UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF: New Prime, Inc. 3720 West 800 South Salt Lake City, Utah Respondent.	Docket No. RCRA-08-2020-0007

COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

Counsel for Complainant respectfully submits this Reply to Respondent's Response to Complainant's Motion for Accelerated Decision on Liability and Penalty, pursuant to 40 C.F.R. §§ 22.16(b) and 22.20 and the Prehearing Order of the Presiding Officer in this matter.

In the Response, Respondent confirmed that it does not contest liability. This Reply, therefore, only addresses Respondent's arguments relating to the penalty portion of the Motion. Complainant has properly supported its Motion. Because Respondent has not identified any issues of material fact that are in dispute all that remains are mixed questions of law and fact regarding an appropriate penalty for each violation. The Presiding Officer, therefore, can properly conduct an independent assessment of the positions of the parties on these mixed questions of law and fact and determine an appropriate penalty for each violation on consideration of the Motion.

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I. Introduction

On February 22, 2021, Complainant filed its Motion for Accelerated Decision on Liability and Penalty (Motion) and Memorandum in Support (EPA Memo). On March 9, 2021, Respondent filed its Response (Response).

A. Liability

In Section V of the EPA Memo, Complainant establishes that it has met its burden for accelerated decision on liability for each Count in the Complaint. In its Response, Respondent reiterates that Respondent will not contest liability. Complainant, therefore, does not address liability any further except to request that the Presiding Officer issue an accelerated decision on liability finding Respondent in violation for each Count in the Complaint.

B. Penalty

As Respondent describes, this case now is about an appropriate penalty for Respondent's "wrongful handling of a truckload of paint." Response at 11. A picture of the truckload of paint at the center of this matter is found in CX10 at 16. All four types of paint products originally transported by Respondent in the truck are classified by the US Occupational Safety and Health Administration (OSHA) as hazardous materials. This information is prominently displayed on each Safety Data Sheet (SDS) that accompanied the truckload of paint. Although OSHA hazardous materials do not always turn out to be RCRA hazardous waste when they become waste, the contents of at least 20 of the 32 drums that were not completely destroyed in a fire during transport did turn out to be RCRA hazardous waste. Because Respondent never made a hazardous waste determination on the contents of the drums, Respondent handled the hazardous waste in complete violation of RCRA's cradle-to-grave regulatory program for over 11 months.

This period only ended when the EPA inspected the facility and subsequently sampled the drums. Respondent thereafter complied with EPA's directions and, with the exception of obtaining an EPA Identification number specific to its Salt Lake City Facility prior to shipment, finally ensured the hazardous waste was properly transported and disposed.

Respondent states that the "penalty phase of the case is where Respondent is entitled to explain its side of the story . . . ." Response at 16. Complainant agrees. The Motion began the penalty phase of this case. In Section II below, Complainant establishes that it met its initial burden on the Motion, including the higher burden for accelerated decision on penalty. The penalty phase of the case, therefore, was brought to Respondent on a properly supported Motion.

Respondent may have preferred to introduce new evidence at hearing and argument in post-hearing briefs to explain its side of the story. Once Respondent received the properly supported motion for accelerated decision on penalty, however, it became incumbent upon Respondent to show that a hearing is necessary. *See, e.g.*, *United States v. Yetim*, 251 F. Supp. 3d 461, 466 (E.D.N.Y. 2017) ("Once the moving party has met its burden, the opposing party must do more than simply show that there is some metaphysical doubt as to the material facts . . . . The nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (internal citations omitted)) Respondent has not identified any additional relevant, material, and credible evidence relating to a disputed issue of material fact that will be obtained at a hearing. Respondent has identified only mixed questions of law and fact, which are precisely the types of questions that are decided by a Presiding Officer, including when such questions are brought on a properly supported Motion.

Complainant therefore respectfully requests that the Presiding Officer consider all evidence and arguments submitted by the parties in a light most favorable to Respondent, determine whether Complainant's proposed penalty for each violation has been calculated in accordance with the 2003 RCRA Civil Penalty Policy (Penalty Policy), and, if so, whether to adopt the penalty as calculated, and issue an accelerated decision on penalty for each violation.

II. Complainant Met its Burden for the Motion for Accelerated Decision on Penalty

"It is well established that the purpose of summary judgment is to pierce the pleadings and to assess the proof to see whether there is a genuine need for trial. Summary judgment saves the time and expense of a full trial when it is unnecessary because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures, as contemplated by the FRCP . . . with a net benefit to society." *In the Matter of Zaclon, Incorporated, Zaclon, LLC and Independence Land Development Company*, 2006 WL 1695609 *4 (EPA ALJ May 23, 2006) (internal citations and quotations omitted).

Respondent must ignore the vast majority of the EPA Memo to reach the conclusion that Complainant's argument is that the "proposed penalty should be assessed now because none of the information provided in Respondent's Prehearing Exchanges [sic] would change how its compliance officer calculated the proposed penalty." Response at 3. Section II of the EPA Memo clearly sets forth Complainant's understanding of the parties' burdens on this Motion, the standard of review, as well as the Presiding Officer's responsibility on consideration of this Motion. *See, e.g.*, EPA Memo at 9-10, citing extensively from *John A. Biewer Co. of Toledo, Inc. and John A. Biewer Co. of Ohio, Inc.*, 15 E.A.D. 772 (EAB 2013), 2013 WL 686378. Further, at

no point does Complainant argue that EPA's RCRA inspector is "the final arbiter of the penalty amount." Response at 3.

In Section IV of the EPA Memo Complainant comprehensively addressed all facts submitted by the parties in the prehearing exchange,[1] and shows that no material facts submitted by either party are in dispute. Complainant also accepted all of the factors and equitable considerations raised by Respondent, for purposes of the Motion, and did so with full understanding that the totality of the undisputed facts, factors, and considerations in front of the Presiding Officer would be viewed in a light most favorable to Respondent. *Id*.

To the extent the Response and declaration of Mr. Steve Field (Field Declaration) raise new facts, Complainant does not dispute them for purposes of the Motion.

By accepting Respondent's facts, factors, and considerations, the potential for a meaningful dispute about the fact or consideration vanishes. The remaining question thus becomes the application of the factors in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), to the facts and considerations in front of the Presiding Officer. In this matter, Complainant chose to present its view to the Presiding Officer through the lens of the Penalty Policy.

[1] The Prehearing Order states in part that "Respondent shall submit the following as part of its Prehearing Exchange . . . all factual information Respondent considers relevant to the assessment of a penalty and any supporting documentation; and [] if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which it intends to rely in support of such position." *Id*. at 3

III. Respondent Has Not Met its Burden to Show That a Hearing is Required on the Proposed Penalty for Any Fact or Violation

Respondent argues that because "genuine issues of material fact exist and predominate the record in this case" a hearing is necessary, and the penalty portion of the Motion should be denied. Response at 1. Respondent's burden in response to the properly supported Motion is clear. "Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported." *Zaclon*, 2006 WL 1695609, at *4 (citations omitted). Respondent has failed to point to any genuine issue of material fact in either the Response or Field Declaration.

In a number of places in the Response, Respondent also speculates that additional evidence will come to light at hearing that will bolster its position on the value of certain facts and considerations. Respondent's burden here is clear as well.

> Summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up. In countering a motion for summary judgment, more is required than mere assertions of counsel. The non-movant . . . must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial. It has been held that an issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc*., 512 F.2d 29, 33-34 (6th Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under FRCP 56); *Ricker v. American Zinser Corp*., 506 F. Supp. 1, 2 (E.D. Tenn. 1978)(affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial), *aff'd, sub nom*. *Ricker v. Zinser Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980).

Zaclon, 2006 WL 1695609, at *5 (some citations omitted).

Respondent's first opportunity to shed light on the additional evidence it expects to introduce at hearing on these considerations was during Respondent's preparation of its Prehearing Exchange. Respondent's second opportunity came and went with the Response.

Respondent has identified only mixed questions of law and fact, which are precisely the types of questions that are decided by a Presiding Officer, including when such questions are brought on a properly supported Motion.

A. Respondent Does Not Raise Any Material Issue of Fact Which Requires a Hearing

Respondent continues to focus on the same sets of facts as Respondent did in its Answer and Prehearing Exchange. In its Response, Respondent restates two groups of facts which Respondent argues are disputed: the events around the 2015 fire and "complex scientific issues." For purposes of the Motion, however, neither group of facts are in dispute. Only the parties' views of the weight of each to a determination on an appropriate penalty differ. Again, these are mixed questions of fact and law which are decided by a Presiding Officer, including when such questions are brought on a properly supported Motion.

1. The Aftermath of the 2015 Fire

Respondent's continuing discussion of the importance of communications on the night of the fire and morning after on Respondent's choices over the next eleven months relies on Respondent's exhibits, and the Declaration of Steve Fields submitted with the Response, Response at 3-8, and promises of more to come at hearing. *Id*. at 7-8. Complainant first notes that, for purposes of the Motion, it does not dispute the contents of Respondent's exhibits. *See*, EPA Memo Section IV.D.4. Thus, there is no dispute over a material fact. Complainant then set

forth its view of Respondent's facts and considerations through the lens of the Penalty Policy. *Id*. at Section VI

Respondent's discussion of the fire in its Response also elaborates on Respondent's "grounds for defense" in the Answer and Respondent's Prehearing Exchange. As set forth in Section IV.D.4 of the EPA Memo, for purposes of the Motion, Complainant accepted Respondent's grounds for defense and then set forth its view of Respondent's grounds through the lens of the Penalty Policy. To the extent that the Response brings forward facts not previously discussed in the EPA Memo, but which are set forth in Respondent's exhibits and Mr. Field's Declaration, Complainant accepts those facts for purposes of the Motion.[2]

Respondent insists that Complainant ignores the true, long term import of "the full context of communications with all governmental entities and contractors at the time, and its reliance on local authorities which caused it to deviate its normal practice of hiring RCRA

[2] Respondent's citations in this section of the Response are not always precise or complete. Complainant notes this here because all evidence and arguments of the parties will be carefully reviewed on consideration of the Motion, not because Respondent's imprecise citations somehow create a material issue of fact. Notwithstanding these imprecisions, and because of the abundance of evidence of the imprecision in communications the night of the fire, Complainant remains of the view that the confusion during and immediately after the fire sufficiently explains Respondent's handling of the waste and the trailer immediately after the fire. But, not starting more than a day or so after the fire. Complainant notes four issues with Respondent's citations. Respondent states that an "Idaho State Police trooper on scene was advised by B&W 'they were qualified to conduct the cleanup' which this trooper in turn verified by calling the Idaho Department of Environmental Quality." Response at 5, citing to RX08 at 3, and RX03 at 3. First, neither exhibit shows that B&W advised Sargent Bonner that B&W was qualified before he made such a call. Second, the cited exhibits do not show that Sargent Bonner called IDEQ (Idaho State Communications Center (ISCC) did, RX03 at 3), nor do they show that ISCC's call to IDEQ resulted in verification that B&W was qualified. On that point, the cited record speaks for itself. Third, RX03 at 3 points to additional confusion, found in Respondent's own evidence, relating to who first called B&W to the site. Respondent cites to RX08 at 2 and quotes Chief Janousek as saying, "Elmore County Dispatch is the entity that called out B&W Wrecking to respond to the incident." Response at 5. But, RX03 at 3 shows that Sargent Bonner understood that Respondent had called B&W out to the fire. Complainant reiterates that none of this is relevant to Complainant's calculation of a proposed penalty. *See* Jacobson Declaration. Last, Respondent states that "middle-of-the-night communications between multiple state, federal and local responders . . . resulted in miscommunications . . . ." Response at 4. No federal responders were present and Mr. Field's Declaration does not say federal responders were present.

trained experts to manage clean up in situations involving hazardous materials."[3] Response at 7. Complainant has thoroughly addressed its view of the confused communications on the night of the fire and how it does not factor into Complainant's calculation of a proposed penalty. EPA Memo at 39-40, 68-69. Respondent believes these communications should be given greater weight in the Presiding Officer's calculation of a penalty. Respondent has had two opportunities to come forth with additional facts relating to the question it raises but has chosen not to. Respondent, therefore, only raises a mixed question of law and fact, which can be decided by the Presiding Officer on consideration of the properly supported Motion by looking at all the facts, factors, and considerations submitted by the parties in a light most favorable to Respondent.

Complainant argues that soon after the fire situation abated the SDSs and the Bill of Lading (BOL) should have alerted Respondent to the fact that the waste in the drums might warrant special attention because the products being shipped were classified as hazardous even before the fire turned them to waste. Complainant also points to communications between Respondent and the Idaho Department of Environmental Quality starting in October 2015 about the second clean-up of the fire site, including the required sampling and analysis that led to a

[3] It is most likely to Respondent's benefit that Complainant is not considering the full context of such communications. Respondent studiously avoids any discussion of Complainant's evidence, which, for example, provides additional information on Respondent's communications with governmental entities in the immediate aftermath of the fire. CX17 details EPA Resident Agent in Charge Darin Mugleston's interview with Sargent Bonner on February 4, 2016, less than 3 months after the fire. "After the rural fire department left the scene, Sgt. Bonner became the incident commander for the scene. . . . During Sgt. Bonner's investigation of the incident, he spoke with the two drivers of the truck/trailer, operated by Prime, Steven Drake and Angela Duck. . . . After explaining in detail of Prime's responsibility for a proper Hazmat cleanup, Sgt. Bonner recalled the drivers sent a 'quall com' (a computer messaging system inside the truck) message to Prime. In addition, Sgt. Bonner witnessed, on at least two different occasions, Drake talking on the phone to someone at Prime. . . . When Sgt. Bonner learned B&W was going to be the cleanup company, Sgt. Bonner stated he again informed Drake the scene was a 'hazardous materials incident' and the site needed to be cleaned up properly. Sgt. Bonner reiterated he told Drake a couple of times throughout the morning the scene needed a Hazmat cleanup." *Id*. at 2

determination that the fire site was contaminated with RCRA hazardous waste, which required proper transport and disposal.

For purely RCRA hazardous waste regulatory purposes, at some point after the fire, specific information about certain hazardous constituents in at least one of the SDSs should have triggered Respondent's interest in calling its "RCRA trained experts" who manage Respondent's "clean ups in situations involving hazardous materials." Response at 7. In addition, merely by skimming the first line of "Section 2. Hazards identification," written in large bold letters on page 1 of each SDS for the four products comprising the shipment, Respondents would have learned that each of the 4 products it was shipping was a hazardous material. (Page 1 for product 6431 1D BACKR 4 states "This material is considered hazardous by the OSHA Hazard Communication Standard." CX32 at 1; Page 1 for product FG CLR PC3200 4 states "This material is considered hazardous by the OSHA Hazard Communication Standard." CX32 at 16; Page 1 for Universal Urethane Yellow Primer states "This material is considered hazardous by the OSHA Hazard Communication Standard." CX32 at 31, 48; and Page 1 for Duranar EZ Lemon Yellow states "This material is considered hazardous by the OSHA Hazard Communication Standard." CX32 at 65)

Specific information as to how the SDSs and BOL were "used and relied upon" by Respondent, including to not meet its own standard procedure for calling its RCRA experts they rely on to manage clean ups in situations involving hazardous materials, could have been filed with Respondent's Prehearing Exchange, the Response, or in a declaration. Respondent has provided none.

In its Response, Respondent does explain how the hazardous waste determination made during the second cleanup was used and relied upon by Respondent. Supervisor David White, of Respondent's national safety department, oversaw the second cleanup. Apparently, Mr. White did not share the RCRA hazardous waste determination with Respondent's road assist employee. Response at 7. Respondent, therefore, never connected the hazardous waste determination it made for the second fire site clean-up to the source of the waste at the fire site. Complainant notes that Respondent has not listed Mr. White or the unnamed key road assist employee as a witness for hearing, has not submitted a declaration from either Mr. White or Respondent's road assist employee, and has not identified any potential testimony by any of its listed witnesses on this fact. Mr. Fields stated what he "believes" about this non-communication in his Declaration. Fields Declaration at ¶ 12. Complainant does not question Mr. Fields beliefs on this matter.

Respondent concludes this section of the Response by positing that a hearing is necessary so the Presiding Officer "may judge the sincerity of Respondent [sic] actions here and its good faith efforts to comply with the law." *Id*. at 8. Respondent's sincerity is not in dispute, and, as discussed at length in the EPA Memo (*see, esp*, VI.C.1.iii at 72) and briefly in Section VI below, Respondent's good faith efforts to comply following EPA's inspection readily can be decided on the properly supported Motion, whether the Presiding Officer chooses to apply the Penalty Policy or the RCRA statutory factors directly.

2. Respondent's Assertion that Complex Scientific Issues are in Dispute is Not Correct

Respondent must again ignore the EPA Memo to argue that a hearing is necessary on what Respondent characterizes as contested complex scientific issues and that these issues must be heard before the Presiding Officer can independently assess the "potential for harm to human

health and the environment" under the Penalty Policy. Respondent also ignores the Penalty Policy, the relevant discussion in Complainant's exhibit setting forth Complainant's penalty analysis prior to receipt of Respondent's Prehearing Exchange and exhibits (CX04, or CX04Cor if EPA's motion to correct granted), and the Declaration of Linda Jacobson.

Respondent points to its retention of Dr. Elizabeth Walker as Respondent's expert, and to her expert report (RX20), then notes that "unlike Respondents [sic], who had Dr. Walker prepare an expert report, . . . Complainant has provided no expert report"[4] and that, therefore, "Dr. Walker's expert opinion is uncontested and at odds with EPA's non-expert assessment of harm to human health and the environment set out in Exhibit CX04." Response at 9. Dr. Walker's opinions are uncontested for purposes of the Motion and are not at odds with Complainant's position on the potential for harm component of the proposed penalty for Count 3, as fully described in CX04 and the EPA Memo.

Respondent must have missed the portion of the EPA Memo where Complainant states that for purposes of the Motion, Complainant accepts "Ms. Walker's conclusions that '[n]o evidence exists that any human or environmental harm or harmful exposure occurred from the primer stored at the Prime facility. Probability of exposure to primer by humans or environmental receptors is low . . . the probability of the materials catching on fire is extremely low . . . and [p]otential seriousness of contamination is also low.'" EPA Memo at 47-48.

[4] Complainant named Dr. Kristen Keteles in its Rebuttal Prehearing Exchange in case it becomes necessary to rebut the expected testimony of Dr. Walker at hearing. Complainant did so because of its choice to file the Motion and the consequent timing requirements set forth in the Prehearing Order for Complainant to simultaneously prepare for hearing while developing and arguing this dispositive motion. Because of the parallel timing requirements, Dr. Keteles is preparing her expert rebuttal report and Complainant will move to have it included in Complainant's proposed exhibits when her report is ready (assuming the Presiding Officer has not ruled in Complainant's favor by that time). This parallel preparation effort does not affect Complainant's position that potential for harm can be determined on consideration of this Motion.

Respondent properly ties Dr. Walker's opinions to Count 3 (storage without a permit) elsewhere in the Response. It is possible, however, that the quoted statement above could be taken to mean that Dr. Walker's uncontested opinions apply to the potential for harm under all counts. In an abundance of caution, Complainant notes that Dr. Walker's expert report unambiguously states her analysis is limited to the potential for harm from Respondent's storage of the hazardous waste at Respondent's facility without a permit.

In response to the properly supported Motion, Respondent's argument on the potential for harm is that because there is no proof that actual harm to human health and the environment occurred as a result of Respondent's illegal storage at its Salt Lake City Facility, and because the Facility has limited access, the trailer and drums were stored on a concrete pad, and few employees went near the drums, Respondent's violation posed a small potential for harm under Section 3008(a)(3) and Penalty Policy.

Respondent's "no harm, small foul" argument flies in the face of the extensive analytical approach to assessing the potential for harm under the Penalty Policy. Penalty Policy at 12-17. First, Respondent completely ignores the second prong of the analysis, "the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program" *Id.* at 13 and *see* 14-15. Second, while Respondent highlights the favorable handling conditions relating to the risk of exposure, the Presiding Officer is to weigh the totality of the circumstances. *See,* "Probability of Exposure," Penalty Policy at 14.

Respondent concludes this section of the Response by stating that Complainant made "many errors in its analysis of the penalty and/or the different reasonable interpretations that can

be drawn from the facts" and that Respondent plans on going into more detail at hearing. Response at 9. Respondent misunderstands its burden in response to the Motion.

Respondent's characterization of Complainant's proposed penalty calculation as being filled with errors is merely an attempt to paint mixed questions of law and fact with a veneer of disputed issues of material fact. The coating is thin. All Respondent is arguing is that certain undisputed facts should be given greater weight than Complainant gives them.

Complainant's view of the potential for harm for Respondent's storage without a RCRA permit is first expressed in CX04. Upon receipt of Respondent's Prehearing Exchange and exhibits, Complainant reviewed all new information and determined that its view was unchanged, except with regard to the amount of economic benefit Complainant initially calculated for the illegal storage violation. Jacobson Declaration. Complainant also determined that it could properly support a motion for accelerated decision on all violations and so filed the Motion and EPA Memo. Complainant provides additional analysis of the proposed penalty for Count 3 in the EPA Memo, particularly in Section VI.C.4.

Because the penalty phase of the case was properly brought to Respondent on the Motion, it was incumbent upon Respondent to come forth with specific facts in the Response or in a declaration which show a disputed issue of material fact. All Respondent has done here is point to undisputed facts, hint that more is to come at a hearing, and argue that certain of the facts in front of the Presiding Officer point to a different conclusion than Complainant has argued on the potential for harm from Respondent's illegal storage of the hazardous waste. Respondent again has identified mixed questions of law and fact, which are precisely the types of questions that are to be decided by a Presiding Officer.

B. Factors, Considerations, and Equitable Issues Touched on by Respondent Do Not Require a Hearing

Respondent argues that other facts can only be placed in front of the Presiding Officer at a hearing, including that Respondent "has no prior history of violations, that [it] does not regularly deal in hazardous waste as part of its business, that it is in full compliance with the law, and that has [sic] trained its relevant employees to ensure this unfortunate event does not recur." Response at 1.[5] Respondent then states the Complainant's penalty witness "gave no credit to the company for good faith efforts, lack of prior violations, or its cooperative and timely responses to EPA's directives, among other things. See CX04 at 8-9." *Id*. at 10 This is misleading.

What EPA's penalty witness did in CX04 was explain her view of how each of Respondent's considerations in front of her at the time are addressed through application of the adjustment factors in the Penalty Policy. Further, after reviewing Respondent's Prehearing Exchange and exhibits EPA's penalty witness concluded that her view of them was unchanged. Jacobson Declaration at ¶ 22-23. Complainant has accepted all of Respondent's considerations as fact for purposes of the Motion and provided greater detail about how these facts are viewed through the lens of the Penalty Policy. *See*, Sections IV.D.2 and VI.C of the EPA Memo.

Respondent argues that these considerations should be given greater weight because they fit in the category of "other factors." Response at 10. Each of the factors and considerations raised by Respondent, however, are directly addressed in the Penalty Policy and explained by Complainant in CX04 and the EPA Memo. Complainant chose not to consider Respondent's

[5] Respondent adds "its lack of experience in dealing with hazardous waste cleanups of this magnitude or when hazardous waste management is required…." *Id*. at 3 Though Respondent does not discuss this factor further in the Response, Complainant did explain how it considered that this was a first-time experience through the lens of the Penalty Policy in the EPA Memo at 70-71. Respondent also requests that the Presiding Officer consider the sincerity of its witnesses at hearing. Response at 8. Again, Respondent's witnesses' sincerity is not in dispute.

considerations a second time as "other factors" when calculating a proposed penalty. Respondent's argument that they should be considered a second time points to another mixed question of law and fact.

Respondent mischaracterizes Complainant's citation to *In the Matter of Titan Wheel Corporation of Iowa*, 2001 WL 1035756 (EPA ALJ May 4, 2001), by stating that the citation was "for the proposition that coming into compliance should not be considered a mitigating factor under the penalty policy." Response at 11. Complainant's citation more properly is characterized as supporting Complainant's explanation that the Penalty Policy does account for a respondent coming into compliance (EPA Memo at 72),[6] even if it does not result in a "mitigating" (or downward) adjustment to the gravity-based calculation.

Complainant has accepted each of Respondent's considerations as fact for purposes of the Motion. Complainant has explained in detail how it views them through application of the Penalty Policy. Respondent argues that a smaller penalty is warranted because of these facts. Respondent again has identified mixed questions of law and fact, which are precisely the types of questions that are to be decided by a Presiding Officer.

IV. Respondent's General Assertions About Complainant's Proposed Penalty Amount Ignore Key Facts

Respondent describes Complainant's view of the case as "aggressive," Response at 12, and Complainant's proposed penalty as "draconian." *Id*. at 12. As the EPA Memo makes abundantly clear, however, both descriptions miss the mark by a wide margin.

[6] "[U]nder the RCRA Penalty Policy, the gravity-based component presumes good faith efforts to comply after EPA has discovered a violation. RCRA Penalty Policy at 33. Therefore, Titan's efforts to comply after being notified of the violations are already accounted for in the gravity-based calculation. In the past we have declined to apply downwards adjustments already taken into account by the penalty matrix." *Titan Wheel*, 2001 WL 1035756, at *18

In 1990 Congress directed Federal agencies to adjust the statutory maximum penalties for inflation, which for Section 3008(a)(3) was $25,000 per day of noncompliance for each violation. *See* EPA Memo at Section III.A.2. Apparently unsatisfied with initial efforts, in 2015 Congress amended the 1990 Adjustment Act and required each agency to make a "catch-up" adjustment, and then annual adjustments for inflation. *Id*. "The purpose of the 2015 Act is to maintain the deterrent effect of civil monetary penalties by translating originally enacted statutory civil penalty amounts to today's dollar . . . ." 85 Fed. Reg. 83818 (Dec. 23, 2020). Thus, today the statutory maximum penalty per day per violation is $102,638.00 for violations occuring on or after November 2, 2015 (and $37,500.00 for violations occuring prior to November 2, 2015).

The upper bound of the "major-major" cell in the gravity-based matrix of the Penalty Policy equaled the statutory maximum until the Agency made adjustments to the gravity-based matrix in response to the 2015 Adjustments Act. *See* EPA Memo at Section III.C. At that time, the upper bound of the major-major box in the gravity-based matrix rose from $37,500 to $40,779, which was far less than the "catch-up" adjustment of the statutory maximum from $37,500 to $93,750. (Both have been adjusted regularly since 2015.)

As discussed in Section II.C of the EPA Memo, the EPA has two options when proposing a penalty under section 3008(a)(3) in administrative adjudications: the EPA may plead the statutory maximum or propose a specific penalty pursuant to the Penalty Policy. By choosing to propose a penalty pursuant to the Penalty Policy, Complainant immediately reduced the potential maximum penalty proposal for day one of each violation from over $100,000 to $44,124. In addition, Complainant exercised discretion and viewed day one of violation for Count 1 as

occurring before November 2, 2015, which further reduced the maximum proposed penalty for day one from $44,124 to $37,500.

Complainant continued exercising discretion by not proposing a penalty for additional days of violation for Counts 1, 2, 4 and 5, even though multi-day penalties are considered mandatory for violations designated major-major. Penalty Policy at 25; *see also* CX04 and Sections VI.C.2, 3, 5, and 6 of the EPA Memo

Complainant only proposed a multi-day component to the proposed penalty for Count 3. Even though Respondent had stored the hazardous waste at its Facility for over 300 days without a permit, and this period ended only after EPA-CID inspected the Facility, Complainant exercised discretion and capped the number of days in the multi-day calculation at 179 and used the dollar values in the multi-day matrix rather than the gravity-based matrix. *See Id.*; *see also* CX04 and Section VI.C.4 of the EPA Memo.

Each of these choices is evidence of Complainant's effort to reach a proposed penalty that reflects Congressional intent and is consistent with the Penalty Policy. *See above* and EPA Memo at Section III.A. The final penalty number may not be small, but Complainant is not taking an aggressive approach in this case, and its proposed penalty is not draconian.

V. Complainant's Basis for its Proposed Selection of Major-Major and Moderate-Major for the Five Violations is Fully Supported

Ignoring Complainant's choices described immediately above, Respondent argues that "Complainant has chosen the most severe categories in the Penalty Policy matrix for most of the allegations in the complaint, yielding some of the highest penalties." Response at 13.

Respondent correctly notes that "considerable judgment and discretion" must be exercised to select the gravity-based penalty designations for each violation (*i.e.*, which "box" in

the matrix applies). *Id*. at 12. Complainant has exercised its judgment and discretion, explained its analysis thoroughly, and now asks the Presiding Officer to do the same through the properly supported Motion.

Respondent argues that it is "entitled to probe the extent that Complainant exercised that discretion in arriving at the proposed penalty of $631,402" and provides examples of questions counsel will ask on cross-examination of EPA's penalty witness. *Id*. Respondent also argues that it is necessary to "probe beyond the superficial treatment EPA gives these subjects in its penalty policy analysis." *Id*. Respondent, however, elsewhere complains that the matter is complicated, in part because of "the 20-page, single-space penalty policy analysis that Complainant relies on" *Id*. at 1, and neglects to mention the extensive Penalty Policy analysis in Section III.C of the EPA Memo and for each violation in Section VI.

Complainant has extensively documented and demonstrated how it exercised judgment and discretion in reaching a proposed penalty for each violation. Respondent again has identified no material facts in dispute but has identified mixed questions of law and fact, which are precisely the questions to be decided by the Presiding Officer.

VI. Respondent's Remaining Arguments in Sections I.E, F and G of the Response Are Unavailing

Respondent's efforts to create a material issue out of Complainant calling attention to its typographical errors in CX04, Response at 13, amount to nothing. Respondent characterizes the requested corrections to CX04 as Complainant dealing "with mistakes made addressing economic benefit." *Id*.

As Ms. Jacobson explains in her Declaration "[t]he only change from my original calculation reflected in the Complaint and CX04 is that upon further analysis after the Complaint

was filed it was determined that the apparent economic benefit from the violation alleged in Count 3 would be less than $5,000. EPA removed the economic benefit component from the calculation for Count 3, for a reduction of $8,273, from the amount pled in the Complaint." Jacobson Declaration at ¶ 12. The requested corrections in CX04 only relate to Complainant inadvertently subtracting this amount twice in parts of CX04.

Respondent's statement that "Respondent intends to challenge this key piece of the proposed penalty" *Id*. (referring to the $10,800 economic benefit calculation for Count 1) ignores that it was Respondent's burden to rebut, or explain how Respondent planned to rebut, Complainant's simple and clear calculation of economic benefit for Count 1 (not Count 3).

For the second time in this proceeding, Respondent attempts to obtain some value with allusions to the almost five year period during which the United States was determining an appropriate enforcement response to Respondent's violations.[7] Complainant could not have pursued an enforcement response during the first year of this period because as a result of Respondent's violations neither Complainant nor Utah were aware of the existence of the hazardous waste. The only way for Complainant to show that the remainder of the five year period does not somehow create value for Respondent is to divulge information from the multiple criminal enforcement offices conducting the criminal investigation, which (the civil side of) Complainant does not have, and divulge information about subsequent settlement negotiations between Complainant and Respondent, which Complainant will not do.

[7] Respondent first tried this in paragraph 40 of the Answer by noting that the U.S. Attorney's Offices in Idaho and Utah eventually declined to prosecute Respondent criminally under RCRA. In response to paragraph 40, Complainant stated "Complainant accepts this statement, but asserts that no inferences about the potential success on the merits of the United States in a criminal prosecution can be drawn from it, and, therefore, it has no bearing on determining a penalty in this matter." EPA Memo at 41

Respondent argues that the Presiding Officer is not bound by the RCRA Penalty Policy. Complainant agrees and points Respondent to Complainant's extensive discussion of its understanding of the Presiding Officer's role when considering penalties proposed by EPA. *See* Sections II.B, C, and D of the EPA Memo.

Respondent lists a number of decisions in support of its point that "ALJs frequently depart from the RCRA Penalty Policy to award substantially smaller penalties than requested by the EPA Regions once all of the facts of the case are set out in the appropriate narrative context at hearing." Response at 15. Given that the decisions by the Presiding Officers speak for themselves when discussing why they awarded substantially smaller penalties than requested, and none discuss Respondent's point, it seems presumptuous to infer that in each case the penalty was reduced because an appropriate narrative context was created at hearing.[8]

[8] The cases cited by Respondent also generally do not support the broad proposition that the reductions are because the Presiding Officer disagrees with EPA over its application of the RCRA Penalty Policy. *In re Aguakem Caribe, Inc.*, 2011 WL 7444586, at *57(EPA ALJ Dec. 22, 2011) ("Accordingly, I find that Complainant appropriately calculated the gravity-based and multi-day components of the proposed penalties for Counts 1 and 2 of the Complaint. To account for the reduction in the quantity of regulated waste at issue in this proceeding, I consider two approaches to be reasonable . . . . This issue need not be resolved, however, inasmuch as I find that Respondent sustained its burden of demonstrating that it is unable to pay a substantial penalty in this proceeding"); *In re Mercury Vapor Processing*, No. RCRA-05-2010-0015at 93-94 (EPA ALJ Dec. 14, 2012) (Penalty assessed based on EPA's expert witnesses' view of financial information, and considering the possibility that the cost of complying with the compliance order may be significant.); *In re Carbon Injection Systems,* No. RCRA-05-2011-0009 at 91 (EPA ALJ March 17, 2015) ("[T]he undersigned finds that Respondents are **not liable** for the ten counts of violation alleged in the Second Amended Complaint" (emphasis added)); *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, at *11 (2013) ("The Board also reaches this conclusion without regard to whether Respondents were *entitled* to a hearing or whether a hearing was required. As clearly set forth in the administrative regulations, the ALJ had the *discretion* to order the hearing, as well as the obligation to weigh the facts and reach a conclusion with respect to the penalty. When ordered to make its case with respect to the proposed penalty at a hearing, Complainant chose not to do so. Not only did Complainant fail to meet its burden to persuade the ALJ with respect to penalty, he effectively exposed the Agency to an award of a zero penalty as a sanction for failure to comply with an ALJ's order. Accordingly, and for these reasons, the Board concludes that a zero penalty against JAB Toledo and JAB Ohio is appropriate under the circumstances of these matters." (footnote omitted)); *In re Ram, Inc.*, 14 E.A.D. 357 (2009) (Decision under the Underground Storage Tank (UST) Penalty Policy for Subtitle I of RCRA, not RCRA Penalty Policy. Also, general citation is not meaningful as the Board discusses a of number of penalty issues on appeal by both parties.); *In re Andrew B. Chase*, 2014 WL 3890099 (EPA ALJ 2014) (Board accepted Presiding Officer's penalty assessment under the UST Penalty Policy, with one small upward adjustment. Penalty was smaller than Complainant's proposed penalty.); *In re M.A. Bruder and Sons, Inc.*, 2001 WL 1659339, at *11 (EPA ALJ Oct. 25,

Complainant also notes that the "Board has stated on numerous occasions, it is inappropriate to compare penalties imposed in different cases. *See, e.g., In re Chem Lab Prods., Inc*., 10 E.A.D. 711, 728 (EAB 2002) ('There is naturally substantial variability in case-specific fact patterns, making meaningful comparison between cases for penalty assessment purposes impracticable.'); *In re Hunt*, 12 E.A.D. 774, 795 (EAB 2006) ('[T]he penalty inquiry is inherently fact-specific such that abstract comparison of dollar figures between cases without considering the unique factual record of cases does not allow for meaningful conclusions about the fairness or proportionality of penalty assessments.')." *In re Euclid Of Virginia, Inc*., 13 E.A.D. 616, n.168 (EAB 2008).

Finally, Respondent lists a number of decisions in support of its point that Presiding Officers frequently deny EPA's motions for accelerated decision on penalty, and, Respondent argues, "for many of the same reasons Respondent raises here." Response at 18, n.4. Complainant briefly discusses and distinguishes each from the Motion.

In *In re Dave Erlanson, Sr*., 2018 WL 4859961 (EPA ALJ Sept. 27, 2018), the parties clearly continued to dispute whether "the operation of his suction dredge on the day in question did not adversely impact the environment." *Id.* at *26. In contrast, here Complainant has clearly accepted Respondent's view of the impact Respondent's illegal storage had on the environment for Count 3 for purposes of the Motion. Further, Complainant has explained in great detail how Complainant has factored this undisputed information into its calculation of a proposed penalty for the illegal storage violation.

2001) ("In this instance, we do not find the ALJ's rationale for departing from the Penalty Policy to be compelling and, as such, find that it does not in this case warrant our deference. The ALJ's decision to depart from the Penalty Policy flowed directly from his mistaken belief that the Region's analysis under the Penalty Policy was correct, a premise we reject.")

In *In re Lay Brothers, Inc*., 1999 WL 362891 (EPA ALJ March 12, 1999), the Presiding Officer's discussion makes it clear that complainant did not even attempt to show that there were no issues of material fact. *Id*. at *9. Complainant notes that respondent in that case raised quite a few of the same considerations as Respondent has here. *Id*. In that case, however, complainant appears to have essentially ignored the considerations. In this case Complainant has accepted Respondent's considerations and explained in great detail how Complainant has factored these undisputed considerations into its calculation of a proposed penalty pursuant to the Penalty Policy.

In re Paco Swain Realty, L.L.C., 2014 WL 4649467 (EPA ALJ July 23, 2014), is another case where complainant's motion for accelerated decision on penalty was not well-founded and its penalty calculation was based on a disfavored policy.

> Complainant's explanation of its penalty calculation is relatively brief in describing the underlying factual basis to support the various numerical values assigned in the calculation. Moreover, the calculation is based on the formulas set out in the Settlement Penalty Policy, the approach criticized by the EAB in Parkwood for its neglect of the statutory penalty criteria and the Agency's general litigation penalty policies. 2013 EPA App. LEXIS 36, *46-47, *58-59, *68. The Motion, Mullins Declaration and other documentation cited by Complainant do not clearly establish that there is no fact material to the calculation of the penalty that can be genuinely disputed.

Id. at *22. This decision, therefore, has no bearing on the instant Motion.

In *In re Berntsen Brass & Aluminum Foundry, Inc*., 1998 WL 289234 (EPA ALJ April 21, 1998), the Presiding Officer found that "the time at which the Respondent became aware of its failure to file Form Rs for lead and copper for 1991 and 1992 is in dispute. Inasmuch as this timing is relevant to possible compliance adjustments under the EPCRA ERP, I find that a material fact is in dispute, and that an evidentiary hearing is necessary to resolve this disputed

fact." *Id*. at *6. The Presiding Officer denied the motion because the Presiding Officer found a material fact that was in dispute, not, as Respondent posits, because there was a dispute about whether a reduction was warranted because respondent "remedied violation [sic] as soon as it was brought to respondent's attention." Response at 16, n.4. Complainant also notes that the Presiding Officer disposed of all remaining potential issues of fact in the decision.

In re Micro Pen of U.S.A., 1999 WL 362851 (EPA ALJ March 22, 1999), is irrelevant because it does not discuss a motion for accelerated decision on penalty. "Complainant filed a Motion for Accelerated Decision, requesting judgment as a matter of law only on the issue of Respondent's liability for each of the twenty-five alleged violations." *Id*. at *1.

VII. Conclusion

Complainant met its initial burden to properly support the Motion, including the higher burden for accelerated decision on penalty. Respondent has not identified any material fact or consideration in dispute. Further, Respondent has not otherwise met its burden to properly support its argument that additional relevant, material, and credible evidence would be obtained at a hearing. Instead, Respondent has identified a number of mixed questions of law and fact relating to an appropriate penalty for each violation, which are the questions Complainant asks the Presiding Officer to decide on consideration of Complainant's properly supported Motion.

Complainant has demonstrated that when calculating a proposed penalty for each Count, Complainant applied the Penalty Policy in accordance with the undisputed facts of this case and consistent with the statutory penalty factors set out in 42 U.S.C. § 6928(a)(3). Complainant also has demonstrated that the proposed penalty for each Count is not arbitrary or capricious, does not evidence an abuse of discretion, and was made in consideration of all probative, relevant, and

material evidence. Complainant also has demonstrated that an appropriate penalty for each Count can be decided on the submittals of the parties, and, therefore, the Presiding Officer can review the facts in a light most favorable to Respondent, independently assess Complainant's proposed penalty for each Count, and independently determine an appropriate penalty for each violation without holding a hearing.

Complainant, therefore, respectfully requests that the Presiding Officer assess the penalty proposed by Complainant for each Count in the Complaint on which the Presiding Officer makes a finding of violation pursuant to the Liability Motion.

Dated: March 19, 2021

Respectfully Submitted,

LAURIANNE JACKSON
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CERTIFICATE OF SERVICE

The undersigned certifies that on March 19, 2021, I filed electronically the foregoing **COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent by electronic mail to Mark Ryan, attorney for Respondent, at mr@ryankuehler.com and Scott McKay, attorney for Respondent, at smckay@nbmlaw.com.

_____
Date: March 19, 2021

By: _/s/ Kate Tribbett_____
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