UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
New Prime, Inc.,	**)**	**Docket No. RCRA-08-2020-0007**
	)	
Respondent.	**)**	

INITIAL DECISION AND ORDER

DATED: March 27, 2024

PRESIDING OFFICER: Administrative Law Judge Christine D. Coughlin

APPEARANCES:

For Complainant:

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I. PROCEDURAL BACKGROUND

This proceeding commenced September 21, 2020, when Complainant, Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency, Region 8 ("EPA" or "the Agency"), filed a Complaint and Notice of Opportunity for a Hearing against Respondent New Prime, Inc. ("Prime") under 42 U.S.C. § 6928(a). The Agency accuses Respondent, a trucking company, of violating the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, based on its conduct following a fire that burned one of its trailers. Specifically, the Complaint alleges in five counts that Respondent (1) failed to make a hazardous waste determination concerning the cargo involved in the fire (burned drums of paint and primer products); (2) failed to prepare a manifest for the transportation of hazardous waste; (3) stored hazardous waste at its Salt Lake City, Utah facility without a permit; (4) failed to properly manage hazardous waste containers; and (5) failed to obtain an EPA identification number prior to storing hazardous waste. For these alleged violations, Complainant seeks a civil penalty in the amount of $631,402.[1]

Respondent filed its Answer to Complaint and Request for Hearing ("Answer") on October 21, 2020, disputing the proposed penalty amount but admitting most of the material facts pertaining to liability.

The parties then engaged in a prehearing exchange of information pursuant to 40 C.F.R. § 22.19, and following their initial exchanges, the Agency moved for accelerated decision as to liability and penalty on February 22, 2021. *See* Complainant's Mot. for Accelerated Decision on Liability and Penalty ("AD Motion"). In response, Respondent admitted its liability but contested the penalty amount. *See* Resp't's Response to AD Mot. (Mar. 9, 2021). On April 4, 2022, I granted the AD Motion with respect to liability, finding Respondent liable for all five violations charged in the Complaint, and denied the motion with respect to penalty. *See* Order on Complainant's Mot. for Accelerated Decision ("AD Order").

I conducted a hearing on the proposed penalty in Springfield, Missouri, from October 24, 2022, through October 27, 2022. Complainant presented four witnesses at the hearing: Marc Callaghan, a special agent with EPA's Criminal Investigation Division; Bradley Miller, Ph.D., principal analytical chemist at EPA's National Enforcement Investigation Center (qualified as an expert witness in analytical chemistry); Kristin McNeill, a RCRA inspector and enforcement officer with EPA's Region 8; and Kristen Keteles, Ph.D., a toxicologist for EPA's National Enforcement Investigation Center (qualified as an expert witness in toxicology and risk assessment). Respondent presented the following six witnesses: Stephan Drake, a Prime truck driver; Kelly O'Neill, a private investigator and consultant; Steven Field, the safety director for Prime; William Sprague, a safety supervisor with Prime; Brian Singleton, the terminal manager

[1] The Agency proposed a penalty of $639,675 in the Complaint but later reduced the requested penalty to $631,402. *See* Compl. ¶¶ 95, 97; Mem. In Supp. of Complainant's Mot. for Accelerated Decision on Liability and Penalty at 4, 102-03 (Feb. 22, 2021); CX 4Cor.

for Prime at its Salt Lake City facility; and Elizabeth Walker, Ph.D., a private consultant (qualified as an expert witness in the fields of toxicology and risk assessment).

The parties stipulated to the authenticity and admissibility of the following exhibits that were admitted into evidence at the hearing: Complainant's Exhibit ("CX") 1-CX 2, CX 6, CX 8, CX 13, CX 15, CX 32-CX 47, CX 49-CX 50, CX 64Cor, CX 67, Respondent's Exhibit ("RX") 1-RX 6, RX 16, and RX 19. Additionally, Complainant presented CX 3, CX 4, CX 4Cor, CX 7, CX 9, CX 10, CX 14, CX 16-20, CX 22-31, CX 52-63, CX 65-66, and CX 75-77, which were all admitted into evidence during the hearing. Likewise, Respondent presented the following exhibits that were admitted into evidence at the hearing: RX 7-11, RX 13-15 (including RX 14A and 14B), RX 17-18, and RX 20.

Following the hearing, this Tribunal received the official hearing transcript,[2] provided electronic copies to the parties, and established a post-hearing briefing schedule. *See* Order Scheduling Post-Hr'g Submissions (Nov. 9, 2022). Thereafter, I adopted certain changes to the transcript requested by the parties to conform it to the actual testimony at hearing. *See* Order on Mots. to Conform Tr. to Actual Testimony (Dec. 30, 2022).

On December 23, 2022, Complainant filed its initial Post-Hearing Brief ("CB"). Respondent filed its initial Post-Hearing Brief ("RB") on February 3, 2023. Complainant filed a reply brief ("CRB") on February 17, 2023. Respondent filed its reply brief ("RRB") on March 3, 2023. With that filing, the record closed.

II. PROVISIONS OF APPLICABLE LAW

a. Hazardous waste regulation under RCRA

Congress enacted RCRA in 1976 "to promote the protection of health and the environment and to conserve valuable material and energy resources by," among other means, "regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment." Pub. L. No. 94-580, 90 Stat. 2795, 2798 (codified as amended at 42 U.S.C. § 6902(a), (b)). This comprehensive statute empowers EPA's "cradle to grave" regulation of the generation, transport, storage, treatment, and disposal of hazardous wastes "in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934."[3] *Pyramid Chem. Co.*, 11 E.A.D. 657, 671 (EAB

[2] Citations to the four-volume transcript are abbreviated as "Tr.," followed by the transcript volume number and page number, e.g., "Tr. III 25." Each volume of the transcript is paginated separately.

[3] RCRA defines "hazardous waste" as a subset of solid waste, "which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5)(B).

2004) (quoting *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331 (1994)); *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 337 n.1 (1992).

Under 42 U.S.C. § 6922(a), EPA has promulgated regulations that govern hazardous waste management at 40 C.F.R. Parts 260-273. This includes regulations that establish standards for hazardous waste generators with respect to recordkeeping practices, labeling practices, use of appropriate containers, furnishing of information about the waste to others, using a manifest system to track the waste, and filing periodic reports about the waste with EPA. *See* 42 U.S.C. § 6922(a); 40 C.F.R. part 262. The regulations also set requirements for those who own or operate hazardous waste facilities. *See* 42 U.S.C. § 6925(a); 40 C.F.R. parts 264, 270. Additionally, RCRA authorizes states, with EPA approval, to administer and enforce their own hazardous waste programs "in lieu of the Federal program." 42 U.S.C. § 6926(b). The Agency retains the right to enforce the requirements of those state programs. *See* 42 U.S.C. § 6928(a); *Pyramid Chem Co.*, 11 E.A.D. at 669.

Utah is one state that EPA has authorized to administer and enforce a hazardous waste management program, and through this enforcement action the Agency seeks to penalize Respondent for violating five of the state regulations implementing that program. *See* 40 C.F.R. § 272.2251; Utah: Final Authorization of State Hazardous Waste Management Program Revisions, 73 Fed. Reg. 29,987 (May 23, 2008). The relevant regulations[4] mandate that:

- A person who generates a solid waste must determine if that waste is a hazardous waste. Utah Admin. Code R315-5-1.11 (2015); *accord* 40 C.F.R. § 262.11.

- A generator who transports, or offers for transportation, a hazardous waste for off-site treatment, storage, or disposal shall prepare a Manifest OMB control number 2050-0039 on EPA form 8700-22. Utah Admin. Code R315-5-2.20(a) (2015); *accord* 40 C.F.R. § 262.20(a)(1).

- No person shall own, construct, modify, or operate any facility for the purpose of treating, storing, or disposing of hazardous waste without first submitting, and receiving the approval of the Director for, a hazardous waste permit for that facility. Utah Admin. Code R315-3-1.1(a) (2015); *accord* 40 C.F.R. §§ 264, 270.1.

- Containers holding hazardous waste shall always be closed during storage, except when it is necessary to add or remove waste. Likewise, these containers shall not be opened, handled, or stored in a manner which may rupture the container or cause it to leak. Utah Admin. Code R315-7-16.4 (2015); *accord* 40 C.F.R. §§ 264.173, 265.173.

[4] The state regulations cited in the Complaint and in this Initial Decision are as they were numbered in 2015, when Respondent generated the hazardous waste at issue. Utah renumbered and reformatted its hazardous waste rules in 2016. *See* AD Order at 5 nn.3-6.

- Every hazardous waste facility owner or operator shall obtain an EPA identification number by applying to the Director using EPA form 8700-12. Utah Admin. Code R315-8-2.2 (2015); *accord* 40 C.F.R. § 264.11.

Under RCRA and Utah regulations, hazardous waste is a solid waste that meets certain criteria, including exhibiting ignitibility, corrosivity, reactivity, or toxicity characteristics.[5] Utah Admin. Code R315-2-3(a), R315-2-9 (2015); *accord* 40 C.F.R. §§ 261.3(a)(2)(i), 261.20-24. Waste has an ignitability characteristic if a representative sample is a liquid and has a flash point of less than 60 degrees Celsius/140 degrees Fahrenheit. Utah Admin. Code R315-2-9(d)(1)(i) (2015); *accord* 40 C.F.R. § 261.21(a)(1). Waste has a toxicity characteristic if, using the Toxicity Characteristic Leaching Procedure ("TCLP"), a representative sample contains a contaminant at a level greater than the maximum concentration allowed. Utah Admin. Code R315-2-9(g) (2015); *accord* 40 C.F.R. § 261.24(a). As relevant to this case, the maximum concentration levels allowed for chromium and barium are 5 mg/L and 100 mg/L, respectively. Utah Admin. Code R315-2-9(g); 40 C.F.R. § 261.24 t.1.

b. Penalty assessment under RCRA

The Agency may assess a civil penalty[6] against any person[7] who violates RCRA. 42 U.S.C. § 6928(a)(1). When a violation has occurred, I must determine the penalty amount "based on the evidence in the record and in accordance with any penalty criteria set forth in [RCRA]." 40 C.F.R. § 22.27(b). I also "shall consider any civil penalty guidelines issued under the Act." *Id.*

RCRA sets forth two criteria that must be considered when imposing a penalty: (1) "the seriousness of the violation," and (2) "any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). Further, the Agency has issued civil penalty guidelines under RCRA in the form of the RCRA Civil Penalty Policy (June 2003) ("Penalty Policy") that incorporates these statutory criteria. Since it was issued in 2003, portions of the Penalty Policy have been revised to account for inflation, and the Agency used two of those revisions to calculate the proposed penalty in this proceeding: the Revision to Adjusted Penalty Policy

[5] A solid waste, subject to certain exclusions not applicable here, is any discarded material. Utah Admin. Code R315-2-2(a)(1) (2015); *accord* 40 C.F.R. § 261.2(a)(1). Discarded material includes material that has been abandoned by being disposed of, burned, or incinerated. Utah Admin. Code R315-2-2(a)(2), (b); *accord* 40 C.F.R. § 261.2(a)(2), (b).

[6] When first enacted, RCRA permitted the Agency to impose a civil penalty of up to $25,000 per day of noncompliance for each violation. 42 U.S.C. § 6928(a)(3). Over time, Congress and EPA have adjusted that amount to account for inflation. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, 129 Stat. 584, 599 (codified at 28 U.S.C. § 2461 note); 40 C.F.R. § 19.4. Consequently, for violations occurring before November 2, 2015, the penalty amount may not exceed $37,500 per day of noncompliance for each violation. 40 C.F.R. § 19.4 tbl.2. For violations occurring after November 2, 2015, the maximum penalty amount is $121,275 per day of noncompliance for each violation. 40 C.F.R. § 19.4 tbl.1.

[7] RCRA defines "person" to include corporate entities. 42 U.S.C. § 6903(15).

Matrices Package Issued on November 16, 2009 (April 2010) ("2010 PP Revision") and the Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the 2020 Civil Monetary Penalty Inflation Adjustment Rule (January 2020) ("2020 PP Adjustment").[8] Broadly speaking, applying the Penalty Policy entails:

> (1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violation's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance.

Penalty Policy at 1.

The gravity-based penalty component considers two factors—potential for harm and extent of deviation from a statutory or regulatory requirement. Penalty Policy at 2. Assessment of the potential for harm is itself "based on 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." Penalty Policy at 12-13. Evaluating the extent of deviation from RCRA and its regulatory requirements refers "to the degree to which the violation renders inoperative the requirement violated." Penalty Policy at 17. This may range from a violator who is "substantially in compliance with the provisions of the requirement" to a violator who has "totally disregarded the requirement." Penalty Policy at 18. A penalty matrix, with the "potential for harm" factor and "extent of deviation factor plotted on opposing axes, provides different penalty ranges based on whether the two factors are rated "minor," "moderate," or "major." Penalty Policy at 2.

The multi-day component accounts for continuing violations. For days 2 through 180 of multi-day violations, "the calculation of penalties using a multi-day component is mandatory, presumed, or discretionary, depending on the 'potential for harm' and 'extent of deviation' of the violations." Penalty Policy at 2. A multi-day penalty matrix is used to add a 5 percent to 20

[8] I have taken judicial notice of the Penalty Policy, the 2010 PP Revision, and the 2020 PP Adjustment. Tr. II 41, 43, 44. The Penalty Policy is available online at https://www.epa.gov/sites/default/files/2020-05/documents/june2003rcracivilpenaltypolicyamended050620.pdf. The 2010 PP Revision and 2020 PP Adjustment are available online at: https://www.epa.gov/sites/default/files/documents/revisionpenaltypolicy04910.pdf and https://www.epa.gov/sites/default/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf. The Agency, in accordance with the inflation adjustment acts, most recently revised its penalty calculation policies and increased statutory maximum penalty amounts at the beginning of this year. *See* Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2024). However, the 2024 amendments have not been applied in this case.

percent increase in the corresponding gravity-based matrix penalty amounts. Penalty Policy at 2.

The sum of the gravity-based component and multi-day component may then be adjusted upward or downward based on consideration of the following factors:

- good faith efforts to comply/lack of good faith (downward or upward adjustment);
- degree of willfulness and/or negligence (upward or downward adjustment);
- history of noncompliance (upward adjustment);
- ability to pay (downward adjustment);
- environmental projects to be undertaken by the violator (downward adjustment); and
- other unique factors, including but not limited to the risk and cost of litigation and the cooperation of the facility during the inspection, case development and enforcement process prior to prehearing exchange (upward or downward adjustment).

Penalty Policy at 3.

Finally, if the violator has saved money or generated profits through its noncompliance, the economic benefit it gained from noncompliance is calculated and added to the gravity-based penalty amount. Penalty Policy at 3.

Upon consideration of these criteria, I am obligated to "explain in detail . . . how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). I must set forth specific reasons for increasing or decreasing the penalty amount from what the Agency has proposed. But I need not assess the Agency's recommended penalty, and I may conduct my own analysis of the evidence. *Id.*; *John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 780 (EAB 2013).

c. Burden and standard of proof

The rules governing this proceeding provide that "[t]he complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a). Once a prima facie case is established, the "respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief." *Id.* Further, with regard to any affirmative defenses, "[t]he respondent has the burdens of presentation and persuasion for any affirmative defenses." *Id.*

For the parties to satisfy the established burdens of proof, "[e]ach matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." 40 C.F.R. § 22.24(b). To prevail under this standard, a party must demonstrate that the facts it seeks to establish are more likely than not to be true. *See, e.g.*, *Euclid of Va., Inc.*, 13 E.A.D. 616, 626 (EAB 2008); *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998); *Echevarria*, 5 E.A.D. 626, 638 (EAB 1994).

III. FACTUAL BACKGROUND

a. Respondent and the Facility

Prime is a privately-owned trucking company founded in 1970 that specializes in refrigerated, flatbed, tanker, and intermodal transport. CX 7 at 2;[9] Tr. III 300, 304. The company is incorporated in Nebraska, headquartered in Springfield, Missouri, and licensed to do business in Utah, where it owns and operates a Salt Lake City facility ("Facility") for the storage, maintenance, and repair of trucking equipment.[10] Joint Set of Stipulated Facts and Exhibits ("Jt. Stips.") ¶¶ 1-3 (Sept. 30, 2022); CX 7 at 2, 10; Tr. II 337; Tr. III 111. Respondent employs nearly 10,000 drivers, and its 7,600 trucks travel hundreds of millions of miles each year. Jt. Stips. ¶ 39; Tr. III 295, 299, 317. Between 2015 and 2020, they logged more than four billion miles. Jt. Stips. ¶ 39.

As a business, Prime is organized into several departments, two of which are Safety and Road Assist. Tr. III 305-06. Safety deals with drivers involved in accidents, keeps track of driver logs, maintains federally mandated driver qualification files, and monitors roadside inspections and citations. Tr. III 297. Road Assist, a subcomponent of Prime's vehicle maintenance operation, is the primary point of contact for drivers having issues with their trucks, from breakdowns to preventative maintenance needs. Tr. III 306-07. Both departments are available to receive calls from drivers 24 hours per day, seven days per week. Tr. III 299-300, 307. At the time of the events at issue in this proceeding, the two departments "were in silos" and did not always communicate information with one another. Tr. III 360.

[9] CX 7 is an EPA Investigative Activity Report ("IAR") that primarily consists of documents produced or compiled by the Idaho Department of Environmental Quality ("IDEQ") during the criminal investigation that led to this civil enforcement action. *See infra* note 13. Respondent objected to the admission of CX 7 and many other IAR exhibits from the criminal investigation, contending they are unreliable and contain multiple levels of hearsay because the documents' authors did not testify at hearing. *See, e.g.*, Tr. I 112-14. But "[h]earsay is admissible in EPA administrative proceedings." *Taotao USA, Inc.*, 18 E.A.D. 40, 82 n.31 (EAB 2020) (citing 40 C.F.R. § 22.22). Further, the Agency laid an appropriate foundation for the admissibility of these exhibits through the testimony of Marc Callaghan, an EPA criminal investigator who was a supporting special agent assigned to the Prime investigation and who became the lead special agent when the former lead agent retired. *See, e.g.*, Tr. I 82-83; CX 76. Respondent made no post-hearing argument as to the weight that I should give these exhibits, and this Initial Decision relies on them to the extent they are cited herein.

[10] The Facility's address is 3720 West 800 South, Salt Lake City, Utah 84104. Jt. Stips. ¶¶ 2, 29.

The Facility is a full-service terminal where Prime employs both sales and dispatch associates—about 175 people—while also operating a cafeteria for drivers and a 24-hour maintenance shop that services inbound tractors and trailers. RX 1; Tr. III 315; Tr. IV 11-14. More than 500 drivers pass through the Facility each week, although there were fewer during 2015 and 2016 when the events relevant to this proceeding took place. Tr. IV 55-56, 86. The now 34-acre site is located in an industrial park near Salt Lake City International Airport. Railroad tracks run along the back side of the property. The closest residential neighborhoods are about 2 miles away. Jt. Stips. ¶ 29; Tr. IV 11, 14-15, 29; RX 13-RX 15. The Facility initially consisted of an 18-acre tract, but during the time relevant to this proceeding, Prime purchased an adjacent trucking company's 16-acre property and began constructing a new maintenance shop there. Tr. IV 11-12, 19-20; RX 14. While Prime was constructing its new maintenance shop, the construction company separated the worksite from the active truck yard with temporary fencing, but at times left access points open between the construction and the rest of the Facility. Tr. IV 27-28, 81-83, 84-86. Otherwise, the Facility is surrounded by a barbed wire fence and is protected by security guards 24 hours per day, 7 days per week. Tr. IV 26-27.

b. The Shipment and the Fire

In September 2015, Pittsburgh Paint and Glass ("PPG") hired Respondent to transport four types of paint and primer products that were hazardous materials ("the Shipment") from Springdale, Pennsylvania, to Portland, Oregon. Jt. Stips. ¶ 4. The Shipment contained 36 drums of "UN 1263 paint 3 PGIII," weighing 19,945 pounds; two pails of "UN 1263 paint 3 PGIII," weighing 106 pounds; four drums of unregulated paint; and 32 drums of PPG's Universal Urethane Yellow Primer, product code BY1Y100B, weighing 17,683 pounds. Jt. Stips. ¶ 5. Each type of paint and primer was accompanied by an associated Safety Data Sheet ("SDS") that set forth the content of the material and recommended safety precautions. Jt. Stips. ¶ 6. Among other data, the SDSs stated that each of the four types of paint products in the Shipment had a flashpoint below 140 degrees Fahrenheit. Compl. ¶ 32; Answer ¶ 5. The Yellow Primer also contained strontium chromate and, as stated on the SDS, the chromium concentration ranged between 25,000 parts per million ("ppm") and 62,500 ppm, with a federal regulatory level of 5 mg/L. Jt. Stips. ¶ 21; Compl. ¶ 33; Answer ¶ 5. The SDS further stated that the Yellow Primer contained barium chromate with chromium at concentrations between 750 ppm and 2,500 ppm with a regulatory level of 5 mg/L, and barium at concentrations between 1,620 ppm and 5,400 ppm with a regulatory level of 100 mg/L. Compl. ¶¶ 34-35; Answer ¶ 5.

Stephan Drake, a Prime truck driver, picked up the Shipment from PPG's facility outside of Pittsburgh. Tr. II 328. PPG had pre-loaded the Shipment on a trailer and provided Mr. Drake with the necessary bill of lading and placarding. Tr. II 328-29; CX 6. At the bottom of the bill of lading was a black box instructing carriers to call Chemtrec, PPG's emergency response group, "for help in emergencies involving spill, fire, leak, exposure." CX 7 at 11; CX 16 at 2. Mr. Drake had a hazardous material endorsement on his commercial driver's license and knew the load contained hazardous material. Tr. II 329-30; Tr. III 325-26. The Shipment was also identified in Prime's computer system as containing hazardous materials. Tr. III 329. Prime hauls hazardous

materials for only a few customers—it makes up less than 3 percent of the freight carried by the company. Tr. III 326-27.

Shortly before 3 a.m. on September 27, 2015, Mr. Drake was driving the Shipment westbound on Interstate 84, about an hour east of Boise, Idaho, when he noticed flames coming out of one of the trailer wheels. Tr. II 327, 332; CX 7 at 7; RX 3 at 4; RX 5 at 1. He immediately pulled the truck over to the shoulder of the road and, after evacuating with his wife and dogs to a safe distance, called 911.[11] Tr. II 332-33. Mr. Drake told the dispatcher where the burning trailer was located and that it contained hazardous material. Tr. II 74, 333, 354.

Emergency responders arrived on the scene, including the King Hill Rural Fire Department and Idaho State Police. CX 7 at 8-10; CX 17 at 1; Tr. I 132, 221-22; Tr. II 334, 339, 353; Tr. III 69, 94; RX 5. The trailer was fully engulfed, and authorities had to block both sides of the interstate. CX 7 at 8; CX 18 at 1; RX 5 at 3, 5-22. The fire burned fast and intensely. Drums of paint fell off the trailer, spilling paint and primer on the road and roadside and catching the grass on fire. Jt. Stips. ¶ 7; Tr. II 336; RX 5 at 5-22. Meanwhile, Mr. Drake called his fleet manager at Prime. Tr. II 337. Prime notified PPG of the fire shortly before 4 a.m., and emails from Prime indicate that it knew then that a "UN 1263" paint load was involved. CX 36 at 3. Mr. Drake also testified at hearing that Prime officials "were aware it was a HAZMAT" scene. CX 17 at 2; Tr. II 355. After several back-and-forth communications with Prime, the company notified Mr. Drake that it had hired B&W Towing to perform the cleanup associated with the trailer fire. Jt. Stips. ¶ 8; Compl. ¶ 44; Answer ¶ 6; Tr. II 339-41. Prime's Road Assist department coordinated the work with B&W.[12] Tr. III 342; Tr. IV 53-54.

After the fire was extinguished, the King Hill rural fire chief, in consultation with the Idaho State Police and a hazardous material response team from the Boise Fire Department, determined "that it went from a haz-mat scene to a clean-up scene" and that the emergency phase of the incident had concluded. CX 20 at 1-2; RX 4 at 4; RX 5 at 3; Tr. III 72-74, 82, 111. After B&W arrived and obtained copies of the shipment's bill of lading from Mr. Drake, it removed the burned trailer and 32 of the burned drums of paint and primer.[13] Jt. Stips. ¶ 8; Tr.

[11] Mr. Drake's wife Angela, also a Prime truck driver, was with him. The couple shares driving responsibilities. Tr. II 316-19, 327-28.

[12] B&W was not authorized to handle or transport hazardous materials or hazardous waste, although at the time of the fire there was some confusion among the authorities and others involved as to what B&W was qualified to do. *See, e.g.*, Tr. II 341, 355; CX 55 at 2-3; RX 8 at 3; RX 10 at 2-3.

[13] B&W took the burned trailer and 32 drums of paint back to its lot. But this was only a portion of the burned contents of the Shipment. B&W also loaded a separate side dump trailer with additional burned drums and debris. The contents of that side dump trailer were later disposed of in a nearby landfill, sparking a criminal inquiry by IDEQ (and then EPA) into whether Prime and B&W illegally dumped hazardous waste. That investigation eventually resulted in this civil administrative proceeding. *See* CX 22 at 3; CX 23 at 1-2; CX 52; Tr. I 87, 183-84; Tr. II 311; Tr. III 119, 126-27; CX 7 at 5.

II 346. Steven Field, Prime's safety director and representative at the hearing, recalled being notified that morning by one of his employees in the Safety Department that B&W was on the scene and "that it was not going to be considered a hazardous cleanup" because "the product . . . had been consumed within the fire." Tr. III 331, 372. He testified that after asking the appropriate questions of his employee, he "was adequately satisfied that there was an approved cleanup crew out there." Tr. III 334. Mr. Field said that when there is a hazardous material spill involving one of Prime's trucks, the company takes its lead from responding emergency personnel, and it is common for responding agencies to call Prime if the cleanup is not occurring correctly. Tr. III 331-32, 334, 336-37. If Prime is conducting the cleanup rather than local officials, it uses a third-party contractor, Premium Environmental Services ("PES"), a company that coordinates the necessary work using various subcontractors. Tr. III 333-34. In this case, Mr. Field testified that he received no calls from authorities on the scene indicating that Prime needed to take further action, so at that time he assumed the cleanup was being conducted correctly and no additional response was required. Tr. III 334, 337-38, 378.

On October 1, 2015, through its Road Assist department, Prime hired Brett's Towing of Ogden, Utah to transport the burned trailer and 32 55-gallon burned drums of paint waste from B&W's lot in Idaho to Salt Lake City. Jt. Stips. ¶ 9; CX 22 at 3; CX 29; Tr. III 342; Tr. IV 32. Brett's Towing transported the trailer and drums directly to the Facility. Jt. Stips. ¶ 9; CX 29 at 2; Tr. IV 32. Prime did not prepare a hazardous waste manifest for this shipment. Jt. Stips. ¶ 10. When the trailer arrived at the Facility, "it was immediately put on legal hold" and placed in "the boneyard," an out-of-the-way area in the northeast corner of the property where people were unlikely to pass near it. Tr. IV 32-35, 38, 87. Prime places a legal hold on equipment that may be the subject of litigation, preserving it and any associated records in their existing condition until local legal counsel advises the company that it can release the hold. Tr. III 342-43. In this case, the company hoped to learn the origin of the fire so that it could make a claim for its loss. Tr. III 346. At the time of the fire, issuing a "legal hold" was an informal process at Prime. Tr. III 377. Brian Singleton, manager of the Facility, testified that he did not know who issued the legal hold but that it came from Prime's headquarters. Tr. IV 56-57. He was aware there were drums on the trailer but said he did not know what, if anything, was in them. Tr. IV 59-60.

PPG subsequently asked Prime for evidence and documentation that the Shipment had been properly disposed of, and on October 13, 2015, an employee in Prime's marketing department responded that "[t]here was nothing to dispose of. Trailer burned to the ground."[14] CX 35 at 1-2; Tr. III 352-53. In actuality, the burned trailer and 32 drums sat largely untouched at the Facility until EPA's August 2016 inspection, except for at least one occasion when Prime employees used forklifts to move it about 30 feet to accommodate construction work on its new maintenance shop, specifically the pouring of concrete "over by" where the waste was stored. Tr. III 344; Tr. IV 38-39, 57.

[14] This, of course, was not true. But Mr. Field testified that the employee was not aware that the trailer had been transported to Salt Lake City and would not have intentionally provided false information to PPG. Tr. III 353.

c. Additional cleanup

About three weeks after the fire and following further investigation, the Idaho Department of Environmental Quality's ("IDEQ") Boise Regional Office determined yellow paint waste remained along the side of the road and that Prime needed to conduct additional cleanup. CX 7 at 3-4; Tr. III 47-51, 348. Prime contacted PES on October 20, 2015, to coordinate the second site cleanup. CX 7 at 5; RX 11 at 13; Tr. III 348-49. On Prime's behalf, PES arranged for a contractor to excavate soil at the site on November 14, 2015, and to clean up the remaining tire, aluminum, and paint debris. CX 23 at 2; RX 10 at 2; RX 11 at 14. PES hired a second contractor, H2O Environmental, to take soil samples from the excavated material on November 18, 2015. After it was analyzed, the sampled waste was characterized as hazardous based on toxicity, because the concentration of chromium measured at 18.5 mg/L, exceeding RCRA's standard of 5 mg/L. CX 7 at 5; CX 25 at 3, 8-17, 20-24.

About one week after the soil sampling, on November 25, 2015, PPG provided Prime with the SDSs for the materials in the Shipment. CX 39 at 1. Thereafter, in light of the sampling results, H2O prepared a waste profile form and hazardous waste manifest for the transport of the excavated waste to U.S. Ecology, a hazardous waste site in Grandview, Idaho. CX 23 at 2-3; CX 25 at 4, 19, 36-37; Tr. III 122-25. PES and H20 signed the waste profile form and hazardous waste manifest on Prime's behalf, and the waste was delivered to U.S. Ecology on December 29, 2015. CX 7 at 5; CX 9; CX 24 at 3; CX 25 at 27; CX 26 at 2-3, 9, 15. Despite making a hazardous waste determination for the contaminated soil from the additional cleanup, Prime did not then address the burned trailer and drums at the Facility. According to Mr. Field, Prime did not think to do so because everyone was solely focused on cleaning up the side of the interstate where the fire had occurred, and nobody asked Prime about the trailer and drums. Tr. III 349. Looking back, he testified, "we did not do a good job, and there's no way to sugarcoat that." Tr. III 350.

d. Investigation at the Facility

On August 2, 2016, EPA criminal investigators located the burned Prime trailer that had carried the Shipment in the northeast corner of the Facility lot.[15] Jt. Stips. ¶¶ 11, 14, 30; CX 10 at 1-2; CX 14; Tr. IV 23-24. The trailer sat about 220 feet behind the Facility's original maintenance shop. Tr. IV 25-26; RX 14. It was covered with heavy tarps that Prime employees partially removed for the inspection. Investigators noticed a strong chemical odor coming from the trailer, which contained 32 burned drums of paint and primer waste. The bung caps on the drums were missing and there were no identifying markings on the drums or trailer. Jt. Stips. ¶¶ 12, 14-16; CX 10 at 2; CX 10 at 5-20 (photographs); Tr. IV 40. The area where the trailer was sitting was paved with asphalt or concrete, and at that time, there was no evidence of leakage from the trailer or of paint waste contaminating soil or groundwater. Jt. Stips. ¶ 13; Tr. IV 47.

[15] Although state emergency communication officials notified EPA of the fire as it burned, the Agency did not initiate its criminal investigation until after meeting with IDEQ in December 2015 and hearing the department's allegations of illegal dumping. CX 7 at 8; CX 52; Tr. I 183-84; Tr. II 311; *see also supra* note 13.

Mr. Field testified that he had not known the trailer was transported to Salt Lake City after the fire, and the Agency's arrival at the Facility first alerted him to the fact that it was being stored there. Tr. III 344-45. "I think that's when we realized that we had some issues here," he said. Tr. III 345. This occurred even though, as Mr. Singleton acknowledged, Prime is a national freight and logistics company that tracks and manages its fleet through electronic means to ensure that it knows where its materials are at any given time. Tr. IV 55.

On August 24, 2016, with Prime's consent, investigators from the Agency's National Enforcement Investigation Center ("NEIC") returned to the Facility to inspect the trailer and drums and sample the waste they contained.[16] Jt. Stips. ¶ 19; CX 10 at 21, 26-33; CX 30. As it had been since arriving at the Facility, the trailer was positioned in the northeast corner of the lot next to fencing separating it from the construction site and another fence separating it from the railroad track that ran behind the Facility. CX 10 at 30-32; Tr. IV 44-45, 47-48. Prime employees removed the 32 drums from the trailer, and NEIC analyzed their contents onsite by X-ray fluorescence spectrometry. Jt. Stips. ¶ 20; CX 10 at 37, 38; CX 14; Tr. IV 41-43. This analysis showed that 20 of the drums contained material consistent with a strontium chromate primer (PPG's Yellow Primer contains strontium chromate). Jt. Stips. ¶¶ 20-21; CX 10 at 37-38; CX 14. Specifically, the 20 drums all contained a yellow-colored liquid and had strontium and chromium concentrations exceeding 10,000 mg/kg.[17] CX 14; CX 75 at 8. NEIC then collected representative samples from 8 of those 20 drums.[18] CX 10 at 21, 37-38; CX 14. Subsequent TCLP analysis of those samples at the NEIC laboratory showed their chromium concentrations were 35 mg/L or more, greater than the 5 mg/L limit established under RCRA for toxicity characteristic hazardous waste. Laboratory analysis further revealed that the samples had flashpoints ranging between 109- and 113-degrees Fahrenheit, also qualifying them as hazardous waste based on ignitability. Jt. Stips. ¶¶ 22-23; CX 10 at 37-44; CX 14.

On September 19, 2016, after receiving Agency approval, Prime created a hazardous waste manifest and arranged for H2O to dispose of the trailer and drums.[19] Jt. Stips. ¶¶ 26, 31. H2O disposed of the 32 drums of paint waste as hazardous waste at Heritage Environmental, a permitted hazardous waste treatment, storage, and disposal facility in Arizona. Jt. Stips. ¶ 37. H2O disposed of Prime's burned trailer, which was contaminated with chromium, on November 16, 2016. CX 13.

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[16] At EPA's request, Prime did not move or manipulate the burned trailer or drums of paint waste following the initial inspection on August 2. Jt. Stips. ¶¶ 17-18.

[17] By comparison, the other 12 of the 32 drums contained a white-colored liquid that field analysis showed contained titanium concentrations exceeding 10,000 mg/kg but near zero concentrations of chromium. CX 14; CX 75 at 8.

[18] The Agency apparently assumed that all 20 drums contained the same burned material—PPG's yellow primer—based on the concentrations of strontium and chromium as well as the liquid's yellow color. CX 14; CX 75 at 9.

[19] The hazardous waste manifest lists the 32 drums of burned paint waste with the following waste codes: D001 (ignitibility); D007 (chromium); and D035 (methyl ethyl ketone). Jt. Stips. ¶ 35.

In sum, from October 1, 2015, through August 2, 2016, Prime stored the trailer and drums of hazardous paint waste outside at the Facility. Jt. Stips. ¶¶ 24, 28. Thereafter, Prime kept the waste materials at the Facility subject to the Agency's request before properly disposing of them on September 29, 2016. Jt. Stips. ¶ 26. Prime did not have a RCRA permit authorizing the storage of hazardous waste at the Facility while it stored the drums there. Jt. Stips. ¶ 27. It later acquired an EPA Facility Identification Number in April 2020. Jt. Stips. ¶ 38.

Mr. Singleton testified that it was "a mistake" for Prime to store the trailer and drums at the Facility, and he blamed that outcome on a breakdown in communication between different parts of the company. Tr. IV 49-51. He contended those communication problems have since been fixed. Tr. IV 51. Mr. Field agreed, testifying that Prime has learned from its mistakes and future incidents would be better handled and coordinated by the Safety Department. Tr. III 354-56, 360-61. None of the decisions made in this incident were with the intent of avoiding legal requirements or saving money, he added, and the company does not constrain his ability to conduct a proper cleanup. Tr. III 357-59. Prime also prioritizes safety, testified Safety Supervisor William Sprague, and has not had an incident of this magnitude since. Tr. III 389-90, 399-400. If it did, "we will always err on the side of caution" and will involve PES from the outset, he said. Tr. III 399-400.

e. Expert testimony

i. The contents of the 12 unsampled drums stored at the Facility

Dr. Bradley Miller testified for the Agency as an expert witness in analytical chemistry. Tr. I 255. He discussed the 20 drums that onsite X-ray fluorescence spectrometry indicated contained strontium chromate and whether the 12 drums *not* sampled for subsequent analysis at the NEIC laboratory did in fact contain hazardous waste. Tr. I 255. After reviewing analytical data from the laboratory analysis of the eight sampled drums, field data, and notes from NEIC staff, Dr. Miller concluded that "the material . . . in the 12 drums [was] consistent with the yellow primer listed in the safety data sheet of the shipping manifest" and that further lab testing would have shown it to be toxicity characteristic hazardous waste. Tr. I 255-56. Specifically, he predicted that "all 12 of those drums would exceed the RCRA chromium level for the characteristic of toxicity. That value is 5 mg/L, and I believe that those 12 drums would likely exceed, by at least a factor of five, that critical level." Tr. I 292-93.

To reach his conclusion, Dr. Miller compared the properties of the Yellow Primer as listed in its corresponding SDS with the properties observed in NEIC testing of the 8 sampled drums. CX 75 at 11; Tr. I 272-73. The lab-measured results with respect to each property—physical state, color, flash point, density, percent solids, and percentage of strontium chromate pigment—were consistent with the properties described by the SDS. CX 75 at 11; Tr. I 272-73. Dr. Miller also looked at the NEIC's TCLP laboratory testing results for the eight sampled drums. Those showed final, total chromium concentrations in the TCLP extraction fluid ranging from 36.9 mg/L to 352 mg/L, depending on the drum, exceeding RCRA's toxicity characteristic

threshold of 5 mg/L.[20] CX 75 at 7, 22; Tr. I 273-74. Through modeling software and an in-depth review of the literature and characteristics listed on the Yellow Primer SDS, Dr. Miller then predicted the total chromium quantities likely to precipitate out through TCLP analysis of the contents of the 12 unsampled drums. CX 75 at 16-24; Tr. I 281-92.

Dr. Miller's testimony was not rebutted. Counsel for Respondent stated at hearing that Prime "has never questioned the contents of these [12 unsampled] drums" and "never contested that strontium chromate was a constituent of all of these drums." Tr. I 293, 295; Tr. II 111. Nor does Prime contest what the bill of lading says or the information supplied by the SDSs, counsel added. Tr. II 111. In its post-hearing reply brief, Respondent further states that the fact "[t]hat the burned paint drums contain hazardous waste has never been contested, nor has there ever been any question that the burned, intact drums on the stored trailer in Salt Lake City are the same drums that Prime picked up from PPG to haul to Oregon." RRB at 6-7 (citing Answer ¶¶ 45-46); *see also* RB at 23 ("No one has ever questioned what was on the burned truck in Salt Lake City."). "The drums Prime picked up from PPG contained paint and primer that were listed as hazardous materials. Those drums stayed on the trailer after it burned and were returned to Salt Lake City." RRB at 7.

To that end, Dr. Miller's testimony confirmed existing evidence in the record that at least 20 of the drums stored at the Facility—all of which were analyzed onsite and 8 of which underwent additional TCLP testing at NEIC's laboratory—contained hazardous waste.

ii. Potential for harm presented by Prime's storage of hazardous waste at the Facility

1. Dr. Walker contends the likelihood of harmful exposure was low

Dr. Elizabeth Walker testified for Respondent as an expert witness in toxicology and risk assessment. Tr. IV 101. She assessed the probability of human or environmental exposure to the hazardous waste stored at Prime's Facility and the potential harm that would result if exposed. Tr. IV 105, 110-11; RX 20 at 1.

Dr. Walker concluded that there was no evidence that harmful exposure had occurred while the hazardous waste was stored at the Facility; the probability of human or environmental exposure was low because people were not in close proximity to the waste for enough time to experience adverse effects; and the probability for a leak or fire (deemed a worst-case scenario) were low. RX 20 at 1; Tr. IV 136-38. She also determined the seriousness of any contamination was low because of the "relatively low quantities of material, unlikely significant environmental transport if leaking had occurred, and low density of nearby human and potentially vulnerable environmental receptors (e.g. waterways)." RX 20 at 1.

[20] Dr. Miller also testified that he did not believe any of the drums that Prime later shipped for disposal as hazardous waste contained trivalent chromium. Rather, based on the SDSs that PPG produced, the waste was barium chromate and strontium chromate, a hexavalent chromium. CX 32 at 33; Tr. I 274-80.

To reach these conclusions, Dr. Walker evaluated information about the Yellow Primer contained in the SDS and the circumstances under which the waste was stored at the Facility. Tr. IV 119-20. The Yellow Primer contained strontium chromate, a known human carcinogen, plus 12 other chemicals that were probable human carcinogens or that were known to have acute toxicity upon a single exposure. Tr. IV 113-15.

She determined the evaporation rate of the waste was low and would be slow to form a vapor that could be inhaled or explode. RX 20 at 2; Tr. IV 122. According to Dr. Walker, the chromium in the Yellow Primer posed little risk to human or environmental health because it was unlikely to evaporate out of the paint, and the volatile chemicals in the primer most likely burned off during the fire. RX 20 at 3; Tr. IV 122. Dr. Walker noted that the samples taken by NEIC had separated into two layers—a clear layer of volatile solvents on top and a yellow, more semi-solid layer on the bottom where the strontium chromate was contained. Tr. IV 127-28. The bottom strontium chromate layer would not have been "bio-available," she testified, in that "it's not going to come off the substance, it's not going to be present in any of the vapors that are lifting off under environmental conditions and then potentially inhaled." Tr. IV 129. The chemical smell that NEIC observed as the tarp was removed from the trailer likely came from volatile solvents present at low concentrations, and there were no reports of symptoms of acute toxicity associated with high vapor concentration exposures from responders to the fire or anyone in close proximity to the trailer and drums afterward. RX 20 at 3; Tr. IV 122. Thus, according to Dr. Walker, even though the drums had been in a fire and were missing bunghole covers, the fact that they were stored on a tarp-covered trailer in the far corner of a large lot where employees did not routinely pass limited human exposure. RX 20 at 3; Tr. IV 158. Further, based on aerial photographs of the site she reviewed, she estimated the trailer was 200 to 250 feet from the closest building where people regularly worked—too far away "to imagine toxicological harm occurring." RX 20 at 3-4; Tr. IV 121-23. The vapors likely dissipated into the atmosphere and did not reach Prime employees, other adjacent workplaces, or residential areas, she declared.[21] RX 20 at 3-4; Tr. IV 121-23. She contended that anyone who happened to briefly walk by the drums likely experienced only "very low and brief" exposures to low-level solvent vapors. RX 20 at 3-4. Although the waste was "sitting open to the environment," it was still "contained in drums" and had not been "poured out into, you know, like a kiddie pool full of paints that people are . . . actively walking over and breathing in deep inhalations. They're still contained to some extent," she testified. Tr. IV 118-19. Based on her conversations with Mr. Singleton, she understood the trailer and drums to be intentionally located in a remote area of the Facility so that it would be "out of the way." Tr. IV 176-77.

On cross examination, Dr. Walker agreed that workers who passed by the trailer and drums could be exposed to solvent vapors and potentially experience adverse health effects. Tr. IV 152-54. Further, she acknowledged that the slow evaporation rate reported on the SDS is based on "room temperature," and that the drums were stored outside in much warmer

[21] Dr. Walker used the Agency's EJ Screen, a publicly accessible screening and mapping tool that displays environmental and demographic socioeconomic indicators, to determine the Facility is in a large, open, flat industrial area and that about 150 people live in the surrounding 12.5 square miles. RX 20 at 4.

temperatures that would increase the evaporation rate. Tr. IV 161-63. She also conceded that she did not learn of construction activity occuring at the Facility until after she drafted her report, but contended it would not change her "significant conclusions." Tr. IV 158-59.

Dr. Walker assessed that environmental health risk was low because environmental transport from the site was unlikely: even if it were leaking from the drums and reaching soil beyond the concrete pad on which the drums were stored, the waste "was unlikely to travel through the environment and contaminate an area of any significance beyond the immediate soil it seeped into" because "it is a stable, water-insoluble paint with a low evaporation rate" and there were no nearby waterways. RX 20 at 5. She observed that the NEIC report described the waste as "semi-solid," "sludge," or "viscous," signifying that it "is not going anywhere fast" if it were to "ooze out" of the drums. Tr. IV 123-24. Because of its insolubility in water, rain would not significantly accelerate its movement into the soil or environment, she testified. Tr. IV 124-25. She also estimated, without specifically calculating, that vapors emanating from the drums would not "have any kind of significant contribution to air pollution or air quality" that would impact nearby residential areas due to the relatively small amounts of chemical volatilizing into the environment. Tr. IV 140-41.

As for the possibility of fire, Dr. Walker found the likelihood of the waste catching fire to be low because the most volatile compounds had already burned and evaporated, and the trailer and drums were relatively isolated from any ignition source. RX 20 at 5. Dr. Walker reviewed temperatures in Salt Lake City during the time the drums were stored at the Facility and noted that there were "a couple of weeks" during the summer months that temperatures approached 95 to 100 degrees Fahrenheit. Tr. IV 131-32, 155-57; RX 19. But, she said, "I think it's a very low probability that we could have that paint, even if it was at the sufficient temperature for there to be accumulated vapors that could ignite, because of the lack of ignition source I just believe the probability of fire is low," she testified. Tr. IV 130. Further, the material was unlikely to explode, she opined, because it was not listed as explosive on the SDS and had already been exposed to temperatures of 1,000 to 1,500 degrees Fahrenheit during the truck fire without exploding. Tr. IV 133-35. She also cited the "almost full drums" of waste at the Facility as additional evidence that a significant fire was unlikely to occur, because exposure to the flames and high temperatures of the truck fire had not burned everything away. Tr. IV 135. If a fire did take place, Dr. Walker acknowledged that responders would be exposed to higher levels of chemicals but contended it was difficult to assess the magnitude of impact because it would depend on atmospheric conditions, size of the fire, half-life of the chemicals, surrounding terrain, and other variables. RX 20 at 5. She admitted that the chromium in the primer could aerosolize and be inhaled by anyone nearby, along with carbon monoxide, phosphorus, and other halogenated compounds. Tr. IV 171-73.

On cross examination, Dr. Walker also admitted that if the temperature inside the drums exceeded 112 degrees Fahrenheit, the approximate flashpoint of the waste, there could be enough vapor to ignite. Tr. IV 167. But she argued that the actual flashpoint inside the drums was 10 to 20 degrees higher than reported by "closed cup" laboratory testing, because the open bungholes in the drums acted as release valves that allowed vapors to escape. Tr. IV

167-68. And she contended it would take time for the drum and its contents to heat up to the same temperature as the ambient air. Tr. IV 179-80. She also accepted that potential ignition sources might be static electricity or sparks generated by the drums hitting each other or the ground while being moved, presuming the sparking occurred inside the drums near the primer's surface. Tr. IV 168-70. And she did not rebut the proposition posed by Agency counsel that because the drums had not been characterized as hazardous waste, responders would not know their contents and may not take precautions they otherwise would. Tr. IV 173-74.

2. Dr. Keteles concludes there was significant likelihood of harmful exposure

In rebuttal to Dr. Walker, Dr. Kristen Keteles testified on behalf of the Agency as an expert witness in toxicology and risk assessment. Tr. IV 200-01. She assessed the potential for harm from storage of the hazardous Yellow Primer waste at the Facility and evaluated Dr. Walker's written report. Tr. IV 201; CX 66. Dr. Keteles concluded that there was a "substantial threat to human health and the environment . . . because of the inherent toxicity of the waste, the potential for exposure, and the risk of fire due to the flammability of the waste." CX 66 at 4. To reach these conclusions, Dr. Keteles studied the applicable SDS, the drum and field logbook, the NEIC report, site photos, and Dr. Walker's report.[22] CX 66 at 4; Tr. IV 202.

Dr. Keteles disputed Dr. Walker's assertion that a low or slow evaporation rate meant that the potential for exposure was also low. Tr. IV 212. Reviewing data from the National Weather Service, she determined that the temperature in Salt Lake City exceeded 100 degrees Fahrenheit for 16 days in 2016. Tr. IV 208-09. She described how that affected volatilization[23] of the chemicals in the Yellow Primer:

> The hotter temperatures would cause the volatile chemicals to become vapor. So during the day, it would get hot. That would heat up the metal drums. Then the vapor would form in the head space of the drum, and pressure would build up from these vapors in that head space. Eventually, the pressure would be [so] great that the drums would actually breathe. They would eject those vapors into the ambient air.
>
> And as the night cools, which Dr. Walker mentioned, what's going to happen is that you're going to actually change the pressure

[22] For Dr. Keteles, NEIC's measurements of the drum contents, including flashpoints and chromium levels, confirmed that the chemical constituents were the same after the fire as they were before and that the SDS information applied to the hazardous waste stored by Prime. Tr. IV 203-04.

[23] Volatilization occurs when chemicals in a liquid become gas or vapor. Tr. IV 207-08. They then are capable of being inhaled. Vapor pressure is the measurement of the upward pressure on air that chemicals make when they are leaving a liquid. Volatilization and vapor pressure are both affected by temperature. Tr. IV 208.

> difference between the head space and the ambient environment. So as it cools, it's actually going to cause more of a release of those vapors that are in the head space that had been heated up the day before. So what you're going to get is . . . high temperatures the day before, cooling temperatures at night [and that] would cause a very rapid release of those volatile chemicals . . . . [I]n the mornings, you could have quite high levels of vapor because of that rapid release of the vapors that were in the head space.

Tr. IV 209-10. Despite the fact that the bungholes were open on all of the drums, vapor formation and the temperature differential between inside and outside the drum created a corresponding pressure differential causing the vapors to escape the drums, she said. Tr. IV 247-50, 266-67. According to Dr. Keteles, this phenomenon was underscored by data collected by the Agency: NEIC measured the volatile organic compounds in the vapor above the drums and found, on average, that they reached 500 parts per million, which Dr. Keteles testified were "pretty high levels" that exceeded occupational exposure limits for the various chemical constituents of the Yellow Primer. Tr. IV 212-15. Further, she added, those measurements were taken in the afternoon and "would have been much higher in the morning." Tr. IV 212.

Dr. Keteles also disagreed with Dr. Walker's contention that vapors in the drum would rapidly disperse as they vented so that only a low concentration of chemicals remained in the air. "[T]he density of the vapor would be greater than air, so it would actually sink. It wouldn't just rise and dissipate," she testified. Tr. IV 216. This was corroborated by data, she observed: historical records showed windy conditions—10 to 20 miles per hour, with gusts up to 30 miles per hour—on the day the NEIC measured vapor concentrations around the drums. "[A]nd they were still getting high readings . . . so that suggested it was dissipating but not enough to really make it safe," she said. Tr. IV 216-17. On cross-examination, Dr. Keteles disputed argument by New Prime's counsel that although NEIC obtained vapor measurements of 500 parts per million, that was only true two inches above the drums, and that it would have rapidly dissipated on a windy day. Tr. IV 243-44. Because the vapors are heavier than air, she said, the wind would not dissipate them but disperse them along the ground. Tr. IV 244-45.

Addressing the likelihood of fire, Dr. Keteles testified that she did not agree with Dr. Walker's opinion that the risk was "improbable." Tr. IV 218. At the measured flashpoint of 112 degrees Fahrenheit, "you could get enough vapor that could ignite in the presence of an ignition source," she said. Tr. IV 218. Because vapors from the drum would be denser than air, they can "accumulate in low or confined areas," such as the trailer in which the drums were stored, "or travel a considerable distance to a source of ignition and flashback," Dr. Keteles said. Tr. IV 217.

> And I believe that you could exceed the flashpoint. These are metal drums on a hot day, a hundred degrees. And then, again, as the drums breathe and they eliminate the vapors outside of the drum and it could collect in the trailer or even it can travel considerable

> distances along the ground, if there's an ignition source, it could ignite and catch fire again.

Tr. IV 218. Sources of ignition could come from a dragging metal chain on the ground, the metal drums banging together, static electricity from the tarp covering the drums, a spark from a train passing on nearby railroad tracks, a faulty electrical wire, or construction equipment dragging on the ground. Tr. IV 219. In the event of a fire, the volatile substances in the hazardous waste would initially burn off, and there would be combustion byproducts in the form of metal oxides, halogen oxides, fumes, smoke, and particulates from the material. Tr. IV 219.

Based on storage conditions at the Facility, Dr. Keteles identified potential exposure pathways through which people could come into contact with the waste: after volatilization from the sun, ambient temperatures, or fire, chemicals would be released into the air where they could be inhaled; or leaks from the drums, or dried waste on the outside of the drums, could end up in nearby soil or dirt and be blown into the air, where it could be inhaled or land on someone's skin. Tr. IV 220-22. The people most likely to be exposed, she determined, were Prime's workers at the Facility, first responders to a fire, or visitors to the Facility. Tr. IV 222-23. The fact that the drums did not have proper labeling created further risk to emergency responders in the event of a fire, Dr. Keteles pointed out, because they "wouldn't know that there's hazardous waste there and that the fumes are hazardous." Tr. IV 229. Under EPA risk assessment standards, "unless a site is completely locked and inaccessible," the pathway to exposure is considered complete, Dr. Keteles testified. Tr. IV 222, 231. And in this case, she observed, Prime was storing the waste in compromised drums that were rusty and in poor condition, on a tilting, burned trailer in the hot summer sun where they could be accessed by anyone at the Facility. Tr. IV 223-26; CX 10 at 16-17. Further, from her study of overhead images of the Facility, she noticed construction activity, train tracks, and moving trucks nearby, all of which could serve as ignition sources and place people in close proximity to the drums. Tr. IV 223-25; CX 10 at 5, 17. She described the waste as "just as flammable as it was before the fire," and dismissed the Facility's industrial location as irrelevant to the Agency's risk assessment. Tr. IV 227. "So at EPA, we don't have a de minimis number of receptors," she testified. Tr. IV 227 "If people could come in contact with it, we would consider the risk," and even in a scenario involving far more isolated but still accessible hazardous waste where "the chance[s] of somebody coming across it are probably low . . . we still would consider that a risk and we would do something about it by removing that hazardous material." Tr. IV 227-28. The same is true for ecological receptors, she added: "if there is potential to come in contact with it, we would still consider that in the risk assessment." Tr. IV 228. In this case, the drums were accessible to birds, small mammals, and reptiles, for example, and "they would still be considered receptors that could come in contact with this material that wasn't properly stored," she said. Tr. IV 228. Consequently, "the storage of this hazardous waste did create a potential for harm [to human health and the environment] . . . because we have the potential for exposure, the inherent toxicity of the waste, and then the potential for fire." Tr. IV 230.

On cross-examination, Dr. Keteles acknowledged she did not assess *probability* of harm or exposure, just the *potential* for exposure and the inherent toxicity of the material. Tr. IV 233. She also agreed that during the time the hazardous waste was stored at the Facility, it did not catch fire, and there was no evidence that anybody experienced the harmful effects of exposure. Tr. IV 239-42; CX 66 at 5. But she clarified on redirect that she was asked only to assess risk, and a risk assessment considers whether there is a potential for exposure rather than the likelihood of somebody passing nearby the waste. Tr. IV 267-68.

3. Dr. Walker notes her disagreement with Dr. Keteles about the probability of harm

Prior to Dr. Keteles' testimony, Dr. Walker stated that she generally agreed with Dr. Keteles' written evaluation, but disagreed with her conclusions regarding the probability of human or environmental exposure to the waste. Tr. IV 142, 146; CX 66 at 9. Dr. Walker found it "highly unlikely" that visitors would be exposed by inhalation, because "the Prime site was not open to visitors," and workers' exposure would be similarly limited because they "are rarely in the area of this paint waste either." Tr. IV 148. Likewise, she said, first responders to a fire would not have significant inhalation exposure because they would be wearing personal protective equipment. Tr. IV 148. Dr. Walker drew similar conclusions regarding the low likelihood of dermal exposure in the event of a leak or soil contamination, in contrast to Dr. Keteles' assertion that there were complete exposure pathways to workers and responders in this scenario and potentially complete exposure pathways to visitors. Tr. IV 149-51; CX 66 at 9. Dr. Walker testified that "where [Dr. Keteles] describes variously high probabilities of exposure or significant risks, . . . generally, I disagree with that characterization of risk for any of these exposure pathways." Tr. Vol. IV 151-52.

Dr. Walker offered the example of a rattlesnake to illustrate her assessment of potential harm: She described the venomous snake as "inherently dangerous or a hazard to any one of us," because its bite can cause difficulty breathing, tissue swelling, and other problems. Tr. IV 111. "But unless you actually are bit by that rattlesnake, your risk of experiencing those adverse effects is zero," she testified. Tr. IV 111. Dr. Keteles challenged this analogy in her testimony: "I agree . . . you will not experience the adverse effects of venom 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," she said. "Unless that rattlesnake is locked away, you are still at risk for getting bit. You are at risk for the exposure. And then, if you are exposed and envenomated, then you would be at risk for the adverse health effects." Tr. IV 207.

f. EPA's calculation of the proposed penalty

Following its investigation at the Facility, the Agency reviewed Prime's conduct and constructed the Complaint around five "fundamental" RCRA violations. Tr. II 26-27, 31-33. It then reviewed the facts surrounding those violations and applied the Penalty Policy (and relevant Penalty Policy revisions) to develop an appropriate penalty for each count. Tr. II 33-34;

CX 4Cor. At hearing, Ms. Kristin McNeill, a RCRA inspector and enforcement officer in Region 8, testified about the Agency's application of the Penalty Policy in this matter.[24] Tr. II 20-21.

i. Count 1 penalty calculation

The penalty for Count 1 is based on Prime's failure to make a hazardous waste determination for the 32 drums of paint and primer that burned in the fire and were then stored at the Facility. Tr. II 70; CX 4Cor at 6.

The Agency determined that the potential for harm to human health, the environment, or the RCRA program was "major." Tr. II 94; CX 4Cor at 6-7. To reach this conclusion, the Agency viewed making a hazardous waste determination as "fundamental to the RCRA program" because it is the first step needed for waste to be properly managed under the statute, and failing to identify hazardous waste "increases the likelihood the hazardous waste will be mismanaged, treated, or disposed of in a manner that results in increased threats of harm, or actual harm, to human health and the environment." Tr. II 70, 88, 93; CX 4Cor at 7. Yet Prime did not make a hazardous waste determination the entire time it managed the waste, Ms. McNeill pointed out. Tr. II 70, 94. Consequently, Prime transported hazardous waste more than 300 miles from Boise, Idaho to Salt Lake City, Utah in compromised drums using an unqualified towing company and did not label, manifest, or placard the load as hazardous waste. Tr. II 89; CX 4Cor at 7. This "severely increased the risk of exposure to people and the environment" in the event of an accident or spill and put the transporters at high risk, the Agency concluded. Tr. II 89-90; CX 4Cor at 7. Prime then stored the hazardous waste at the Facility for more than 300 days on a burned, tarp-covered trailer bed "without anyone knowing it was hazardous," which the Agency determined "created a substantial potential for harm to human health and the environment including to personnel at the Facility." Tr. II 89; CX 4Cor at 7. Regarding harm to the RCRA program, EPA considered Prime's failure to make a hazardous waste determination as an omission "that fundamentally undermines the integrity of the RCRA program" because the first step to initiate proper RCRA management was never taken.[25] Tr. II 93; CX 4Cor at 7.

Similar to its assessment of potential harm, the Agency concluded that Prime's extent of deviation was also "major," because "[m]aking a waste determination is relatively straightforward." Tr. II 94; CX 4Cor at 7. "In this case, it was never done," Ms. McNeill testified,

[24] Ms. McNeill was not the original enforcement officer who prepared the Agency's penalty analysis. She was brought into the case during the prehearing exchange process. After reviewing the documents associated with this proceeding, she concluded the Agency had proposed an appropriate penalty and testified about that process. Tr. II 25, 60.

[25] According to Ms. McNeill, the Agency concluded that Prime's responsibility for making a hazardous waste determination and moving forward with proper hazardous waste management began on the morning after the fire, when the emergency had ended and Prime knew that a solid waste remained. Tr. II 91-92. At the same time, Ms. McNeill pointed out that even on the night of the fire, Prime could have called their own environmental contractor, PES, or the environmental contractor that PPG listed on its bill of lading, Chemtrec. Tr. II 92-93. In any event, the Agency's penalty calculation does not encompass the night of the fire. Tr. II 92.

"so it was a complete deviation from the requirement to do a hazardous waste determination." Tr. II 94; CX 4Cor at 7.

Classifying both gravity-based penalty factors as "major" called for a penalty range of $28,330 to $37,500 under the penalty matrix of the Penalty Policy (as adjusted by the 2010 PP Revision), and the Agency selected a midpoint of $32,915. Tr. II 95-96; CX 4Cor 6-8; Penalty Policy at 19; 2010 PP Revision at 8. The Agency did not select the highest amount in recognition of Prime's general cooperation with the 2016 inspection and its eventual disposal of the hazardous waste at a hazardous waste facility. It did not select the lowest amount after considering Prime's size, sophistication, and resources as a large national shipping company and the fact that it made no attempt to make a waste determination for nearly one year. Tr. II 95-96; CX 4Cor 6-8. Ms. McNeill highlighted information Prime had that the Agency believed should have prompted it to make this determination:

- There was a flammable placard on the trailer carrying the original load indicating the presence of hazardous material, which, if it became waste, would therefore likely also be hazardous. Tr. II 71-72.

- The bill of lading that accompanied the original load stated that the material was flammable and identified it as UN 1263, a DOT Hazard Class III flammable material. The bill of lading was on the truck the night of the fire, and information about the bill of lading was in Prime's computer system where anybody at the company who looked it up would have known the Shipment contained UN 1263 flammable paint. Tr. II 74-75.

- IDEQ approached Prime in October 2015 about conducting a second cleanup of the fire site where paint waste had leaked onto the ground, and after Prime's contractor excavated and sampled that soil, it was determined to be hazardous waste due to its chromium content. Tr. II 75.

- The SDSs for the four products that comprised the Shipment were in Prime's possession by November 25, 2015, when they were emailed to Prime by PPG. The first page of each SDS stated that the relevant product was considered hazardous by OSHA. In the case of the Yellow Primer, the SDS further indicated that it contained between 10 and 25 percent strontium chromate, barium chromate, and a number of solvents, all of which could cause the material to be a hazardous waste. Tr. II 77-80; CX 39; CX 32 at 33. "They could have looked at the SDS and said, well, the product is considered hazardous by OSHA, so we'll therefore manage it as a hazardous waste . . . . In this case, they didn't do that," Ms. McNeill testified. Tr. II 79-80; CX 4Cor at 6-7.

After calculating the gravity portion of the penalty, the Agency considered the Penalty Policy's adjustment factors. For the willfulness and negligence factor, EPA determined Prime had full control over the violation as the generator of the waste. Tr. II 102. It also determined

that Prime knew or should have known about the hazards associated with its conduct and legal requirements that it violated, because Prime had "a number of pieces of information in their possession" suggesting that hazardous waste management was required, such as the bill of lading, SDS sheets, communications from IDEQ, and H2O's hazardous waste determination following the second cleanup in November 2015. Tr. II 102-03; CX 4Cor at 8-9. Because Prime "basically ignored all the information that they had in their possession that would have led them to . . . making that waste determination," the Agency applied a ten percent increase to the penalty, or $3,292, raising it to $36,207. Tr. II 104; CX 4Cor at 6, 9.

EPA considered Prime's good faith efforts to comply with RCRA and decided to make no downward adjustment, because the violation was discovered by EPA and Prime was then expected to come into compliance. Likewise, EPA did not make a downward adjustment due to Prime's lack of knowledge of the requirement. Tr. II 98-99; CX 4Cor at 9. Further, the Agency had already credited Prime with cooperating with the 2016 inspection when it determined where to set the penalty within the gravity-based penalty matrix range.[26] Tr. II 100-01; CX 4Cor at 9. In Ms. McNeill's view, good faith "would be cooperating with EPA's inspection and inspectors and throughout negotiations and working to maintain compliance with the hazardous waste requirements." Tr. II 291. But the Penalty Policy specifies that there is "no downward adjustment for lack of knowledge about requirements." Tr. II 291.

The Agency also calculated Prime's economic benefit based on its avoided costs of sampling each of the 32 burned drums stored at the Facility. Tr. II 104-05; CX 4Cor at 9. EPA determined that if Prime had replicated the TCLP analysis that EPA performed on samples from eight of the drums, it would have cost the company $1,350 per sample or $10,800 in total. Tr. II 104-05; CX 1;[27] CX 4Cor at 9. Of that total economic benefit, the Agency added $1,293 to the penalty for Count 1, reaching the pre-November 2, 2015 statutory maximum of $37,500. Tr. II 105-06; CX 4Cor at 6, 9. On cross-examination, Ms. McNeill acknowledged that it would also have been reasonable for Prime to make a hazardous waste determination simply by relying on the bill of lading and SDS. Tr. II 269-71. In that scenario, there would be no avoided sampling costs and no corresponding penalty amount for economic benefit. Tr. II 271.

[26] The Agency did not apply a multi-day penalty factor, although Prime could have made a waste determination on any of the days it was managing the waste. Tr. II 97; CX 4Cor at 8. Further, EPA made no adjustments for history of non-compliance, ability to pay, environmental projects, or other unique factors. Tr. II 98.

[27] To estimate the cost of TCLP sampling, the Agency relied on its Unit Cost Compendium (September 2000), a guidance document providing data and algorithms for estimating costs associated with the management of hazardous waste under RCRA. Tr. II 105; CX 1. The per sample cost cited in the Unit Cost Compendium was $791 per sample in the year 2000. The Agency increased that amount to $1,350 in this case to account for inflation. Tr. II 105; CX 1 at 54. Ms. McNeill, who did not perform the Agency's penalty calculation, testified that her subsequent review revealed that EPA should have referred to a different TCLP analysis in the Unit Cost Compendium that would have carried an inflation-adjusted cost of $956 per sample, or $7,648 total for eight samples. Tr. II 112-13.

ii. Count 2 penalty calculation

The penalty for Count 2 is based on Prime's failure to prepare a hazardous waste manifest when it hired Brett's Towing to transport the burned trailer and drums from Boise, Idaho to the Facility in Salt Lake City. Tr. II 115-16; CX 4Cor at 10.

The Agency determined that the potential for harm to human health, the environment, or the RCRA program posed by Prime's failure to prepare a hazardous waste manifest was "major." Tr. II 117; CX 4Cor at 10-11. This was based on the fact that Prime transported the waste more than 300 miles on public roads in drums that were open and mostly full, without any placarding or manifest that would notify the driver, other motorists, or potential emergency responders of the hazardous nature of the load. Tr. II 118-19; CX 4Cor at 11. There is a heightened level of concern when hazardous waste is being transported and not just stored, Ms. McNeill added, so "management requirements such as having the drums be closed and in good condition are even more critical." Tr. II 122. Further, the potential for harm to RCRA was major because the manifest is "[t]he key component of the waste tracking system" in that it "acts as a chain of custody" that follows the waste as it passes from generator to transporter(s) to its final destination at a treatment, storage, and disposal facility. Tr. II 116; CX 4Cor at 11. EPA also classified the extent of deviation from RCRA as "major," because "manifests are another one of those fundamental requirements of the RCRA program" that are necessary for cradle to grave management, and Prime failed to complete this requirement entirely. Tr. II 115-16, 119-21; CX 4Cor at 11. As with Count 1, classifying these penalty factors as "major" called for a penalty range of $28,330 to $37,500 under the gravity-based penalty matrix of the Penalty Policy and 2010 PP Revision. The Agency again selected a midpoint of $32,915 after considering the same factors—Prime's general cooperation with the inspection, the eventual proper disposal of the waste, and the company's size and sophistication. Tr. II 123; CX 4Cor at 10-11.

For the same reasons asserted in Count 1, the Agency did not make any downward adjustment for a good faith effort to comply with RCRA, and it increased the base penalty amount by 10 percent, or $3,292, to reflect Prime's willfulness and negligence. It also took into account "the additional detail that Prime did not inform the towing company that there was paint on the trailer, much less potentially hazardous waste[.]" Tr. II 125-26; CX 4Cor at 10, 12. This led to a total penalty for Count 2 of $36,207.

iii. Count 3 penalty calculation

The penalty for Count 3 is based on Prime's storage of the burned drums and trailer at the Facility for nearly one year without obtaining a permit to store hazardous waste. Tr. II 127; CX 4Cor at 12.

The Agency determined that the potential for harm to human health, the environment, or the RCRA program was "moderate." Tr. II 127-28; CX 4Cor at 13-14. To reach that conclusion with respect to human and environmental harm, the Agency considered that none

of the hazardous waste storage requirements were met—the drums were not labeled, closed, or marked with an accumulation start date, and they were in poor condition. Further, Prime employees had not received hazardous waste training, were not conducting weekly inspections for leaks, and had no contingency plan to inform an emergency response in the event of a spill. Tr. II 128-29; CX 4Cor at 13. This was true even though the SDS in Prime's possession also directed that similar precautions be taken to avoid harm to people or the environment. Tr. II 129-31; CX 4Cor at 14; CX 32. EPA did not view the potential for harm to human health and the environment as minor because the waste was stored in open drums that were in rusty, poor condition and it was volatizing into the air where workers could be exposed. Tr. II 131-32; CX 4Cor at 14. At the same time, the Agency determined the potential for harm was not major based on the volume of waste being stored,[28] the lack of nearby waterways that could be contaminated by a spill, and the paved surface under the trailer that would contain a spill better than dirt. Tr. II 154-58.; CX 4Cor at 14. The Agency reached this decision while acknowledging there was no evidence of actual harm resulting from the manner in which the drums were stored. According to Ms. McNeill and the Penalty Policy, "the emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred," because "violators rarely have control over whether their pollution causes actual harm or not, and . . . they shouldn't be rewarded with a downward adjustment or a credit in penalty because there was not an actual harm." Tr. II 131; Penalty Policy at 15. Likewise, the Agency assessed that the potential for harm to the RCRA program was also "moderate," due to the Agency's view that "getting a RCRA permit is fundamental to the RCRA program" and prevents mismanagement of hazardous waste. Tr. II 132-33; CX 4Cor at 13-14. As for the extent of deviation from RCRA, EPA treated Prime's violation as "major" because "there was no attempt made to get the hazardous waste permit," making it "a complete deviation from the requirement." Tr. II 133; CX 4Cor at 14.

Choosing "moderate" and "major" penalty factors called for a penalty range of $14,120 to $19,413 under the gravity-based penalty matrix of the Penalty Policy and 2020 PP Adjustment. Tr. II 134; CX 4Cor at 14; Penalty Policy at 19; 2020 PP Adjustment at 11. The Agency selected a midpoint in this range—$16,767—for the same reasons it utilized the midpoint in Counts 1 and 2. The Agency also accounted for Prime's failure to act even after waste from the second cleanup in November 2015 was determined to be hazardous. Tr. II 134-36; CX 4Cor 13-14.

The Agency next applied a multi-day penalty calculation based on the fact that the waste was stored at the Facility without a permit from October 1, 2015, through the inspection on August 2, 2016, and using the "moderate-major" designation for the gravity factors. Tr. II 136-37; CX 4Cor at 14. Applying the "moderate-major" penalty factors to the multi-day penalty matrix yielded a daily penalty range of $706 to $3,883 under the Penalty Policy and 2020 PP Adjustment. Tr. II 138-39; CX 4Cor at 14; Penalty Policy at 26; 2020 PP Adjustment at 11. EPA selected the midpoint of that range, $2,295, and applied the 2020 PP Adjustment because most

[28] Ms. McNeill testified that the Agency did not know the drums were mostly full when it calculated the penalty, so it was "kind of exercising some discretion" by not calling the potential for harm "major." Tr. II 157-58.

of the 306 storage days subject to a penalty took place after November 2, 2015. Tr. II 138; CX 4Cor at 14; Penalty Policy at 26; 2020 PP Adjustment at 11. At the same time, the Agency capped the number of days of violation being penalized at 180, as advised by the Penalty Policy. Tr. II 137-39; CX 4Cor at 14; Penalty Policy at 2-3, 25-26. To that end, the first day of the violation was assessed a penalty of $16,767, and the next 179 days were assessed a daily penalty of $2,295, leading to a total gravity-based penalty of $427,572. Tr. II 139; CX 4Cor 13-14. During cross examination, Ms. McNeill conceded the Agency was exercising discretion when it assessed the entire multi-day penalty under the higher inflation multiplier of the 2020 PP Adjustment rather than the lower values contained in the 2010 PP Revision, which would have applied to the first month of the storage violation. This, she said, was because "the bulk" of the violation occurred after November 2, 2015, the date the 2020 PP Adjustment went into effect. Tr. II 264-66. She agreed that EPA could have used the 2010 PP Revision for the roughly one-month period that Prime was in violation between October 1, 2015 and November 2, 2015, and that it would have lowered the total penalty "[b]y a slight amount." Tr. II 264-65.

For the same reasons asserted in Count 1, the Agency did not make any downward adjustment for a good faith effort to comply with RCRA, and it increased the base penalty amount by 10 percent, or $42,757, to reflect Prime's willfulness and negligence, which also took into account how long Prime stored the waste without seeking a permit. Tr. II 140; CX 4Cor at 13-14. This led to a total penalty for Count 3 of $470,329.

iv. Count 4 penalty calculation

The penalty for Count 4 is based on Prime's failure to properly manage the drums of hazardous waste. Tr. II 159; CX 4Cor at 15.

The Agency determined that the potential for harm to human health, the environment, or the RCRA program was "major." Tr. II 159-60; CX 4Cor at 15-17. Of the drums containing hazardous waste, 19 were nearly full and open to the air because the bung caps had blown out. They also were burned, rusted, and in generally poor condition for storage after the fire, yet were kept on an uneven surface outside in a corner of the Facility's lot for more than 300 days. Tr. II 160-61, 163-64; CX 4Cor at 15-16; e.g. CX 14 at 24; CX 30 at 11, 13. The Agency viewed this as creating a substantial risk for human exposure to volatizing waste or the drums rupturing and releasing their contents into the environment. Tr. II 161; CX 4Cor at 16. Similarly, EPA considered the potential for harm to RCRA to be "major" because "proper management of containers is fundamental to the RCRA program" and "the potential for harm from not meeting these drum storage requirements substantially undermines the RCRA program." Tr. II 173; CX 4Cor at 16. Likewise, the extent of deviation from RCRA's storage requirements was deemed to be "major" because Prime didn't meet these requirements at all. Tr. II 173-74; CX 4Cor at 17.

Assessing the gravity penalty factors as "major" called for a penalty range of $35,300 to $44,124 under the gravity-based penalty matrix of the Penalty Policy and 2020 PP Adjustment. Tr. II 174-75; CX 4Cor at 15, 17; Penalty Policy at 19; 2020 PP Adjustment at 11. The Agency selected a midpoint in this range—$39,712—for the same reasons it utilized the midpoint in the

previous counts. The Agency also considered Prime's failure to attempt to manage the waste at all during the time it was stored at the Facility. Tr. II 174-75; CX 4Cor at 15-17.

Although the Agency presumed the violation continued for each day of storage at the Facility, it did not assess a multi-day penalty because it was not certain that the drums missing bung caps at the time of the fire were the same drums missing bung caps when the Facility was inspected. Tr. II 175-76; CX 4Cor at 17. Also, for the same reasons asserted in previous counts, the Agency did not make any downward adjustment for a good faith effort to comply with RCRA. It increased the base penalty amount by 10 percent, or $3,971, to reflect Prime's willfulness and negligence, also taking into account that Prime knew the fire site required a second cleanup in November 2015 for identified hazardous waste and that Prime failed to comply with safe storage requirements indicated by the SDS it possessed. Tr. II 177-78; CX 4Cor at 15, 17. This led to a total penalty for Count 4 of $43,683.

v. Count 5 penalty calculation

The penalty for Count 5 is based on Prime's failure to obtain an EPA identification number while storing the drums at its facility. Tr. II 182; CX 4Cor at 18.

The Agency determined that the potential for harm to human health, environment, or the RCRA program was "major." Tr. II 184; CX 4Cor at 18. By storing the drums at the Facility for more than 300 days without an EPA identification number, neither EPA nor Utah state environmental regulators knew that hazardous waste was being kept there. Without that knowledge, the state and federal agencies did not know they should be inspecting the Facility to ensure the waste was being stored in a safe, compliant manner. The Agency treated this as directly increasing the risk of harm to humans and the environment. Tr. II 184-85; CX 4Cor at 18. The potential for harm to RCRA was "major," according to Ms. McNeill, because failing to obtain an EPA ID "substantially undermines the RCRA program" due to regulators' reliance on the requirement to know where hazardous waste is physically located and being managed. Tr. II 183, 185; CX 4Cor at 18-19. Because "there was no attempt made by Prime to obtain an EPA ID number," the Agency treated the extent of deviation from the requirement as "major." Tr. II 186; CX 4Cor at 19.

Assessing the gravity penalty factors as "major" called for a penalty range of $35,300 to $44,124 under the gravity-based penalty matrix of the Penalty Policy and 2020 PP Adjustment. Tr. II 186-87; CX 4Cor at 18, 19; Penalty Policy at 19; 2020 PP Adjustment at 11. The Agency selected a midpoint in this range—$39,712—for the same reasons it utilized the midpoint in the previous counts. Tr. II 186-87; CX 4Cor at 18, 19.

Although Prime had the opportunity to apply for an ID number on each day that it stored the waste at the Facility, the Agency opted to not apply a multi-day penalty factor because "[g]etting an ID number is generally viewed to be a one-time event." Tr. II 187; CX 4Cor at 19. Also, for the same reasons asserted in previous counts, the Agency did not make any downward adjustment for a good faith effort to comply with RCRA, and it increased the

base penalty amount by 10 percent, or $3,971, to reflect Prime's willfulness and negligence, taking into account that Prime already had an EPA ID number for its facility in Springfield, Missouri and that, following the second roadside cleanup in November 2015, Prime's contractors had obtained an ID number for the fire site before transporting the hazardous waste that was removed from it. Tr. II 188-89; CX 4Cor at 19. This led to a total penalty for Count 5 of $43,683. Tr. II 190; CX 4Cor at 18.

vi. Overall penalty calculation

Based on the penalties calculated for each count in the Complaint, the Agency proposed a total penalty of $631,402. Tr. II 190; CX 4Cor at 5. The only upward adjustment made during those calculations, according to Ms. McNeill, was the 10 percent increase that EPA assessed for Prime's willfulness and negligence. Tr. II 190-91. At the same time, she testified that the Agency made several discretionary decisions that prevented the assessment of an even higher penalty, including: (1) not alleging additional charges in the Complaint based on the facts at hand; (2) applying a multi-day factor to only one count even though a multi-day penalty could have been assessed for additional counts; (3) capping the multi-day penalty at 180 days; (4) using the penalty matrix in the Penalty Policy rather than the statutory maximum for counts 3 through 5; and (5) using the 2010 PP Revision for Count 1 rather than the 2020 PP Adjustment, even though Prime could have made a waste determination after November 2, 2015, when the 2020 PP Adjustment went into effect. Tr. II 190-92; CX 4Cor at 5.

Ms. McNeill also addressed changes made to the proposed penalty during the course of this proceeding. When the Complaint in this matter was filed in September 2020, the Agency proposed a total penalty of $639,675. Compl. ¶ 95. At that time, the penalty for Count 3 was $478,602. Compl. ¶ 97. When the Agency filed its prehearing exchange three months later, it submitted a total penalty calculation of $631,402, including a Count 3 penalty of $462,056. CX 4 at 5; Complainant's Prehr'g Exchange (Dec. 18, 2020). In February 2021, the Agency submitted a corrected version of its penalty calculation that assessed the currently proposed total penalty of $631,402, a Count 3 penalty of $470,329, and which was ultimately introduced at hearing as CX 4Cor. According to Ms. McNeill, the original penalty proposed in the Complaint was incorrect. Tr. II 256. It included an approximately $8,000 economic benefit penalty component for Count 3 that was subsequently removed. Tr. II 256. However, when the Agency submitted its penalty calculation with its prehearing exchange, it mistakenly subtracted the $8,000 economic benefit component *twice*. It then submitted the corrected penalty calculation in CX 4Cor to reflect a single subtraction of that amount. Tr. II 258.

IV. ANALYSIS

a. Liability

The Complaint charges Respondent with five counts of failing to comply with RCRA through its violations of Utah's hazardous waste management program.

Count 1 charges Respondent with failing to make a hazardous waste determination with respect to the 32 drums of paint waste from the fire by the time of the Agency's inspection at the Facility in August 2016, a violation of Utah Admin. Code R315-5-1.11 (2015). Compl. ¶¶ 72-75. *See also* 40 C.F.R. § 262.11 (requiring a person who generates a solid waste to determine if that waste is a hazardous waste).

Count 2 charges Respondent with failing to prepare a hazardous waste manifest when it transported the 32 drums of paint waste from B&W's lot in Idaho to the Facility in Salt Lake City in October 2015, a violation of Utah Admin. Code R315-5-2.20(a) (2015). Compl. ¶¶ 76-80. *See also* 40 C.F.R. § 262.20(a)(1) (requiring a generator who transports, or offers for transportation, a hazardous waste for off-site treatment, storage, or disposal to prepare a Manifest OMB control number 2050-0039 on EPA form 8700-22).

Count 3 charges Respondent with storing at least 20 drums of hazardous waste at the Facility without a permit between October 1, 2015, and August 3, 2016, a violation of Utah Admin. Code R315-3-1.1(a) (2015). Compl. ¶¶ 81-85. *See also* 40 C.F.R. § 270.1 (mandating that no person shall own, construct, modify, or operate any facility for the purpose of treating, storing, or disposing of hazardous waste without first obtaining a hazardous waste permit for that facility).

Count 4 charges Respondent with failing to properly manage the burned drums of hazardous waste at the Facility by leaving them open and not replacing missing bung caps, a violation of Utah Admin. Code R315-7-16.4 (2015). Compl. ¶¶ 86-90. *See also* 40 C.F.R. § 265.173 (requiring that containers holding hazardous waste always be closed during storage, except when necessary to add or remove waste, and that the containers not be opened, handled, or stored in a manner which may rupture the container or cause it to leak).

Count 5 charges Respondent with failing to obtain an EPA identification number while storing at least 20 drums of hazardous waste at the Facility between October 1, 2015, and August 3, 2016, a violation of Utah Admin. Code R315-8-2.2 (2015). Compl. ¶¶ 91-94. *See also* 40 C.F.R. § 264.11 (requiring every hazardous waste facility owner or operator to obtain an EPA identification number).

Respondent has admitted its liability for all five counts alleged in the Complaint, and as indicated above, I previously granted the Agency's request for accelerated decision as to Respondent's liability. *See* AD Order; Answer ¶¶ 18, 21, 24, 27-28, 31. Accordingly, Respondent's liability is established by a preponderance of the evidence, and my prior findings with respect to Respondent's liability are hereby incorporated into this Initial Decision.

b. Penalty

Because Prime's liability was previously determined, this Initial Decision focuses on the issue of penalty. As set forth above, when assessing an appropriate penalty, RCRA requires that I take two factors into account: (1) "the seriousness of the violation" and (2) "any good faith

efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). Because the Agency has issued civil penalty guidelines under RCRA in the form of the Penalty Policy, I am charged to consider those guidelines as well. 40 C.F.R. § 22.27(b). The parties disagree as to whether I should rely on the Penalty Policy when determining a penalty in this case. But for the reasons discussed below, I see no compelling reason to not apply the Penalty Policy, which incorporates the required statutory criteria.

i. The Penalty Policy provides an appropriate framework for determining the penalty in this case

1. Agency argument

The Agency constructed a specific penalty amount based on its application of the Penalty Policy to the violations alleged in the Complaint. CB at 15-54; CX 4Cor. It advocates for the policy's use because it "was published to ensure national consistency in assessing penalties under RCRA and to guide EPA's implementation of the statutory criteria." CB at 16.

2. Respondent's argument

Respondent disagrees, and argues that I "should deviate from the [Penalty Policy] here because its application is not appropriate to the facts of this case and its application here would result in an unjust result." RB at 3. Respondent correctly observes that this Tribunal is not legally obligated to adhere to the Penalty Policy or to impose the Agency's recommended penalty, even if the recommended penalty takes into account all of the statutory factors. RB at 3; RRB at 9. The Penalty Policy itself instructs that it should not be used when enforcement actions are filed in federal court, Respondent points out. RB at 4 (citing Penalty Policy at 1).

Respondent also suggests due process concerns exist because the Penalty Policy was never subject to public notice and comment, "the regulated public has never had an opportunity to address its terms," and "Respondent has [not been] given fair notice of its applicability." RB at 4-5; *see also* RRB at 9 (protesting that broad application of the Penalty Policy "create[es] due process problems"). Further, according to Respondent, RCRA provides broad discretion to this Tribunal when it comes to penalty assessment whereas the Penalty Policy is "hyper prescriptive . . . overly complex, often difficult to understand and subject to varying interpretations." RB at 5. Respondent also complains the Penalty Policy "is open to wide discretion in its application," such as where distinctions are drawn between "major" versus "moderate" harm, and that discretion "is cabined largely by how the EPA compliance officer interprets the [Penalty Policy]." RB at 7. For example, Respondent points out, the Agency concluded the risk of harm in Count 3 was "significant"—or moderate harm—while "Dr. Walker testified that it was 'relatively low'"—or minor harm. RB at 7. This categorical change would drop the proposed penalty from $470,329 to $121,634, Respondent calculates. RB at 8. But "[a]pplication of this complex policy is unnecessary here given the undisputed, one-off nature of the admitted violations involving a trucking company with little prior experience or involvement with hazardous waste," Respondent asserts. RB at 8.

Respondent additionally maintains that the Penalty Policy "prohibits the use of good faith efforts to reduce penalties," contrary to the statutory requirement that the Tribunal "'shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.'" RB at 10 (quoting 42 U.S.C. § 6928(a)(3)). The Agency's "narrow interpretation of good faith" rewards "a violator that is aware it is violating, but takes steps to cease the violations" while giving no credit to a violator like Respondent "that is unaware of its violations—and therefore not aware of the need to take corrective actions— . . . even if it immediately complies when told of its mistake," Respondent declares. RB at 10. This view is not required by the statute or the EAB, and it makes no rational sense when the violator "fully cooperates with EPA and immediately rectifies the problem once notified and stays in compliance for years afterward," Respondent adds. RB at 10-11. In this case, the Agency did not even consider Respondent's good faith efforts to timely comply once notified of the violation, Respondent states, as it described the factor as not applicable here. RB at 11 (citing CX 4Cor). According to Respondent, the EAB has not limited this Tribunal's consideration of good faith to the interpretation urged by the Agency. RB at 11. And Ms. McNeill's description of good faith—cooperating with inspectors and working to maintain compliance with the hazardous waste requirements—matches Respondent's conduct once EPA became involved and Prime was made aware of the violations. RB at 11-12.

Respondent further alleges that if adopted, the proposed penalty "will be one of the largest RCRA penalties ever assessed by an ALJ in a contested case." RB at 8. Respondent cites ten administrative enforcement cases brought under RCRA in which it says the ALJ rejected EPA's proposed penalty and claims that ALJs "typically assess far smaller penalties than sought by EPA." RB at 9. Respondent adds that it "does not offer these cases to compare the penalties assessed in them to this case" but "to show that the [Penalty Policy] has a very poor track record when EPA is forced to substantiate its interpretation of its own policy to a neutral ALJ." RRB at 11. Respondent also argues that it is different from typical RCRA violators in that it is not in the hazardous waste or underground storage tank business, and it does not regularly work under RCRA, so the Penalty Policy should not apply. RB at 9-10; RRB at 10. And Respondent complains that the Penalty Policy does not use the "history of noncompliance" factor to credit violators who have no prior violations while it increases the penalty for repeat offenders. RB at 12. Prime has a "clean prior record" that was wrongly ignored by EPA, Respondent declares, and "the absence of any prior or subsequent history of RCRA violations should be a mitigating factor in assessing the penalty." RB at 12.

3. Discussion

Respondent's arguments do not compel me to disregard the Penalty Policy in this instance, even though it is clear that I have the discretion to do so. *See Biewer*, 15 E.A.D. at 780; *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 609-10 (EAB 2002). As a general principle, I recognize and appreciate that "the Agency designs penalty policies to be used as valuable tools for assessing penalties," and the Penalty Policy here was specifically developed to:

> ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

Bruder, 10 E.A.D. at 610 (quoting RCRA Civil Penalty Policy (October 1990) at 5).[29] Further, the Penalty Policy facilitates the uniform application of statutory penalty factors by creating a framework through which a Tribunal can apply its discretion to these factors. *Id.*; *Mobil Oil Corp.*, 5 E.A.D. 490, 515 (EAB 1994); *see also CDT Landfill Corp.*, 11 E.A.D. 88, 117 (EAB 2003) ("[W]e have noted on numerous occasions that penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments."). For these reasons, absent compelling arguments to the contrary, the Environmental Appeals Board "has emphasized that the Agency's penalty policies should be applied whenever possible." *Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002). Thus, while I am cognizant that the Penalty Policy is guidance that need not be "rigidly followed," it is a constructive framework through which to evaluate the statutory penalty factors, and I see no reason to abandon the direction it provides. *See Chase*, 16 E.A.D. 469, 488 (EAB 2014).

a. Respondent's due process and complexity concerns are insufficient reason to dispense with the Penalty Policy

Respondent's due process concerns are misplaced and have no particular legal basis. As Respondent acknowledges, the Penalty Policy is an internal guidance document that does not carry the force of law. RB at 4; RRB at 9. It therefore is not subject to public notice and comment requirements under the Administrative Procedure Act. *See Chase*, 16 E.A.D. at 488; *Bruder*, 10 E.A.D. at 610; 5 U.S.C. § 553(b)(3)(A). But the document has not been kept secret either, and the principles it articulates have been at play in Agency enforcement matters for nearly 40 years. Indeed, the Agency has applied the current Penalty Policy to RCRA violations since 2003. It is a revision of a RCRA civil penalty policy issued in 1990, and it employs the same underlying enforcement goals and method for calculating penalties that the Agency outlined in its general Policy on Civil Penalties issued in 1984. Penalty Policy at 6. The Penalty Policy is also publicly available on the Agency's website.[30] Given the extent to which it has long been intertwined with RCRA enforcement actions, Respondent cannot claim not to have fair notice of

[29] The current Penalty Policy includes this same language. Other cases cited in this Initial Decision were also decided under earlier versions of the Penalty Policy. Although the current Penalty Policy includes specific revisions to prior policies, the overall analytical approach remains the same, and I find the cases discussing the earlier policies to be applicable here.

[30] *See* U.S. EPA, Resource Conservation and Recovery Act Civil Penalty Policy, https://www.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-civil-penalty-policy (last visited Mar. 19, 2024).

the Penalty Policy's potential applicability. Respondent cites *ExxonMobil Pipeline Co. v. United States Department of Transportation* for the proposition "that agency *regulations* that 'allow monetary penalties against those who violate them . . . must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.'" 867 F.3d 564, 578 (5th Cir. 2017) (emphasis added) (quoting *Diamond Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976)); RB at 4-5. But by its express terms, the Fifth Circuit's holding refers to regulations addressing required or prohibited conduct. The Penalty Policy is not a regulation, nor does it require or prohibit conduct. Rather, it provides guidance to Agency officials on how to calculate penalties for violations described in RCRA regulations previously promulgated through notice and comment procedures. Respondent's reliance on *ExxonMobil* is inapposite.

Likewise, Respondent is not unfairly prejudiced by whatever general complexity or discretion characterize the Penalty Policy. Certainly the penalty provision of RCRA uses fewer words than the Penalty Policy does in setting forth penalty factors. *See* 42 U.S.C. § 6928(a)(3); RB at 5. But the statutory terms are broad in concept. The Penalty Policy requires additional words to describe that breadth, because it "serve[s] to facilitate the application of statutory penalty criteria." *Bruder*, 10 E.A.D. at 610. At the same time, regardless of its complexity, the Penalty Policy does not mandate or proscribe conduct, nor does it change the statutory maximum penalty amount that Respondent *could* face for its violations. RCRA itself (in conjunction with federal inflation adjustment statutes) provides notice to the regulated community of the potential cost of noncompliance. *See* 42 U.S.C. § 6928(a)(3). Application of the Penalty Policy does not change or increase that potential cost. To the extent Respondent is claiming it cannot understand the Penalty Policy and so should not be subject to it, I do not find this claim credible. If it truly desires to understand the Penalty Policy and how it might apply to particular conduct, Respondent's size and sophistication afford it the means to achieve this understanding. With respect to discretion, Respondent both urges that I rely on the "broad discretion" provided by the statutory factors and then protests that the Penalty Policy "is open to wide discretion in its application." RB at 5, 7. The fact is, there are discretionary choices to be made regardless of the Penalty Policy's role in penalty calculation. What makes the Penalty Policy helpful is that it provides guidance in exercising that discretion. For example, determining whether the potential for harm is "minor," "moderate," or "major" based on the Penalty Policy's discussion of these concepts provides a more focused means of "tak[ing] into account the seriousness of the violation." And Respondent's concern about an EPA enforcement officer exercising subjective judgment in categorizing the potential for harm is mitigated by the independent review of any such judgment by this Tribunal, the EAB, or the federal judiciary.[31]

[31] I am also unpersuaded by Respondent's contention that the Penalty Policy is not needed in this case "given the undisputed, one-off nature of the admitted violations" and Prime's limited hazardous waste experience. This is essentially an argument that the Penalty Policy should not apply because Respondent was ignorant of RCRA, and its violations were inadvertent. But Respondent has not explained why this should be the case.

b. The Penalty Policy considers a violator's good faith effort to comply with RCRA, and the Agency has done so here

Respondent's assertion that the Penalty Policy "prohibits the use of good faith efforts to reduce penalties" is incorrect. RB at 10. The policy specifically instructs that Agency personnel should, when calculating the proposed penalty for an administrative proceeding, make downward adjustments "based . . . on respondent's 'good faith efforts to comply with applicable requirements.'" Penalty Policy at 11 (quoting 42 U.S.C. § 6928(a)(3)). At the same time, the Penalty Policy distinguishes between "good faith efforts to comply" and a respondent's "cooperative attitude," both of which are adjustment factors applied to the sum of the gravity-based and multi-day components of the penalty. Penalty Policy at 3, 34. The Penalty Policy observes that "self-reporting and correction of violations qualify as good faith efforts," while the "cooperative attitude" adjustment factor "should apply to those violators who demonstrate and maintain a high degree of willingness to work with EPA regarding the investigation and resolution of violations." Penalty Policy at 41. Further, a "cooperative attitude" adjustment is generally applied only in the context of settlement. *See* Penalty Policy at 12, 35.

Regarding "good faith efforts to comply," the Penalty Policy states that "[t]he violator can manifest good faith by promptly identifying and reporting noncompliance or instituting measures to remedy the violation *before the Agency detects the violation*." Penalty Policy at 35 (emphasis added). According to the policy, "a violator's admission or correction of a violation prior to detection may provide a basis for mitigation of the penalty, particularly where the violator institutes significant new measures to prevent recurrence." Penalty Policy at 35. However, the Penalty Policy further provides that "[n]o downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance" or "because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent." Penalty Policy at 36. And it states that the Agency "will also apply a presumption against downward adjustment for respondent's efforts to comply or otherwise correct violations *after* the Agency's detection of violations . . . since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA discovery of a violation." Penalty Policy at 36 (emphasis added).

In contrast, a respondent's "cooperative attitude" is primarily treated as an adjustment factor under "other unique factors" that can be applied to increase or decrease the base gravity penalty component. Penalty Policy at 40-41. The Penalty Policy contemplates a potential downward adjustment when "the violator demonstrates a highly cooperative attitude throughout the compliance inspection and enforcement process[.]" Penalty Policy at 12. However, the Penalty Policy views this to be a decision "involving matters of policy and prosecutorial discretion which by their nature are only appropriate to apply in the context of settling a penalty claim." Penalty Policy at 12. "It is therefore contemplated that decisionmakers in administrative proceedings would not adjust penalty amounts downward based upon" a respondent's cooperative attitude because that is treated as a "settlement only" factor. Penalty Policy at 12; *see also* Penalty Policy at 35 ("[O]nly Agency enforcement

personnel, as distinct from an administrative law judge charged with determining an appropriate RCRA penalty, should consider adjusting the amount of a penalty downward based on . . . the cooperative attitude of the respondent" because this factor is "only relevant in the settlement context."). But notably, when not applied as an adjustment factor, the Penalty Policy allows that enforcement personnel may consider "the degree of cooperation evidenced by" a Respondent when selecting a specific dollar amount within a given cell of the gravity-based penalty matrix. Penalty Policy at 20.

Based on the Penalty Policy's discussion, the Policy clearly accounts for the statutory requirement that the Agency calculate a penalty that considers any good faith efforts to comply with the applicable requirements of RCRA. The EAB has also affirmed that "[t]he RCRA Penalty Policy implements the statutory penalty criteria by taking into account ' . . . any good faith efforts to comply with the applicable requirements.'" *Titan Wheel Corp. of Iowa*, 10 E.A.D. 526, 542 (EAB 2002) (citing *Everwood Treatment Co.*, 6 E.A.D. 589, 594 (EAB 1996)).[32] Respondent's claim that the Penalty Policy ignores its "good faith efforts to comply" is in fact an argument that its "cooperative attitude" during the investigation should be treated as a "good faith effort to comply" with RCRA. But these are two distinct concepts, and the EAB has confirmed that after-the-fact cooperation is not the same as a good faith effort to comply with the law.

For example, in *Titan Wheel*, the respondent was storing hazardous waste for more than 90 days without a permit, a RCRA violation identified by EPA inspection. 10 E.A.D. at 548. Before the inspection, the respondent had made no effort to discover the violations or ascertain its obligations under RCRA. 10 E.A.D. at 548. Once it learned of the violation from EPA, the respondent removed excess drums of waste and instituted a maximum storage length of 80 days, a more stringent storage period than required by RCRA. 10 E.A.D. at 548-49. But the EAB rejected the respondent's claim that this constituted a good faith effort to comply with RCRA:

> The RCRA Penalty Policy provides . . . that 'no downward adjustments should be made if the good faith efforts to comply primarily consist of coming into compliance.' RCRA Penalty Policy at 33. Titan's removal of excess drums and implementation of an 80-day storage policy were prompted by the Region's inspection and discovery of violations. As such, these efforts do not rise to the level of 'good faith efforts' contemplated by the RCRA Penalty Policy. Furthermore, under 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. *See, e.g.*, *In re Catalina Yachts,*

[32] *Titan Wheel* applied the 1990 Revised RCRA Civil Penalty Policy. *Titan Wheel*, 10 E.A.D. at 531 n.12.

> *Inc.*, 8 E.A.D. 199, 211 (EAB 1999) (declining to apply downward adjustment on the basis that it would be duplicative given that the penalty matrix already accounts for that factor).

Titan Wheel, 10 E.A.D. at 550-51. The EAB further held that significant penalty reductions for good faith "should be reserved for those cases where the violator promptly reports its noncompliance, or the possibility of noncompliance, once discovered or suspected," and in the case of Titan Wheel, "the record is devoid of any indication of Titan's efforts to self-discover, self-report, or take actions to correct the violations *prior to EPA's inspection*." 10 E.A.D. at 551 (emphasis added). Federal trial and appellate courts upheld the EAB's assessment and application of the Penalty Policy in *Titan Wheel*:

> The RCRA Penalty Policy requires the EPA to consider a violator's good faith efforts to comply. However, the policy makes clear that a good faith effort is demonstrated by the prompt identification and remediation of violations *before* they are detected by the EPA. (RCRA Penalty Policy) Pl.'s App. at 113. The policy further states "[n]o downward adjustment should be made if the good faith efforts to comply primarily consist of coming into compliance." *Id.* Contrary to Titan's assertions, its good faith efforts to comply were considered but the EPA found a good faith downward adjustment was not appropriate.

Titan Wheel Corp. of Iowa v. U.S. EPA, 291 F. Supp. 2d 899, 925 (S.D. Iowa 2003), *aff'd*, 113 Fed. App'x 734 (8th Cir. 2004) (unpublished).

The EAB has drawn the same conclusions in other RCRA enforcement cases involving Underground Storage Tanks ("USTs"). The UST penalty policy also implements a statutory provision directing the Agency to take into account "any good faith efforts to comply with the applicable requirements." *See, e.g.*, *Euclid*, 13 E.A.D. at 687 (citing 42 U.S. § 6991e(c)). In *Silky Associates, LLC*, the respondent committed five UST program violations. 2021 WL 2912094, at *1 (EAB July 6, 2021) (Final Order and Vacatur of Order Electing to Exercise Sua Sponte Review). The respondent argued it should not be assessed a penalty because it cooperated with the Agency to eventually come into compliance. However, the EAB rejected this argument, observing that the UST penalty policy "specifies that 'Because compliance with the regulation is expected from the regulated community, *no downward adjustment* may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no 'reward' for doing now what should have been done in the first place.'" *Silky*, 2021 WL 2912094, at *2 (quoting *U.S. EPA Penalty Guidance for Violations of UST Regulations*, OSWER Directive 9610.12, at 18 (Nov. 1990)). The EAB relied on the same UST penalty policy language in *Ram Inc.*, where the respondent removed tanks that violated UST regulations after EPA completed an inspection and filed an administrative complaint, finding that "compliance with a regulation after being cited for its violations does not warrant a downward adjustment to a gravity-based penalty." 14 E.A.D. 357, 375-76 (EAB 2009). A similar outcome was reached in

Euclid as well. There, the respondent allegedly "engaged in a complete upgrade of its tanks and line release detection systems and methodology during and after the [Agency] investigation, and it upgraded its other practices to exceed the RCRA requirements." 13 E.A.D. at 700. But the EAB determined this qualified "at best as efforts to come into compliance," and underscored that "it is the violator's burden to demonstrate that it has gone beyond what is required by law" to earn a reduction in the penalty. *Euclid*, 13 E.A.D. at 700-01.

As set forth above, "good faith efforts to comply" with RCRA requires a respondent to be working toward compliance *before* the Agency identifies the respondent's shortcoming as a violation. *See also United States v. JG-24, Inc.*, 331 F. Supp. 2d 14, 71 (D.P.R. Aug. 12, 2004) (observing that, under RCRA, "[g]ood faith efforts to comply are those done before the [violator] is caught"). Contrary to Respondent's contention, the Penalty Policy specifically accounts for this statutory factor as an adjustment to be made to the gravity-based portion of the penalty calculation. It just happens that Respondent made no such effort to comply in this case, so the Agency did not credit Respondent with any good faith effort to comply. Even so, the Agency did consider Respondent's after-the-fact cooperation, despite Respondent's claim otherwise. *See* RB at 11. Ms. McNeill testified that, when identifying an appropriate penalty amount within the identified penalty range of the gravity-based penalty matrix, EPA's selection took into account Respondent's cooperative attitude following the August 2016 inspection. *See* Tr. II 95-96, 123, 134-36, 174-75, 186-87; CX 4Cor at 6-8, 10-11, 13-14, 15-17, 18, 19. She further explained that the Agency took note of the Penalty Policy's assertion that the degree of cooperation exhibited by a respondent is one of the factors that can be used to choose a value within the appropriate penalty matrix range. Tr. II 181. At the same time, she described a respondent's cooperation as categorically different than its good faith efforts to comply, which for a downward adjustment requires "that the violation is identified and . . . corrective actions are taken before any agency identifies the violation." Tr. II 181. "Also, [there are] no adjustments for not knowing about the requirement and no downward adjustments for just coming back into compliance." Tr. II 181. Here, she added, the good faith requirements were not met because the Agency identified the violation, and Respondent merely did what it was already expected to do: come into compliance. Tr. II 181-82. "[I]t was more appropriate in this case to consider that degree of cooperation in the penalty matrix cell, because the factors for good faith efforts to comply just didn't really fit," she said. "So to give them a credit for cooperating, we used [it] as a part of the determination of the matrix level to select the penalty." Tr. 182. Respondent may be dissatisfied with EPA's decision that a "good faith" downward adjustment was not appropriate in this matter, but it is still a component of the Penalty Policy that the Agency considered.

c. Penalty amounts in other cases are not comparable here, and the penalty need not be mitigated for Respondent's lack of prior violations

Respondent's presentation of other RCRA cases in which an ALJ or the EAB assessed a penalty lower than what the Agency is proposing here does not specifically affect the penalty analysis in this case. The EAB has on several occasions "emphasize[d] the case-by-case nature

of penalty assessments," *Capozzi*, 11 E.A.D. 10, 28-29 (EAB 2003), such that the penalty in "'one case cannot determine the fate of another.'" *Titan Wheel*, 10 E.A.D. at 533 (quoting *Newell Recycling Co.*, Inc., 8 E.A.D. 598, 642 (EAB 1999)); *see also Euclid*, 13 E.A.D. at 694-95 n.168 ("[A]s this Board has stated on numerous occasions, it is inappropriate to compare penalties imposed in different cases."). Respondent contends that it does not seek "to compare the penalties assessed in [prior cases] to this case," but "to show that the [Penalty Policy] has a very poor track record when EPA is forced to substantiate its interpretation of its own policy to a neutral ALJ." RRB at 11. But Respondent still invites a case-by-case comparison in which I decline to engage. I accept that other Tribunals have in other cases assessed lower penalties than the Agency initially sought, but that has no bearing on the particular facts of this matter or the penalty size those facts warrant.

Finally, Respondent's argument that the Penalty Policy should not apply because it does not credit Prime for being a first-time violator also misses the mark. There is no statutory basis for mitigating the penalty based on Respondent's lack of prior violations, and, as Ms. McNeill explained, the Agency's assumed starting point is that regulated entities are *not* violating the law. *See* Tr. II 57. Only when they do so repeatedly is the history of noncompliance considered for an *upward* adjustment to the penalty. Otherwise, it is entirely appropriate that the Penalty Policy does not reward a respondent with a downward adjustment simply because, prior to its violation, it did what the law required it to do.

Accordingly, I find it appropriate to apply the Penalty Policy in this case.

ii. The Agency made an appropriate "potential for harm" determination under the Penalty Policy

For counts 1, 2, 4, and 5, the Agency assessed the "potential for harm" component of the gravity-based penalty amount to be *major*, while assigning a *moderate* level of potential for harm to the storage violation of Count 3. Respondent contests the Agency's determination of the potential for harm in Count 3 in particular, arguing that the proper classification should be *minor* rather than *moderate*.[33] RB at 13-22. Respondent bases its argument on the notion that its storage of hazardous waste at the Facility posed less risk than the Agency claims. This was the focus of much of the expert testimony at hearing.

Under the Penalty Policy, assessment of the potential for harm "should be based on two factors: [1] the risk of human or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by noncompliance, and [2] the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 12-13.

[33] Respondent then declares that as a consequence of downgrading the potential harm for Count 3, counts 1, 2, 4, and 5 should likewise be reduced from major to minor. RB at 22. This would still yield a sufficiently deterrent penalty of $137,386, according to Respondent. RB at 22, 34-36. However, as discussed herein, the potential harm for Count 3 should not be reduced to "minor," and even if it were, Respondent has not established that reduction as a basis for changing the potential harm assessments for the other four violations.

Regarding the first factor, the risk of exposure "depends on both [1] the likelihood that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents and [2] the degree of such potential exposure." Penalty Policy at 14. The likelihood of exposure refers to "the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions posing a threat of exposure to hazardous waste or waste constituents," which is "based on whether the integrity and/or stability of the waste management unit or waste management practice is likely to have been compromised." Penalty Policy at 14. Factors to consider in making this determination include evidence of release, waste mismanagement (such as rusting drums), and adequacy of provisions for detecting and preventing a release (such as monitoring equipment or inspection procedures). Penalty Policy at 14. Further, "[a] larger penalty is presumptively appropriate where the violation significantly impairs the ability of the hazardous waste management system to prevent and detect releases of hazardous waste and constituents." Penalty Policy at 14. The degree of a potential exposure—the potential seriousness of contamination—requires weighing the harm that would result if hazardous waste was in fact released. Factors to consider for this determination include the quantity and toxicity of wastes that might be released, the likelihood of transport by environmental media such as air or groundwater, and the existence, size, and proximity of human or environmental receptors. Penalty Policy at 14-15. The Penalty Policy further advises that when evaluating 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 not be rewarded with lower penalties simply because the violations did not result in actual harm." Penalty Policy at 15.

With respect to the second factor, noncompliance with certain RCRA requirements "directly increases the threat of harm to human health and the environment" even if does not directly or immediately give rise to a significant risk of contamination. Penalty Policy at 15. These violations "may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 15. As one example, the Penalty Policy cites "operating without a permit or interim status," the category of violation charged in Count 3. The Penalty Policy views such requirements as "based squarely on protection concerns" and "fundamental to the overall goals of RCRA to handle wastes in a safe and responsible manner." Penalty Policy at 15.

The degree of potential harm may be classified as major, moderate, or minor. As relevant to Count 3, a "moderate" level of harm indicates that "(1) [t]he violation poses or may pose a *significant* risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a *significant* adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 16 (emphasis added). One example of moderate harm is when a facility storing hazardous waste containers inspects its storage areas every two weeks rather than weekly as required by RCRA to guard against containers deteriorating or leaking. Penalty Policy at 17. Although a leak is unlikely to go completely undetected, the frequency of inspection "may allow

a container to leak for up to two weeks unnoticed." Penalty Policy at 17. By comparison, a "minor" level of harm reflects that "(1) [t]he violation poses or may pose a relatively *low* risk of exposure of humans or other environmental receptors to hazardous waste or constituents; and/or (2) the actions have or may have a *small* adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 16 (emphasis added). An example of minor harm occurs when a facility uses a manifest with a type-written name instead of signing it by hand. Penalty Policy at 17. This would require further examination of the manifest for validity and reliability of the information it contained but otherwise may result in a "relatively low" likelihood of exposure and harm to RCRA. Penalty Policy at 17.

Respondent first asserts the Agency did not consider the probability of exposure and "cannot show how likely it was that the storage of burned paint . . . posed a significant risk to Prime workers or the local population or to the environment." RB at 13; RRB at 3. According to Respondent, the Agency's written penalty analysis makes no mention of probability of exposure, and Dr. Keteles testified that she did not consider probability of exposure. RB at 14 (citing CX 4Cor and Tr. IV 233:11-20);[34] RRB at 3. Respondent further disputes the conclusion in Dr. Keteles's report that there was a strong likelihood of human or ecological receptors coming into contact with the 20 drums of hazardous waste, pointing to their "remote isolated storage location in an outdoor lot where workers do not often visit." RB at 14 (citing CX 66 at 8). The fact that there is no evidence of actual exposure shows that Dr. Keteles's concerns about the likelihood of "imminent and substantial endangerment" are unfounded, Respondent alleges. RB at 14-15. Likewise, Respondent states that Ms. McNeill was unable to "point to any analysis of probability of exposure" other than the Agency's general consideration of risk to human health and the environment. RB at 15. Therefore, Respondent concludes that EPA's potential for harm determination is unsupported. RB at 15.

The Agency counters that Respondent is "relying on word games," and argues that it did address the probability of exposure even if that is not that precise language that was used by its witnesses. CRB at 4. I generally agree. The Agency produced ample evidence at hearing that it had assessed various factors related to the probability that human or environmental receptors would be exposed to hazardous waste. This includes evidence that none of the hazardous waste storage requirements were met—the drums were not labeled, closed, or marked with an accumulation start date, and were in poor condition; that Prime employees had not received hazardous waste training, were not conducting weekly inspections for leaks, and had no contingency plan to inform an emergency response in the event of a spill; and that the waste was stored in open, rusty drums that allowed their contents to volatize into the air where workers could be exposed. *See, e.g.*, Tr. II 128-29, 131-32; CX 4Cor at 13-14. Further, the Agency determined there was not a *major* potential for harm, recognizing that the probability of exposure was reduced because there were no nearby waterways to be contaminated by a spill and because the paved surface under the trailer would contain a spill better than dirt. *See* Tr. II 154-58; CX 4Cor at 14. Additionally, Dr. Keteles's testimony does not suggest that the

[34] Respondent's brief inaccurately cites Tr. IV 234.

Agency failed to consider "probability of exposure." At hearing, Respondent's counsel asked Dr. Keteles whether, in her expert report, she "ever talked about the probability of *harm*." Tr. IV 233 (emphasis added). She responded: "No, I did not look at probability of harm. I just looked at *potential for exposure* and just the inherent toxicity because that's all the information I had," before stating in response to a follow-up question that she "did not" look at "the probability of exposure." Tr. IV 233 (emphasis added). Dr. Keteles later explained that she did not need to look at the probability of exposure because she was "just asked to assess risk," and the risk of exposure exists so long as "there is a potential for human exposure." Tr. IV 267-68. In this case, that risk existed without further calculating "what are the chances of somebody walking past the site," because there were completed exposure pathways. Tr. IV 268; CX 66 at 8-9. Thus, while Dr. Keteles did not provide a bottom-line probability of a person walking by and being exposed to the drums of hazardous waste, she did discuss the likelihood of human and environmental exposure due to Respondent's waste mismanagement and lack of provisions to detect and prevent a release, the inherent toxicity of the waste, and the general presence of human and environmental receptors that could freely interact with the waste.

Respondent next contends that the potential for harm was low based on Dr. Walker's testimony that there was a low probability of exposure. RB at 15 (citing RX 20; Tr. IV 11). Respondent's argument and Dr. Walker's conclusions are largely premised on the conditions they say characterized the storage of hazardous waste at the Facility: in an out-of-the-way corner at the back of the property, approximately 200 feet from the nearest building where Prime employees worked and where there were likely to be few passersby. RB at 16-17; RRB at 4-5; *see also, e.g.*, RX 20 at 3; Tr. IV 121-23, 158. They also point to the asphalt pad under the trailer of waste that would minimize contamination by drum leakages; vapor dispersal by the wind; and that the nearest residential areas were two to three miles away. RB at 18; RRB at 4-5; RX 20 at 3-5; Tr. IV 140-41. Further, Dr. Walker discounted the likelihood of fire based on the assumption that the most volatile compounds were burned in the trailer fire and that the drums were relatively isolated from any ignition source. RB at 17-18; Tr. IV 112; RX 20 at 5. The Agency and Dr. Keteles view the probability of exposure from a different angle. Dr. Keteles testified that because workers (and animals) at the Facility had unfettered access to the waste based on how it was stored—in rusty, open, improperly labeled drums on a tilting, burned trailer parked behind Facility buildings under the hot sun—the pathway to exposure was complete. *See, e.g.*, Tr. IV 222-26, 231; CX 10 at 16-17. The Agency argues that "the risk of exposure to the hazardous waste was determined generally by the level of access to the drums," and "[w]hether any receptors chose to move toward the hazardous waste is a separate question." CRB at 7; CB at 42.

I tend to agree with the Agency's position. The probability of exposure to hazardous waste in this case is informed to a large degree by the fact that anyone at any time could have been exposed because of how Respondent managed (or rather, failed to manage) the waste. It was kept outside in rusty containers open to the elements, at the back of an active, working truck lot near a construction site where anyone could encounter it. Further, there were significant quantities of this inherently toxic material—at least twenty mostly full 55-gallon drums, nearly 1,100 gallons in total. Even if workers at the Facility did not routinely pass by the

trailer of drums during the time it was stored there, if or when they did, the probability that they would be exposed to the volatizing waste was significant. Moreover, the drums as stored were susceptible to a fire or other event that would draw people and first responders to the waste or broaden the area of exposure to include individuals who otherwise may not have passed nearby. Although Dr. Walker testified that the risk of fire was low due to a lack of ignition source inside the drums, I found more credible Dr. Keteles's explanation that vapors from the waste could accumulate in the trailer or sink to the ground where they would be susceptible to ignition by a variety of sources, such as dragging metal objects, metal-on-metal contact from the drums banging together, static electricity, or a brush fire caused by passing trains. *See* Tr. IV 130, 216-19. A fire in particular would accelerate the risk of exposure as the waste burned and the combustion byproducts were released into the air. Tr. IV 219.

Respondent complains that the Agency's arguments and Dr. Keteles's opinions rely on hypothetical harms, because the facts adduced at hearing demonstrated that people did not generally go near the trailer. *See, e.g.*, RB at 18-19. However, this argument discounts the potential for harm that actually existed. Although Respondent's employees did not routinely work near the waste, if for any reason they did, the risk and likelihood of exposure was significant because there was nothing to guard against their direct interaction with the waste. For example, at least three Prime employees used forklifts to move the trailer of waste some thirty feet to accommodate construction work. Such a project could easily have resulted in a spill or sparked a fire as the drums and trailer were being handled. Likewise, construction workers pouring concrete "over by" the trailer faced significant risk of exposure and provided another potential ignition source while completing their task. *See* Tr. III 344; Tr. IV 38-39, 57. And so long as the waste was stored at the Facility under the conditions described at hearing, any other irregular assignment that placed people near the trailer placed them at significant risk of exposure. This is an illustration of the rattlesnake analogy as viewed by Dr. Keteles: Respondent's employees, construction workers, visitors, trespassers, or first responders, even if ultimately few in number, were all at significant risk of being bit and envenomated because the snake was not properly locked away. Additionally, in assigning a *moderate* rather than *major* level of potential harm to human health or the environment due to Respondent's storage of waste at the Facility, the Agency has accounted for risk-mitigating factors, such as the out-of-the-way placement of the drums. As Ms. McNeill suggested, the Agency could have increased the risk assessment to *major*, particularly after discovering that the drums remained mostly full.[35]

[35] Respondent also argues that EPA must have viewed the potential for exposure to be low because, upon discovering the trailer in the back of the Facility, it instructed Prime not to move, tamper, alter, discard, or relocate any part of it until the Agency gave it permission to do so, and it did not warn anybody of potential risks. RB at 19-21; RRB at 7-8; *see* Jt. Stips. ¶¶ 17-18. I do not find this argument compelling. The Agency issued its commands in the context of a criminal investigation, where ensuring the preservation of evidence is essential. The Agency's actions *might* show a lack of concern for imminent danger, but they do not demonstrate any conclusion about the potential for harm under the Penalty Policy or RCRA, which could not have been adequately made in the middle of the investigation. EPA's investigative conduct remains consistent with its later determination that Prime's handling of the waste presented a moderate potential for harm.

However, even if I accepted Respondent's assertions that the risk for human or environmental exposure to hazardous waste was low, its unpermitted storage of hazardous waste may still have "a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 16. This factor provides an independent basis for finding the potential for harm to be moderate, regardless of how insignificant the risk of exposure might be. *See Harmon Elecs., Inc.*, 7 E.A.D. 1, 52-53 (EAB 1997); *Everwood*, 6 E.A.D. at 601-02. "Hence, under the Penalty Policy, even if the risk of exposure is not [significant], the Presiding Officer may nevertheless characterize the violation as [moderate] if it [significantly] undermines the integrity of the RCRA program." *Harmon*, 7 E.A.D. at 53.

In *Harmon*, the respondent operated a facility that assembled railroad signal equipment and used cleaning solvents which, once discarded, were classified as a hazardous waste under RCRA. 7 E.A.D. at 4. Before management intervened, maintenance workers at the facility routinely disposed of unused solvents "by throwing them out the back door . . . onto the ground." *Id.* Based on this conduct, the Agency charged the respondent with, among other violations, operating a hazardous waste disposal facility without a permit. *Id.* at 23. The ALJ found that this violation "would *substantially* undermine the integrity of the RCRA program," posing "a *major* potential for harm." *Id.* at 52-53 (emphasis added). The EAB affirmed this conclusion, finding it consistent with the recommendation of the Penalty Policy that such a violation "'undermine[s]' the statutory or regulatory purposes or procedures for implementing the RCRA program." *Id.* at 53 (quoting 1990 Penalty Policy). According to the EAB, the respondent's operation of a RCRA facility without a permit "was a particularly serious violation" because it "took place entirely outside the RCRA program. Such an operation cannot help but have an adverse effect on the RCRA program, even if the risk of actual exposure was not substantial." *Id.* at 52, 54.

In *Everwood*, the respondent operated a wood treatment facility that generated hazardous waste and typically shipped it off-site to a permitted disposal facility. But following an unexpected spill of the waste product, the respondent buried the contaminated soil and debris in a pit on its property. 6 E.A.D. at 590-91. The Agency charged the respondent with 13 RCRA violations, including operating a hazardous waste disposal facility without a permit. *Id.* at 592-93. The Presiding Officer in that case concluded the potential for harm from operating without a permit was "minor," because the Agency had not established any actual environmental impact from the permitting violation and the quantity of contaminated material was relatively small. *Id.* at 599, 601. But the EAB rejected this conclusion, ruling that it was reversable error to not also consider the violation's harm to the RCRA permitting scheme when assessing the "potential for harm." *Id.* at 602. The EAB held that "the RCRA permitting requirements 'go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function.'" *Id.* (quoting *A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 418 (CJO 1987)). To that end, the EAB found the permitting requirement "fundamental" to RCRA and reiterated that permitting violations "go to the heart of the RCRA program." *Id.* at 604.

Here, Respondent's failure to obtain a permit before storing hazardous waste at the Facility—for nearly a year—was a fundamental breach of RCRA requirements that goes to the heart of the regulatory scheme. Permitting is the means by which RCRA regulates hazardous waste. *See* 42 U.S.C. § 6925(a) (mandating the Agency promulgate regulations that require persons owning or operating a facility for the treatment, storage, or disposal of hazardous waste to obtain a permit, and prohibiting this conduct "except in accordance with such a permit"); *see also JG-24, Inc.*, 331 F. Supp. 2d at 70 (finding defendants' unpermitted storage of hazardous waste to be "a very serious violation" because "the permit requirement is the central mechanism under RCRA for assuring that hazardous wastes are not being mismanaged at facilities without regard to public health and the environment"). Ms. McNeill described as much: "Harm to the program is evaluated based on how fundamental the requirement is to the integrity of the RCRA program," and "getting a RCRA permit is fundamental to the RCRA program;" it "form[s] the very basis of the RCRA program." Tr. II 38, 51, 132. If a person is storing hazardous waste and does not have a permit to do so, they are "out[side] of the whole program, and therefore . . . just completely unregulated. There's no way to ensure that that hazardous waste is being managed properly at all." Tr. II 51. "[I]f you don't get a permit," she said, "there's definitely the chance that waste can be mismanaged," as it was in this case when storage requirements were not met. Tr. II 132-33. This causes "significant harm" to the program. Tr. II 132. In contrast, she observed, less fundamental violations might occur where a facility is "managing hazardous waste under RCRA but not meeting some of the requirements of the program," such as not properly labeling waste. Tr. II 52. The concerns Ms. McNeill discussed are consistent with the EAB's evaluation of harm to the RCRA program in *Harmon* and *Everwood*, where operating without a permit presented a "major" harm to RCRA. Respondent's specific conduct in this case may be different in kind from the respondents in those cases, in that Prime stored rather than disposed of hazardous waste without a permit. But the concern is the same: the handling and storage of hazardous waste "took place entirely outside of the RCRA program," which wholly defeats the program's ability to manage hazardous waste so as to minimize risks to human health and the environment. *See* 42 U.S.C. § 6901(b)(5) (congressional finding that "the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment"). And in this case, there was no evidence that despite the lack of permit, the hazardous waste was stored in compliance with RCRA: The drums containing the waste were unlabeled, open to the air, and in poor condition; and Prime did not provide hazardous waste training to its employees, conduct weekly inspections for leaks, or develop contingency plans to inform an emergency response to a spill. *See, e.g.*, Tr. II 128-29. This significantly undermines the integrity of RCRA.

Consequently, given the potential for harm to human health, the environment, and the RCRA regulatory scheme posed by Respondent's unpermitted storage of hazardous waste, I find that EPA appropriately assessed the potential for harm in Count 3 to be "moderate."

iii. Prime has not shown that the penalty should be further reduced for its good faith effort to comply with RCRA

As discussed above, demonstrating a "good faith effort" to comply with RCRA requires certain conduct of a Respondent *prior* to the Agency's discovery of a violation and does not include after-the-fact cooperation with an investigation. In this case, Respondent made no effort to comply with RCRA until Agency investigators showed up at the Facility in August 2016 to inspect the burned drums and trailer. Respondent cooperated with the Agency and endeavored to come back into compliance *after* the violations were discovered. Nevertheless, Prime advances various arguments related to its good faith compliance efforts that it contends should mitigate its penalty. RB at 25-31; RRB at 13.

First, Respondent contends that it lacked the experience to effectively deal with the hazardous waste violations that resulted from the fire, because it is a trucking company that mostly hauls refrigerated food and pharmaceuticals and does not regularly work under RCRA. RB at 25. Once it learned of its mistake, Respondent argues, it cooperated with EPA and remedied the situation. RB at 26. But I do not find this particularly persuasive. Prime estimates that three percent of the freight it carries is hazardous material. Certainly that is a small portion of its total payload, but if it has 7,600 trucks on the road, that equates to 228 trucks hauling hazardous material. If each of those trucks carried 32 55-gallon drums of Yellow Primer or some other hazardous material, that is more than 400,000 gallons of hazardous material. It is also 228 opportunities for one of Prime's trucks to be involved in an accident that generates hazardous waste. These are not insignificant numbers, and Prime cannot claim the benefit of inexperience when, after choosing to haul hazardous material for profit, it does not make itself aware of RCRA's requirements. Moreover, the evidence shows Prime was aware of RCRA: It had an EPA ID number for its facility in Springfield, Missouri, and an established relationship with PES for environmental cleanup work when needed. *See* Tr. II 188-89; Tr. III 333-34. Additionally, regardless of Respondent's RCRA experience, when it picked up the Shipment, PPG gave Prime explicit instructions to call its own environmental contractor, Chemtrec, "for help in emergencies involving spill, fire, leak, [or] exposure." CX 7 at 11; CX 16 at 2. Prime did not need a comprehensive understanding of RCRA to follow these directions.

Second, Respondent blames emergency responders and government authorities in Idaho for "multiple and confusing communications and decisions" during their response to the fire that colored Prime's conduct thereafter. RB at 26-30; RRB at 13-15. In particular, it points to the local fire chief's conclusion "that it went from a haz-mat scene to a clean-up scene" and the fact that B&W was allowed to clean up the site even though it was not qualified to do so. RRB at 14. In this context, "Prime's then compartmentalization allowed it to deviate from its commitment to regulatory compliance," Respondent argues. RRB at 14. I reject these arguments. First, the fire chief's statement may imply that hazardous materials in the Shipment were contained, but it says nothing about the inherent characteristics of the material that remained to be cleaned up. Second, Prime's then-compartmentalization was entirely of its own making and cannot be laid at the feet of responding officials. And ultimately, whatever confusion existed that night was rendered moot after IDEQ notified Prime that a second

cleanup was necessary, and Prime's contractor determined after that cleanup that contaminated soil and debris from the fire contained hazardous waste. Prime might have a stronger argument based on confusion at the scene of the fire if, following the second cleanup and waste determination, it had then made an effort to properly dispose of the trailer and drums at the Facility. But it did not do so. In light of that fact, any confusion at the scene of the fire is irrelevant to Prime's failure to act in accordance with RCRA. Moreover, such confusion does not relieve Prime of its obligation to know in the first instance that it was transporting hazardous materials that, once burned or incinerated, would likely convert to hazardous waste under RCRA.

Third, Respondent points to the fact that it cooperated fully with EPA after the August 2016 inspection and immediately came into compliance with RCRA as directed by the Agency. RB at 30-31. Respondent also observes it made operational changes to prevent similar RCRA violations in the future. RB at 31. However, Ms. McNeill testified that that EPA considered Respondent's cooperation and return to compliance when calculating the gravity portion of the penalty, prompting the Agency to select the midpoint of the matrix range for each violation rather than an amount closer to the top. *See* Tr. II 95, 100; CX 4Cor at 8. Respondent presents no authority for further reducing the penalty based on its cooperation with the investigation or conduct afterward, and there is sufficient evidence that its cooperation has been adequately accounted for.[36]

Accordingly, I find that the Agency appropriately considered Respondent's cooperative attitude and good faith effort to comply with RCRA when calculating the proposed penalty, and Respondent has not demonstrated any reason to further reduce the penalty on these bases.

iv. Assessment of the Agency's penalty calculations

In light of the above considerations, I turn now to my assessment of the Agency's penalty calculation for each alleged violation.

1. Count 1

The Agency proposes a penalty of $37,500 for Count 1, failure to make a hazardous waste determination. CX 4Cor at 6; CB at 22.

The Agency has adequately shown that the potential for harm—to human health, the environment, and the RCRA program—was major. Respondent transported hazardous waste on public roads for more than 300 miles from Boise, Idaho to Salt Lake City, Utah in compromised drums using an unqualified towing company. Further, it did not label, manifest, or placard the load as hazardous waste. This "severely increased the risk of exposure to people

[36] Relatedly, Respondent presents its general good corporate citizenship as another basis for decreasing the penalty, RB at 32-34, but does not explain how that is a factor to be considered under RCRA generally or the Penalty Policy specifically.

and the environment" in the event of an accident or spill and put the transporters at high risk. Tr. II 89-90; CX 4Cor at 7. Prime then stored the hazardous waste at the Facility for more than 300 days on a burned, tarp-covered trailer bed "without anyone knowing it was hazardous." Tr. II 89; CX 4Cor at 7. Had Respondent made a waste determination, it could have mitigated these potential harms and the risk of exposure by handling the waste appropriately. Prime's violation also "fundamentally undermines the integrity of the RCRA program" because the first step to initiate proper RCRA management was never taken. Tr. II 93; CX 4Cor at 7; *see also Chem-Solv, Inc.*, 16 E.A.D. 594, 618-19 (EAB 2015) ("[this] determination is the crucial, first step in the regulatory system, and the generator must undertake this responsibility seriously"). Respondent has not through evidence or argument persuasively contested the potential for harm posed by this violation, other than suggesting the storage risk was not as great as the Agency claims. But for the reasons discussed above, that argument fails.

Likewise, the extent of deviation is major because, as the Agency showed, the relatively straightforward action of making a waste determination was never done, which was a complete departure from the requirement. Tr. II 94; CX 4Cor at 7. As the Penalty Policy states, a "major" extent of deviation occurs when "[t]he violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance." Penalty Policy at 18. Respondent has not rebutted this conclusion.

Finding both gravity-based penalty factors to be "major" calls for a penalty range of $28,330 to $37,500 under the penalty matrix of the Penalty Policy (as adjusted by the 2010 PP Revision), and the Agency selected a midpoint of $32,915. Tr. II 95-96; CX 4Cor 6-8; Penalty Policy at 19; 2010 PP Revision at 8. This midpoint value is appropriate in light of the factors articulated by the Agency. It is not at the top of the range because Respondent generally cooperated with the investigation and properly disposed of the waste at a hazardous waste facility when instructed to do so. And it is not at the bottom of the range because Prime is a large, national shipping company of significant size and sophistication that had ample opportunity and ability to comply with RCRA's most basic requirements. *See* Tr. II 71-72, 74-75, 95-96; CX 4Cor 6-8.

The Agency also appropriately applied an upward adjustment to the penalty of 10 percent, or $3,292, raising it to $36,207, to reflect Respondent's willfulness or negligence. *See* Tr. II 104; CX 4Cor at 6, 9. Under the Penalty Policy, assessment of willfulness or negligence entails consideration of several factors:

- how much control the violator had over the events constituting the violation;
- the foreseeability of the events constituting the violation;
- how much control the violator had over the events constituting the violation;
- the foreseeability of the events constituting the violation;

- whether the violator took reasonable precautions against the events constituting the violation;
- whether the violator knew or should have known of the hazards associated with the conduct; and
- whether the violator knew or should have known of the legal requirement which was violated.

Penalty Policy at 36.

In this case, Prime had total control over events as the generator of the hazardous waste. It knew or should have known about the hazards associated with its conduct and the legal requirements that were violated, because Prime had "a number of pieces of information in their possession" suggesting that hazardous waste management was required, such as: (1) the flammable placard on the trailer carrying the Shipment, which indicated the presence of hazardous material that, if transformed into waste, would therefore likely be hazardous as well; (2) the bill of lading accompanying the Shipment that identified its contents as UN 1263, a DOT Hazard Class III flammable material; (3) the fact that the bill of lading was on the truck the night of the fire, and information about the bill of lading was in Prime's computer system where anybody at the company who looked it up would have known the Shipment contained UN 1263 flammable paint; (4) the facts that IDEQ approached Prime in October 2015 to conduct a second cleanup of the fire site where paint had leaked onto the ground, and when the soil was excavated and sampled by Prime's contractor, it was determined to be hazardous waste due to its chromium content; (5) the SDSs for the four products that comprised the Shipment, which were in Prime's possession by November 25, 2015, when they were emailed to Prime by PPG, and each of which stated on the first page that the products were considered hazardous by OSHA; and (6) the SDS for the Yellow Primer, which further indicated that it contained between 10 and 25 percent strontium chromate, barium chromate, and a number of solvents, all of which could cause the material to be a hazardous waste. *See* Tr. 71-72, 74-75, 77-80, 102-03; CX 4Cor at 8-9; CX 32 at 33; CX 39. But despite all of these indicators that should have prompted Respondent to make a hazardous waste determination, Respondent did nothing.

It was also appropriate for the Agency not to apply a downward adjustment for Respondent's good faith efforts to comply. As previously discussed, the Agency credited Prime for cooperating with the 2016 inspection when it determined where to set the penalty within the gravity-based penalty matrix range. *See* Tr. II 100-01; CX 4Cor at 9. Beyond that, no further adjustment for Respondent's good faith is called for, because it was only EPA's discovery of the violations that compelled Prime to come back into compliance. Additionally, Respondent's claimed lack of experience or awareness of RCRA is an unacceptable excuse. Prime is a sophisticated transport and logistics company that should have educated itself about RCRA's requirements when it began hauling hazardous materials around the country. The company may not be "in the hazardous waste or underground storage business," RB at 25, but it still ships a considerable volume of hazardous material, and as illustrated by this case, has the capability of generating a significant quantity of hazardous waste. Prime should not be

rewarded with a penalty reduction for failing to become competent in regulations that impact this portion of its business.

The Agency applied a $10,800 upward adjustment for the economic benefit Respondent gained by not performing a hazardous waste determination. EPA arrived at this figure by calculating Prime's avoided costs of not testing samples from eight of the 20 burned drums.[37] This is not an unreasonable assessment. However, Ms. McNeill also acknowledged that it would have been reasonable for Prime to make a waste determination simply by relying on the bill of lading and SDS. In that scenario, there would be no sampling costs to avoid. *See* Tr. II 269-71; *see also* CX 4Cor at 9 ("[T]he SDS and other documents . . . would serve as a reasonable basis for determining the drums contain hazardous waste[.]"). If Prime had chosen to make a waste determination, presumably it would have chosen the free option. I will therefore impose no penalty based on Respondent's economic benefit.

Accordingly, an appropriate penalty for the violation alleged in Count 1 is $36,207.[38]

2. Count 2

The Agency proposes a penalty for Count 2 of $36,207, based on Prime's failure to prepare a hazardous waste manifest when it hired Brett's Towing to transport the burned trailer and drums of hazardous waste from Boise, Idaho to the Facility in Salt Lake City. Tr. II 115-16; CX 4Cor at 10.

As with Count 1, the Agency has adequately shown the potential for harm—to human health, the environment, and the RCRA program—was major. Respondent transported hazardous waste on public roads for more than 300 miles in drums that were open and mostly full, without any placarding or manifest that would notify the driver, other motorists, or potential emergency responders of the hazardous nature of the load. Tr. II 118-19; CX 4Cor at 11. There is increased risk when hazardous waste is being transported and not just stored, Ms. McNeill testified, so "management requirements such as having the drums be closed and in good condition are even more critical." Tr. II 122. In this case, preparing a manifest would have mitigated these risks by ensuring the waste was handled and managed appropriately by a qualified transporter, and in the event of a spill, responders would know what they were dealing with. Beyond the risk to people and the environment, the potential harm to RCRA was major because the manifest is "[t]he key component of the waste tracking system" in that it

[37] At hearing, and in its Post-Hearing Brief, the Agency disclosed that testing costs could be further reduced to $7,648 to reflect a sample analysis that excludes pesticides and herbicides. CB at 27 (citing Tr. II 113).

[38] I agree with the Agency's decision to not apply the other adjustment factors under the Penalty Policy—including for History of Noncompliance, Ability to Pay, Environmental Projects, or Other Unique Factors. With respect to History of Noncompliance, I again observe that no downward adjustment is available to Prime on grounds that it is a first-time violator. Rather, because it has no prior known violations, the penalty should not be increased under this factor.

"acts as a chain of custody" that follows the waste as it passes from generator to transporter(s) to its final destination at a properly permitted treatment, storage, and disposal facility. Tr. II 116; CX 4Cor at 11. *See also Pyramid Chem. Co.*, 11 E.A.D. at 671("Hazardous waste manifests are important in establishing a clear record of generation, handling, and final disposition of hazardous waste."); *Ashland Chem. Co.*, 3 E.A.D. 1, 1989 WL 253202, at *6 (CJO 1989)[39] ("The manifest system is the heart of RCRA's cradle-to-give management system for hazardous waste. The Act specifically requires such a system, and the Congress expressly noted the importance of manifests in establishing a clear record of generation, handling, and final disposition of hazardous waste." (citations and quotation marks omitted)). By not preparing a manifest, Respondent dramatically undercut RCRA's effort to ensure that hazardous waste is not mishandled.

It is also appropriate for EPA to classify the extent of deviation from RCRA as major, because "manifests are another one of those fundamental requirements of the RCRA program" that are necessary for cradle to grave management. Here, Prime failed to complete this requirement entirely. *See* Tr. II 115-16, 119-21; CX 4Cor at 11.

As with Count 1, classifying these penalty factors as "major" called for a penalty range of $28,330 to $37,500 under the gravity-based penalty matrix of the Penalty Policy and 2010 PP Revision. For the same reasons cited in Count 1, the Agency again appropriately selected a midpoint of $32,915. Tr. II 123; CX 4Cor at 10-11. Likewise, for the reasons articulated under Count 1, it is appropriate to not provide any downward adjustment for a good faith effort to comply with RCRA and to increase the base penalty amount by 10 percent, or $3,292, to reflect Prime's willfulness and negligence.

Beyond the broader defenses discussed above, Respondent has not through evidence or argument persuasively contested the specific potential for harm, extent of deviation, or upward adjustment determinations made with respect to Count 2.

Accordingly, an appropriate penalty for the violation alleged in Count 2 is $36,207.

3. Count 3

The Agency proposes a penalty for Count 3 of $470,329 based on Prime's storage of the burned drums and trailer at the Facility for nearly one year without obtaining a permit to store hazardous waste. Tr. II 127; CX 4Cor at 13.

[39] In *Ashland*, the Chief Judicial Officer affirmed an ALJ decision that characterized the potential for harm as "moderate" where the respondent prepared manifests to accompany shipments of hazardous waste that inadvertently reflected the EPA I.D. number for a different Ashland facility than the one that generated the waste. 1989 WL 253202, at *6. I find this factually distinct from the present matter, where there was a wholesale failure to prepare a manifest. Shipping hazardous waste without any manifest at all presents a greater harm to RCRA than does preparing a manifest with the wrong EPA I.D. number, and therefore deserves to be classified as posing a "major" potential for harm.

As discussed above, the Agency has adequately shown the potential for harm—to human health, the environment, and the RCRA program—was moderate. Further, there can be no genuine dispute that the extent of deviation was major, because "there was no attempt made to get the hazardous waste permit" throughout the entire time the waste was stored at the Facility. *See* Tr. II 133; CX 4Cor at 14. Based on the moderate and major penalty factors, a penalty range of $14,120 to $19,413 was called for under the penalty matrix of the Penalty Policy, and EPA chose the midpoint amount of $16,767.

The Penalty Policy states that "selection of the exact penalty amount within each cell" is a discretionary act, and that "[t]he range of numbers provided in each matrix cell serves as a 'fine tuning' device" that can be used "to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances." Penalty Policy at 20. Selecting a dollar figure from this range should "rely on case-specific factors." Penalty Policy at 20. In this case, while I agree with the Agency's "moderate" classification of the potential for harm, I am adjusting this portion of the proposed penalty downward by 10 percent, to yield a penalty of $15,090. This downward adjustment within the moderate penalty matrix range is appropriate to reflect the fact that, despite the moderate potential for harm posed by Respondent's storage violation, there are case-specific factors that mitigate the probability of exposure or, in the event of a release, the potential seriousness of contamination. The evidence at hearing showed that the waste was fenced off from the general public and located several hundred feet from buildings where Respondent's employees worked. Respondent's workers did not pass by the waste on any routine basis. The flat asphalt pad beneath the trailer would prevent a spill from traveling into soil, and there were no nearby waterways. Likewise, the Facility is located in an industrial park, and the closest residential properties are more than two miles away. Although the Agency presumably took these factors into account when calculating the penalty amount, Dr. Walker's testimony that this demonstrated a low probability of harmful human or environmental exposure to the waste persuades me to make this additional reduction within the otherwise appropriate penalty range.

I apply this same reasoning to the multi-day component of the penalty. Based on the moderate-major designation, the multi-day penalty matrix yields a daily penalty range of $706 to $3,883, and the Agency assessed the midpoint amount of $2,295 per day. That amount should be adjusted downward by 10 percent to $2,066. As the Agency observed, a multi-day penalty is appropriate because the violation continued for 306 days, and under the Penalty Policy, a multi-day penalty is "presumed appropriate for days 2-180 of violations" given a gravity designation of moderate-major, "unless case-specific facts overcoming the presumption" are demonstrated. Penalty Policy at 25-26. Here, there is no factual basis for excluding a multi-day penalty component. Adding a Day 1 penalty of $15,090 to the Days 2-180 penalty of $369,814 (179x$2,066) yields a multi-day penalty amount of $384,904.[40]

[40] Of the 306 days of storage violation, the first 33 days (October 1, 2015 through November 2, 2015) occurred while the inflation rate of the 2010 PP Revision applied. The remaining 273 days took place under the higher inflation rate dictated by the 2020 PP Adjustment. Because only 180 of those days are being penalized, it is not inappropriate to calculate the entire multi-day penalty using the 2020 PP Adjustment, as the Agency did here.

Likewise, for the reasons articulated under Count 1, it is appropriate to not provide any downward adjustment for a good faith effort to comply with RCRA and to increase the base penalty amount by 10 percent, or $38,490, to reflect Prime's willfulness and negligence. Beyond the broader defenses discussed above, Respondent has not through evidence or argument specifically contested the extent of deviation or upward adjustment determinations made with respect to Count 3.

Accordingly, an appropriate penalty for the violation alleged in Count 3 is $423,394.

4. Count 4

The Agency proposes a penalty of $43,683 for Count 4, based on Prime's failure to properly manage the drums of hazardous waste. Tr. II 159; CX 4Cor at 15.

As with Counts 1 and 2, the Agency has adequately shown there to be a major potential for harm to human health, the environment, and the RCRA program. Of the drums containing hazardous waste, 19 were nearly full and open to the air because the bung caps had blown out. They also were burned, rusted, and in generally poor condition for storage after the fire, yet were kept on an uneven surface outside for more than 300 days. Tr. II 160-61, 163-64; CX 4Cor at 15-16; e.g. CX 14 at 24; CX 30 at 11, 13. This created a substantial risk of release. Additionally, "the potential for harm from not meeting these drum storage requirements substantially undermines the RCRA program," because "proper management of containers is fundamental" to RCRA. Tr. II 173; CX 4Cor at 16. Indeed, when enacting RCRA, Congress found that "the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment," and that "if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming." 42 U.S.C. § 6901(b)(6)-(7). By storing hazardous waste in containers whose condition increased the likelihood of a spill, Respondent frustrated the goals of RCRA.

It is also appropriate for EPA to classify the extent of deviation from RCRA as major, because Respondent again failed entirely to satisfy RCRA's requirements for managing containers of hazardous waste. Tr. II 173-74; CX 4Cor at 17.

The major-major designation places the gravity-based penalty in a range of $35,300 to $44,124, and the Agency appropriately chose the midpoint in this range—$39,712—for the same reasons it utilized the midpoint in the previous counts. Respondent implies, without elaboration, that reducing the potential for harm penalty amount in Count 3 requires a corresponding reduction in Count 4 because it is also "based on potential harm during storage in Salt Lake City." RB at 22. However, I disagree that any reduction is warranted. Although there were factors that could mitigate the probability of exposure to human and environmental receptors during storage, Respondent's mismanagement of the drums also created a higher spill probability. Once released, the opportunity for exposure increases. Further, the evidence suggests the condition of the drums while being stored at the Facility was not substantially

different from their condition while being transported to the Facility. The number of potential receptors in the event of a spill during highway transport—human or environmental—was much higher than when the drums were in storage at the Facility.

Likewise, for the reasons articulated under Count 1, it is appropriate to not provide any downward adjustment for a good faith effort to comply with RCRA and to increase the base penalty amount by 10 percent, or $3,971, to reflect Prime's willfulness and negligence.

Beyond the broader defenses discussed above, Respondent has not through evidence or argument persuasively contested the specific potential for harm, extent of deviation, or upward adjustment determinations the Agency made with respect to Count 4.

Accordingly, an appropriate penalty for the violation alleged in Count 4 is $43,683.

5. Count 5

The Agency proposes a penalty of $43,683 for Count 5, based on Prime's failure to obtain an EPA identification number while storing the drums at its Facility. Tr. II 182; CX 4Cor at 18.

EPA rightly found this violation to present a major potential for harm to human health, the environment, and the RCRA program. In coordination with permit and manifest requirements, the EPA identification number plays a key role in enabling regulators to keep track of hazardous waste. As Ms. McNeill testified, without the number, neither EPA nor Utah state environmental regulators knew that hazardous waste was being kept at the Facility, and therefore they could not know they should be inspecting it to ensure the waste was being stored in a safe, compliant manner (which it was not). Further, not obtaining an identification number substantially undermines RCRA, because regulators rely on the EPA ID to know where hazardous waste is physically located and being managed. *Cf. Ashland*, 1989 WL 253202, at * 6 (respondent's use of wrong EPA ID number on manifest disrupted EPA's ability to track accurately the generation of waste and to determine the status of a facility as a hazardous waste generator). I also agree with the Agency's decision to classify the extent of deviation from RCRA as major, because Respondent made no attempt at all to obtain an EPA identification number.

The major-major designation calls for a penalty range of $35,300 to $44,124 under the gravity-based penalty matrix of the Penalty Policy and 2020 PP Adjustment, and it is appropriate to set the penalty at the midpoint of this range—$39,712—for the same reasons previously stated. As with Count 4, I see no reason to adjust the penalty to a lower amount in the matrix range in accordance with the reduction I made in Count 3. Failing to notify regulators of the generation and location of hazardous waste creates a potential for harm through the many ways in which the waste could be mismanaged without the Agency ever knowing it existed in the first place. This harm stands on its own regardless of how the storage location of the waste at the Facility mitigated opportunities for human exposure.

Likewise, for the reasons articulated under Count 1, it is appropriate to not provide any downward adjustment for a good faith effort to comply with RCRA and to increase the base penalty amount by 10 percent, or $3,971, to reflect Prime's willfulness and negligence. Additionally, evidence that Prime previously obtained an EPA ID number for its facility in Missouri and again when disposing of excavated soil following the second roadside cleanup further demonstrates that the company should have known the same was required for waste stored at the Facility.

Beyond the broader defenses discussed above, Respondent has not through evidence or argument persuasively contested the specific potential for harm, extent of deviation, or upward adjustment determinations the Agency made with respect to Count 5.

Accordingly, an appropriate penalty for the violation alleged in Count 5 is $43,683.

v. Penalty conclusion

After considering the statutory penalty factors, relevant penalty guidance documents, and facts of this case, I find it appropriate to assess a total penalty of $583,174 for the violations of RCRA that are alleged in Counts 1 through 5 of the Complaint and established by a preponderance of the evidence in the record.

DECISION AND ORDER

1. Respondent is liable for violating RCRA as set forth above and in the AD Order.

2. For these violations, Respondent is hereby assessed a civil penalty of **$583,174**.

3. Payment of the full amount of this civil penalty shall be made within **30 days** after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below:

> Payment shall be made by submitting a certified or cashier's check[41] in the requisite amount, payable to "Treasurer, United States of America," and mailed to:
>
> U.S. Environmental Protection Agency
> Fines and Penalties
> Cincinnati Finance Center
> P.O. Box 979077
> St. Louis, MO 63197-9000
>
> A transmittal letter identifying the subject case and EPA docket

[41] Respondent may also pay by one of the electronic methods described at the following Agency website: https://www.epa.gov/financial/additional-instructions-making-payments-epa

number (RCRA-08-2020-0007), as well as the Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

4. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order **45 days** after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within **20 days** after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within **30 days** after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, under 40 C.F.R. § 22.30(b).

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: March 27, 2024
Washington, D.C.

In the Matter of New Prime, Inc., Respondent.
Docket No. RCRA-08-2020-0007

Certificate of Service

I hereby certify that copies of the foregoing **INITIAL DECISION AND ORDER**, dated and issued by Administrative Law Judge Christine Donelian Coughlin on March 27, 2024, were sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Copy by OALJ E-Filing System to:
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
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Dated: March 27, 2024
Washington, D.C.