



U.S. Department  
of Transportation

**Pipeline and Hazardous  
Materials Safety Administration**

Office of the  
Chief Counsel

1200 New Jersey Avenue, S.E.,  
PHC-10, Room E26-311  
Washington, D.C. 20590-0001  
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**Hazardous Materials Safety  
Law Division**

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**NOTICE OF PROBABLE VIOLATION**

Date Issued: FEB 26 2013

PHMSA Case No.: 12-0201-CR-SO

Respondent: Hagemeyer North America  
1460 Tobias Gadson Blvd,  
Charleston, SC 29407

ATTN: Lisa Mitchell, CEO

No. of Alleged Violations: 2

Total Proposed Assessment: \$9,600 (Includes a \$2,400 reduction for corrective action)

The Office of Chief Counsel of the Pipeline and Hazardous Materials Safety Administration (PHMSA) alleges that you (the Respondent named above) violated certain provisions of the Federal Hazardous Materials Transportation Law, 49 U.S.C. § 5101 *et seq.*, and/or the Hazardous Materials Regulations (HMR), 49 CFR Parts 171 - 180. PHMSA sets forth the specific allegations in Addendum A to this Notice.

What are the maximum and minimum civil penalties that PHMSA can assess? Federal law sets a maximum civil penalty of \$55,000 (or \$110,000 if the violation results in death, serious illness or severe injury, or substantial destruction of property) and a minimum civil penalty of \$250 (or \$495 if the violation concerns training) for each violation of the Federal hazardous materials transportation law or the HMR committed on or after December 31, 2009. Each day of a continuing violation by a shipper or transporter of hazardous materials constitutes a separate violation for which the maximum penalty may be imposed (49 U.S.C. § 5123(a)).

What factors does PHMSA consider when proposing and assessing a civil penalty? Federal law requires PHMSA to consider certain factors when proposing and assessing a civil penalty for a violation of Federal Hazardous Materials Transportation Law or the HMR. Please refer to Addendum B to this Notice for more information concerning these factors.

When is my response due? You must respond within thirty (30) days from the date you receive the Notice (49 CFR § 107.313(a)), unless you have made a written request for an extension, which must have been approved by PHMSA (49 CFR §107.313(c)). Due to security concerns, mail delivery from the United States Postal Service (USPS) is experiencing significant delays. As a result, you should allow at least 72 hours for delivery, even for overnight service by the USPS. To assure timely receipt, **PHMSA strongly encourages you to submit your response by e-mail, fax, or express mail.** A response received out of time will not be considered.

What are my response options? You may respond to this Notice in any of three ways:

- (1) Admit the alleged violations and pay the proposed assessment (49 CFR § 107.313(a)(1));
- (2) Send an informal response, which can include a request for an informal conference (49 CFR § 107.313(a)(2)); or
- (3) Request a formal hearing (49 CFR § 107.313(a)(3)).

PHMSA provides information on these options in Addendum B to this Notice and the Office of Chief Counsel's homepage (<http://hazmat.dot.gov>). PHMSA explains its procedures for assessing civil penalties and imposing compliance orders in 49 CFR §§ 107.307 - 107.331.

What happens if I fail to respond? You waive your right to contest the allegations made in Addendum A to this Notice if you fail to respond within thirty (30) days of receiving it (or by the end of any extension). Also, the Chief Counsel may make a finding of fact consistent with the allegations in this Notice and assess an appropriate civil penalty if you fail to respond within the applicable time frame.



Adam Horsley, Attorney  
Phone: (202) 366-8000  
[adam.horsley@dot.gov](mailto:adam.horsley@dot.gov)

Enclosures: Addendum A  
Addendum B  
Addendum C  
Case Exhibits (See attached CD - if you experience difficulty accessing the attached compact disk, please contact me for assistance.)

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

CC:

Rodger Ellis, Training and Quality Assurance Specialist  
Hagemeyer Technical Services  
309-D Cahaba Valley Parkway North  
Pelham, AL 35124

# **ADDENDUM A**

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PHMSA Case No. **12-0201-CR-SO**

## **GENERAL ALLEGATIONS**

### General Allegations/Averments

- A. On August 23, 2012, PHMSA's investigator conducted a compliance inspection at Respondent's facility in Pelham, Alabama.
- B. Ms. Lisa Scurlock, Customer Service Representative, and Mr. Rodger Ellis, Training and Quality Assurance Specialist, represented Respondent during the inspection and provided necessary documentation.
- C. Respondent is a U.S. DOT-approved cylinder requalifying test facility with a Requalification Identification Number (RIN) of D148. It performs requalification of DOT high pressure 3A, 3AA, and 3AL cylinders through hydrostatic testing. It also ships class 2 and 3 hazardous materials via highway on its own trucks and by commercial carriers.

## **SPECIFIC ALLEGATIONS**

### Probable Violation No. 1

Failure to condemn DOT-SP 9634 cylinders that showed permanent expansion in excess of the 5% limit prescribed by Section 7(b) of DOT-SP 9634, in violation of 49 CFR §§ 171.2(a), (c), (g), and (j), 180.205(b), and 180.205(i)(1)(vii), and DOT-SP 9634.

### Factual Allegations/Averments

- A. Pursuant to 49 CFR § 180.205(i)(1)(vii), a DOT special permit cylinder must be condemned when permanent expansion exceeds the limit in the applicable special permit, or the cylinder meets another criterion for condemnation in the applicable special permit.
- B. DOT-SP 9634, § 7(b) limits permanent expansion to 5 percent of total volumetric expansion at test pressure (See Exhibit 2 to Report No. 12296094). Section 7(b) states:

Each cylinder must be reinspected and hydrostatically retested every three years in accordance with § 180.209 as prescribed for DOT 3HT cylinders, except that the rejection elastic expansion criteria does not apply, **permanent volumetric expansion must not exceed 5 percent of total volumetric expansion at test pressure (emphasis added)** and retest dates must be steel stamped on the outer exposed metallic surface of the cylinder neck, or

marked on a label securely affixed to the cylinder and over coated with epoxy. Reheat treatment or repair of rejected cylinders is not authorized.

- C. During the documentation review, the investigator reviewed cylinder requalification records for the period of June 2011 through August 2012, including records related to DOT-SP 9634 cylinders.
- D. Respondent provided cylinder requalification records that documented requalification of DOT-SP 9634 cylinders that received a disposition code of "A", indicating passed cylinders that were returned to service, after the cylinders had exceeded 5% permanent expansion (See Exhibit 3 to Report No. 12296094):
  - 1. Requalification record dated August 22, 2012, line 8, related to DOT-SP 9634 cylinder, with a service pressure of 3,000 p.s.i.g., serial #DK52870, shows that the cylinder was tested at a test pressure of 5,000 p.s.i.g., with a permanent expansion of 6.7% (See Exhibit 3 to Report No. 12296094, Page 1); and
  - 2. Requalification record dated January 10, 2012, line 3, related to DOT-SP 9634 cylinder, with a service pressure of 3,000 p.s.i.g., serial #DK7472, shows that the cylinder was tested at a test pressure of 5,000 p.s.i.g., with a permanent expansion of 5.7% (See Exhibit 3 to Report No. 12296094, Page 6).
- E. On or about the date referenced in paragraph D above, Respondent failed to condemn DOT-SP 9634 cylinders that showed permanent expansion in excess of the 5% limit prescribed by Section 7(b) of DOT-SP 9634, in violation of 49 CFR §§ 171.2(a), (c), (g), and (j), 180.205(b), and 180.205(i)(1)(vii), and DOT-SP 9634.

- Please see Inspection/Investigation Report Number 12296094 at pages 3 - 4, and the exhibits that accompany this report, which are incorporated herein.

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#### Probable Violation No. 2

Failure to comply with the testing requirements of DOT-SP 11194 and maintain test records in accordance with 49 CFR 180.215(b)(2), in violation of 49 CFR §§ 171.2(a), (c), (g), & (j), 180.3(a), 180.205(b) & (c), 180.215(b)(2), and DOT-SP 11194, § 7(b)(2).

#### Factual Allegations/Averments

- A. Pursuant to 49 CFR §§ 171.2(g), no person may represent, mark, certify, sell, or offer a packaging or container as meeting the requirements of a special permit unless the packaging or container is manufactured, fabricated, marked, maintained, reconditioned, repaired, and retested in accordance with the applicable requirements of the special permit.

- B. DOT SP-11194, § 7(b)(2) states that a cylinder must be condemned if the elastic expansion exceeds the rejection elastic expansion (REE) as marked on the cylinder (See Exhibit 4 to Report No. 12296094).
- C. Respondent provided requalification records, dated August 1, 2011, that documented the requalification of three DOT-SP 11194 cylinders. The records do not list a rejection elastic expansion (REE) as required for testing criteria, indicating Respondent's failure to comply with the special permit requirements (See Exhibit 5 to Report No. 12296094):
1. Requalification record dated August 1, 2011, lines 1, 2, and 3, denoted testing of DOT-SP 11194 cylinders, serial numbers 6151-95745, serial number 6262-1965, and serial number 6151-95750, with service pressures of 4,500 p.s.i.g., and test pressures of 7,500 p.s.i.g., which do not reflect a REE value; all three (3) cylinders received a disposition code of "A" or "Return To Service" (page 1).
- D. On or about the date referenced in paragraph C above, Respondent failed to comply with the testing requirements of DOT-SP 11194 and maintain test records in accordance with 49 CFR 180.215(b)(2), in violation of 49 CFR §§ 171.2(a), (c), (g), & (j), 180.3(a), 180.205(b) & (c), 180.215(b)(2), and DOT-SP 11194, § 7(b)(2).

- Please see Inspection/Investigation Report Number 12296094 at pages 5 - 6, and the exhibits that accompany this report, which are incorporated herein.

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## **FACTS ALREADY CONSIDERED (UNDER 49 CFR § 107.331) IN SETTING PROPOSED PENALTIES**

### Prior Violations of the Hazardous Materials Regulations:

PHMSA increases proposed penalties when Respondent has committed a prior violation of the Federal Hazardous Materials Transportation Law or the HMR within the last six years, as determined through a civil penalty case, criminal case, or ticketing process (49 CFR § 107.331(d)). More specifically, "the general standards for increasing a baseline proposed penalty on the basis of prior violations are . . . (1) for each prior civil or criminal enforcement case -25% increase over pre-mitigation recommended penalty, and (2) for each prior ticket-10% increase over pre-mitigation recommended penalty" (49 CFR Part 107, Subpart D, Appendix A, Section IV, E).

According to PHMSA's records, Respondent has committed the following prior violations:

- (1) In PHMSA Case No. 09-0139-CR-SW, which closed on April 12, 2010, Respondent paid a \$7,961 civil penalty for failing to condemn special permit cylinders when permanent expansion exceeded the limit set by the special permit and failing to verify the accuracy of its equipment within  $\pm 1\%$  of its calibration cylinder's documented pressure and corresponding expansion values.

(2) In PHMSA Case No. 10-0019-CR-SW, which closed on January 12, 2011, Respondent paid a \$9,750 civil penalty for failing to condemn special permit cylinders when permanent expansion exceeded the limit set by the special permit and failing to prepare cylinder test records with the information required by 49 CFR 180.215.

**Based on these prior violations, the proposed penalty has been increased by 50% (as indicated below).**

Corrective Action:

An important purpose of PHMSA's enforcement program is to bring the regulated community into compliance with the Hazardous Materials Regulations, and to promote ongoing efforts by that community to maintain compliance. In determining the final penalty assessment, PHMSA considers documented evidence of actions taken by a Respondent to correct violations and ensure that they do not recur (49 CFR § 107.331 (g)).

Respondent provided correspondence September 20, 2012, addressing the corrective action it has taken in response to the probable violations resulting from the inspection. Respondent described and documented its corrective action as follows:

- Violation No.1: Respondent provided evidence that it has (1) recalled cylinders that exceeded permanent expansion during requalification and condemned them in accordance with the HMR; (2) retrained personnel on cylinder condemnation criteria, retesting procedures, and special permit requirements; and (3) is now testing cylinders in accordance with applicable Special Permit criteria (See Exhibit 6 to Report No. 12296094). Based on this information and documentation, the proposed penalty has been reduced by 20% (as indicated below).
- Violation No.2: Respondent provided evidence that it has (1) verified the REE on the three cylinders tested and ensured that the REE had not been exceeded; and (2) retrained personnel on applicable testing requirements and are now requalifying cylinders in accordance with applicable Special Permit criteria (See Exhibit 6 to Report No. 12296094).

Financial Status

Under 49 CFR §107.331 (e) and (f), the proposed penalty may be reduced if Respondent demonstrates that it is unable to pay that penalty, or if payment of the proposed penalty would affect Respondent's ability to continue in business. Respondent's poor financial condition may be a basis for reducing the proposed penalty; a healthy financial condition is *not* a basis for increasing the penalty.

PHMSA has no information that indicates that Respondent is unable to pay the proposed penalty. If Respondent believes it lacks the ability to pay the proposed penalty or that the proposed



penalty will affect Respondent's ability to continue in business, Respondent should submit a current balance sheet (certified if possible) or other evidence of its assets and liabilities.

**TOTAL CIVIL PENALTY PROPOSED**

Probable Violation	Maximum Possible Penalty	Baseline Penalty	Increase for Priors	Corrective Action	Proposed Penalty
1	\$55,000	\$8,000	\$4,000	\$2,400	\$9,600
2	\$55,000	\$1,000	\$500	N/A	PHMSA has determined that it will issue a warning in lieu of assessing a penalty for this violation. Respondent should continue taking appropriate actions to correct this violation, and work towards total compliance with the HMR. Recurrence of this violation, or any other violation of the HMR or the Federal hazardous material transportation law (49 U.S.C. §§ 5101 et seq.), may subject you to a future enforcement action.
<b>TOTAL</b>	<b>\$55,000</b>	<b>\$8,000</b>	<b>\$4,000</b>	<b>\$2,400</b>	<b>\$9,600</b>

# **ADDENDUM B**

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DEPARTMENT OF TRANSPORTATION  
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

How do I respond to this Notice of Probable Violation (Notice)?

You may respond to this Notice in any of three ways:

- (1) Pay the proposed assessment (49 C.F.R. § 107.315);
- (2) Send an informal response, which can include a request for an informal conference (§ 107.317); or
- (3) Request a formal hearing (§ 107.319).

How do I pay the proposed assessment?

You pay the proposed assessment by:

- (1) Sending a wire transfer, through the Federal Reserve Communications System (Fedwire), to the U.S. Treasury account (49 C.F.R. § 89.21(b)(3)). Addendum C contains the instructions for sending wire transfers. Questions concerning wire transfers should be directed to: Financial Operations Division (AMZ-341), ATTN: Ryan Incaudo, Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 269039, Oklahoma City, OK 73125 (Telephone No. 405-954-8893).

Or

- (2) Sending a certified check or money order if the penalty amount is \$10,000 or less. The certified check or money order must be payable to the "U.S. Department of Transportation" and must be mailed to the Chief, Financial Operations Division, Attn: Ryan Incaudo Federal Aviation Administration, Mike Monroney Aeronautical Center, AMZ-341, P.O. Box 269039, Oklahoma City, OK 73125.

Or

- (3) Using a credit card via the Internet. To pay electronically with a credit card, visit the following website address and follow the instructions:

<https://www.pay.gov/paygov/>

Where do I send my response?

You must address your informal response or formal hearing request to the attorney who issued the Notice at the following address:

Pipeline and Hazardous Materials Safety Administration  
Office of the Chief Counsel (PHC-10)  
Room E26-105  
U.S. Department of Transportation  
1200 New Jersey Avenue S.E.  
Washington, D.C. 20590

When is my response due? (§ 107.313)

You must respond to the Notice within thirty (30) days of the date you receive it. The attorney who issued the Notice may extend the 30-day period for your response if you ask for an extension, and show good cause, within the original 30-day period.

What happens if I do not respond? (§ 107.313)

If you fail to respond to the Notice within thirty (30) days of receiving it (or by the end of any extension), you will waive your right to contest the allegations made in Addendum A to the Notice. In addition, the Chief Counsel will issue a default Order finding the facts as alleged in the Notice and assessing the civil penalty as outlined within that notice.

May I propose a compromise offer? (§ 107.327)

Yes. At any time before an order is issued and referred to the Attorney General for collection, you may propose to compromise a civil penalty case by submitting a specific compromise offer amount to the attorney handling the case (§ 107.327). The Chief Counsel may also propose a compromise.

If a compromise is agreeable to all parties, the attorney handling the case will forward a compromise agreement to you for signature. This document will outline the terms of the joint agreement and you must return a signed original to the attorney handling the case within 30 days. After this agreement has been returned it will be signed by the assigned attorney and presented to the Chief Counsel with a request that the Chief Counsel adopt the terms of that agreement by issuing a Compromise Order (49 C.F.R. § 107.327(a)(1)). The terms of the agreement constitute an offer of compromise until accepted by the Chief Counsel. When you agree to a compromise, you give up your right to appeal the order issued by the Chief Counsel.

What should I include in my informal response? (§107.317)

Your informal response must contain written explanations, information or arguments that respond to the allegation(s), the amount of the proposed civil penalty, or the terms of a proposed compliance order. Provide complete documentation of your explanations and arguments. No specific format is required for an informal response.

May I request an informal conference? (§ 107.317)

Yes. You may request an informal conference as part of your informal response. Please describe the issues you want to discuss during the conference. After receiving your request, the attorney handling the case will contact you to arrange the conference. Normally the conference will be held by telephone, and the attorney handling the case and the inspector who conducted the compliance inspection will participate in the conference.

What happens after I submit an informal response to the Notice?

We will hold an informal conference if you have asked for one. Based on the Notice, the evidence supporting the Notice, any written explanations, information and documentation that you provide, and matters presented at a conference, the Chief Counsel decides the case. The Chief Counsel may issue an order finding all or some of the violation(s) alleged in the Notice or may withdrawal all or some of the alleged violation(s). If the Chief Counsel finds violation(s), the order will assess a civil penalty.

How do I appeal an order? (§ 107.325)

You may appeal an order to PHMSA's Administrator.

How do I request a formal hearing? (§ 107.319)

You must request a formal hearing within 30 days of the date that you receive the Notice. If you are granted an extension of time to respond to the Notice, you must submit a formal hearing request by the end of the extended time period. If you do not request a formal hearing within the specified time, you will waive your right to a formal hearing.

Your request for a formal administrative hearing must include the following:

- (1) The name and address of the respondent and any other person submitting the request;
- (2) A statement of which allegations of violations are not in dispute; and
- (3) A description of the issues that you will raise at the hearing. (The Administrative Law Judge will decide whether issues not raised in the request may be raised at the hearing.)

After receiving a request for a hearing that complies with these requirements, the Chief Counsel will request an Administrative Law Judge from the DOT Office of Hearings to preside over the hearing. Once an Administrative Law Judge is assigned, all further matters in the proceeding will be conducted by the Administrative Law Judge. Either you or PHMSA may appeal the decision of the Administrative Law Judge to PHMSA's Administrator.

How does PHMSA determine if I have committed a violation?

This is a civil penalty case and PHMSA uses the "knowingly" standard, which is defined in the Federal hazardous materials transportation law (See 49 U.S.C. 5123(a)(1)), in all civil penalty cases. The standard for a violation is similar to "negligence". After considering all the available information (including the additional information you provide in your response to the Notice), PHMSA must find either that (1) you had actual knowledge of the facts giving rise to the violation, or (2) you had imputed knowledge, of the facts giving rise to the violation, in that a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge. PHMSA does not need to find that you actually knew about, or intended to violate, requirements in the Federal hazardous material transportation law or the HMR.

What factors does PHMSA consider when proposing and assessing a civil penalty? (§ 107.331)

PHMSA considers the following factors when proposing and assessing a civil penalty for a violation of the regulations:

- (1) The nature and circumstances of the violation(s);
- (2) The extent and gravity of the violation(s);
- (3) The degree of your culpability;
- (4) Your history, if any, of prior offenses;
- (5) Your ability to pay the penalty;

- (6) The effect of the penalty on your ability to continue in business;
- (7) The size of your business, and
- (8) Other matters as justice may require.

The nature and the timeliness of any corrective action you take to prevent future violations of a similar nature will be considered under item No. 8. However, you must submit documented evidence of that corrective action to the PHMSA attorney. If you have submitted documented evidence regarding any of these factors during PHMSA's investigation of the alleged violation(s), and that documentation is referenced in the Notice or accompanying Inspection/Investigation Report, you do not need to resubmit it.

Under the Small Business Regulatory Enforcement Fairness Act (SBREFA), PHMSA must consider the rights of small entities in enforcement actions. PHMSA's hazardous materials enforcement program has been designed to consider small businesses and the penalties that PHMSA proposes and assesses are generally considered appropriate for small businesses. PHMSA takes into consideration the size of the company when proposing and assessing a civil penalty.

However, special consideration may not be given to a small business if:

- (1) The small business has not corrected its violation(s) within a reasonable time;
- (2) The small business has committed one or more prior violations of the HMR;
- (3) The violations involve willful conduct;
- (4) The violations pose serious threats to health, safety or the environment; or
- (5) The small business has not made a good faith effort to comply with the law.

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. Our objective is to ensure a fair regulatory enforcement environment.

You have a right to contact the Small Business Administration's national Ombudsman at 1-888-REG-FAIR (1-888-734-3247) or [www.sbs.gov/ombudsman](http://www.sbs.gov/ombudsman) regarding the fairness of the compliance and enforcement activities by this agency.

The Pipeline and Hazardous Materials Safety Administration strictly forbids retaliatory acts by its employees. As such, you should feel confident that you will not be penalized for expressing your concerns about compliance and enforcement activities.

Where can I find more information on how PHMSA handles hazardous materials enforcement cases?

A more detailed discussion of these procedures is in 49 C.F.R. §§ 107.301 through 107.333. These procedures are also on the Office of the Chief Counsel's home page at <http://hazmat.dot.gov>.



# ADDENDUM C

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**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=/AC-69140001	10. <u>REASONS FOR PAYMENT</u> <i>Example:</i> 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, which must be used for all wire transfer to the Treasury Department.

**Block #9** - BENEFICIAL - AGENCY LOCATION CODE - "BNF=/AC-69140001"  
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.