



U.S. Department
of Transportation

**Pipeline and Hazardous
Materials Safety Administration**

Office of
Chief Counsel

1200 New Jersey Avenue, S.E.,
PHC-10, Room E26-331
Washington, D.C. 20590-0001
Phone: (202)366-5199
Fax: (202) 366-7041
E-mail: vincent.lopez@dot.gov

**Hazardous Materials Safety
Law Division**

NOTICE OF PROBABLE VIOLATION

Date Issued:

DEC - 3 2007

PHMSA Case No. 07-0117-CR-SO

Respondent: Desert Cylinder Recertified
28743 US Highway 58
Barstow, CA 92311

ATTN: Mr. Cesar Gallardo, Owner

No. of Alleged Violations: 3

Maximum Possible Assessment: \$150,000

Total Proposed Assessment: **\$10,160** (Includes a \$2,540 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 C.F.R. 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 \$50,000 (or \$100,000 if the violation results in death, serious illness or severe injury, or substantial destruction of property) and a minimum civil penalty of \$250 (or \$450 if the violation concerns training) for each violation of the Federal hazardous materials transportation law or the HMR committed on or after August 10, 2005. 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 C.F.R. § 107.313(a)), unless you have made a written request for an extension, which must have been approved by PHMSA (49 C.F.R. §107.313(c)). Due to security concerns, mail delivery from the United States Postal Service (USPS) is experiencing significant delays.

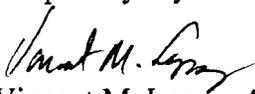
As a result, you should allow at least 72 hours for delivery, even for overnight service by the USPS. To assure timely receipt, **PHMSA strongly encourages you to submit your response by e-mail, fax, or express mail.** A response received out of time will not be considered.

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 C.F.R. § 107.313(a)(1));
- (2) Send an informal response, which can include a request for an informal conference (49 C.F.R. § 107.313(a)(2)); or
- (3) Request a formal hearing (49 C.F.R. § 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 C.F.R. § 107.307 through 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.


Vincent M. Lopez, Attorney
Phone: (202) 366-5199
vincent.lopez@dot.gov

Enclosures: Addendum A
Addendum B
Addendum C
Case Exhibits

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

PHMSA Case No. 07-0117-CR-SO

SPECIFIC ALLEGATIONS

Probable Violation No. 1

Representing, certifying and marking DOT specification cylinders as having been successfully re-qualified, without holding a requalifiers identification number (RIN) issued by the US DOT PHMSA Approvals office and stamping a RIN number which was expired, in violation of 49 C.F.R. §§ 171.2(c), (h), (j) and 180.205(b).

Factual Allegations/Averments

A. On June 26, 2007 an Inspector from the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Hazardous Materials Enforcement, conducted a compliance inspection at Respondent's Barstow, CA facility.

B. During the course of the inspection referenced in paragraph A above, the Inspector observed and photographed cylinders stamped with an invalid RIN number.

C. During the course of the inspection referenced in paragraph A above, the Inspector reviewed Respondent's recent cylinder retest records.

D. The Inspector's review of Respondent's cylinder retest records referenced in paragraph C above revealed that Respondent represented, certified, and marked DOT specification cylinders as having been successfully re-qualified, without holding a requalifiers identification number (RIN) issued by the US DOT PHMSA Approvals office and stamping a RIN number which was expired.

- Please see Inspection/Investigation Report Number 07465054 at pages 3 – 4, and the exhibits that accompany this report, which are incorporated herein.

Probable Violation No. 2

Representing, certifying, and marking cylinders as having been successfully re-qualified per exemption requirements, while failing to comply with the requirements and having expired exemptions, in violation of 49 C.F.R. §§ 171.2(c), (h), (j), 180.205(c), 180.215(a)(5) and SP-9421 & SP-9370.

Factual Allegations/Averments

A. On June 26, 2007 an Inspector from the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Hazardous Materials Enforcement, conducted a compliance inspection at Respondent's Barstow, CA facility.

B. During the course of the inspection referenced in paragraph A above, the Inspector reviewed Respondent's recent cylinder retest records.

C. The Inspector's review of Respondent's cylinder retest records referenced in paragraph B above revealed that Respondent retested cylinders subject to Special Permits (Exemptions) DOT-E 9421 and DOT-E 9370.

D. The Inspector requested copies of the special permits referenced in paragraph C above and Respondent's representative provided the Inspector with the requested special permits.

E. The Inspector's review of the special permits referenced in paragraph C above revealed that the special permits were expired.

F. On or about July 6, 2006, Respondent represented, certified, and marked cylinders as having been successfully re-qualified per exemption requirements, while failing to comply with the requirements and having expired exemptions, in violation of the Hazardous Materials Regulations (HMR).

- Please see Inspection/Investigation Report Number 07465054 at pages 5 – 6, and the exhibits that accompany this report, which are incorporated herein.

Probable Violation No. 3

Representing, certifying, and marking cylinders as having been successfully re-qualified, while failing to maintain complete and accurate daily records of retest, in violation of 49 C.F.R. §§ 171.2(c), (h), (j) and 180.215(b)(1) & (2).

Factual Allegations/Averments

A. On June 26, 2007 an Inspector from the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Hazardous Materials Enforcement, conducted a compliance inspection at Respondent's Barstow, CA facility.

B. During the course of the inspection referenced in paragraph A above, the Inspector reviewed Respondent's recent cylinder retest records.

C. The Inspector's review of Respondent's cylinder retest records referenced in paragraph B above revealed that Respondent represented, certified, and marked cylinders as having been successfully re-qualified, while failing to maintain complete and accurate daily records of retest, in violation of the HMR.

- Please see Inspection/Investigation Report Number 07465054 at page 7, and the exhibits that accompany this report, which are incorporated herein.

FACTS ALREADY CONSIDERED (UNDER 49 C.F.R. § 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 C.F.R. § 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 C.F.R. Part 107, Subpart D, Appendix A, Section IV, E).

PHMSA's records do not contain any prior violations by Respondent and PHMSA did not consider any prior violations in determining the proposed assessment for the violation in this Notice.

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 C.F.R. § 107.331 (g)).

Respondent provided correspondence, undated, 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 indicated that it was seeking a new RIN through the US DOT Office of Special Permits and Approvals. Respondent submitted a copy of its RIN application as further evidence of its corrective action.

- Violation No.: 2: Respondent indicated that it had obtained current copies of the subject special permits. Respondent submitted copies of the special permits as further evidence of its corrective action.
- Violation No.: 3: Respondent indicated that it was maintaining complete and accurate retest records. Respondent submitted a sample calibration log and updated retest records as further evidence of its corrective action.

Financial Status

Under 49 C.F.R. §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	\$50,000	\$7,200	\$0	\$1,440	\$5,760
2	\$50,000	\$2,000 - \$6,000	\$0	\$800	\$3,200
3	\$50,000	\$1,000 - \$3,000	\$0	\$300	\$1,200
TOTAL	\$150,000	\$10,200 – 16,200	\$0	\$2,540	\$10,160