, marked, classed, labeled, placarded, described, stowed and segregated, and certified in accordance with the IMDG Code, and otherwise conforms to the requirements of this section, may be offered and accepted for transportation and transported within the United States [provided] all or part of the transportation [is by vessel.]” 49 CFR 171.12(b). This allowance is limited by another provision stating, “A material that is designated as a hazardous material under this subchapter, but is not subject to the requirements of the IMDG Code ... may

not be transported under the provisions of this section and is subject to the requirements of this subchapter.” 49 C.F.R. 171.12(b)(3).

Paint, UN 1263, is a flammable liquid regulated under IMDG Code Chapter 2.3.

Paragraph 2.3.2.5 states that “[v]iscous substances which have a flashpoint of 23°C or above and less than or equal to 61°C; are not toxic or corrosive; ... and are packed in receptacles not exceeding 30 ℓ capacity are not subject to the provisions for the marking, labelling and testing of packages in chapters 4.1, 5.2 and 6.1” under certain additional conditions. IMDG Code 2.3.2.5 also provides that “The following statement shall be included in the transport document: ‘Transport in accordance with 2.3.2.5 of the IMDG Code.’”

Respondent provided evidence that the UN 1263 paints have the physical properties specified in IMDG Code 2.3.2.5. Furthermore, all of the containers were less than 30 ℓ. Because the UN 1263 paints are subject to the requirements of the IMDG Code, Respondent’s shipments could have been transported from Greece to the United States using the IMDG exception from marking, labeling and package testing because the transportation was by vessel.² Accordingly, Respondent’s shipment would have been in compliance with the HMR, with respect to the facts supporting Violations 2 and 3, if the statement “Transport in accordance with 2.3.2.5 of the IMDG Code.” had been printed on the shipping paper. This case provides a perfect example of why the inclusion of such statements on the shipping paper is essential. None of the people with whom the inspector spoke (the freight forwarder, the recipient, or Respondent’s U.S. counterpart) were aware that the shipment was intended to be made under the exception provided

² Respondent may use the exception in IMDG Code 2.3.2.5 to the final destination indicated on the shipment originating in Greece. The shipping paper indicated that the Port of New Orleans, Louisiana, was the final destination of the shipment. Neither Respondent, nor another party, may use the exception for transport within the United States unless some, or all, of the transportation is by vessel. Therefore, the drums of paint were required to be repackaged, marked and labeled prior to shipment to CIC by truck in the United States. Determining the party responsible for bearing that cost is not within the jurisdiction of PHMSA.

in 2.3.2.5 of the IMDG Code. Because all of the requirements of section 2.3.2.5 of the IMDG Code were not fulfilled, however, Respondent was not entitled to use those exceptions and was required to properly package, mark and label each pail.

Violation 1 dealt with the failure to ship a Division 6.1 material in a UN standard packaging. By the terms of IMDG 2.3.2.5, the material did not qualify for the packaging exception. Therefore, under the HMR and under the IMDG Code, Respondent was obligated to ship the material in a UN standard packaging. The evidence clearly supports this violation.

In response to the Notice, Respondent engaged in several corrective actions. Respondent had all of the paints (both Class 3 and Division 6.1) placed in UN standard packages and had all of the packages properly marked and labeled at the cost of \$7.50 per pail. Respondent indicated it had changed its practices to always use the UN standard packages and to mark and label all packages properly. This evidence was provided prior to the issuance of the Notice and should have been reflected in the proposed penalty.

Findings

Based on the above facts, I find that there is sufficient evidence to support a finding that Respondent knowingly committed the three violations. In reaching this conclusion, I have reviewed the inspector's Inspection/Investigation Report and accompanying exhibits, the exit briefing, Respondent's replies, and all other correspondence in the case file.

Based on my review of the record, I have determined that Respondent committed three violations of the HMR. Respondent took action to come into compliance prior to receipt of the Notice. Accordingly, I am reducing the civil penalty for all three violations by twenty-five percent (25%), the maximum recommended reduction for corrective action. Furthermore, Respondent may have incurred excessive costs to come into compliance in reliance on the

representations of PHMSA inspectors and counsel. Accordingly, I am reducing the civil penalty by \$7,057, the costs incurred by Respondent for remarking, relabeling and repackaging the 941 pails of Class 3 paints.

Conclusion

Accordingly, under the authority of 49 U.S.C. § 5123 and 49 C.F.R. §§ 107.317 and 107.329, I assess a total civil penalty of \$5,319 for three violations of the HMR. The total penalty is allocated as follows:

- Violation No. 1: \$2,898, reduced from \$7,000 in the Notice;
- Violation No. 2: \$1,398, reduced from \$5,000 in the Notice; and
- Violation No. 3: \$1,023, reduced from \$4,500 in the Notice.

In assessing this civil penalty, I have taken into account the following statutory criteria (49 U.S.C. § 5123(c) and 49 C.F.R § 107.331):

1. The nature, circumstances, extent, and gravity of the violations;
2. with respect to the Respondent, its degree of culpability, any history of prior violations, its ability to pay, and any effect on its ability to continue to do business; and
3. other matters as justice may require.

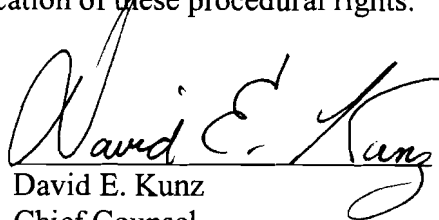
Payment and Appeal

Respondent must either pay the civil penalty in accordance with the attached instructions (Addendum A), or appeal this Order to PHMSA's Administrator. Respondent may request a payment plan extending up to three months by contacting the Office of Chief Counsel; however, the first payment must be made within 30 days of this Order. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.³

³ The requirements of § 107.325 include the following: (1) File a written appeal within twenty (20) days of receiving this Order (filing effective upon *receipt* by PHMSA); (2) address the appeal to the Administrator, c/o Office of Chief Counsel – PHC, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Ave., SE, Washington, DC 20590-0001; and (3) state with particularity in the appeal (a) the findings in the Order that are

This Order constitutes written notification of these procedural rights.

3/05/2008
Date


David E. Kunz
Chief Counsel

Enclosure

REGISTERED MAIL - RETURN RECEIPT REQUESTED

challenged; and (b) all arguments for setting aside any of the findings in the Order or reducing the penalty assessed in the Order. The appeal must include all relevant information or documentation. *See* 49 C.F.R. § 107.325(c)(2). PHMSA will not consider any arguments or information not submitted in or with the written appeal. PHMSA will regard as untimely any appeal that is received after the twenty (20) day period, and it will not consider the request; therefore, PHMSA recommends the use of fax (202.366.7041) or an overnight service as documents received late will not be accepted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of MAR - 7 2008 2008, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Wilckens Paints (Hellas) S.A.
12 Skouze Street
Piraeus Greece, XX 99999
Attn: John Staphopoulos, General Manager

Original Order with Enclosures
Registered Mail Return Receipt

Ryan Posten
Director, OHME
PHH-40, East Building, 2nd Floor
1200 New Jersey Ave., SE
Washington, D.C. 20590

One Copy
Internal E-Mail

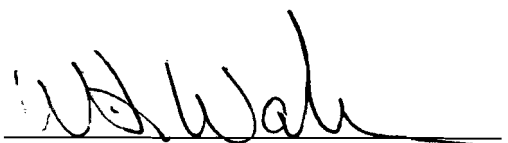
Billy Hines, Jr., Chief
Office of Hazardous Materials Enforcement
Southwestern Region Office
8701 S. Gessner Road, Ste 1110
Houston, TX 77074

One Copy
Internal Email

U.S. DOT Dockets, M-30
U.S. Department of Transportation
West Building Ground Floor, Room W12-14
1200 New Jersey Ave., SE
Washington D.C. 20590

One Copy
Personal Delivery

MAR - 7 2008


Willard Walker

Appeal Information

If Respondent chooses to appeal, Respondent must:

- (1) File a written appeal within twenty (20) days of receiving this Order; a submission will be considered "filed" with PHMSA on the date it is received by PHMSA;
- (2) Address the appeal to the Administrator, c/o Office of Chief Counsel, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Ave., SE, Washington, DC 20590; and
- (3) State with particularity in the appeal (a) the findings in the Order that are challenged; and (b) all arguments for setting aside any of the findings in the Order or reducing the penalty assessed in the Order.

The appeal must include all relevant information or documentation. PHMSA will not consider any arguments or information not submitted in or with the written appeal.

PHMSA will regard as untimely, and will not consider, any appeal that is received after the twenty (20) day period. PHMSA recommends the use of fax (202.366.7041) or an overnight service. An appeal received by PHMSA more than twenty (20) days after receipt of the Order by Respondent will not be considered and will not toll the deadline for payment of the civil penalty assessed in the Order.

Payment of Civil Penalty

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-341
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-341
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 or ticket 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.