

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

In the Matter of:

Beta Chem, Inc.

Respondent

**PHMSA Case No. 02-503-RMS-SW
DMS Docket No. PHMSA-2006-26204-1**

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 Beta Chem, Inc., (Respondent) on December 1, 2002. The Notice formally initiated proceedings against Respondent for three violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. Parts 171–180, as follows:

Violation 1: allowing employees to perform a function subject to the requirements of the HMR without providing general awareness, function specific and safety training, and failure to maintain hazmat employee training records, in violation of 49 C.F.R. §§ 171.2(a)-(b); 172.702(a) and 172.704(a) and (d);

Violation 2: offering a hazardous material for transportation in commerce in DOT specification 7A packagings, when the required Type A testing had not been conducted, in violation of 49 C.F.R. §§ 171.2(a) and (c); 173.465; and 178.350; and

Violation 3: offering a hazardous material for transportation in commerce in DOT specification 7A packagings, when additional required tests for packagings containing liquids and gases had not been conducted, in violation of 49 C.F.R. §§ 171.2(a) and 173.466(a).

Background

Respondent offers radiopharmaceuticals for transportation in the United States. Therefore, 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

Respondent's owner and sole employee signed the shipper's certification statement on the shipping papers for a shipment of radioactive materials in a combination packaging, identified as meeting the requirements of DOT Specification 7A, Type A. Respondent's air waybill, dated July 1, 2002, was marked, in part, "Radioactive Material Type A Packing, 7, un2915, Carbon-14 0.85 GBq Liquid One Type A Box Packing."

On August 22, 2002, during a follow-up compliance inspection at Respondent's facilities, the inspector requested a copy of Respondent's training records. Respondent stated that it used a contractor for shipping services and, accordingly, had not provided hazmat training to its employees and did not know if the shipping packaging it used had been tested in accordance with the HMR.

In a letter responding to an amended exit briefing, Respondent stated it would test the packaging, would provide the required hazmat training and would maintain records of the training.

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

On December 1, 2002, the Office of Chief Counsel issued a Notice of Probable Violation, alleging three violations of the HMR and proposing to assess a civil penalty in the amount of \$14,900,00. The Notice was returned undelivered. A copy of the Notice was mailed to a different address on or about January 10, 2003.

Respondent replied to the allegations in the Notice and, over the course of the following two years, provided additional information and documentation concerning corrective action. The case is now before me for resolution.

Discussion

Violation 1: The HMR require all employees who directly affect hazardous materials transportation safety to receive hazardous materials training in the areas of general awareness/familiarization, function-specific training, safety training, and security awareness training.² Respondent claimed to have general hazmat safety awareness but did not dispute the training was not current. In addition, Respondent had no records of any training.

As corrective action, Respondent provided records showing its employee received hazardous materials training, primarily safety training, and provided a copy of its training manual. However, the records do not show that the curriculum adequately covered the requirements of the HMR.

Violations 2 and 3: The specification packagings used to transport radioactive materials must meet performance standards, as prescribed in 49 C.F.R. Part 173, Subpart I. Radioactive materials in the liquid or gas phase must be transported in packagings meeting higher performance standards than those in solid phase.

² The requirement for security awareness training was not in effect at the time of the inspection. Respondent is advised that, effective March 24, 2006, all hazmat employees involved in offering hazardous materials for transportation must have security awareness training. 49 C.F.R. § 172.704(a)(4).

Respondent self-certified the packaging by marking the packaging as a DOT Specification 7A, Type A packaging. Respondent admitted it did not know if the packaging actually met that standard and, accordingly, was not permitted to mark it as a DOT Specification 7A, Type A packaging. Respondent was not permitted to offer radioactive materials for transportation in the unauthorized packaging.

Respondent stated it had used its packaging safely for many years with no apparent breaches or leakage of radioactive material and that the packaging was of a similar design to that used by many shippers of similar hazardous materials throughout the United States. Respondent did not challenge the allegation that documentation of testing was not available at the time of the inspection.

The Notice alleges Respondent offered a hazardous material for transportation in commerce in a packaging that was unauthorized because the appropriate testing had not been performed (Violation 2) and because it had not met the higher testing standards applicable to packagings for liquid radioactive materials (Violation 3). Because the alleged violations were based on the same conduct, a finding of two separate violations is not warranted. Violation 3 is dismissed.³

Although it could not do so at the time of the inspection, Respondent has since provided extensive documentation of the testing of its packaging, including a test report and photographs.

Findings

I find Respondent knowingly violated the HMR as set forth in the opening to this Order with respect to Violations 1 and 2. I am dismissing Violation 3. In reaching this conclusion, I have reviewed the Inspection/Investigation Report and accompanying exhibits, the exit briefing,

³ It appears that Respondent also improperly certified the packaging; however, no such violation was alleged in the Notice.

Respondent's replies, and all other correspondence in the case file. In particular, I note Respondent did not contest the factual allegations in the Notice.

Civil Penalty

In determining an appropriate civil penalty, I am required to consider 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.

Based on my review of the record and the nature and circumstances of the violations, I find that an adjustment of the proposed penalties is warranted. Respondent is a small business with no prior record of HMR violations. Further mitigation is warranted by Respondent's action to correct its packaging violations and improve its training. Because it does not appear that Respondent fully corrected Violation 1, I am reducing that penalty by only fifteen percent, however.

The penalty is allocated as follows:

- Violation No. 1: \$1,275, reduced from \$1,500 in the Notice;
- Violation No. 2: \$4,725, reduced from \$8,400 in the Notice; and
- Violation No. 3: dismissed.


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 \$6,000 for two violations of the HMR.**

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. If Respondent chooses to appeal this Order, it must do so in accordance with 49 C.F.R. § 107.325.

This Order constitutes written notification of these procedural rights.

10/26/06
Date



Krista L. Edwards
Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of OCT 26 2006, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Beta Chem, Inc.
10300 Howe Drive
Leawood, Kansas 66206
ATTN: Mr. Ahmed El-Sherif, President

Original Order
Certified Mail – Return Receipt

Mr. Ahmed El-Sherif
El-Sherif@BetaChem.com

One Copy
E-mail

Mr. Ryan Posten
Director, OHME
USDOT/PHMSA/OHMS
400 Seventh Street, S.W., Ste. 7104
Washington, D.C. 20590

One Copy
Internal E-Mail

Mr. Billy Hines, Jr.
Office of Hazardous Materials Enforcement
Southwestern Region Office
Houston, TX

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 26 2006



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, 400 Seventh Street, S.W., Washington, DC 20590-0001; 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-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.