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must be filed with the Chief Counsel, in the same manner specified for filing an application in §107.215(b), within 20 days of publication of the determination in the FEDERAL REGISTER.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual or legal error alleged. If the petition requests consideration of information that was not previously made available to the Chief Counsel, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the waiver of preemption proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Chief Counsel within 20 days. The petition filed with the Chief Counsel must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Chief Counsel will publish the decision on the petition for reconsideration or notice of the decision in the FEDERAL REGISTER, at which time the decision on the petition for reconsideration becomes a final agency action.

[Amdt. 107–25, 57 FR 20429, May 13, 1992, as amended by Amdt. 107–38, 61 FR 21099, May 9, 1996; 71 FR 30068, May 25, 2006]

§107.227 Judicial review.

A party to a proceeding under §107.215(a) may seek review of a determination of the Chief Counsel by filing a petition, within 60 days after the determination becomes final, in the United States Court of Appeals for the District of Columbia or in the Court of Appeals for the United States for the circuit in which the person resides or has its principal place of business.

[71 FR 30068, May 25, 2006]

Subpart D—Enforcement

SOURCE: Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, unless otherwise noted.

§107.301 Delegated authority for enforcement.

Under redelegation from the Administrator, Pipeline and Hazardous Materials Safety Administration, the Associate Administrator for Hazardous Materials Safety and the Office of the Chief Counsel exercise their authority for enforcement of the Federal hazardous material transportation law, this subchapter, and subchapter C of this subchapter, in accordance with §1.53 of this title.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994]

§107.303 Purpose and scope.

This subchapter describes the various enforcement authorities exercised by the Associate Administrator for Hazardous Materials Safety and the Office of Chief Counsel and the associated sanctions and prescribes the procedures governing the exercise of those authorities and the imposition of those sanctions.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–15, 51 FR 34986, Oct. 1, 1986; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991]

§107.305 Investigations.

(a) *General.* In accordance with its delegated authority under part 1 of this title, the Associate Administrator may initiate investigations relating to compliance by any person with any provisions of this subchapter or subchapter C of this chapter, or any special permit, approval, or order issued thereunder, or any court decree relating thereto. The Associate Administrator encourages voluntary production of documents in accordance with and subject to §105.45, and hearings may be conducted, and depositions taken pursuant to 49 U.S.C. 5121(a). The Associate Administrator may conduct investigative conferences and hearings in the course of any investigation.

(b) *Investigations and Inspections.* Investigations under 49 U.S.C. 5121(a) are conducted by personnel duly authorized for that purpose by the Associate Administrator. Inspections under 49

U.S.C. 5121(c) are conducted by Hazardous Materials Enforcement Specialists or Hazardous Materials Compliance Investigators, also known as ''hazmat investigators'' or ''investigators,'' whom the Associate Administrator has designated for that purpose.

(1) An investigator will, on request, present his or her credentials for examination, but the credentials may not be reproduced.

(2) An investigator may administer oaths and receive affirmations in any matter under investigation by the Associate Administrator.

(3) An investigator may gather information by reasonable means including, but not limited to, interviews, statements, photocopying, photography, and video- and audio-recording.

(4) With concurrence of the Director, Field Operations, Pipeline and Hazardous Materials Safety Administration, an investigator may issue a subpoena for the production of documentary or other tangible evidence if, on the basis of information available to the investigator, the documents and evidence materially will advance a determination of compliance with this subchapter or subchapter C. Service of a subpoena shall be in accordance with §105.50. A person to whom a subpoena is directed may seek review of the subpoena by applying to the Office of Chief Counsel in accordance with §105.55(a). A subpoena issued under this paragraph may be enforced in accordance with §105.55(b).

(c) *Notification.* Any person who is the subject of an Associate Administrator investigation and who is requested to furnish information or documentary evidence is notified as to the general purpose for which the information or evidence is sought.

(d) *Termination.* When the facts disclosed by an investigation indicate that further action is unnecessary or unwarranted at that time, the person being investigated is notified and the investigative file is closed without prejudice to further investigation by the Associate Administrator.

(e) *Confidentiality.* Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation, shall remain confidential under the investigatory file exception, or other appropriate exception, to the public disclosure requirements of 5 U.S.C. 552.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–38, 61 FR 21099, May 9, 1996; 66 FR 45377, Aug. 28, 2001; 67 FR 61011, Sept. 27, 2002; 73 FR 4711, Jan. 28, 2008; 76 FR 56311, Sept. 13, 2011]

COMPLIANCE ORDERS AND CIVIL PENALTIES

§ 107.307 General.

(a) When the Associate Administrator and the Office of Chief Counsel have reason to believe that a person is knowingly engaging or has knowingly engaged in conduct which is a violation of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any exemption, special permit, or order issued thereunder, for which the Associate Administrator or the Office of Chief Counsel exercise enforcement authority, they may—

(1) Issue a warning letter, as provided in §107.309;

(2) Initiate proceedings to assess a civil penalty, as provided in either §§107.310 or 107.311;

(3) Issue an order directing compliance, regardless of whether a warning letter has been issued or a civil penalty assessed; and

(4) Seek any other remedy available under the Federal hazardous material transportation law.

(b) In the case of a proceeding initiated for failure to comply with an exemption or special permit, the allegation of a violation of a term or condition thereof is considered by the Associate Administrator and the Office of Chief Counsel to constitute an allegation that the special permit holder or party to the special permit is failing, or has failed to comply with the underlying regulations from which relief was granted by the special permit.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–36, 61 FR 7183, Feb. 26, 1996; 66 FR 45377, Aug. 28, 2001; 70 FR 73162, Dec. 9, 2005]

§ 107.309 Warning letters.

(a) The Associate Administrator may issue a warning letter to any person whom the Associate Administrator believes to have committed a probable violation of the Federal hazardous material transportation law or any provision of this subchapter, subchapter C of this chapter, or any special permit issued thereunder.

(b) A warning letter issued under this section includes:

(1) A statement of the facts upon which the Associate Administrator bases its determination that the person has committed a probable violation;

(2) A statement that the recurrence of the probable violations cited may subject the person to enforcement action; and

(3) An opportunity to respond to the warning letter by submitting pertinent information or explanations concerning the probable violations cited therein.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–15, 51 FR 34986, Oct. 1, 1986; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–36, 61 FR 7183, Feb. 26, 1996; 66 FR 45377, Aug. 28, 2001]

§ 107.310 Ticketing.

(a) For an alleged violation that does not have a direct or substantial impact on safety, the Associate Administrator may issue a ticket.

(b) The Associate Administrator issues a ticket by mailing it by certified or registered mail to the person alleged to have committed the violation. The ticket includes:

(1) A statement of the facts on which the Associate Administrator bases the conclusion that the person has committed the alleged violation;

(2) The maximum penalty provided for by statute, the proposed full penalty determined according to PHMSA's civil penalty guidelines and the statutory criteria for penalty assessment, and the ticket penalty amount; and

(3) A statement that within 45 days of receipt of the ticket, the person must pay the penalty in accordance with paragraph (d) of this section, make an informal response under § 107.317, or request a formal administrative hearing under § 107.319.

(c) If the person makes an informal response or requests a formal administrative hearing, the Associate Administrator forwards the inspection report, ticket and response to the Office of the Chief Counsel for processing under §§ 107.307–107.339, except that the Office of the Chief Counsel will not issue a Notice of Probable Violation under § 107.311. The Office of the Chief Counsel may impose a civil penalty that does not exceed the proposed full penalty set forth in the ticket.

(d) Payment of the ticket penalty amount must be made in accordance with the instructions on the ticket.

(e) If within 45 days of receiving the ticket the person does not pay the ticket amount, make an informal response, or request a formal administrative hearing, the person has waived the right to make an informal response or request a hearing, has admitted the violation and owes the ticket penalty amount to PHMSA.

[Amdt. 107–36, 61 FR 7183, Feb. 26, 1996, as amended at 66 FR 45377, Aug. 28, 2001]

§ 107.311 Notice of probable violation.

(a) The Office of Chief Counsel may serve a notice of probable violation on a person alleging the violation of one or more provisions of the Federal hazardous material transportation law or any provision of this subchapter or subchapter C of this chapter, or any special permit, or order issued thereunder.

(b) A notice of probable violation issued under this section includes the following information:

(1) A citation of the provisions of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or the terms of any special permit issued thereunder which the Office of Chief Counsel believes the respondent is violating or has violated.

(2) A statement of the factual allegations upon which the demand for remedial action, a civil penalty, or both, is based.

(3) A statement of the respondent's right to present written or oral explanations, information, and arguments in answer to the allegations and in mitigation of the sanction sought in the notice of probable violation.

(4) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing.

(5) In addition, in the case of a notice of probable violation proposing a compliance order, a statement of the proposed actions to be taken by the respondent to achieve compliance.

(6) In addition, in the case of a notice of probable violation proposing a civil penalty:

(i) A statement of the maximum civil penalty for which the respondent may be liable;

(ii) The amount of the preliminary civil penalty being sought by the Office of Chief Counsel, constitutes the maximum amount the Chief Counsel may seek throughout the proceeding; and

(iii) A description of the manner in which the respondent makes payment of any money due the United States as a result of the proceeding.

(c) The Office of Chief Counsel may amend a notice of probable violation at any time before issuance of a compliance order or an order assessing a civil penalty. If the Office of Chief Counsel alleges any new material facts or seeks new or additional remedial action or an increase in the amount of the proposed civil penalty, it issues a new notice of probable violation under this section.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107–24, 56 FR 8624, Feb. 28, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–35, 60 FR 49108, Sept. 21, 1995; Amdt. 107–36, 61 FR 7184, Feb. 26, 1996]

§ 107.313 Reply.

(a) Within 30 days of receipt of a notice of probable violation, the respondent must either:

(1) Admit the violation under § 107.315;

(2) Make an informal response under § 107.317; or

(3) Request a hearing under § 107.319.

(b) Failure of the respondent to file a reply as provided in this section constitutes a waiver of the respondent's right to appear and contest the allegations and authorizes the Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the notice of probable violation and issue an order directing compliance or assess a civil penalty, or, if proposed in the notice, both. Failure to request a hearing under paragraph (a)(3) of this section constitutes a waiver of the respondent's right to a hearing.

(c) Upon the request of the respondent, the Office of Chief Counsel may, for good cause shown and filed within the 30 days prescribed in the notice of probable violation, extend the 30-day response period.

§ 107.315 Admission of violations.

(a) In responding to a notice of probable violation issued under § 107.311, the respondent may admit the alleged violations and agree to accept the terms of a proposed compliance order or to pay the amount of the preliminarily assessed civil penalty, or, if proposed in the notice, both.

(b) If the respondent agrees to the terms of a proposed compliance order, the Chief Counsel issues a final order prescribing the remedial action to be taken by the respondent.

(c) Payment of a civil penalty, when the amount of the penalty exceeds $10,000, must be made by wire transfer, through the Federal Reserve Communications System (Fedwire), to the account of the U.S. Treasury. Detailed instructions on making payments by wire transfer may be obtained from the Financial Operations Division (AMZ–120), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125.

(d) Payment of a civil penalty, when the amount of the penalty is $10,000 or less, must be made either by wire transfer, as set forth in paragraph (c) of this section, or certified check or money order payable to ''U.S. Department of Transportation'' and submitted to the Financial Operations Division (AMZ–120), Federal Aviation Administration, Mike Monroney Aeronautical Center, P.O. Box 25082, Oklahoma City, OK 73125.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–23, 57 FR 45453, Oct. 1, 1992; Amdt. 107–29, 58 FR 51527, Oct. 1, 1993; Amdt. 107–38, 61 FR 21100, May 9, 1996; 68 FR 52848, Sept. 8, 2003]

§ 107.317 Informal response.

(a) In responding to a notice of probable violation under §107.311, the respondent may submit to the official who issued the notice, written explanations, information, or arguments in response to the allegations, the terms of a proposed compliance order, or the amount of the preliminarily assessed civil penalty.

(b) The respondent may include in his informal response a request for a conference. Upon the request of the respondent, the conference may be either in person or by telephone. A request for a conference must set forth the issues the respondent will raise at the conference.

(c) Upon receipt of a request for a conference under paragraph (b) of this section, the Chief Counsel's Office, in consultation with the Associate Administrator, arranges for a conference as soon as practicable at a time and place of mutual convenience.

(d) The respondent's written explanations, information, and arguments as well as the respondent's presentation at a conference are considered by the Chief Counsel in reviewing the notice of probable violation. Based upon a review of the proceeding, the Chief Counsel may dismiss the notice of probable violation in whole or in part. If he does not dismiss it in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–23, 56 FR 66157, Dec. 20, 1991; 66 FR 45377, Aug. 28, 2001]

§ 107.319 Request for a hearing.

(a) In responding to a notice of probable violation under §107.311, the respondent may request a formal administrative hearing on the record before an Administrative Law Judge (ALJ) obtained by the Office of the Chief Counsel.

(b) A request for a hearing under paragraph (a) of this section must:

(1) State the name and address of the respondent and of the person submitting the request if different from the respondent;

(2) State which allegations of violations, if any, are admitted; and

(3) State generally the issues to be raised by the respondent at the hearing. Issues not raised in the request are not barred from presentation at the hearing; and

(4) Be addressed to the official who issued the notice.

(c) After a request for a hearing that complies with the requirements of paragraph (b) of this section, the Chief Counsel obtains an ALJ to preside over the hearing and notifies the respondent of this fact. Upon assignment of an ALJ, further matters in the proceeding generally are conducted by and through the ALJ, except that the Chief Counsel and respondent may compromise or settle the case under §107.327 of this subpart without order of the ALJ or voluntarily dismiss the case under Rule 41(a)(1) of the Federal Rules of Civil Procedure without order of the ALJ; in the event of such a compromise, settlement or dismissal, the Chief Counsel expeditiously will notify the ALJ thereof.

(d) At any time after requesting a formal administrative hearing but prior to the issuance of a decision and final order by the ALJ, the respondent may withdraw such request in writing, thereby terminating the jurisdication of the ALJ in the case. Such a withdrawal constitutes an irrevocable waiver of respondent's right to such a hearing on the facts, allegations, and proposed sanction presented in the notice of probable violation to which the request for hearing relates.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 48 FR 17094, Apr. 21, 1983; Amdt. No. 107–19, 54 FR 22899, May 30, 1989]

§ 107.321 Hearing.

(a) To the extent practicable, the hearing is held in the general vicinity of the place where the alleged violation occurred or at a place convenient to the respondent. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim.

(b) Hearings are conducted in accordance with the Federal Rules of Evidence and Federal Rules of Civil Procedure; however, the ALJ may modify them as he determines necessary in the interest of a full development of the facts. In addition, the ALJ may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided by § 105.45;

(3) Adopt procedures for the submission of motions, evidence, and other documents pertinent to the proceeding;

(4) Take or cause depositions to be taken;

(5) Rule on offers of proof and receive relevant evidence;

(6) Examine witnesses at the hearing;

(7) Convene, recess, reconvene, adjourn and otherwise regulate the course of the hearing;

(8) Hold conferences for settlement, simplification of the issues, or any other proper purpose; and

(9) Take any other action authorized by, or consistent with, the provisions of this subpart and permitted by law which may expedite the hearing or aid in the disposition of an issue raised therein.

(c) The official who issued the notice of probable violation, or his representative, has the burden of proving the facts alleged therein.

(d) The respondent may appear and be heard on his own behalf or through counsel of his choice. The respondent or his counsel may offer relevant information including testimony which he believes should be considered in opposition to the allegations or which may bear on the sanction being sought and conduct such cross-examination as may be required for a full disclosure of the facts.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 67 FR 61011, Sept. 27, 2002]

§ 107.323 ALJ's decision.

(a) After consideration of all matters of record in the proceeding, the ALJ shall issue an order dismissing the notice of probable violation in whole or in part or granting the sanction sought by the Office of Chief Counsel in the notice. If the ALJ does not dismiss the notice of probable violation in whole, he issues an order directing compliance or assessing a civil penalty, or, if proposed in the notice, both. The order includes a statement of the findings and conclusions, and the reasons therefore, on all material issues of fact, law, and discretion.

(b) If, within 20 days of receipt of an order issued under paragraph (a) of this section, the respondent does not submit in writing his acceptance of the terms of an order directing compliance, or, where appropriate, pay a civil penalty, or file an appeal under § 107.325, the case may be referred to the Attorney General with a request that an action be brought in the appropriate United States District Court to enforce the terms of a compliance order or collect the civil penalty.

§ 107.325 Appeals.

(a) *Hearing proceedings.* A party aggrieved by an ALJ's decision and order issued under § 107.323, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, Office of the Administrator, Pipeline and Hazardous Materials Safety Administration, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(b) *Non-Hearing proceedings.* A respondent aggrieved by an order issued under § 107.317, may file a written appeal in accordance with paragraph (c) of this section with the Administrator, Office of the Administrator, Pipeline and Hazardous Materials Safety Administration, East Building, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(c) An appeal of an order issued under this subpart must:

(1) Be filed within 20 days of receipt of the order by the appealing party; and

(2) State with particularity the findings in the order that the appealing party challenges, and include all information and arguments pertinent thereto.

(d) If the Administrator, PHMSA, affirms the order in whole or in part, the respondent must comply with the terms of the decision within 20 days of the respondent's receipt thereof, or within the time prescribed in the order. If the respondent does not comply with the terms of the decision within 20 days of receipt, or within the time prescribed in the order, the case may be referred to the Attorney General for action to enforce the terms of the decision.

(e) The filing of an appeal stays the effectiveness of an order issued under §107.317 or §107.323. However, if the Administrator, PHMSA, determines that it is in the public interest, he may keep an order directing compliance in force pending appeal.

[70 FR 56090, Sept. 23, 2005, as amended at 72 FR 55683, Oct. 1, 2007]

§107.327 Compromise and settlement.

(a) At any time before an order issued under §107.317 or §107.323 is referred to the Attorney General for enforcement, the respondent or the Office of Chief Counsel may propose a compromise as follows:

(1) In civil penalty cases, the respondent or Chief Counsel may offer to compromise the amount of the penalty by submitting an offer for a specific amount to the other party. An offer of compromise by the respondent shall be submitted to the Chief Counsel who may, after consultation with the Associate Administrator, accept or reject it.

(i) A compromise offer stays the running of any response period then outstanding.

(ii) If a compromise is agreed to by the parties, the respondent is notified in writing. Upon receipt of payment by Office of Chief Counsel, the respondent is notified in writing that acceptance of payment is in full satisfaction of the civil penalty proposed or assessed, and Office of Chief Counsel closes the case with prejudice to the respondent.

(iii) If a compromise cannot be agreed to, the respondent is notified in writing and is given 10 days or the amount of time remaining in the then outstanding response period, whichever is longer, to respond to whatever action was taken by the Office of Chief Counsel or the Administrator, PHMSA.

(2) In compliance order cases, the respondent may propose a consent agreement to the Chief Counsel. If the Chief Counsel accepts the agreement, he issues an order in accordance with its terms. If the Chief Counsel rejects the agreement, he directs that the proceeding continue. An agreement submitted to the Chief Counsel must include:

(i) A statement of any allegations of fact which the respondent challenges;

(ii) The reasons why the terms of a compliance order or proposed compliance order are or would be too burdensome for the respondent, or why such terms are not supported by the record in the case;

(iii) A proposed compliance order suitable for issuance by the Chief Counsel;

(iv) An admission of all jurisdictional facts; and

(v) An express waiver of further procedural steps and all right to seek judicial review or otherwise challenge or contest the validity of the order.

(b) Notwithstanding paragraph (a)(1) of this section, the respondent or Office of Chief Counsel may propose to settle the case. If the Chief Counsel agrees to a settlement, the respondent is notified and the case is closed without prejudice to the respondent.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended at 50 FR 45730, Nov. 1, 1985; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107–29, 58 FR 51527, Oct. 1, 1993; 66 FR 45377, Aug. 28, 2001]

§107.329 Maximum penalties.

(a) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or a special permit or approval issued under this subchapter applicable to the transportation of hazardous materials or the causing of them to be transported or shipped is liable for a civil penalty of not more than $55,000 and not less than $250 for each violation, except the maximum civil penalty is $110,000 if the violation results in death, serious illness or severe injury to any person or substantial destruction of property, and a minimum $495 civil penalty applies to a violation relating to training. When the violation is a continuing one, each day of the violation constitutes a separate offense.

(b) A person who knowingly violates a requirement of the Federal hazardous material transportation law, an order issued thereunder, this subchapter, subchapter C of this chapter, or a special permit or approval issued under

this subchapter applicable to the design, manufacture, fabrication, inspection, marking, maintenance, reconditioning, repair or testing of a package, container, or packaging component which is represented, marked, certified, or sold by that person as qualified for use in the transportation of hazardous materials in commerce is liable for a civil penalty of not more than $55,000 and not less than $250 for each violation, except the maximum civil penalty is $110,000 if the violation results in death, serious illness or severe injury to any person or substantial destruction of property, and a minimum $495 civil penalty applies to a violation relating to training.

[71 FR 8487, Feb. 17, 2006, as amended at 74 FR 68702, Dec. 29, 2009; 75 FR 53596, Sept. 1, 2010]

§ 107.331 Assessment considerations.

After finding a knowing violation under this subpart, the Office of Chief Counsel assesses a civil penalty taking the following into account:

(a) The nature and circumstances of the violation;

(b) The extent and gravity of the violation;

(c) The degree of the respondent's culpability;

(d) The respondent's prior violations;

(e) The respondent's ability to pay;

(f) The effect on the respondent's ability to continue in business; and

(g) Such other matters as justice may require.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–30, 58 FR 50500, Sept. 27, 1993; Amdt. 107–38, 61 FR 21100, May 9, 1996]

CRIMINAL PENALTIES

§ 107.333 Criminal penalties generally.

A person who knowingly violates § 171.2(l) of this title or willfully or recklessly violates a requirement of the Federal hazardous material transportation law or a regulation, order, special permit, or approval issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both, except the maximum amount of imprisonment shall be 10 years in any case in which the violation involves the release of a hazardous material which results in death or bodily injury to any person.

[71 FR 8487, Feb. 17, 2006]

§ 107.335 Referral for prosecution.

If the Associate Administrator becomes aware of a possible willful violation of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any special permit, or order issued thereunder, for which the Associate Administrator exercises enforcement responsibility, it shall report it to the Office of the Chief Counsel, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590–0001. If appropriate, the Chief Counsel refers the report to the Department of Justice for criminal prosecution of the offender.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–22, 55 FR 39978, Oct. 1, 1990; Amdt. 107–24, 56 FR 8621, Feb. 28, 1991; 56 FR 15510, Apr. 17, 1991; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994; Amdt. 107–35, 60 FR 49108, Sept. 21, 1995; 66 FR 45377, Aug. 28, 2001]

§ 107.336 Limitation on fines and penalties.

If a State or political subdivision or Indian tribe assesses any fine or penalty determined by the Secretary to be appropriate for a violation concerning a subject listed in § 107.202(a), no additional fine or penalty may be assessed for such violation by any other authority.

[Amdt. 107–24, 56 FR 8624, Feb. 28, 1991]

INJUNCTIVE ACTION

§ 107.337 Injunctions generally.

Whenever it appears to the Office of Chief Counsel that a person has engaged, or is engaged, or is about to engage in any act or practice constituting a violation of any provision of the Federal hazardous material transportation law, this subchapter, subchapter C of this chapter, or any special permit, or order issued thereunder, for which the Office of Chief Counsel exercises enforcement responsibility,

the Administrator, PHMSA, or his delegate, may request the Attorney General to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages as provided by 49 U.S.C. 5122(a).

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–32, 59 FR 49131, Sept. 26, 1994]

§ 107.339 Imminent hazards.

Whenever it appears to the Office of the Chief Counsel that there is a substantial likelihood that death, serious illness, or severe personal injury will result from the transportation of a particular hazardous material or hazardous materials container, before a compliance order proceeding or other administrative hearing or formal proceeding to abate the risk of that harm can be completed, the Administrator, PHMSA, or his delegate, may bring an action under 49 U.S.C. 5122(b) in the appropriate United States District Court for an order suspending or restricting the transporation of that hazardous material or those containers or for such other equitable relief as is necessary or appropriate to ameliorate the hazard.

[Amdt. 107–11, 48 FR 2651, Jan. 20, 1983, as amended by Amdt. 107–15, 51 FR 34987, Oct. 1, 1986; Amdt. 107–32, 59 FR 49131, Sept. 26, 1994]

APPENDIX A TO SUBPART D OF PART 107—GUIDELINES FOR CIVIL PENALTIES

I. This appendix sets forth the guidelines used by the Office of Hazardous Materials Safety (as of October 1, 2005) in making initial baseline determinations for recommending civil penalties. The first part of these guidelines is a list of baseline amounts or ranges for probable violations frequently cited in enforcement reports referred for action. Following the list of violations are general guidelines used by OHMS in making initial penalty determinations in enforcement cases.

II. LIST OF FREQUENTLY CITED VIOLATIONS

II—LIST OF FREQUENTLY CITED VIOLATIONS

Violation description	Section or cite	Baseline assessment
General Requirements		
A. Registration Requirements: Failure to register as an offeror or carrier of hazardous material and pay registration fee.	107.608, 107.612	$1,000 + $500 each additional year.
B. Training Requirements:		
1. Failure to provide initial training to hazmat employees (general awareness, function-specific, safety, and security awareness training):	172.702	
a. More than 10 hazmat employees		$700 and up each area.
b. 10 hazmat employees or fewer		$450 and up each area.
2. Failure to provide recurrent training to hazmat employees (general awareness, function-specific, safety, and security awareness training).	172.702	$450 and up each area.
3. Failure to provide security training when a security plan is required but has not been developed.	172.702	Included in penalty for no security plan.
4. Failure to provide security training when a security plan has been developed but hazmat employees have not been trained concerning the security plan and its implementation.	172.702	$2,500.
5. Failure to create and maintain training records:	172.704	
a. more than 10 hazmat employees		$800 and up.
b. 10 hazmat employees or fewer		$500 and up.
C. Security Plans:		
1. Failure to develop a security plan; failure to adhere to security plan:	172.800	
a. § 172.504 table 1 materials		$7,500.
b. Packing Group I		$6,000.
c. Packing Group II		$4,500.
d. Packing Group III		$3,000.
2. Incomplete security plan or incomplete adherence (one or more of four required elements missing).		One-quarter (25%) of above for each element.
3. Failure to update a security plan to reflect changing circumstances	172.802(b)	One-third (33%) of baseline for no plan.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
4. Failure to put security plan in writing; failure to make all copies identical.	172.800(b)	One-third (33%) of baseline for no plan.
D. Notification to a Foreign Shipper: Failure to provide information of HMR requirements applicable to a shipment of hazardous materials within the United States, to a foreign offeror or forwarding agent at the place of entry into the U.S.	171.12(a)	$1,500 to $7,500 (corresponding to violations by foreign offeror or forwarding agent).
E. Expired Exemption or Special Permit: Offering or transporting a hazardous material, or otherwise performing a function covered by an exemption or special permit, after expiration of the exemption or special permit	171.2(a), (b), (c), Various.	$1,000 + $500 each additional year.
Offeror Requirements—All hazardous materials		
A. Undeclared Shipment:		
Offering for transportation a hazardous material without shipping papers, package markings, labels, or placards.	172.200, 172.300, 172.400, 172.500.	$15,000 and up.
B. Shipping Papers:		
1. Failure to provide a shipping paper for a shipment of hazardous materials.	172.201	$3,000 to $6,000.
2. Failure to follow one or more of the three approved formats for listing hazardous materials on a shipping paper.	172.201(a)(1)	$1,200.
3. Failure to retain shipping papers:.		
a. by an offeror, for two years after the date the shipment is provided to the carrier (or 3 years if the material is a hazardous waste).		
b. by a carrier, for one year after the date the shipment is provided to the carrier (or 3 years if the material is a hazardous waste).	172.201(e), 174.24(b), 175.30(a), 176.24(b), 177.817(f).	$1,000.
4. Failure to include a proper shipping name in the shipping description or using an incorrect proper shipping name.	172.202	$800 to $1,600.
5. Failure to include a hazard class/division number in the shipping description.	172.202	$1,000 to $2,000.
6. Failure to include an identification number in the shipping description.	172.202	$1,000 to $2,000.
7. Using an incorrect hazard class/identification number:	172.202.	
a. that does not affect compatibility requirements		$800.
b. that affects compatibility requirements		$3,000 to $6,000.
8. Using an incorrect identification number:	172.202..	
a. that does not change the response information		$800.
b. that changes the response information		$3,000 to $6,000.
9. Failure to include the Packing Group, or using an incorrect Packing Group.	172.202	$1,200.
10. Using a shipping description that includes additional unauthorized information (extra or incorrect words).	172.202	$800.
11. Using a shipping description not in required sequence	172.202	$500.
12. Using a shipping description with two or more required elements missing or incorrect:.	172.202.	
a. such that the material is misdescribed		$3,000.
b. such that the material is misclassified		$6,000.
13. Failure to include the total quantity of hazardous material covered by a shipping description.	172.202(c)	$500.
14. Failure to list an exemption or special permit number in association with the shipping description.	172.203(a)	$800.
15. Failure to indicate ''Limited Quantity'' or ''Ltd Qty'' following the basic shipping description of a material offered for transportation as a limited quantity.	172.203(b)	$500.
16. Failure to include ''RQ'' in the shipping description to identify a material that is a hazardous substance.	172.203(c)(2)	$500.
17. Failure to include a required technical name in parenthesis for a listed generic or ''n.o.s.'' material.	172.203(k)	$1,000.
18. Failure to include the required shipper's certification on a shipping paper.	172.204	$1,000.
19. Failure to sign the required shipper's certification on a shipping paper.	172.204	$800.
C. Emergency Response Information Requirements:		
1. Providing or listing incorrect emergency response information with or on a shipping paper.	172.602.	
a. No significant difference in response		$800.
b. Significant difference in response		$3,000 to $6,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
2. Failure to include an emergency response telephone number on a shipping paper.	172.604	$2,600.
3. Failure to have the emergency response telephone number monitored while a hazardous material is in transportation or listing multiple telephone numbers (without specifying the times for each) that are not monitored 24 hours a day.	172.604	$1,300.
4. Listing an unauthorized emergency response telephone number on a shipping paper.	172.604	$2,600 to $4,200.
5. Listing an incorrect or non-working emergency response telephone number on a shipping paper.	172.604	$1,300.
6. Failure to provide required technical information when the listed emergency response telephone number is contacted.	172.604	$1,300.
D. Package Marking Requirements:		
1. Failure to mark the proper shipping name on a package or marking an incorrect shipping name on a package.	172.301(a)	$800 to $1,600.
2. Failure to mark the identification number on a package	172.301(a)	$1,000 to $2,000.
3. Marking a package with an incorrect identification number	172.301(a).	
a. that does not change the response information		$800.
b. that changes the response information		$3,000 to $6,000.
4. Failure to mark the proper shipping name and identification number on a package.	172.301(a)	$3,000 to $6,000.
5. Marking a package with an incorrect shipping name and identification number.	172.301(a).	
a. that does not change the response information		$1,500 to $3,000.
b. that changes the response information		$3,000 to $6,000.
6. Failure to include the required technical name(s) in parenthesis for a listed generic or ''n.o.s.'' entry.	172.301(c)	$1,000.
7. Marking a package as containing hazardous material when it contains no hazardous material.	172.303(a)	$800.
8. Failure to locate required markings away from other markings that could reduce their effectiveness.	172.304(a)(4)	$800.
9. Failure to mark a package containing liquid hazardous materials with required orientation marking.	172.312	$2,500 to $3,500.
10. Failure to mark ''RQ'' on a non-bulk package containing a hazardous substance.	172.324(b)	$500.
E. Package Labeling Requirements:		
1. Failure to label a package	172.400	$5,000.
2. Placing a label that represents a hazard other than the hazard presented by the hazardous material in the package.	172.400	$5,000.
3. Placing a label on a package that does not contain a hazardous material.	172.401(a)	$800.
4. Failure to place a required subsidiary label on a package	172.402	$500 to $2,500.
5. Placing a label on a different surface of the package than, or away from, the proper shipping name.	172.406(a)	$800.
6. Placing an improper size label on a package	172.407(c)	$800.
7. Placing a label on a package that does not meet color specification requirements (depending on the variance).	172.407(d)	$600 to $2,500.
8. Failure to provide an appropriate class or division number on a label.	172.411	$2,500.
F. Placarding Requirements:		
Failure to properly placard a freight container or vehicle containing hazardous materials:.	172.504.	
a. when Table 1 is applicable		$1,000 to $9,000.
b. when Table 2 is applicable		$800 to $7,200.
G. Packaging Requirements:		
1. Offering a hazardous material for transportation in an unauthorized non-UN standard or nonspecification packaging (includes failure to comply with the terms of an exemption or special permit authorizing use of a nonstandard or nonspecification packaging).	Various.	
a. Packing Group I (and § 172.504 Table I materials)		$9,000.
b. Packing Group II		$7,000.
c. Packing Group III		$5,000.
2. Offering a hazardous material for transportation in a self-certified packaging that has not been subjected to design qualification testing:.	178.601 & Various.	
a. Packing Group I (and § 172.504 Table I materials)		$10,800.
b. Packing Group II		$8,400.
c. Packing Group III		$6,000.
3. Offering a hazardous material for transportation in a packaging that has been successfully tested to an applicable UN standard but is not marked with the required UN marking.	178.503(a)	$3,600.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
4. Failure to close a UN standard packaging in accordance with the closure instructions.	173.22(a)(4)	$2,500.
5. Offering a hazardous material for transportation in a packaging that leaks during conditions normally incident to transportation:	173.24(b).	
a. Packing Group I (and § 172.504 Table I materials)		$12,000.
b. Packing Group II		$9,000.
c. Packing Group III		$6,000.
6. Overfilling or underfilling a package so that the effectiveness is substantially reduced:	173.24(b).	
a. Packing Group I (and § 172.504 Table I materials)		$9,000.
b. Packing Group II		$6,000.
c. Packing Group III		$3,000.
7. Offering a hazardous material for transportation after October 1, 1996, in an unauthorized non-UN standard packaging marked as manufactured to a DOT specification:	171.14.	
a. packaging meets DOT specification		$3,000.
b. packaging does not meet DOT specification		$5,000 to $9,000.
8. Failure to mark an overpack with a statement that the inside packages comply with prescribed specifications or standards when specification or standard packaging is required.	173.25(a)(4)	$3,000.
9. Filling an IBC or a portable tank (DOT, UN, or IM) that is out of test and offering hazardous materials for transportation in that IBC or portable tank.	173.32(a), 180.352, 180.605.	
a. All testing overdue		$3,500 to $7,000.
b. Only periodic (5 year) test overdue		$3,500.
c. Only intermediate periodic (2.5 year) tests overdue		$3,500.
10. Failure to provide the required outage in a portable tank that results in a release of hazardous materials.	173.32(f)(6)	$6,000 to $12,000.
Offeror Requirements—Specific hazardous materials		
A. Cigarette Lighters:		
Offering for transportation an unapproved cigarette lighter, lighter refill, or similar device, equipped with an ignition element and containing fuel.	173.21(i)	$7,500.
B. Class 1—Explosives:		
1. Failure to mark the package with the EX number for each substance contained in the package or, alternatively, indicate the EX number for each substance in association with the description on the shipping description.	172.320	$1,200.
2. Offering an unapproved explosive for transportation:	173.54, 173.56(b).	
a. Div. 1.3 and 1.4 fireworks meeting the chemistry requirements (quantity and type) of APA Standard 87–1.		$5,000 to $10,000.
b. All other explosives (including forbidden)		$10,000 and up.
3. Offering a leaking or damaged package of explosives for transportation.	173.54(c)	$10,000 and up.
4. Packaging explosives in the same outer packaging with other materials.	173.61	$2,500 to $5,000.
C. Class 7—Radioactive Materials:		
1. Failure to include required additional entries, or providing incorrect information for these additional entries.	172.203(d)	$1,000 to $3,000.
2. Failure to mark the gross mass on the outside of a package of Class 7 material that exceeds 110 pounds.	172.310(a)	$800.
3. Failure to mark each package in letters at least 13 mm (½ inch) high with the words ''Type A'' or ''Type B'' as appropriate.	172.310(b)	$800.
4. Placing a label on Class 7 material that understates the proper label category.	172.403	$5,000.
5. Placing a label on Class 7 material that fails to contain (or has erroneous) entries for the name of the radionuclide(s), activity, and transport index.	172.403(g)	$2,000 to $4,000.
6. Failure to meet one or more of the general design requirements for a package used to ship a Class 7 material.	173.410	$5,000.
7. Failure to comply with the industrial packaging (IP) requirements when offering a Class 7 material for transportation.	173.411	$5,000.
8. Failure to provide a tamper-indicating device on a Type A package used to ship a Class 7 material.	173.412(a)	$2,000.
9. Failure to meet the additional design requirements of a Type A package used to ship a Class 7 material.	173.412(b)–(i)	$5,000.
10. Failure to meet the performance requirements for a Type A package used to ship a Class 7 material..	173.412(j)–(l)	$8,400.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
11. Offering a DOT specification 7A packaging without maintaining complete documentation of tests and an engineering evaluation or comparative data:	173.415(a), 173.461	
a. Tests and evaluation not performed		$8,400.
b. Complete records not maintained		$2,000 to $5,000.
12. Offering any Type B, Type B(U), Type B(M) packaging that failed to meet the approved DOT, NRC or DOE design, as applicable.	173.416	$9,000.
13. Offering a Type B packaging without holding a valid NRC approval certificate:	173.471(a).	
a. Never having obtained one		$3,000.
b. Holding an expired certificate		$1,000.
14. Failure to meet one or more of the special requirements for a package used to ship uranium hexafluoride.	173.420	$10,800.
15. Offering Class 7 material for transportation as a limited quantity without meeting the requirements for limited quantity.	173.421(a)	$4,000.
16. Offering a multiple-hazard limited quantity Class 7 material without addressing the additional hazard.	173.423(a)	$500 to $2,500.
17. Offering Class 7 low specific activity (LSA) materials or surface contaminated objects (SCO) with an external dose rate that exceeds an external radiation level of 1 rem/hr at 3 meters from the unshielded material.	173.427(a)(1)	$6,000.
18. Offering Class 7 LSA materials or SCO as exclusive use without providing specific instructions to the carrier for maintenance of exclusive use shipment controls.	173.427(a)(6)	$1,000.
19. Offering in excess of Type A quantity of a Class 7 material in a Type A packaging.	173.431	$12,000.
20. Offering a package that exceeds the permitted limits for surface radiation or transport index.	173.441	$10,000 and up.
21. Offering a package without determining the level of removable external contamination, or that exceeds the limit for removable external contamination.	173.443	$5,000 and up.
22. Storing packages of radioactive material in a group with a total transport index more than 50.	173.447(a)	$5,000 and up.
23. Offering for transportation or transporting aboard a passenger aircraft any single package or overpack of Class 7 material with a transport index greater than 3.0.	173.448(e)	$5,000 and up.
24. Exporting a Type B, Type B(U), Type B(M), or fissile package without obtaining a U.S. Competent Authority Certificate or, after obtaining a U.S. Competent Authority Certificate, failing to submit a copy to the national competent authority of each country into or through which the package is transported.	173.471(d)	$3,000.
25. Offering special form radioactive materials without maintaining a complete safety analysis or Certificate of Competent Authority.	173.476(a), (b)	$2,500.
D. Class 2—Compressed Gases in Cylinders:		
1. Filling and offering a cylinder with compressed gas when the cylinder is out of test.	173.301(a)(6)	$4,200 to $10,400.
2. Failure to check each day the pressure of a cylinder charged with acetylene that is representative of that day's compression, after the cylinder has cooled to a settled temperature, or failure to keep a record of this test for 30 days.	173.303(d)	$5,000.
3. Offering a limited quantity of a compressed gas in a metal container for the purpose of propelling a nonpoisonous material and failure to heat the cylinder until the pressure is equivalent to the equilibrium pressure at 130 °F, without evidence of leakage, distortion, or other defect.	173.306(a)(3), (h)	$1,500 to $6,000.
Manufacturing, Reconditioning, Retesting Requirements		
A. Third-Party Packaging Certifiers (General):		
Issuing a certification that directs the packaging manufacturer to improperly mark a packaging (e.g., steel drum to be marked UN 4G).	171.2(e), 178.2(b), 178.3(a), 178.503(a).	$500 per item.
B. Packaging Manufacturers (General):		
1. Failure of a manufacturer or distributor to notify each person to whom the packaging is transferred of all the requirements not met at the time of transfer, including closure instructions.	178.2(c)	$2,500.
2. Failure to insure a packaging certified as meeting the UN standard is capable of passing the required performance testing.	178.601(b).	
a. Packing Group I (and § 172.504 Table 1 materials)		$10,800.
b. Packing Group II		$8,400.
c. Packing Group III		$6,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
3. Certifying a packaging as meeting a UN standard when design qualification testing was not performed.	178.601(d).	
a. Packing Group I (and § 172.504 table 1 materials)		$10,800.
b. Packing Group II		$8,400.
c. Packing Group III		$6,000.
4. Failure to conduct periodic retesting on UN standard packaging (depending on length of time and Packing Group).	178.601(e)	$2,000 to $10,800.
5. Failure to properly conduct testing for UN standard packaging (*e.g.,* testing with less weight than marked on packaging; drop testing from lesser height than required; failing to condition fiberboard boxes before design test):.		
a. Design qualification testing	178.601(d)	$2,000 to $10,800.
b. Periodic retesting	178.601(e)	$500 to $10,800.
6. Marking, or causing the marking of, a packaging with the symbol of a manufacturer or packaging certifier other than the company that actually manufactured or certified the packaging.	178.2(b), 178.3(a), 178.503(a)(8).	$7,200.
7. Failure to maintain testing records	178.601(l).	
a. Design qualification testing		$1,000 to $5,000.
b. Periodic retesting		$500 to $2,000.
8. Improper marking of UN certification	178.503	$500 per item.
9. Manufacturing DOT specification packaging after October 1, 1994 that is not marked as meeting a UN performance standard.	171.14.	
a. If packaging does meet DOT specification		$3,000.
b. If packaging does not meet DOT specification		$6,000 to $10,800.
C. Drum Manufacturers & Reconditioners:		
1. Failure to properly conduct production leakproofness test on a new or reconditioned drum.	178.604(b), (d), 173.28(b)(2)(i).	
a. Improper testing		$2,000.
b. No testing performed		$3,000 to $5,000.
2. Marking an incorrect registration number on a reconditioned drum	173.28(b)(2)(ii).	
a. Incorrect number		$800.
b. Unauthorized use of another reconditioner's number		$7,200.
3. Representing, marking, or certifying a drum as a reconditioned UN standard packaging when the drum does not meet a UN standard.	173.28(c), (d)	$6,000 to $10,800.
4. Representing, marking, or certifying a drum as altered from one UN standard to another, when the drum has not actually been altered.	173.28(d)	$500.
D. IBC and Portable Tank Requalification:		
1. Failure to properly mark an IBC or portable tank with the most current retest and/or inspection information.	180.352(e), 178.703(b), 180.605(k).	$500 per item.
2. Failure to keep complete and accurate records of IBC or portable tank retest and reinspection.	180.352(f), 180.605(l).	
a. No records kept		$4,000.
b. Incomplete or inaccurate records		$1,000 to $3,000.
3. Failure to make reinspection and retest records available to a DOT representative upon request.	180.352(f), 49 U.S.C. 5121(b)(2).	$1,000.
E. Cylinder Manufacturers & Rebuilders:		
1. Manufacturing, representing, marking, certifying, or selling a DOT high-pressure cylinder that was not inspected and verified by an approved independent inspection agency.	Various	$7,500 to $15,000.
2. Failure to have a registration number or failure to mark the registration number on the cylinder.	Various	$800.
3. Marking another company's number on a cylinder	Various	$7,200.
4. Failure to mark the date of manufacture or lot number on a DOT-39 cylinder.	178.65(i)	$3,000.
5. Failure to have a chemical analysis performed in the U.S. for a material manufactured outside the U.S./failure to obtain a chemical analysis from the foreign manufacturer.	Various	$5,000.
6. Failure to meet wall thickness requirements	Various	$7,500 to $15,000.
7. Failure to heat treat cylinders prior to testing	Various	$5,000 to $15,000.
8. Failure to conduct a complete visual internal examination	Various	$2,500 to $6,200.
9. Failure to conduct a hydrostatic test, or conducting a hydrostatic test with inaccurate test equipment.	Various	$2,500 to $6,200.
10. Failure to conduct a flattening test	Various	$7,500 to $15,000.
11. Failure to conduct a burst test on a DOT-39 cylinder	178.65(f)(2)	$5,000 to $15,000.
12. Failure to have inspections and verifications performed by an inspector.	Various	$7,500 to $15,000.
13. Failure to maintain required inspector's reports	Various.	
a. No reports at all		$5,000.
b. Incomplete or inaccurate reports		$1,000 to $4,000.

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
14. Representing a DOT-4 series cylinder as repaired or rebuilt to the requirements of the HMR without being authorized by the Associate Administrator.	180.211(a)	$6,000 to $10,800.
F. Cylinder Requalification:		
1. Failure to remark as DOT 3AL an aluminum cylinder manufactured under a former exemption or special permit.	173.23(c)	$800.
2. Certifying or marking as retested a nonspecification cylinder	180.205(a)	$800.
3. Failure to have retester's identification number (RIN)	180.205(b)	$4,000.
4. Failure to have current authority due to failure to renew a retester's identification number (RIN).	180.205(b)	$2,000.
5. Failure to have a retester's identification number and marking another RIN on a cylinder.	180.205(b)	$7,200.
6. Marking a RIN before successfully completing a hydrostatic retest	180.205(b)	$800.
7. Representing, marking, or certifying a cylinder as meeting the requirements of an exemption or special permit when the cylinder was not maintained or retested in accordance with the exemption or special permit.	171.2(c), (e), 180.205(c), Applicable Exemption or Special Permit.	$2,000 to $6,000.
8. Failure to conduct a complete visual external and internal examination.	180.205(f)	$2,100 to $5,200.
9. Failure to conduct visual inspection or hydrostatic retest	180.205(f) & (g)	$4,200 to $10,400.
10. Performing hydrostatic retesting without confirming the accuracy of the test equipment.	180.205(g)(3)	$2,100 to $5,200.
11. Failure to hold hydrostatic test pressure for 30 seconds or sufficiently longer to allow for complete expansion.	180.205(g)(5)	$3,100.
12. Failure to perform a second retest, after equipment failure, at a pressure increased by the lesser of 10% or 100 psi (includes exceeding 90% of test pressure prior to conducting a retest).	180.205(g)	$3,100.
13. Failure to condemn a cylinder when required (*e.g.,* permanent expansion of 10% [5% for certain exemption or special permit cylinders], internal or external corrosion, denting, bulging, evidence of rough usage).	180.205(i)	$6,000 to $10,800.
14. Failure to properly mark a condemned cylinder or render it incapable of holding pressure.	180.205(i)(2)	$800.
15. Failure to notify the cylinder owner in writing when a cylinder has been condemned.	180.205(i)(2)	$1,000.
16. Failure to perform hydrostatic retesting at the minimum specified test pressure.	180.209(a)(1)	$2,100 to $5,200.
17. Marking a star on a cylinder that does not qualify for that mark	180.209(b)	$2,000 to $4,000.
18. Marking a "+" sign on a cylinder without determining the average or minimum wall stress by calculation or reference to CGA Pamphlet C–5.	173.302a(b)	$2,000 to $4,000.
19. Marking a cylinder in or on the sidewall when not permitted by the applicable specification.	180.213(b)	$6,000 to $10,800.
20. Failure to maintain legible markings on a cylinder	180.213(b)(1)	$800.
21. Marking a DOT 3HT cylinder with a steel stamp other than a low-stress steel stamp.	180.213(c)(2)	$6,000 to $10,800.
22. Improper marking of the RIN or retest date on a cylinder	180.213(d)	$800.
23. Marking an FRP cylinder with steel stamps in the FRP area of the cylinder such that the integrity of the cylinder is compromised.	Applicable Exemption or Special Permit.	$6,000 to $10,800.
24. Failure to maintain current copies of 49 CFR, DOT exemption or special permits, and CGA Pamphlets applicable to inspection, retesting, and marking activities.	180.215(a)	$600 to $1,200.
25. Failure to keep complete and accurate records of cylinder reinspection and retest.	180.215(b).	
a. No records kept		$4,000.
b. Incomplete or inaccurate records		$1,000 to $3,000.
26. Failure to report in writing a change in name, address, ownership, test equipment, management, or retester personnel.	171.2(c) & (e), Approval Letter.	$600 to $1,200.
Carrier Requirements		
A. Incident Notification:		
1. Failure to give immediate notification of a reportable hazardous materials incident.	171.15	$3,000.
2. Failure to file a written hazardous material incident report within 30 days following an unintentional release of hazardous materials in transportation (or other reportable incident).	171.16	$500 to $2,500.
B. Shipping Papers:		

II—LIST OF FREQUENTLY CITED VIOLATIONS—Continued

Violation description	Section or cite	Baseline assessment
Failure to retain shipping papers for 375 days after a hazardous material (or 3 years for a hazardous waste) is accepted by the initial carrier.	174.24(b), 175.30(a)(2), 176.24(b), 177.817(f).	$1,000.
C. Stowage/transportation Requirements:		
1. Transporting packages of hazardous material that have not been secured against movement.	Various	$3,000.
2. Failure to properly segregate hazardous materials	Various	$7,500 and up.
3. Transporting explosives in a motor vehicle containing metal or other articles or materials likely to damage the explosives or any package in which they are contained, without segregating in different parts of the load or securing them in place in or on the motor vehicle and separated by bulkheads or other suitable means to prevent damage.	177.835(i)	$5,200.
4. Transporting railway track torpedoes outside of flagging kits, in violation of DOT-E 7991.	171.2(b) & (e)	$7,000.
5. Transporting Class 7 (radioactive) material having a total transport index greater than 50.	177.842(a)	$5,000 and up.
6. Transporting Class 7 (radioactive) material without maintaining the required separation distance.	177.842(b)	$5,000 and up.
7. Failure to comply with requirements of an exemption or special permit authorizing the transportation of Class 7 (radioactive) material having a total transportation index of 50.	171.2(b) & (e).	
a. Failure to have the required radiation survey record		$5,000.
b. Failure to have other required documents		$500 each.
c. Other violations		$5,000 and up.

III. CONSIDERATION OF STATUTORY CRITERIA

A. These guidelines are used by the Office of Hazardous Materials Safety (OHMS) in setting initial proposed penalties for hazmat violations. They indicate baseline amounts or ranges for probable violations frequently cited in enforcement reports and set forth general OHMS policy for considering statutory criteria.

B. The initial baseline determination partially considers the nature, extent, circumstances, and gravity of the alleged violation. That determination then is adjusted to consider all other evidence concerning the nature, extent, circumstances, and gravity of the alleged violation; degree of culpability; history of prior violations; ability to pay; effect of the penalty on ability to continue to do business; and such other matters as justice may require (a major component of which is corrective action taken by a respondent to prevent a recurrence of similar violations). In making a penalty recommendation, the baseline or range may be increased or decreased on the basis of evidence pertaining to these factors.

C. The following miscellaneous factors are used to implement one or more of the statutory assessment criteria.

IV. MISCELLANEOUS FACTORS AFFECTING PENALTY AMOUNTS

A. Corrective Action

1. A proposed penalty is mitigated for documented corrective action of alleged violations taken by a respondent. Corrective action may occur: (1) After an inspection and before a Notice of Probable Violation (NOPV) is issued; (2) on receipt of an NOPV; or (3) after receipt of an NOPV (possibly after it is solicited by an PHMSA attorney). In general, corrective action may reduce a penalty up to 25%. Mitigation may be taken into account in the referral memo or may be recommended prior to issuance of an Order by PHMSA's Chief Counsel.

2. The two primary factors in determining the penalty reduction are extent and timing of the corrective action. In other words, mitigation will be determined on the basis of how much corrective action was taken and when it was taken. Systemic action to prevent future violations is given greater consideration than action simply to remedy violations identified during the inspection.

3. Mitigation is applied to individual violations. Thus, in a case with two violations, if corrective action for the first violation is more extensive than for the second, the penalty for the first will be mitigated more than that for the second.

B. Respondents That Re-Ship

A shipper that reships materials received from another company, in the same packaging and without opening or altering the package, independently is responsible for ensuring that the shipment complies with Federal hazmat law, and independently may be subject to enforcement action if the package does not comply. Nevertheless, the reshipper is considered to have a lesser level of responsibility for compliance in those respects in which it reasonably relies on the compliance of the package as received. In most cases of

this type, OHMS will discount the applicable baseline standard by about 25%. The specific knowledge and expertise of all parties must be considered in discounting for reliance on a prior shipper. This discount is applied before any consideration of mitigation based on corrective action.

C. Penalty Increases for Multiple Counts

Under the Federal hazmat law, 49 U.S.C. 5123(a), each violation of the HMR and each day of a continuing violation (except for violations pertaining to packaging manufacture or qualification) is subject to a civil penalty of up to $55,000 or $110,000 for a violation occurring on or after January 1, 2010. Absent aggravating factors, OHMS, in its exercise of discretion, ordinarily will apply a single penalty for multiple counts or days of violation. In a number of cases, particularly those involving shippers, an inspector may cite two or more similar packaging violations for different hazardous materials. For example, the inspector may cite the same marking violation for two or more packages. OHMS usually will consider those additional violations as counts of the same violation and will not recommend multiples of the same baseline penalty. Rather, OHMS usually will recommend the baseline penalty for a single violation, increased by 25% for each additional violation.

D. Financial Considerations

1. Mitigation is appropriate when the baseline penalty would (1) exceed an amount that the respondent is able to pay, or (2) have an adverse effect on the respondent's ability to continue in business. These criteria relate to a respondent's entire business, and not just the product line or part of its operations involved in the violation(s). Beyond the overall financial size of the respondent's business, the relevant items of information on a respondent's balance sheet include the current ratio (current assets to current liabilities), the nature of current assets, and net worth (total assets minus total liabilities).

2. These figures are considered on a case-by-case basis. In general, however, a current ratio close to or below 1.0 means that the company may have difficulty in paying a large penalty, and may justify reduction of the penalty or an installment payment plan. A small amount of cash on hand representing limited liquidity, even with substantial other current assets (such as accounts receivable or inventory), may warrant a short-term payment plan. Respondent's income statement also will be reviewed to determine whether a payment plan is appropriate.

3. Many companies are able to continue in business for extended periods of time with a small or negative net worth, and many respondents have paid substantial civil penalties in installments even though net worth was negative. For this reason, negative net worth alone does not always warrant reduction of a proposed penalty or even, in the absence of factors discussed above, a payment plan.

4. In general, an installment payment plan may be justified where reduction of a proposed penalty is not, but the appropriateness of either (or both) will depend on the circumstances of the case. The length of a payment plan should be as short as possible, but the plan may consider seasonal fluctuations in a company's income if the company's business is seasonal (e.g., swimming pool chemical sales, fireworks sales) or if the company has documented specific reasons for current non-liquidity.

5. Evidence of financial condition is used only to decrease a penalty, and not to increase it.

E. Penalty Increases for Prior Violations

The baseline penalty presumes an absence of prior violations. If prior violations exist, generally they will serve to increase a proposed penalty. The general standards for increasing a baseline proposed penalty on the basis of prior violations are as follows:

1. For each prior civil or criminal enforcement case—25% increase over the pre-mitigation recommended penalty.

2. For each prior ticket—10% increase over the pre-mitigation recommended penalty.

3. A baseline proposed penalty will not be increased more than 100% on the basis of prior violations.

4. A case or ticket of prior violations initiated in a calendar year more than six years before the calendar year in which the current case is initiated normally will not be considered in determining a proposed penalty for the current violation(s).

F. Penalty Increases for Use of Expired Special Permits

Adjustments to the base line figures for use of expired special permits can be made depending on how much material has been shipped during the period between the expiration date and the renewal date. If the company previously has been found to have operated under an expired special permit, the penalty is normally doubled. If the company has been previously cited for other violations, the penalty generally will be increased by about 25%.

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