UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF: Bluestone Coke, LLC 3500 35th Avenue North Birmingham, Alabama 35207 Respondent. Proceedings under Section 3008(a) and (h) of the Solid Waste Disposal Act, as amended by, inter alia, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(a) and (h)	Docket No. RCRA-04-2023-2106 **COMPLAINANT'S AMENDED REBUTTAL PREHEARING EXCHANGE**

Pursuant to 40 C.F.R. § 22.20, the Presiding Officer's Prehearing Order of July 11, 2024 (the Prehearing Order), and the Presiding Officer's Order Imposing Sanctions & Scheduling Order of October 24, 2024 (the Scheduling Order), Complainant, the Director of the Enforcement and Compliance Assurance Division of Region 4 of the United States Environmental Protection Agency (the EPA), by and through the undersigned, provides the following as its Amended Rebuttal Prehearing Exchange:

I. Statement in Response to Respondent's Prehearing Exchange

As noted in the Scheduling Order, Respondent, Bluestone Coke, LLC, failed to file its Prehearing Exchange (PHX) on or before September 13, 2024, as required by the Prehearing Order. (Scheduling Order at 2). Despite communications from the Office of Administrative Law Judges (OALJ) bringing this failure to Respondent's attention, as of October 4, 2024, the PHX had still not

been properly filed, and so the Presiding Officer entered an Order to Respondent to Show Cause (the OSC) on that date. (*Id.*).

The OSC required Respondent by October 11, 2024, to "file and serve a document . . . showing cause as to why it failed to file a [PHX] as required by [40 C.F.R. § 22.19(a)] and as directed by the Prehearing Order, and why an adverse order should not be entered against it." (OSC at 3). The OSC did *not* give Respondent leave to file its PHX out of time, and, in fact, it noted that the OALJ had informed Respondent that any PHX it wished to file "would now need to be accompanied by a motion for leave to file out of time." (*Id.*).

On October 10, 2024, Respondent filed its PHX, but it still failed both to file the exhibits thereto and to serve the PHX on Complainant. (Scheduling Order at 3). Despite these failures, Respondent's PHX falsely claimed that it "included" its exhibits with its PHX (Ex. CF16 to Scheduling Order at 3) and that unredacted versions of its exhibits that contained CBI had been "provided separately to the OALJ pursuant to instructions received therefrom" (*Id.*). Counsel for Respondent also falsely certified that he had "sent [the PHX] by electronic mail to" undersigned counsel on October 10, 2024. (*Id.* at 6).

Respondent also failed to file a motion for leave to file its PHX out of time or to consult with Complainant as to its position on any such motion, as required by the Prehearing Order. Because Respondent's PHX was filed without compliance with any of the Presiding Officer's orders or the permission of this Tribunal,[1] without service upon Complainant as required pursuant to 40 C.F.R. § 22.5(b), and with several material misrepresentations in its text—Complainant's first response thereto is that Complainant objects to the entry of Respondent's PHX.

[1] Although the Scheduling Order at least tacitly recognizes Respondent's submission of its PHX.

In the alternative, however, Complainant makes the following additional response thereto. Pursuant to the Prehearing Order, Respondent was required to submit as part of its PHX "(A) a copy of any documents in support of the denials made in its Answer," (B) a copy of any documents in support of any asserted affirmative defenses and an explanation of the arguments in support of any such affirmative defenses," and "(C) all factual information Respondent considers relevant to the assessment of a penalty, including any information regarding ability to pay, and any supporting documentation." As discussed below, Respondent's PHX does not properly meet any of these requirements; therefore, there is no information or documentation for Complainant to substantively rebut.

A. Documents in Support of Respondent's Denials

Respondent did submit eleven exhibits with its PHX (RX01 – RX11), but as it did not identify which, if any, of these documents were intended to support the denials it made in its June 27, 2024 Answer By Respondent to Complaint, Compliance Order, and Opportunity to Request a Hearing (the Answer), Complainant can only speculate as to Respondent's intentions regarding these documents.

Four of Respondent's exhibits (RX01, RX02, RX04, and RX05) are mere copies of filings that were previously made in this case. Another of the exhibits (RX03) is a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits at 40 C.F.R. Part 22. None of these five exhibits, therefore, can provide support to any of Respondent's denials.

Three of the remaining six exhibits (RX09, RX10, and RX11) are copies of documents that Respondent submitted to the EPA as Confidential Business Information (CBI) between August 5 and

August 21, 2024, in order to substantiate its claim that it is unable to provide financial assurance. The other three exhibits (RX06, RX07, and RX08) are the cover letters that were sent with those CBI documents. The documents presented in these six exhibits all purport to provide information about the current financial state of Respondent and its parent and other affiliated entities, and they are all thus irrelevant to nearly all of the denials made in the Answer.[2]

More specifically, this means that Respondent failed to support the denials in its Answer of the factual and legal positions alleged in the April 10, 2024, Complaint, Compliance Order, and Opportunity to Request a Hearing (the Complaint) in paragraphs 1, 8, 9, 29, 32–44, 47, 52–55, 57, 59–69, 71–73, 75–76, and 78–95 thereof. As such, Complainant has nothing to respond to regarding these denials.

B. Documents and Explanation in Support of Respondent's Asserted Affirmative Defenses

The statements in Paragraphs 110–120 of the Answer are styled as "affirmative defenses" that Respondent is raising in this matter. Nowhere in Respondent's PHX are these defenses mentioned, however, and Respondent provides no explanation in support of the affirmative defenses nor any indication of which, if any, of the documents it provided were submitted in support thereof. As with the denials discussed above, therefore, Complainant can only speculate as to how the documents submitted by Respondent were intended to support its affirmative defenses, but it is clear from any interpretation, that they do not substantially do so.

In Paragraph 110 of the Answer, Respondent states that it "denies each and every material allegation of the Complaint not previously and/or specifically admitted herein and demands strict

[2] In paragraph 3 of the Complaint, Complainant erroneously alleged that Respondent is a "Delaware corporation," when it is, in fact, a limited liability company (LLC). Respondent's exhibits do support its denial of this paragraph by demonstrating that it is an LLC. All of Respondent's other denials remain unsupported.

proof thereof."[3] As discussed in Section I.A. above, Respondent's PHX did not provide any documents or explanation in support of these denials.

In Paragraph 111 of the Answer, Respondent states that it "denies any violations of any agreement, contractual, or otherwise, that is allegedly entered into."[4] Presumably, this assertion is made because Respondent is claiming that the 2016 RCRA Section 3008(h) Administrative Order on Consent (the 2016 Order, Exhibit CX03), which Complainant seeks to enforce in this matter, is such an "agreement." Respondent's signature (under its former name) appears on the 2016 Order. (Ex. CX03 at 28). Respondent's PHX does not include any documents to support or any discussion of how or why this signature should not be viewed as evidence of its "agreement," nor why the 2016 Order should not be binding on it. Further, as discussed in Section I.A. above, Respondent's PHX also did not provide any documents or explanation in support of any blanket denial of the fact that it violated the 2016 Order.

In Paragraph 112 of the Answer, Respondent claims, without elaboration, that "the Complaint separately and severally fails to state a claim or cause of action against the Respondent upon which relief may be granted."[5] Respondent's PHX failed to include any legal analysis or explanation in support of this claim, and, as it is an assertion of law, no factual support was or could have been provided in support thereof.

[3] Despite its inclusion in the Answer's "Affirmative Defenses" section, this paragraph fails to state an affirmative defense. *See*, *e.g. Flav-O-Rich, Inc. v. Rawson Food Serv., Inc. (In re Rawson Food Serv., Inc.)*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("A defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense . . . An affirmative defense raises matters extraneous to the plaintiff's prima facie case.").

[4] This paragraph also fails to state an affirmative defense.

[5] This paragraph also fails to state an affirmative defense.

In Paragraph 113 of the Answer, Respondent asserts that "[a]ny claim for punitive damages made in the Complaint is barred under either Federal Law or State Law against the Respondent and should be stricken."[6] Respondent's PHX did not provide any documents or explanation in support of this claim.

In Paragraph 114 of the Answer, Respondent states that it "pleads the defense of laches and estoppel as a bar to the Complaint." To raise such a defense, Respondent would need to make a showing that Complainant unreasonably delayed in bringing this action. Respondent's PHX did not provide any documents or explanation in support of this claim.

In Paragraph 115 of the Answer, Respondent states that it "pleads collateral estoppel or issue preclusion as a bar to the Complaint." To raise such a defense, Respondent would need to make a showing that certain issues in this case have already been litigated and decided in a prior case. Respondent has identified no such issues, and Respondent's PHX did not provide any documents or explanation in support of this claim.

In Paragraph 116 of the Answer, Respondent states that it "pleads lack of cooperation as a bar to the Complaint" because "Respondent provided an insurance policy providing adequate financial assurance that was summarily rejected." Initially, Respondent has provided no explanation or documentation to suggest that Complainant had any legal duty to cooperate such as would give rise to the existence of this affirmative defense. Secondly, Complainant has previously submitted the purported insurance policy (CX22 and CX23) and the emails between the EPA and Respondent discussing why it was insufficient to provide the necessary financial assurance (CX21) as exhibits.

[6] This assertion is irrelevant to the case at bar as no claim for "punitive damages" was, in fact, made in the Complaint.

Respondent's PHX did not provide any documents or explanation that would support either the sufficiency of the policy, or any other reason that the EPA's rejection of the policy should be viewed as a "lack of cooperation."

In Paragraph 117 of the Answer, Respondent states that it "pleads the willful concealment of facts as a bar to the Complaint." Respondent's PHX did not provide any documents or explanation in support of this bald accusation.

In Paragraph 118 of the Answer, Respondent states that it "pleads force majeure and events beyond the Respondent's control as a bar to the Complaint" and proceeds to outline a narrative of Respondent's purported financial difficulties. Respondent's Exhibits RX06–RX11 do at least arguably attempt to provide support for its claim that it is "in a distressed financial position." However, Respondent's PHX does not provide any documents or explanation in support of the claim that the circumstances described by Respondent rise to the level of a force majeure event, as defined by Section XXIX the 2016 Order (CX03 at 25–26). The provisions of the 2016 Order require, among other things, that Respondent use its "best efforts" to fulfill all obligations under the order despite the force majeure event and that Respondent provide oral notice of the occurrence of the force majeure event within 48-hours of Respondent's awareness thereof and written notice within five days thereafter. Nothing in Respondent's PHX provides support for the claim that these or the other requirements under Section XXIX of the 2016 Order have been met.

In Paragraph 119 of the Answer, Respondent states that it pleads that its "counsel has not yet had an opportunity to complete a full investigation into all of the facts and legal issues involved in this case" and then provides an unadorned list of various defenses, many of which do not and could not apply to this case. Respondent's PHX does not provide any documents or explanation that

would support any of the defenses listed in this paragraph. Complainant notes that the underlying order requiring financial assurance from Respondent is now over eight years old, and it has been in active communication with counsel for Respondent about the financial assurance requirement since at least 2020. Complainant's response is therefore that Respondent's counsel has had ample "opportunity to complete a full investigation into all of the facts and legal issues involved in this case."

In Paragraph 120 of the Answer, Respondent states that it is "giv[ing] notice that [it] intend[s] to rely upon any other defenses that may become available or appear during the discovery proceedings in this case and hereby reserve[s] the right to amend [its] Answer to assert any such defenses." Despite having already received "discovery" in the form of Complainant's PHX, Respondent gives no indication in its own PHX of what such defenses might be, and it provides no explanation or documentation to support any other defenses.

Respondent's PHX therefore provided no documents to support, or explanation of, its purported affirmative defenses, and Complainant can thus make no substantive responses thereto.

C. Information and Documents Respondent Finds Relevant to Penalty Assessment

Respondent did not provide any "factual information [it] considers relevant to the assessment of a penalty, including any information regarding inability to pay, and any supporting documentation," as required by the Prehearing Order. As discussed above, Respondent produced three exhibits (RX09–RX11) containing financial documents. As evidenced by their cover letters, all of these documents had been previously sent to the EPA by Respondent in attempts to "substantiate [Respondent's] inability to pay *for financial assurance*." (RX06–RX08, emphasis added). As Respondent has been informed on multiple occasions, however, the financial

statements submitted in Exhibits RX09–RX11 are insufficient to allow the EPA to make an inability to pay determination, both because they are unaudited and because they commingle the financial data of Respondent with its parent and other affiliated entities.

Furthermore, in prior conversations the Parties have discussed Respondent's purported inability to pay *financial assurance* in this matter. Respondent has made no claim, either in its Answer, its PHX, or even in informal discussions with EPA, that it is unable to pay a *penalty* in this matter. Therefore, as Respondent has not provided information or documents relevant to a penalty assessment, Complainant cannot offer a response.

II. Statement Specifying a Proposed Penalty

Pursuant to the Prehearing Order, Complainant is also required to provide a statement specifying a proposed penalty and a detailed explanation of the factors considered and methodology utilized in calculating the amount of the proposed penalty. The Prehearing Order referenced 40 C.F.R. § 22.19(a)(4) for this requirement, which obligates Complainant to provide a proposed penalty and explanation "[w]ithin 15 days after [R]espondent files its prehearing exchange."

In Respondent's PHX, Respondent is required by the Prehearing Order to provide factual information it considers relevant to Complainant's assessment of a penalty, including information regarding Respondent's ability to pay. As noted in Section I.C., above, Respondent's PHX does not provide any such relevant factual information, nor does it address the assessment of any penalty. Under Section 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6828, the EPA is not required to consider the ability of a violator to pay a proposed penalty when calculating said penalty. As a result, the RCRA Civil Penalty Policy states that "a company's inability to pay

usually will be considered only if the issue is raised by the respondent." (Ex. CX53 at 39). As Respondent has not raised the issue, Complainant submits that it should not be considered.

In the event that Respondent's ability to pay were to be evaluated here, however, the only documentation that Respondent has provided to do so is insufficient. Complainant has determined that it cannot use these documents to perform an ability to pay analysis for either financial assurance or a penalty because, as explained above, Respondent's financial documents are unaudited, and they commingle the financial data of Respondent with its parent and other affiliated entities. Complainant is thus unable to form a clear understanding of Respondent's particular financial circumstances.

Subject to the foregoing, Complainant proposes a penalty in this matter in the total amount of **$13,696,087**.

III. Explanation of Penalty Factors and Methodology

The proposed penalty specified in Section II above was calculated using the 2003 Revisions to the 1990 RCRA Civil Penalty Policy[7] that was previously submitted by Complainant as Exhibit CX53, in conjunction with the revisions and amendments thereto that were previously submitted by Complainant as Exhibits CX54–CX58 and CX73. These calculations are evidenced and explained in the Penalty Justification Memorandum dated September 27, 2024 (the Penalty Memo), that is newly submitted herewith as Exhibit CX74, and in the Penalty Calculation Worksheets and Penalty Calculation Narratives that are attached to the Penalty Memo (Ex. CX74 at 4–26).

(Signature on next page)

[7] The RCRA Civil Penalty Policy is based upon Section 3008 of RCRA and therefore incorporates the statutory requirements for any penalty assessment to consider the seriousness of the violation and Respondent's good-faith efforts, if any, to comply.

Dated: December 5, 2024

Respectfully Submitted,

JOAN DURBIN

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Joan Redleaf Durbin
Senior Attorney
RCRA/FIFRA/TSCA Law Office
U.S. Environmental Protection Agency, Region 4

CERTIFICATE OF SERVICE

The undersigned certifies that on December 5, 2024, I electronically filed the foregoing **COMPLAINANT'S AMENDED REBUTTAL PREHEARING EXCHANGE** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent it by electronic mail to James V. Seal and Ron Hatfield, attorneys for Respondent, at James.Seal@bluestone-coal.com and Ron.Hatfield@bluestone-coal.com.

Date: December 5, 2024

JOAN DURBIN

Digitally signed by JOAN DURBIN
Date: 2024.12.05 12:29:27 -05'00'

Joan Redleaf Durbin
Senior Attorney
RCRA/FIFRA/TSCA Law Office
U.S. Environmental Protection Agency, Region 4