

**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

**COMPLAINANT'S POST-HEARING BRIEF**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
A.	Factual Background .....	2
B.	Statement of the Case.....	4
II.	ALL TWENTY DRUMS OF STRONTIUM CHROMATE PRIMER WASTE WERE RCRA HAZARDOUS WASTE .....	7
III.	COMPLAINANT HAS MET ITS BURDEN TO SHOW THAT \$631,402 IS A REASONABLE PENALTY FOR RESPONDENT’S FIVE VIOLATIONS OF RCRA .....	9
A.	Each of Prime’s Violations Increased the Risk of Exposure to Hazardous Waste and the Potential for Harm.....	9
1.	The Hazardous Waste Prime Generated and Improperly Managed Was Inherently Toxic.....	9
2.	Harm to Human Health and the Environment for Purposes of the RCPP.....	10
B.	Complainant’s Proposed Penalty Fully Considers Respondent’s Compliance History, Cooperation After EPA’s Investigation Reached the Facility, and Respondent’s Eventual Return to Compliance.....	12
1.	Compliance History.....	12
2.	Cooperation .....	13
C.	The Proposed Penalty is Reasonable and Reflects Full Consideration of the Statutory Factors as Applied Through the RCPP .....	15
1.	Facts Applicable to More Than One Count .....	17
a.	The Bill of Lading, Prime’s Computer System, and Flammable Placards Provided Respondent with Significant Information About the Hazardous Nature of the Waste.....	17
b.	The IDEQ Communications, SDSs and the Hazardous Waste from the Second Cleanup Provided Respondent with Additional Information About the Hazardous Nature of the Waste .....	20
2.	COUNT 1-Failure to Make a Hazardous Waste Determination, Utah Admin. Code R315-5-1-1.11.....	22
a.	Introduction.....	22
b.	Potential for Harm.....	22
i.	Harm to the Program.....	23
ii.	Harm to Human Health and the Environment .....	23
c.	Extent of Deviation.....	24

d.	Amount from the Matrix Cell .....	25
e.	Multi-Day Penalties .....	25
f.	Adjustment Factors .....	26
g.	Economic Benefit.....	27
3.	COUNT 2-Failure to Prepare a Manifest, Utah Admin. Code R315-5-2-2.20(a).....	28
a.	Introduction.....	28
b.	Potential for Harm.....	28
i.	Harm to the Program.....	28
ii.	Harm to Human Health and the Environment .....	30
c.	Extent of Deviation.....	31
d.	Amount from Matrix Cell.....	31
e.	Multi-Day Penalties .....	32
f.	Adjustment Factors .....	32
4.	COUNT 3-Storage Without a Permit- Utah Admin. Code R315-3-1-1.1(a).....	32
a.	Introduction.....	32
b.	Potential for Harm.....	33
i.	Harm to the Program.....	33
ii.	Conditions at the Facility and Harm to Human Health and the Environment.....	35
iii.	Expert Testimony and the Risk of Exposure .....	40
(a)	Dr. Walker did not properly assess exposure pathways, and, therefore, her assessment that the probability of exposure was low is in error. ....	41
(b)	Dr. Walker’s assessment that the risk of fire was low was inaccurate.....	43
(c)	Dr. Walker’s conclusion that there was a low probability of harm to human health and the environment from the improper storage of the waste is flawed.....	45
c.	Extent of Deviation.....	46
d.	Amount from Matrix Cell.....	47
e.	Multi-Day Penalties .....	47
f.	Adjustment Factors .....	48
g.	Economic Benefit.....	48
5.	COUNT 4-Failure to Properly Manage Containers, Utah Admin. Code R315-7-15-16.4 .....	49
a.	Introduction.....	49
b.	Potential for Harm.....	49

i.	Harm to the Program.....	49
ii.	Harm to Human Health and the Environment .....	49
c.	Extent of Deviation.....	50
d.	Amount from Matrix Cell.....	51
e.	Multi-Day Penalties .....	51
f.	Adjustment Factors .....	51
6.	COUNT 5-Failure to Obtain an EPA ID Number, Utah Admin. Code R315-8-2-2.2... 52	
a.	Introduction.....	52
b.	Potential for Harm.....	52
i.	Harm to the Program.....	52
ii.	Harm to Human Health and the Environment .....	53
c.	Extent of Deviation.....	53
d.	Amount from Matrix Cell.....	54
e.	Multi-Day Penalties .....	54
f.	Adjustment Factors .....	54
IV.	CONCLUSION.....	54

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>A.Y. McDonald Indus., Inc.</i> , 2 E.A.D 402 (CJO 1987).....	15, 33, 34, 47
<i>Carroll Oil Co.</i> , 10 E.A.D. 635 (EAB 2002).....	16
<i>Cohen v. Perales</i> , 412 F.2d 44 (5th Cir.1969).....	5, 8, 9, 10
<i>Everwood Treatment Co. v. EPA</i> , No. 96-1159-RV-M, 1998 WL 1674543 (S.D. Ala., Jan. 21, 1998).....	15
<i>In the Matter of Ashland Chemical Company, Division of Ashland Oil, Inc.</i> , 3 E.A.D. 1 (E.P.A.), 1989 WL 253202).....	29
<i>In the Matter of Chem-Solv, Inc.</i> , 2014 WL 2593697.....	23
<i>In the Matter of Titan Wheel Corporation of Iowa</i> , 2002 WL 1315600 (EAB 2002).....	14-15
<i>In re Catalina Yachts, Inc.</i> , 8 E.A.D. 199 (EAB 1999).....	14
<i>In re Everwood Treatment Co.</i> , 6 E.A.D. 589 (EAB 1996).....	passim
<i>In re Harmon Elec., Inc.</i> , 7 E.A.D. 1 (EAB 1997).....	5, 34, 52
<i>In re Great Lakes Division of National Steel Corp.</i> , 5 E.A.D. 355, 1994 WL 372214 (1994).....	5
<i>In re M.A. Bruder &amp; Sons, Inc.</i> , 10 E.A.D. 598 (EAB 2002).....	16
<i>In re Mayes</i> , No.3:05-CV-478, 2008 WL 65178 (E.D. Tenn, Jan. 4, 2008).....	15
<i>New Waterbury, Ltd.</i> , 5 E.A.D. 529, 1994 WL 615377 (EAB 1994).....	1
<i>United States v. Davis</i> , 826 F. Supp. 617 (D.R.I. 1993).....	5
 <b>Statutes</b>	
42 U.S.C. § 6901(b)(5) .....	33
42 U.S.C. § 6902(a)(1)(4) and (5).....	55
42 U.S.C. § 6924(a)(6).....	33
42 U.S.C. § 6925(a) .....	33
42 U.S.C. § 6928.....	6
42 U.S.C. § 6928(a)(3).....	56
42 U.S.C.A § 6922(a)(5).....	29

**Rules**

Federal Rule of Evidence 803(8) ..... 5

**Regulations**

40 C.F.R. § 22.14(a)(4)..... 16  
40 C.F.R. § 22.24..... 1  
40 C.F.R. § 22.27(a)..... 6  
40 C.F.R. § 22.27(b) ..... 16  
40 C.F.R. § 261.21(a)(1)..... 21  
40 C.F.R. § 262.42 ..... 29  
40 C.F.R. § 263.10 ..... 30  
40 C.F.R. Parts 264 and 270 ..... 33  
40 C.F.R. 264 Subpart B..... 33  
40 C.F.R. 264 Subpart I ..... 33  
40 C.F.R. § 264.17 ..... 33  
Utah Admin. Code R315-5-1-1.11..... 1, 22, 56  
Utah Admin. Code R315-8-2-2.2..... 1, 52, 57  
Utah Admin. Code R315-7-15-16.4..... 1, 49, 57  
Utah Admin. Code R315-5-2-2.20(a) ..... 1, 28, 57  
Utah Admin. Code R315-3-1-1.1(a) ..... 1, 32, 57

**Other Authorities**

43 Fed. Reg. 58985 (Dec. 18, 1978)..... 29  
45 Fed. Reg. 12724 (Feb. 26, 1980) ..... 23  
H.R. Rep. 1491, 94th Cong. 2d (1976)..... 29

COMES NOW, the U.S. Environmental Protection Agency Region 8 (Complainant, or Region 8), by and through its undersigned counsel and pursuant to this Court's November 9, 2022, Order Scheduling Post-Hearing Submissions, to respectfully offer the following post-hearing brief.

## I. INTRODUCTION

Complainant filed the Complaint in this matter on September 21, 2020, alleging that New Prime, Inc. (Respondent or Prime) committed five violations of the Resource Conservation and Recovery Act (RCRA).<sup>1</sup> Respondent filed its answer on October 21, 2020. Complainant filed a motion for accelerated decision on liability and penalty on February 22, 2021. By order dated April 4, 2022 (April 4 Order), this Tribunal granted Complainant's motion for accelerated decision on liability for each count with regard to 8 drums of hazardous waste, rather than at least 20 drums as alleged by Complainant; and denied the motion as to penalty. A hearing was held on October 24-27, 2022.

The hearing record clearly shows that all 20 drums were RCRA hazardous waste.

The record also clearly shows that Complainant has met its burden on the penalty it proposed for each violation.<sup>2</sup> Complainant has shown that its calculations are reasonable and

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<sup>1</sup> Complainant alleged that Respondent failed to make a hazardous waste determination for at least 20 drums of hazardous waste in violation of Utah Admin. Code R315-5-1-1.11 (Count 1); failed to prepare a hazardous waste manifest for the transportation of the 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); 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); stored the compromised and open drums of hazardous waste in violation of Utah Admin. Code R315-7-15-16.4 on the same dates as Count 3 (Count 4); and 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).

<sup>2</sup> See *In the Matter of GreenBuild Design & Construction, LLC*, Docket No. TSCA-10-2021-0006, (December 12, 2022, Initial Decision) at 20 (“According to the Rules of Practice, “[t]he complainant has the burdens of presentation and persuasion . . . that the relief sought is appropriate.” 40 C.F.R. § 22.24; see also *New Waterbury, Ltd.*, 5 E.A.D. 529, 1994 WL 615377, at \*6 (EAB 1994) (Remand Order). Once the complainant has established its prima facie case, the respondent then bears “the burden of persuasion with respect to the appropriateness of the proposed penalty.”

appropriate and consider all relevant information and arguments. Finally, the record shows that Respondent's arguments in support of a lower penalty either were already considered in the calculations Complainant made pursuant to the RCRA Civil Penalty Policy (as modified by the related inflation adjustment memoranda) (RCPP) or are unavailing.

In committing the violations, and as more fully described below, Respondent continuously placed human health and the environment at unknowing and unnecessary risk of exposure from thousands of pounds of liquid hazardous waste for over 300 days. Further, by committing these violations, Respondent defeated many of the safeguards built into the RCRA program. The requirements Respondent violated are designed to identify whether a solid waste is subject to the RCRA program, and if it is, to prevent releases and other harms from mishandling at all times. In addition, Respondent violated requirements that allow tracking of hazardous waste during its transfer from one location to another, and to notify the regulators of the existence of hazardous waste management facilities for appropriate levels of oversight. Each requirement Respondent violated is a fundamental and integral component of the RCRA program. Complainant, therefore, asks this Tribunal to order Respondent to pay \$631,402 for its violation of these five fundamental requirements of RCRA.

#### **A. Factual Background**

On or about September 24, 2015, PPG Industries, Inc. (PPG), hired Respondent to ship four different types of paint products and accompanying packaging, totaling 40,743 pounds, from Springdale, Pennsylvania, to Portland, Oregon, virtually all labeled as United Nations (UN) hazardous materials. *See* Joint Stipulations of Fact (September 30, 2022) (hereinafter *Stip.*) at ¶ 4; CX06.

The shipment contained 36 drums of "UN 1263 paint 3 PGIII," weighing 19,945 pounds; two pails of "UN 1263 paint 3 PGIII," weighing 106 pounds; four drums of unregulated paint;



and 32 drums of PPG's Universal Urethane Yellow Primer, product code BY1Y100B, weighing 17,683 pounds. Stip. at ¶ 5; CX06.

Before the load left PPG's lot, Respondent entered into its computer tracking system the fact that the load contained UN hazardous materials. Tr. Vol. 3, 329; *see also* CX59 at 19 ("The load comes up on the screen and it will already show hazmat. The load call person will specifically ask what the UN numbers do you have and the driver reads off the phone UN whatever....").

On or about September 27, 2015, Respondent's trailer and its contents caught fire in rural Idaho. Stip. at ¶ 8; RX03. Some drums fell out of the trailer; paint and primer were released onto the road and roadside. *Id.*

On or about October 1, 2015, approximately five days after the fire and without first conducting a hazardous waste determination, Respondent hired Brett's Towing of Ogden, Utah, to transport the burned trailer and 32 55-gallon burned and open drums of paint waste from B&W's Lot in Idaho to Respondent's Facility in Salt Lake City, Utah (Facility).<sup>3</sup> Stip. at ¶ 9; *see also* Tr. Vol. 3, 172-176.

Respondent informed Brett's Towing that the drums contained "water-based paint", rather than inherently hazardous paint, or hazardous waste, when it offered the burnt trailer and paint for transport. Tr. Vol. 3, 176. As a result, neither Respondent nor Brett's Towing took any measures to account for the condition of the destroyed trailer or the burned open drums.<sup>4</sup>

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<sup>3</sup> Tr. Vol. 4, 59 (Singleton testified "I guess I was aware of 32 drums on the trailer."). The hearing transcript citations reflect corrections made from Complainant's Motion to Conform the Transcript to the Actual Testimony (December 9, 2022) and Respondent's Motion to Conform the Transcript (December 9, 2022).

<sup>4</sup> Steve Marrs, Office Manager of Brett's Towing told EPA-CID "if they knew there was hazardous paint on the trailer, they would have secured the trailer to obtain the appropriate documentation, i.e., placards, MSDS sheets, etc." CX29 at 2.

Transportation of the burnt trailer and drums occurred without a RCRA manifest, a bill of lading, placarding, or any other notice of the inherent hazards of the waste to the driver and other persons potentially coming into contact with the load in transit. Tr. Vol. 2, 118-119; Tr. Vol. 3, 179; *see also* Stip. at ¶ 10.

At least 20 of the 32 drums contained materials consistent with strontium chromate primer waste. Stip. at ¶ 20. As more fully discussed *infra* Section II, all 20 drums are RCRA hazardous waste. CX14.

Between October 1, 2015, and August 2016, for over 300 days, Respondent stored at least 20 unlabeled drums of hazardous waste at its Facility on a burnt, collapsed trailer, missing the top half of its structure, missing their bung hole covers, tilted on the trailer, outside exposed to the elements, approximately 220 feet from its maintenance shop and next to ongoing construction. Tr. Vol. 4, 26, 33, 39, 155, 160, 223-225; Tr. Vol. 2, 65, 127, 128, 132. RX14B; *see also* Stip. at ¶ 24; *see, e.g.*, CX10 at 5, 17.

Respondent stored these 32 compromised and unlabeled drums, including at least 20 drums of hazardous waste for over 300 days without a permit and without obtaining a facility ID number. Tr. Vol. 2, 127-128, 130-131, 182-183.

Respondent's noncompliance with RCRA only ended after the EPA's Criminal Investigation Division (EPA-CID) inspected the Facility and EPA's National Enforcement Investigation Center sampled the drums in August 2016. Tr. Vol. 2, 95; CX10.

## **B. Statement of the Case**

Between October 24 and 27, 2022, this Tribunal held an administrative hearing to determine the appropriate penalty for Respondent's violations. During the hearing, Complainant offered three witnesses during its case in chief.

Marc Callaghan, an EPA-CID Criminal Investigator who has been with the EPA for 14 years, testified about the records created and maintained by EPA-CID during its investigation into Respondent's transportation and storage of hazardous waste. Tr. Vol. 1, 39; CX77. Mr. Callaghan established that Investigative Activity Reports (IARs) are created as part of EPA-CID's regular practice, prepared by an employee at or near the time of the interview or receipt of documents, and maintained in the ordinary course of business. *See* Tr. Vol. 1, 44-237; CX76. Mr. Callaghan testified that he had reviewed each of the IARs Complainant proposed to introduce into evidence, that he recognized each IAR as coming from the files of EPA-CID, and about the other elements of foundation for the admissibility of each. These IARs were admitted into evidence.<sup>5</sup> Mr. Callaghan also testified that he had personal knowledge of, and participated in, some of the investigation. Tr. Vol. 1, 123, 138, 140, 150, 153, 156; CX76.

Dr. Bradley Miller, who has worked for EPA's National Enforcement Investigation Center (NEIC) since 2013 testified as an expert analytical chemist. Tr. Vol. 1, 239, 249; CX75. Dr. Miller testified that it was his expert opinion that the additional 12 drums of waste consistent with strontium chromate primer were RCRA hazardous waste because they exceeded the

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<sup>5</sup> As discussed in colloquy during the hearing, hearsay is admissible in administrative proceedings. *See, e.g.*, Tr. Vol. 1, 74-76; *see also, In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 1994 WL 372214, at \*5 (1994) (quoting *Cohen v. Perales*, 412 F.2d 44, 51 (5th Cir.1969))("The hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value."). In addition, Federal Rule of Evidence 803(8) creates a hearsay exception for most public records and reports. Properly certified official records from public offices are generally admissible if they are routine, factual, based on personal knowledge of public officials, and appear reasonably reliable. As agency records, the IARs are presumed as trustworthy. *See In re Great Lakes*, 5 E.A.D. 355, 1994 WL 372214, at \*9 (EPA "met its burden of going forward and proving the alleged violations by presenting contemporaneously prepared incident reports from each of the response agencies charged by law with receiving and maintaining such reports"); *United States v. Davis*, 826 F. Supp. 617, 621 (D.R.I. 1993) (Trustworthiness is presumed because "[t]he assumption is that public officers will perform their duties, that they lack motive to falsify, and that the public inspection to which the records are subject will disclose inaccuracies.").

chromium level for the characteristic of toxicity by at least a factor of five. Tr. Vol. 1, 292-293; CX75.

Kristin McNeill, an EPA RCRA inspector and enforcement officer with approximately 11 years of RCRA experience, Tr. Vol. 2, 19; CX67, testified, among other things, how Complainant calculated the proposed penalty by applying the statutory factors, using the RCPP, to the facts of this case. Tr. Vol. 2, 20-312; *see also* 42 U.S.C. § 6928; and 40 C.F.R. § 22.27(a). As part of her testimony, Ms. McNeill established the seriousness of each of Prime’s violations.

Respondent then put on its case in chief to provide its “response or evidence with respect to the appropriate relief” and offered five fact witnesses: Steven Drake (Truck Driver, Mobile, Alabama) who testified about picking up the PPG shipment and the night of the fire; Mr. Kelly O’Neill (Private Investigator, Boise, Idaho) who testified about his independent investigation into the night of the fire and Respondent’s handling of the hazardous waste; Steve Field (Safety Supervisor, Springfield, Missouri), William Sprague (Safety Manager, Springfield, Missouri) and Brian Singleton (Facility Manager, Salt Lake City, Utah). Respondent’s employee witnesses testified, among other things, to various potential equitable factors, such as Prime’s corporate philosophy, Prime’s view of the EPA-CID investigation, Prime’s cooperation with EPA after the investigation reached the Facility, Prime’s compliance history, and its improved internal processes.<sup>6</sup> *See* Tr. Vol. 3 and 4.

Respondent then called Dr. Elizabeth Walker as an expert toxicologist. Dr. Walker testified that the potential for harm for Respondent’s 300 plus days of unpermitted storage and

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<sup>6</sup> Complainant will address arguments Respondent raises regarding the relevance of its alleged improved processes, including the alleged litigation hold and internal communications between departments, in its reply brief to the extent necessary or appropriate.

improper management of the drums of hazardous waste created a low risk to human health. Tr. Vol. 4, 92.

Complainant then offered the testimony of Dr. Kristen Keteles, an expert toxicologist with approximately 14 years of experience working for the EPA, in rebuttal of Dr. Walker's testimony. Dr. Keteles testified that the unpermitted storage and improper management of the drums of hazardous waste created a potential for exposure to employees, visitors and first responders and, given the inherent toxicity of the hazardous waste and the potential for a fire, there was the likely potential for harm. Tr. Vol. 4, 189, 228-230, CX63; CX66.

## **II. ALL TWENTY DRUMS OF STRONTIUM CHROMATE PRIMER WASTE WERE RCRA HAZARDOUS WASTE**

In the Complaint, Region 8 alleged that at least 20 of the 32 drums of waste Respondent stored outside on the damaged trailer at the Facility were hazardous waste. In its April 4 Order, this Tribunal found that only "eight of the 32 drums contained hazardous waste." *Id.* at 11. At hearing Complainant called Dr. Bradley Miller, an analytical chemist with EPA NEIC, to testify as to his opinion regarding the additional 12 drums that NEIC determined to be consistent with strontium chromate primer. Dr. Miller was deemed an expert in the field of analytical chemistry by this Tribunal, Tr. Vol. 1, 255, and testified to his extensive analysis, which is documented in his expert opinion report. CX75.

Dr. Miller first explained that based on the notes from the NEIC field investigators and analytical results from the NEIC laboratory staff, the material in the 12 drums was consistent with strontium chromate primer.<sup>7</sup> Tr. Vol. 1, 255-56. Dr. Miller then explained his analysis of

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<sup>7</sup> NEIC investigators conducted x-ray fluorescence spectrometry (XRF) tests on all 32 drums during the field inspection. The results demonstrated that the contents of 20 drums contained materials consistent with strontium chromate primer. Stip. at ¶ 22-23; CX14 at 4. The NEIC analysis performed on or about August 24, 2016, on the samples of eight of the 20 burned drums of paint waste, documented that the flashpoint ranged between 109- and

the properties of the material as listed in PPG's Safety Data Sheet (SDS) for the material, and NEIC's field and laboratory results, and how it led him to his preliminary prediction that the additional 12 drums likely would have failed the RCRA toxicity characteristic leaching procedure (TCLP) for chromium and been RCRA hazardous waste. *Id.* at 272-73.

The manifest Respondent completed when shipping the 32 drums to a permitted treatment, storage, or disposal (TSD) facility listed the hazardous waste as containing trivalent chromium. *See* RX16 at 3, and Tr. Vol. 1, 276-77. Dr. Miller testified, however, that the strontium chromate primer would have contained hexavalent chromium, which is significantly more toxic than trivalent chromium.<sup>8</sup> *Id.* at 278-80.

Dr. Miller explained his in-depth literature review and use of EPA software to model how much chromium would precipitate out of the amount of strontium chromate (in each of the 12 drums of the primer waste) when the material was placed in a TCLP leachate solution. *Id.* at 281-83. Dr. Miller then provided a number of strontium chromate primer-specific reasons that so much less chromium precipitated out of the 8 samples NEIC analyzed in the lab than might be expected based on his modeling work. *Id.* at 283-85.

Using a table similar to Table 5 in his expert opinion report as a demonstrative, Dr. Miller explained how he evaluated all of the existing data and calculated predicted TCLP numbers for chromium in the 12 drums. *Id.* at 285-91. Finally, Dr. Miller explained how he then made his initial calculations even more conservative. *Id.* at 291-92. Dr. Miller ultimately rendered his expert opinion that "all 12 of those drums would exceed the RCRA chromium level for the

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113-degrees Fahrenheit (43 and 45 degrees Celsius); and levels of chromium were above 35.0 mg/L for all eight drums. Stip. at ¶ 22-23; CX14 at 6-7.

<sup>8</sup> Chromate is commonly accepted in chemistry to mean the hexavalent species of chromium 6. Tr. Vol. 1, 278 ("No, I don't believe any of the material had trivalent chromium....").

characteristic of toxicity. That value is 5 milligrams per liter, and I believe that those 12 drums would likely exceed, by at least a factor of five, that critical level.” *Id.* at 292-93.

On cross-examination, counsel for Respondent stated that “[i]t’s our position that those drums were the paint that we picked up from PPG and they made it back to Salt Lake City and we’ve never questioned what’s inside those drums.” *Id.* at 295.

Through Dr. Miller’s uncontested expert testimony, Complainant proved unequivocally that all 20 drums of material consistent with PPG’s strontium chromate primer were hazardous waste and regulated under Subtitle C of RCRA.

### **III. COMPLAINANT HAS MET ITS BURDEN TO SHOW THAT \$631,402 IS A REASONABLE PENALTY FOR RESPONDENT’S FIVE VIOLATIONS OF RCRA**

#### **A. Each of Prime’s Violations Increased the Risk of Exposure to Hazardous Waste and the Potential for Harm**

##### **1. The Hazardous Waste Prime Generated and Improperly Managed Was Inherently Toxic**

Respondent’s toxicologist Dr. Walker brought the inherent hazardous nature of the primer waste into focus by explaining that the hazards it posed extended well beyond the chromate levels.

The SDS lists a total of 12 chemical components as potential hazards. The other 11 were predominantly solvents that were also components in the paint. The solvents themselves carry additional risks. These are the types of risks or hazards. There are known probable human carcinogens. A known human carcinogen is IARC’s most severe categorization of carcinogens. There were others in the paint that are probable, classified as probable human carcinogens. There were also solvents that were known to have acute toxicity upon a single exposure. So that would be where you had a large one-time exposure to the chemical component of the paint.

Tr. Vol. 4, 114-115.<sup>9</sup>

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<sup>9</sup> Dr. Walker also testified that the strontium chromate primer SDS statements “that are quoted in the Dr. Keteles’ report [sound] quite alarming. And they should be. They’re meant to direct how we handle hazardous chemicals with care to minimize exposure.” Tr. Vol. 4, 118.

Dr. Keteles confirmed, explaining that because the chemical constituents remained the same after the fire, the hazard warnings in the SDS remained applicable. Tr. Vol. 4, 204. Dr.

Keteles also explained that the primer waste is a:

flammable liquid vapor. It's also hazardous to human health. It's harmful if swallowed or inhaled. It causes serious eye irritation. It causes skin irritation. It may cause allergic skin reaction. It may cause cancer. It may damage fertility [of] the unborn child. It may cause respiratory irritation and may damage organs with prolonged or repeated exposures. . . . Well, chromate, or hexavalent chromium, is a known human carcinogen, but there are also non-cancer effects, such as it can affect breathing, make breathing difficult. It could also damage liver, kidney, as the SDS says fertility. There's been studies that show that it reduces sperm count in men. It could also damage the unborn child."

Tr. Vol. 4, 205-206. All of these potential health effects establish that the hazardous waste primer is potentially hazardous to human health. *Id.* at 206.

Testimony from both experts conclusively shows that the strontium chromate primer, whether in product form, or as a hazardous waste after having gone through the fire, was an inherently hazardous material or waste.

## **2. Harm to Human Health and the Environment for Purposes of the RCPP**

As the RCPP explains, “[t]he RCRA requirements were promulgated in order to **prevent** harm to human health and the environment.” RCPP at 12 (emphasis added). Dr. Walker brought the preventative purpose of the RCRA regulatory program into crystalline focus when she testified that “it is important to note that our environment is full of carcinogens. We live in a very chemical world. And . . . we manage our risk of those carcinogens by managing our exposure, or not managing our exposure.” Tr. Vol. 4, 114.

Congress, through RCRA, placed responsibility for preventing harm from (or “managing exposure” to) hazardous waste on the persons who handle hazardous waste. Persons who handle hazardous waste are managing exposure to the waste for the rest of the population and the environment. Persons who handle hazardous waste in compliance with RCRA ensure that



contact with hazardous waste by others is minimized, if not cut off completely. Persons who mishandle hazardous waste, on the other hand, do not give other persons who may be exposed to the hazardous waste the opportunity to accurately manage exposure for themselves.

Each violation by Respondent led to a greater risk of exposure than would have existed if it had complied with RCRA. Because there was a risk of exposure, there also was the potential for harm.<sup>10</sup> Respondent complied with none of the following five fundamental RRA requirements.

If Respondent had made a hazardous waste determination after the fire it would have increased the likelihood that Respondent would have handled the hazardous waste in compliance with RCRA, and the likelihood that potential exposures were minimized, if not cut off completely.

If Respondent had transported the waste under manifest, the Respondent or the hazardous waste transportation-trained transporter likely would have taken other measures to reduce the risk of spills (for example by overpacking the drums or transporting them in an enclosed trailer<sup>11</sup>) and reduce the risks to first responders and the public from releases during an accident.

If Respondent had obtained a RCRA storage permit and stored the hazardous waste in compliance with the conditions in the permit it would have increased the likelihood that potential exposures were minimized, if not cut off completely.

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<sup>10</sup> As more fully discussed *infra* Section III.C.4.b.iii., for purposes of toxicological analysis, both toxicologists appeared to agree that there was potential for harm during the time the waste was stored at the Facility. Dr. Walker concluded that the potential (in her words, probability) for harm was low. Dr. Keteles, however, explained that it was not possible to determine the toxicological potential for harm, as opposed to potential for exposure, because exposure level and duration information was not available. It appears as though Dr. Walker agrees to this limitation. RX20 at 5 (“Estimates of exposure are beyond the scope of this report” because Respondent did not have the ability to evaluate the volume and duration of exposure). Yet Dr. Walker still felt comfortable quantifying the toxicological potential for harm as low.

<sup>11</sup> In September 2016, Respondent’s contractor overpacked all 32 drums and transported them in a box truck or van from the Facility to a permitted RCRA facility. *See* RX16 at 1.

If Respondent had managed the hazardous waste appropriately in closed containers that were in good condition and properly labeled it would have reduced the potential for exposure during transportation and storage.

If Respondent had obtained a RCRA facility identification number before storing the waste at the Facility, regulators may have inspected the Facility and helped ensure that any RCRA noncompliance was remedied as quickly as possible, thereby reducing the risk of exposure.

Prime's violation of each requirement reduced, if not eliminated, the ability of persons who might come into contact with this hazardous waste to knowledgeably manage exposure for themselves. As discussed more fully in the analysis of each count below, each violation, therefore, led directly or indirectly to increased risks of exposure and, therefore, to increased potential for harm to human health and the environment than would have existed if Respondent had complied with that RCRA requirement.

**B. Complainant's Proposed Penalty Fully Considers Respondent's Compliance History, Cooperation After EPA's Investigation Reached the Facility, and Respondent's Eventual Return to Compliance**

**1. Compliance History**

Because Complainant has no evidence to the contrary, Complainant's proposed penalty was calculated as though these were first time violations of this type by Respondent. Gravity-based penalty amounts are to be adjusted based on the violator's history of noncompliance, but only upward. RCPP at 37; Tr. Vol. 2, 56 ("So basically if the violator is a first-time violator, there's no upwards adjustment"). This approach is based on the presumption that the violator

does not have a relevant history of noncompliance.<sup>12</sup> Thus, Complainant's calculation does not include an upward adjustment for a "history of noncompliance."<sup>13</sup>

## 2. Cooperation

Respondent testified that it cooperated with EPA investigators.<sup>14</sup> Complainant does not disagree. Cooperation does provide a basis for a reduction in the penalty. Complainant, however, already has reduced the proposed penalty in consideration of Respondent's eventual cooperation with EPA. As Ms. McNeill testified, Complainant has factored in Respondent's cooperation after the EPA investigation reached the Facility. Under the RCPP, cooperation is considered at one of two points: after the gravity 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. In this instance, the Complainant specifically considered Respondent's cooperation and proper disposal of the hazardous waste at a licensed TSD facility as the reasons Complainant did not select the top of the matrix cell.<sup>15</sup> By selecting the midpoint instead of the top of the cell, Complainant effectively reduced the base proposed gravity-based penalty for Counts 1 and 2 by over 12%. For Count 3, the base gravity-based

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<sup>12</sup> Tr. Vol. 2, 57 ("THE WITNESS: Absolutely. It's a fair question. Basically, it's just the [level] playing field concept. So we kind of start with the assumption that facilities wouldn't have violations to begin with. So then if they do have that history, then we add the upwards adjustment. JUDGE COUGHLIN: So they're expected to be in compliance? THE WITNESS: Yes.").

<sup>13</sup> Tr. Vol. 2, 98-99 ("no downward adjustment was made because the violation was discovered by CID . . . once EPA identifies a violation, basically there's an expectation that they will make an attempt to come back into compliance. There was also no downward adjustment made because of lack of knowledge of the requirement."); *see also* CX04Cor at 9.

<sup>14</sup> *See, e.g.*, Tr. Vol. 4, 40-42.

<sup>15</sup> Tr. Vol. 2, 95 ("In this case, we determined the penalty should not be at the top of the matrix cell because of Prime's general cooperation with CID when they arrived and did the inspection on August 2<sup>nd</sup> and then because the waste was eventually disposed of as hazardous waste at a treatment, storage and disposal facility."); *see also*, CX04Cor at 8.

penalty for day 1 effectively was reduced by over 13%, **and for days 2-180 by over 40%**. For Counts 4 and 5, Complainant effectively reduced the potential gravity-based penalty by 10%.

Respondent has provided no convincing evidence to support a further reduction in the penalty by applying the **adjustment factor** for good faith efforts to comply. At hearing, Ms. McNeill explained that Complainant did not make a second adjustment to the penalty under the adjustment factor for good faith effort to comply because (1) Respondent's cooperation after the EPA's investigation and eventual return to compliance does not qualify for adjustment under the good faith efforts to comply adjustment factor in the RCPP, Tr. Vol. 2, 98, and (2) a reduction based on the same information should be made only once per calculation.<sup>16</sup> Further, decisions by the Environmental Appeals Board (Board) show that Region 8 considered and applied these equitable factors at the correct point in the analysis (again, leading to a more favorable reduction than Prime might have obtained otherwise). *See also* Tr. Vol. 2, 182 (reflecting Respondent's degree of cooperation as opposed to "good faith efforts to comply").

The Board has consistently held that subsequent compliance does not warrant a downward adjustment for good-faith efforts to comply. Thus, even though Respondent ultimately disposed of the waste at a permitted TSD facility, no good faith effort adjustment is appropriate. As the Board explained in *In the Matter of Titan Wheel Corporation of Iowa*:

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.**

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<sup>16</sup> Tr. Vol. 2, 100 ("[W]e did take into account Prime's general cooperation with CID . . . when determining the place in the matrix cell. So basically adding a downward adjustment for good faith efforts to comply adjustment factor would basically be a second, an additional downward adjustment based on the same information.").

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).

2002 WL 1315600 (EAB 2002) at \*18 (note omitted, emphasis added).<sup>17</sup>

In this case, in addition to the SDSs and bill of lading, Respondent had been contacted by the Idaho Department of Environmental Quality (IDEQ) about hazardous waste remaining at the fire scene within a few weeks of the fire and Respondent's contractor had sampling results from the second cleanup indicating that at least some of the materials in the shipment had become hazardous waste. Respondent, however, made no good faith effort to comply with RCRA for another nine months, and did so only after the noncompliance was detected by EPA-CID and at least 20 of the drums were determined by NEIC to contain hazardous waste.

**C. The Proposed Penalty is Reasonable and Reflects Full Consideration of the Statutory Factors as Applied Through the RCPP**

Section 3008(a)(3) of RCRA directs that “the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements” when assessing a penalty for violations of Subtitle C of RCRA. A complainant has

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<sup>17</sup> See also, e.g., *In re Mayes*, No.3:05-CV-478, 2008 WL 65178, at \*21 (E.D. Tenn, Jan. 4, 2008) (applying the UST Penalty Policy, the district court noted that “[b]ecause compliance with the regulations is expected from the regulated community, no downward adjustment may be made if the good faith efforts to comply primarily consist of coming into compliance. That is, there should be no ‘reward’ for doing now what should have been done in the first place. . . . Respondent's activities were only the minimal requirements necessary to finally come into compliance with the UST regulations. . . . Furthermore, Respondent's adherence to clean-up directives clearly does not constitute cooperative behavior to merit a reduction and would be, in fact, a reward for doing now what should have been done by him.”).

two options when proposing a penalty for violations of RCRA in administrative adjudications: plead the statutory maximum or propose a specific penalty.<sup>18</sup>

In this case, Complainant has calculated a specific proposed penalty for each violation, considering the statutory factors and using the RCPP as its guide. CX04Cor. The RCPP was published to ensure national consistency in assessing penalties under RCRA and to guide EPA's implementation of the statutory criteria.<sup>19</sup> EPA Presiding Officers and the Board recognize the RCPP as 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.'" *In the Matter of Chem-Solv, Inc.*, 2014 WL 2593697 at \*103 (citing *Carroll Oil Co.*, 10 E.A.D. 635, 656 (EAB 2002) (quoting *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002))).<sup>20</sup>

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<sup>18</sup> See, e.g., 40 C.F.R. § 22.14(a)(4), and the RCPP at 5-6 ("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.") In this case the statutory maximum would have been \$37,500 per day for Counts 1 and 2, and \$101,439 per day for Counts 3, 4 and 5.

<sup>19</sup> "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.

<sup>20</sup> The EPA has updated the dollar amounts in the RCPP 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, in addition to the RCPP, two inflation memoranda must be consulted to determine applicable matrices for each violation: EPA Memorandum from Rosemarie A. Kelley, Revision to Adjusted Penalty Policy Matrices Package Issued on November 16, 2009 (updated 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 2020 Matrices Update Memo](#)). During the hearing, Ms. McNeill referred to the matrix based on the date of the original 2009 memorandum. See e.g., Tr. Vol. 2, 96-97. Because the 2009 Memorandum was updated on April 6, 2010, Complainant will refer to the matrix as the 2010 Matrix herein.

As more fully described below, Complainant applied the RCPP in accordance with the facts of this case and consistent with the statutory penalty factors set forth in Section 3008(a).

### **1. Facts Applicable to More Than One Count**

Ms. McNeill's testimony establishes Complainant has considered all the information relevant to each violation. As Complainant has consistently argued, Respondent's assertions regarding the fire do not bear on Complainant's calculations, which consider the violations as having accrued one or more days after the fire.<sup>21</sup>

Before turning to Complainant's count-by-count penalty analysis, Complainant will address two categories of information that were assessed in the same manner in its calculation for each count: (1) the bill of lading (BOL) from PPG, information in Prime's computer system, and flammable placards and (2) the IDEQ communications, SDSs, and the hazardous waste identified during the second cleanup.

#### **a. The Bill of Lading, Prime's Computer System, and Flammable Placards Provided Respondent with Significant Information About the Hazardous Nature of the Waste**

Through the testimony of Ms. McNeill, Complainant has shown that there are only three pieces of information from the night of the fire that are relevant to the violations in this matter: the BOL, the UN hazardous materials number and HAZMAT designation in Prime's computer tracking system, and the flammable placards. Each of these pieces of information should have led Prime to treat the material in the 32 drums that ended up at the Facility at a minimum as hazardous material, but also should have led Prime to consider that they might be hazardous waste.

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<sup>21</sup> As Ms. McNeill testified, EPA considered the fire an emergency and as a result, the timeline for EPA's analysis of Respondent's violations for purposes of calculating a proposed penalty begins the day after the fire. Tr. Vol. 2, 90-92.

Respondent had the BOL from the moment Mr. Drake and Ms. Duck picked up the shipment of hazardous paint from PPG. Tr. Vol. 2, 329. The BOL informed Prime that over 37,000 pounds of the material being transported carried the UN1263 designation and that only 1,904 pounds of the load did not. CX06 at 2. The UN1263 hazardous designation indicates the paint materials were Department of Transportation (DOT) hazard class 3 flammable material. Tr. Vol 2, 74. The BOL also separately states that the load contained “Flammable liquid”. CX06 at 2. Further, the BOL indicated that the strontium chromate primer contained a reportable quantity of strontium chromate, which identifies the quantities of substances that if released require notification to the government and sets forth the notification requirements for these substances.

Before the truck even left PPG’s lot, Prime had entered both the UN number and the fact that the load was a hazmat load into its computer system, CX59 at 19-20. After that, anyone at Prime could clearly see this information just by hitting one key.<sup>22</sup> Yet, somehow, it **never** struck anyone at Prime who dealt with the portion of the shipment that went to the Facility after the fire to consider treating the material as hazardous material, if not hazardous waste.

During shipment, and even after the fire was extinguished, the trailer had at least one “flammable” placard in a highly visible location on the trailer<sup>23</sup>, which “would indicate to anyone who saw the trailer that there were hazardous materials on the trailer [and] which if that material became waste, there would be [a] likely indication that it would be hazardous waste based on the fact that it was a hazardous material.” Tr. Vol. 2, 71-72; *see also* CX17 at 11.

Complainant notes that by the time EPA visited the Facility, the placard in the photos above was

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<sup>22</sup> Mr. Field testified that “to clarify, these loads are marked HAZMAT in our system. If I for whatever reason was pulling up Mr. Drake's truck, I could clearly see that it's a HAZMAT load, and I could hit one key – I wouldn't know that it had chromium in it, but I would know what the UN number is, it's visible to us.” Tr. Vol. 3, 329.

<sup>23</sup> *See, e.g.*, CX07 at 78 (photograph 5); at 79 (photographs 8 and 10) and at 80 (photograph 15). Front of trailer is to the left in all photographs. *See also* RX05 at 10.



gone.<sup>24</sup> Complainant also notes that there is no evidence in the record of when, or by whom, the placard was removed after the photographs were taken shortly after the fire was extinguished.

Finally, the BOL instructed “For help in emergencies involving a spill, leak or fire—Call Chemtrec.” Tr. Vol. 2, 74, 92-93; CX 06. Testimony shows, however, that Prime did not call Chemtrec for advice or assistance during or after the fire. Tr. Vol. 3, 238. Even with the information at hand, Prime did not follow its own self-proclaimed practice and call its own HAZMAT contractor, Premium Environmental Services (Premium or PES)<sup>25</sup>, until IDEQ contacted them weeks later with significant concerns. Had Prime called Chemtrec or Premium after the immediate response to the fire was over (or arguably even during the fire for safety information (*See, e.g.*, Tr. Vol. 2, 72-73)), Prime might have handled the waste safely from the start.

Even without calling its own HAZMAT contractor or PPGs, the placards, the BOL, and perhaps most importantly, Prime’s own computer system should have given enough information to consider handling the waste as a hazardous material, if not a RCRA hazardous waste. If Prime had handled the waste as a hazardous material, Prime may still not have been in complete compliance with RCRA, but some of the risk of exposures likely would have been reduced, perhaps even significantly reduced. *See, e.g.*, Dr. Walker’s testimony *supra* note 10.

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<sup>24</sup> *See* CX10 at 15 (photograph taken 8/2/16); at 45 (photograph taken 8/24/16). Front of trailer is to the left in both photographs.

<sup>25</sup>“Q And, you're aware that Prime's practice at the time for HAZMAT incidents, was to call Premium, correct? MR. O'NEILL: That's correct. PES was their cleanup contractor that they consulted with. ... MR. FIGUR: And, Prime didn't call Premium the night of the fire, did they? MR. O'NEILL: They did not. MR. FIGUR: Okay. So Premium wasn't able to provide any advice? MR. O'NEILL: That's correct.” Tr. Vol. 3, 238-239

**b. The IDEQ Communications, SDSs and the Hazardous Waste from the Second Cleanup Provided Respondent with Additional Information About the Hazardous Nature of the Waste**

Even if the information in Prime's computer system, on the BOL, or the placards did not somehow alert Prime to the hazardous nature of the waste in the drums, communications from IDEQ, the SDSs for the 4 products in the shipment, and the sampling results from the second cleanup effort should have.

Within a few weeks of the fire, on or about October 21, 2015, during a discussion with Respondent, [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 [IDEQ] that an environmental contractor would be hired to handle the remaining waste at the Site."<sup>26</sup> CX07 at 4.; Tr. Vol. 3, 348; *see also* RX11 at 11 (email from Premium to Respondent, including Steve Field, Bill Sprague and David White, stating "DEQ had the accident declared disaster and hazardous [sic] and will remain hazardous [sic] until cleanup is completed.").

Premium, on behalf of Prime, then "hired H2O Environmental (H2O) to handle the waste profiling and disposal of remaining waste at the Site" of the fire. CX07 at 5. On November 19, 2015, H2O, on behalf of Prime, sampled the soils, debris and waste that had been removed from the side of the highway during the second cleanup. *Id.* H2O documented that this cleanup waste was over three times the regulatory limit for chromium. Specifically, the soils were "hazardous for chromium exceeding the regulatory level of 5 milligrams per liter (mg/L) with a result of

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<sup>26</sup> The administrative record reflects that David White, Safety Supervisor, was the point of contact for IDEQ and Premium Environmental Services, Respondent's environmental contractor, for the second cleanup. CX7 at 4; RX11 at 13; Tr. Vol. 3, 408 ("he most likely was the point of contact [for PES] at that time."); *see also* CX30 at 1 (PPG emails the SDSs to David White). Mr. White, however, was not called to testify at hearing. Tr. Vol. 3, 408.

18.5 mg/L.” *Id.* at 5, 84, 88, and CX25 at 8. Respondent failed to consider the analytical results and admonishments from IDEQ about the hazardous waste, which could have put it on the road to compliance for the drums at the Facility.<sup>27</sup>

Prime received the SDSs from PPG on or about November 25, 2015. Tr. Vol. 2, 78; Tr. Vol. 3, 264-65; CX39. The SDSs for the drums of hazardous material included in the shipment state that each product had a flashpoint of less than 140 degrees Fahrenheit. CX32.<sup>28</sup> The SDSs also communicate hazard warnings, as well as storage and handling instructions for the materials. Tr. Vol. 4, 116-118; 205-207; Tr. Vol. 2, 79; *see also* CX32 at 6, 21, 36, 53, 69-70 (handling and storage instructions in Section 7); at 8-12, 24-27, 40-43, 57-60, 73-76 (toxicological information for the product or ingredients of the product in Section 9); and at 14, 29-30, 45-46, 62-63, 78-79 (federal regulatory information for the product in Section 15).

If Prime had followed some of the handling instructions for the strontium chromate primer product in the SDS, it may not have been in complete compliance with RCRA requirements, but any such actions likely would have reduced risks of exposure and could have led to different conclusions on potential for harm to human health and the environment, and/or extent of deviation for at least some of the counts.<sup>29</sup>

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<sup>27</sup> Tr. Vol. 2, 103 (“Q Did they make a waste determination after IDEQ informed them that or after IDEQ contacted them? A No, they did not. Even after IDEQ had been in contact [in] October and November regarding, as I said, the fact that paint [had] spilled from the drums onto the ground at the fire site. And then H2O made the waste determination in mid-November. That knowledge was not applied to the drums that had been sent to Salt Lake City.”).

<sup>28</sup> 6431D BACKR 4 (CX32 at 1, 8); FG CLR PC3200 4 (CX32 at 16, 23); Universal Urethane Yellow Primer (CX32 at 31, 39); DURANAR EZ LEMON YELLOW (CX32 at 65, 72). A solid waste is a RCRA hazardous waste for ignitibility if it has a flashpoint of less than 140 degrees. *See generally* 40 C.F.R. § 261.21(a)(1).

<sup>29</sup> *See* Tr. Vol 2, 120 (“JUDGE COUGHLIN: One quick question, when you have one of these requirements that's either they did it or they didn't, how do you then exercise discretion and account for categorizing that as minor, moderate, major? MS. MCNEILL: . . . and so looking at the definition of major extent of deviation is something that's not met, a requirement that's not met or most of the requirement is not met. . . . In the case of an example that might be a moderate extent of deviation, so in the case where some of the requirements are met as intended and others aren't.”).

**2. COUNT 1-Failure to Make a Hazardous Waste Determination, Utah Admin. Code R315-5-1-1.11**

**a. Introduction**

Complainant has proposed a penalty of \$37,500 for Count 1. In assessing the seriousness of the violation (the gravity), 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% (\$3,292).

Complainant also calculated that Respondent received an economic benefit for this violation and included a portion of it in the proposed penalty. Although Prime did not make a hazardous waste determination at any time over 300 days, Complainant chose to use the penalty matrix for violations occurring on or before November 2, 2015, and the proposed penalty was capped at \$37,500. The basis for Complainant's proposed penalty for Count 1 is set forth in CX04Cor at 6-9 and Ms. McNeill's testimony at Tr. Vol. 2, 88-114.

**b. Potential for Harm**

In applying the RCPP, the Complainant considers the potential for harm associated with the violations, which consists of potential for harm to the program **and/or** potential for harm to human health and the environment.<sup>30</sup> *See, e.g., In re Everwood*, 6 E.A.D. 589, 1996 WL 557269, at \*2 (finding reversible error by the Presiding Officer's failure to consider the harm to the RCRA program in determining the potential for harm). Thus, either one of those factors can result in a major potential for harm. *Id.* at \*7.

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<sup>30</sup> Tr. Vol. 2, 39 ("Major potential for harm occurs when there is considered to be a substantial risk of exposure, [to] human health and the environment. And it's an and/or definition. So, and/or if there's a substantial risk of harm to the regulatory program.").

### **i. Harm to the Program**

Under the RCPP, the harm to the program factor considers “the adverse effect noncompliance may have on statutory or regulatory purposes or procedures for implementing the RCRA program.” RCPP at 13. “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 in *Chem-Solv*, underlined the importance of the hazardous waste determination requirement, and explained

[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.*

2014 WL 2593697 at \*90 (emphasis added).

Ms. McNeill, testified that making a hazardous waste determination is “a fundamental part of the RCRA program . . . it is the critical first step of basically entering a material into the RCRA hazardous waste management program.” Tr. Vol. 2, 88, 93. Because Prime did not make a hazardous waste determination, Prime illegally and unsafely transported thousands of pounds of hazardous waste over 300 miles and improperly stored the waste for over 300 days at the Facility. *Id.* at 93-94.

### **ii. Harm to Human Health and the Environment**

The RCPP makes clear the potential for harm factor analyzes the **potential** for harm. *See, e.g.,* RCPP at 14; *see also* Tr. Vol. 2, 37-38 (“There doesn’t have to be an actual release or exposure in order for there to be a potentially substantial or major potential for harm”). If Respondent had considered the information in the BOL, the SDS (including, but not limited to,

potential exposure effects, flammability and toxicity), the communications with IDEQ and/or the waste characterization data from the second cleanup, and decided to make a hazardous waste determination, Respondent could have mitigated the potential for harm that it created by not conducting a hazardous waste determination.<sup>31</sup> Without a waste determination, for every mile of the over 300 miles the open, unlabeled, unmanifested and unplacarded drums of hazardous waste traveled there was a risk of exposure to persons involved in the transport of the material, to the general public and first responders in the event of an accident during transport, and to other persons handling the waste.<sup>32</sup> Further, without a waste determination, the open, compromised drums containing thousands of pounds of hazardous waste were improperly stored over 300 days creating a substantial risk of harm to human health and the environment. Tr. Vol. 2, 93-94; *see also* discussion *supra* Section III.A.1. (inherent toxicity), and *infra* Section III.C.4.b. (Count 3, Potential for Harm).

**c. Extent of Deviation<sup>33</sup>**

Respondent's failure was a complete deviation from the requirement to make a hazardous waste determination. Tr. Vol. 2, 94. As Ms. McNeill testified, Respondent's failure to make any effort towards a hazardous waste determination completely rendered inoperative the requirement

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<sup>31</sup> *See* Ms. McNeill's testimony *supra* notes 22 and 24.

<sup>32</sup> *See, e.g.*, Tr. Vol. 2, 89-90 (Ms. McNeill testified that Mr. McCallum, who drove the truck into which the soils and debris were loaded during the cleanup right after the fire said to the investigators that "that they were trying to clean up the waste really quickly, that the drums were leaking everywhere, that they were making a mess. He noted that his clothing got paint all over it and was ruined. He noted that his truck got paint on it, and then he washed the paint off of his truck when he got back to the yard."); *see also* CX62 at 2; CX57 at 1, and CX04Cor at 7.

<sup>33</sup> The extent of deviation is distinct from the consideration of harm to the program under the RCPP. As Ms. McNeill's testimony explains, the extent of deviation focuses on the steps that "were taken or what actions were taken in order to attempt to meet" the regulatory requirements. Tr. Vol. 2, 48-49. In other words, extent of deviation focuses on what the Respondent did or did not do to comply, whereas the potential for harm focuses on the potential impacts from the violation.

violated, and directly led to other complete deviations from key RCRA requirements (each of which, is discussed in Section III.C.3.-III.C.6 (Counts 2-5)). *See id.*; *see also* RCPP at 17.

**d. Amount from the Matrix Cell<sup>34</sup>**

Complainant did not choose the penalty at the top of the matrix cell “because of Prime’s general cooperation with CID . . . and then because the waste was eventually disposed of as hazardous waste at a [permitted] treatment, storage and disposal facility.” Tr. Vol. 2, 95, 100, 182 (reflecting Respondent’s degree of cooperation as opposed to “good faith efforts to comply”). Complainant also did not choose the bottom of the matrix cell due to “Prime’s size and sophistication because they are a national large shipping company. They have the resources to make a hazardous waste determination. Also, Prime made no attempt to properly make a waste determination and properly manage the waste over the 300 days. . . .” Tr. Vol. 2, 94-96. Therefore, a penalty at the midpoint of the cell was selected, which was \$32,915. Tr. Vol. 2, 96; CX04Cor at 8.

**e. Multi-Day Penalties**

Even though under most circumstances multi-day penalties are considered mandatory for major-major violations, Complainant determined it had a sufficient basis to not propose the assessment of multi-day penalties for this violation. Tr. Vol. 2, 97; CX04Cor at 8; RCPP at 25. As Ms. McNeill testified, Complainant treated this as a one-time violation even though Respondent did not make such a determination at any point during the over 300-day period following generation of the waste. Tr. Vol. 2, 70, 72.

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<sup>34</sup> Using the gravity-based penalty matrix for violations that occurred after January 12, 2009, and before November 2, 2015, the major potential for harm/major extent of deviation penalty cell has a penalty range of \$28,330 to \$37,500. Because the failure to make a hazardous waste determine first occurred at any point following the fire, prior to November 2, 2015, Complainant applied the 2010 Matrix.

#### **f. Adjustment Factors**

Complainant first notes that it applied the same adjustment factors analysis to each count, except where additional information is specified in Ms. McNeill's testimony and discussed *infra* Sections III.C.3.f., III.C.4.f., III.C.5.f. and III.C..f. (Counts 2-5). The only adjustment factor Complainant applied to the gravity-based penalty for each count was "willfulness and/or negligence." *See* discussion *supra* Section III.B. (explaining why Complainant did not adjust the gravity-based penalty downward for any count for "good faith efforts to comply" as opposed to selection within the matrix for cooperation); *see also* CX04Cor at 7-8.

Ms. McNeill testified that "[w]illfulness and negligence focuses on whether the violator had full control over the events constituting the violation, [t]he foreseeability of the violation, if the violator knew or should have known about the hazards associated with the conduct. Again, knew or should have known about the legal requirements that were violated. And then if they took any reasonable precautions to prevent the violation." Tr. Vol. 2, 55-56; *see also* RCPP at 36. In this case, Respondent was the generator "[s]o making a waste determination and then ensuring the safe transport, storage, treatment and disposal of the hazardous waste was their responsibility." Tr. Vol. 2, 102. Respondent is a large national shipping company that hauls hazardous materials.<sup>35</sup> In addition, Respondent had knowledge of RCRA at the time of the shipment, as evidenced by the fact that at the time of the violations, Respondent had an EPA ID

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<sup>35</sup> At hearing, Mr. Field testified that approximately three percent of Respondent's shipments contained hazardous materials in 2015. Tr. Vol. 3, 326, 366. And, in 2015 Prime stored trailers at PPG for shipments wherein 70 percent of PPG shipments contain hazardous material. CX16; Tr. Vol. 3, 366-368. Mr. Field also testified that Respondent primarily hauls "food stuff products." *Id.* at 327. Despite the assertion during opening statement that Respondent "haul[s] mostly frozen food and COVID vaccine[s];" Mr. Field testified "I don't think we hauled per se, the vaccines." Tr. Vol. 1, 23; Vol. 3, 301. Mr. Field also testified that "unfortunately trailer fires are not - - they're not common, but they do happen on a somewhat regular basis in the trucking industry." Tr. Vol 3, 338. Also, Mr. Sprague acknowledged that Prime is a logistics business that moves freight, it tracks and manages its fleet through an electronic system, and part of its fleet management is knowing where its freight is at any given time. Tr. Vol. 4, 55.



number for its Springfield facility and had obtained a site-specific EPA ID number for the second cleanup.<sup>36</sup> The record is clear that in spite of Respondent's general awareness of RCRA regulations and the inherent hazardousness of the hazardous waste, it did not apply any of the information it possessed to the drums sent to Salt Lake City. Tr. Vol. 2, 102-103. Respondent had "the ability to make a waste determination throughout any of the 300 plus days but basically ignored all the information that they had in their possession that would have led them to that making that waste determination. Therefore, a ten percent increase in willfulness or negligence was applied." Tr. Vol. 2, 104.

**g. Economic Benefit**

Complainant calculated that there was an economic benefit to Respondent by never making a hazardous waste determination.<sup>37</sup> As Ms. McNeill testified, Complainant used the number of samples that NEIC determined to be representative as an appropriate number of samples.<sup>38</sup> Complainant used the 2000 Unit Cost Compendium in CX01 for the cost per sample and adjusted for inflation. Tr. Vol. 2, 105. At hearing, however, Ms. McNeill testified that Complainant could decrease the per sample costs from \$1,350 to \$956 (in 2022 dollars) to reflect a sample analysis that excludes pesticides and herbicides. Tr. Vol. 2, 113; *see also* CX01 at 120-121. Thus, the economic benefit for this count may be adjusted to \$7,648, rather than \$10,800. Tr. Vol. 2, 113. For this count, however, this minimal change does not affect the total proposed

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<sup>36</sup> Tr. Vol. 2, 188-89 (Respondent had "an EPA ID number for their facility here in Springfield, and . . . Prime contractors contacted Idaho State DEQ to get an ID number for the fire site in order to ship what was determined to be hazardous waste that was cleaned up from the fire site" in December 2015); *see also* CX28.

<sup>37</sup> Complainant does not propose an economic benefit for Counts 2-5.

<sup>38</sup> "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)." CX04Cor at 9; *see also* Tr. Vol. 2, 104-105.

penalty because Complainant only included approximately \$1,300 for economic benefit in the proposed penalty because Complainant used the 2010 Matrix for this count.<sup>39</sup>

### **3. COUNT 2-Failure to Prepare a Manifest, Utah Admin. Code R315-5-2-2.20(a)**

#### **a. Introduction**

Complainant has proposed a penalty of \$36,207 for Count 2. 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 adjusted the penalty upward by 10% (\$3,292). The basis for Complainant's proposed penalty for Count 2 is set forth in detail in Ms. McNeill's testimony at Tr. Vol. 2, 115-127 and CX04Cor at 10-12.

#### **b. Potential for Harm**

The manifest is the document that tracks the handling of the hazardous waste from the generator through ultimate disposal, including information such as the name, address and EPA ID number of the generator, transporter and disposal facility, the DOT description of the hazardous waste, quantities of the waste and container type and certification as to the accurate description of the shipment. Tr. Vol. 2, 115-116.<sup>40</sup>

#### **i. Harm to the Program**

The manifest essentially serves as a chain of custody ensuring critical accountability in the transportation and the subsequent treatment, storage, and disposal processes. *See* Tr. Vol. 2, 115-116. "In this case, Prime [offered for transport] the hazardous waste from Boise, Idaho to Salt Lake City, Utah, which is a distance of over 300 miles along public roadways with no

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<sup>39</sup> Since the total penalty exceeded the maximum applicable at that time (in both the 2010 Matrix and the statutory maximum), the proposed penalty was capped at \$37,500, assessing only approximately \$1,300 in economic benefit (less than the cost of two drum samples). Tr. Vol. 2, 106.

manifest.” Tr. Vol. 2, 115. Failure to properly identify the hazardous waste on a manifest may mean that the hazardous waste never enters RCRA’s cradle to grave management program. As EPA’s Chief Judicial Officer stated in *In the Matter of Ashland Chemical Company, Division of Ashland Oil, Inc.*:

The manifest system “is the heart of RCRA's cradle-to-grave 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),<sup>41</sup> it most assuredly disrupted EPA's ability to track accurately the generation of waste, particularly when viewed in conjunction with Ashland's permit violation.

[note 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.]]

3 E.A.D. 1 (E.P.A.), 1989 WL 253202 at \*6.<sup>41</sup>

Respondent’s failure to prepare a hazardous waste manifest for transport from B&W’s lot to the Facility prevented the waste from being tracked from cradle-to-grave. Tr. Vol. 2, 119. Prime’s failure to prepare a manifest for the transportation of hazardous waste in the open and compromised condition the drums were in after the fire for over 300 miles has “serious implications” for the RCRA program and can have a “major” potential for harm to the program regardless of whether there was actual harm to humans and the environment.<sup>42</sup>

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<sup>41</sup> The manifest system is designed to ensure that all hazardous waste generated is designated for treatment, storage, or disposal in, and arrives at, a TSD facility for which a permit has been issued as required by RCRA. *See*, 42 U.S.C. § 6922(a)(5).

<sup>42</sup> *See also* RCPP at 15.

## ii. Harm to Human Health and the Environment

The potential for harm during transport of this hazardous waste without a manifest over 300 miles becomes clear when viewing the photograph of the trailer on the back of the tow truck following the fire with the knowledge that at least 19 almost full, open and tilting drums of hazardous waste were on board. *See CX57* at 6.<sup>43</sup> The threat of harm would only have been worse if Brett Towing's truck had been in an accident of any type during transport because the driver and emergency responders would not have had any information about the nature of the materials involved.

If Prime had prepared a manifest, Prime would have been required to use an authorized hazardous waste transporter and, among other things, the load would have been placarded, and the waste would not have been transported on an open trailer, with the open and compromised drums still on the collapsed trailer. To protect transportation workers, the public and the environment from the dangers associated with the transport of hazardous waste, those who arrange for transport must provide a safe operating environment in both containment and in movement. *See generally* 40 C.F.R. § 263.10.

Exacerbating Respondent's failure to use a manifest, Respondent told the transporter, Brett's Towing, that the waste was water-based paint before the collapsed trailer and open drums were transported over 300 miles of public highways *Tr. Vol. 3, 172-176.*<sup>44</sup> This only increased the threat of substantial harm. If the transporter or emergency responders had to address an emergency (leak or fire) during transportation, they would have thought they were dealing with

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<sup>43</sup> Ms. McNeill testified that this photograph likely is a fair representation of the condition of the trailer and drums while being transported by Brett's Towing. *Tr. Vol. 2, 117.*

<sup>44</sup> Complainant's penalty calculation was made on the basis that Brett's Towing was not told there were any drums in the destroyed trailer. *See, testimony of Ms. McNeill, Tr. Vol. 2, 118 and 125.*

water-based paint, when in fact they would have been dealing with hazardous waste, resulting in an unsafe and improper response to the emergency. Tr. Vol. 2, 119. Further, had Respondent properly manifested the shipment, the Facility would not have been designated as the receiving facility (unless it had obtained authorization to store hazardous waste). Even if Respondent had designated the Facility as the receiving facility on the manifest, Prime personnel at the Facility would have been aware of what was arriving at its gate, which could have caused the Facility to reject the shipment and potentially avoid illegally storing the hazardous waste.

**c. Extent of Deviation**

Respondent's failure was a complete deviation from the requirement to prepare a RCRA manifest. Tr. Vol. 2, 119-120 ("determined to be a major extent of deviation"); RCPP at 17. As Ms. McNeill testified, had Respondent completed a manifest, but with some of the information incomplete or wrongly completed, that might have been cause to determine a moderate or minor extent of deviation.<sup>45</sup>

**d. Amount from Matrix Cell<sup>46</sup>**

The explanation for this selection is discussed *supra* Section III.C.2.d (Count 1), as Complainant applied the same analysis to each count. *See also* Tr. Vol. 2, 123-124; CX04Cor at 7-8.

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<sup>45</sup> "[W]e take everything back to the penalty policy basically and so looking at the definition of major extent of deviation is something that's not met, a requirement that's not met or most of the requirement is not met. In this case there was no manifest at all, so it was a full complete deviation from the requirement." Tr. Vol. 2, 120-21. In comparison for moderate extent of deviation "some of the requirements are met as intended and others aren't. In the case of a manifest, it might be if there was a manifest, but it wasn't signed or . . . it didn't have complete information." *Id.* at 121-122. This example can be applied to all counts.

<sup>46</sup> Because the manifest violation occurred on or about October 1, 2015, Complainant applied the 2010 Matrix. The major-major cell, therefore, has a penalty range of \$28,330 to \$37,500.

#### **e. Multi-Day Penalties**

Even though under most circumstances multi-day penalties are considered mandatory for major-major violations, 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.” Tr. Vol. 2, 124; *see also* CX04Cor at 12, RCPP at 25.

#### **f. Adjustment Factors**

The only adjustment factor Complainant applied to the gravity-based penalty for Count 2 is “willfulness and/or negligence.” *See* discussion *supra* Section III.C.2.f. (Count 1) as Complainant applied the same analysis to each count. For Count 2, Ms. McNeill testified that Complainant also considered “the additional detail that Prime did not inform the towing company that there was paint on the trailer, much less potentially hazardous waste being there” when considering an adjustment for willfulness or negligence.<sup>47</sup> Tr. Vol. 2, 125.

### **4. COUNT 3-Storage Without a Permit- Utah Admin. Code R315-3-1-1.1(a)**

#### **a. Introduction**

Complainant has proposed a penalty of \$470,329 for Count 3. 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 gravity-based penalty of \$427,572. Complainant then adjusted the penalty upward by 10% (\$42,757) for a total base

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<sup>47</sup> *But see* testimony *supra* note 23. The fact that a Prime employee, Mr. Oheim, told Brett’s Towing that they were towing an innocuous material (water-based paint), however, does not decrease Prime’s negligence in causing thousands of pounds of hazardous waste to be transported in this manner without a manifest, especially considering that Mr. Oheim had access to Prime’s computer system and easily could have seen that the load was HAZMAT. *See* Tr. Vol. 3, 176; Tr. Vol. 2, 91-92 (water-based); *see also* Tr. Vol. 3, 329 (computer system).

penalty of \$470,329.<sup>48</sup> The basis for Complainant’s proposed penalty for Count 3 is set forth in detail in Ms. McNeill’s testimony at Tr. Vol 2, 128-158, and CX04Cor at 12-15.

**b. Potential for Harm**

At its core, RCRA regulates the treatment, storage, and disposal of hazardous waste through permitting. *See* Tr. Vol. 2, 132-133; *see also* 42 U.S.C. § 6925(a) (“the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit”); and 40 C.F.R. Parts 264 and 270.

**i. Harm to the Program**

Storage requirements in RCRA permits, including storage in containers, are designed to ensure the prevention and detection of releases of hazardous waste to the environment and protect persons coming into contact with containers and wastes.<sup>49</sup> In a number of decisions, the Board has made it clear how important RCRA permits are to fulfilling the purposes of the RCRA program. In its review of the Presiding Officer’s decision in *Everwood*, the Board explained that “[a]s 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.” 1996 WL 557269 at \*8.

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<sup>48</sup> Complainant originally calculated an economic benefit of \$8,273 for this count. After the Complaint was filed, however, Complainant declined to pursue this economic benefit amount, and the total base penalty became Complainant’s total proposed penalty for this count. After correcting an earlier version of the exhibit, this amount is properly reflected as the “total gravity-based penalty” in the summary table on page 13 of CX04Cor.

<sup>49</sup> Regarding general permit protectiveness, *see, e.g.*, 42 U.S.C. § 6901(b)(5) (Congressional finding that “inadequate controls on hazardous waste management will result in substantial risks to human health and the environment”); and 42 U.S.C. § 6924(a)(6) (requires contingency plans for “unanticipated damage” from any treatment, storage and disposal of hazardous waste). Regarding more specific RCRA permit requirements applicable to storage of hazardous waste in containers, *see, e.g.*, 40 C.F.R. 264 Subpart I (Use and Management of Containers), and 40 C.F.R. § 264.17 (General requirements for ignitable, reactive, or incompatible wastes). Regarding facility-wide standards applicable to TSD facilities, *see, e.g.*, 40 C.F.R. 264 Subpart B (General Facility Standards).

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 the 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).

1997 WL 133778, at \*33 (emphasis added).

In its *Everwood* decision the Board also made it clear that storage of hazardous waste at a facility without a permit rarely can be considered to pose a minor potential for harm to the program.

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



1996 WL 557269 at \*8 (emphasis added).<sup>50</sup>

There is no evidence in the record that Respondent's storage of thousands of pounds of hazardous waste at the Facility complied with any single RCRA storage requirement or facility-wide permit requirement.<sup>51</sup> The harm to the RCRA program from Prime's storage of the hazardous waste without a permit at the Facility, therefore, cannot be considered minor as defined in the RCPP ("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. Without a permit, Respondent's storage of hazardous waste caused at least significant harm to the RCRA program.

**ii. Conditions at the Facility and Harm to Human Health and the Environment**

Complainant's proposed penalty appropriately accounts for the potential for harm to human health and the environment based on the potential (or likelihood) for exposure and the potential seriousness of contamination<sup>52</sup> caused by Respondent's storage of hazardous waste without a permit.

Even without the expert testimony Complainant put on to rebut Respondent's expert witness testimony (discussed in the following section), Complainant has demonstrated that its

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<sup>50</sup> The 2003 updates to the RCPP 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 [here](#). 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.

<sup>51</sup> "Right, so the drums were not labeled. They were not marked with an accumulation start date. They were not closed. As I said, 19 of the 20 were open because they didn't have bung covers anymore. These containers were also noted to be in poor condition." Tr. Vol. 2, 128. And, with regard to facility requirements there was no evidence at the time the waste was stored at the Facility that "the employees had received hazardous waste training, that they were conducting weekly inspections to detect any potential releases of hazardous waste. . . no contingency plan that would inform an emergency response if there was a release." *Id.* at 128-129.

<sup>52</sup> See discussion *supra* Section III.A.1 (inherent toxicity).

assessment of a moderate potential for harm to human health and the environment under the RCPP demonstrates that Complainant fully considered the totality of the facts regarding Respondents improper storage.<sup>53</sup> *See* Tr. Vol. 2, 132. The drums were stored outside without secondary containment on a compromised trailer missing the top half of its structure. CX04Cor at 13; CX10 at 15, 16. The drums were also open, missing bung covers, and in poor condition. Tr. Vol. 2, 128, 132.<sup>54</sup>

Prime failed to make a hazardous waste determination of the contents of the burned drums and failed to manage them as hazardous waste. There is no evidence that workers were informed that the drums contained hazardous waste or that they were informed of measures to be taken in event of releases. Tr. Vol. 2, 128-129. Similarly, there is no evidence of monitoring or regular inspections of the drums to check their condition. *See id.*; *see also* Tr. Vol. 4, 175. Without proper labels, packaging and storage conditions, Prime's employees, drivers, and construction workers, and visitors at the Facility, were at risk of exposure. Tr. Vol. 2, 128-132. Respondent put on no testimony or evidence that rebuts these assumptions. In fact, the lack of information possessed by Respondent's employees was buttressed at hearing by the Facility Manager. Mr. Brian Singleton testified that he did not know what was contained in the drums on the trailer while the hazardous waste was being stored at the Facility. Tr. Vol. 4, 59-60; *see also*

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<sup>53</sup> According to the RCPP, the risk of exposure caused by a violation depends on the risk (likelihood) of exposure and/or the hazardous constituents and the degree of the potential exposure. RCPP at 13. The RCPP notes that when considering the "likelihood of a release" one should consider "evidence of release (e.g., existing soil or groundwater contamination), evidence of waste mismanagement (e.g., rusting drums), adequacy of provisions for detecting and preventing a release (e.g., monitoring equipment and inspection procedures)." *Id.* And, 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." *Id.*

<sup>54</sup> Indeed, this Tribunal already has found that Respondent's manner of storage of the drums "may have caused a rupture of a drum or may have caused a drum . . . to leak. As a consequence, any of the eight drums that contained hazardous waste could have released its contents into the environment." April 4 Order, at 15.

CX10 at 2. This is further supported by Mr. Field's testimony that the drums were "forgotten."  
Tr. Vol. 3, 344.

A wealth of other testimony at hearing and admitted evidence shows that the Facility was in a dynamic transition, with major construction activity occurring adjacent to the maintenance shop and the hazardous waste storage location.<sup>55</sup> The evidence, perhaps particularly the photographs showing the broader area around the storage location, clearly depict the open access to the trailer and drums by Prime employees, visitors to the maintenance shop (such as truck drivers) or construction workers.<sup>56</sup> Further, testimony shows that the trailer and open drums were moved at least once during storage due to the ongoing construction activity.<sup>57</sup>

Respondent's witnesses offered testimony about the site-security and fencing to support its argument of a low potential for harm under the RCPP. Complainant first notes that effective fencing and security surrounding the entirety of the Facility would only potentially prevent trespassers from access to the drums. This exterior fencing would do nothing to prevent the potential risk posed for workers, drivers, or visitors (including emergency responders).<sup>58</sup>

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<sup>55</sup> See, e.g., Tr. Vol. 4, 26 (maintenance shop is approximately 220 feet from storage location); Tr. Vol. 2, 164 (Ms. McNeill testified "So they were in a corner of the facility, and then there was construction occurring. And the vehicles were driving past the area where these drums were stored.").

<sup>56</sup> See e.g., CX 10 at 8, 16, 17; see also Tr. Vol. 4, 220-227 (Dr. Keteles testimony regarding site conditions). The Facility is a major terminal for Prime, Tr. Vol. 3, 313-314, and Mr. Singleton agreed that currently "over 500 drivers visit Prime's Salt Lake facility every week". Tr. Vol. 4, 56. Notably, however, Mr. Singleton could not provide estimates for the number of drivers (visitors) that visited the Facility during the period of storage. Tr. Vol. 4, 55-56. Nevertheless, Mr. Singleton testified that Prime conducts any needed repairs on its trucks at the Facility, presumably in the maintenance shop located approximately 220 feet from the trailer and drums. Tr. Vol. 4, 14; see also CX10 at 17, which shows that the large entryways into the shop are open at least some of the time and CX10 at 48, which shows most doors were closed at one point on another day in the same month evidencing activity in the shop.

<sup>57</sup> Tr. Vol. 4, 38-39 (Mr. Singleton's testimony referencing RX14A)("Q Did you -- was the trailer ever moved during the time it sat there 2015-16? A It was. It was moved once. Lance Curtis and two other shop gentlemen moved that about probably 30 feet over from right to left in the picture. Q How did they move it? A With forklifts. . . MR. RYAN: And why was it moved? THE WITNESS: For the construction. Construction asked us to move it, I think, to pour more concrete over by there so.").

<sup>58</sup> Tr. Vol. 4, 231 (Dr. Keteles testified "Yes. So if there's access, like I mentioned, unless a site is completely locked, like locked and nobody can access it, we would still consider that somebody could come in contact with that.

Mr. Singleton testified that “[t]he property itself is surrounded by fence, barbed wire fence” and the two “gates have guards, security guards are at the gates.” Tr. Vol. 4, 26-27. Mr. Singleton also testified that “[t]he construction company put up a fence around the construction site, and so they handled anybody that came in and out of the construction site.” Tr. Vol. 4, 27, 35-36. Respondent’s own exhibit RX14B, which was marked by Mr. Singleton, shows that access to the Facility was not fully restricted during the time of storage, and that access to the drum storage area was unimpeded from the entryways from the street to the construction area.

In an effort to show that access to the hazardous waste from the construction area also was cut off, Mr. Singleton testified that construction fencing was in place between the construction site and the rest of the Facility (including the drum storage area) and “extended from the front to the back of the lot.” Tr. Vol. 4, 45. He also testified, however, that he had no knowledge of people passing back and forth between the construction site and the “active yard.” Tr. Vol. 4, 28, 35.

On cross-examination, Mr. Singleton’s responses were even less certain. For example, when asked again about whether there was traffic from the construction side through the Prime Facility, Mr. Singleton said “[n]ot to my knowledge. I don’t know. Well, I mean, I have no—I couldn’t tell you if [the construction activity] accessed [through the Facility] or not.” Tr. Vol. 4, 7. When pressed, Mr. Singleton stated that he “can’t tell you 6 years ago” about the fencing despite testifying moments before to the site-security and fencing on direct examination. Tr. Vol. 4, 73. When looking at CX10 at 17, from EPA-CID’s August 2, 2016, inspection, Mr. Singleton admitted that he did not see a fence separating the trailer and drums from the construction

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I mean, I’ve had other sites that I’ve looked at and, unless it’s fenced off, we would consider the potential for exposure, that there could be receptors.”).

activity. Tr. Vol. 4, 62. Finally, when presented with a google earth image of the Facility dated July 8, 2016, Tr. Vol. 4, 77, Mr. Singleton acknowledged that the image reflects “two access points” between the construction and the paved side of the Facility. *Id.* at 82-83. When asked on re-direct about temporary fencing visible in certain pictures taken by EPA, Mr. Singleton admitted “I don’t know if they [construction] took it up and down, changed it, moved it back and forth. I don’t know exactly. Best of my knowledge there was a fence there.” *Id.* at 85.

In sum, the Facility Manager could not reliably testify to the details of the fencing that allegedly secured the Facility and the hazardous waste from access during Prime’s illegal storage of hazardous waste. Complainant also notes that even if there actually had been an effective temporary construction fence separating the active construction from the paved portion of the Facility during the time of storage it would only potentially impact the risk for exposure caused by the presence of construction workers, not the risk of exposure to Prime workers, truck drivers, or visitors at the Facility, which is a major terminal for Prime.<sup>59</sup>

Ms. McNeill testified that Complainant could not assess the potential for harm to human health and the environment under the RCPP as minor under these circumstances. In addition to complying with the methods of storage that would have been required in a permit, Respondent would have been required to ensure, among other things, that employees were properly trained, that weekly inspections of the hazardous waste storage area and containers were conducted, and that a contingency plan was in place. Without complying with a single element of protectiveness built into a RCRA permit (so that hazardous waste can be stored in a manner that prevents

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<sup>59</sup> See, e.g., CX10 at 48 (reflecting gaps in temporary fencing on August 24) and CX10 at 17 (no temporary fencing on August 2). Because temporary fencing is composed of readily moveable sections, such fencing is notice that movement is meant to be restricted. It does not prevent movement. Further, as the testimony of Dr. Keteles shows (*see* next section), construction workers near the storage area still would have been at risk of exposure to vapors from the hazardous waste, because such fencing does not stop vapors from moving.

releases), Respondent's storage without a permit cannot be considered a minor potential for harm to human health and the environment.<sup>60</sup>

Finally, Ms. McNeill also testified that Complainant considered the lack of nearby waterways and Respondent's storage of the trailer on a paved surface, all of which resulted in Complainant selecting a moderate (significant, pursuant to the RCPP) rather than major (substantial) potential for harm for this violation. Tr. Vol. 2, 155-156.

### **iii. Expert Testimony and the Risk of Exposure**

At hearing, Respondent submitted the testimony and expert report of its toxicologist, Dr. Walker, in support of the proposition that the potential for harm to human health and the environment from Respondent's storage of waste at the Facility was low. Dr. Walker testified that her assessment of the conditions surrounding the trailer and drums at the Facility led her to conclude that the probability (or risk) of exposure was low. Tr. Vol. 4, 112. Dr. Walker also testified that she had "determined that the probability of a fire occurring was also low." *Id.* at 112. Based on these two factors, Dr. Walker concluded that "the potential for harm was also low." *Id.* Complainant's expert toxicologist, Dr. Keteles, however, showed that Dr. Walker's assessment of the two key considerations supporting her conclusion that the potential for harm was low were flawed. Dr. Keteles also identified other flaws in Dr. Walker's analysis supporting her conclusion on the potential for harm. Each is discussed below.

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<sup>60</sup> This is true whether this violation is viewed relative to full spectrum of RCRA permit violations (from one very minor violation of a permit to the complete failure to get a permit), or when viewed in relation to the disparity between actual storage conditions at Respondent's Facility and the storage conditions one would see at a facility operating in compliance with a permit.

**(a) Dr. Walker did not properly assess exposure pathways, and, therefore, her assessment that the probability of exposure was low is in error.**

Dr. Walker testified that certain pathways between the hazardous waste and receptors were not complete during Prime's storage of the hazardous waste at its Facility.<sup>61</sup> According to Dr. Walker, the exposure pathways were not complete because she deemed it unlikely that receptors would have come into meaningful contact with the hazardous waste.<sup>62</sup> Dr. Keteles, Complainant's expert toxicologist, however, testified that those same pathways were complete because receptors were not cut off from the ability to come into contact with the hazardous waste.<sup>63</sup>

The record is clear that humans (Prime workers, truck drivers, construction workers and other visitors) at the Facility and any animals in the area, had unfettered access to the trailer and

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<sup>61</sup> With regard to the air inhalation pathway, Dr. Walker testified that the pathway in the conceptual site model in Dr. Keteles' expert opinion report (CX66 at 9 (Figure 3)) should go from "red to orange" indicating a potential rather than complete exposure pathway. Tr. Vol. 4, 146. And, when discussing the exposure pathways more generally, Dr. Walker stated, "and that's where I disagree that we have a complete pathway here." Tr. Vol. 4, 146; *see also* Tr. Vol. 4, 151 ("JUDGE COUGHLIN: Yes. And if you don't mind, I just, I think it's clear, but I just want to make sure. So with regard to this conceptual model that we've been looking at, is it your opinion and where you differ from that of Dr. Keteles when she presumably testifies about this that the red in each of these categories would be, at best, orange, if not less, as depicted in this legend? THE WITNESS: Yes.")

<sup>62</sup> "So we've already discussed the Prime site was not open to visitors, so it's unlikely that there are going to be visitors that are exposed to this waste. With regards to workers, the workers are rarely in the area of this paint waste either. And then with regards to responders, presumably this refers to emergency responders who would come and be summoned in case of a fire, they would be wearing personal protective equipment, and so it's unlikely that they would have a significant inhalation exposure to the paint waste." Tr. Vol. 4, 148. Conversely, when asked whether first responders would "be wearing PPE if they didn't know what was in the drums" Dr. Walker could not answer. *Id.*

<sup>63</sup> "So at EPA, in risk assessment, unless a site is completely locked and inaccessible, we would consider the pathway complete. So because the workers had access to the drums, we consider that the pathway is complete. We wouldn't rule it out. We would still consider them at risk. They are potential receptors because they still have access to it." Tr. Vol. 4, 222. And, with regard to emergency responders, Dr. Keteles testified that "Yes, [the lack of labeling is] a very important consideration because, without the proper labeling, say an emergency responder that arrives at the site wouldn't know that there's hazardous waste there and that the fumes are hazardous. . . . If there was a fire, firefighters could show up and the drums aren't labeled. They don't know what's in them or that it's hazardous." Tr. Vol. 4, 229. Dr. Keteles went on to state that there is "evidence that there's trucks and there's obviously human activity [at the Facility]". . . . [t]hey have potential to come into contact with [the hazardous waste]. So, the exposure pathway is complete. *Id.* at 246-247.

drums.<sup>64</sup> Whether any receptors chose to move toward the hazardous waste is a separate question. If any humans (or animals) at the Facility chose to move toward the hazardous waste, nothing would have alerted them that they were moving toward RCRA hazardous waste; or even an inherently hazardous material, because even the flammable placard was gone by the time EPA-CID visited the Facility.<sup>65</sup> Further, nothing inhibited, or even slowed, an approach path to the trailer and open drums.

At some point during their approach, human or ecological receptors would have come into contact with vapors from the waste.<sup>66</sup> On arrival, the condition of the trailer certainly would not have inhibited any access to the mostly full drums, or any hazardous waste that may have leaked out of any of these compromised drums; and because the bung hole covers were open on all but one of the drums of hazardous waste, not even the drums would have prevented actual physical contact with waste in the drums.<sup>67</sup> Finally, because there were no labels or information on the drums, humans would not have been alerted to the inherent hazardousness of the waste

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<sup>64</sup> Dr. Keteles testified that the site conditions, including the location of the maintenance shop, “indicates that there were workers present, there are workers that have access to the drums. They’re not fenced in, so yes, people had access to it, so there could be exposure. Tr. Vol. 4, 226, CX10 at 16-17; *see also* Tr. Vol. 4, 232 (“I don’t see a fence between the drums and the construction activity.”).

<sup>65</sup> *See* discussion *supra* Section III.A.1. (inherently hazardous); *see also* CX10 at 15 (no placard).

<sup>66</sup> “But to answer your other question, yes, distance would matter. But since Prime didn't do the occupational monitoring, we don't know how far away the vapors would travel. But what I do know from the drum logs is that nearby the drums the levels were high. And based on that chemical composition that day, they would have likely exceeded some of the occupational exposure limits.” Tr. Vol. 4, 231-232 and 214; *see also* Tr. Vol. 4, 213 (“the PID measurements indicate[] that the organic chemicals were volatilizing. They were becoming a vapor, and they could be inhaled”). *See also id.* at 245-46 (“Q Okay. And vapors on the ground would be less likely to be breathed, wouldn't they? A I could see a trucker that's working on his rig with his breathing field close to the ground. Q No, I said, as we walk around on our feet, we're less likely to encounter vapors on the ground. Isn't that correct? A It would also depend on the amount of vapors too. And it would also depend on the elevation of the ground, and if there's a low-lying area.”).

<sup>67</sup> *See* Tr. Vol. 4, 214 (Dr. Keteles testifying that “I believe the [chemical constituent] concentrations could actually be quite high and even exceed some of the occupational exposure limits . . . . The drum logbook does indicate that most of the drums were quite full, three-quarters full, seven-eighths full, so the volume wasn't substantially reduced by the fire.”); *see also* RX66 at 12, Appendix A (drum log).



and thus could not have made their own informed choice about whether and how to be exposed to the hazards the waste posed (i.e., to manage the risks for themselves).

Because the volatilization and leak pathways identified by Dr. Keteles were complete<sup>68</sup>, the risk of exposure to the thousands of pounds of hazardous wastes by humans and other receptors existed.<sup>69</sup> *See* CX66 at 9.

**(b) Dr. Walker's assessment that the risk of fire was low was inaccurate.**

Dr. Walker concluded that the risk of fire was also low. Tr. Vol. 4., 112. She testified that the biggest point for considering the probability of fire for the flammable hazardous waste is the “ignition” source. Tr. Vol. 4, 130. According to Dr. Walker, the storage conditions at the Facility lack a potential ignition source.<sup>70</sup> She acknowledged, however, that static electricity, a spark from metal hitting concrete, drums hitting one another, and construction equipment can all be ignition sources. *Id.* at 169-170. Dr. Walker also testified that the ignition source has to be “directly at the level of paint, so we need to have it inside the actual barrel at the surface of the paint to be considered at the flashpoint. So if something sparks, but it's 20 yards away, that's not likely to be something that's going to cause a fire.” *Id.* at 170. Another basis for Dr. Walker's

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<sup>68</sup> Dr. Walker agreed that “because [the hazardous waste] was not locked away entirely, there is potential for some workers to come by and be exposed to very, very low levels of vapors, yes.” Tr. Vol. 4, 154.

<sup>69</sup> Tr. Vol. 4, 227 (There is no “de minimis number of receptors. If people could come in contact with it, we would consider the risk.”). The same is true for environmental receptors. *Id.* at 228. (“If there is the potential to come in contact with it, we would still consider that in the risk assessment. So if birds could access this facility, say small mammals, reptiles, like what was mentioned, a lizard, they would still be considered receptors that could come in contact with this material that wasn't properly stored.”) *Id.* at 228.

<sup>70</sup> Tr. Vol. 4, 130 (“the location of the trailer and the drums, again they're in a drum with a small hole at the top, off in a remote corner of the [yard]. The facility is mostly fenced, there aren't workers nearby, there's no activity taking place nearby” and “I think it's a very low probability that we could have that paint, even if it was at the sufficient temperature for there to be accumulated vapors that could ignite, because the lack of ignition source I just believe that the probability of fire is low.”).

conclusion that the risk of fire was low was that that the vapors would “readily dissipate into the surrounding environment” *Id.* at 138

Dr. Keteles, however, testified that that the vapors from the hazardous waste would not have readily dissipated, the ignition source does not have to be in the drum, and ignition sources were present at the Facility; therefore, there was significant potential for fire.

Contrary to Dr. Walker's opinion that the vapors (including the chemical constituents) would readily dissipate when released from the drums, Tr. Vol. 4, 138, Dr. Keteles testified that “because the density of the vapor would be greater than air, so it would actually sink. It wouldn't just rise and dissipate.” *Id.* at 216. Thus,

as the drums breath[e] and they eliminate the vapors outside of the drum and it could collect in the trailer or even it can travel considerable distances along the ground, if there's an ignition source, it could ignite and catch fire again. The material in the drums caught fire once. They could catch fire again.

*Id.* at 218.<sup>71</sup>

Dr. Keteles also listed several obvious potential ignition sources at the Facility:

dragging a metal chain on the ground, just the metal drums banging together, static electricity from, say, the tarp. I did notice there was a train nearby. A spark from the train that could set the brush on fire, and then you have a flame which then could ignite the waste. Pretty much anything that generates a spark. A faulty electrical wire. Just the construction equipment dragging a metal blade across the concrete could generate a spark.<sup>72</sup>

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<sup>71</sup> Dr. Keteles also pointed out that the SDS for the strontium chromate primer “speaks to the fact that [the vapor is] more dense than air and, therefore, it would accumulate in lower confined areas, such as the drums being stored on that trailer. They would accumulate there, and . . . If there was an ignition source, it could ignite.” *Id.* at 217-218; *see also* CX32 at 53 (“**Vapors may accumulate in low or confined areas or travel a considerable distance to a source of ignition and flash back.**”) (emphasis added).

<sup>72</sup> Tr. Vol. 4, 224 (“Yes, I did look at some Google Earth images, and I noticed that there was construction activity nearby, which again, would result in potential exposure to the construction workers. I also noticed that there were train tracks nearby, so that could be an ignition source, in addition to the construction company. I noticed that trucks, and, depending on what date you looked at the Google Earth images, there were trucks that had moved, so there was obviously human activity there. People were there, and people had access to those drums.”).

*Id.* at 218-219. And, in the event of a fire, there could be a release of "combustion byproducts as the material burned" to include "metal oxides, halogen oxides, as well as fumes, smoke, particulates from the material." *Id.* at 219. The testimony and evidence reflecting the high concentration of vapors at the drums, the density and characteristics of these vapors, and the clear presence of ignition sources at the Facility create a significant risk of fire. With this risk comes the risk of exposure during a fire. For, example, "firefighters could show up and the drums aren't labeled" then they "wouldn't know that there's hazardous waste there and that fumes are hazardous" putting them at risk. *Id.* at 229.

**(c) Dr. Walker's conclusion that there was a low probability of harm to human health and the environment from the improper storage of the waste is flawed.**

In addition to two key bases underpinning Dr. Walker's conclusion being incorrect, other evidence and testimony establishes that the potential for harm from contact with the waste or vapors was not minor.

Dr. Keteles testified that Respondent's storage of hazardous waste without a permit created a potential for harm based on the inherent toxicity of the waste (*see* discussion *supra* Section III.A.1.), potential for exposure, and potential for fire. Tr. Vol. 4, 230; *see also* CX66 at 6-10.

Dr. Keteles testified that on the day of the NEIC inspection:

NEIC actually measured the volatile organic compounds with a photoionization detector, and they got pretty high levels of organic compounds in the vapor above the drums that, on average, was 500 parts per million. And those measurements were actually taken in the afternoon. They would have been much higher in the morning. And even at 500 parts per million, I would still expect that the occupational exposure limits would be exceeded for some of those chemicals just based on the composition of the chemicals that were in that material.

Tr. Vol 4, 212-213; *see also* CX66 at 12, Attachment A.

This "indicates that the organic compounds were volatilizing. They were becoming a vapor, and they could be inhaled," Tr. Vol 4, 212-213.<sup>73</sup> According to Dr. Keteles "the concentrations [of chemical constituents] could actually be quite high and even exceed some of the occupational exposure limits." *Id.* at 214.

Finally, with regard to hexavalent chromium specifically, Dr. Keteles testified that it "is so hazardous that OSHA doesn't allow you to manage exposure with time." *Id.* at 216. As a result:

If you exceed the permissible exposure limit, OSHA will not let employers reduce the amount of time that they are near the chemical in order to reduce their exposure. They have to wear PPE. Well, first, you have to reduce the exposure by using proper controls and then, as a last resort, you would provide PPE.

*Id.* at 216. No such measures ever were taken at the Facility, where the drums were "forgotten."

Tr. Vol. 3, 344; *see also* CX10.

Because, as Dr. Keteles explained, there was a significant potential for exposure, and the potential for exposure is further exacerbated by the potential for fire, Dr. Keteles concluded that there was a potential for harm. Tr. Vol. 4, 228; *see also* CX66 4-10.

### **c. Extent of Deviation**

The RCPP defines a major extent of deviation from a RCRA requirement as "[t]he violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance."

RCPP at 18. Complainant determined the deviation to be major because "there was no attempt made to get the hazardous waste permit." Tr. Vol. 2, 133. In addition, Respondent did not even consider heeding the storage and handling instructions in the SDS. Had Respondent done so

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<sup>73</sup> Dr. Keteles testified these measurements indicate a "very rapid release of those volatile chemicals" as the drums were breathing. *Id.* at 212-213. This is further supported by EPA-CID inspectors' observation of a "strong chemical odor" when inspecting the Facility. *Id.* at 213; *see also* CX10 at 2.

Respondent would have come close to complying with at least some storage conditions that would be in a RCRA permit.<sup>74</sup> Respondent's storage of hazardous waste without a permit rendered the permit requirement entirely inoperative. RCPP at 17; *see also, Everwood* (finding "[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').") 1996 WL 557269 \*9.

**d. Amount from Matrix Cell<sup>75</sup>**

The explanation for this selection is discussed *supra* Section III.C.2.d (Count 1), as Complainant applied the same analysis to each count. *See also* Tr. Vol. 2, 134-135; CX04Cor at 7-8.

**e. Multi-Day Penalties**

The RCPP states that multi-day penalties are presumed appropriate for days 2-180 of violations designated as moderate-major. RCPP at 25-26; *see also* Tr. Vol. 2, 137. Therefore, "a multi-day penalty is considered to be mandatory if there is a continuing violation . . . unless there are case specific factors that would cause EPA to not apply the multi-day." Tr. Vol. 2, 137. "In this case, there were no such case specific factors so EPA did apply the muti-day component." *Id.* Respondent presented no evidence to overcome the presumption that multi-day penalties are

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<sup>74</sup> *See* testimony of Ms. McNeill "A No, there's also other requirements through, as I said, throughout the SDS that state that the material should be labeled. It should be stored tightly closed, again, in a well ventilated place. Also dry and cool. It should be stored at temperatures not exceeding 95 degrees Fahrenheit. Also that vapors should not be inhaled or breathed in.... Q And are there similarities between these requirements and the RCRA requirements? A Yes, there are. A number of them overlap...." Tr. Vol. 2, 130-31.

<sup>75</sup> Using the gravity-based penalty matrix for violations that occurred after November 2, 2015, the cell in the gravity-based penalty matrix for the first day of violation for a moderate potential for harm/major extent of deviation has a penalty range of \$14,120 to \$19,414. Because the majority of this violation occurred after November 2, 2015, when the inflation adjustment changed, Complainant applied the 2020 Matrix. Tr. Vol. 2, 138.

applicable for this violation. This is especially true when multi-day penalties were not proposed for any other violation.

Multi-day penalties for days beyond 181 are discretionary. RCPP at 25. Accordingly, Complainant did not propose penalties for more than 180 days even though the violation ran from October 1, 2015, through August 3, 2016. Tr. Vol. 2, 137-38. The analysis for the Complainant's selection of the mid-point in the multi-day matrix cell is the same as the analysis for the gravity component of each count, which is described *supra* Section III.C.2.d. (Count 1, Matrix Cell). Tr. Vol. 2, 138-39.

#### **f. Adjustment Factors**

The only adjustment factor Complainant applied to the gravity-based penalty was "willfulness and/or negligence." *See* discussion *supra* Section III.C.2.f. (Count 1) as Complainant applied the same analysis to each count.

#### **g. Economic Benefit**

As Ms. McNeill testified, and explained in CX04Cor 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. Tr. Vol. 2, 141 ("After review, EPA determined that the economic benefit gained through noncompliance for this count was determined to be minimal and so no economic benefit was applied."), and *Id.* at 256 ("It's not[,] because we initially considered an approximately \$8,000 economic benefit for count three that was later revised and removed.").

**5. COUNT 4-Failure to Properly Manage Containers, Utah Admin. Code R315-7-15-16.4**

**a. Introduction**

Complainant has proposed a penalty of \$43,683 for Count 4. 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% (\$3,971). The basis for Complainant's proposed penalty for Count 4 is set forth in detail in Ms. McNeill's testimony at Tr. Vol 2, 159-178 and CX04Cor at 15-18.

**b. Potential for Harm**

**i. Harm to the Program**

Proper container management also is fundamental to the RCRA hazardous waste management program. Tr. Vol. 2, 173. Inadequate containment of hazardous waste directly frustrates the entire preventative goal of the RCRA. Respondent's failure in meeting container management requirements by storing the containers in the open and in poor condition for an extended period of time substantially undermined the RCRA program. Tr. Vol. 2, 173; *see also* Tr. Vol. 2, 128 (storage requirement failures).

**ii. Harm to Human Health and the Environment**

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 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. RCPP at 14. According to the RCPP, "[s]ome factors to consider include evidence of waste mismanagement (e.g. **rusting drums**). . . ." RCPP at 15. As reflected in the record, at least 19 of the 20 drums that were transported to and stored at the Facility contained hazardous waste. Tr. Vol. 2, 160; CX66, Appendix A. All of these drums

were nearly full, in rusted and poor condition after having been through the fire. Tr. Vol. 2, 159, 160-161; *see also* CX66, Appendix A; CX10 at 45-87.<sup>76</sup> “[T]aking into account the condition of the drums, the fact that they were opened,” on a tilted surface, for over 300 days, and volatilizing, such that any workers could have been exposed to the vapors, creates a substantial potential for harm to human health and the environment.<sup>77</sup> Tr. Vol. 2, 161-164; CX14 at 24 (photograph of sampled Drum No. 6); CX30 at 11 and 13 (photographs illustrating storage conditions); *see also* discussion *supra* Section III.A.1 (inherent toxicity) and Section III.C.4.b. (Count 3). In sum,

[n]one of the drum storage conditions were met. . . . the requirement is that they’re kept closed and obviously these drums were open. The requirement is also that they shouldn’t be stored in a manner that would cause the rupture or release of hazardous waste. They weren’t stored protectively. This wasn’t a low access corner of the facility. You know, the fact that the drums were stored on a non-flat surface.

Tr. Vol. 2, 164.

### **c. Extent of Deviation**

Respondent stored hazardous waste in compromised burned drums, that were missing bung hole covers and were not appropriately labeled, tilted on a compromised truck trailer. Tr. Vol. 2, 159; *see, e.g.*, CX10 at 7, 9, 18. Prime deviated from the requirements of the regulation to such an extent that the most important aspects of the requirements were not met resulting in a major deviation from the container management requirements. Tr. Vol. 2, 173-74; CX04Cor at 17.

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<sup>76</sup> *See also* Tr. Vol. 2, 160-161 (“The drum log confirmed that 19 of the 20 drums were open while they were being managed at the Salt Lake City Facility. It also confirmed that . . . 19 of the 20 of them were determined to be nearly full of hazardous waste over the time they were stored. Also, confirmed through NEIC’s direct observation of the drums that the drums were considered to be in poor condition and that they were rusted and burned from being through the fire.”).

<sup>77</sup> Complainant also considered that having the open drums of hazardous waste stored for more than 300 days contributes to the environmental stressors in a census block area that already was overburdened. Tr. Vol. 2, 173.



**d. Amount from Matrix Cell<sup>78</sup>**

The explanation for this selection is discussed *supra* Section III.C.2.d (Count 1), as Complainant applied the same analysis to each count. *See also*, Tr. Vol. 2, 174-75; CX04Cor at 7-8.

**e. Multi-Day Penalties**

Even though under most circumstances multi-day penalties are considered mandatory for major-major violations, based on the totality of the circumstances, Complainant did not assess a multi-day for this count. Tr. Vol. 2, 175-76; CX04Cor at 17.

**f. Adjustment Factors**

The only adjustment factor Complainant applied to the gravity-based penalty was “willfulness and/or negligence.” *See* discussion *supra* Section III.C.2.f. (Count 1) as Complainant applied the same analysis to each count. Ms. McNeill testified that for this count additional support for the adjustment is evidenced by the hazard warning statements and storage conditions provided in the SDS for the hazardous strontium chromate primer, which Respondent had in its possession no later than November 25, 2015 (approximately 8 months prior to EPA’s investigation at the Facility). Tr. Vol. 2, 78, 177; CX39 at 1.<sup>79</sup> Respondent’s failure to consider any of the information on the SDSs about the drums for another eight months is at least negligent, if not willful. *See* Tr. Vol. 2, 177-178; CX32 at 31-64.

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<sup>78</sup> Using the gravity-based penalty matrix for violations that occurred after November 2, 2015 (2020 Matrix), the major potential for harm/major extent of deviation penalty cell has a range of \$35,299 to \$44,124. Complainant used the 2020 Matrix 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 that Respondent could have properly managed the containers of hazardous waste came after November 3, 2015.

<sup>79</sup> Safe storage instructions include “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” CX32 at 36

**6. COUNT 5-Failure to Obtain an EPA ID Number, Utah Admin. Code R315-8-2-2.2**

**a. Introduction**

Complainant has proposed a penalty of \$43,683 for Count 5. 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% (\$3,971). The basis for Complainant's proposed penalty for Count 5 is set forth in detail in Ms. McNeill's testimony at Tr. Vol 2, 182-190 and CX04Cor at 15-18.

**b. Potential for Harm**

Respondent did not obtain a site-specific EPA ID number for the Facility while it improperly stored at least 20 drums of hazardous waste for over 300 days.

**i. Harm to the Program**

Obtaining an EPA ID number for a hazardous waste storage facility ensures that it can be tracked and authorized for the proper treatment, storage, and disposal of hazardous waste. Further, it allows regulators to assess whether safe and legal hazardous waste management activities are being conducted at the Facility. The ID number alerts state and federal regulators that there are hazardous waste activities at a given location. Tr. Vol. 2, 183. This is key in tracking the management of the wastes from "cradle to grave," which is a core component of the RCRA program. Violation of this requirement may have serious implications and merits a substantial penalty as it undermines the statutory or regulatory purposes or procedures for implementing the RCRA program.<sup>80</sup>

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<sup>80</sup> See, e.g., *In re Harmon Elec., Inc.* 7 E.A.D. 1, at \* 33 ("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.**" The Board concluded that "Harmon's disposal of hazardous waste between 1980 and at

As Ms. McNeill testified “this is one of the examples the penalty policy gives for violations that may not obviously appear to cause a substantial potential for harm to the program. But they are still fundamental to the program itself, that failing to get the ID number substantially undermines the RCRA program.” Tr. Vol. 2, 185; *see also* CX04Cor at 18; RCPP at 15.

**ii. Harm to Human Health and the Environment**

Obtaining 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 the waste. CX04Cor at 18. It also allows regulators to assess whether hazardous waste management activities at each facility are being conducted safely and in compliance with RCRA. *Id.* Respondent improperly stored at least 20 drums of hazardous waste for over 300 days, and neither EPA nor the Utah Department of Environmental Quality were notified of the storage. Tr. Vol. 2, 184-85. As a result, regulators were unable to “ensure that waste is being properly stored in a safe manner” putting workers, visitors and first responders at risk. Tr. Vol. 2, 184. Prime’s failure to obtain an EPA ID number directly increased the risks of harm to humans and the environment, where the hazardous waste was being stored without tracking or notification to regulators to assess through inspections or otherwise, Respondent’s compliance with any aspect of RCRA. Tr. Vol. 2, 184-85.

**c. Extent of Deviation**

Respondent made no attempt to obtain an EPA ID number during the storage of hazardous waste, resulting in a complete deviation from the requirement. Tr. Vol. 2, 186.

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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.”)(emphasis added).

**d. Amount from Matrix Cell<sup>81</sup>**

The explanation for this selection is discussed *supra* Section III.C.2.d (Count 1), as Complainant applied the same analysis to each count. *See also* Tr. Vol. 2, 187; CX04Cor at 7-8.

**e. Multi-Day Penalties**

Even though under most circumstances multi-day penalties are considered mandatory for major-major violations, Complainant treated getting an ID number as a one-time event; thus, no multi-day assessment for this violation was calculated. Tr. Vol. 2, 187-188; *see* RCPP at 25.

**f. Adjustment Factors**

The only adjustment factor Complainant applied to the gravity-based penalty was “willfulness and/or negligence.” *See* discussion *supra* Section III.C.2.f. (Count 1) as Complainant applied the same analysis to each count. Ms. McNeill testified that additional support for the adjustment for this count is evidenced by the fact that Respondent had an EPA ID number for its Springfield, Missouri location and obtained an ID number for the second cleanup at the fire site in Idaho, demonstrating knowledge of the need to get an EPA ID number while handling the hazardous waste at the Facility. Tr. Vol. 2, 187-189; CX28.

**IV. CONCLUSION**

Congress’ objective to protect human health and the environment from the risks of harm from exposure to hazardous waste is accomplished 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**

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<sup>81</sup> Using the gravity-based penalty matrix for violations that occurred after November 2, 2015 (2020 Matrix), the major potential for harm/major extent of deviation penalty cell has a range of \$35,299 to \$44,124. Complainant used the 2020 Matrix 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 that Respondent could have obtained an EPA ID number came after November 3, 2015.

**instance.**” Section 1003(a)(1)(4) and (5) of RCRA, 42 U.S.C. § 6902(a)(1)(4) and (5) (emphasis added). To achieve these objectives, RCRA directed the EPA to establish a comprehensive “cradle-to-grave” hazardous waste management program. Tr. Vol. 2, 24.

From the day after the fire, when the drums of hazardous waste were sitting exposed 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 20 burned drums filled with thousands of pounds of hazardous waste. The five violations in this case tell the story of Respondent’s total disregard for the hazardous waste management program from shortly after the waste was first generated during the fire until the waste finally was properly disposed.

Every mile the waste traveled, and every day the waste was improperly stored, presented a risk of release. Respondent failed at every warning sign to make any efforts toward RCRA compliance until EPA-CID investigated the Facility. These are precisely the kind of hazardous waste handling conditions the RCRA regulatory scheme was designed to prevent, and Prime should be held accountable in a manner that reflects the seriousness of the violations and serve as a deterrent to Respondent and others.

In the first instance, Respondent did not make a hazardous waste determination on the drums of waste in the days after the fire or any time thereafter. In the end, the EPA did it for them.

Respondent, a national shipping company, caused the 32 burned and open drums of solid waste, including at least 20 drums of thousands of pounds of hazardous waste, to be shipped in poor and/or open condition over 300 miles without a hazardous waste manifest. Respondent then received the drums of hazardous waste at its Facility and haphazardly stored them for over 300

days outside, open and tilting on the fire-damaged trailer; unprotected from the elements, with construction activity and a maintenance shop nearby, and without first obtaining a RCRA permit.

At no point during transportation or storage did the drums meet any of the RCRA container conditions, including simply keeping the drums closed. Finally, Respondent failed to obtain an EPA Identification number for the Facility, which would have informed EPA and the State of Utah that hazardous waste management activities were occurring at that location.

Complainant, through its experienced RCRA enforcement officer, Ms. McNeill, and other witnesses and exhibits has met both its burden of presentation and of persuasion that the relief Complainant seeks is appropriate. Complainant has shown that when calculating a proposed penalty for each count, Complainant applied the RCPP and inflation matrices 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 sufficiently 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.

Further, Complainant also has shown that it exercised significant discretion in Respondent's favor when calculating the proposed penalty in a variety of ways, including but not limited to, only applying a multi-day factor for one count, and limiting the single multi-day count to 180 days rather than the 300 plus days of violation for Count 3. Tr. Vol. 2, 191-92.

Complainant respectfully requests that the Presiding Officer assess the penalty proposed by Complainant for each of the violations committed by Respondent as indicated by the April 4, 2022, Order, 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 at least 20 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).

Therefore, Complainant asks this Tribunal to order Respondent to pay \$631,402 for its five violations of the RCRA.

Dated: December 23, 2022

Respectfully Submitted,

Laurianne Jackson  
Senior Assistant Regional Counsel  
Environmental Protection Agency Region 8

Of Counsel:

Charles Figur  
Senior Assistant Regional Counsel  
Environmental Protection Agency Region 8

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on December 23, 2022, I filed electronically the foregoing COMPLAINANT'S POST-HEARING BRIEF with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent by electronic mail to Mark Ryan, attorney for Respondent, at [mryan@boisemsn.com](mailto:mryan@boisemsn.com) and Scott McKay, attorney for Respondent, at [smckay@nbmlaw.com](mailto:smckay@nbmlaw.com).

Date: December 23, 2023

Kate Tribbett  
Paralegal