UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF: New Prime, Inc., Respondent.	Docket No. RCRA-08-2020-0007

COMPLAINANT'S POST-HEARING REPLY BRIEF

COMES NOW, the U.S. Environmental Protection Agency Region 8 (Complainant, or Region 8), by and through its undersigned counsel and pursuant to this Tribunal's January 12, 2023, Order on Motion for Extension of Time, to respectfully offer its brief in reply to Respondent's Post-Hearing Brief dated February 3, 2023.

I. Introduction

As Complainant detailed in its Post-Hearing Brief dated December 23, 2022 (Compl. Br.), Complainant has met its evidentiary burdens on the issues remaining in this case: the number of drums of hazardous waste; and an appropriate penalty for each violation.[1]

Through expert testimony at hearing, Complainant has proven by a preponderance of the evidence that at least twenty drums contained hazardous waste as defined under the Resource Conservation and Recovery Act (RCRA).

Because Complainant also met its burden of persuasion with regard to the proposed penalty for each violation, it is Respondent's burden to show that the penalty proposed by Complainant is not appropriate. Respondent has failed to do so. Respondent also failed to make any

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[1] By order dated April 4, 2022 (April 4 Order), this Tribunal granted Complainant's motion for accelerated decision on liability for each of the five counts in the complaint with regard to eight drums of hazardous waste, rather than at least twenty drums as alleged by Complainant; and denied the motion as to penalty.

meaningful arguments in support of its position that this Tribunal should abandon the comprehensive analytical framework set forth in the 2003 RCRA Civil Penalty Policy (RCPP) and create a case-specific framework for analyzing the two statutory factors RCRA requires to be considered. *See* 42 U.S.C. § 6928(a). Complainant, therefore, respectfully requests that this Tribunal assess a penalty as proposed by Complainant.

II. Complainant has Proven its Allegation that at Least Twenty Drums at Issue in this Matter Contained RCRA Hazardous Waste

Through the expert testimony of Dr. Miller, Complainant met its burden of persuasion by showing that at least twenty of the thirty-two drums at issue in this matter contained RCRA hazardous waste. At hearing, and in its Post-Hearing Brief dated February 3, 2023 (Resp. Br.), Respondent did not contest Complainant's allegation. Because Complainant has shown that at least twenty of the drums at issue in this matter were hazardous waste, Complainant respectfully requests that this Tribunal find that its prior ruling that Respondent is liable for five violations of RCRA applies to at least twenty drums of hazardous waste rather than eight.

III. Respondent has not Adduced Meaningful Evidence that the Penalty Proposed for any of the Five Violations is Not Appropriate

A. Respondent Has Not Met Its Burden to Show That the Penalty Proposed by Complainant is Not Appropriate.

The Environmental Appeals Board (Board) has clearly stated that the complainant "bears both the initial burden of production and the ultimate burden of persuasion with respect to the appropriateness of the proposed penalty."[2] In *Titan Wheel*, the Board also explained that "[a]n 'appropriate' penalty is one which reflects a consideration of each factor the governing statute

[2] *In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526 (EAB 2002) 2002 WL 1315600, *28, *aff'd*, *Titan Wheel Corp. of Iowa v. U.S.E.P.A.*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd sub nom, Titan Wheel Corp. of Iowa v. U.S. Env't Prot. Agency*, 113 F. App'x 734 (8th Cir. 2004) (*Titan Wheel*).

requires to be considered, and which is supported by an analysis of those factors." *Id*. Looking squarely at the 1990 RCRA Penalty Policy[3] the Board stated that it "implements the statutory penalty criteria by taking into account 'the seriousness of the violation, and any good faith efforts to comply with the applicable requirements.' *In re Everwood Treatment Co*., 6 E.A.D. 589, 594 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998)." *Id*. at *12.[4] The Board continued

> Once the complainant establishes a *prima facie* case, the burdens shift to the respondent to come forward with evidence that the penalty is not appropriate. Respondent is then required to show: (1) through the introduction of evidence that the penalty is not appropriate because the Region had, in fact, failed to consider all the statutory factors, or (2) through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and, thus, is not "appropriate."

Id. at *28 (citations omitted). Respondent has failed to make either showing.

B. Respondent has Submitted No Meaningful Evidence Showing that Complainant's Proposed Penalty Calculation is Not Supported, and, Thus, Not Appropriate.

Respondent argues broadly that Complainant did not correctly analyze the "seriousness of the violations," and specifically, that Complainant did not correctly analyze the potential for harm under the RCPP.[5] *See* Resp. Br. at 13-15. The RCPP explains that two factors are considered

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[3] Again, because the details of the 2003 Penalty Policy only differ from the 1990 Penalty Policy as described in the Suarez Memo, case law discussing application of the 1990 Penalty Policy remains of value in assessing appropriate application of the 2003 Penalty Policy to the unique facts of each case. *See* Compl. Br. at 35, n.50.

[4] The Board also explained that "ALJs must consider any civil penalty guidance or policies issued by the Agency . . . as such policies derive from the statutory penalty criteria and suggest methods for consistently applying these criteria . . . [and that] once an ALJ considers the relevant penalty policy, he or she may adopt the penalty computed in accordance with that policy or deviate therefrom, so long as the deviation is explained and the penalty assessed reflects the criteria in the applicable statute." *Id*. (internal citations and footnote omitted).

[5] Respondent also continues to point to the lack of evidence of "actual" harm in support of its argument for a substantial deviation from the RCPP. Resp. Br. at 24. The RCPP makes clear "[i]n considering the risk of exposure, the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred. Violators rarely have any control over whether their pollution actually causes harm. Therefore, such violators should

when analyzing the seriousness of a violation: the potential for harm and the extent of deviation. *See* RCPP at 12. Respondent has not submitted evidence or argument regarding Complainant's calculation of the extent of deviation. Instead, Respondent only focuses on the potential for harm, which itself requires the assessment of two factors – "the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program." *Id*. (emphasis added).

Respondent studiously avoids any analysis of the second factor (commonly known as the "potential for harm to the program"). *See* RCPP at 14. Respondent does so notwithstanding the substantial case law on this stand-alone factor cited in Complainant's Brief, as well as Ms. McNeill's extensive testimony on this factor. *See, e.g.*, Compl. Br. at 23-24; Tr. Vol. 2.

Respondent makes three arguments in support of its contention that Complainant overstates the potential for harm to human health or the environment: (1) Complainant did not evaluate the probability of exposure, and, therefore, Complainant's potential for harm argument is unsupported; (2) Respondent has shown that the probability of exposure was low, and, therefore, the potential for harm was low; and (3) based on the approach taken during EPA's criminal investigation of the Facility, EPA considered the potential for harm to be low. Each argument fails to show that Complainant's proposed penalty calculation is not appropriate.

With regard to the first argument, Respondent simply is relying on word games. A very cursory look at the description of the analysis to be conducted on the "probability of exposure"

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not be rewarded with lower penalties simply because the violations did not result in actual harm." RCPP at 14 (emphasis added).

for purposes of the RCPP (RCPP at 13), and a review of Ms. McNeill's testimony to this factor for each violation (Tr. Vol 2), and CX04Cor (admitted), shows that Complainant undertook this analysis appropriately for each violation.[6]

Respondent also argues that "Complainant's expert, Dr. Keteles testified that she did not consider probability of exposure in her analysis, Tr. Vol.4, 234 [sic, should be 233], even though the RCPP clearly states that EPA should do so." Resp. Br. at 14. Again, this is mere word play. First, as Dr. Keteles testified, she was asked to evaluate the expert report of Respondent's toxicologist, Dr. Walker, and to determine in her expert opinion "if there was a potential for harm from the improper storage of waste at the Prime site." Tr. Vol. 4 at 201. Dr. Keteles was not asked to analyze the probability of exposure as that term is used in the RCPP. Further, Dr. Keteles explained that probability of exposure is not considered when a toxicologist assesses the likelihood of contact with a harm. Finally, as more fully discussed in Complainant's Brief, Dr. Keteles testified that a potential for exposure existed because certain exposure pathways were complete.[7] Compl. Br. at 41-43.

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[6] Respondent must ignore evidence presented at hearing regarding, among other things, the condition of the open rusted drums stored on a collapsed burnt trailer, the ongoing release of vapors, the ongoing construction activity, the lack of fencing around the construction activity, and the finding of this Tribunal that Respondent's manner of storage of the drums "may have caused a rupture of a drum or may have caused a drum . . . to leak. As a consequence, any of the eight drums that contained hazardous waste could have released its contents into the environment." April 4 Order at 15. (As discussed in section II, supra, Complainant requests that this finding be modified to reflect a finding that twenty drums contained hazardous waste.).

[7] *See, e.g.*, Tr. Vol. 4 at 227 (There is no "de minimis number of receptors. If people could come in contact with it, we would consider the risk."). The same assessment is true for environmental receptors. *Id*. at 228. ("If there is the potential to come in contact with it, we would still consider that in the risk assessment. So if birds could access this facility, say small mammals, reptiles, like what was mentioned, a lizard, they would still be considered receptors that could come in contact with this material that wasn't properly stored."). *See also* CX66 at 8 ("A completed exposure pathway exists when there's evidence of or using best professional judgement a strong likelihood of human or ecological receptors coming into contact with site-related contaminants."); and 9 (Conceptual Site Model for Prime, Inc. Hazardous Waste Storage Site representing complete pathways for first responders, workers, and visitors).

Second, Respondent argues that the potential for harm from Respondent's storage of drums at the Facility was low by pointing to the testimony of Dr. Walker explaining that because she concluded the probability of exposure was low, and the risk of fire was low, there was a low potential for harm. According to Respondent, Dr. Walker's conclusion was based on "the how and where the trailer was stored." Resp. Br. at 15, and Respondent emphasizes that "[t]he facts are important." *Id*. In response, Complainant first notes that a very large number of facts that Respondent presents as undisputed in its Brief are clearly contradicted by evidence and testimony in the record.[8] Second, Complainant notes that it already has shown that Dr. Walker's conclusions that the probability of exposure is low and that the risk of fire was low were in error. *See* Compl. Br. at 40-46.

Another error in Dr. Walker's analysis is that she erroneously conflates risk of harm with risk of exposure. This is seen most readily in her rattlesnake example.

> So, the simple way to understand that then is that toxins have an inherent hazard, and that's independent of the exposure. If you're not exposed to that hazard, the risk is zero. There's no way that you can have a risk for something that you're never exposed to. The example I use in my report is a rattlesnake bite and the potential harm: difficulty breathing, tissue swelling, et cetera, that can come from a rattlesnake bite. So, a rattlesnake is inherently dangerous or a hazard to any one of us sitting in this room. But unless you actually are bit by that rattlesnake, your risk of experiencing those adverse effects is zero.

Tr. Vol. 4 at 111.

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[8] Throughout its Post-Hearing Brief, Complainant documented that a significant amount of information provided by and relied upon by Respondent about the Facility and storage conditions was inaccurate. Complainant also documented that information relied upon and assumptions made by Dr. Walker were inaccurate. *See* Compl. Br. at 40-43; *see also* Tr. Vol. 4 at 103-104 and 159 as modified pursuant to this Tribunal's Order on Motions to Conform Transcript to Actual Testimony dated December 30, 2022 (Order to Conform) (Dr. Walker testified that at the time of her report she "understood that the trailer was covered the entirety of the time it was stored at the Prime facility", and she assumed "some or all [of the drums] were no longer filled." She also testified that "[t]he construction activity is something I learned about subsequent to writing the report.").

The inherently hazardous substance is the venom, not, as Dr. Walker states, the rattlesnake. The rattlesnake is analogous to the twenty opened, rusted and nearly full drums at the Facility that contained the hazardous waste. As Dr. Keteles explained,

> I agree in that, yes, you will not experience the adverse effects unless you're envenomated, but I don't agree that, if you are in the presence of a rattlesnake, you are not at risk for being bit. Unless that rattlesnake is locked away, you are still at risk for getting bit. You are at risk for the exposure.

Tr. Vol. 4 at 207 as modified by the Order to Conform (emphasis added).

At the Facility, the risk of exposure to the hazardous waste was determined generally by the level of access to the drums. If there was no access to the hazardous waste in the drums or the vapors, there would have been no risk of exposure. If access to drums had been impeded in any meaningful way (for example by compliance with some or all of the RCRA drum storage requirements, or the SDS storage instructions), the risk of exposure would have been lowered for most potential receptors.[9] In this case, the unfettered access to the drums of hazardous waste created a strong likelihood that that someone or something may have been exposed to the highly toxic and ignitable drums of hazardous waste. *See* CX66 at 8.

Dr. Keteles further explained that the toxicological risk of harm (health effects) cannot be quantified unless the exposure levels are known.[10] At the Facility, a receptor's risk of harm would have been determined by the details of their contact with the waste, vapors, and/or

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[9] The waste containers were open, were not marked with an accumulation date or as "hazardous waste." Similarly, Respondent submitted no evidence of an onsite emergency response coordinator or emergency preparedness plan.

[10] "And then, if you are exposed and envenomated, then you would be at risk for the adverse health effects" Tr. Vol 4 at 207. "So you need two pieces of the puzzle to assess risk [of harm]. You need to know the inherent toxicity, the levels that would cause an adverse health effect; and then you need to know the actual exposure levels, what levels people come into contact with and how long they come into contact with it." Tr. Vol. 4 at 220. Based on her report, Dr. Walker appears to agree. RX20 at 5.

combustion byproducts, fumes, smoke, and particulates during a fire. *See* Tr. Vol. 4 at 219. In other words, the potential health effects to human or environmental receptors during the period of Respondent's illegal storage of the hazardous waste is not determinable without actual exposure information.[11]

Complainant has shown that the two conclusions upon which Dr. Walker bases her opinion that the potential for harm was low are faulty in and of themselves. Complainant also has shown that Dr. Walker's opinion on the probability of harm is unsound from a toxicological perspective; and further, that even if assessing probability of harm has merit, Dr. Walker's approach (conflating the potential for harm from Respondent's mismanagement of the hazardous waste at the Facility with the potential for exposure) does not. Evidence and argument proffered by Respondent that the potential for harm was low, therefore, does not show that Complainant's analysis of the potential for harm under the RCPP is not appropriate.

Third, Respondent's attempt to create a narrative that EPA believed the potential for harm was low at the time of EPA's investigation at the Facility is patently absurd. Respondent turns the purpose of EPA's criminal investigation on its head. It is standard practice in criminal investigations to attempt to preserve all potential evidence until the investigation is complete. No credible inference about the understanding of the Criminal Investigation Division (CID) about the potential for harm can be drawn from the preservation request letter, except, perhaps, that CID did not think there was an emergency. *See* CX11. And, while it generally is true that the

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[11] As Dr. Keteles testified with regard to the vapors from the drums, because "Prime didn't do occupational monitoring, we don't know how far away the vapors would travel. But what we do know from the drum logs is that nearby the drums the levels were high. And based on that chemical composition [the day of sampling], they would have likely exceeded some of the occupational exposure limits." Tr. Vol. 4 at 231-32. Dr. Keteles further testified that because of the lack of data she "did not look at the probability of harm. I just looked at <u>potential for exposure</u> and just <u>the inherent toxicity</u> because that's all the information that I had*." Id.* at 233 (emphasis added).

existence of criminal investigations are not widely shared, Complainant has no knowledge of whether CID informed any other agency about the existence of the waste or its criminal investigation. If Respondent has knowledge that CID did not communicate with other agencies in Utah (for example, by asking them if CID had reached out to them), it has not placed that information into the record. Finally, EPA's investigation included a step that Respondent should have taken at least nine months earlier. EPA performed a hazardous waste determination by conducting field sampling and analysis of the materials in drums, and lab analysis of the materials in a specific subset of drums.[12] When the EPA thereafter determined that the material was regulated as hazardous waste, and when the field investigation of the trailer and drums was complete, EPA authorized and required Respondent to dispose of the hazardous waste properly. The fact that, at the time of the CID investigation, EPA had reason to believe the material might be hazardous waste does not lead inexorably to the conclusion that the EPA had quantified the hazards the waste posed. The fact that Respondent also might not have known the hazards the wastes posed, however, in no way excuses or mitigates Respondent's responsibilities with regard to the waste, starting, of course, with making an accurate hazardous waste determination shortly after the emergency response to the fire.

[12] In its Brief, Respondent argues no economic benefit should be assessed for Count 3 because the Safety Data Sheet (SDS) could have served as a reasonable basis for determining the drums contained hazardous waste rather than needing to sample the drums. Resp. Br. At 23-24. The SDS was in the possession of Respondent for at least nine months, and it never utilized this information for a hazardous waste determination or proper handling. And, Brian Singleton, Facility Manager, testified that at the time of the CID inspection, he did not know what was in the drums or whether they contained any material. Tr. Vol. 4 at 59-60.

C. Respondent has Submitted No Meaningful Evidence Showing that Complainant's Proposed Penalty Calculation is Not Supported, and that This Tribunal Should Deviate from the RCPP.

Complainant understands that this Tribunal is not required to follow the RCPP in assessing a penalty for Respondent's five violations of RCRA. The Board, however, has explained that the RCPP should not be discarded lightly. "Though the [RCPP] is not binding upon the Presiding Officer, it must be considered and 'should be applied whenever possible because such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner.'"[13] Respondent has provided no meaningful evidence or argument showing that this Tribunal should create a case-specific framework for analyzing RCRA's statutory factors as this Tribunal determines appropriate penalties for each violation.

1. Respondent's Due Process Assertions Have No Support in the Law

Respondent's own quotation from *ExxonMobil Pipeline Co. v. U.S. D.O.T.,* 867 F.3d 564, 578 (5th Cir. 2017) highlights that the holding in that case applies to regulations alleged by the government to be violated, not to the government's approach to calculating penalties. Respondent provides no other support that due process concerns are implicated by the Agency's use of the RCPP.[14]

Respondent's unsupported assertion that it has not been given fair notice of the applicability of the RCPP is spurious for at least three reasons. First, the RCPP and its predecessors have been in use, and recognized by the Board and its predecessor, since at least 1984. Second, agency

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[13] *In the Matter of Chem-Solv, Inc.*, 2014 WL 2593697, at *103 (citing *Carroll Oil Co*., 10 E.A.D. 635, 656 (EAB 2002) (quoting *In re M.A. Bruder & Sons, Inc*., 10 E.A.D. 598, 613 (EAB 2002))).

[14] Also, Respondent failed to raise any due process arguments in its Answer or at any time in advance of the post-hearing brief. *See* 40 C.F.R. § 22.15(b).

penalty policies, including the RCPP, are used as guides in administrative proceedings; they are not "applicable". *See* 40 C.F.R. § 22.27(b). Finally, the Board has stated many times, including in the *Chem-Solv* matter cited in note 13 above, that presiding officers are not required to strictly apply penalty policies.

2. Respondent's Argument that Complainant's Proposed Penalty is Out of Line with Precedent is Contrary to Case Law and Unsupported by its Own Citations

Respondent lists a number of irrelevant decisions in support of its argument 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." Resp. Br. at 8-9. Given that the decisions by the Presiding Officers speak for themselves when discussing why they awarded 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.[15]

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[15] The cases cited by Respondent also do not support the broad proposition that the reductions are because the Presiding Officer disagrees with EPA over its application of the RCPP.

In re Titan Wheel Corp., 2001 WL 499328, at *3-10 (ALJ May 4, 2001) (assessing the Region's proposed penalty against the Respondent);

In re M.A. Bruder and Sons, Inc., 2001 WL 1659339, at *11 (EPA ALJ Oct. 25, 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 the Matter of Dearborn Refining Co., 2004 WL 3214475, at *2, RCRA (3008) Appeal No. 03-04 (2004) (affirming the initial decision of the ALJ which reduced the penalty in recognition of the fact that Dearborn was not a large corporation with infinite resources needed to ensure expeditious return to compliance);

In re Ram, Inc., 14 E.A.D. 357 (2009) (reinstating the Region's proposed penalty based on the Region's characterization of the potential for harm for several counts);

In re Euclid of Virginia, Inc., 2008 WL 700562, at *4, 60, 13 E.A.D. 616 (2008) (the ALJ deviated from the Region's proposed penalty for some of the numerous counts based on facts specific to this case, however, the Board noted that "the ALJ provided a reasonable explanation of how the assessed penalty relates to the applicable penalty criteria, and the Region reasonably applied the applicable penalty policy in calculating the proposed penalty amount");

In re Aguakem Caribe, Inc., 2011 WL 7444586, at *57 (EPA ALJ Dec. 22, 2011) (finding "Complainant appropriately calculated the gravity-based and multi-day components of the proposed penalties for Counts 1 and 2 of

Further, and most importantly, the Board has admonished that "'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.*, 2008 WL 700562, n.168, 13 E.A.D. 616 (2008).

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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-05-2010-0015 at 93-94 (EPA ALJ Dec. 14, 2012) (assessing the penalty 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 John A. Biewer Co. of Toledo, Inc., 15 E.A.D. 772, at *11 (2013) (stating that "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 Andrew B. Chase, 2014 WL 3890099 (EPA ALJ 2014) (accepting the ALJ's reduced penalty assessment under the UST Penalty Policy, with one small upward adjustment); and

In re Carbon Injection Systems, No. RCRA-05-2011-0009 at 91 (EPA ALJ March 17, 2015) (awarding no penalty because the Board found that "Respondents are not liable for the ten counts of violation alleged in the Second Amended Complaint") (emphasis added).

3. Respondent's Good Citizenship, Lack of Familiarity with RCRA, Compliance History, Good Faith Efforts to Comply and/or Coming into Compliance Have Been Properly Considered.

Respondent asserts that Complainant either failed to consider, or did not sufficiently account for, information that Respondent argues warrants major adjustments to the proposed penalty. Complainant already has addressed Respondent's compliance history and cooperation. *See* Compl. Brief at 12-15.[16] Respondent also asserts that other factors deserve significant weight, without significant legal or evidentiary support (Other Equitable Factors). Further, a number of them are contradicted by evidence in the record. Respondent cites to its lack of experience with RCRA. The facts of this case when viewed through the RCPP show that a downward adjustment is not warranted here.[17] Respondent's good corporate citizenship may be commendable, but it does not warrant a reduction under the RCPP. Relatedly, Respondent argues that it always tries to do the right thing. The record, however, is replete with an abundance of mistakes relating to Respondent's handling of the hazardous waste from the time it was sitting in B&W's lot.[18]

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[16] Respondent points to the Board's statement in *In re John A. Biewer* to support its argument that the Presiding Officer should "consider both good faith efforts and lack of good faith efforts without limitations on how to judge good faith." Resp. Br. at 11. The Board's decision in *Biewer* does not support Respondent's argument that this Tribunal should deviate from the RCPP. In fact, the Board concluded the award of zero penalty was an appropriate sanction due to the Region's failure to appear at hearing "without considering whether there was sufficient evidence on the record to support the Agency's recommended penalty assessment." *Id.,* 2013 WL 686378, at *10 (also discussed in n.1, *supra*).

[17] The RCPP explains that "no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent." RCPP at 36. Further, even if this was Respondent's first emergency involving hazardous materials, Respondent should not be given credit (a downward adjustment) for not having and following a robust response plan, especially since Respondent's trucks travel millions of miles a year and at times transport hazardous materials. *See* Tr. Vol. 3 at 314, 326, 366 (Mr. Field estimated that hazardous material shipments make up approximately 3 percent of its shipments that travel between 14-17.5 million miles per week). Further, Respondent had knowledge of RCRA requirements. *See, e.g*., Tr. Vol. 2 at 188-189 (Ms. McNeill testified that "Prime has an EPA ID number for their facility here in Springfield, and also the fact that in the communications with Idaho DEQ about the cleanup, second cleanup of the fire site, Prime contractors contacted Idaho State DEQ to get an ID number for the fire site in order to ship what was determined to be hazardous waste.").

[18] Respondent misinformed the transporter of the trailer and drums of toxic and ignitable waste from Boise to Salt Lake City that the drums were full of water-based paint, contrary to the bill of lading and information in its own

Finally, Respondent asserts that it has changed for the better since the fire. Aside from its assertion that it will call Premium Environmental Services every time, Respondent provided little evidence in support.[19] Finally, Respondent has provided no legal authority or other support for its argument that reductions should be made for companies that do not "regularly work under RCRA." Resp. Br. at 25.

At hearing, Complainant's penalty witness, Ms. McNeill, clearly and thoroughly explained how Complainant properly and completely took all of the relevant pieces of information into account in its calculations in accordance with the RCPP. As set forth more fully in Complainant's Brief, Board decisions clearly show that Complainant correctly considered the factors raised by Respondent. *See* Compl. Br. at 14-15. Respondent ignores case law and has not otherwise shown that Complainant's analysis of good faith efforts, coming into compliance and Other Equitable Factors is not appropriate.

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computer system. *See* Tr. Vol 3 at 176. Finally, Respondent also misinformed the paint product manufacturer about the condition of the drums of hazardous waste in the weeks following the fire. *See* CX35 at 1 (email from Respondent to PPG stating "[t]here was nothing to dispose of. Trailer burned to the ground."); Tr. Vol. 3 at 353 ("There was talk in that everything was destroyed in the fire, [McCoy] just basically ran with that, and erroneously provided that information to PPG)).

Respondent also contends it moved the trailer and drums the Facility to keep it safe and investigate the case of the trailer fire. Resp. Br. at 29. Evidence in the record, however, reveals that Respondent moved it to avoid being charged storage by B&W. *See* CX 34 at 1 (email titled "143320—Trailer Fire-Permission to Dispose" from Erika Duckworth, Prime Road Assist, stating "Has permission to dispose of been obtained for this trailer yet? . . . The tow company that worked the accident is <u>charging storage</u> that the product is sitting on.") (emphasis added). Respondent also offers its alleged litigation hold in support of its storage of the trailer and drums. Respondent's witnesses, however, could not say who issued the alleged hold, how the hold would have been issued or lifted, when the hold started, the intended length of the hold, and admitted that no electronic records were preserved. *See, e.g*., Tr. Vol 4 at 57-58 and Tr. Vol. 3 at 376-77. In fact, Respondent's witness admitted that it forgot about the trailer and drums until CID came knocking. Tr. Vol. 1 at 29 and Vol. 3 at 344 ("And I do think through oversight on Prime's part, it was kind of forgotten right there, which should not have happened. But we just left it there, basically until the EPA showed up"), and 345 ("Yes, I think that's when we realized that we had some issues here. We still have that trailer sitting there, we still have those barrels sitting there.").

[19] Respondent presented no persuasive evidence of education, training, or procedures to ensure proper hazardous waste management in the future. *See* Tr. Vol. 3 at 404.

4. Respondent's Characterization of Communications on September 27, 2015, is Unsupported by Credible Evidence and Does Not Support A Downward Adjustment for any Count.

Ms. McNeill testified that Respondent's liability for penalties began after the damaged trailer and drums reached B&W's lot in Boise, Idaho, and before Respondent arranged for transportation of the trailer and drums to the Facility. In these four days Respondent had more than enough time to look at its computer system or the bill of lading, which clearly indicated that the load was hazardous, and to either call Premium Environmental Services, or the hazardous materials experts recommended by PPG, Chemtrec. The fire and emergency cleanup response, therefore, are unrelated to the assessment of an appropriate penalty. Further, even if there is a shred of credibility to the argument that Chief Janousek is responsible for its failure to comply with RCRA for over ten months after the trailer and drums reached B&W's lot in Boise, this defense ended when the Idaho Department of Environmental Quality (IDEQ) first contacted Prime.

Respondent's argument that it believed the trailer and drums (and other debris and contamination at the fire site) were no longer were "hazmat" hinges on a statement allegedly made at the scene by the first incident commander, Chief Janousek. A closer look at Respondent's story, however, shows that it is wholly unsupported by the record.

First, at 6:30 a.m. the first responders were aware that the trailer, drums, debris, and contamination still were considered hazmat. During a conference call held after the fire was extinguished and attended by the Idaho Office of Emergency Management (IOEM), IDEQ, Regional Response Team 4 (RRT4), Chief Janousek, and Sargent Bonner, Idaho State Police (ISP), the IOEM advised call participants that the "incident will remain at Level II and Bobby

Dye [of IDEQ] agrees." RX03 at 3.[20] Chief Janousek either left the scene at 7:13 a.m. or already had returned to the station by then. Tr. Vol. 2 at 248-49 (O'Neill).

Second, Respondent adduced no evidence, at hearing or otherwise, that Chief Janousek actually made the allegedly confusing statement at the fire scene to anyone, including any Prime representatives.[21] Respondent also adduced no evidence that the alleged remark indirectly made its way to Respondent's representatives or Respondent at that time. To the contrary, in fact, Prime's representative at the hearing, Mr. Field, Tr. Vol. 3 at 362, who testified that the failure to call their hazmat contractor the night of the fire was his responsibility, Tr. Vol 3 at 334, also testified that he did not have a clear understanding of whether the materials were hazmat or not at the time of the cleanup <u>and</u> that he believed the cleanup was being conducted correctly. *Id*. at 378.

What is abundantly clear in the record is that as of 6:30 a.m., all first responders, including the second incident commander, Sargent Bonner, who had been the Hazardous Materials Supervisor for ISP's Commercial Vehicle Safety Hazardous Materials Division since 2006, were aware that the waste was hazmat. The record also clearly shows that he informed Respondent's

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[20] IOEM's 2013 Hazmat plan defines Level 2 as an "incident involving hazardous materials that is beyond the capabilities of the first responders on the scene and may be beyond the capabilities of the public sector response agency having jurisdiction. Level 2 incidents may require the services of a State of Idaho Regional Response Team, or other state/federal assistance. This would include a weapons of mass destruction threat or incident that involves explosives, release of toxic material, release of radioactive material or release of organisms that can be analyzed and stabilized using resources that exist within the State of Idaho. This level may pose immediate and/or long-term risk to the environment and/or public health and could result in a local declaration of disaster." (http://ioem.idaho.gov/wp-content/uploads/2022/04/HazMat-Plan-2013.pdf at p. ii.)

[21] The closest Respondent comes is during redirect of Mr. O'Neill, who postulated that Chief Janousek may have used words before he left the fire scene that were similar to the words in his report written after his return to the fire station. Tr. Vol 3 at 281. While it is Respondent's burden to show that this alleged communication occurred, and Respondent did not, Complainant notes that Chief Janousek told investigators for both parties that he never told Prime's headquarters, the truck drivers, or B&W that the waste was not hazardous. CX18 at 2; and RX08 at 3 and 7.

representatives at the site of this fact multiple times and that this information was relayed directly to Respondent. For example, Mr. Drake, Prime's truck driver, testified

> Q Okay. And are you aware that when Chief Janousek left, that Sergeant Bonner became incident command?
> A He definitely appeared to be the man in charge from the minute he drove up to me. I wasn't told specifically who was -- you can just sense these things.
> Q Okay. Fair enough. … when Sergeant Bonner talked to you, he was telling you that the scene remained HAZMAT, right? That this was a HAZMAT scene, it needed to be cleaned up as a HAZMAT scene? That's what he was telling you?
> A Yeah.
> Q Okay. And that is what you conveyed to Prime?
> A Yes. They were aware it was a HAZMAT.

Tr. Vol. 2 at 355.[22]

In addition, during his interview with EPA investigators six months after the fire, Mr. Drake explained that he also "reported to Prime about [Sargent Bonner's] concern that B&W didn't have hazmat permits." CX55 at 2. Mr. Drake went on to explain that "the individual from Prime said that B&W told Prime it had the hazmat permits." *Id.*[23]

B&W also was Respondent's representative at the scene, notwithstanding Respondent's attempt to create separation by asserting that Elmore County Dispatch called B&W to the scene.

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[22] At hearing, however, Mr. Field blamed Sargent Bonner for not calling him directly. "A When I say we, I mean Prime, we're 1500 miles away. We have Mr. Drake, and his wife there, they've just been through a traumatic experience. I'm not really depending on them to be providing information, as much as I am from the local authorities. And knowing that there were local authorities there, and again, I wasn't receiving any phone calls, I'm available 24 7. Sergeant Bonner, what's unique about him is that he's a commercial vehicle enforcement officer. . . . Q And it would have been your expectation at the time that if there were any issue, that Sergeant Bonner simply could have called the company Prime, which was available 24 hours a day at that time? A Yes, and not only that, but it's also based on my experience of other spills." Tr. Vol. 3 at 336-37.

[23] At hearing, Mr. Drake testified that he did not remember whether Prime told him this. Tr. Vol. 2 at 355-56. Mr. Drake also testified that he did not hear Sargent Bonner discuss the need for B&W to have hazmat permits with Mr. Derrick. *Id.* at 357. During the interview with EPA investigators, which was given approximately six months after the fire, however, Mr. Drake said that he had heard Sgt. Bonner question B&W about hazmat permits. CX 55 at 2.

Resp. Brief at 28.[24] Significant evidence shows that Respondent called B&W employee Sandy Derrick.[25] B&W, Respondent's other representative at the scene, was told multiple times by Sargent Bonner that the waste was hazmat. *See, e.g.,* CX17 at 3.[26]

IOEM, RRT4, IDEQ, and both incident commanders understood that the site remained level 2 after 6:30 am.[27] Mr. Drake and Mr. Derrick were being told that the waste was hazmat by Sargent Bonner. Mr. Drake had told Respondent's headquarters that the waste was hazmat. Respondent's headquarters told Mr. Drake that B&W had hazmat permits. At this time, within Prime, apparently only Mr. Field was not clear that the waste was hazmat.[28]

Respondent has adduced no evidence that Chief Janousek actually made the statement during the fire emergency that Respondent alleges it relied on. Respondent also has not shown how Respondent could have relied on any such statement in good faith when so much information to

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[24] Prime's representative at hearing, Mr. Field, seemed less certain. "The possibilities are the local authorities called them, or our [road] assist department called them, and it's just not clear to me who called them." Tr. Vol. 3 at 335.

[25] "Derrick said he got called in the middle of the night from Prime's "break down department" regarding the questioned fire incident. . . . Derrick estimated that Prime might call B&W once or twice a month for service." CX22 at 2. Since Mr. Derrick was a participant on the call, and Chief Janousek was responding to the fire at the time, Mr. Derrick's recollection is entitled to more weight. Further, Mr. Drake, testified at hearing that "[a]t some point Prime notified me . . . that they had a company on the way to clean up the trailer, the mess." Tr. Vol. 2 at 339.

[26] Finally, the record also shows that Mr. Derrick was aware of this later that morning. David McCallum, who drove the truck that was used to haul the debris generated during the cleanup on September 27, 2015, told investigators that B&W asked him if he had a hazmat endorsement and that he said no. But B&W told him they didn't have anyone else to haul it, so he would have to. CX62 at 3.

[27] RRT4 was released after 6:30 a.m. because, as Captain Riedinger explained "the RRT is not tasked to do any hazardous material cleanup. The cleanup is the responsibility of the spiller." CX20 at 2.

[28] Idaho Transportation Department (ITD) employees, whose scope of work was limited to "traffic control and opening the highway," but who apparently assisted in the cleanup, CX54 at 3, also could not have been confused about whether the waste was hazmat. Mr. Myers and Mr. Bowden, who were on scene, told EPA investigators "they did not have any conversations with anyone about hazardous materials." *Id*. In addition, "Myers and Bowden stated they never had any discussions with the Prime truck drivers. Bowden stated he left the scene before B&W arrived on scene [and] Myers stated he had conversations with Sandy Derrik [sic] from B&W, but they did not discuss anything about the incident." *Id*. Finally, Respondent's investigator only interviewed Mr. Vaughn of ITD, who was not there, and was not otherwise contacted at any time the night of the fire. Given the statements of the ITD personnel who were there (cited in this note) and the fact that there is no other evidence the alleged statement actually was made to anyone, Mr. Vaughn's statements about Chief Janousek's remarks as he left the scene do not carry any weight.

the contrary was in their possession at that time, whether provided directly to Respondent's representatives by Sargeant Bonner, or in its paperwork or computer system. Finally, Complainant's penalty calculation analysis begins after the fire response and emergency subsided, and Respondent has not shown that this is otherwise not appropriate. Thus, no downward adjustment is appropriate.

IV. Conclusion

RCRA is a preventative program that establishes a system for safely handling hazardous waste from the time it is generated until its ultimate disposal, i.e., the "cradle-to-grave" management. *See* RCPP at 12. The RCRA regulated community is comprised of a large, diverse group that must understand and comply with RCRA regulations to ensure that wastes are managed properly in the first instance in a manner that is protective of human health and the environment. *See* 42 U.S.C. § 6902(a)(4)-(5).

Respondent, a national shipping company, caused thirty-two burned and open drums of solid waste, including at least twenty drums containing thousands of pounds of toxic and ignitable hazardous waste, to be shipped in poor and/or open condition over 300 miles without first making a hazardous waste determination or shipping the hazardous waste under manifest. Respondent then received the drums of hazardous waste at its Facility and haphazardly stored them for over 300 days outside, open and tilting on the fire-damaged trailer; unprotected from the elements, with construction activity and a maintenance shop nearby.

Complainant, through its witnesses and exhibits, surpassed its burden to support its proposed penalty by using the RCPP and inflation matrices to analyze RCRA's statutory factors.[29] Respondent has failed to meet its burden to show that Complainant's calculation is not appropriate. Respondent has submitted no evidence or argument showing that Complainant's analysis of the (1) extent of deviation and (2) potential for harm to the RCRA program under the RCPP was unsupported. Respondent also has not shown that Complainant's analysis of the potential for harm to human health or the environment was unsupported. Finally, and equally important, Respondent's arguments fall significantly short of providing any reasonable basis for not applying the RCPP in this case.

Complainant, therefore, respectfully requests that the Presiding Officer assess the proposed penalty of $631,402 for Respondent's five violations of RCRA.

Dated: February 17, 2023

Respectfully Submitted,

Laurianne Jackson
Senior Assistant Regional Counsel
Environmental Protection Agency
Region 8

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[29] In this case, without the RCPP and inflation matrices, the statutory maximum would have been $37,500 per violation per day for Counts 1 and 2, and $101,439 per violation per day for Counts 3, 4 and 5.

CERTIFICATE OF SERVICE

The undersigned certifies that on February 17, 2023, I filed electronically the foregoing COMPLAINANT'S POST-HEARING REPLY BRIEF 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 mryan@boisemsn.com and Scott McKay, attorney for Respondent, at smckay@nbmlaw.com.

Date: February 17, 2023

Kate Tribbett
Paralegal