UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

The undersigned counsel for the United States Environmental Protection Agency (EPA), Director of the Enforcement and Compliance Assurance Division Region 8 (Complainant), submits this memorandum in support (Memorandum) of Complainant's Motion for Accelerated Decision on Liability and Penalty filed on February 22, 2021, (Motion), pursuant to sections 22.16(a) and 22.20(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22 and referred to herein as the Rules) and the Prehearing Order of the Presiding Officer in this matter dated November 2, 2020 (Prehearing Order).

In the Motion, Complainant requests that the Presiding Officer find Respondent New Prime, Inc. (Respondent) liable for the five allegations of violation set forth in counts 1 through 5 in the Complaint filed on September 21, 2020, initiating this matter. In the Motion, Complainant also requests that the Presiding Officer determine an appropriate penalty for each of the violations alleged in counts 1 through 5 of the Complaint for which a finding of violation is made. As stated in the Motion, the undersigned has spoken with counsel for Respondent and Respondent will oppose the Motion.

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I. INTRODUCTION

On September 21, 2020, Complainant filed a Complaint alleging five violations of the Solid Waste Disposal Act, as amended by, *inter alia*, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 *et seq*. (RCRA). (Compl.) Complainant's allegations describe the complete failure of Respondent to comply with any hazardous waste management requirements for 32 drums of industrial paint Respondent was transporting across the country which became hazardous waste after the truck transporting the paint caught on fire late at night on a remote section of highway in Idaho. For over ten months after the fire, Respondent ignored information in its possession that the burned drums could contain hazardous waste. Shortly after the fire, Respondent caused the drums to be transported over 300 miles from Idaho to Respondent's facility in Salt Lake City, Utah by a towing company not licensed to transport hazardous wastes. Respondent then stored the burned drums of hazardous outside, on the same compromised trailer that went through the fire, protected from the elements only by tarpaulins. Respondent's noncompliance with RCRA only ended after the EPA inspected the facility and the drums in August 2016. Complainant proposed a total penalty of $639,675.00 for the five violations. Respondent filed an answer to the Complaint on October 21, 2020, admitted four of the five violations, and requested a hearing. (Answer)

The Presiding Officer issued its Prehearing Order on November 2, 2020. (Prehearing Order) Among other things, the Prehearing Order set a schedule for the parties to complete their "Prehearing Exchange" and directs the parties to submit the exhibits each party may produce at hearing, and the list of witnesses each intends to call, with "a brief narrative summary of their

expected testimony" on that schedule. Prehearing Order at 2. The parties have completed their Prehearing Exchange.[1]

The Prehearing Order further directs that dispositive motions be filed within 30 days of the due date for Complainant's Rebuttal Prehearing Exchange. Since Complainant's Rebuttal Prehearing Exchange was due on January 22, 2021, the due date for dispositive motions is Sunday February 21, 2021. Pursuant to 40 C.F.R. § 22.7(a) this date is extended to Monday February 22, 2021.

On February 22, 2021, Complainant filed its Motion for Accelerated Decision on Liability and Penalty (Motion). This memorandum in support of the Motion (Memorandum) was filed simultaneously with the Motion.

As more fully set forth in Section V below, the Presiding Officer can find Respondent liable for each of the Counts in the Complaint without a hearing because there are no material facts in dispute relating to any of the elements of proof required to find liability on any of the Counts; Complainant has shown that each element of each violation is proven by a preponderance of the evidence; and because Respondent has admitted liability for all Counts. "Respondent admits liability in the present case but contests the amount of the proposed penalty." RPHX at 5.

Complainant, therefore, respectfully requests that the Presiding Officer find Respondent liable for each count in the Complaint, specifically that:

[1] Pursuant to the Prehearing Order, the parties submitted copies of the exhibits the parties may produce at any hearing in this matter with Complainant's prehearing exchange on December 18, 2020 (CPHX), Respondent's prehearing exchange on January 8, 2021 (RPHX), and Complainant's rebuttal prehearing exchange on January 22, 2021 (CRPHX). Pursuant to the Prehearing Order, the exhibits have been marked for identification as Complainant's exhibits (CX) and Respondent's exhibits (RX), and will be referred to herein as CX# and RX#.

1) Respondent failed to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11 (Count 1);
2) Respondent failed to prepare a hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a) (Count 2);
3) Respondent owned and operated a hazardous waste storage facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016 (Count 3);
4) Respondent stored burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016 (Count 4); and
5) Respondent stored at least 20 burned drums of hazardous waste at the Facility prior to obtaining an EPA identification number in violation of Utah Admin. Code R315-8-2-2.2 (Count 5).

As more fully set forth in Section VI below, the Presiding Officer also can determine an appropriate penalty for each violation without a hearing. In Section VI, Complainant will explain how all information probative, material or relevant to calculating a penalty for each count already is in front of the Presiding Officer. Complainant will then show that Complainants calculation of proposed penalty for each Count reflects consideration of all probative and relevant information. Complainant also will show that Complainant properly applied RCRA's statutory factors to the facts of this matter through appropriate application of the RCRA Civil Penalty Policy to the facts, viewing the information in a light most favorable to Respondent. Complainant also respectfully argues in Section VI below, that the expected testimony from

Respondent's witnesses, when viewed in a light most favorable to Respondent, either already has been considered in Complainant's proposed penalty calculation, or is not probative, or otherwise relevant or material to consideration of penalties in this matter.

Complainant, therefore, requests that the Presiding Officer assess the penalty proposed by Complainant for each count in the Complaint on which the Presiding Officer has made a finding of violation, specifically: (1) $37,500 for Count 1 (failure to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11); (2) $36,207 for Count 2 (failure to prepare a hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a)); (3) $470,329[2] for Count 3 (owning and operating a hazardous waste storage facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016); (4) $43,683 for Count 4 (storage of burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016); and (5) $43,683 for Count 5 (storage of at least 20 burned drums of hazardous waste at the Facility prior to obtaining an EPA identification number in violation of Utah Admin. Code R315-8-2-2.2).

II. STANDARD OF REVIEW AND BURDENS

The procedural regulations governing this proceeding, and guiding consideration of this Motion, are found at 40 C.F.R. Part 22. (Rules) The following sections of the Rules are of

[2] As described in Section VI below, and in the Declaration of Complainant's Penalty witness Ms. Linda Jacobson, attached hereto, this amount differs from both the amount proposed in the Complaint and in two places in CX04. The Complaint included an economic benefit component of $8,273 for Count 3. After the Complaint was filed, Complainant determined to not include an economic benefit component for Count 3. (*see*, CX04, at 15) CX04, however, incorrectly reflects the subtraction of $8,273 twice from the Complaint proposal in the Summary of Total Proposed Penalty chart and in the Penalty Summary Table for Count 3. Simultaneously with the filing of the Motion and this Memorandum, Complainant is filing a Motion to Substitute Complainant's Exhibit requesting permission to substitute a corrected version of CX04, to address this and another non-critical error in CX04.

particular relevance to the consideration of the Motion: section 22.16 (Motions); section 22.20 (Accelerated decision; decision to dismiss); and section 22.27 (Initial Decision).

As an initial matter, Complainant notes that Respondent asserts two affirmative defenses in its Answer. Both relate to Complainant's calculation of a proposed penalty. First, Respondent asserts that "Complainant's application of the RCRA Penalty Policy is not in accordance with the facts of the case and is not consistent with the statutory penalty factors set out in 42 U.S.C. § 6928(A)(3)," and second, that the proposed penalty "is arbitrary and capricious and an abuse of discretion and otherwise not supported by the record." Answer at 6. In administrative penalty matters, when a respondent raises an affirmative defense, the respondent bears the burden of proving that affirmative defense. 40 C.F.R. § 22.24(a)

For purposes of this Motion, Complainant relieves Respondent from the burden of proof for these affirmative defenses. This is because Complainant argues herein and must show precisely the opposite, i.e., that Complainant applied the 2003 RCRA Civil Penalty Policy in accordance with the facts of this case and consistent with the statutory penalty factors set out in 42 U.S.C. § 6928(a)(3), that the penalty proposed for each Count is neither arbitrary nor capricious, that the proposed penalty for each Count does not evidence an abuse of discretion, and that the proposed penalty for each violation is fully supported by the information in front of the Presiding Officer. Complainant further argues herein that the Presiding Officer can reasonably conclude that additional probative, material and credible evidence would not be obtained during a hearing, when all evidence is viewed in a light most favorable to Respondent. The Presiding Officer, therefore, can issue an accelerated decision on an appropriate penalty for each violation.

A. MOTIONS FOR ACCELERATED DECISION

Section 22.20(a) of the Rules states that the "Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [they] may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

During the pendency of *In The Matter of Arizona Environmental Container Corporation* (EPA Docket No. EPCRA-09-2007-0028), the Presiding Officer had the opportunity to rule on multiple motions by both parties, including a motion for accelerated decision on liability by complainant and a motion for accelerated decision on penalty by respondent. In both published decisions, *Arizona Environmental Container Corporation*, 2008 WL 3978678 (EPA ALJ August 12, 2008) (*Arizona Environmental Container I),* and *Arizona Environmental Container Corporation*, 2008 WL 4635897 (EPA ALJ October 16, 2008) (*Arizona Environmental Container II)*, the Presiding Officer explained that for purposes of proceedings under the Rules, "[a] motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP") and thus federal court rulings on motions under FRCP 56 provide guidance in ruling on a motion for accelerated decision."[3]

In *In the Matter of Zaclon, Incorporated, Zaclon, LLC and Independence Land Development Company*, 2006 WL 1695609 (EPA ALJ May 23, 2006), the Board explained that "[i]t is well established that the purpose of summary judgment is to 'pierce the pleadings and to

[3] *Arizona Environmental Container I*, 2008 WL 3978678 at *10, *Arizona Environmental Container II,* 2008 WL 4635897 at *6. In both decisions the court cites *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781-82, *24-26 (EAB 1993), *aff'd sub nom., Puerto Rico Sewer Authority v. U.S. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995), in support.

assess the proof to see whether there is a genuine need for trial.' *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). Summary judgment saves 'the time and expense of a full trial when it is unnecessary because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures, as contemplated by the FRCP . . . with a net benefit to society.' *Pure Gold, Inc. v. Syntex (USA), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984) (quoting *US. Steel Corp. v. Vasco*, 394 F.2d 1009 (CCPA 1968))." *Id*. *4

Citing extensively to decisions by the United States Supreme Court, United States Courts of Appeal and the Environmental Appeals Board (Board), the Presiding Officer described in detail the burdens of the parties and elaborated on the responsibility of the courts and EPA Presiding Officers when reviewing motions for summary judgement or accelerated decision.

> The moving party has the burden of showing there is no genuine issue of material fact. A "material" issue is one which "affects the outcome of the suit," or "needs to be resolved before the related legal issues can be decided." A dispute is "genuine" if "there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of truth at trial." The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. The finder of fact may draw "reasonably probable" inferences from the evidence. Summary judgment is inappropriate where contradictory inferences may be drawn from the evidence or where there are unexplained gaps in materials submitted by the moving party, if pertinent to material issues of fact.

Arizona Environmental Container II, 2008 WL 4635897 at *6 (internal citations omitted); *see also, Arizona Environmental Container I*, 2008 WL 3978678 at *10.

As the Presiding officer also explains in *Arizona Environmental Container I*, "unsupported allegations or affidavits with ultimate or conclusory facts and conclusions of law

are insufficient to defeat a properly supported motion for summary judgment." *Environmental Container I*, 2008 WL 3978678 at *10.[4]

A review of decisions on motions for accelerated decision for penalty make it clear that the moving party must clear a high bar. In *In the Matter of MRM Trucking*, 1993 WL 426020 (EPA ALJ August 18, 1993), the Presiding Officer determined that under the circumstances of that case a hearing on penalty was not required, while acknowledging that "'[a]ccelerated decision' as to the amount of the penalty . . . is seldom granted", *Id*. at *1, and that "[g]enerally there is reluctance to impose civil sanctions without providing the violator an opportunity for an oral evidentiary hearing." *Id*. The Presiding Officer, however, also explained that "[a] principal consideration in determining whether a penalty may be assessed in the absence of such a hearing is whether it is reasonable to believe that additional relevant, material, and credible evidence would be obtained." *Id*.[5]

Finally, In *Arizona Environmental Container II* the Presiding Officer explained that "the Presiding Officer acts to ensure that the Agency's penalty assessment satisfies the Administrative

[4] *See also, United States v. Yetim*, 251 F. Supp. 3d 461, 466 (E.D.N.Y. 2017) discussing a motion for summary judgment ("Once the moving party has met its burden, the opposing party "'must do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial.'" *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (alteration and emphasis in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)). As the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." 477 U.S. 242, 249-50 (1986) (citations omitted). Indeed, "the mere existence of some alleged factual dispute between the parties alone will not defeat an otherwise properly supported motion for summary judgment." *Id*. 477 U.S. at 247-48 (emphasis in original). Thus, the nonmoving party may not rest upon mere conclusory allegations or denials but must set forth "'concrete particulars'" showing that a trial is needed. *R.G. Grp., Inc. v. Horn & Hardart Co*., 751 F.2d 69, 77 (2d Cir. 1984) (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)). Accordingly, it is insufficient for a party opposing summary judgment "'merely to assert a conclusion without supplying supporting arguments or facts.'" *BellSouth Telecomms., Inc. v. W.R. Grace & Co.–Conn*., 77 F.3d 603, 615 (2d Cir. 1996) (quoting *Research Automation Corp.*, 585 F.2d at 33).)

[5] *See also, John A. Biewer Co. of Toledo, Inc. and John A. Biewer Co. of Ohio, Inc.*, 15 E.A.D. 772 (EAB 2013), 2013 WL 686378 (*Biewer*) ("ALJs also have the discretion to proceed without a hearing where an ALJ determines that no genuine issues of material fact exist and the ALJ exercises his discretion to apply the law to the unrefuted facts before him. *See In re Newell Reycling Co., Inc.*, 8 E.A.D. 598, 625 (EAB 1999); *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792-93 (EAB 1997)" *13, fn 7).

Procedure Act's 'abuse of discretion' standard, 5 U.S.C. § 706(2), i.e. that the assessment is neither 'unwarranted in law' nor 'without sufficient justification in fact.'" (citing *Employers Insurance of Wausau and Group Eight Technology*, 6 E.A.D. 735 (EAB 1997), 1997 WL 94743 (*Wausau*)), *Id*. at *9.[6]

B. RCRA PENALTY DECISIONS

In *John A. Biewer Co. of Toledo, Inc. and John A. Biewer Co. of Ohio, Inc.*, 15 E.A.D. 772 (EAB 2013), 2013 WL 686378 *(Biewer),* the Board comprehensively addressed the standards for review of proposed penalties by presiding officers, and in that matter a penalty proposed under section 3008(a) of RCRA. 42 U.S.C. § 6928(a).

> The rules require the ALJ to issue an initial decision containing a recommended civil penalty assessment. 40 C.F.R. § 22.27. The amount of the recommended civil penalty must be determined by the ALJ "based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The ALJ must "consider any civil penalty guidance issued under the Act [and must] * * * explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." *Id*. Finally, "[i]f the [ALJ] decides to assess a penalty different in amount from the penalty proposed by complainant," the ALJ must "set forth in the initial decision the specific reasons for the increase or decrease." *Id*.; see also *In re Euclid of Virginia, Inc.,* 13 E.A.D. 616, 686-87, 689 (EAB 2008).

Id. at *7 (internal footnote omitted). [7] The Board further explained that

> the ALJ is under no legal obligation to impose a region's recommended penalty, even if the recommended penalty takes all of the recommended statutory factors into account. *In re Employers Ins. of Wausau and Group Eight Tech., Inc*., 6 E.A.D. 735, 758-759 (EAD 1997) (making clear that "if * * * the [p]residing [o]fficer does not agree with the [r]egion's analysis of the statutory penalty factors

[6] *See also, Titan Wheel Corp. of Iowa v. U.S.E.P.A.,* 291 F. Supp. 2d 899, 907 (S.D. Iowa 2003) discussing review of a penalty decision by the EPA for violations of RCRA. ("'The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).") (The decisions of the Presiding Officer and the Environmental Appeals Board are discussed in section II.C below.)

[7] *See also*, *Chem-Solv, Inc., Formerly Trading as Chemicals and Solvents, Inc., and Austin Holdings-VA, L.L.C.,* 2014 WL 2593697 (EPA ALJ June 5, 2014), at *103

> or their application to the particular violations at issue," the presiding officer "may specify the reasons for disagreement," and "may assess a penalty different from that recommended"). *Id*. Instead, the ALJ may conduct [their] own analysis of the penalty, and in doing so, may consider such additional evidence as the ALJ deems necessary for an informed decision as to the appropriateness of the proposed penalty. *Id*.

Id.

C. COMPLAINANT'S PROPOSED PENALTY AND THE RCRA CIVIL PENALTY POLICY OF 2003

The EPA has two options when proposing a penalty for a violation under section 3008(a)(3) in administrative adjudications. The Agency may plead the statutory maximum, or propose a specific penalty.[8] In this matter, Complainant has calculated a proposed penalty for each violation pursuant to the 2003 RCRA Civil Penalty Policy. *See*, Compl., ¶¶ 95-97; and CX04. As more fully discussed in section III.C below, the 2003 RCRA Civil Penalty Policy (2003 Penalty Policy) is "civil penalty guidance." Complainant's proposed penalty calculation and the 2003 Penalty Policy, therefore, are to be considered pursuant to 40 C.F.R. § 22.27(b).

In *In the Matter of Titan Wheel Corporation of Iowa*, 2001 WL 1035756 (EPA ALJ May 4, 2001) the Presiding Officer found Titan Wheel Corporation of Iowa (Titan) in violation of three requirements of RCRA. The Presiding Officer took note of 40 C.F.R. § 22.27(b) and acknowledged that EPA's proposal had been calculated pursuant to the 1990 version of the RCRA Penalty Policy (1990 Penalty Policy).[9] The Presiding Officer then analyzed the EPA's calculation according to the 1990 Penalty Policy in light of the facts, and found no reason to assess a different penalty for any of the counts. *Id*. at *3-10

[8] *See*, e.g., 40 C.F.R. § 22.14(a)(4), and the 2003 RCRA Civil Penalty Policy at 8-9 ("While this Policy addresses the calculation of specific penalty amounts for the purposes of administrative enforcement actions, under appropriate circumstances, Agency personnel may plead the statutory maximum penalty.")

[9] The analytical framework for calculating proposed penalties is the same in the 2003 version as in the 1990 Penalty Policy. *See*, section III.C below,

Titan appealed, making a number of arguments, including many relating to the Presiding Officer's penalty analysis and assessment. *In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526 (EAB 2002). In the resulting decision, the Board explained "[i]n prior decisions we have made clear that once an ALJ considers the relevant penalty policy, he or she may adopt the penalty computed in accordance with that policy or deviate therefrom, so long as the deviation is explained and the penalty assessed reflects the criteria in the applicable statute." *Id*. at *12 (citations omitted)[10] The Board then extensively analyzed and rejected all of Titan's arguments and upheld the Presiding Officer's penalty assessment without change. "The Board finds no clear error or abuse of discretion in the penalty assessed by the ALJ for each of the three counts." *Id*. at *30

Titan appealed to district court arguing, among other things, that the Board's penalty analysis was flawed. The court disagreed. "Titan asserts the ALJ and the EAB made several errors in applying RCRA's policy without an explanation for the deviations. . . . A review of the EAB's detailed analysis of the penalty calculations reveals that Titan's argument is without merit." *Titan Wheel Corp. of Iowa v. U.S.E.P.A.*, 291 F. Supp. 2d 899, 919 (S.D. Iowa 2003).[11]

[10] *See also*, *Andrew B. Chase, a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc. and Chase Commercial Land Development, Inc.*, 2014 WL 3890099 (EAB 2014) "The Board has previously explained that, while penalty policies facilitate the application of statutory penalty criteria and serve as guidelines for the Agency, they are guidance. As such, they should not be treated as rules and need not be 'rigidly followed.' *In re Pac. Refining Co*., 5 E.A.D. 607, 613 (EAB 1994); *accord In re Chem Lab Prods., Inc*., 10 E.A.D. 711, 725 (EAB 2002). For this reason among others, the Board has repeatedly stated that an ALJ need not strictly follow the relevant penalty policy and may depart from it as long as he or she adequately explains the reasons for doing so. *In re Capozzi*, 11 E.A.D. 10, 32, 38 (EAB 2003)."

[11] It is notable that the District Court does not question *whether* the Penalty Policy can be used by the Agency. The Court only independently assessed whether the Agency used it properly under the particular circumstances of the case when the Presiding Officer and the Board chose to follow the Penalty Policy.

Titan appealed to the Eighth Circuit Court of Appeals. In an unpublished opinion, the Eighth Circuit affirmed the decision of the District Court.[12]

The Presiding Officer, therefore, must consider whether Complainant's proposed penalty for each violation has been calculated in accordance with the Penalty Policy, and if so, whether to adopt the penalty as calculated, or depart from the proposed amount and explain why.

D. SUMMARY OF THE STANDARD OF REVIEW AND BURDENS

Section 22.20(a) of the Rules confirms the discretion of the Presiding Officer to "at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [they] may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). Generally, presiding officers decide matters in controversy based on a preponderance of the evidence. 40 C.F.R. § 22.24(b). When considering a motion for accelerated decision, however, the "record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor." *Arizona Environmental Container II*, 2008 WL 4635897 at *6.

For the liability phase of the Motion, Complainant, as the party moving for accelerated decision on liability, must show there is no genuine issue of material fact for each violation that must be addressed at a hearing before the Presiding Officer may properly determine liability as a matter of law. *See, e.g.*, *Arizona Environmental Container II*, 2008 WL 4635897; FRCP 56(c).

[12] "Having carefully reviewed the record and the parties' briefs and having considered their arguments, we conclude the district court's decision is clearly correct, and the issues do not warrant a comprehensive opinion. Finding no reversible error, we affirm for the reasons stated in the district court's order." *Titan Wheel Corp of Iowa v. United States Environmental Protection Agency,* 113 F. App'x. 734 (8th Cir. 2004).

For the penalty portion of the Motion, the Presiding Officer also ensure that "the Agency's penalty assessment satisfies the Administrative Procedure Act's 'abuse of discretion' standard, 5 U.S.C. §706(2), i.e. that the assessment is neither 'unwarranted in law' nor 'without sufficient justification in fact.'" *Arizona Environmental Container II*, 2008 WL 4635897 at *9.

Complainant, as the moving party, must show there is no genuine issue of material fact for each violation that must be addressed at a hearing before the Presiding Officer may properly determine a penalty. *See, e.g.*, *Arizona Environmental Container II*. Once Complainant has met its burden, Respondent must show that issues of material fact exist probative to each finding of violation and that such probative, material facts warrant a hearing. *See, e.g.*, *United States v. Yetim*, 251 F. Supp. 3d 461, 469 fn. 5 (E.D.N.Y. 2017).

If the Presiding Officer determines that a hearing is not necessary, the Presiding Officer then may consider whether Complainant's proposed penalty for that violation has been calculated in accordance with the 2003 Penalty Policy, and if so, whether to adopt the penalty as calculated. As the Board stated in *In Re John A. Capozzi D/B/A Capozzi Custom Cabinets,* 11 E.A.D. 10 (EAB 2003), 2003 WL 1787938 "in all civil penalty cases, the Region has the burden of proof on the appropriateness of the penalty." *Id*. at *15, citing *In re New Waterbury, Ltd*., 5 E.A.D. 529, 537 (EAB 1994); *Premex, Inc. v. Commodity Futures Trading Comm'n,* 785 F.2d 1403, 1409 (9th Cir. 1986)."

III. STATUTORY, REGULATORY, AND POLICY BACKGROUND

A. STATUTORY BACKGROUND

1. RCRA Generally

As set forth in section 1002(b) of RCRA, 42 U.S.C. § 6901(b), Congress has found that "disposal of solid waste and hazardous waste in or on the land without careful planning and

management can present a danger to human health and the environment; . . . the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment; [and] 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)(2), (4) and (5).

Congress determined to promote its objective to promote protection of human health and the environment by "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment; [and] **requiring that hazardous waste be properly managed in the first instance** thereby reducing the need for corrective action at a future date." Section 1003(a)(1)(4) and (5) of RCRA, 42 U.S.C. § 6902(a)(1)(4) and (5) (emphasis added). In addition, Congress declared it to be national policy to reduce hazardous waste generation where possible and that "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize **the present and future threat** to human health and the environment." Section 1003(b) of RCRA, 42 U.S.C. § 6902(b) (emphasis added). *See also, Chem-Solv, Inc., Formerly Trading as Chemicals and Solvents, Inc., and Austin Holdings-VA, L.L.C.*, 2014 WL 2593697 (EPA ALJ June 5, 2014), *upheld* at 16 E.A.D. 594 (EAB 2015), at *38 (*Chem-Solv*).

The Presiding Officer in *Chem-Solv* explained that Subtitle C of RCRA "directs the EPA to establish a comprehensive 'cradle to grave' system regulating the generation, transport, storage, treatment, and disposal of hazardous wastes." *Id*. citing *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 337 n.1 (1992), and that "[u]nder the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, . . . and owners and operators of hazardous waste treatment, storage, and disposal facilities ('TSD

facilities'), directing them to comply with handling, recordkeeping, storage, and monitoring requirements. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 331-32 (1994)" *Id*. (internal quotations omitted); (*See also*, *Meghrig v. KFC W., Inc*., 516 U.S. 479, 483 (1996))

Section 3002(a) of RCRA, 42 U.S.C. § 6922(a), requires the Administrator to promulgate regulations establishing standards applicable to generators of characteristic or listed hazardous waste, including requirements respecting: record keeping; labeling and use of appropriate containers for the storage, transportation or disposal of hazardous waste; the furnishing of information regarding the chemical composition of hazardous waste to those transporting, treating, storing or disposing of such waste; use of a manifest system to ensure that hazardous waste is designated for treatment, storage or disposal in, and arrives at, a permitted facility; and reporting to the Administrator. The EPA has promulgated regulations for generators at 40 C.F.R. Part 262.

Section 3005 of RCRA, 42 U.S.C. § 6925(a), requires the Administrator to promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit. Thus, persons owning and operating a facility that treats, stores, or disposes of hazardous waste must either possess a permit issued by the EPA or the authorized state authority. *Id*. The EPA has promulgated regulations for treatment, storage and disposal facilities at 40 C.F.R. §§ 270 and 264.

Section 3010 of RCRA, 42 U.S.C. § 6930, applies directly to the regulated community, and requires the owner and operator of each facility handling hazardous waste obtain a unique EPA identification number.

2. Assessment of Penalties – Amount

Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) authorizes the Administrator to assess a civil penalty "not to exceed $25,000 per day of noncompliance for each violation of [Subtitle C of RCRA]". The Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 28 U.S.C. 2461 (1990 Adjustments Act), since has directed Federal agencies "to issue regulations adjusting for inflation the statutory civil monetary penalties that can be imposed under the laws administered by that agency."[13] 85 Fed. Reg. 83818 (December 23, 2020) (footnote omitted). The EPA has promulgated its regulations at 40 C.F.R. Part 19.

Congress amended the 1990 Adjustment Act most recently in 2015.[14] This major amendment directed federal agencies, among other things, "to adjust the level of statutory civil monetary penalties under the laws implemented by that agency **with an initial 'catch-up' adjustment . . . [and] to make subsequent annual adjustments for inflation**." 85 Fed. Reg. 83818 (footnote omitted; emphasis added) "**The purpose of the 2015 Act is to maintain the deterrent effect of civil monetary penalties by translating originally enacted statutory civil penalty amounts to today's dollars** and rounding statutory civil penalties to the nearest dollar." *Id*. (emphasis added)

EPA's most recent annual adjustment for inflation was promulgated and effective on December 23, 2020.[15,16] The statutory civil monetary penalty level, or the "statutory maximum"

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[13] *See, Chem-Solv*, 2014 WL 2593697 at *103 ("The maximum allowable penalty has since been increased pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, to reflect inflation.") (internal citation omitted) The 1990 Act was amended again in 1998, and most recently and most significantly in 2015.

[14] Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, title VII, sec. 701(b), Nov. 2, 2015, 129 Stat. 599 (codified at 28 U.S.C. § 2461 note). (2015 Adjustment Act)

[15] "Consistent with the language of the 2015 Act, this rule is not subject to notice and an opportunity for public comment and will be effective on December 23, 2020." 85 Fed. Reg. at 83819

[16] A portion of the relevant instructions for applying the adjusted penalty amounts in this matter are described in part in revised 40 C.F.R. § 19.2(a) (effective December 23, 2020). "The statutory civil monetary penalty levels set forth in the third column of Table 1 of § 19.4 apply to all violations which occur or occurred after November 2, 2015, where the penalties are assessed on or after December 23, 2020." 85 Fed. Reg. 83818, 83820. As described in

penalty, that may be assessed under Section 3008(a)(3) of RCRA for each day of each violation of Subtitle C of RCRA, is $37,500.00 for violations occuring prior to November 2, 2015, and $102,638.00 for violations occuring on or after November 2, 2015.[17] Congress's rationale and goals (and EPA's basis) for this seemingly large jump is found in the "catch-up" requirement and over-arching purpose of the 2015 Adjustment Act described briefly above.

As more fully described in Section III.C. below, EPA also has adjusted the penalty amounts in its 2003 RCRA Civil Penalty Policy over time to reflect the objectives and meet the requirements of the 1990 Adjustment Act, as amended. The maximum penalty for violations assessed when following the 2003 Penalty Policy, however, has not increased as significantly as the statutory maximum amount.

3. Assessment of Penalties – Factors the Administrator Must Consider

When considering assessment of a penalty for violations of Subtitle C of RCRA, Section 3008(a)(3) directs that "the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

B. REGULATORY BACKGROUND

1. RCRA

RCRA's "cradle-to-grave" regulatory scheme establishes requirements for the safe handling of hazardous waste from the point such waste is generated through final legal disposition of the waste. Along the way from cradle to grave, hazardous waste handlers may

section 19.4, "Table 2 of this section sets out the statutory civil monetary penalty provision of statutes administered by the EPA, with the operative statutory civil monetary penalty levels, as adjusted for inflation, for violations that occurred on or before November 2, 2015." 40 C.F.R. § 19.4 (effective December 23, 2020).

[17] The statutory maximum for this period cited in the Complaint and CX04 is different ($101,439). The Complaint amount reflects the statutory maximum as determined by EPA's inflation adjustment for 2020 (85 Fed. Reg. 1752 (January 13, 2020)) Complainant also carried that amount into CX04 for consistency and because the increase is unlikely to have no material effect on any penalty assessed in this matter for Counts 3, 4 and 5.

store, transport, treat or dispose of the waste. RCRA's comprehensive regulatory scheme sets forth the persons responsible for compliance, and detailed requirements for identification of hazardous waste, tracking the waste from cradle to grave, and for transportation, storage, treatment and disposal of hazardous wastes. The federal generator regulations promulgated pursuant to section 3002(a) of RCRA, 42 U.S.C. § 6922(a), are set forth at 40 C.F.R. Part 262. The federal TSD regulations promulgated pursuant to Section 3005 of RCRA, 42 U.S.C. § 6925(a), are set forth at 40 C.F.R. §§ 270 and 264.

2. The State of Utah's Federal Hazardous Waste Program

Pursuant to section 3006 of RCRA, 42 U.S.C. § 6926, the State of Utah's hazardous waste program was authorized to operate in lieu of the federal program on October 10, 1984.[18] 49 Fed. Reg. 39683. The EPA has authorized revisions to the State of Utah's hazardous waste program a number of times since, most recently on March 7, 2008. 73 Fed. Reg. 12277 (regulations submitted by Utah dated September 30, 2003).

Pursuant to section 3008(a) of RCRA, 42 U.S.C. § 6928(a), the EPA may enforce federally authorized state hazardous waste programs for violations of any requirement of the authorized program which has been incorporated into Subtitle C of RCRA, sections 3001-3023e, 42 U.S.C. §§ 6921-6939e.[19]

[18] *See, e.g., Chem-Solv*, 2014 WL 2593697 at *39, "The national standards set by RCRA are generally overseen by the Administrator of the EPA. *See* 42 U.S.C. §§ 6921-6925, 6928; *see also Cement Kiln Recycling Ass'n v. EPA*, 493 F.3d 207, 211-12 (D.C. Cir. 2007) (describing RCRA program). A state may seek 'to administer and enforce' its own hazardous waste program in lieu of the federal program, but must apply to the Administrator for approval to do so. 42 U.S.C. § 6926; see 40 C.F.R. Parts 271-72."

[19] "[I]n all cases, including in states with authorized hazardous waste programs, the Administrator retains the authority to assess administrative penalties and impose compliance orders upon determining that a person has violated any requirement of Subtitle C of RCRA, any Federal regulations promulgated thereunder, or any authorized requirement of a state hazardous waste program. 42 U.S.C. § 6928." Id.

C. THE RCRA CIVIL PENALTY POLICY

EPA Presiding Officers and the Board recognize the RCRA Civil Penalty Policy is a "penalty guideline" for purposes of 40 C.F.R. § 22.27(b). "Though the [RCRA] Penalty Policy is not binding upon the Presiding Officer, it must be considered and should be applied whenever possible because such policies assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *Chem-Solv*, 2014 WL 2593697 at *103 *(citing Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002) (quoting *In re M.A. Bruder & Sons, Inc*., 10 E.A.D. 598, 613 (EAB 2002)).)

On June 23, 2003, the EPA significantly updated and re-issued the 1990 RCRA Civil Penalty Policy. (Penalty Policy or RCPP). (Link to RCPP) "The purposes of the Policy are to ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that 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." RCPP at 5. Agency personnel use the Penalty Policy "to calculate penalties sought in all RCRA administrative actions or accepted in settlement of both administrative and judicial civil enforcement actions". RCPP at 6.

The 2003 updates to the Penalty Policy are set forth in detail in the memorandum from Assistant Administrator John P. Suarez transmitting the 2003 Penalty Policy to senior EPA leadership across the Agency (Suarez Memo). The Suarez Memo is included as the first pages in the electronic copy of the 2003 Penalty Policy found at the link above.

Because the broad analytical framework for considering the statutory factors set forth in section 3008(a)(3) in the 2003 Penalty Policy is unchanged from the 1990 Penalty Policy, and the details of the 2003 Penalty Policy only differ from the 1990 Penalty Policy as described in the Suarez Memo, case law discussing application of the 1990 Penalty Policy remains of value in assessing acceptable application of the 2003 Penalty Policy to the unique facts of each case.

The analytical framework of the 2003 Penalty Policy was laid out in detail by the Presiding Officer in *In the Matter of Aguakem Caribe, Inc.*, 2011 WL 7444586 (EPA ALJ December 22, 2011).[20] The Presiding Officer first notes that the "Penalty Policy was designed by EPA to guide its implementation of the statutory criteria. *Carroll Oil Co.*, 10 E.A.D. 635, 653 (EAB 2002) ("Carroll Oil")." *Id*. at *48 The Presiding Officer continues

> A penalty calculation employing the RCRA Penalty Policy calls for the following steps: (1) determining a gravity based component for each violation to measure the seriousness of the violation; (2) adding a multi-day component, as appropriate, to account for a violation's duration or multiple violations of the same statutory or regulatory requirement; (3) adjusting the sum of the gravity-based and multi-day components upward or downward based upon case specific circumstances; and (4) adding to this amount the appropriate economic benefit gained by the violator due to its failure to comply. RCRA Penalty Policy at 1-3, 22.
>
> More specifically, the gravity-based component required by the Policy considers two factors, the potential for harm resulting from the given violation and the extent of deviation from the statutory or regulatory requirement, each of which forms an axis of the "penalty assessment matrix" provided in the Policy. RCRA Penalty Policy at 2, 12-19. The gravity-based component is determined by ranking the potential for harm factor and extent of deviation factor as "major," "moderate," or "minor"; locating the cell of the matrix where those rankings intersect; and selecting a dollar figure from the penalty range specified in the appropriate cell. *Id.* The Policy instructs that an assessment of the potential for harm resulting from the given violation should be based on two criteria: (1) the risk of human or environmental exposure to hazardous waste and (2) the adverse effect that the violation may have on the implementation of the RCRA regulatory program. *Id.* at 12-16. In turn, an assessment of the extent of deviation resulting

[20] The Presiding Officer in *Chem-Solv*, 2014 WL 2593697 at *103-105 did as well.

from the violation "relates to the degree to which the violation renders inoperative the requirement violated." *Id.* at 16.

Where the duration of a particular violation exceeds one day, a multi-day component may be calculated by (1) determining the length of time the violation continued; (2) determining whether a multi-day penalty is mandatory, presumed, or discretionary in accordance with the guidance provided by the Policy; (3) selecting the same matrix cell location in the "multi-day matrix" that was used to calculate the gravity-based component; and (4) multiplying the dollar amount selected from the appropriate cell by the number of days the violation continued beyond the first day, which is assessed at the gravity-based penalty rate. RCRA Penalty Policy at 2, 20-27. The Policy advises that, where multiple violations of the same statutory or regulatory requirement have occurred, each violation after the first in the series may also be treated as a multi-day violation. *Id.* at 22-23.

Once the gravity-based and multi-day components have been calculated for a given violation, a number of factors may be applied to adjust the sum of those components. RCRA Penalty Policy at 3, 33-42. The purpose of these factors is to "to make adjustments that reflect legitimate differences between separate violations of the same provision." *Id.* at 33. The Policy identifies several adjustment factors to consider, including good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, environmentally beneficial projects to be performed by the violator, and other unique factors. *Id.* at 3, 35-41.

Finally, the Policy directs that an economic benefit component should be added to the penalty for a given violation where the violation results in a "significant" economic benefit to the violator, as that term is defined by the Policy. RCRA Penalty Policy at 3, 28-33.

Id. at *48-49

The upper bound of the "major-major" cell in the gravity-based matrix of earlier versions of the Penalty Policy, including the 1990 version, reflected the statutory maximum the Administrator may assess pursuant to section 3008(a)(3) of RCRA. As the statutory maximum penalty continues to climb, however, the upper bound of the "major-major" box in the gravity-based matrix has climbed at a significantly slower rate. This difference began with the Agency's adjustments made in response to the 2015 Adjustments Act. [21] As more fully discussed in

[21] *See Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation* (July 27, 2016). (Superseded) (Linked Here)

Section III.A.2 above, the 2015 Adjustments Act directed the EPA and other Federal agencies to implement a "catch-up" provision, which caused the statutory maximum to more than double overnight (from $37,500 on November 2, 2015 to $93,750 on November 3, 2015). While the Agency also increased the dollar amounts in the 2003 Penalty Policy matrices significantly, and notwithstanding the catch-up provision in the 2015 Adjustment Act, the upper bound of the major-major box in the gravity-based matrix rose from $37,500 to $40,779, far less than the statutory maximum of $93,750. *Id*.

The Agency has updated the dollar amounts in each of the matrices by memorandum a number of times since the 1990 Adjustments Act. The violations alleged in this matter happen to fall on both sides of the cutoff date in November 2015, therefore two memoranda must be consulted to determine applicable matrices for each violation.[22]

IV. ANALYSIS OF FACTS SUBMITTED BY COMPLAINANT AND RESPONDENT

A. INTRODUCTION

Complainant's analysis of the facts and law in support of the liability portion of the Motion is set forth in Section V below. Complainant's analysis of the facts, law and policy in support of the penalty portion of the Motion is set forth in Section VI below. Complainant, however, must first address the facts that are properly before the Presiding Officer for each portion of the Motion. Both Complainant and Respondent have submitted facts for consideration. Each set of facts is discussed in this Section.

Respondent has admitted liability for each of the violations alleged in the Complaint. "Respondent admits liability in the present case but contests the amount of the proposed

[22] EPA Memorandum from Rosemarie A. Kelley, Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009 (April 6, 2010) (Link to 2010 Matrices Update Memo); and, Memorandum from Susan Bodine, Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (January 15, 2020) (Link to 2010 Matrices Update Memo). Each is described further in CX04.

penalty." RPHX at 5. Respondent further states that the witnesses Respondent may call at hearing "will present facts relating to the statutory penalty factors in Section 3008(a)(3) of the Solid Waste Disposal Act." *Id*. Respondent's facts, therefore, relate solely to the penalty portion of this memorandum.

Respondent admitted many of the allegations in the Complaint, but denied in whole or in part, a number of the factual allegations. The Prehearing Exchange is complete, and Respondent has submitted its exhibits and listed its witness for purposes of contesting the proposed penalty. Respondent also has set forth its "outline of the factual information relevant to the assessment of a penalty" *Id*., *see also* Answer ¶¶ 37-42, and its arguments why the proposed penalty should be reduced or eliminated. *Id*. Facts in Respondent's Prehearing Exchange are discussed in Sections IV.D.1-4 below.

In support of both the liability and penalty portions of the Motion Complainant sets forth the undisputed facts in this matter in section IV.B immediately below.

In support of the liability portion of the Motion, Complainant explains in Section IV.C below that each factual allegation denied by Respondent in the Answer (1) is not relevant to a finding of violation for any of Complainant's allegations of violation; and (2) is proven by a preponderance of the evidence. Complainant also provides citations to the parties' exhibits relating to the allegation, and respectfully argues that Respondent's denial of that allegation should not materially affect the ability of the Presiding Officer to independently assess Complainant's allegations of violation and issue an order finding Respondent liable for each of the violations.

In support of the penalty portion of the Motion, Complainant explains whether each denied allegation is relevant to the calculation of a penalty for any of the Counts, and if so,

whether and how it has been considered in the calculation of the proposed penalty. Complainant further requests that the Presiding Officer find proven by a preponderance of the evidence each allegation denied by Respondent the Presiding Officer deems probative or otherwise material to determining an appropriate penalty for one or more violation.

B. UNDISPUTED FACTS

Respondent admits the following paragraphs of the Complaint: 26-43 (Answer ¶ 5); 45 (except footnote) (Answer ¶ 7); 46-49 (Answer ¶ 8); 52 (Answer ¶ 10); 55-56 (Answer ¶ 13); 60-71 (Answer ¶ 15); 74-75 (Answer ¶ 18); 79-80 (Answer ¶ 21); 83-85 (Answer ¶ 24); and 93-94 (Answer ¶ 31). Therefore, while a number of these allegations are of fact and law, the following allegations of fact are admitted.

In addition, Respondent correctly denied Complainant's assertion that Respondent is a Utah Corporation. Answer ¶ 4. Complainant corrects the record immediately below.

- Respondent is a Nebraska corporation licensed to do business and doing business in Utah. Compl. ¶ 25 and 27.
- Respondent is the owner and operator of a facility located at 3720 West 800 South, Salt Lake City, Utah 84104 (Facility) Compl. ¶ 27.
- Basic functions performed at, or from, the Facility include storage, maintenance, and repair of trucking equipment for a national freight trucking company. Compl. ¶ 29.
- On or about September 24, 2015, Pittsburgh Paint and Glass hired Respondent to ship four different types of paint products and accompanying packaging, totaling 40,743 pounds, from Springdale, Pennsylvania, to Portland, Oregon. Compl. ¶ 30.
- 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; and four drums of

unregulated paint; and 32 drums of PPG's Universal Urethane Yellow Primer, product code BY1Y100B, weighing 17,683 pounds. Compl. ¶ 31.

- The Safety Data Sheets (SDSs) for the drums of paint included in the shipment state that each of the four types of paint products in the shipment had a flashpoint of less than 140 degrees Fahrenheit. Compl. ¶ 32.
- The SDS for Universal Urethane Yellow Primer states that the strontium chromate in the primer contains chromium at concentrations between 25,000 parts per million (ppm) and 62,500 ppm, with a federal regulatory level of 5 mg/L (D007). Compl. ¶ 33.
- The SDS for Universal Urethane Yellow Primer states that the barium chromate in the primer contains chromium at concentrations between 750 ppm and 2,500 ppm, with a regulatory level of 5 mg/L (D007). Compl. ¶ 34.
- The SDS for Universal Urethane Yellow Primer states that the barium chromate in the primer contains barium at concentrations between approximately 1,620 ppm and 5,400 ppm, with a regulatory level of 100 mg/L (D005). Compl. ¶ 35.
- On or about September 27, 2015, Respondent used its trailer to transport the four types of paint products from Pennsylvania to Oregon. Compl. ¶ 36.
- On or about September 27, 2015, Respondent's trailer caught fire outside of Mountain Home, Idaho and the drums and paint contents were burned. Compl. ¶ 37.
- An Idaho State Communications Center Report dated on or about September 27, 2015, documents the following from the Incident Commander: "[s]everal drums . . . had ruptured releasing paint onto the road." Compl. ¶ 38.
- The paint contents of the remaining drums in the trailer were burned and rendered useless. Compl. ¶ 39.

- On or about October 1, 2015, Respondent hired Brett's Towing of Ogden, Utah, to transport the burned trailer and approximately 32 55-gallon burned drums of paint waste from B&W's Lot in Idaho to Respondent's Facility in Salt Lake City, Utah (Facility). Compl. ¶ 45. (*See*, Section IV.C below for a discussion of the footnote to Compl. ¶ 45, which footnote Respondent denied.)
- Respondent used the Facility for storage of the burned drums of paint waste between at least October 1, 2015, and August 3, 2016. Compl. ¶ 46.
- On or about August 2, 2016, Special Agents from the EPA-Criminal Investigation Division (CID) conducted an initial inspection on consent of the Facility (EPA-CID Inspection). Compl. ¶ 47.
- At the time of the EPA-CID Inspection, the burned trailer and 32 burned drums of paint waste were covered by tarps and stored outside at the Facility. Compl. ¶ 48.
- During the EPA-CID Inspection, the tarps covering the 32 burned drums were removed and several burned drums of paint waste on the trailer were stained with paint, and missing covers known as bung caps. Compl. ¶ 49.
- On August 3, 2016, EPA CID sent a letter to Respondent requesting the burned trailer and burned drums of paint waste stored at the Facility not to be moved or manipulated (CID Preservation Letter). Compl. ¶ 52.
- According to the on-site X-ray fluorescence spectrometry, 20 of the 32 burned drums contained materials consistent with a strontium chromate primer, with readings greater than 10,0000 milligrams per kilogram (mg/kg) chromium and 17,000 mg/kg strontium. Compl. ¶ 52.

- Strontium chromate is the same material in PPG's Universal Urethane Yellow Primer. Compl. ¶ 56.
- The NEIC analysis performed on or about August 24, 2016, documented that the flashpoint for the representative samples of 8 of the 20 burned drums of paint waste ranged between 109 and 113 degrees Fahrenheit (43 and 45 degrees Celsius), meeting the regulatory threshold for ignitability, which is a flashpoint below 140 degrees Fahrenheit (60 degrees Celsius). Utah Admin. Code R315- 2-9(d). Compl. ¶ 60.
- The NEIC TCLP analysis performed on or about August 24, 2016, on the representative samples of 8 of the 20 burned drums of paint waste documented levels of chromium between 36.8 and 352 mg/L, which levels exceed the regulatory level of 5 mg/L for toxicity. Utah Admin. Code R315-2-9(g) Compl. ¶ 61.
- At least 20 of the 32 burned drums of paint waste are "hazardous waste" that exhibits the ignitibility and toxicity characteristics of hazardous waste. Compl. ¶ 62.
- On or about September 19, 2016, after receiving the sampling results from NEIC, Respondent created a hazardous waste manifest. Compl. ¶ 63.
- Respondent provided the generator name and address as Prime, Inc., 2740 North Mayfair Avenue, Springfield, Missouri 65803, on the hazardous waste manifest. Compl. ¶ 64.
- Respondent provided the generator's site address as Prime, Inc., 3720 West 800 South, Salt Lake City, Utah 84104, on the hazardous waste manifest. Compl. ¶ 65.
- Respondent provided the EPA Facility Identification Number MOD050188407, using a Missouri facility generator id number, on the hazardous waste manifest. Compl. ¶ 66.

- The hazardous waste manifest lists the 32 drums of burned of paint waste with the following waste codes: D001 (ignitibility); D007 (chromium); and D035 (methyl ethyl ketone). Compl. ¶ 67.
- On or about September 19, 2016, Respondent arranged for the transportation of the 32 burned drums of paint waste by a licensed hazardous waste transporter, H2O Environmental. Compl. ¶ 68.
- On or about September 19, 2016, Respondent arranged for the disposal of the 32 burned drums of paint waste as hazardous waste at Heritage Environmental, a permitted treatment, storage, or disposal facility located at 284 East Storey Road, Coolidge, Arizona. Compl. ¶ 69.
- Respondent stored at least 20 burned drums of hazardous waste at the Facility for at least 306 days, from October 1, 2015, until August 3, 2016; the date of the CID Preservation Letter. Compl. ¶ 70.
- Respondent was assigned the EPA Facility Identification Number UTP000001644, for the Facility in Utah on or about April 23, 2020. Compl. ¶ 71.
- At the time of the EPA-CID Inspection and the NEIC Inspection, Respondent had not made a hazardous waste determination of the 32 burned drums of paint solid waste. Compl. ¶ 74.
- Respondent did not prepare a manifest for transportation of the 32 burned drums of hazardous waste to the Facility. Compl. ¶ 79.
- Between October 1, 2015, and August 3, 2016, Respondent stored at least 20 burned drums of hazardous waste at the Facility. Compl. ¶ 83.

- At no time has the EPA or the State of Utah issued a RCRA permit to Respondent to own and operate the Facility as a hazardous waste treatment, storage, or disposal facility. Compl. ¶ 84.
- Respondent owned and operated the Facility and stored at least 20 drums of hazardous waste at the Facility between October 1, 2015, and August 3, 2016. Compl. ¶ 93.

C. ALLEGATIONS IN THE COMPLAINT DENIED BY RESPONDENT

Respondent denied the following paragraphs in the Complaint in whole or in part in the Answer (¶¶ 44, 45, 50, 51, 53, 54, 57, 58, 59, 88, 89, 90, 96, and 97). Respondent's denial of these allegations did not affect Respondent's decision to admit liability for each of Complainant's five allegations of violation in Complaint. RPHX at 5. Further, Respondent has stated that Respondent only intends to present facts relating to the proposed penalties at any hearing. *Id*.

In full support of both the liability and penalty portions of the Motion, however, Complainant cites each allegation denied and Respondent's denial below, then notes whether the allegation relates to an element of proof of the Counts, and discusses the evidence submitted by the parties during the Prehearing Exchange. (Respondent's own evidence supports a number of the allegations.) Finally, Complainant explains whether the denied allegation is relevant to the calculation of a penalty for any of the Counts, and if so, how it has been considered.

None of Respondent's evidence contradicts any of Complainant's allegations and Complainant has submitted significant evidence supporting each allegation. Complainant, therefore, requests that the Presiding Officer find proven each allegation denied by Respondent which the Presiding Officer deems relevant, material or otherwise probative to consideration of liability or the proposed penalty for any Count proven by a preponderance of the evidence.

Compl. ¶ 44 "On or about September 27, 2015, Respondent hired B&W Wrecker Services (B&W) to transport the burned trailer and burned drums of paint waste from the site of the trailer fire outside of Mountain Home, Idaho, to B&W's lot located at 20 S. Garden in Boise, Idaho ("B&W's Lot")." **Answer ¶ 6** "Respondent admits it hired B&W to perform the clean up associated with the trailer fire but otherwise denies this paragraph."

This allegation of fact does not relate to the elements of proof of any of the allegations of violation. Complainant included this information only to provide a fuller narrative of the movement of the trailer and hazardous waste from the location of the fire to B&W's lot in Idaho. *See*, Declaration of Linda Jacobson, attached hereto.

To the extent Complainant must prove this fact, Complainant notes that Respondent has not provided any evidence or other information that might disprove this allegation. In fact, Respondent's exhibits provide support for this allegation. *See,* RX03 at 3, during the response to the fire, "Collin Bonner, [Idaho State Patrol], called in asking if B&W Towing could clean up since that is who the semi company had contacted." Complainant's exhibits also indicate that this allegation is true. *See*, CX22 at 3, "After the site was cleaned up, B&W took the burnt trailer with the drums to B&W's yard in Mountain Home, ID"; and CX27 at 7.

The violations alleged in the Complaint only relate to the burned trailer and drums. Further, and as more fully set forth in Section IV.D.3.a below, the timeline for the violations cited in the Complaint begins when the trailer and hazardous waste were sitting on B&W's lot. Therefore, information regarding who hired B&W for cleanup versus the transportation of the trailer and hazardous waste or whether B&W was hired to take the wastes from the fire site specifically to the B&W lot, is not probative to either liability or penalty. Complainant, however, respectfully requests that if the Presiding Officer determines it is probative or otherwise material to a finding on liability or penalty, the Presiding Officer find this allegation proven by a preponderance of the evidence.

Compl. ¶ 45 footnote. "On or about September 29, 2015, Respondent also hired Corder, LLC (also known as Corder Excavation), through B&W, to transport and dispose of a portion of the burned drums of paint waste from the B&W Lot to the Simco Road commercial municipal solid waste landfill operated by Idaho Waste Systems in Mountain Home, Idaho. This landfill is not a RCRA permitted hazardous waste disposal facility. Respondent's transportation and disposal in Idaho is not a subject of this complaint." **Answer ¶ 7** "Respondent admits Paragraph 45 of the Complaint. The footnote to Paragraph 45 does not allege facts relevant to the instant matter, and therefore requires no answer. To the extent that an answer is required, Respondent denies the allegations in footnote 2."

Complainant agrees that the footnote does not "allege facts relevant to the instant matter." In addition, Complainant clearly states that the matter described in the footnote is not a subject of the Complaint. Therefore, Complainant and Respondent agree that this information is not relevant to the Presiding Officer's consideration of any allegations of violation, or the penalty. *See also*, Declaration of Linda Jacobson, attached hereto.

Compl. ¶ 50 "During the EPA-CID Inspection, the EPA-CID agents documented the smell of a strong chemical odor emanating from the burned trailer and drums." **Answer P9** "Answering Paragraphs 50-51 of the Complaint, Respondent is without knowledge of the allegations and therefore denies."

This allegation of fact does not relate to the elements of proof of any of the allegations of violation. This information was included to provide a fuller narrative of the observations of the inspectors as they approached and inspected the trailer and drums.

Because this fact was considered as part of Complainant's penalty calculation, Complainant argues that CX10 at 2, supports a finding that the EPA-CID agents smelled a strong chemical odor emanating from the burned trailer and drums, and that the agents documented this fact. Respondent has not provided any evidence or described potential testimony that would indicate that the inspectors did not smell a strong chemical odor emanating from the drums or that the agents documented the fact. Complainant, therefore, respectfully request that the Presiding Officer finds this allegation proven by a preponderance of the evidence.

Compl. ¶ 51 "During the EPA-CID Inspection, the EPA-CID agents documented that the burned drums of paint waste did not have labels." **Answer ¶ 9** "Answering Paragraphs 50-51 of the Complaint, Respondent is without knowledge of the allegations and therefore denies."

This allegation does not relate to the elements of proof of any of the allegations of violation. However, the lack of proper labels exacerbated the risk of harm during transportation and storage.

Because this fact was considered as part of Complainant's penalty calculation, Complainant argues that Respondent's own evidence supports a finding that the burned drums of paint did not have labels. Photographs included in RX05 (all) show the severity of the fire, and the condition of at least parts of some of the drums at the end of the initial response to the fire. Evidence submitted by Complainant further documents that the drums were not labeled. The photographs in CX10, Appendix D, make this absolutely clear. *See also*, Photographs in CX14, CX18, CX07 at 80-81. Finally, Complainant provided additional evidence from Sgt. Bonner that stated the "drums also had flammability labels, but the fire burned the labels off the drums." CX17 at 2.

Respondent has not included any evidence in its Prehearing Exchange that either the burned drums of hazardous waste were labeled, properly or not. Finally, none of Respondent's expected testimony indicates that any of Respondent's witnesses will testify that Respondent placed hazardous waste labels on any of the drums. Complainant, therefore, respectfully requests that the Presiding Officer find this allegation proven by a preponderance of the evidence.

Compl. ¶ 53. "On August 24, 2016, at the request of EPA-CID, the EPA National Enforcement Investigation Center (NEIC) conducted a field inspection at the Facility (NEIC Inspection)." **Answer ¶ 11** "Respondent admits that EPA conducted an inspection of the facility on August 24, 2016, but otherwise denies the allegation for want of knowledge."

Respondent admitted that EPA conducted an inspection of the Facility on August 24, 2016, but apparently denied for want of knowledge that EPA-CID requested that NEIC conduct

the inspection, and perhaps that it was a "field" inspection. Whether the inspection was a field inspection, or not, simply has no bearing on either liability or penalty analysis. Whether the inspection occurred because EPA-CID requested it, or someone else may have, also has no bearing on either liability or penalty analysis.

To the extent, however, that Complainant must prove any portion of this allegation beyond that NEIC conducted an inspection, Complainant notes that CX14 at 5, clearly establishes that "NEIC provided field technical assistance to the EPA Criminal Investigation Division (CID) in support of an investigation of Prime Inc. (Prime), located at 3720 West 800th South, Salt Lake City, Utah. NEIC provided field and laboratory support to the Prime investigation". Respondent has provided no information or evidence to the contrary. Complainant, therefore, respectfully requests that if the Presiding Officer determines that any of the denied portions of this allegation are material to liability or penalty, the Presiding Officer find this allegation proven by a preponderance of the evidence.

Compl. ¶ 54. "As part of the NEIC Inspection, NEIC staff performed on-site X-ray fluorescence spectrometry testing to perform chemical analysis of fluids in the 32 burned drums of paint waste stored at the Facility." **Answer ¶ 12** "Respondent admits that site testing was performed but otherwise denies this Paragraph for want of knowledge."

The procedures used by NEIC during the inspection are set forth in CX14 at 4 and Appendix A. Further, Respondent admits the results of the X-ray fluorescence spectrometry testing alleged in paragraph 55 of the Complaint. Answer ¶ 13. Finally, nowhere in Respondents Prehearing Exchange does Respondent indicate they will put on evidence to the contrary. Respondent has acknowledged the factual outcome of these allegations. Complainant, therefore, respectfully requests that the Presiding Officer find that this allegation proven by a preponderance of the evidence.

Compl. ¶ 57. "Strontium chromate is used as a metal protective coating to prevent corrosion, as a colorant in polyvinyl chloride resins, and in pyrotechnics." **Answer ¶ 14** "Respondent is without knowledge to answer Paragraphs 57-59, and therefore denies."

This fact is not relevant to proving any of the violations or the penalty. This information was provided for additional context about the products that became hazardous wastes after the fire.

Compl. ¶ 58. "As part of the NEIC Inspection, NEIC staff extracted representative samples from 8 of the 20 burned drums that contained material consistent with strontium chromate primer, for further laboratory analysis.", and **Compl. ¶ 59.** "On or about August 24, 2016, NEIC utilized TCLP analysis of 8 representative samples for toxicity and ignitability characteristics." **Answer ¶ 14** "Respondent is without knowledge to answer Paragraphs 57-59, and therefore denies."

The procedures used by NEIC during the inspection are set forth in CX14, and CX43 through CX47 (NEIC Operating Procedures). Further, Respondent admits the results of the sampling and analysis alleged in paragraphs 58 and 59 of the Complaint. Answer ¶ 15. Finally, nowhere in Respondents Prehearing Exchange does Respondent indicate its intent to introduce evidence or testimony to the contrary. Complainant, therefore, respectfully requests that the Presiding Officer find that this allegation proven by a preponderance of the evidence.

Compl. ¶ 88. "During the EPA-CID Inspection, several burned drums on the trailer were open and missing covers known as bung caps." **Answer ¶ 27** "Respondent admits that several drums of the intact barrels of paint covered by a tarp were missing bung caps but denies the remainder of this paragraph."

Notwithstanding Respondent's admission of liability, this allegation may be relevant to liability and penalty. The portion of the allegation that is relevant for liability is that bung caps were missing on several drums, and, therefore, several drums were open. Respondent admits this. Therefore, there is no dispute of a fact material to a finding that several of the drums were open. This information only relates to liability for Count 4.

Substantial evidence supporting this allegation has been included in the Prehearing Exchange. Respondent's exhibits support for this allegation. *See,* RX08 at 3 ("Chief

JANOUSEK stated that it is also his recollection that nearly every drum on the trailer 'BLEVED" [sic] before the incident concluded . . . this caused the bungs that had been placed in the drums to be blown out."); RX20 at 3 ("the high temperatures of [the] fire are likely what caused the bung holes to release from the drums").

Complainant also submitted significant probative evidence supporting the allegation that several drums were missing bung caps (and that therefore the drums were open). *See*, CX14; CX17 at 2 ("Sgt. Bonner did not recall seeing all of the drums, but the drums he did observe were all compromised, i.e., the heat caused the bungs to pop off the drums, or the drums were partially split open. . . . Sgt. Bonner described how the compromised drums oozed out paint sludge from the bung holes.")

Respondent's denial includes an assertion that the barrels were "intact". Answer ¶ 27. For purposes of this Motion, Complainant accepts that the 32 drums were intact, but only to the extent that it does not contradict Respondent's admission, and both parties' evidence, that that several of the drums were missing bung caps (and therefore open). Respondent has not provided any evidence or other information that would indicate that the burned drums on the trailer were closed or were not missing covers known as bung caps, and, in fact has submitted evidence supporting this allegation. In addition, nowhere in Respondents Prehearing Exchange does Respondent indicate its intent to introduce evidence or testimony on this allegation. Complainant, therefore, respectfully requests that the Presiding Officer find that the allegation is proven by a preponderance of the evidence.

Compl. ¶ 89 "All 32 drums and paint waste stored at the Facility were burned." **Answer ¶ 28** "Respondent admits that the paint barrels stored at the SLC Facility from October 1, 2015 to August 3, 2016 had been in a fire and some of the bung caps were missing, and the Respondent otherwise denies this paragraph."

This allegation does not relate to the elements of proof of any of the allegations of violation. However, the burned condition of the drums exacerbated the risk of harm during transportation and storage, and, therefore, was considered in calculating the proposed penalty.

EPA-CID agents documented their observations that the drums were burned. *See* CX10. Photographs submitted by Respondent RX05 (all) show the severity of the fire, and the condition of at least parts of some of the drums. Respondent admitted that the "burned trailer and 32 burned drums of paint waste were covered by tarps and stored outside at the Facility" and "the paint contents of the remaining drums in the trailer were burned and rendered useless." Compl., ¶¶ 48 and 39; Answer ¶¶ 8 and 5.

There can be little question that trailer and its contents were in an intense fire resulting in burned drums as shown in photographs CX10, Appendix D. *See also*, photographs in CX14, CX18, CX07 at 80-81; CX17 at 2. In addition, Respondent's exhibits provide support for this allegation. *See,* RX20 at 1 ("Following a fire during transport, a burned trailer containing thirty-two 55-gallon drums of paint and primer were stored outdoors at an industrial facility belonging to Prime Inc. . . . .[t]he burned trailer and drums were covered with tarps and located on a large concrete pad . . ."); and RX08 at 7, (Chief Janousek stated "'pretty much' everything that was contained in the trailer was destroyed.")

Respondent has not included any evidence in its Prehearing Exchange that the 32 drums stored at the Facility were not burned during the fire. Further, none of Respondent's proposed testimony indicates that one of Respondent's witnesses will testify that any of the drums were not burned in the fire. Complainant, therefore, respectfully requests that the Presiding Officer find that the allegation is proven by a preponderance of the evidence.

Even viewing this allegation of fact as unproven, and in a light most favorable to Respondent, however, does not lead to the conclusion that any downward adjustment to the proposed penalty is appropriate. Whether all 32 drums were burned, or not, Respondent's transportation and then storage of the drums and failure to manage them appropriately, in their admitted condition (some burned, some open and missing bung caps) is not somehow mitigated by the absence of proof that they were not all burned.

Compl. ¶ 90 "Between October 1, 2015, and August 3, 2016, Respondent stored burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4." **Answer ¶ 28** "Respondent admits that the paint barrels stored at the SLC Facility from October 1, 2015 to August 3, 2016 had been in a fire and some of the bung caps were missing, and the Respondent otherwise denies this paragraph."

Although paragraph 90 states a conclusion of law, Complainant notes again that Respondent initially denied this conclusion of law Answer ¶ 28, but subsequently admitted the substance of this conclusion of law by admitting "liability in the present case" RPHX at 5, and by admitting that the drums were burned, were open and had bung caps missing *see* discussion to Compl. ¶ 89 above, and argument in Section V.D.4 below. (Liability for Count 4)

Compl. ¶ 96 "In proposing this penalty amount, the Complainant has considered the applicable statutory factors set forth in section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), include the seriousness of the violations, and any good faith efforts of Respondent to comply with the applicable requirements, as well as other matters as justice may require by following the RCRA Civil Penalty Policy (a copy of which is attached hereto). This policy is used by Complainant to provide a rational and consistent application of the statutory factors to the facts and circumstances of a specific case." **Answer ¶ 33** "Respondent is without knowledge to answer Paragraph 96, and therefore denies."

Compl. ¶ 97 "Complainant proposes to assess a civil penalty of $639,675 for the violations alleged herein as follows: Count 1 $37,500 Count 2 $36,207 Count 3 $478,602 (single day maximum and multi-day penalty applied for 179 days) Count 4 $43,683 Count 5 $43,683" **Answer ¶ 34** "Respondent denies Paragraph 97."

These paragraphs are part of the "Proposed Penalty" section of the Complaint, and, therefore, do not relate to the liability portion of this Motion. They do relate to the penalty

portion of this Motion. Paragraph 96 describes Complainant's argument that the proposed penalty for each Count was calculated in accordance with the law, which is precisely the question presented to the Presiding Officer for decision under the penalty portion of this Motion. Paragraph 97 is a recitation of EPA's proposed penalties, and therefore need not be proven or disproven.

D. RESPONDENT'S FACTS RELEVANT TO THE PENALTY PORTION OF THE MOTION FOR ACCELERATED DECISION

1. Introduction

While Respondent does not contest liability for any count, Respondent does contest the penalty proposed by Complainant. RPHX at 5. Respondent, therefore, has submitted exhibits and has listed witness for purposes of contesting the proposed penalty. Respondent also has set forth its "outline of the factual information relevant to the assessment of a penalty" and its arguments why the proposed penalty should be reduced or eliminated. *Id*., *see also,* Answer ¶¶ 37-42. In this Section, Complainant discusses Respondent's grounds for its defense against the proposed penalty, Respondent's exhibits, and the expected testimony of Respondent's witnesses.

2. Respondent's Grounds for Defense

Respondent has clearly stated the grounds for its defense against the proposed penalty in both the Answer and in Respondent's Prehearing Exchange. Because Respondent's grounds appear to be about the same in both documents. *See* Answer ¶¶ 37-42; RPHX at 6-7. Complainant cites to the Answer by paragraph number.

Answer ¶ 37 – "The unexpected fire, which destroyed Respondent's trailer during the early morning hours of September 27, 2015, occurred on a remote portion of Interstate 84 near Hammett, Idaho. Middle-of-the-night communications between Respondent's Springfield, Missouri headquarters and multiple state, federal and local responders, including the local fire department, Elmore County Dispatch, Idaho State Patrol, Idaho Department of Transportation and Idaho Department of Environmental Quality, resulted in miscommunications on how to best deal with the aftermath of the trailer fire. Ultimately, the on-scene fire chief and incident

commander concluded: 'It was our determination that it went from a haz-mat scene to a clean up scene. We released Region IV Haz Mat after that discussion. B&W Wrecker was on scene when we left, they were going to be in charge of the clean up.' For its, part, Respondent did everything asked of it by the local authorities and regulators and relied on B&W to perform the clean-up and disposal of the materials destroyed by the fire."

The violations alleged in the Complaint only relate to the burned trailer and drums, and as more fully set forth in Section IV.D.3.a below, the timeline for the violations cited in the Complaint begins when the trailer and hazardous waste were sitting on B&W's lot. Complainant, therefore, argues that this information is not probative, material or otherwise relevant to a determination on appropriate penalties for each violation. Complainant accepts these statements for purposes of this Motion, as follows.

Complainant accepts without discussion Respondent's statement that "[t]he unexpected fire, which destroyed Respondent's trailer during the early morning hours of September 27, 2015, occurred on a remote portion of Interstate 84 near Hammett, Idaho."

A plethora of both parties' exhibits relate to the many communications during the immediate response to the fire (documented during and after the fire). For purposes of this Motion, Complainant, therefore, accepts without discussion the statement that "[m]iddle-of-the-night communications between Respondent's Springfield, Missouri headquarters and multiple state, federal and local responders, including the local fire department, Elmore County Dispatch, Idaho State Patrol, Idaho Department of Transportation and Idaho Department of Environmental Quality, resulted in miscommunications on how to best deal with the aftermath of the trailer fire."

For purposes of this Motion, Complainant agrees that Respondent's characterization of the fire chief's conclusion during the response to the fire is accurate. "Ultimately, the on-scene fire chief and incident commander concluded: 'It was our determination that it went from a haz-

mat scene to a clean up scene. We released Region IV Haz Mat after that discussion. B&W Wrecker was on scene when we left, they were going to be in charge of the clean up.'"

Respondent's statement that "For its part, Respondent did everything asked of it by the local authorities and regulators and relied on B&W to perform the clean-up and disposal of the materials destroyed by the fire" is vague both in regard to the regulators and B&W.

Complainant first addresses the portion of this statement addressing B&W's role. The exhibits in front of the Presiding Officer show that B&W's responsibilities included handling of "materials destroyed by the fire", during the first clean-up of the fire site. RX3 at 3 and CX22 and 27; Answer ¶ 3. B&W also transferred the trailer and drums from the site of the fire to the B&W lot. *Id*. B&W, however, did not perform the second clean-up of the fire site, which occurred at the request of Idaho Department of Environmental Quality (IDEQ). CX07 at 3. Therefore, this sentence cannot apply to the second fire site clean-up that occurred in November 2015. *Id*. For purposes of this Motion, therefore, Complainant accepts that Respondent relied on B&W to perform the first clean-up and disposal of materials picked up by B&W when the fire site became a "clean-up scene", and that Respondent relied on B&W to tow the burned trailer and hazardous waste from the clean-up scene to B&W's lot on or about September 27, 2015.

For purposes of this Motion, Complainant accepts the statement that "Respondent did everything asked of it by the local authorities and regulators" at the time of the "unexpected fire." To the extent Respondent intends to extend this comment to the second clean-up at the fire site at the Request of IDEQ, Complainant also accepts the statement above, solely for purposes of this Motion. To the extent Respondent intends this comment to extend to management of the burned trailer and drums after they arrived at B&W's lot, Complainant notes that there is nothing in Respondent's Prehearing Exchange (or Complainant's) that directly or indirectly describes

communications by the local authorities and regulators about the trailer and drums between the time they were stored at B&W's lot, and when Prime arranged for the transport of the trailer and drums to Respondent's Facility in Salt Lake City.

Answer ¶ 38 Respondent arranged to have the damaged trailer and its remaining contents including the intact barrels of paint moved to its Salt Lake City (SLC), Utah facility in October 2015. In arranging this transportation, a representative of Respondent mistakenly advised the Utah based tow company that the trailer involved in the fired [sic] had been hauling barrels of water-based paint. The damaged trailer and intact barrels of paint loaded on this trailer were securely placed on an impervious concrete slab in the truck yard of Respondent's Salt Lake City facility and covered with a tarp. The area where the trailer was stored was fenced off, and not accessible to the public. No discharges from the trailer to the environment occurred. No ground or drinking water resources have been impacted.

For purposes of this Motion, Complainant accepts without discussion Respondent's statement that "Respondent arranged to have the damaged trailer and its remaining contents including the intact barrels of paint moved to its Salt Lake City (SLC), Utah facility in October 2015."

Respondent's statement that "[i]n arranging this transportation, a representative of Respondent mistakenly advised the Utah based tow company that the trailer involved in the fire had been hauling barrels of water-based paint" is accepted for purposes of this Motion. Complainant notes that RCRA is a strict liability statute and that intent only is a factor in determining liability in criminal proceedings under section 3008(d)-(f), 42 U.S.C. § 6928(d)-(f).

For purposes of this Motion, Complainant accepts Respondent's statement that "[t]he damaged trailer and intact barrels of paint loaded on this trailer were securely placed on an impervious concrete slab in the truck yard of Respondent's Salt Lake City facility and covered with a tarp. The area where the trailer was stored was fenced off, and not accessible to the public." *See*, discussion on Compl. ¶ 88 in Section III.C. above and Section V.D. below. Complainant asserts, however, that Respondent's characterization of the drums as intact does not

disprove the allegations that the burned drums were missing bung hole covers (and therefore open). *See, e.g.*, RX8 at 3, RX20, Answer ¶ 27.

Because Complainant presently does not have any evidence to the contrary, Complainant accepts solely for purposes of the Motion that "No ground or drinking water resources have been impacted."

Answer ¶ 39 When EPA notified Respondent in early August, 2016 of its intent to investigate the trailer, Respondent complied fully with all EPA requests, and gave EPA investigators unfettered access to the Facility. Respondent's staff assisted the EPA investigators with a forklift and driver to assist in sampling drums. EPA sent a letter to Respondent on August 3, 2016, instructing Respondent to not move or manipulate the paint drums stored on site. Respondent complied.

Complainant accepts these statements without comment.

Answer ¶ 40 After an extended investigation by EPA, and after consultation with the U.S. Attorney's Offices in Idaho and Utah, the government declined a criminal prosecution and this civil administrative action ensued.

Complainant accepts this statement, but asserts that no inferences about the potential success on the merits of the United States in a criminal prosecution can be drawn from it, and, therefore, it has no bearing on determining a penalty in this matter.

Answer ¶ 41 On September 19, 2016, Respondent disposed of the trailer and its contents as hazardous waste at significant expense to Respondent. Respondent enjoyed no economic benefit from noncompliance. Respondent also complied with all requests from EPA to rectify any paperwork problems that may have existed dating from the original 2015 fire.

Complainant agrees that Respondent disposed of the "contents" of the trailer as hazardous waste in September 2016. *See*, RX16 at 1; CX12. Respondent's exhibits RX17 at 1 and CX13, however, show that Respondent disposed of the trailer as non-hazardous solid waste in September 2016. The cost of disposal speaks for itself. *See,* CX12 and 13

With regard to the statement that "Respondent enjoyed no economic benefit from noncompliance" Complainant notes that as more fully discussed in Section VI.C.3 below,

Complainant's amended proposed penalty includes one calculation of economic benefit for one violation, Count 1 (Failure to Make a Hazardous Waste Determination.) On its face Complainant's calculation was made using a simple and clear methodology. See CX01 and CX04; CRPHX at 4, and section VI.C.3 below. Complainant respectfully argues that Respondent's burden is to rebut this calculation, and that Respondent has submitted no evidence relating to an alternative approach to determining the cost Respondent might have incurred if Respondent had ever performed a hazardous waste determination.

For purposes of this Motion only, Complainant accepts Respondent's statement that "Respondent also complied with all requests from EPA to rectify any paperwork problems that may have existed dating from the original 2015 fire."

Answer ¶ 42 Since the fire, Respondent has engaged in a comprehensive hazardous-waste training program for its relevant employees to ensure that future events such as this will be handled appropriately.

For purposes of this Motion only, Complainant accepts this statement. Complainant notes, however, that Respondent has chosen not to provide any documentary evidence supporting this statement in its completed Prehearing Exchange.

3. Respondent's Witnesses

i. Introduction

Respondent lists six witnesses in its Prehearing Exchange. RPHX at 2-3. As more fully described below, for the purposes of this Motion, Complainant accepts the expected testimony as described. Much of the proposed testimony, however, warrants some degree of analysis by Complainant, particularly regarding its probity or significance to calculating a penalty for each violation. Because a significant amount of the expected testimony of Respondent's witnesses relates to the response to the fire, the first clean-up (which would include transportation of the

trailer and drums at issue in this matter to the B&W yard), and the second clean-up at the fire site conducted by Respondent at the request of IDEQ, Complainant discusses those subjects first.

The timeline for the violations in the Complaint begin when the trailer and hazardous waste were sitting on B&Ws lot. Complainant accepts that Chief Janousek's statement late in the on-scene response to the fire, as well as the plethora of other communications, relating to moving waste away from the fire site in the immediate aftermath of the fire seem confusing.

Although Complainant included some description of activities in the immediate aftermath of the fire in the Compl. ¶ 45, fn 2, and CX04 at 3, as described in the Declaration of EPA's penalty witness, Ms. Jacobsen (Jacobson Declaration attached hereto), this information was included to provide a comprehensive picture of the immediate aftermath of the fire and for no other purpose.

The only facts from the response to the fire and the clean-ups that are relevant to the penalty calculation in any probative way come from: the information on the bill of lading and Safety Data Sheets accompanying the shipment when it caught on fire; and the communications from IDEQ to Respondent regarding the second clean-up at the fire site.

Other testimony from the Respondent's witnesses related to the fire and the first and second clean-up at the fire site (except communications between Respondent and IDEQ, which Respondent did not list as a subject of expected testimony by any of its witnesses), therefore, is not likely to lead to probative or relevant testimony as the Presiding Officer determines a recommended penalty.

ii. Witnesses

Mr. Steve Field – The bulk of Mr. Field's proposed testimony would go to Prime's activities during the fire and first clean-up. As discussed above, this portion of Mr. Field's proposed testimony is not probative to the consideration of the penalty portion of the Motion.

Mr. Field also could be expected to testify to "the company's experience with such matters, its safety program and its corporate philosophy. Mr. Field will also address lessons learned from this matter including processes implemented to ensure this situation is not repeated." RPHX at 2. Notwithstanding the lack of documentary evidence submitted as part of Respondent's Prehearing Exchange on these matters, for purposes of this Motion, Complainant accepts these matters as stated.

Finally, Mr. Field also could be "expected to testify that this was an isolated incident, that Prime trucks cover millions of miles each year and that Prime had not had an experience like this prior to the 2015 fire, or since the 2015 fire." Given that Mr. Field is expected to make these statements under oath, and Complainant has not independently investigated the veracity of the statement, for the purposes of this Motion, Complainant accepts these statements.

Mr. Kelly O'Neill – Respondent states that Mr. O'Neill "is expected to testify regarding the results of his investigation, as informed by his own training and experience with EPA, including his interviews of witnesses and key individuals involved in the matter. Reports or summaries of reports prepared by Mr. O'Neill are submitted as exhibits herein and described below RX06-RX12." RPHX at 2. RX06 is Mr. O'Neill's curriculum vitae and speaks for itself. As more fully described in the next section, for purposes of this Motion, Complainant accepts most of the statements in RX07-RX12, but with a few small, exceptions noted below in the discussion of

Respondent's exhibits argues that nothing in RX06-RX12 is probative or relevant to the calculation of an appropriate penalty for each violation in this matter.

Mr. William Sprague – Respondent states that Mr. Sprague is expected to testify to "Prime's corporate philosophy and commitment to safety including technology utilized by Prime and the training and monitoring of Prime drivers. He will discuss the limited experience Prime has had with incidents of this nature involving hazardous materials and that the 2015 incident in Idaho was unique. Mr. Sprague will discuss the processes Prime employs should such a situation arise." RPHX at 2. Notwithstanding the lack of documentary evidence submitted as part of Respondent's Prehearing Exchange on these matters, for purposes of this Motion, Complainant accepts these matters as stated.

Mr. Brian Singleton – Respondent states that Mr. Singleton is expected to testify "regarding the operation of this facility, its physical characteristics and the security employed at this facility, particularly with respect to the time period when the wrecked trailer stored at the terminal after the fire. Mr. Singleton will testify that the trailer and barrels were at all times stored at the terminal in a locked yard, with restricted access and on an impermeable surface. He will testify that he believed the trailer was at the facility because a legal hold had been placed on it by Prime counsel. Mr. Singleton will also testify regarding the location of the Salt Lake City terminal and the industrial and commercial nature of the surrounding area. Mr. Singleton will testify regarding his and Prime's efforts to cooperate with EPA when they visited the facility in 2016, and that his charge from the company is to do the right thing every time a decision needs to be made."

For purposes of this Motion, and notwithstanding the lack of documentary evidence submitted in support of these matters, Complainant accepts each of Mr. Singleton's statements as stated. Certain of Mr. Singleton's expected testimony is intended to relate to the "potential for

harm" for Count 3 (i.e., the "physical characteristics and the security employed … that the trailer and barrels were at all times stored at the terminal a locked yard, with restricted access and on an impermeable surface, and the industrial and commercial nature of the surrounding area.") Complainant's discussion of the proposed penalty for Count 3 will show that Complainant already views this information in a light most favorable to Respondent. Complainant notes that without any documentary evidence submitted relating to his apparent belief that "the trailer was at the facility because a legal hold had been placed on it by Prime counsel" it is not possible to accurately assess whether and how this belief can be viewed in a light most favorable to Respondent. It therefore is not probative or relevant to the proposed penalty.

Mr. Lance Curtis - Respondent states that Mr. Curtis is expected to testify to a number of matters relating to the Facility. "In his experience, trailers involved in fires such as the one at issue here are often sent to storage facilities so they can be examined for fire causation by experts. Mr. Curtis will testify that when he inquired about the contents of the barrels on the burned trailers, he was provided the bills of lading for the load, and that he later called and left a message with a local environmental clean-up company that he would have used to manage the disposal. Mr. Curtis does not believe he received a return call from this company and he did not get back to coordinating the disposal of the barrels prior to being visited by EPA later in 2016. He will testify that when EPA visited, Prime cooperated with EPA including in its sampling efforts. He will testify that at all times, the trailer and barrels were stored on an impermeable surface in a locked yard with controlled access. He will testify regarding what he understands to be the company's philosophy to do things the right way, a philosophy that is preached by the company's owner and which he attempts to follow in the discharge of his duties at Prime."

Similar to Mr. Singleton, certain of Mr. Curtis's expected testimony relates to the "potential for harm" for Count 3. Complainant's discussion of the proposed penalty for Count 3 in Section VI.C.4 below, will show that Complainant already views this information in a light most favorable to Respondent.

Complainant notes that without any documentary evidence submitted relating to the statement "trailers involved in fires such as the one at issue here are often sent to storage facilities so they can be examined for fire causation by experts," it is not possible to accurately assess whether this is the reason that the trailer remained stored outdoors for over 10 months, and more particularly whether this is the reason the drums of hazardous waste were also stored in complete noncompliance for this period. Even if fire experts normally do not look at trailers for 10 months after a fire while they sit exposed to the elements (other than being covered by a tarpaulin), this cannot explain Respondent's management of the hazardous waste in a way that could add probative or relevant information for calculating a penalty for any of the violations.

Mr. Steven Drake – Mr. Drake's expected testimony relates solely to the fire and immediate response to the fire. Therefore, Mr. Drake's testimony is not relevant to the calculation of a proposed penalty in this matter.

Ms. Elizabeth Walker – Ms. Walker's expected testimony will address the "nature of the potential harm posed by a theoretical release of paint or paint fumes from the stored trailer in Salt Lake City." Ms. Walker's Report, RX20, and testimony all appear to go to the "potential for harm" for Counts 3, and perhaps Count 4. Complainant accepts, solely for purposes of this Motion, that Ms. Walker's conclusion that "[n]o evidence exists that any human or environmental harm or harmful exposure occurred from the primer stored at the Prime facility. Probability of exposure to primer by humans or environmental receptors is low . . . the

probability of the materials catching on fire is extremely low . . . and [p]otential seriousness of contamination is also low." RX20 at 1.

Complainant notes, however, that nothing in Ms. Walker's Report or testimony addresses the potential for harm to the RCRA program, which also is considered equally during an assessment of the potential for harm component of a penalty calculation. As more fully described in the penalty discussion Section VI.C below, Respondent's storage of hazardous waste without a permit (Count 3) and improper management of the containers (Count 4) posed significant risks of harm to the RCRA program. Complainant briefly addresses Ms. Walker's expected testimony in Complainant's discussion of the proposed penalty for Count 3 below.

4. Respondent's Exhibits

As discussed herein, very little in Respondent's exhibits offers probative information relevant to the calculation of a proposed penalty for each Count, even when viewed in a light most favorable to Respondent.

RX01 ("Prime Presence") speaks for itself.

RX02 ("Prime Network") speaks for itself.

RX03 ("Idaho State CC Hazmat") relates almost entirely to the fire and immediate response. Complainant accepts all statements in RX03, but notes that none are probative or relevant to the calculation of a proposed penalty in this matter.

RX04 ("Boise Fire Department") relates entirely to the fire and immediate response. Complainant accepts all statements in RX04, but notes that none are probative or relevant to the calculation of a proposed penalty in this matter.

RX05 (“King Hill Rural Fire District”) relates entirely to the fire and immediate response. Complainant accepts all statements in RX05, but notes that none are relevant to the calculation of a proposed penalty in this matter.

RX06 is the curriculum vitae for Respondent’s private investigator, Mr. O’Neill, and speaks for itself.

RX07 is Mr. O’Neill’s report describing Mr. O’Neill’s first contact with the Fire Chief, Mr. Derik Janousek. The focus of their conversation was the fire. Complainant accepts all statements in RX05, but notes that, with the following exception, none are probative or relevant to the calculation of a proposed penalty in this matter.

Mr. Janousek stated to Mr. O’Neill that “he ‘got caught’ on how he worded the report he wrote pertaining to this incident. Chief JANOUSEK stated that he subsequently attended a class in which he was taught to be very careful in the manner in which things are written. Chief JANOUSEK stated that the way he phrased his report “can go either way" but the fact of the matter is that the site needed to be cleaned up properly. Chief JANOUSEK opined that the cleanup was not "handled right." RX07 at 4. This portion of RX07 provides support for the fact that communications at the end of the fire were confusing.

RX08 is Mr. O’Neill’s report describing Mr. O’Neill’s second contact with the Fire Chief, Mr. Derik Janousek. The focus of their conversation again was the fire. For purposes of this Motion Complainant accepts RX08 in its entirety as reflecting Mr. Janousek’s statements to Mr. O’Neill, but argues that, with the two exceptions described below, it is of no relevance to the calculating a penalty.

Two of Chief Janousek’s observations as recorded in RX08 by Respondent’s investigator, Mr. O’Neill, are relevant to calculation a penalty. First, “Chief JANOUSEK stated that it is also

his recollection that nearly every drum on the trailer "BLEVED" [sic] before the incident concluded. Chief JANOUSEK stated that this caused the bungs that had been placed in the drums to be blown out. Chief JANOUSEK stated that the drums on the truck were primarily metal 55-gallon drums with ring tops and bungs. Chief JANOUSEK stated that he does not recall any of the drums blowing the ring tops off." RX08 at 3. Second, "Chief JANOUSEK stated that he recalls that the placards on the load and the contents of the shipping documents were different. Chief JANOUSEK stated that they ultimately used the shipping documents to determine the contents of the load instead of relying on the placards that were on the trailer. Chief JANOUSEK stated that Drake [the driver of the truck] provided these shipping documents detailing what the trailer contained to the fire department. Chief JANOUSEK stated that fire department personnel looked at these shipping documents before it decided how to handle the fire." *Id*. at 4.

These statements support, if not confirm Complainant's evidence supporting Complainant's allegations that the drums were burned, missing bung hole covers, and were not labeled *See* discussion of denied allegations ¶¶ 51, 88 and 89 in Section IV.C above. *See also*, CX07, CX10, CX14, CX17, and CX53.

RX09 is Mr. O'Neill's report describing his unsuccessful attempts to contact representatives of B&W. For purposes of this Motion, Complainant accepts this exhibit without comment.

RX10 is Mr. O'Neill's report describing Mr. O'Neill's contact with Mr. Tim Corder, Jr., a member and the Registered Agent of CWE, LLC, Mountain Home, Idaho. The focus of their conversation was the two clean-ups. For the same reasons stated above for RX07 and RX08, for the purposes of this Motion. Complainant accepts RX10 in its entirety as reflecting Mr. Corder,

Jr.'s statements to Mr. O'Neill, but argues that, with one exception, it is of no relevance to calculating a penalty.

The following statement by Mr. Corder, Jr., is of some potential relevance in calculation a penalty. "In fact, CORDER stated that CWE was hired by Premium Environmental Services to excavate soil in the area of the Prime, Inc., trailer fire some number of weeks after the fire occurred. CORDER stated that he does not know what occurred between the State and Prime, Inc., but it must have been something of significance because it was communicated to him by Premium Environmental Services, which had been hired by Prime, Inc., that the State was unhappy with the extent of the cleanup that had been completed at the location where the trailer fire occurred in September 2015." RX10 at 2. This is in accord with Complainant's information. *See* CX23. This information also indicates that Respondent was aware that IDEQ had issues with materials that remained at the fire site after the first clean-up was conducted immediately after the fire was extinguished.

RX11 is Mr. O'Neill's report describing Mr. O'Neill's contact with Mr. Carl Vaughn, Idaho Department of Transportation. For the same reasons stated above for RX07, RX08 and RX10, for the purposes of this Motion Complainant accepts RX11 in its entirety as reflecting Mr. Vaughn's statements to Mr. O'Neill, and accepts the two attachments to RX11. Complainant, however, argues that with two exceptions in the exhibits, RX11 is not probative or relevant to the calculation of a proposed penalty.

Attachment II to RX11 evidences that Respondent engaged Premium Environmental on October 20, 2015, to conduct the second clean-up RX11 at 13, and both attachments evidence that on the same day Premium Environmental informed nine of Respondent's employees that

"DEQ had the accident declared disaster and hazarous [sic] and will remain hazadous [sic] until cleanup is completed." *Id*. at 11 and 13.

RX12 is Mr. O'Neill's report describing Mr. O'Neill's contact with Research Geologist Dr. Virginia Gillerman. For the purposes of this Motion Complainant accepts RX12 in its entirety as reflecting Dr. Gillerman's statements to Mr. O'Neill, but argues that, with one exception, it not probative or relevant to the calculation of a proposed penalty.

Dr. Gillerman's explains that chromium exists in multiple ionic states and that different ionic states have different toxic effects on humans and the environment. Generally speaking, all of that is true. Complainant notes, however, that Dr. Gillerman does not directly discuss any of the acts or omissions at issue in this matter, or the actual character of the hazardous waste in the drums.

RX13, 14 and 15 are "Google Overheads" of the Salt Lake City terminal area, neighborhood, and terminal. These documents speak for themselves. Complainant's only note is that these exhibits evidence a waterbody immediately adjacent to Respondent's Facility.

RX16 is the invoice and manifest for disposal of the hazardous waste paint. The documents speak for themselves.

RX17 is the invoices and manifest for the handling and disposal of the trailer. The documents speak for themselves.

RX18 is Ms. Walker's curriculum vitae and speaks for itself.

RX19 is weather data which speaks for itself.

RX20 is Ms. Walker's expert report. Ms. Walker's report relates to Count 3 and is discussed in Complainant's analysis of Count 3 below, and briefly in Section IV.D.3.b above.

V. COMPLAINANT IS ENTITLED TO ACCELERATED DECISION ON LIABILITY AS A MATTER OF LAW

Complainant respectfully argues that the Presiding Officer can make a finding of liability for each count in the Complaint as a matter of law after consideration of: (1) the undisputed allegations set forth in Section IV.B above, (2) the discussion of the allegations in the Complaint disputed by Respondent in Section IV.C above, and any findings made on those disputed allegations, and (3) the discussion of the information in Respondent's Prehearing Exchange in Section IV.D. above, even when viewed in a light most favorable to Respondent. In light of the extensive discussion of the facts above, Complainant only cites to the relevant allegations in the Complaint and Respondent's admissions of the same.

A. COUNT 1: Respondent failed to make a hazardous waste determination in violation of Utah Admin. Code R315-5-1-1.11

Complainant alleges Respondent failed to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11.

Based on the record when viewed in a light most favorable to Respondent, Complainant has shown by a preponderance of the evidence that: (1) Respondent is a person as defined in section 1004(15) of RCRA, 42 U.S.C. § 6903(15), (Compl. ¶ 73 (Alleged), Answer ¶ 5 (Admitted))[23]; (2) after the fire the 32 drums of paint waste became solid waste pursuant to Utah Admin. Code R315-2-2; (Compl. ¶ 40 (Alleged), Answer ¶ 5 (Admitted) (CX42 at 5 ("The trailer was fully engulfed by flames. It was a complete loss."; CX15); and (3) Respondent did not make a hazardous waste determination on the drums at any time. (Compl. ¶ 74-75 (Alleged), Answer ¶ 18 (Admitted)) Further, Respondent has submitted no evidence, and Respondent does not intend to introduce testimony at a hearing that Respondent made such a determination.

[23] This finding applies to the remaining counts as well.

(RPHX at 5) Complainant, therefore, respectfully requests that the Presiding Officer find as a matter of law that Respondent failed to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11.

B. COUNT 2: Respondent failed to prepare a hazardous waste manifest in violation of Utah Admin. Code R315-5-2-2.20(a)

Complainant alleges Respondent failed to prepare a hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a).

Based on the record when viewed in a light most favorable to Respondent, Complainant has shown by a preponderance of the evidence that: (1) at least 20 of the 32 burned drums of paint waste are "hazardous waste" that exhibits the ignitibility as defined in Utah Admin. Code R315- 2-9(d), and toxicity characteristics of hazardous waste for chromium as defined in Utah Admin. Code R315-2-9(g) (Compl. ¶¶ 60-62 (Alleged), Answer ¶ 15 (Admitted); CX14; [24] (2) Respondent is the generator, as defined in 40 C.F.R. § 260.10, as incorporated by reference in Utah Admin. Code R315-1-1(b), of the hazardous waste ((Compl. ¶¶ 43, 64-66 (Alleged), Answer ¶¶ 5, 15 (Admitted); CX12; (3) Respondent shipped the hazardous waste from B&W's lot to the Facility ((Compl. ¶ 45 (Alleged), Answer ¶ 7 (Admitted); CX29 at 1; and (4) Respondent did not prepare a hazardous waste manifest for this shipment of hazardous waste (Compl. ¶ 79 (Alleged), Answer ¶ 21 (Admitted); CX29 at 2). Further, Respondent has submitted no evidence and Respondent does not intend to put on evidence at hearing that Respondent prepared a hazardous waste manifest for this shipment. (RPHX at 5) Complainant, therefore, respectfully requests that the Presiding Officer find that Respondent failed to prepare a

[24] This finding applies to the remaining counts as well.

hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a).

C. COUNT 3: Respondent illegally stored hazardous waste in violation of Utah Admin. Code R315-3-1-1.1(a)

Complainant alleges that Respondent owned and operated a hazardous waste storage facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016.

Based on the record when viewed in a light most favorable to Respondent, Complainant has shown by a preponderance of the evidence that: (1) The Facility, is a "facility" as defined in 40 C.F.R. § 260.10, incorporated by reference at Utah Admin. Code R315-1-1(b) Compl. ¶ 28, (Alleged), Answer ¶ 5 (Admitted); (2) Respondent is the "owner" and "operator" of the Facility, as defined in 40 C.F.R.§ 260.10, incorporated by reference at Utah Admin. Code R315-1-1(b). Compl. ¶ 27, (Alleged), Answer ¶ 5 (Admitted); (3) Respondent stored at least 20 burned drums of hazardous waste at the Facility between October 1, 2015, and August 3, 2015; (Compl. ¶¶ 46 and 83 (Alleged), Answer ¶¶ 8 and 24 (Admitted); CX29, CX10) and (4) at no time has the EPA or the State of Utah issued a RCRA permit to Respondent to own or operate the Facility as a hazardous waste treatment, storage, or disposal facility. (Compl. ¶ 84 (Alleged), Answer ¶ 24 (Admitted); CX28) Further, Respondent has submitted no evidence, and Respondent does not intend to introduce testimony at a hearing that Respondent received such a permit. (RPHX at 5) Complainant, therefore, respectfully requests that the Presiding Officer find that Respondent stored hazardous waste at the Facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016.

D. COUNT 4: Respondent failed to properly manage containers of hazardous waste in violation of Utah Admin. Code R315-7-15-16.4

Complainant alleges Respondent stored burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016.

Based on the record when viewed in a light most favorable to Respondent, Complainant has shown by a preponderance of the evidence that: (1) the drums contain hazardous waste Compl. ¶¶ 41 and 42 (Alleged), Answer ¶ 5 (Admitted); CX14; (2) several of the drums of hazardous waste stored at the Facility were stained with paint, and were open with missing bung covers known as bung caps (Compl. ¶¶ 49 and 88 (Alleged), Answer ¶ 8 (Admitted "several intact barrels of paint covered by a tarp were missing bung caps"); CX10 and 14; and (3) Respondent stored drums of hazardous waste at the Facility that were left open with bung caps missing between October 1, 2015, and August 3, 2016. Compl. ¶¶ 46 and 83 (Alleged), Answer ¶¶ 8 and 24 (Admitted); CX29, CX10. Complainant, therefore, respectfully requests that the Presiding Officer find that Respondent stored burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016.

E. COUNT 5: Respondent failed to obtain an EPA ID number in violation of Utah Admin. Code R315-8-2-2.2.

Complainant alleges Respondent stored at least 20 burned drums of hazardous waste at the Facility prior to obtaining an EPA identification number in violation of Utah Admin. Code R315-8-2-2.2.

Based on the record, when viewed in a light most favorable to Respondent Complainant has shown by a preponderance of the evidence that: (1) Respondent owned and operated the

Facility Compl. ¶ 27, (Alleged), Answer ¶ 5 (Admitted); (2) Respondent used the Facility to store at least 20 burned drums of hazardous waste at the Facility between October 1, 2015, and August 3, 2015 Compl. ¶¶ 46 and 83 (Alleged), Answer ¶¶ 8 and 24 (Admitted); CX29, CX10); and (3) Respondent stored at least 20 drums of hazardous waste at the Facility prior to obtaining an EPA identification number. Compl. ¶ 94 (Alleged), Answer ¶ 31 (Admitted);CX28. Further, Respondent has submitted no evidence, and does not intend to introduce testimony at a hearing that Respondent obtained an EPA identification number for the Facility prior to storing the hazardous waste. Complainant, therefore, respectfully requests that the Presiding Officer find that Respondent stored at least 20 burned drums of hazardous waste at the Facility prior to obtaining an EPA identification number in violation of Utah Admin. Code R315-8-2-2.2.

VI. COMPLAINANT HAS DEMONSTRATED THAT AN APPROPRIATE PENALTY FOR EACH COUNT CAN BE DETERMINED BY THE PRESIDING OFFICER, WITHOUT FIRST HOLDING A HEARING, WHEN VIEWING FACTS IN A LIGHT MOST FAVORABLE TO RESPONDENT

A. INTRODUCTION

In Section IV.B above, Complainant set forth the undisputed facts in this matter relating to both a determination on liability and penalty. In Section IV.C above, Complainant set forth the allegations of fact in the Complaint denied by Respondent and demonstrated that the denied allegations of fact are proven by a preponderance of the evidence submitted by one or both parties. Complainant also established that Respondent introduced no evidence on these allegations, and finally that Respondent's description of the expected testimony of its witnesses will not provide evidence relevant to the denied allegations. Having shown that the disputed facts have been proven by Complainant by a preponderance of the evidence, Complainant requested that the Presiding Officer find those facts proven in this matter.

In Section IV.D above, Complainant reviewed the grounds set forth by Respondent for contesting the proposed penalty as described in both the Answer and Respondents Prehearing Exchange, as well as Respondent's exhibits, and Respondent's description of the expected testimony of its witnesses. Complainant described where Complainant accepts the proposed facts and arguments for purposes of this Motion.

In Section VI.B below, Complainant sets forth its proposed findings of fact for purposes of the penalty portion of this Motion.

In Section VI.C.1 below, Complainant addresses two overarching sets of Respondent's facts potentially applicable to one or more violations.

In Section VI.C.2-6 below, Complainant sets forth its penalty rationale for each Count and demonstrates how each such amount is supported by the facts when viewed in a light most favorable to Respondent.

B. COMPLAINANT'S PROPOSED FACTS FOR PURPOSES OF THE PENALTY PORTION OF THIS MOTION

Complainant sets forth its proposed facts for the penalty portion of this Motion here, and incorporates the undisputed facts set forth in Section IV.B herein, by reference. Complainant respectfully requests that the Presiding Officer also incorporate facts the Presiding Officer deems proven after consideration of the arguments in Section IV.C (allegations in the complaint denied by plaintiff), and facts and information in Respondent's Answer and Prehearing Exchange discussed in Section IV.D above.[25]

[25] After each fact, Complainant sets forth the original source. If the fact was admitted by Respondent, or agreed for purposes of this Motion by Complainant, no further citation is provided. If the fact was denied by Respondent, Complainant references Complainant's analysis of the denied fact and request for a finding that the fact is proven, above. If the fact is from Respondent and analyzed by Complainant, Complainant references its analysis above. Quotation marks around facts taken from Respondent's documents are used solely to evidence exact quotation of the language, so as to avoid any possibility of Complainant inadvertently restating or misstating Respondent's language.

Respondent is a Nebraska corporation licensed to do business and doing business in Utah. Compl. ¶¶ 25 (corrected above) and 27.

Respondent is a large national trucking company with a large national presence, and Prime's trucks cover millions of miles each year. RX01; RX02; RPHX at 2 expected testimony of Mr. Field.

"[Prime has a] corporate philosophy and commitment to safety" *Id.* at 2 expected testimony of Mr. Field. *See also*, expected testimony of Mr. Singleton "his charge from the company is to do the right thing every time a decision needs to be made" (*Id*. at 3); and Mr Curtis "[h]e will testify regarding what he understands to be the company's philosophy to do things the right way, a philosophy that is preached by the company's owner and which he attempts to follow in the discharge of his duties at Prime." *Id*.

On or about September 24, 2015, Pittsburgh Paint and Glass hired Respondent to ship four different types of paint products and accompanying packaging, totaling 40,743 pounds, from Springdale, Pennsylvania, to Portland, Oregon. Compl. ¶ 30.

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; and four drums of unregulated paint; and 32 drums of PPG's Universal Urethane Yellow Primer, product code BY1Y100B, weighing 17,683 pounds. Compl. ¶ 31.

The Safety Data Sheets (SDSs) for the drums of paint included in the shipment state that each of the four types of paint products in the shipment had a flashpoint of less than 140 degrees Fahrenheit. Compl. ¶ 32

The first page of each SDS[26] for the four PPG products being shipped states "[t]his material is considered hazardous by the OSHA Hazard Communication Standard." CX32 at 1, 16, 31, 48, 65. Each SDS also lists the "classification of the substance or mixture" specific to those materials on the first page. *Id*. at 1, 16, 31, 48, 65.

Among other things, each SDS sets forth handling and storage instructions for the product in Section 7, CX32 at 6, 21, 36, 53, 69-70; toxicological information for the product or ingredients of the product in section 9, *Id*. at 8-12, 24-27, 40-43, 57-60, 73-76; and federal regulatory information for the product in section 15, *Id*. at 14, 29-30, 45-46, 62-63, 78-79.

The unexpected fire, which destroyed Respondent's trailer during the early morning hours of September 27, 2015, occurred on a remote portion of Interstate 84 near Hammett, Idaho. Answer ¶ 37.

"Chief JANOUSEK stated that all of the bungs that were in the drums that remained in the trailer after the fire had blown out. Chief JANOUSEK estimated that 20 to 30 of the drums on the trailer had tipped over because the front and back sections of the trailer had collapsed causing the drums to tip over. Chief JANOUSEK stated that the only drums that were on the trailer that remained upright following the fire were in the center section of the trailer." RX07 at 8.

"Chief JANOUSEK stated that it is also his recollection that nearly every drum on the trailer "BLEVED" [sic] before the incident concluded. Chief JANOUSEK stated that this caused the bungs that had been placed in the drums to be blown out. Chief JANOUSEK stated that the drums on the truck were primarily metal 55-gallon drums with ring tops and bungs. Chief

[26] Two copies of the SDS for the Universal Urethane Yellow Primer dated August 19, 2015, version 4, are included in CX32 (the first copy begins on page 31, the second on page 48.)

JANOUSEK stated that he does not recall any of the drums blowing the ring tops off." RX08 at 3.

"Chief JANOUSEK stated that they ultimately used the shipping documents to determine the contents of the load instead of relying on the placards that were on the trailer." RX08 at 4.

"Chief JANOUSEK stated that Drake [the driver of the truck] provided these shipping documents detailing what the trailer contained to the fire department. Chief JANOUSEK stated that fire department personnel looked at these shipping documents before it decided how to handle the fire." *Id*.

"Ultimately, the on-scene fire chief and incident commander concluded: 'It was our determination that it went from a haz-mat scene to a clean up scene. We released Region IV Haz Mat after that discussion. B&W Wrecker was on scene when we left, they were going to be in charge of the clean up.'" Answer ¶ 37., *see also, supra*, at IV.D.3.a.

"Middle-of-the-night communications between Respondent's Springfield, Missouri headquarters and multiple state, federal and local responders, including the local fire department, Elmore County Dispatch, Idaho State Patrol, Idaho Department of Transportation and Idaho Department of Environmental Quality, resulted in miscommunications on how to best deal with the aftermath of the trailer fire." *Id*.

Respondent did everything asked of it by the local authorities and regulators during the immediate response to the fire and relied on B&W to perform the first clean-up and disposal of the materials destroyed by the fire. *See*, discussion of Answer ¶ 38*, supra*, at IV.C.

The trailer and drums were transported to B&W's lot from the fire site. *See*, discussion of Answer ¶ 37*, supra*, at IV.D.ii.

The waste in at least 20 of the 32 drums exhibited the characteristics of ignitibility and toxicity, and therefore are hazardous waste. Compl. ¶ 62, Answer ¶ 15.

"Respondent arranged to have the damaged trailer and its remaining contents including the intact barrels of paint moved to its Salt Lake City (SLC), Utah facility in October 2015." Answer ¶ 38; *see also, supra*, at IV.D.ii

"In arranging this transportation, a representative of Respondent mistakenly advised the Utah based tow company that the trailer involved in the fired [sic] had been hauling barrels of water-based paint." *Id*. *see also, supra, at IV.D.ii*

A hazardous waste manifest was not prepared for the transportation of the damaged trailer and drums from B&W's lot to the Facility.

Respondent engaged Premium Environmental to conduct the second clean-up at the fire site on October 20, 2015, RX11 at 13.

On October 20, 2015, Premium Environmental informed at least nine of Respondent's employees that "DEQ had the accident declared disaster and hazarous [sic] and will remain hazadous [sic] until cleanup is completed." *Id*. at 11 and 13.

On October 21, 2015, during a discussion with Prime, IDEQ staff "informed Prime that paint remained at the Site [of the fire], observed during the October 16, 2015 visit, and this waste needed to be handled appropriately by a contractor knowledgeable of environmental regulations and capable of performing a hazardous waste determination resulting in appropriate disposal. Prime ensured DEQ that an environmental contractor would be hired to handle the remaining waste at the Site." CX7 at 4

On November 17, 2015, IDEQ staff "spoke with Premium Environmental Services (Premium), hired by Prime to conduct the remaining cleanup of the Site." *Id*.

Premium "hired H2O Environmental (H2O) to handle the waste profiling and disposal of remaining waste at the Site" of the fire. *Id*. at 5.

On November 19, 2015, H2O sampled the remaining waste (soils) at the site of the fire on behalf of Prime. *Id*.

H2O documented that the waste characterized at the site of the fire, during the second clean-up, were "hazardous for chromium exceeding the regulatory level of 5 milligrams per liter (mg/L) with a result of 18.5 mg/L." *Id*. at 5 and 88, and CX25 at 3.

On December 7, 2015, IDEQ received an application from Prime for an EPA ID number for the hazardous waste from the second cleanup. CX28; see also CX7 at 5.

On December 10, 2015, IDEQ issued an EPA ID number to Prime. CX28.

On December 29, 2015, Premium, on behalf of Prime, arranged for the transportation of the hazardous waste from the second clean-up of the site to U.S. Ecology, a permitted hazardous waste management facility in Grand View, Idaho for disposal. CX7 at 5; CX25 at 36-37.

"The damaged trailer and intact barrels of paint loaded on this trailer were securely placed on an impervious concrete slab in the truck yard of Respondent's Salt Lake City facility and covered with a tarp. The area where the trailer was stored was fenced off, and not accessible to the public." Answer ¶ 37, *see also, supra*, at IV.D.ii.

Basic functions performed at, or from, the Facility include storage, maintenance, and repair of trucking equipment for a national freight trucking company. Compl. ¶ 29.

"Mr. Curtis, Shop Manager at the Facility was provided the bills of lading for the load when he inquired about the contents of the barrels on the burned trailers." RPHX at 3

"Mr. Curtis later called and left a message with a local environmental clean-up company that he would have used to manage the disposal." *Id*.

"Mr. Curtis does not believe he received a return call from this company and he did not get back to coordinating the disposal of the barrels prior to being visited by EPA later in 2016." *Id*.

"No discharges from the trailer to the environment occurred. No ground or drinking water resources have been impacted." Answer ¶ 37, *see also, supra*, at IV.D.ii.

"No evidence exists that any human or environmental harm or harmful exposure occurred from the primer stored at the Prime facility. Probability of exposure to primer by humans or environmental receptors is low . . . . the probability of the materials catching on fire is extremely low . . . and [p]otential seriousness of contamination is also low." RX20 at 1; *see also, supra*, at IV.D.3 and IV.D.4.

Respondent stored at least 20 burned drums of hazardous waste at the Facility for at least 306 days, from October 1, 2015, until August 3, 2016; the date of the CID Preservation Letter. Compl. ¶ 70.

Respondent never made a hazardous waste determination on the 32 drums of hazardous waste stored at the Facility.

Respondent never received a permit to operate the Facility as a hazardous waste storage facility.

"All 32 drums and paint waste stored at the Facility were burned." Compl. ¶ 89, *see also, supra*, at IV.C.

On or about August 2, 2016, Special Agents from the EPA-Criminal Investigation Division conducted an initial inspection on consent of the Facility (EPA-CID Inspection). Compl. ¶ 47

During the EPA-CID Inspection, the tarps covering the 32 burned drums were removed and several burned drums of paint waste on the trailer were stained with paint and were open because covers known as bung caps were missing. Compl. ¶ 49; *see also, supra*, at IV.C.

"During the EPA-CID Inspection, the EPA-CID agents documented the smell of a strong chemical odor emanating from the burned trailer and drums." Compl., ¶ 50, *see also, supra*, at IV.C.

"During the EPA-CID Inspection, the EPA-CID agents documented that the burned drums of paint waste did not have labels." Compl. ¶ 51; *see also, supra*, at IV.C.

"During the EPA-CID Inspection, several burned drums on the trailer were open and missing covers known as bung caps." Compl. ¶ 88; *see also, supra*, at IV.C.

On August 3, 2016, EPA CID sent a letter to Respondent requesting the burned trailer and burned drums of paint waste stored at the Facility not to be moved or manipulated. Compl. ¶ 52.

"When EPA notified Respondent in early August 2016 of its intent to investigate the trailer, Respondent complied fully with all EPA requests, and gave EPA investigators unfettered access to the Facility. Respondent's staff assisted the EPA investigators with a forklift and driver to assist in sampling drums. EPA sent a letter to Respondent on August 3, 2016, instructing Respondent to not move or manipulate the paint drums stored on site. Respondent complied." Answer ¶ 39; *See also*, expected testimony of Mr. Singleton "his and Prime's efforts to cooperate with EPA when they visited the facility in 2016" RPHX. at 2; Mr. Curtis "when EPA visited, Prime cooperated with EPA including in its sampling efforts" *Id*.

"Respondent also complied with all requests from EPA to rectify any paperwork problems that may have existed dating from the original 2015 fire." *Id*.

On August 24, 2016, the EPA National Enforcement Investigation Center (NEIC) conducted an inspection at the Facility." Compl. ¶ 53

"On September 19, 2016, Respondent disposed of the trailer and its contents as hazardous waste…." Answer ¶ 41; *see also, supra*, at IV.C.

"[T]his was an isolated incident … and … Prime had not had an experience like this prior to the 2015 fire, or since the 2015 fire." RPHX at 2, expected testimony of Mr. Field. *See also, supra*, at IV.D.iii.

Prime has had limited experience "with incidents of this nature involving hazardous materials and … the 2015 incident in Idaho was unique." Id at 2-3, expected testimony of Mr. Sprague. *See also, supra*, at IV.D.iii.

Prime has "learned [lessons] from this matter including processes implemented to ensure this situation is not repeated." *Id*. at 2, expected testimony of Mr. Field; *see also,* Mr. Sprague "will discuss the processes Prime employs should such a situation arise." *Id*. at 3; Answer ¶ 42 ("Since the fire, Respondent has engaged in a comprehensive hazardous-waste training program for its relevant employees to ensure that future events such as this will be handled appropriately"). *See also, supra*, at IV.D.iii.

C. PENALTY ANALYSIS

1. Introduction and Discussion of Facts Potentially Applicable to More Than One Count

As set forth in the attached Declaration of Complainant's penalty witness, Ms. Jacobson (Jacobson Declaration), and as more fully described in the analysis of each count below, Complainant has reviewed all of the information in Respondent's Prehearing Exchange, including exhibits and expected testimony, and has concluded that Respondent has not brought any new information to this matter which warrants an adjustment to the penalties proposed for

each violation as described in CX04, even when all of the information is viewed in a light most favorable to Respondent. This conclusion primarily is based on the fact that Complainant already has made adjustments for the probative or otherwise relevant information in Respondent's Prehearing Exchange to the degree appropriate under the 2003 Penalty Policy framework. In addition, Respondent has raised a number of issues that do not bear on the calculation of an appropriate penalty, particularly the fire and the clean-up efforts at the fire site.

Before turning to its count by count analysis Complainant will address three subjects that apply, or not, to all counts: (1) disposal of the materials generated during the first clean-up immediately after the fire was extinguished; (2) the fire and related clean-ups; and (3) Respondent's corporate culture, cooperation with the criminal investigation, efforts to comply, lessons learned, and education and process improvements.

i. Disposal of Materials Generated During the First Clean Up

Complainant acknowledges that the Complaint, and the "core facts" section of CX04, reference the potential issues relating to disposal of the materials generated during the first clean-up and that this led to some confusion about the importance Complainant placed on this information. Ms. Jacobson clarifies in the attached Declaration that this information was not considered relevant to her calculation of proposed penalties for any of the violations alleged in the Complaint. Jacobson Declaration at 10.

ii. The Fire and Related Clean-Ups

Respondent's Answer and Prehearing Exchange indicate that the events on the night of the fire, the clean-ups of the fire site, and the disposition of the materials generated during the first clean-up are of material relevance to calculating a proposed penalty. (The parties agree that the disposition of the materials generated during the second clean-up is not relevant, *see*,

discussion of footnote to Complaint ¶ 45, IV.3, *supra*.), Complainant reiterates that there are only three pieces of information from this time period that are relevant the violations in this matter: the bill of lading that accompanied the shipment; the SDSs that accompanied the shipment; and Respondent's communications with IDEQ regarding the second clean-up at the fire site.

For purposes of this Motion, Complainant accepts "that when Chief Janousek announced that the scene was no longer hazardous, the ITD and everyone else associated with the incident simply assumed that the waste associated with the location of the Prime trailer fire was nothing other than solid waste." RX11 at 8. As also discussed above, Complainant's concerns with Respondent's handling of the burned drums of hazardous waste begins after the initial response to the emergency is complete and Respondent had the opportunity to assess what remained from the shipment while it was located at B&W's lot. This is because Complainant is agrees that it is possible that during the response to the emergency the situation could have been changing rapidly, and communications could have been confusing.

After the emergency was over, however, it was incumbent upon Respondent to begin assessing appropriate next steps. Even just one day later, given the nature of its business and Respondent's scope of operations, the bill of lading and SDSs should have been enough to cause Respondent to at least reconsider its reliance on the Fire Chief's broad statement. Respondent certainly had no basis to continue to rely on the Fire Chief's statement after IDEQ contacted Respondent. The only possible source of contamination at the fire site were the drums in the shipment that were destroyed in the fire. And Respondent still had in its possession 32 drums of the source of hazardous waste at the fire site, with no product labels indicating the contents.

iii. Respondent's corporate culture, cooperation with the criminal investigation, efforts to comply, lessons learned, and education and process improvements

Respondent would use the testimony of a number of witnesses to show the following: that this was an unusual or unique circumstance for the company[27]; that the corporate culture always has been to do the right thing[28]; that Respondent made efforts to comply[29]; that Respondent initiated an education program and new processes after the investigation[30]; and that Respondent cooperated during the criminal investigation.[31] For purposes of this Motion, complainant accepts all of this as true. As described below, Complainant has considered these factors in its penalty calculation for each count to the extent appropriate under the 2003 Penalty Policy.

Complainant has taken into account that these were first time violations of this type. The 2003 Penalty Policy methodology is designed to apply to first time violators and violations. This is most readily seen in the discussion of the "history of noncompliance" adjustment factor. RCPP at 37. Gravity-based penalty amounts can be adjusted based on the violator's history of noncompliance, but only upward. *Id*. This approach is based on the presumption that the violator

[27] Expected testimony of Mr. Field "this was an isolated incident … and that Prime had not had an experience like this prior to the 2015 fire, or since the 2015 fire" RPHX at 2; and Mr. Sprague "the limited experience Prime has had with incidents of this nature involving hazardous materials and that the 2015 incident in Idaho was unique" *Id*. at 2-3)

[28] Expected testimony of Mr. Field "the company's…corporate philosophy" RPHX at 2; Mr. Sprague "will address Prime's corporate philosophy and commitment to safety" *Id*. at 2; Mr. Singleton "his charge from the company is to do the right thing every time a decision needs to be made" *Id*. at 3; and Mr Curtis "[h]e will testify regarding what he understands to be the company's philosophy to do things the right way, a philosophy that is preached by the company's owner and which he attempts to follow in the discharge of his duties at Prime." *Id*.

[29] "Respondent did everything asked of it by the local authorities and regulators during the immediate response to the fire, and relied on B&W to perform the first clean-up and disposal of the materials destroyed by the fire." See, discussion of Answer ¶ 38, supra, at IV.D.2; *See also,* discussion of Answer ¶ 41, Section IV.D.2, *supra.*

[30] Expected testimony of Mr. Field "lessons learned from this matter including processes implemented to ensure this situation is not repeated" (RPHX at 2); and Mr. Sprague "will discuss the processes Prime employs should such a situation arise" (*Id*. at 3).

[31] Expected testimony of Mr. Singleton "his and Prime's efforts to cooperate with EPA when they visited the facility in 2016" (RPHX at 2); Mr. Curtis "when EPA visited, Prime cooperated with EPA including in its sampling efforts" (*Id*.)*; see also* discussion of Answer ¶ 39 at IV.D.2.

does not have a relevant history of noncompliance. Complainant's calculation does not include an upward adjustment for "history of noncompliance."

Even though Respondent previously may not have worked through the RCRA requirements after an accident involving hazardous materials they were shipping, the 2003 Penalty Policy explains that "no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent." *Id*. at 36. Complainant also notes that even if Respondent has not had an accident with hazardous products like this before, does not mean Respondent should be given credit (for example, a downward adjustment) for not having and following a robust response plan, especially since Respondent's trucks travel millions of miles a year and at times transport hazardous products that are accompanied by SDSs and bills of lading explaining the hazards and proper handling methods for those hazardous products. Respondent did not submit any evidence of any accident response plan in place at the time of or after the fire.

Complainant accepts that Respondent's corporate culture is as described in Respondent's documents. RCRA, however, is a strict liability statute. Mistakes were made by Respondent, and as discussed below, these mistakes substantially increased threats of harm to human health and the environment, posed substantial harm to the integrity of the RCRA program, and deviated entirely from the applicable elements of the RCRA program for over 10 months. Further, despite communications with IDEQ relating to the need for a second clean-up at the fire site because hazardous waste remained there, even after the first clean-up, Respondent's compliance with RCRA at the facility only began after the EPA-CID inspection and NEIC determined the drums contained hazardous waste. Complainant, therefore, has no basis to adjust its proposed penalty because of Respondent's corporate culture.

Respondent has undertaken new educational programs and implemented new processes since the time of the violations and this likely will result in fewer threats of harm to human health and the environment going forward. Complainant, however, sees little opportunity to apply a material downward adjustment under the 2003Penalty Policy, or even when directly considering the statutory factors for these changes in corporate education and processes.

Respondent raises its cooperation with investigators after the violations as a penalty mitigation factor. Complainant has factored in Respondent's cooperation after the EPA investigation began. Under the 2003 Penalty Policy, cooperation is considered at one of two points: after the matrix cell is selected (and is used at that point to assist in determining the amount within the range in that cell); or as an adjustment factor after selecting the amount from within the cell. (RCPP at 20) Complainant specifically considered Respondent's cooperation as one of two reasons Complainant did not select the top of the cell. *See,* CX04 at 8 ("EPA did not select the top of the cell because Prime cooperated with EPA CID's investigation and disposed of the 32 drums of paint waste as hazardous waste at a licensed treatment, storage or disposal facility").

Complainant's consideration of Respondent's cooperation applied to all counts. *Id*. at 11 ("Please see the explanation in the penalty assessment matrix section of Count 1 for selection of the midpoint of the penalty cell, because it is equally applicable here." *See also*, *Id*. at 14, 17 and 19) By selecting the midpoint instead of the high end of the cell range, Complainant effectively reduced the potential gravity-based penalty for Counts 1 and 2 by over 12%; for Count 3 the gravity-based penalty effectively was reduced by over 13%, and the multi-day by over 40%; for Count 4 and 5 Complainant effectively reduced the potential gravity-based penalty by 10%.

The Environmental Appeals Board has consistently held that subsequent compliance does not warrant a downward gravity adjustment for good-faith or other reasons. Thus, even though Respondent ultimately manifested the waste to a permitted TSD facility, as the Board explained in *In the Matter of Titan Wheel Corporation of Iowa*, 2001 WL 1035756 (EPA ALJ May 4, 2001):

> 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, 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). Given the facts here, we find no reason to deviate from that practice.
>
> Further, as the Board has previously held, significant penalty reductions for good faith, like the ones suggested by Titan (a 40% reduction), should be reserved for those cases where the violator promptly reports its noncompliance, or the possibility of noncompliance, once discovered or suspected. *In re Everwood Treatment Co.*, 6 E.A.D. 589, 609 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA*, No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998); *In re A.Y. McDonald Indus., Inc.*, 2 E.A.D. 402, 421 (CJO 1987).

Id, at *18 (footnote omitted, emphasis added)

Here, Respondent had been contacted by IDEQ about hazardous waste paint remaining at the fire scene within a month of the fire. Respondent, however, made no good faith effort to comply with RCRA for another nine months, and only after the noncompliance was detected by EPA-CID and the drums were determined by NEIC to contain hazardous waste.

2. COUNT 1

Introduction. Complainant has proposed a penalty of $37,500 for Respondent's failure to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11. Complainant treats this as a one-time violation even though Respondent did not make such a determination at any point after the fire for nearly a year. Complainant chose to

consider this violation as having occurred early enough in this period that the statutory maximum and 2003 Penalty Policy matrices in effect prior to November 3, 2015, apply.

Complainant selected a major potential for harm, a major extent of deviation, and selected the mid-point of the major-major matrix cell ($32,915). Complainant then considered the adjustment factors and adjusted the penalty upward by 10%. Complainant also calculated that Respondent received an economic benefit of $10,800 from this violation and included it in the penalty. Since, however, the total penalty exceeds the statutory maximum applicable at that time, the proposed penalty was capped at $37,500.

As the Presiding Officer stated in *Chem-Solv*

> [t]he hazardous waste determination is 'the crucial, first step in the regulatory system.' Part 260—Hazardous Waste Management Overview and Definitions, 45 Fed. Reg. 12,724, 12,727 (Feb. 26, 1980). A generator 'must undertake this responsibility seriously,' and has a 'continuing responsibility to know whether [its] wastes are hazardous.' *Id*. Though the law does not require that waste be tested as part of the determination, there is no provision excusing 'good faith' or "inadvertent mistakes in the determination of whether a waste is hazardous.' *Id*. Conducting an erroneous hazardous waste determination is as much a violation as failing to conduct a hazardous waste determination at all. *See Morrison Bros. Co*., EPA Docket No. VII-98-H-0012, 2000 EPA ALJ LEXIS 68, at **13-14 (ALJ, Aug. 31, 2000) (citing 45 Fed. Reg. at 12,727) (erroneous hazardous waste determination would not satisfy regulatory requirement).

2014 WL 2593697 at *90

Potential for Harm. The basis for EPA selecting a major potential for harm is set forth in detail in CX04 at 7. In *Chem-Solv*, the Presiding Officer underlined the importance of the hazardous waste determination requirement, and explained

> [o]ne of RCRA's statutory objectives is to require "that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date." 42 U.S.C. § 6902(a)(5). As generators of hazardous waste, Respondents were responsible for ensuring that the waste was "properly managed in the first instance," and they did not do so…. Respondents cite the fact that hazardous waste from their facility moved "freely along the roads of commerce" as if it was a mitigating factor. To the contrary, that Respondents'

> actions allowed hazardous waste to be transported in commerce without the proper safeguards is an illustration of just how serious Respondents' violations are.

2014 WL 2593697 at *106 (Complainant is not asserting that the Respondent in this matter believes the drums of hazardous waste should have moved freely from Idaho to Utah (i.e., without a manifest). Complainant includes this portion of the decision to emphasize the Presiding Officer's view of how important a correct hazardous waste determination is to all subsequent hazardous waste handling activities, and, therefore, the RCRA program.)

As the 2003 Penalty Policy makes clear the potential for harm factor analyzes the potential for harm. Actual harm is one factor evidencing the potential for harm. *See, e.g.,* RCPP at 14. The purpose of the RCRA program is to minimize the risks of harm by ensuring that hazardous waste is managed safely from cradle-to-grave. This cannot happen if the hazardous waste determination is not properly made in the first instance. "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." RCPP at 14.

The Presiding Officer's analysis of the potential for harm for operating a facility without a permit *In re Everwood Treatment Co.*, 6 E.A.D. 589, 1996 WL 557269 (EAB 1996), is discussed at length in Count 3 below. The Presiding Officer's analysis of the potential for harm to the RCRA program, is equally applicable in an evaluation of the potential for harm to the RCRA program for this Count.

> There may be violations where the likelihood of exposure resulting from the violation is small, difficult to quantify, or nonexistent, but which nevertheless may disrupt the RCRA program (e.g., failure to comply with financial requirements). This disruption may also present a potential for harm to human health or the environment, due to the adverse effect noncompliance can have on the statutory or regulatory purposes or procedures for implementing the RCRA

> program. *Id*. at 420 (quoting 1984 RCRA Civil Penalty Policy at 6). The policy applicable to this case, the 1990 Penalty Policy, also supports the conclusion that certain violations may have "serious implications" for the RCRA program and can have a "major" potential for harm regardless of their actual impact on humans and the environment. Penalty Policy at 14.

Id. at *8

Nothing in Respondent's submittals to this proceeding change Complainant's analysis in CX04. If Respondent had considered the information in the bill of lading or the SDSs in the first instance, or at any time during the course of the year, and decided to make a hazardous waste determination, Respondent could have mitigated the risk of threats and harms that Respondent created by not conducting a hazardous waste determination. The failure to identify this solid waste as hazardous waste created substantial risks of harm to health and the environment over the course of almost a year, and posed a substantial risk of harm to the RCRA program.

Extent of Deviation. The basis for EPA selecting the major extent of deviation is set forth in CX04, at 7. Nothing in Respondent's submittals to this proceeding change the analysis. Respondent's failure was a complete deviation from the requirement. It completely rendered inoperative the requirement violated (*see*, RCPP, at 17) and directly led to other complete deviations from key RCRA requirements, all of which increased the risk of harm to human health and the environment.

Amount from Matrix Cell. The basis for EPA selecting the mid-point of the major-major cell also is set forth in detail in CX04, at 7. As described there, and in Section VI.C.3 above, Complainant could have selected the top of the cell based on a number of factors, but did not, because "Prime cooperated with EPA CID's investigation and disposed of the 32 drums of paint waste as hazardous waste at a licensed treatment, storage or disposal facility." CX04, at 8. Under

the facts of this case, this essentially results in a 12% reduction in the gravity-based amount for these two factors.

Multi-Day Penalties. Even though under most circumstances multi-day penalties are considered mandatory for major-major violations RCPP, at 25, prior to filing the Complainant, Complainant determined it had a sufficient basis to not propose the assessment of multi-day penalties for this violation.

Adjustment Factors. Complainant then considered the adjustment factors, and reviewed the facts to determine appropriate adjustments to the gravity-based penalty if any. Complainant did so again after Respondent's Prehearing Exchange was complete.

The only adjustment factor Complainant applied to the gravity-based penalty was "willfulness and/or negligence." (*See,* the explanation for why Complainant did not adjust the gravity-based penalty downward for any count for "good faith efforts to comply" at the end of Section VI.C.3 above.) Complainant applied the same analysis to each Count, and continues to conclude it is appropriate to do so. Complainant's basis for applying a 10% upward adjustment to the gravity-based penalty for each count is set forth in detail in CX04, at 7-8. Respondent is a major shipping company. Respondent's failure to consider the shipping documents at any time is at least negligent. Respondent's failure to consider the implications of communications with IDEQ about the character of the contamination that remained at the fire site seems more willful than negligent.

Economic Benefit. Complainant calculated that there was an economic benefit to Respondent by never making a hazardous waste determination. Nothing submitted by Respondent gives EPA any basis to consider a different calculation. EPA's rationale for choosing the method it analyzed for costs is simple and clear.

> EPA considers the least expensive means of compliance when calculating economic benefit. Although the SDS and other documents described above would serve as a reasonable basis for determining the drums contain hazardous waste it also is reasonable to assume that Prime would have decided to test the wastes in the drums since the labels were burned off, the paint had been in a fire, some of the drums had burst open and been disposed, leaving the remaining 32 drums to be of uncertain contents, thus requiring a waste determination. The least expensive way for Prime to correct this violation would have been to characterize their wastes using the toxicity characteristic leaching procedure (TCLP). The economic benefit asserted for these violations was estimated as avoided costs that will never be incurred by the Prime.

CX04, at 9.

Complainant then explained how it determined the number of samples that could be appropriate in this matter. "NEIC used XRF to determine that 20 of the 32 burned drums contained strontium chromate primer. NEIC collected representative samples from 8 of the 20 burned drums of paint waste to conduct a TCLP analysis. Using TCLP, the representative samples were determined to be hazardous for ignitability (Flash Point < 140 F) and toxicity (chromium levels exceeding regulatory levels)." *Id*.

Finally, Complainant precisely laid out the source of its cost information in CX01, and how those costs were properly adjusted for inflation. Complainant did not provide a link to the inflation calculator in CPHX, but did so in its Rebuttal CRPHX, at 4.

> EPA estimated costs using figures from EPA's Unit Cost Compendium, Data and Algorithms for Estimating Costs Associated with "Cradle to Grave" Management of RCRA Solid and Hazardous Waste, September 30, 2000, and were adjusted to current costs using the online U.S. inflation calculator. An estimated cost of $1,350 per TCLP sample was used for 8 samples, the same number of samples collected by NEIC, yielding an economic benefit of $10,800 in avoided costs. This cost includes sample collection, shipment, analysis, and results report.

CX04, at 9.

Complainant has properly considered the least expensive means Complainant could have used to avoid violating the requirement to conduct a hazardous waste determination, and the amount should be included in any penalty assessed for Count 1.

3. COUNT 2

Introduction. Complainant has proposed a penalty of $36,207 for Respondent's failure to prepare a hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a). Complainant views this as a single day of violation. Transportation occurred prior to November 3, 2015. Complainant selected a major potential for harm, a major extent of deviation, and selected the mid-point of the major-major matrix cell ($32,915). Complainant then considered the adjustment factors and adjusted the penalty upward by 10%.

As EPA's Chief Judicial Officer stated in *In the matter of Ashland Chemical Company, Division of Ashland Oil, Inc., Appellant/Respondent*, 3 E.A.D. 1 (E.P.A.), 1989 WL 253202

> The manifest system "is the heart of RCRA's cradle-to-give management system for hazardous waste." 43 Fed. Reg. 58985 (Dec. 18, 1978). The Act specifically requires such a system (see 42 U.S.C.A. § 6922(a)(5)), and the Congress expressly noted the importance of manifests in establishing a clear record of generation, handling, and final disposition of hazardous waste. See H.R. Rep. 1491, 94th Cong. 2d Sess. 27 (1976). Although the misinformation here probably did not significantly increase the risk of exposure (as noted by the ALJ),11 it most assuredly disrupted EPA's ability to track accurately the generation of waste, particularly when viewed in conjunction with Ashland's permit violation.
>
> [footnote 11] One purpose of the manifest system is to prevent "roadside dumping" of hazardous waste. See H.R. Rep. 1491, supra, at 27. This goal is accomplished by requiring the facility that receives the waste to sign the manifest and return it to the generator; if the generator fails to receive the signed manifest within a specified time after shipment, it must contact the transporter and the receiving facility and report the omission to EPA so that the status of the waste may be investigated. See 40 C.F.R. § 262.42.]

Id. at *6 Respondent's failure to properly identify hazardous waste on a hazardous waste manifest for transport from a temporary storage location to its next destination (the Facility) essentially prevents the waste from entering the RCRA's cradle-to-give management system .

Potential for Harm. The basis for EPA selecting a major potential for harm is set forth in detail in CX04 at 10-11. Nothing in Respondent's submittals to this proceeding change the analysis. The fact that Respondent mistakenly told the transporter that the waste was water based paint before the trailer and drums were transported over 300 miles by a transporter who was not licensed to haul hazardous waste, only increases the risks of substantial harm. If the transporter or emergency responders had to address an emergency during transportation they would have thought they were dealing with water based paint, when in fact they would have been dealing with hazardous waste, resulting in an unsafe and improper response to the emergency. Further, had Respondent properly manifested the shipment the receiving facility would have been aware of what was arriving at its gate.

Complainant's basis for selecting a major potential for harm for failing to manifest the hazardous waste on its 300 mile journey to Respondent's Facility is fully supported by the facts and case law.

> This violation posed a substantial risk of exposure of humans or other environmental receptors to the hazardous waste during and after transport, especially when considering the condition of the drums being transported, and that the driver for Brett's Towing likely was not trained to transport hazardous waste or respond to hazardous waste emergencies during transportation and did not secure the appropriate documentation (i.e., placards or SDS). This failure also had a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

Id.

The Presiding Officer's analysis of the potential for harm for operating a facility without a permit in *Everwood* is discussed at length in Count 3 below. The Presiding officer's analysis of the potential for harm, however, is equally applicable to this Count.

> There may be violations where the likelihood of exposure resulting from the violation is small, difficult to quantify, or nonexistent, but which nevertheless may disrupt the RCRA program (e.g., failure to comply with financial requirements). This disruption may also present a potential for harm to human health or the environment, due to the adverse effect noncompliance can have on the statutory or regulatory purposes or procedures for implementing the RCRA program. *Id*. at 420 (quoting 1984 RCRA Civil Penalty Policy at 6). The policy applicable to this case, the 1990 Penalty Policy, also supports the conclusion that certain violations may have "serious implications" for the RCRA program and can have a "major" potential for harm regardless of their actual impact on humans and the environment. Penalty Policy at 14.

Id, at *8

Failure to prepare a manifest for the transportation of hazardous waste in the condition they were in after the fire for over 300 miles by a transporter who was not licensed to transport hazardous waste is a violation that has "serious implications" for the RCRA program and can have a "major" potential for harm regardless of the actual impact on humans and the environment. The value of shipping documents, including manifests for use in an emergency (and otherwise during transportation) is shown by Fire Chief Janousek's statement that as the responders worked to figure out the correct response to the fire "they ultimately used the shipping documents to determine the contents of the load instead of relying on the placards that were on the trailer." RX08, at 4

Extent of Deviation. The basis for EPA selecting the major extent of deviation is set forth in CX04, at 10-11. Respondent's failure to prepare a manifest for the shipment rendered completely inoperative the requirement violated. RCPP, at 17. Nothing in Respondent's submittals changes the analysis.

> The generator deviated from the requirements of the regulation to such an extent that none of the transportation and subsequent handling requirements were met resulting in substantial noncompliance which jeopardizes the integrity of the RCRA program. Proper manifesting of hazardous wastes, which allows tracking of the management of the wastes from "cradle to grave," is a core component of the RCRA program. Prime did not prepare a manifest and did not meet any of the regulatory requirements for waste tracking."

CX04, at 11.

Amount from Matrix Cell. The basis for EPA selecting the mid-point of the major-major cell also is set forth in detail in CX04, at 7 (it is the same for each Count). As described there, and in Section VI.C.3 above, Complainant could have selected the top of the cell based on a number of factors, but did not, because "Prime cooperated with EPA CID's investigation and disposed of the 32 drums of paint waste as hazardous waste at a licensed treatment, storage or disposal facility." CX04, at 8. Under the facts of this case, this essentially results in a 12% reduction in the gravity-based amount for these two factors.

Multi-Day Penalties. Even though under most circumstances multi-day penalties are considered mandatory for major-major violations RCPP, at 25, prior to filing the Complainant, Complainant determined "that it is appropriate to view Prime's specific manifest violation as independent and non-continuous; thus, has not calculated a multiday assessment for this violation." *Id*. at 12.

Adjustment Factors. Complainant then considered the adjustment factors, and reviewed the facts to determine appropriate adjustments to the gravity-based penalty if any. Complainant did so again after Respondent's Prehearing Exchange was complete. The only adjustment factor Complainant applied to the gravity-based penalty was "willfulness and/or negligence." (See, the explanation for why Complainant did not adjust the gravity-based penalty downward for any count for "good faith efforts to comply" at the end of Section VI.C.3 above.) Complainant applied the same analysis to each Count, and continues to conclude it is appropriate to do so.

Complainant's basis for applying a 10% upward adjustment to the gravity-based penalty for each count is set forth in detail in CX04, at 7-8. Regardless of whether the factors evidence negligence or willfulness, Respondent is a major shipping company that at least occasionally ships hazardous materials. A bill of lading accompanied the paint shipment, as did the SDSs. Respondent's failure to consider the shipping documents before mistakenly telling a towing company that the waste paint was water-based paint and then shipping the trailer and hazardous waste over 300 miles, without a manifest, seems at least negligent.

Economic Benefit. Complainant did not include an economic benefit component in the proposed penalty for Count 2.

4. COUNT 3

Introduction. As more fully set forth in CX04, Complainant has proposed a penalty of $470,329 for Respondent's ownership and operation of a hazardous waste storage facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016. Complainant treated this as a daily violation but chose to limit the number of days to 180 for penalty calculation purposes. For purposes of calculating the proposed penalty, Complainant selected 180 days of violation after November 3, 2015.[32]

Complainant selected a moderate potential for harm, a major extent of deviation, and selected the mid-point of the moderate-major matrix cell ($16,767) for the first day of violation. Complainant then selected the mid-point of the moderate-major cell in the multi-day matrix ($2,295) and multiplied this amount by 179 days for a multi-day penalty of $410,805, and a total

[32] As more fully described in Ms. Jacobson's Declaration, Complainant erroneously stated that the proposed penalty for Count 3 was based on the matrices that applied to violations before November 3, 2015. The calculation, however, actually was based on the amounts in the 2003 Penalty Policy matrices as updated through Ms. Bodine's Memorandum dated January 15, 2020, meaning for dates of violation on November 3, 2015 and after.

gravity based penalty of $427,572. Complainant then considered the adjustment factors and adjusted the penalty upward by 10% ($42,757) for a total base penalty of $470,329.[33, 34]

At its core, RCRA regulates the treatment storage and disposal of HW through permitting. In *U.S. v. WCI Steel, Inc*., 72 F. Supp. 2d 810 (1999) (*WCI Steel*), the court determined that the defendant had operated its facility without a permit and stated

> 42 U.S.C. § 6925(a) prohibits the operation of any facility that treats, stores, or disposes of hazardous wastes, except in accordance with a permit. *United States v. Heuer*, 4 F.3d 723, 730 (9th Cir.1993) ("It is fundamental that an entity which performs a hazardous waste activity for which a permit is required under RCRA may not legally perform that activity unless it has a permit for the relevant activity."). Moreover, a party receiving a permit to store or dispose of hazardous waste must thereafter comply with the requirements of the permits.

Id. at 818.

In *Bruder*, 10 E.A.D. 598, the Board reviewed a Presiding Officer's decision, which found Bruder had operated a hazardous waste facility without a permit. Although the Board ultimately disagreed with the Region's assessment that Respondent's operation of its facility without a permit reflected a major potential for harm under the RCRA Penalty Policy, the Board stated that "[t]he Region's determination reflects case law which generally holds that when a TSD facility fails to obtain a permit, the extent of deviation under the Penalty Policy is major."[35] *Id*.

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[33] As more fully described in Ms. Jacobson's Declaration, Complainant originally calculated an economic benefit of $8,273 for this Count. After the Complaint was filed, however, Complainant determined not to pursue this economic benefit amount, and so the total base penalty became Complainant's total proposed penalty for this count. (*See*, CX04, at 13) This amount is properly reflected as the "total gravity-based penalty" in the penalty summary table on page 13 of CX04. Complainant, however, inadvertently subtracted the economic benefit amount twice in two places when finalizing the document for filing, so the penalty summary tables on pages 5 and 13 reflect an incorrect amount.

[34] Simultaneously with this Motion, Complainant is filing a Motion to substitute a corrected version of CX04. The differences between CX04 and the corrected version CX04Cor, are (1) that the language explaining the matrices applied to the penalty calculation for count 3 are the 2003 Penalty Policy matrices as updated through Ms. Bodine's Memorandum dated January 15, 2020 (on pages 2 and 14); and (2) are in the summary chart on page 5, which will reflect the corrected count 3 and the corrected total penalty, and total penalty line in the chart on page 13.

[35] citing *In re Harmon Elec., Inc.*, 7 E.A.D. 1 (EAB 1997*), rev'd on other grounds* 19 F. Supp 2d 988 (W.D. Mo. Aug. 25, 1998), aff'd 191 F.3d 894 (8 Cir. Sept. 16, 1999); *In re Everwood*, 6 E.A.D. 589 (EAB 1996); *In re*

Potential for Harm. Complainant's description of its analysis of the potential for harm to human health and the environment demonstrates that Complainant fully considered the totality of the facts regarding Respondents illegal storage, including expected witness testimony. The following factors appropriately support a finding of a moderate potential for harm.

> Prime's storage of the hazardous waste in compromised, unlabeled drums with missing bung hole covers, dried paint on the exterior of drums, strong odors emitting from the open drums, in a compromised trailer, and stored at a Facility that did not meet any of the RCRA hazardous waste storage standards posed a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents….The drums were stored outside without secondary containment. Because Prime failed to make a hazardous waste determination of the burned drums and failed to manage them as hazardous waste, it is logical to assume that workers were not informed that the drums contained hazardous waste and were not informed of measures to be taken in event of releases. Similarly, it is logical to assume that Prime did not conduct regular inspections of the drums to check their condition.

CX04, at 13.

Complainant notes further that "[t]aking into account other specific facts of this matter which include the volume of the waste stored, the lack of nearby waterways, and storage of the trailer on a paved surface, a moderate potential for harm is warranted."

Additional information from Respondent's witnesses regarding site security and the imperviousness of the paved surface, and other Facility-specific conditions, would not affect Complainant's selection of a moderate potential for harm for two reasons. First, the totality of the circumstances for this Count demonstrate more than a "relatively low risk of exposure of humans" as required for a finding of a minor potential for harm. RCPP, at 16.

As noted by Complainant in its analysis of the potential for harm "Because Prime failed to make a hazardous waste determination of the burned drums and failed to manage them as

Ashland Chem. Co., 3 E.A.D. 1 (CJO 1989); In re Zalcon Inc., RCRA V W-92-R-9 (June 30, 1998); *In re Bloomfield Foundry, Inc*., RCRA VII 88 H 0017 (July 14, 1989); *In re A.Y. McDonald*, 2 E.A.D. 402 (CJO 1987)."

hazardous waste, it is logical to assume that workers were not informed that the drums contained hazardous waste and were not informed of measures to be taken in event of releases." CX04, at 13. These potential harms are made all the more clear first by Respondent's admission that Respondent arranged to have the damaged trailer and its remaining contents including the intact barrels of paint moved to its Salt Lake City (SLC), Utah facility in October 2015. In arranging this transportation, a representative of Respondent mistakenly advised the Utah based tow company that the trailer involved in the fired had been hauling barrels of water-based paint Answer ¶ 38. In addition, Respondent has described no expected testimony regarding any changes to its understanding of the actual character of the waste from October 2015 to the date of the EPA inspection, or submitted any exhibits showing it understood the hazardous character of the stored materials and took precautions to protect workers at the Facility from the significant risk of exposure. In fact, Mr. Curtis, who manages 75 employees at the Facility, reviewed the shipping documents at some point during storage. It is notable that his expected testimony does not include a discussion about precautions before, or after, taken regarding employee safety.

Second, the harm to the RCRA program here cannot be considered minor ("the actions have or may have a small adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program." RCPP, at 16) The hazardous waste storage method itself did not comply with one RCRA requirement, it is likely the Facility did not comply with facility regulations either. The Board's review of the Presiding Officer's decision in *Everwood*, shows that storing hazardous waste at a facility without a permit rarely can be considered to pose a minor potential for harm to the program.

> As the CJO stated in *In re A.Y. McDonald Industries, Inc*., the RCRA permitting requirements "go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function." *A.Y. McDonald*, 2 E.A.D. at 418. In A.Y. McDonald, the CJO rejected a Presiding Officer's

> determination that the failure to obtain a permit before disposing of hazardous waste on the ground resulted in a "moderate" potential for harm. Rather, the CJO concluded that because of the adverse effect on the RCRA program the potential for harm should be considered "major" **even where there is no evidence of actual harm**. *Id*. at 419…. The CJO cited with approval the following statement in the 1984 RCRA Civil Penalty Policy: There may be violations where the likelihood of exposure resulting from the violation is small, difficult to quantify, or nonexistent, but which nevertheless may disrupt the RCRA program (e.g., failure to comply with financial requirements). This disruption may also present a potential for harm to human health or the environment, due to the adverse effect noncompliance can have on the statutory or regulatory purposes or procedures for implementing the RCRA program. *Id*. at 420 (quoting 1984 RCRA Civil Penalty Policy at 6). The policy applicable to this case, the 1990 Penalty Policy, also supports the conclusion that certain violations may have "serious implications" for the RCRA program and can have a "major" potential for harm regardless of their actual impact on humans and the environment. Penalty Policy at 14. The Penalty Policy lists operating without a permit as one example of this kind of regulatory harm. *Id*. at 14-15 ….
>
> An analysis of the 1990 Penalty Policy clearly indicates that violations of regulatory requirements which are fundamental to the RCRA program such as the permitting requirement at issue in this case "merit substantial penalties" in that they "undermine[] the statutory or regulatory purposes or procedures for implementing the RCRA program." Penalty Policy at 14; see also id. at 48-49 (Hypothetical Application of the Penalty Policy, Example 1) (stating that the potential for harm in operating without a permit is major in that it "may pose a substantial risk of exposure, and may have a substantial adverse effect on the statutory purposes for implementing the RCRA program."). Such violations go to the heart of the RCRA program.

1996 WL 557269 at *8 (emphasis added)

For purposes of this Motion, any additional statements from Respondent's witnesses in support of the conclusion that there is no potential for significant harm to human health and the environment, including testimony of employees, and Respondent's expert witness testimony and report RX20, seen in the best light possible for Respondent, supports a finding of a moderate potential for harm to the environment, rather than major. A determination of a minor potential for harm to the "statutory or regulatory purposes or procedures for implementing the RCRA

program", however, cannot be not justified under these circumstances. Complainant's selection of a moderate potential for harm, therefore, is appropriate for this violation.

Extent of Deviation. Although concise, Complainant's description of the basis for determining that the extent of deviation was major included the additional information discussed in the potential for harm section immediately above.

> As more fully described immediately above, Prime received and stored hazardous waste in unlabeled drums in a compromised truck trailer that was burned and missing approximately half of its structure. Prime deviated from the requirements of the regulation to such an extent that none of the storage requirements that would form the core of a RCRA storage permit were met, resulting in substantial noncompliance which jeopardizes the integrity of the RCRA program.

CX04, at 14.

Respondent's storage of hazardous waste without a permit rendered the permit requirement entirely inoperative. RCPP, at 17. *See also*, *Everwood*, "As the CJO stated in *In re A.Y. McDonald Industries, Inc.,* the RCRA permitting requirements 'go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function.' *A.Y. McDonald*, 2 E.A.D. at 418 . . . . [T]he Presiding Officer concluded, and we agree, that the extent of the deviation from the RCRA regulatory requirements was major . . . . See *A.Y. McDonald*, 2 E.A.D. at 420 (stating that the total failure to adhere to the permitting requirements 'can be described as nothing other than a major deviation')." *Everwood*, 1996 WL 557269 *9; 2003 Penalty Policy at 18 ("MAJOR: The 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.")

Amount from Matrix Cell. The basis for EPA selecting the mid-point of the moderate/major cell for both the gravity-based penalty (for day 1) and the multi-day penalty (for days 2-180) also is set forth in detail in CX04 at 7 (it is the same for each Count). As described there, and in

Section VI.C.3 above, Complainant could have selected the top of the cell based on a number of factors, but did not, because "Prime cooperated with EPA CID's investigation and disposed of the 32 drums of paint waste as hazardous waste at a licensed treatment, storage or disposal facility." CX04 at 8. Under the facts of this case, this essentially results in a 13% reduction in the gravity-based amount for these two factors and a 40% reduction in the multi-day amount.

Multi-Day Penalties. The court in *WCI Steel* calculated a penalty for WCI Steel's operation without a permit and found that "[e]ach day that WCI operated Ponds 5, 6, and 6A without a permit or without interim status is a separate violation of RCRA." *WCI Steel*, 72 F. Supp. 2d at 827.

The 2003 Penalty Policy, at 25-26, states that multi-day penalties are presumed appropriate for days 2-180 of violations with the following gravity-based designations: major-minor, moderate-major, moderate-moderate. Therefore, multi-day penalties should be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files. The presumption may be overcome for one or more days. Multi-day penalties for days 181+ are discretionary.

Complainant sees no "case-specific facts" which overcome the presumption that multi-day penalties are applicable for this violation. This is especially true when multi-day penalties were not proposed for any other violation. *See*, CX04, at 14. Complainant, however, exercised its discretion to not propose penalties for more than 180 days even though the violation ran from October 2015 through August 3, 2016.

Adjustment Factors. Complainant then considered the adjustment factors and reviewed the facts to determine appropriate adjustments to the gravity-based penalty if any. Complainant did so again after Respondent's Prehearing Exchange was complete. The only adjustment factor

Complainant applied to the gravity-based penalty was "willfulness and/or negligence." See the explanation for why Complainant did not adjust the gravity-based penalty downward for any count for "good faith efforts to comply" at the end of Section VI.C.3 above. Complainant applied the same analysis to each Count, and continues to conclude it is appropriate to do so. Complainant's basis for applying a 10% upward adjustment to the gravity-based penalty for each count is set forth in detail in CX04 at 7-8. Regardless of whether the factors evidence negligence or willfulness, Respondent's is a major shipping company. Respondent's failure to consider potential storage requirements for hazardous waste during its almost year-long storage outside in a compromised trailer covered only by a tarpaulin is at least negligent. Respondent's failure to consider the implications of communications with IDEQ about the character of the contamination that remained at the fire site after the first cleanup, seems, perhaps, more willful than negligent. Finally, Mr. Curtis, who manages 75 employees at the Facility reviewed the shipping documents at some point during the storage, and still Respondent felt no urgency to act.

Economic Benefit. As explained in CX04 at 15, after the Complaint was filed, Complainant determined not to include an economic benefit component in the proposed penalty for Count 3 and reduced the proposed amount for this violation accordingly.

5. COUNT 4

Introduction. As more fully set forth in CX04, Complainant has proposed a penalty of $43,683 for Respondent's storage of burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016. Complainant treated this as a one-time violation even though it continued daily. Because at least some of the information Respondent should have considered based on its interactions with IDEQ became available after November 3, 2015, and because most of the days this

violation occurred at Respondent's Facility and came after November 3, 2015, Complainant used the matrix amounts for violations after that date. Complainant selected a major potential for harm, a major extent of deviation, and selected the mid-point of the major-major matrix cell ($39,712). Complainant then considered the adjustment factors and adjusted the penalty upward by 10%.

Potential for Harm. The basis for EPA selecting the major potential for harm is set forth in detail in CX04 at 15-17. Nothing in Respondent's submittals to this proceeding changes the analysis. The requirements of 40 C.F.R. § 265.173 (incorporated by reference at Utah Admin. Code R315-7-16.4) are that "(a) a container holding hazardous waste shall always be closed during storage, except when it is necessary to add or remove waste; and (b) a container holding hazardous waste shall not be opened, handled, or stored in a manner which may rupture the container or cause it to leak." As Complainant explains in CX04

> [e]ven if the product in the drums had not become a total loss, Respondent was on notice that the material needed to be stored much more safely than it was at the Facility. The SDS for the product, which Prime had in its possession prior to and after the fire, indicates that each container should be kept tightly closed; persons should not breathe the vapor or mists; the containers should be stored locked up and not stored at temperatures above 95 degrees Fahrenheit. The SDS goes on to state that the product should be protected from sunlight in a dry, cool, and well-ventilated area and not stored in unlabeled containers. The SDS also directs persons to use appropriate containment to avoid environmental contamination from leaks, spills, or venting.

Id. at 15-16.

The evidence shows that Prime did not ensure that the drums were closed. In fact, during the inspection approximately 10 months after the fire, the EPA CID agents documented strong odor emanating from the drums and the drums were missing bung caps. *Id*. at 14.

Complainant provided a detailed basis why a major potential for harm was selected for this violation.

> The RCPP explains that when a violation involves the actual management of waste, a penalty should reflect the probability that a violation could have resulted in or has resulted in a release of hazardous waste or hazardous constituents or hazardous conditions such as a threat of exposure to hazardous waste or constituents. According to the RCPP, "[s]ome factors to consider include evidence of waste mismanagement (**condition of containers**)…." A larger penalty also 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. Violators should not be rewarded with lower penalties simply because the violation did not result in actual harm, or no evidence of harm has been identified. In this case, EPA does not have direct evidence of spillage or leakage during transportation over 300 miles or during the over 300 days of storage. And, despite evidence of venting, EPA does not have direct evidence of harm to receptors from the venting.

Id. (emphasis added).

Extent of Deviation. The basis for EPA selecting the major extent of deviation is set forth in CX04 at 10-11. Nothing in Respondent's submittals changes the analysis.

> The Facility received and stored hazardous waste in compromised burned drums, that were missing bung hole covers and had evidence of materials staining on the exterior of the drums, and which were not appropriately labeled, in a compromised truck trailer. Prime deviated from the requirements of the regulation to such an extent that most important aspects of the requirements were not met resulting in substantial noncompliance which jeopardizes the integrity of the RCRA program.

Id.

Amount from Matrix Cell. The basis for EPA selecting the mid-point of the major-major cell also is set forth in detail in CX04 at 7 (it is the same for each Count). As described there, and in Section VI.C.3 above, Complainant could have selected the top of the cell based on a number of factors, but did not, because "Prime cooperated with EPA CID's investigation and disposed of the 32 drums of paint waste as hazardous waste at a licensed treatment, storage or disposal facility." CX04 at 8. Under the facts of this case, this essentially results in a 10% reduction in the gravity-based amount for these two factors.

Multi-Day Penalties. Even though under most circumstances multi-day penalties are considered mandatory for major-major violations (RCPP at 25), prior to filing the Complainant, Complainant determined that "[e]ven though EPA has some evidence from the fire response that the drums had vented and were missing bung caps, because EPA is not certain that the drums identified as venting or missing bung covers at the time of the fire response are the exact drums missing bung caps at the Facility at the time of the inspections, this count is reasonably viewed as independent and non-continuous; thus, there is no multi-day assessment for this violation." *Id*. at 17.

Adjustment Factors. Complainant then considered the adjustment factors and reviewed the facts of this matter to determine appropriate adjustments to the gravity-based penalty if any. Complainant did so again after Respondent's Prehearing Exchange was complete. The only adjustment factor Complainant applied to the gravity-based penalty was "willfulness and/or negligence." (See the explanation for why Complainant did not adjust the gravity-based penalty downward for any count for "good faith efforts to comply" at the end of Section VI.C.3 above.) Complainant applied the same analysis to each Count, and continues to conclude it is appropriate to do so. Complainant's basis for applying a 10% upward adjustment to the gravity-based penalty for each count is set forth in detail in CX04 at 7-8.

Respondent's is a national shipping company. Respondent's failure to take into account any of the information on the SDSs about the drums (each container should be kept tightly closed; persons should not breathe the vapor or mists; the containers should be stored locked up and not stored at temperatures above 95 degrees Fahrenheit . . . the product should be protected from sunlight in a dry, cool, and well-ventilated area and not stored in unlabeled containers) and ensure the drums of hazardous waste were closed during its over 10 months-long storage of the

drums outside in a compromised trailer covered by only a tarp is at least negligent. Respondent's failure to consider the implications of its communications with IDEQ about the character of the contamination that remained at the fire site after the first cleanup, seems, perhaps, more willful than negligent.

Economic Benefit. Complainant did not include an economic benefit component in the proposed penalty for Count 4.

6. COUNT 5

Introduction. As more fully set forth in CX04, Complainant has proposed a penalty of $43,683 for Respondent's failure to obtain an EPA identification number prior to storage of at least 20 burned drums of hazardous waste at the Facility in violation of Utah Admin. Code R315-8-2-2.2. Complainant treated this as a one-time violation even though it continued daily. Because at least some of the information Respondent should have considered based on its interactions with IDEQ became available after November 3, 2015, and because most of the days this violation occurred at Respondent's Facility and came after November 3, 2015, Complainant used the matrix amounts for violations after that date. Complainant selected a major potential for harm, a major extent of deviation, and selected the mid-point of the major-major matrix cell ($39,712). Complainant then considered the adjustment factors and adjusted the penalty upward by 10%.

Utah Admin. Code R315-8-2-2.2 requires every facility owner or operator shall obtain an EPA identification number by applying to the State Executive Secretary using EPA form 8700-12 ("Notification of Regulated Waste Activity"). This requirement implements Section 3010 of RCRA, 42 U.S.C. § 6930.[36]

[36] *See, e.g.,* RCRA Subtitle C Reporting Instructions and Forms EPA Forms **8700-12**, 8700-13 A/B, 8700-23, at https://rcrapublic.epa.gov/rcrainfoweb/documents/rcra_subtitleC_forms_and_instructions.pdf, at p.12 of 137.

In *In re Harmon Elec., Inc.*, 7 E.A.D. 1 (EAB 1997), *rev'd on other grounds* 19 F. Supp 2d 988 (W.D. Mo. Aug. 25, 1998), *aff'd* 191 F.3d 894 (8 Cir. Sept. 16, 1999), the Board reviewed the Presiding officer's assessment of a penalty for failure to give notification under section 3010, as well as Respondent's operation of its facility without a permit. The Board observed that

> Harmon's operation of a RCRA facility without a permit or interim status was a particularly serious violation, for until 1988, such operation 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, as Harmon argues. In previous cases, the Agency has found that similar operations presented a major potential for harm, even when risk of actual exposure was not substantial. See *Everwood Treatment Co., supra*; *In re A.Y. McDonald Industries, Inc.,* 2 E.A.D. 402, 418 (CJO 1987). **For similar reasons, the failure to give notification under section 3010 is also a serious violation and a threat to the integrity of the program.**

Id. at *33 (emphasis added).

The Board concluded that "Harmon's disposal of hazardous waste between 1980 and at least the end of 1987 without having complied with the notification requirements in RCRA § 3010, posed a serious threat to the Agency's ability to properly monitor such disposal and thereby ensure the protection of human health and the environment." *Id*. *33

Potential for Harm. The basis for EPA selecting the major potential for harm is set forth in detail in CX04 at 18. Nothing in Respondent's submittals to this proceeding changes the analysis, which is as follows.

> Prime's noncompliance with this requirement directly increased the threat of harm to human health and the environment. Attainment of an EPA ID number for a hazardous waste storage facility ensures that facilities can be tracked and authorized for the proper treatment, storage and disposal of hazardous wastes. Further, it allows regulators to assess whether safe and legal hazardous waste management activities are being conducted at the facility. This is a critical component in tracking the management of the wastes from "cradle to grave," which is a core component of the RCRA program. Prime's failure to obtain an

> EPA ID number, therefore directly increased the risks of harm to humans and the environment.
>
> Violation of this requirement may have serious implications and merits substantial penalty as it undermines the statutory or regulatory purposes or procedures for implementing the RCRA program.

Id. Complainant notes that much of the discussion for the extent of deviation below also is relevant to the potential for harm to the program.

Extent of Deviation. The basis for EPA selecting the major extent of deviation is set forth in CX04 at 19. Nothing in Respondent's submittals changes the analysis. Respondent's failure to notify rendered completely inoperative the requirement violated. RCPP at 17. EPA ID numbers are site-specific. One of the primary purposes of the requirement to obtain an ID number is so that hazardous waste can be accurately tracked whether the waste is generated at that location, moving through that location, or whether it is treated, stored or disposed at that location. As noted above, obtaining an EPA ID number allows the regulators to track compliance with the RCRA program at that facility. Because Prime did not obtain an EPA ID number, neither EPA nor Utah had any record or other knowledge of Respondent's operations and, therefore no way to track the movement of hazardous waste out of the Facility. Further, the regulators also had no reason to visit the Facility to assess Respondent's compliance with any aspect of RCRA. Prime did not obtain an EPA ID number, and therefore, the extent of deviation is major.

Amount from Matrix Cell. The basis for EPA selecting the mid-point of the major-major cell also is set forth in detail in CX04 at 7 (it is the same for each Count). As described there, and in Section VI.C.3 above, Complainant could have selected the top of the cell based on a number of factors, but did not, because "Prime cooperated with EPA CID's investigation and disposed of the 32 drums of paint waste as hazardous waste at a licensed treatment, storage or disposal

facility." CX04 at 8. Under the facts of this case, this essentially results in a 10% reduction in the gravity-based amount for these two factors.

Multi-Day Penalties. Even though under most circumstances multi-day penalties are considered mandatory for major-major violations (RCPP at 25), prior to filing the Complainant, Complainant determined "that it is appropriate to view Prime's failure to obtain an EPA ID number as independent and non-continuous; thus, no multi-day assessment for this violation was calculated." *Id*. at 19.

Adjustment Factors. Complainant then considered the adjustment factors and reviewed the facts of this matter to determine appropriate adjustments to the gravity-based penalty if any. Complainant did so again after Respondent's Prehearing Exchange was complete. The only adjustment factor Complainant applied to the gravity-based penalty was "willfulness and/or negligence." (See the explanation for why Complainant did not adjust the gravity-based penalty downward for any count for "good faith efforts to comply" at the end of Section VI.C.3 above.) Complainant applied the same analysis to each Count, and continues to conclude it is appropriate to do so. Complainant's basis for applying a 10% upward adjustment to the gravity-based penalty for each count is set forth in detail in CX04 at 7-8. Regardless of whether the factors evidence negligence or willfulness, Respondent's is a national shipping company. Respondent's failure to consider potential registration and permitting requirements for hazardous waste during its almost year-long storage of the drums is at least negligent. Respondent's failure to consider the RCRA facility requirements and hazardous nature of the waste it stored at the Facility, after the implications of communications with IDEQ about the character of the contamination that remained at the fire site after the first cleanup, seems, perhaps, more willful than negligent.

Economic Benefit. Complainant did not include an economic benefit component in the proposed penalty for Count 2.

D. A HEARING WILL NOT MATERIALLY AID IN THE CALCULATION OF AN APPROPRIATE PENALTY FOR ANY COUNT

Respondent has requested a hearing. Answer at 6. Respondent admits liability but contests the amount of the proposed penalty. RPHX at 5. Respondent has submitted the documents it proposes to introduce into evidence at the hearing, has briefly summarized the expected testimony of each of its proposed witnesses, RPHX at 2-4, has laid out the grounds for its argument that the penalty was not calculated properly, Answer ¶¶ 36-42; RPHX at 5-8, and, thus, has completed its Prehearing Exchange. Complainant also has completed its Prehearing Exchange.

Complainant has demonstrated that no material question of fact exists that must be resolved before the Presiding Officer may determine Respondent's liability for each Count in the Complaint. *See*, Section V above. Complainant also has demonstrated that each Count in the Complaint is proven by a preponderance of the evidence. The Presiding Officer, therefore, can determine Respondent's liability for each count without a hearing in this matter.

Complainant also has demonstrated that there is no genuine need for a hearing on the proposed penalty for any of the violations because it is reasonable to conclude that additional probative, relevant or material evidence would not be obtained by holding a hearing on the penalty proposed for any of the violations.[37]

[37] See *Zaclon*, "It is well established that the purpose of summary judgment is to 'pierce the pleadings and to assess the proof to see whether there is a genuine need for trial.' Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)." 2006 WL 1695609 *4; *MRM Trucking*, "[a] principal consideration in determining whether a penalty may be assessed in the absence of such a hearing is whether it is reasonable to believe that additional relevant, material, and credible evidence would be obtained." 1993 WL 426020 (EPA ALJ August 18, 1993 at *1.

Complainant has demonstrated that Respondent's positions set forth in its Answer, and Respondents exhibits, description of witness testimony and arguments submitted as part of Respondent's Prehearing Exchange already have been considered and factored in the EPA's penalty analysis in a light most favorable to Respondent, and to the extent appropriate under the circumstances. *See* Section IV.D above. See also Section IV.C for Complainant's analysis of the probative value, relevance of Complainant's allegations denied by Respondent; and the attached Declaration of Linda Jacobson. Because no significant probative facts are likely to be elicited at hearing, the Presiding Officer can review the facts in a light most favorable to Respondent, independently assess Complainant's proposed penalty for each violation, and independently determine an appropriate penalty for each violation without holding a hearing.

VII. CONCLUSION

A. LIABILITY

Complainant has demonstrated that no material question of fact exists that must be resolved before the Presiding Officer may determine Respondent's liability for each count in the Complaint. *See*, Section V above. Complainant also has demonstrated that each count in the Complaint is proven by a preponderance of the evidence. Complainant, therefore, respectfully requests that the Presiding Officer find Respondent liable for each count in the Complaint, specifically that:

1) Respondent failed to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11 (Count 1);
2) Respondent failed to prepare a hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a) (Count 2);

3) Respondent owned and operated a hazardous waste storage facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016 (Count 3);

4) Respondent stored burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016 (Count 4); and

5) Respondent stored at least 20 burned drums of hazardous waste at the Facility prior to obtaining an EPA identification number in violation of Utah Admin. Code R315-8-2-2.2 (Count 5).

B. PENALTY

Congress determined to promote its objective to promote protection of human health and the environment by "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment; [and] **requiring that hazardous waste be properly managed in the first instance** thereby reducing the need for corrective action at a future date." Section 1003(a)(1)(4) and (5) of RCRA, 42 U.S.C. § 6902(a)(1)(4) and (5) (emphasis added). RCRA established a comprehensive "cradle-to-grave" hazardous waste management system.

Two of the fundamental requirements of the RCRA program, which are designed to ensure that hazardous waste is properly managed in the first instance are the hazardous waste identification requirement (which helps ensure that hazardous waste is properly managed and tracked from cradle to grave); and the requirement that each facility handling hazardous waste obtain a unique identification number (which helps ensure that the facility is in compliance with RCRA and that it handles waste in compliance with RCRA, facilitates tracking of hazardous

waste as waste moves from facility to facility, and informs regulators that hazardous waste handling is occurring at that facility).

From the day after the fire, when the drums of hazardous waste were sitting on B&W's lot, until the day EPA-CID showed up to conduct a criminal investigation of the Facility, Respondent failed to properly manage these burned drums of hazardous waste. Of the many RCRA violations Complainant could have chosen to allege and to seek penalties for, Complainant selected these five because they tell the story of Respondent's complete disregard for the hazardous waste management program from the first instance until the waste finally was properly disposed.

In the first instance, Respondent did not make a hazardous waste determination on the drums of waste shortly after the fire or any time thereafter, because in the end the EPA did it for them. Respondent, a national shipping company, caused the 32 burned drums of hazardous waste to be shipped by an unlicensed transporter over 300 miles without a hazardous waste manifest. Respondent received the drums of hazardous waste at its Facility and stored them for 10 months outside, on the fire-damaged trailer, protected from the elements only by tarpaulins, without first obtaining a RCRA permit. From among the many container issues that are self-evident on review of the pictures in the exhibits of both parties from the time of the fire and almost a year later during the EPA-CID inspection, Complainant chose to pursue one count for Respondent's failure to keep the drums closed (because the bungs were missing). Finally, Complainant chose to allege that Respondent did not obtain an EPA Identification number for the Facility, which would have informed EPA and the State of Utah that hazardous waste management activities were occuring at that location.

Complainant has demonstrated that when calculating a proposed penalty for each Count, Complainant applied the 2003 Penalty Policy in accordance with the facts of this case and consistent with the statutory penalty factors set out in 42 U.S.C. § 6928(a)(3). Complainant also has demonstrated that the proposed penalty for each count is not arbitrary or capricious, does not evidence an abuse of discretion, and was made in consideration of all probative, relevant and material evidence. Complainant also has demonstrated that an appropriate penalty for each count can be decided on the submittals of the parties, and, therefore, the Presiding Officer can review the facts in a light most favorable to Respondent, independently assess Complainant's proposed penalty for each violation, and independently determine an appropriate penalty for each violation without holding a hearing.

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

- a penalty of $37,500 for Count 1 (failure to make a hazardous waste determination for 32 drums of paint waste in violation of Utah Admin. Code R315-5-1-1.11);
- a penalty of $36,207 for Count 2 (failure to prepare a hazardous waste manifest for the transportation of the 32 drums of hazardous waste from Idaho to storage at the Facility in violation of Utah Admin. Code R315-5-2-2.20(a));
- a penalty of $$470,329 for Count 3 (owning and operating a hazardous waste storage facility without a permit in violation of Utah Admin. Code R315-3-1-1.1(a) between October 1, 2015, and August 3, 2016);

- a penalty of $43,683 for Count 4 (storage of burned drums of hazardous waste that were left open with bung caps missing in violation of Utah Admin. Code R315-7-15-16.4 between October 1, 2015, and August 3, 2016); and
- a penalty of $43,683 for Count 5 (storage of at least 20 burned drums of hazardous waste at the Facility prior to obtaining an EPA identification number in violation of Utah Admin. Code R315-8-2-2.2).

Dated: February 22, 2021

Respectfully Submitted,

LAURIANNE JACKSON
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Laurianne Jackson
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Environmental Protection Agency Region 8

Of counsel:

Charles Figur
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CERTIFICATE OF SERVICE

The undersigned certifies that on February 22, 2021, I filed electronically the foregoing **MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCLERATED DECISION ON LIABILITY AND PENALTY** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent by electronic mail to Mark Ryan, attorney for Respondent, at mr@ryankuehler.com and Scott McKay, attorney for Respondent, at smckay@nbmlaw.com.

_____ By: /s/ Kate Tribbett_____

Date: February 22, 2021

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