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

In the Matter of: **Chemical Equipment Labs of VA, Inc.** **Respondent.**	**PHMSA Case No. 04-391-SIBCD-EA** **DMS Docket No. PHMSA-2006-24405 - I**

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 Research and Special Programs Administration's (RSPA)[1] Notice of Probable Violation (Notice), issued to Chemical Equipment Labs of VA, Inc. (Respondent) on September 10, 2004. The Notice formally initiated proceedings against Respondent for 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 $27,665 for the following nine violations of the HMR:

> Violation 1: Discharging a hazardous material from an intermediate bulk container without first removing the container from the transport vehicle, in violation of 49 C.F.R. §§ 171.2(a)-(b), 173.30, and 177.834(h).
>
> Violation 2: Offering a hazardous material for transportation in commerce in intermediate bulk containers that were not marked with the required identification numbers, in violation of 49 C.F.R. §§ 171.2(a)-(b), 172.302(a)(2), 172.302(b), and 172.331(b).

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

Violation 3: Offering for transportation and transporting a hazardous material in commerce in intermediate bulk containers that did not contain the required labels or placards, in violation of 49 C.F.R. §§ 171.2(a)-(b), 172.400(a)(2), and 172.514(a).

Violation 4: Offering for transportation and transporting a hazardous material in commerce in nonbulk packages that were not properly labeled, in violation of 49 C.F.R. §§ 171.2(a)-(b); 172.406(a); and 172.407(c)(1).

Violation 5: Offering for transportation and transporting a hazardous material in commerce in nonbulk packages that were not properly retested and requalified, in violation of 49 C.F.R. §§ 171.2(a)-(b); 173.22(a)(2); 173.28(b)(2); 173.202(a), (c).

Violation 6: Offering a hazardous material for transportation in commerce in nonbulk packages that were not properly retested and requalified, in violation of 49 C.F.R. §§ 171.2(a); 173.22(a)(2); and 173.28(b)(2)(ii).

Violation 7: Offering a hazardous material for transportation in commerce in UN standard packages that were not closed in accordance with the manufacturer's closure instructions, and therefore, were unauthorized packages, in violation of 49 C.F.R. §§ 171.2(a); 173.22(a)(2), (4); and 173.202.

Violation 8: Offering a hazardous material for transportation in commerce accompanied by hazardous materials shipping papers, which (1) failed to include a proper packing group, (2) failed to include a shipper's certification, (3) contained additional information interspersed with the basic description, and (4) failed to include a unit of measure, in violation of 49 C.F.R. §§ 171.2(a); 172.201(a)(4); 172.202(a)(4)-(5); 172.204(d)(1); and 173.22(a)(1).

Violation 9: Offering a hazardous material for transportation in commerce while failing to offer or provide placards to the carrier at the time of offering the hazardous material, in violation of 49 C.F.R. §§ 171.2(a), and 172.504(a).[2]

Background

As an initial matter, PHMSA must consider whether Respondent's business activities bring Respondent within the jurisdiction of this agency. As a function of its business, Respondent manufactures and distributes hazardous materials – particularly water treatment chemicals – which it sells and offers for transportation in the United States. Therefore,

[2] The citation in the Notice to the section of the CFR requiring an offeror to provide placards to a carrier is incorrect. The citation should be 49 C.F.R. § 172.506(a). Any issues relating to adequate notice which this error may have caused is irrelevant as this violation is dismissed *(infra* at 17).

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.[3]

A. Inspection

On May 20 and 21, 2004, an inspector from the Office of Hazardous Materials Enforcement conducted a compliance inspection at Respondent's facilities in Marcus Hook, Pennsylvania. Mr. Edward Morgan, Plant Manager, represented the company during the inspection and provided requested documents. At the end of the inspection, the inspector conducted an exit briefing with Respondent and explained the probable violations.

Respondent provided shipping papers for recent shipments offered for transportation and/or transported by Respondent.

- Shipment of jerricans made on May 19, 2004 – The shipping paper identified the shipment as 276 UN3H1 5-gallon jerricans filled with hypochlorite solution, 8, UN1791, PGIII, (corrosive material). Shipper's certification statement is not signed.
- Shipment made on May 20, 2004, in a truck Respondent identified as the "bleach truck." The shipping paper (bill of lading number 21599), dated May 18, 2004, listed the shipment as 600 gallons of hypochlorite solution, 8, UN1791, PGIII, (corrosive material). Shipper's certification statement is not signed.
- Shipment made on May 18, 2004, in the "bleach truck." The shipping paper (bill of lading number 21573), dated May 17, 2004, listed the shipment as 63.8 (unknown unit of measurement) of sodium hydroxide 50% diaphragm 8, UN1824, PGII, (corrosive material). A handwritten notation in the quantity column

[3] *See* 49 U.S.C. § 5103 (2005); 49 C.F.R. § 107.301 (2004).

indicates the quantity was 500 gallons. Shipper's certification statement is not signed.

- Shipment made on May 21 – 32 UN3H1 5-gallon jerricans of hypochlorite solution, 8, UN1791, PGIII, (corrosive material). Shipper's certification statement is not signed.

Intermediate Bulk Containers

When the inspector arrived at Respondent's facilities on May 20, 2004, the inspector observed a flat bed truck with three intermediate bulk containers (IBCs) secured to the bed of the vehicle. Respondent indicated it called the vehicle its "bleach truck." The IBCs on the truck appeared to be partially filled. Corrosive placards containing the identification number UN1791 were displayed on all four sides of the truck. None of the IBCs were marked or placarded. The IBCs were braced to prevent movement but were not permanently mounted to the vehicle. While the inspector was at the facility, the truck left the property to deliver hypochlorite solution.

On May 21, 2004, the inspector observed and photographed the truck and IBCs. The three IBCs were 550-gallon containers certified as UN31H2/Y/USA/Snyder Ind., Inc., Lincoln, NE/0/4255. Respondent indicated the IBCs were not removed from the truck prior to discharge of their contents.[4] Respondent indicated the truck was not placarded or marked with the appropriate identification number prior to the delivery made May 20, 2004.

Nonbulk Containers

The inspector observed and photographed pallets loaded with UN3H1/Y1.8/100 5-gallon jerricans, which were filled with hypochlorite solution. The jerricans were marked with varying years of manufacture and certifying party symbols. Each jerrican had a plastic sleeve around the rectangular sides of the container. One side of each sleeve was marked with the proper shipping

[4] For example, the contents of the IBCs were discharged the prior day directly from the bed of the truck.

name (hypochlorite solution). The opposite side of each sleeve was marked with the identification number of the material and a hazard warning label. The dimensions of the label were approximately 2.75 inches by 2.75 inches. Respondent stated no other warning labels were applied to the jerricans prior to transportation.

On May 21, 2004, the inspector observed and photographed additional pallets of the filled jerricans (as above). In addition, the inspector observed and photographed empty jerricans which had been returned to Respondent. The returned jerricans bore the same markings and labels as the filled jerricans. Approximately twenty percent (20%) of the jerricans (filled and empty) had a yellow, adhesive label attached to the handle of the jerrican. The labels included Respondent's name, phone number and the statement: "this container has been leak-proof tested." Although Respondent indicated the labels were applied to all leak tested jerricans, the inspector observed jerricans manufactured in 1996, 2001, and 2003 which did not have the yellow, adhesive labels attached. Respondent explained the solution is very corrosive and that the labels could have worn off or been pulled off. Respondent also stated the labels were a temporary solution because it had run out of its usual (compliant) labels.

Respondent stated it had re-ordered compliant labels from the printer it had used previously. Respondent later provided a May 12, 2004 order form and receipt for labels. The order form indicated the order was a new order, not a re-order. The inspector did not observe any labels on any of the jerricans at Respondent's facilities which bore the same text as the sample text on the order form.

Although the jerricans were manufactured by various companies, the majority of the jerricans were made by Nampac. Respondent provided a copy of the closure instructions it had

received from Nampac.[5] Nampac provided the inspector with a copy of Respondent's most recent invoice for the purchase of UN3H1 jerricans. The invoice showed Respondent purchased 2,686 UN3H1 jerricans and 2,600 Rieke FS-80 bungs from Nampac on June 25, 2003. Respondent indicated it closed the jerricans hand-tight using a bung wrench and did not have a torque wrench with which it could verify the closure torque.

Respondent stated it leak tested jerricans every two years. In addition, Respondent indicated it had understood the jerricans only needed to be tested if they were five years or older. In explaining its business, Respondent stated it sold the jerricans to customers who serviced pools and/or sold the filled packages to retail customers for residential pools. Respondent stated its most recent purchase of jerricans was approximately a year prior; therefore, all of the jerricans at the facility had been used at least once previously. Respondent indicated jerricans were refilled and reshipped within a few days after receipt back into inventory because the pool season had started.

While the inspector was at Respondent's facilities, the inspector observed a customer drive away after picking up 32 filled jerricans. Respondent indicated the jerricans were 5-gallon UN3H1 containers, each weighing approximately 53 pounds. The customer's truck was not placarded when it left Respondent's facilities. Respondent stated it had not offered placards to the customer.

B. Correspondence

In response to the exit briefing, Respondent sent a letter dated June 18, 2004. With regard to Violation 1, Respondent stated it had misinterpreted the law and believed the tanks were approved for offloading because "the D.O.T. approved such tanks to be sold as D.O.T. approved

[5] Although the closure instructions did not identify the manufacturer or identify Nampac as the provider of the instructions, the inspector obtained a sample of Nampac's closure instructions, which were the same documents provided by Respondent.

IBC's." Respondent stated it does placard the truck on all four sides and on both sides of the IBCs. Respondent stated the failure to placard was a single incident. Respondent also stated that evidence of placarding, such as outline of taping and torn sticker remnants, was on the truck. Respondent stated the inspector said he would not write up the violation for improper marking for leakproofness testing if Respondent provided proof of ordering labels. Respondent stated it provided proof and that it understood the inspector called the printing company to confirm the order.

Respondent stated it had its label approved by the U.S. Environmental Protection Agency and was not permitted to make any changes to the label. Respondent also stated the inspector from a prior inspection had not said there was a problem with the size of the corrosive label. Respondent stated ordering new product sleeve labels would "decide whether we stay in or go out of business." Respondent also claimed its corrosive label meets the intent of the regulation and that there is inadequate space on the label to place a larger corrosive label. Respondent stated it considered placing the shipping name on the opposite side of the product label from the corrosive warning label to be in compliance because the regulations state the shipping name should be near the warning label "if the package dimensions are adequate." (citing 49 C.F.R. § 172.406(a)(ii).

Respondent stated it "does not see anything pertaining to the regulations that say, "'You must verify torque on bungs on UN packages' only that you must have the closure instructions." Respondent stated that bungs were properly tightened prior to the inspection but that Respondent had obtained torque wrenches and was closing bungs to the suggested torque.

Respondent stated it had misunderstood the provision of the HMR permitting insertion of technical or chemical groups between the shipping name and the hazard class or after the basic

description. Respondent insisted it had provided a unit of measure on its shipping papers and that it was unable to respond to the inspector's allegation. Respondent stated the employee accompanying the inspector during the inspection is the employee authorized to sign the shipper's certification statement. Respondent stated that the failure to sign the shipper's certification statement was the result of the employee's unavailability due to the inspection. Respondent stated it would reinforce its training to ensure all procedures are followed in the future.

Respondent stated it had maintained records of IBC requalification and that the inspector had been provided with a copy of those records. Finally, Respondent denied that it did not offer placards to a customer picking up a shipment of hazardous materials in an amount requiring placarding.

Respondent stated it had applied for an exemption for offloading hazardous materials from IBC's without removing the IBC from the vehicle. Respondent stated it had received its order of labels to use to show containers had been leakproofness tested. Respondent stated it had asked its product label manufacturer if the corrosive label could be made larger. Respondent stated it had corrected its shipping papers and was in the process of retraining its employees. Respondent also requested that PHMSA consider that Respondent has less than 30 customers in its pool division.

C. Notice of Probable Violation

On September 10, 2004, the Office of Chief Counsel issued a Notice of Probable Violation (Notice) to Respondent, proposing a civil penalty in the amount of $27,665 for nine violations of the HMR. PHMSA used the Penalty Guidelines set forth at Appendix A to

49 C.F.R. Part 107, subpart D, in calculating the civil penalty proposed in the Notice. The proposed penalty included a $2,515 increase for a prior violation.

D. Informal Response

On October 5, 2004, Respondent requested by email an additional 30 days in which to respond to the Notice. The Office of Chief Counsel granted the request and set a new deadline of November 10, 2004. On November 10, 2004, Respondent submitted an informal response to the Notice and requested an informal conference.

Respondent stated it had applied for an exemption to permit it to discharge a hazardous material from an IBC without offloading the IBC from the transport vehicle. Respondent denied Violations 2 and 3 stating the inspector had mischaracterized the driver's statement. Respondent stated that the driver "advised the inspector he was told but simply forgot" to placard the IBCs. Respondent denied Violation 4, stating its smaller hazard warning labels were compliant because it was exempt from the size requirement due to limited room on the product label. Respondent denied Violations 5 and 6 stating it had provided proof that it had ordered labels and that it was in compliance. Respondent denied Violation 7 stating it followed the manufacturer's closure instructions. Respondent also denied the existence of any regulation requiring it to verify the torque it used to close bungs.

Respondent denied Violation 8. Respondent stated it "may have misinterpreted the regulations and interspersed a single descriptive word between the proper shipping name and hazardous classification." Respondent denied that it "violated the regulations when it misclassified the proper packing group." Respondent reiterated its claim that it failed to sign the shipper's certification statement due to the disruption caused by the inspection. Respondent denied that it had not included a unit of measurement on its shipping papers.

Finally Respondent disputed the testimony used by the inspector to support Violation 9. Respondent stated it is in compliance with regard to providing placards to carriers.

On December 16, 2004, the Office of Chief Counsel held an informal teleconference with Respondent. The inspector also participated in the conference.

On January 7, 2005, Respondent submitted evidence of corrective actions. Respondent submitted a copy of an email sent to PHMSA requesting party status to exemption E11537. Respondent also submitted copies of photographs showing placards and identification numbers on transport vehicles and IBCs, photographs of new corrosive labels, and photographs of compliant leak test labels and of returned empty containers with labels still affixed. Respondent also submitted a copy of an invoice for a preset torque wrench and sample bills of lading showing proper wording. The new bills of lading include a block for the carrier's signature stating Respondent had offered placards to the carrier.

On December 14, 2005, Respondent requested a formal hearing. Respondent stated it was presently suffering financial hardship and requested additional mitigation.

Discussion

PHMSA's procedural regulations require that a request for a formal hearing be made in response to the Notice.[6] The November 10, 2004 response to the Notice requested an informal conference. Respondent did not request a formal hearing at that time. Respondent's December 14, 2005 request for a formal hearing was untimely and is denied.

Violation 1:

Respondent did not contest the allegation. The HMR prohibits discharge of the contents from an IBC prior to removing the IBC from the transport vehicle. Respondent admitted to

[6] 49 C.F.R. § 107.319.

discharging hypochlorite solution from the IBCs on the "bleach truck" on May 20, 2004, without off-loading the IBCs.

Respondent provided evidence of applying for a party status to a Special Permit Authorization (previously called an Exemption). PHMSA granted the Special Permit, which was valid until July 31, 2005. PHMSA consolidated several related special permits into Special Permit DOT-SP 12412. Respondent was made a grantee to DOT-SP 12412, which expires January 31, 2007.[7]

Violation 2:

The HMR require IBCs to be marked on two opposing sides, if the packaging has a capacity of less than 1,000 gallons. In its informal response and at the informal conference, Respondent argued the inspector mischaracterized the events. Respondent stated, "The driver advised the inspector he was told but simply forgot." The violation is for failure to mark the IBCs – not the failure to train the employees. Respondent admitted the truck transported hazardous materials when the IBCs were not marked with the identification number for the chemical contents.

Violation 3:

The HMR generally require bulk packages to be labeled and placarded. An exception permits IBCs to be labeled or placarded. As in Violation 2, Respondent argued the inspector mischaracterized events. The violation is for failure to label or placard the IBCs. Respondent admitted the truck transported hazardous materials when the IBCs were not labeled or placarded.

Respondent submitted photographs as evidence of corrective action for Violations 2 and 3. The photographs do not establish compliance with the HMR however. Photographs of the

[7] PHMSA makes no representation as to whether Respondent's practices are compliant with the terms of DOT-SP 12412.

"bleach truck" show the truck placarded on four sides; however, the IBCs still are not marked and labeled or placarded. Other photographs showing IBCs on a truck are marked and placarded; however, the photographs do not appear to be of the same truck. In addition, the UN identification numbers are handwritten in the placards.[8] The photographs also show tubing connected to the three IBCs on both trucks. Respondent should note that DOT-SP 12412 states: "Hoses may not be attached to discharge outlets during transportation (movement) of the motor vehicle." The special permit also states: "The packages may be unloaded but may not be refilled while on a motor vehicle."

Violation 4:

The HMR require most packages containing hazardous materials to bear a hazard class warning label. The HMR provide specifications for hazard class labels, which include size requirements. Labels must be at least 3.9 inches on each side.[9] The HMR also require hazard class labels to be "printed on or affixed to a surface (other than the bottom) of the package ... and be located on the same surface of the package and near the proper shipping name marking, if the package dimensions are adequate."[10]

In its response to the Notice, Respondent stated that it "was in compliance with its use of 2.75 inch square corrosive labels and warning labels, that were otherwise compliant. Respondent maintains that due to the label size, Respondent is exempt." Respondent admits its corrosive labels are smaller than the HMR requirement of 3.9 inches on each side. Respondent appears to be claiming its labels are permissible based on U.S. Environmental Protection Agency (EPA) approval of its labels. The EPA and PHMSA regulate different uses of hazardous materials. The

[8] 49 C.F.R. § 172.332(c) provides for precise sizes and fonts for identification numbers displayed on a placard.
[9] 49 C.F.R. § 172.407(c)(1).
[10] 49 C.F.R. § 172.406(a)(1). Although there are some exceptions to this requirement, none are applicable to the facts of this case.

EPA generally regulates the storage and use of hazardous materials, while PHMSA regulates the transportation of hazardous materials. Compliance with EPA's regulations does not necessarily indicate compliance with PHMSA's regulations. Respondent implies it is unable to comply with both sets of regulations; however, EPA specifically permits Respondent to meet any labeling requirements imposed by the U.S. Department of Transportation. In addition, EPA permits Respondent to correct its label without submitting it for re-approval as long as it only changes the PHMSA-required elements.[11] Therefore, contrary to Respondent's claims, Respondent may increase the size of the hazard class warning label to the required size without requiring additional review by EPA. Photographs of Respondent's packages illustrate that Respondent has several inches of additional white space on its labels in which to increase the size of the hazard class warning label.

In addition, Respondent claims it is not in violation for its failure to place the shipping name near the hazard class warning label because the product label dimensions are not adequate. Respondent's claims are belied by the photographs showing inches of white space around the hazard class warning label. Respondent also argues it cannot print on all portions of the label because the chemical could spill on the label and "distort the important information" contained on the label. Based on the photographs, it is difficult to see how this is the basis for Respondent's failure to place the shipping name next to the hazard class warning label. The corrosive warning label is located on the opposite side of the label from the pour spout. There are several square inches of white space above the hazard class warning label, which should be more than adequate space for the shipping name. Respondent should have no difficulty finding the space to print the proper shipping name near the hazard class warning label.

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[11] *See* EPA Pesticide Registration Notice 98-10 p.11 (Oct. 22, 1998) *available at* http://www.epa.gov/PR_Notices/pr98-10.pdf.

Respondent argues printing new product labels is prohibitively expensive. Respondent should have ensured it was in compliance with the HMR prior to printing the labels. Respondent attempts to argue that the failure of PHMSA to inform Respondent that its product labels were not in compliance with the HMR excuses Respondent's failure to have compliant labels. The omission of a violation during an inspection does not imply Respondent is in compliance. It is the responsibility of every person who offers or transports hazardous materials in commerce to ensure its own compliance. Respondent cannot rely upon periodic inspections by PHMSA to educate it as to the regulations.

Respondent submitted photographs of new corrosive hazard warning labels with the UN identification number and the shipping name adjacent to the warning label. Respondent also submitted photographs of the labels placed on the jerricans.

Violations 5 & 6:

In its response to the Notice, Respondent denied that it offered for transportation and transported a hazardous material in nonbulk packages that were not properly retested and requalified. During the inspection, however, Respondent stated it did not leak test each jerrican prior to refilling. Respondent stated it leak tested and marked jerricans every other year from the date of manufacture, in compliance with an exception to the requirement to leak test prior to refilling (49 C.F.R. § 173.28(b)(7)). The exception to the requirement to leak test prior to each refilling of the container is only available under a limited set of circumstances, which include the requirement that the container "is transported in a transport vehicle ... under the exclusive use of the refiller of the packaging."[12] Respondent admitted it sold the jerricans to resellers, who sold the jerricans to residential pool customers. Respondent knew it was not in compliance with the

[12] 49 C.F.R. § 173.28(b)(7)(iii).

exception, as the jerricans were not for its exclusive use. Because the exception did not apply, Respondent was required to leak test the jerricans prior to refilling.

After admitting it did not leak test each jerricans prior to refilling, Respondent stated it had properly marked jerricans it had leak tested. The inspector observed a jerrican manufactured in 1996, which did not have any markings to indicate the packaging had been leak tested.[13] The HMR require Respondent to mark a jerricans each time it is retested.

Respondent argues that it provided proof to the inspector that labels were on order and that it was in compliance. Although Respondent provided a copy of an order form for labels to indicate leak testing, merely ordering labels is insufficient. Respondent shipped filled jerricans during the two-day inspection, even though Respondent admitted that it had not leak tested all of the jerricans prior to refilling *and* did not properly mark the jerricans it had tested. Respondent cannot claim to have performed leak testing and claim compliance with the marking requirement when there is clear evidence (photographs) of refilled jerricans that are not marked. Respondent either did not leak test the jerricans or did not mark them after testing.

Respondent later provided photographs of its new labels with the leakproof testing markings. The photographs were too blurry to determine whether the labels are compliant. Respondent also provided photographs of "returned, empty containers with leak test labels still affixed." At least one of the jerricans in the photograph did not have a leak test label affixed to the handle.

Violation 7:

The HMR require an offeror to apply closures consistent with the manufacturer's instructions. Respondent is correct that there is no specific provision stating an offeror must

[13] The inspector observed jerricans manufactured in different years which were not marked as having been leak tested.

purchase a torque wrench; however, the HMR clearly state that "a person must perform all functions necessary to bring the package into compliance ... as identified by the packaging manufacturer."[14] Respondent cannot be certain it has closed a packaging in compliance with the manufacturer's instructions (when those instructions require closure to a specific torque), unless Respondent has a tool with which it can measure torque.

Most UN-standard packagings of the type used by Respondent require closure to a specific torque; however, I am unable to determine from the information in the case file what the manufacturer's instructions are for closure of the particular drums and cap combination Respondent was using. Therefore, I am dismissing this violation. Respondent must ensure it is closing the jerricans in accordance with the manufacturer's instructions, which includes closing the packagings to a specific torque if required by the manufacturer.

Violation 8:

The Notice stated Respondent had provided shipping papers which failed to include a shipper's certification, contained additional information in the basic description and failed to include a unit of measurement. In addition, the Notice stated Respondent indicated an incorrect packing group on its shipping papers.

Respondent denies the violation. Respondent continues to maintain its shipping papers include a unit of measurement.[15] The shipping papers included with the inspector's report and the shipping papers Respondent submitted as evidence of corrective action *clearly* do not have any unit of measurement on them. The shipping papers have a column "Net Weight," which contains values such as 5500, 5000, and 6000. There is a second column "Gross Weight" which contains the same values. Below the material descriptions, the shipping papers list "Total

[14] 49 C.F.R. § 173.22(a)(4).

[15] Respondent appears to be confusing a unit of measurement with the actual measurement. The violation is not for failure to state the weight of the material.

Weights." There is no unit of measurement (e.g., grams, kilograms, pounds, or ounces) anywhere on the page. Without a unit of measurement, the numeric values have no meaning and are of no use to an emergency responder. Respondent must correct its shipping papers to include a unit of measurement.[16]

Respondent admitted it may have "interspersed a single descriptive word between the proper shipping name and hazardous classification." Hazard communication requires attention to detail. The HMR require information to be provided in a specific format in order to provide rapid access to that information by emergency responders. Extraneous information may confuse emergency responders or may slow their access to the appropriate information. Although Respondent apparently believes its inclusion of extra information is not important, PHMSA has adopted the HMR in an effort to ensure the safe transportation of hazardous materials, and none of the regulations are trivial.

Respondent admitted it did not sign the shipper's certification prior to offering the May 21 shipment. Respondent claims the omission was the result of the inspector's presence at the facility. The inspector's presence is irrelevant. Respondent's personnel should know that no shipment of hazardous materials may be offered without certifying compliance with the HMR; therefore, no shipment may be released until the shipper's certification is signed. Respondent could have handled the situation in a variety of ways; however, the HMR do not permit Respondent to neglect signing the certification because of inconvenience. Furthermore, the shipping certification was not signed on any of the shipping papers Respondent provided to the inspector.

The HMR require Respondent to properly mark, label and describe a hazardous material. In this case, Respondent used an MSDS to determine the appropriate packing group. Respondent

[16] Based on the inspector's report, Respondent appears to be reporting weights in pounds.

did not classify the material, instead relying on the classification in a published MSDS. The inspector reviewed the MSDS and advised Respondent that the sodium hypochlorite solution should be classified as packing group II. Although the MSDS has a note stating that under Canadian regulations sodium hypochlorite solutions of greater than 7% are packing group II, the MSDS states that under U.S. DOT regulations, the appropriate classification is packing group III. Therefore, Respondent appears to have correctly described the material as packing group III.[17]

As stated in the Notice, Violation 8 combined four separate violations of the HMR into a single violation for failure to properly prepare shipping papers. Although Respondent did not improperly describe the material, I am not dismissing this violation because Respondent did fail to properly prepare its shipping papers. I am, however, reducing the baseline penalty for Violation 8 to $2,100, in keeping with the Guidelines for Civil Penalties.

Respondent provided copies of shipping papers prepared following the inspection. None of the shipping papers have a unit of measurement for the weight (e.g., pounds). Respondent delivered each of the shipments; therefore, a shipper's certification statement was not required. Therefore, the shipping papers Respondent submitted do not establish that any corrective action has been taken.

Violation 9:

Respondent states a male employee offered placards. The inspector's summary of his conversation with a female employee states she admitted that she did not offer placards to the customer picking up the shipment. The inspector also summarized a conversation with the customer in which the customer stated neither employee offered placards. Respondent did not contest the allegation that the customer drove off the premises without placards on its vehicle.

[17] This finding is based exclusively on the MSDS provided by Respondent. PHMSA is not making a determination regarding the proper classification of Respondent's sodium hypochlorite solution.

I am excluding the statement from the customer, which was made verbally outside the presence of Respondent, was not signed, and was not contemporaneous with the inspection. Most importantly, the customer's statement was made during an inspection of the customer's business. The inspector spoke with a female employee of Respondent but did not interview the warehouse worker who loaded the shipment onto the customer's truck.

The shipping paper for the shipment picked up by the customer has a box for the carrier to initial when offered placards.[17] There are no initials in the box; however, there is a signature below the box. It is not clear whether the signature indicates receipt of the goods or confirms that placards were offered. Therefore, there is insufficient evidence to conclude Respondent did not offer placards to the customer.[18]

Findings

Based on the facts detailed above, I find there is sufficient evidence to support a finding that Respondent knowingly violated the HMR as set forth in the opening to this Order with respect to Violations 1-6. 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.

Although there is sufficient evidence to support a finding that Respondent knowingly committed Violations 5 and 6, the language in the Notice was essentially the same for Violation 5 and Violation 6. The text of the inspection report indicated that Violation 5 was for a failure to perform leakproofness testing and that Violation 6 was for a failure to properly mark packagings

[17] Respondent submitted copies of shipping papers prepared following the inspection. Respondent cited the presence of a box for the carrier to initial when offered placards. This box does not demonstrate compliance. The shipping paper for the May 21 shipment at issue also had the box for the carrier to initial. Respondent should ensure any carrier picking up a shipment initials the box when placards are offered.

[18] This type of situation would not arise if the inspector obtained a signed statement from the employee at the time of the inspection.

which had been leakproofness tested; however, the Notice did not make this clear. The responses made by Respondent also indicate Respondent did not understand the distinction between these violations. Furthermore, the penalty proposed for Violation 6 is twice the normal baseline. The Notice only alleges one violation for Violation 6; therefore, the penalty should only reflect one count. Because of these deficiencies in the Notice, I find that Respondent did not receive adequate notice of the allegations underlying Violation 6. Accordingly, I am dismissing Violation 6.

I find there is insufficient evidence to support a finding that Respondent knowingly violated the HMR as set forth in the opening to this Order with respect to Violations 7 and 9. Finally, I find there is insufficient evidence to support a finding that Respondent misclassified a hazardous material on its shipping papers; however, there is sufficient evidence to support a finding that Respondent incorrectly prepared its shipping papers with respect to the basic description, the unit of measurement of the weight and the failure to sign the shipper's certification. Therefore, I find Respondent knowingly committed Violation 8.

Conclusion

Based on my review of the record, I have determined that Respondent committed six violations of the HMR. The baseline penalty for the six violations is $19,700. After mitigation for corrective action, the penalty is allocated as follows:

Violation No. 1: $2,700, reduced from $3,300 in the Notice;[19]
Violation No. 2: $1,650, as proposed in the Notice;
Violation No. 3: $5,500, as proposed in the Notice;
Violation No. 4: $850, reduced from $1,100 in the Notice;[20]
Violation No. 5: $3,675, reduced from $3,850 in the Notice;[21]
Violation No. 6: dismissed for inadequate notice;
Violation No. 7: dismissed for insufficient evidence;
Violation No. 8: $2,310, reduced from $3,850 in the Notice;[22] and
Violation No. 9: dismissed for insufficient evidence.

Although Respondent's most recent correspondence claimed financial hardship, Respondent has not provided any financial information to substantiate its claim.

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.

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 $16,685 for six violations of the HMR**. Recognizing Respondent's business may be seasonal, Respondent may contact the Office of Chief Counsel to arrange a payment plan; however, the initial payment of an arranged payment plan must be made within 30 days of the date of this Order.

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[19] The penalty reflects a twenty percent (20%) reduction for corrective action and a ten percent (10%) increase for a prior violation.
[20] The penalty reflects a fifteen percent (15%) reduction for corrective action. Because the inspector did not indicate to Respondent that the label was not compliant during the previous inspection, I am dropping the ten percent (10%) increase for a prior violation.
[21] The penalty reflects a five percent (5%) reduction for corrective action and a ten percent (10%) increase for a prior violation.
[22] The penalty reflects ten percent (10%) increase for a prior violation and the revised baseline to reflect the finding that Respondent did not misclassify the packing group of the material.

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.[23]

This Order constitutes written notification of these procedural rights.

4/5/06
Date

Joseph Ahern
Acting Chief Counsel

Enclosure

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[23] 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, 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. *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 5TH day of APRIL, 2006, the Undersigned served in the following manner the designated copies of this Order with attached addendums to each party listed below:

Chemical Equipment Labs of VA, Inc. Chestnut & Pine Streets Marcus Hook, PA 19018 Attn: Mr. Edward Morgan, President	Original Order with Enclosures Certified Mail – Return Receipt
Thomas Benjamin Huggett Morgan Lewis & Bockius LLP 1701 Market Street Philadelphia, PA 19103-2921	One Copy Certified Mail – Return Receipt
Mr. Doug Smith Office of Hazardous Materials Enforcement Washington, D.C. 20590	One Copy Internal E-Mail
Ms. Colleen Abbenhaus Office of Hazardous Materials Enforcement Eastern Region Office West Trenton, NJ 08628	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

W. J. Walker

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. RECEIVER'S ABA NO. 021030004	2. TYPE SUBTYPE (provided by sending bank)
3. SENDING BANK ARB NO. (provided by sending bank)	4. SENDING BANK REF NO. (provided by sending bank)
5. AMOUNT	6. SENDING BANK NAME (provided by sending bank)
7. RECEIVER NAME: TREAS NYC	8. PRODUCT CODE (Normally CTR, or sending bank)
9. BENEFICIAL (BNF)- AGENCY LOCATION CODE BNF=/ALC-69-14-0001	10. REASONS FOR PAYMENT *Example:* PHMSA Payment for Case #/Ticket

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.