

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

IN THE MATTER OF:

New Prime, Inc.  
3720 West 800 South  
Salt Lake City, Utah

Respondent.

Proceedings under Section 3008(a) of the Solid Waste Disposal Act, as amended by, inter alia, the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)

Docket No. RCRA-08-2020-0007

COMPLAINANT'S PREHEARING EXCHANGE

Complainant, U.S. Environmental Protection Agency, Region 8 (Complainant), provides this Prehearing Exchange as directed in the Presiding Officer's Prehearing Order of November 2, 2020 (Prehearing Order).

**I. Complainants List of Witnesses to be Called at Hearing**

Complainant may call any or all of the following witnesses at hearing. Complainant may not call some of the witnesses on this list if, at the time of hearing, the substance of their testimony is undisputed or stipulated, if they are otherwise determined by Complainant to be unnecessary, or if they are unavailable. Complainant respectfully reserves the right to supplement this list of witnesses to the extent allowed for by 40 C.F.R. Part 22, or by order of the Presiding Officer.

Linda Jacobson (Fact Witness)

Ms. Jacobson holds a bachelor's degree in Chemical Engineering, and a master's degree in both Chemical and Civil Engineering. CX05. Ms. Jacobson is an Environmental Engineer and RCRA Inspector in the Enforcement and Compliance Assurance Division of EPA Region 8. Ms. Jacobson is expected to testify about Respondent's failure to properly manage containers of hazardous waste at Respondent's facility in Salt Lake City, Utah (Facility). Ms. Jacobson is also expected to testify about

the gravity and economic benefit of Respondent's noncompliance with the "cradle to grave" hazardous waste management requirements of the RCRA program regulations. Finally, Ms. Jacobson also will provide a foundation for authentication of Agency records and public records considered in making the penalty determination to the extent that admissibility of such records remains in dispute at hearing.

Darin Mugleston (Fact Witness)

Mr. Mugleston was a Special Agent in EPA's Criminal Investigation Division (EPA-CID) for approximately 22 years. Mr. Mugleston now works as a consultant and criminal investigator for the United States Public Defenders Office. Mr. Mugleston is expected to testify to information gathered during his investigation of Respondent's compliance with RCRA regulations while employed as a Special Agent by EPA-CID, including, but not limited to his observations during the EPA-CID inspection of the Facility on August 2, 2016, and the National Enforcement Investigation Center (NEIC) Inspection on August 24, 2016, where Respondent stored hazardous the hazardous waste in burned drums in a burned truck trailer.

Mr. Mugleston is also expected to provide a foundation for authentication of Agency records he created and maintained while employed by the Agency and public records regarding the criminal investigation into Respondent's compliance with RCRA regulations to the extent that admissibility of such records remains in dispute at hearing.

Jacob Stowell (Fact Witness)

Mr. Stowell is a Physical Scientist in EPA's NEIC in Lakewood, Colorado. Mr. Stowell is expected to testify to his observations during his inspection of the Facility, including at the time of NEIC's inspection on August 24, 2016, and his proper sampling of the paint waste in the burned drums.

John Reschl (Fact Witness)

Mr. Reschl is a Chemist in EPA’s NEIC in Lakewood, Colorado. As lead chemist on the NEIC Report, Mr. Reschl is expected to testify to his analysis of the samples of the paint waste obtained during NEIC’s inspection of the Facility on August 24, 2016.

Expert Witness

Complainant does not anticipate calling any expert witnesses to testify on its behalf at hearing. Should Respondent’s Prehearing Exchange or other submittals reveal the need for one or more expert witnesses to respond to Respondent’s positions, Complainant respectfully reserves the right to supplement this list of witnesses with one or more expert witnesses upon adequate notice to the Presiding Officer and Respondent, and to call such witnesses at the hearing of this matter.

**II. Exhibits Complainant Intends to Introduce into Evidence at Hearing**

Complainant includes with this Prehearing Exchange the documents and exhibits it intends to introduce into evidence. Several of complainant’s exhibits have redactions. These redactions are limited to sensitive personal information (CX07, Driver/Vehicle Examination Report) and names of active federal criminal investigators to protect their identity for law enforcement purposes. These individuals will not be called as witnesses and therefore their identities will not impede this court’s ability to conduct this proceeding, or Respondent’s ability to prepare its defense. Complainant’s exhibits are as follows:

<b>Exhibit #</b>	<b>Document Title/Description</b>	<b>Date</b>	<b>Pages</b>
CX01	EPA’s Unit Cost Compendium, Data and Algorithms for Estimating Costs Associated with “Cradle to Grave” Management of RCRA Solid and Hazardous Waste	9/30/2000	121
CX02	Utah Department of Environmental Quality Rules R315-1 through 9, 12 through 14, 50, 101, and 102	9/15/2003	162
CX03	EJSCREEN Report for the Prime Facility (Utah)	12/14/2020	3
CX04	EPA's Explanation of the Proposed Penalty Assessment in the Matter of New Prime, Inc.	12/16/2020	20
CX05	Resume of Linda Jacobson, U.S. EPA	12/16/2020	3
CX06	Invoice and Bill of Lading	9/28/2015	2

CX07	IAR: IDEQ Inspection Report on Prime, Inc. (September 2015 IDEQ Inspection Report)	1/7/2016	105
CX08	Check from Prime, Inc. to PPG Industries, Inc.	1/9/2016	1
CX09	IAR: Hazmat Manifest and Invoice for 12/29/15 Disposal at US Ecology	3/22/2016	3
CX10	IAR: Meeting and Inspection of Trailer with Brian Singleton and Attorney Peter Christensen, Prime S.L.C. (CID Inspection Report)	8/2/2016	100
CX11	Letter from EPA Re: Preservation Request Letter	8/3/2016	2
CX12	Prime Paint Disposal Records (Invoice and Manifest)	9/23/2016	3
CX13	Prime Trailer Disposal Records (Invoice and Manifest)	11/21/2016	6
CX14	IAR: NEIC Report for 8-24-16 Field Support (NEIC Report)	12/13/2016	67
CX15	Standard Form for Presentation of Loss and Damage Claims		1
CX16	IAR: Interview of Mark Lowe, PPG	1/16/2016	3
CX17	IAR Interview of Sgt. Colin Bonner, ISP	2/4/2016	13
CX18	IAR: Interview - Documents from Derik Janousek	2/9/2016	14
CX19	IAR: Incident Report from Boise Fire Department	2/9/2016	9
CX20	IAR: Interview of Cpt. Riedinger, RRT4	2/22/2016	2
CX21	IAR: PPG Emails (PPG Attorney Transmittal of Emails and Documents) <sup>1</sup>	3/7/2016	2
CX22	IAR: Recorded Interview of Sandy Derrick, B&W Truck Driver	3/30/2016	8
CX23	IAR: Recorded Interview of Tim Corder, CWE	4/13/2016	6
CX24	IAR: Invoices from CWE	4/17/2016	3
CX25	IAR: Documents of Wickenden and Simmons, H2O	5/4/2016	39
CX26	IAR: Interview of Noel Bailey, US Ecology	5/17/2016	25
CX27	IAR: 4-27-16 Receipt of B&W Records	5/20/2016	7
CX28	IAR: EPA Hazardous Waste ID Number Inquiry by IDEQ	7/6/2016	1
CX29	IAR: Interview of Brett Baur and Steve Marrs, Bretts Towing	8/1/2016	2
CX30	IAR: Consent to Search to Sample Drums at Prime, SLC Utah	8/24/2016	13
CX31	IAR: 6-28-16, Transcript of Recorded Interview of Tim Corder, CWE	11/1/2016	99
CX32	PPG Safety Data Sheets, provided as part of 3/7/16 IAR	6/23/2015	80

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<sup>1</sup> To avoid duplication and limit extraneous pages of exhibits, Complainant selected specific pages from the IAR: PPG Emails and Documents dated March 7, 2016, CX21, which includes approximately 659 pages. If the Presiding Officer or Respondent prefers the full content of this IAR, Complainant will include it in Complainants Rebuttal Prehearing Exchange.

CX33	Email from Beth McDonald to Thomas Casey Re: 143320 - Trailer fire - Permission to dispose Prime#1335454 Dispose	9/28/2015	2
CX34	Email from Jill Buatte to Erika Duckworth Re: 143320 - Trailer fire - Permission to Dispose Prime#1335454	9/28/2015	2
CX35	Email from Marc Lowe to Keith McCoy Re: 143320 - Trailer fire - Permission to Dispose Prime#1335454	10/21/2015	3
CX36	Email from Marc Lowe to Joseph Frank Re: Truck fire - shipment from Springdale to Bushnell's	10/21/2015	4
CX37	Email from Marc Lowe to Bill Gallagher Re: Follow-up - truck fire in Hammett, ID	11/4/2015	3
CX38	Email from Marc Lowe to David White Re: Fire dept report - Prime claim #116457	11/10/2015	2
CX39	Email from Marc Lowe to David White Re: 143320 - Trailer fire - Permission to Dispose Prime#1335454	11/25/2015	66
CX40	Email from Marc Lowe to Joann Black Re: Claim against Prime for truck fire - CAP00709220/1335454	12/1/2015	11
CX41	Email from Marc Lowe to Steve Faeth Re: Prime Truck fire-September 2015 (PPG Personnel)	2/2/2016	1
CX42	Email chain from Joann Black to Marc Lowe Re: Claim against Prime for truck fire - CAP00709220/1335454	12/4/2016	10
CX43	NEIC Operating Procedure - Container Sampling	4/27/2010	11
CX44	NEIC Operating Procedure - X-ray Fluorescence Spectrometry Using the Niton Model 792 XLt Field Portable X-ray Fluorescence Spectrometer	3/28/2011	14
CX45	NEIC Operating Procedure - Elemental Analysis	7/9/2013	41
CX46	NEIC Operating Procedure - Water Content Determination by Coulometric Karl Fischer Titration	2/19/2014	16
CX47	NEIC Operating Procedure - Setaflash Method for Determining Ignitability of Liquids	12/11/2014	14
CX48	Email from Karla Perrin to Linda Jacobson re: Transmittal of CID Files	8/3/2020	1
CX49	Complaint Certificate of Service	9/21/2020	1
CX50	Complaint Green Card (Signed)	9/24/2020	1

### III. Complainant's Estimate of Time Needed to Present its Case

Complainant estimates that it will take approximately eight hours to present its direct case. This time frame may be shortened significantly if the parties reach agreement on any or all of the few facts and elements of the case in dispute and if the parties reach agreement on the admission of complainant's

documents and exhibits prior to hearing. This time frame also could be shortened significantly if the parties reach agreement on any of the elements of the expected testimony of each of EPA's witnesses.

**IV. Translation Services**

Complainant does not anticipate requiring translation service to present its direct case.

**V. Documentation Showing Service of Complaint Completed.**

The Prehearing Order requires Complainant to file documentation showing that service of the Complaint was completed in accordance with section 22.5(b)(1) of the Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules of Practice), 40 C.F.R. § 22.5(b)(1). Complainant has included such documentation at CX49(Certificate of Service) and CX50 (Green Card) in its list of proposed exhibits under Section II above.

**VI. Narrative Statement and Documents in Support of Complainant's Allegations Denied or Not Admitted in Respondent's Answer**

Respondent admits Complainant's jurisdictional allegations in paragraphs 1-5 of the Administrative Complaint and Opportunity to Request a Hearing (Complaint). Answer to Complaint and Request for Hearing filed on October 21, 2020 (Answer) para. 2.

Respondent characterizes Complainant's allegations of law in Complaint paragraphs 6-24, 73, 77, 78, 82, 87, 92 and 95 as statements of the law not requiring admission or denial. (Answer paras. 3, 17, 20, 23, 26, 30, and 32). Respondent characterizes EPA allegations of law and EPA policy in Complaint paragraphs 98-114 as "recitation of the law and/or EPA policy and require no answer." (Answer para. 35). Respondent characterizes Complaint paragraphs 72, 76, 81, 86, and 91 as not requiring an answer. (Answer paras. 16, 19, 22, 25, and 29). The substance of the Complaint paragraphs listed in this paragraph, therefore, are not in dispute.

Respondent admits liability for Count 1 (Failure to Make a Hazardous Waste Determination); Count 2 (Failure to Prepare a Manifest); Count 3 (Storage Without a Permit); and Count 5 (Failure to

Obtain an EPA ID Number). The only count in dispute, therefore, is Count 4 (Failure to Properly Manage Containers).

Complainant, therefore, provides the following support for its factual and legal positions denied in whole or in part by Respondent (Complaint paras. 44, 45, 50, 51, 53, 54, 57, 58, 59, 88, 89, 90, 96, and 97). Complainant will use witness testimony, Agency records and public records to demonstrate its factual and legal positions. Paragraph references for the remainder of this section VI follow the Complaint filed September 21, 2020.

Para. 44. Complainant will use fact testimony from Mr. Mugleston, supported as appropriate by complainant's exhibits, including but not limited to Mr. Mugleston's March 30, 2016 Investigation Activity Report for the recorded interview of Sandy Derrick, B&W Truck Driver (March 30, 2016 IAR) CX22; the May 20, 2016 Investigation Activity Report for the 4-27-16 Receipt of B&W Records (May 20, 2016 IAR), CX27; and January 7, 2016 Investigation Activity Report for the IDEQ Inspection Report on Prime, Inc., dated September 27, 2015 (hereinafter referred to as the September 2015 IDEQ Inspection Report), CX07, to show that 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 to B&W's lot located at 20 S. Garden in Boise, Idaho (B&W's lot).

Para. 45. Respondent admitted that Respondent hired B&W to transport the burned trailer and burned drums of paint waste from the site of the trailer fire to B&W's lot. Respondent denies the allegations in footnote 2. To the extent Complainant must prove the allegations in footnote 2, Complainant will use fact testimony from Mr. Mugleston, supported as appropriate by complainant's exhibits, including but not limited to the September 2015 IDEQ Inspection Report, CX07; the April 13, 2016 Investigation Activity Report for the recorded interview of Tim Corder (April 13, 2016 IAR), CX23; and the May 20, 2016 IAR, CX27, to show that Respondent hired Corder, LLC, through B&W,

to transport and dispose of a portion of the burned drums of paint waste from the B&W Lot to a commercial municipal solid waste landfill operated by Idaho Waste Systems in Mountain Home, Idaho.

Para. 50 and 51. Complainant will use fact testimony from Mr. Stowell and Mr. Muggleston, supported as appropriate by complainant's exhibits, including but not limited to the August 2, 2016 Investigative Activity Report for the CID Inspection (hereinafter referred to as the CID Inspection Report), CX10; and the December 13, 2016, Investigative Activity Report including the August 24, 2016 NEIC Report (hereinafter referred to as the NEIC Report), CX14, to show the drums of paint waste on the trailer were emanating a strong chemical odor and did not have labels.

Para. 53. Respondent admitted in the Answer para. 11 that EPA conducted an inspection of the Facility on August 24, 2016. To the extent, however, that Complainant must prove that the NEIC conducted a field inspection at the Facility, Complainant will use fact testimony from Mr. Stowell and Mr. Muggleston, supported as appropriate by the NEIC Report, CX14, to show that NEIC conducted a field inspection on that date.

Para. 54. Complainant will use fact testimony from Mr. Stowell, supported as appropriate by complainant's exhibits, including but not limited to the NEIC Inspection Report to show that NEIC staff performed X-ray fluorescence spectrometry analysis of the fluids in the 32 drums of paint waste stored at the Facility. CX14.

Para. 57. Complainant will use public records to show that strontium chromate is used as a metal protective coating to prevent corrosion, as a colorant in polyvinyl chloride resins, and in pyrotechnics.

Para. 58. Complainant will use fact testimony from Mr. Stowell, supported as appropriate by complainant's exhibits, including but not limited to the NEIC Report, CX14, to show that Mr. Stowell properly extracted representative samples from 8 of the 20 burned drums that contained material consistent with strontium chromate primer.

Para. 59. Complainant will use fact testimony from Mr. Reschl and Mr. Stowell, supported as appropriate by complainant's exhibits, including but not limited to the NEIC Report, CX14, to show that NEIC conducted TCLP analysis on the 8 representative samples for toxicity and ignitability characteristics.

Para. 88. Although Respondent admitted in the Answer para. 27, that several drums of the paint waste were covered by a tarp and missing bung caps, to the extent that Complainant must prove that the burned drums of paint waste on the trailer were open and missing bung caps, Complainant will use fact testimony from Mr. Stowell and Mr. Mugleston, supported as appropriate by complainant's exhibits, including but not limited to the CID Inspection Report, CX10; and the February 9, 2016 Investigative Activity Report for the Incident Report from the Boise Fire Department (February 9, 2016 IAR), CX19, to show that the burned drums of paint waste at the Facility were open and missing covers known as bung caps.

Paras. 89 and 90. Although Respondent admitted in the Answer para. 28, that the burned drums stored at the Facility from October 1, 2016 to August 3, 2016, had been in a fire and some of the bung caps were missing, to the extent that Complainant must prove all 32 drums and paint waste stored at the Facility were burned and that Respondent stored burned drums of hazardous waste that were left open with bung caps missing, Complainant will use fact testimony from Mr. Stowell and Mr. Mugleston, supported as appropriate by complainant's exhibits, including but not limited to the CID Inspection Report, CX10; the NEIC Report, CX14; the August 1, 2016 Investigative Activity Report for the Interview of Brett Baur and Steve Marris (August 1, 2016 IAR), CX29; and the February 4, 2016 Investigative Activity Report for the Interview of Sgt. Colin Bonner, Idaho State Patrol (February 4, 2016 IAR), CX17.

Paras. 96 and 97. Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), provides for a violation to be subject to separate penalties for each day of a continuing violation. Complainant will use fact

testimony from Ms. Jacobson, including *EPA's Explanation of the Proposed Penalty Assessment*, CX04, supported as appropriate by other of complainant's exhibits, to demonstrate the extent of non-compliance, and the amount of appropriate penalties considering the statutory penalty factors in 42 U.S.C. § 6298(a)(3), through the application of the RCRA Civil Penalty Policy to the facts of this matter.

## **VII. Facts and Policy Relevant to Complainant's Assessment of a Penalty**

Included with this Prehearing Exchange is *Complainant's Explanation of the Proposed Penalty Assessment*, CX04, which describes the law, policies and facts germane to calculating the appropriate penalty pursuant to 42 U.S.C. § 6298(a)(3). As addressed in more detail in CX04, Complainant proposes a penalty of \$631,402 for the violations alleged in the Complaint.

The Prehearing Order requires Complainant to file a copy, or a statement of the internet (URL), of any EPA guidance documents and/or policies, including any updates or revisions to such guidance and/or policies, and any preambles to regulations that Complainant has relied upon with regard to the allegations set forth in the Complaint. Complainant intends to rely on the following:

- a. *RCRA Civil Penalty Policy* (2003), available at

<https://www.epa.gov/sites/production/files/2020-05/documents/june2003rcracivilpenaltypolicyamended050620.pdf>

- b. Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (effective January 12, 2008) and Transmittal of the December 11, 2008 Civil Monetary Penalty Inflation Adjustment Rule, dated December 29, 2008, available at <https://www.epa.gov/sites/production/files/documents/amendmentstopenaltypolicies-implemmentpenaltyinflationrule08.pdf>

c. EPA Memorandum from Rosemarie A. Kelley, *Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009* (April 6, 2010), available at <https://www.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf>

d. Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (effective January 15, 2020) and Transmittal of the January 13, 2020 Civil Monetary Penalty Inflation Adjustment Rule, dated January 15, 2020, available at <https://www.epa.gov/sites/production/files/2020-01/documents/2020penaltyinflationruleadjustments.pdf>

e. National Center for Biotechnology Information (2020). PubChem Compound Summary for CID 24599, Strontium chromate. Retrieved December 16, 2020, available at <https://pubchem.ncbi.nlm.nih.gov/compound/Strontium-chromate>

## **VIII. Complainant's Explanation of the Factors Considered and Methodology Utilized in Calculating the Proposed Penalty.**

As described in Section VI above, CX04, *Complainant's Explanation of the Proposed Penalty Assessment*, describes the law, policy, and facts germane to calculating an appropriate penalty in this matter pursuant to 42 U.S.C. § 6928(a)(3).

## **IX. Utah Administrative Code**

The EPA and Utah regulations cited in EPA's Complaint are set forth in 40 C.F.R. Parts 262 and 264, and Utah Admin. Code R315-3, R315-5, R315-7 and R315-8 (2003). The EPA last authorized revisions to the State of Utah's authorized hazardous waste program on March 7, 2008. 73 Fed. Reg. 12277, on regulations submitted by Utah on September 30, 2003. Utah Admin. Code R315-1 through 9, 12 through 14, 50, 101, and 102 (2003), therefore, is included herein at CX02.

Dated: December 18, 2020

Respectfully Submitted,

LAURIANNE

JACKSON

Laurianne Jackson

Senior Assistant Regional Counsel

U.S. Environmental Protection Agency, Region 8

Digitally signed by LAURIANNE  
JACKSON  
Date: 2020.12.18 17:02:42 -07'00'

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 18, 2020, I filed electronically the foregoing **COMPLAINANT'S PREHEARING EXCHANGE and EXHIBITS** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System, which sends a Notice of Electronic Filing to Respondent.

Additionally, I hereby certify that on December 18, 2020, I served a true and correct copy of the **COMPLAINANT'S PREHEARING EXCHANGE and EXHIBITS** by electronic mail to Mark Ryan, attorney for Respondent, at mr@ryankuehler.com and Scott McKay, attorney for Respondent, at smckay@nbmlaw.com.

December 18, 2020  
Date

By: /s/ Kate Tribbett  
Kate Tribbett  
Paralegal  
Regulatory Enforcement Section  
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