Mark Ryan
MARK RYAN LAW PLLC
P.O. Box 306i
Winthrop, WA 98862
Telephone (509) 557-5447
mryanboise@msn.com

Scott McKay
NEVIN, BENJAMIN & McKAY LLP
P.O. Box 2772
Boise, ID 83701
Telephone: (208) 343-1000
Facsimile: (208) 345-8274
smckay@nbmlaw.com

Attorneys for Respondent New Prime, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

IN THE MATTER OF:	)	
	)	Docket No. RCRA-08-2020-0007
New Prime, Inc.	)	
	)	
Respondent.	)	**RESPONDENT'S POST HEARING BRIEF**
	)	
_____	)	

Pursuant to the Presiding Officer's Order dated November 9, 2022, as amended on January 12, 2023, Respondent New Prime, Inc. (hereinafter "Prime" or "Respondent") submits this Post Hearing Brief. Respondent has admitted liability in the present case, leaving only the amount of the penalty to be resolved. For the reasons set out below, Complainant EPA's proposed penalty of $631,402 should be rejected in favor of a more reasonable penalty based on the mitigating circumstances and facts including those adduced at hearing.

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SUMMARY OF ARGUMENT

New Prime, Inc. is a trucking company that specializes in hauling refrigerated foods and pharmaceuticals. It does not haul or generally generate RCRA hazardous waste as part of its daily operations. When a trailer hauled by a Prime truck in 2015 burned in the middle of the night on the side of a highway in a remote corner of Idaho, Prime, along with first responders to the fire and other government regulators, made a series of mistakes. Those mistakes led to Prime transporting and storing a burned trailer of intact paint barrels at its Salt Lake City yard for approximately 10 months without realizing that it was violating the law.

Prime admitted liability at the onset of this litigation and has owned the mistakes it made here. Prime accepts it will pay a penalty as a consequence but disputes the reasonableness of EPA's proposed penalty. Because Prime is in full compliance with RCRA and no injunctive relief is involved, the only remaining issue to resolve is the amount of the penalty. Respondent respectfully submits that Complainant's $631,402 proposed penalty is excessive and should be rejected.

The facts of this case demonstrate that the 2003 RCRA Civil Penalty Policy (RCPP) is not suited to a one-off violation by a company not in the hazardous waste business such as Prime and the Presiding Officer should deviate from the RCPP as she is authorized to do. Deviating from the RCPP and relying on the RCRA statutory penalty factors will result in a fairer and more equitable penalty. Even if the RCPP is found to apply, the facts do not support EPA's aggressive application of the penalty factors in this case.

While RCRA was violated here, Prime, when notified of the need to address the paint waste that was securely stored in its Utah facility, promptly and responsibly took action and properly disposed of the paint waste without any harm to persons or the environment. Indeed,

Prime gained nothing from the failure to timely dispose of the trailer. There was no financial benefit of any kind to the company from delay. To the contrary, the oversight has cost Prime a considerable amount of time and money addressing the EPA investigation, not to mention the harm to its business reputation.

If accepted by the Presiding Officer, EPA's proposed penalty would be one of the largest RCRA penalties ever assessed in a contested administrative proceeding. And it would be against a company that is not in the hazardous waste business and is an otherwise law-abiding company with no prior or subsequent history of violations and where there was no actual harm to human health and the environment and, critically, where the probability of exposure from storing the trailer in Salt Lake City was low.

The facts established at hearing showed that EPA's reliance on its complex RCPP is misguided in this case. In addition to the errors EPA admits it made in calculating the penalty, Prime also proved that the proposed penalty inappropriately applied the major/major and moderate/major designations – amongst the highest penalty assessment possible -- to the violations noted in the Complaint. Complainant's Proposed penalty is not supported by the facts and is excessive. A penalty between $50,000 and $150,000 is more appropriate under the facts including those adduced at hearing.

ARGUMENT

I. THE PRESIDING OFFICER SHOULD DEVIATE FROM THE RCPP.

The RCPP is an internal EPA policy the Agency uses to derive its proposed penalties. It is not binding on the Presiding Officer, and she may deviate from it so long as she explains why. The Presiding Officer should deviate from the RCPP here because its application is not appropriate to the facts of this case and its application here would result in an unjust result.

A. The Presiding Officer Is Not Bound by Complainant's Proposed Penalty.

The Environmental Appeals Board (EAB) has been clear that the Presiding Officer is not bound by EPA's proposed penalty. "[T]he ALJ is under no legal obligation to impose a region's recommended penalty, even if the recommended penalty takes all of the recommended statutory factors into account." *In re John A. Biewer*, 2013 WL 686378 (EAB 2013) at *7. Further:

> The amount of penalty assessed in a RCRA enforcement action requires consideration of a mixture of facts and law that are not necessarily established by concession or determination of liability. For example, factors such as good faith efforts to comply or lack thereof, the degree of willfulness involved, a history of noncompliance, ability to pay, and other unique factors, all may involve questions of fact that an ALJ must resolve in assessing a penalty.

Id. at *10.

The Consolidated Rules of Practice provide that the Presiding Officer shall, when assessing a penalty, consider the applicable statutory penalty criteria and any agency guidance issued under the statute, 40 C.R.R. § 22.27(b), but, as noted above, the EAB does not require the Presiding Officer to adhere to the RCPP.

The EAB has elaborated on 40 C.F.R. § 22.27(b), holding that the Presiding Officer may consider any applicable penalty policy, but she is not required to comply with it, and may deviate

from the policy so long as she explains why. "[A]n ALJ need not strictly follow the relevant penalty policy and may depart from it as long as he or she adequately explains the reasons for doing so." *In re Andrew B. Chase*, 2014 WL 3890099 (EAB 2014) at *15; *see also*, *In re Great Lakes Division of National Steel Corp*, 5 E.A.D. 355, 374 (EAB 1994) ("Therefore, a presiding officer *may* properly refer to such a policy as a means of explaining how he arrived at his penalty determination…. Agency regulations require that a presiding officer consider any penalty policy issued under the Act, although they do not mandate that he adhere to it.") (Emphasis added).

It is worth noting that the RCPP provides that penalties argued in federal court cases should rely only on the RCRA statutory penalty factors and existing case law, and not rely on the RCPP. *Id.* at 1 (last paragraph).

B. The Presiding Office Should Deviate from the RCPP Because It Is Inappropriate for the Present Case.

The RCPP is EPA's internal policy interpreting the RCRA statutory penalty factors. It has never been subject to public notice and comment, Tr. at 213:8-17, and the regulated public has never had the opportunity to address its terms. The EAB has held, "while penalty policies facilitate the application of statutory penalty criteria and serve as guidelines for the Agency, they are guidance. As such, they should not be treated as rules and need not be 'rigidly followed.'" *In re Andrew B. Chase*, 2014 WL 3890099 (EAB 2014) at *15.

Due process concerns therefore arise where the RCPP dictates a large six-figure penalty with no prior public comment and where Respondent has been not given fair notice of its applicability. *ExxonMobil Pipeline Co. v. U.S. D.O.T.*, 867 F.3d 564, 578 (5th Cir. 2017) ("agency regulations that 'allow monetary penalties against those who violate them . . . must give [a party] fair warning of the conduct it prohibits or requires, and it must provide a reasonably

clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.'" (quoting, *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

The only penalty factors imposed by law in this case are those found in the RCRA statute, which provides broad discretion to the Presiding Officer in assessing a penalty. It states: "In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). The RCPP, by contrast, is hyper prescriptive. EPA has used the brief outline set out by Congress in section 6928(a)(3) to draft a 42-page, single-spaced penalty policy plus appendices and supplemental rules, policies and guidance documents that bears little resemblance to the factors set out in the statute. Under the facts of this case, the RCPP is not a reasonable interpretation of the statutory penalty factors.

Despite Complainant's view its RCPP is "pretty straight forward," Tr. at 215:4, it is not, especially when attempting to apply its various provisions in this case. The RCPP is overly complex, often difficult to understand and subject to varying interpretations. The densely-written 42-page document (plus exhibits, and other supplemental documents) is nearly impossible for a non-professional not steeped in RCRA to understand, which raises questions of fairness, due process and practicality.

The Policy's complexity is reflected not only in the 42-page Policy itself, but in the myriad of supplemental documents needed to interpret it. In the present case, aside from the thousands of pages of CID and other documents EPA put into the prehearing exchange, one must read at least eight separate documents together in order to apply the RCPP here:

- the Complaint
- Complainants' two penalty memos, Exs. CX04 and CX04Cor.
- July 23, 2003 RCPP

- January 15, 2020 Memo entitled "Amendment to the EPA's Civil Penalty Policies to Account for Inflation . . ."
- April 19, 2010 Memo entitled "Revision to Adjusted Penalty Policy Matrices Package Issued on November 6, 2009"
- August 9, 1990 Memo from James Strock "Documenting Penalty Calculations and Justifications in EPA Enforcement Action." (Cited at page 8 of the 2003 RCRA Penalty Policy.)
- 40 CFR Part 19 inflation adjustments applicable at the time EPA filed the complaint.

Tr. at 215:9 – 218:18.

Once those eight documents are reviewed, each of which is lengthy and multifaceted, a multi-step process is required to estimate the proposed penalty for each of the five counts in the Complaint. Each analysis for each count has multiple components to consider. The two matrixes EPA employs (one for single day and one for multi-day violations) require a choice of one of nine boxes based on three criteria for each of two categories of harm with multiple pages of explanation on how to apply those criteria. *See* RCPP at 18. Once EPA subjectively decides which box a respondent should be in (e.g., major/major, major/minor, etc.), it then choses a range of penalty within each box of the matrix box it has chosen based, again, on pages of explanation of where to put a respondent on a sliding scale of possible penalties. And that's just for one part of one count. The summary chart in Complainant's penalty analysis contains 35 boxes describing the 35 separate analyses it performed to come up with the proposed penalty of $631,402.[1] Cx04Cor at 5. Then additional complications are added.

For example, EPA chose for Count 3 (Storage without a permit) moderate/major for the proposed penalty (moderate harm/major deviation) with a resulting figure of $2,295 per day per violation. In order to arrive at the total proposed penalty for Count 3, one must look at the matrix on page 26 of the RCPP, then look up the inflation adjustment number in the 2020 memo at page

[1] It is not entirely clear what penalty EPA is proposing in the present case. CX04Cor states $631,402. The Complaint, which has not been amended, proposes a penalty of $639,675. Complaint at ¶ 97. Respondent assumes the lower amount applies given the discrepancy.

11, then calculate the new inflation-adjusted high and low range (multiply by 1.60451) within the selected matrix, then add the high and low numbers, then divide by two to come to the middle of the range, then multiple by 179 for the number of days of violation, then add ten percent to come up with the number EPA calculated, $470,329. That calculus results in only part of the multipart penalty analysis for all five counts in the Complaint. And Complainant, despite its years of experience calculating such penalties, years of time to prepare this case, and claiming the analysis "pretty straight forward," Tr. at 215:4, made mistakes in calculations. *See* Tr. v. 2 at 251:17-271:11; EPA Motion to Correct Complainant's Prehearing Exchange filed February 22, 2021 (mistakes on economic benefit and typos); Tr. v.2 at 265:11-26:18 (Complainant failed to use the lower penalty numbers for early violations).

The RCPP is open to wide discretion in its application. For example, in determining major versus moderate categories, one must differentiate between significant and substantial. RCPP at 15. One must determine percentage increases in the penalty based on concepts such as negligence. Without defining negligence, the RCPP at page 36 sets out five factors to consider in assessing the degree of willfulness and/or negligence. One must evaluate each of those five factors and come up with an opinion on the degree of willfulness or negligence under the facts of the case. Each exercise of subjective judgment by EPA results in a discretionary decision that is cabined largely by how the EPA compliance officer interprets the RCPP.

In order to come up with the major harm determination here, Complainant assessed for four of the five counts that the Potential for harm was "substantial" and not "significant" or "relatively low risk." *See* RCPP at 15. Complainant concluded that the potential for harm in Count 3 from the storage of the paint was "significant," but Dr. Walker testified that it was "relatively low." Those two conclusions result in vastly different penalties for Count 3. Looking

at the penalty matrix on page 26 of the RCPP (after adjusting for inflation), dropping the "Potential for Harm" from "significant" to "relatively low" lowers the harm category from "moderate" to "minor" resulting in a drop in the proposed penalty from $470,329 to $121,634, assuming one stays in the middle of the range for those two boxes as Complainant did. If one goes to the low end of the range for minor, the penalty drops down to $34,851 ($177 x 179 days + 10%).

The complexity of the Policy and its application here is reflected in the time it took EPA to explain its proposed penalty at hearing. Complainant's penalty witness, Ms. McNeil, spent a full half-day on direct (177 pages of transcript) to explain how her predecessor derived the proposed penalty. *See* Tr. v.2 at 20-197 (the noon break occurred at the completion of initial direct). Ms. McNeil's lengthy testimony regarding the RCPP, coupled with the lengthy written analysis EPA employed, CX04Cor, resulted in a complex mix of legal and policy arguments by a lay witness.

Application of this complex policy is unnecessary here given the undisputed, one-off nature of the admitted violations involving a trucking company with little prior experience or involvement with hazardous waste. The Presiding Officer should give Complainant's proposed penalty the weight it is due: little.

C. EPA'S Proposed Penalty Is Out of Line with Precedent.

If the Presiding Officer adopts EPA's proposed penalty here, it will be one of the largest RCRA penalties ever assessed by an ALJ in a contested case. A review of ALJ initial decisions in RCRA cases shows EPA has a history of seeking high penalties that were significantly reduced by the ALJ after hearing. These cases show that ALJs frequently depart from the RCPP

to award substantially smaller penalties than requested by the EPA Regions once all the facts of the case are set out in the appropriate narrative context at hearing.

In each of the RCRA cases cited below, EPA presumably performed a detailed RCPP analysis similar to the one done for the present case, and in most of the cases the ALJ rejected EPA's assessment of the case, regardless of the facts. *See, e.g.*,

> *In re Carbon Injection Systems,* No. RCRA-05-2011-0009 (ALJ, March 15, 2015) (ALJ assessed zero penalty in a case where EPA asked for $1,915,148)
>
> *In re Andrew B. Chase*, 2014 WL 3890099 (ALJ, 2014) (proposed penalty of $263,069 reduced to $131,014)
>
> *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772 (2013) (zero penalty assessed)
>
> *In re Mercury Vapor Processing*, No. RCRA-05-2010-0015 (ALJ, Dec. 14, 2012) ($743,293 proposed a penalty reduced to $62,000)
>
> *In re Aguakem Caribe, Inc.*, 2011 WL 7444586 (ALJ, Dec. 22, 2011) ($332,996 proposed penalty reduced to $32,500)
>
> *In re Ram, Inc.*, 14 E.A.D. 357 (2009) (proposed penalty of $175,063 reduced to $86,012)
>
> *In re Euclid of Virginia, Inc.*, 2008 WL 700562, 13 E.A.D. 616 (2008) (proposed penalty of $3,362,149 reduced to $3,164,555).
>
> *In the Matter of Dearborn Refining Co.*, 2004 WL 3214475, RCRA (3008) Appeal No. 03-04 (2004) (proposed penalty of $2,910,525 reduced after hearing to $1,250,000)
>
> *In re Titan Wheel Corp.*, 2001 WL 499328 (ALJ May 4, 2001) (full $150,289 proposed by EPA assessed)
>
> *In re M.A. Bruder and Sons, Inc.*, 2001 WL 1659339 (ALJ, 2001) ($64,900 proposed penalty reduced to $8,950).

Other than default orders, ALJs seldom agree with EPA on its proposed penalty and typically assess far smaller penalties than sought by EPA. These administrative RCRA penalty cases also differ in the types of businesses involved. Prime is not in the hazardous waste or

underground storage tank business, and hauling hazardous materials (not hazardous *waste*) constitutes a small fraction of its business. Tr. at 326:6-327:9. The rest of these cases all involve companies who work under RCRA on a regular basis. For example, *Euclid*, involved 70 counts against a company that was in the underground storage tank business, a highly-regulated business under RCRA. *Dearborn Refining* involved multiple counts against a large oil-processing facility in which EPA was forced to seek a compliance order, unlike Prime, which cooperated fully with the EPA.

D. The RCPP Should Not Apply Were Complainant Inappropriately Ignored Good Faith Efforts to Comply.

The RCRA statute states that the ALJ "shall take into account the seriousness of the violation and *any good faith efforts to comply* with applicable requirements." 42 U.S.C. § 6928(a)(3) (emphasis added). Consistent with the statutory mandate, the EAB has supported the need to consider good faith efforts. *See In re John A. Biewer*, 2013 WL 686378 at *10.

The RCPP, however, prohibits the use of good faith efforts to reduce penalties, without any support in the statute. Under EPA's narrow interpretation of good faith, a violator that is aware it is violating, but takes steps to cease the violations, is acting in good faith. But a violator that is unaware of its violations - - and therefore not aware of the need to take corrective actions - - is not given any credit for good faith even if it immediately complies when told of its mistake. Nothing in the statute or EAB precedent compels this one-sided use of a "good faith" factor. *See* Tr. v.2 at 291:21-292:1.

EPA's interpretation also makes no rational sense. A violator that is unaware of its violations -- for example, a company that doesn't regularly deal with the RCRA statute -- and therefore is unaware of the need to take corrective actions, is given no credit for good faith

efforts, even if it fully cooperates with EPA and immediately rectifies the problem once notified and stays in compliance for years afterward. EPA's penalty witness, Ms. McNeil, admitted as much at hearing. Tr. v.2 at 290:21-292:1. EPA did not give zero credit to Prime for coming quickly into compliance once notified, it simply decided to not consider it. In the penalty analysis, it noted "N/A" for good faith. *See* charts in CXCor at 6, 10, 13, 15 and 18. Thus, it did not even consider Prime's efforts to timely comply once notified. Tr. at 279:22-280:16.

EPA's treatment of good faith under RCPP is also inconsistent with EAB precedent. In *In re John A. Biewer*, the EAB stated that "factors such as *good faith efforts to comply or lack thereof*, ... all may involve questions of fact that an ALJ must resolve in assessing a penalty." Nothing in that decision limits the consideration of good faith in the way the RCPP does. The EAB in *Biewer* instructs the Presiding Officer to consider both good faith efforts and lack of good faith efforts without limitations on how to judge good faith.

EPA's constrained interpretation of good faith is also at odds with Complainant's penalty witness, Ms. McNeil, who defined good faith as: "Basically good faith would be cooperating with EPA's inspection and inspectors and throughout negotiations and working to maintain compliance with the hazardous waste requirements." Tr. v.2 at 291:2-6. Prime did exactly that. It cooperated fully with EPA from the time EPA became involved and Prime took all actions necessary to come into compliance once EPA became involved, and it came quickly into compliance once it was authorized to dispose of the trailer by EPA. Stip. ¶¶ 12, 25, 26.

The record shows that Prime was unaware of its mistake in keeping the burned trailer in Salt Lake City until around the time EPA inspected the Salt Lake City yard on July 29, 2016. Soon after the initial inspection, on August 2, 2016, EPA ordered Prime to not dispose of or alter the trailer in any way, and Prime dutifully followed that order. Tr. v.2 at 272:16-19, CX04Cor at

4, Stip. ¶ 25. Once EPA lifted the hold on the trailer, Prime immediately hired a licensed RCRA disposal contractor, and properly disposed of the trailer. CX04Cor at 12; Stip. ¶ 26.

Prime indisputably made a mistake when it left the trailer in Salt Lake City for so long before properly disposing of it. But it is also clear that Prime was in no way trying to avoid the law or save money. Tr. v.3 at 356:10-357:17; v.4 at 49:16-51:7. The record is also clear that Prime fully cooperated with EPA once alerted to its mistake. Tr. v.4 at 48:21-49:5; Stip. ¶ 12. Yet EPA is unwilling to recognize good faith on Prime's part. EPA's interpretation of 42 U.S.C. § 6928(a)(3) is unreasonable and should be rejected.

E. EPA Wrongly Opted to Not Consider Lack of Prior or Subsequent History of Violations to Reduce the Penalty.

Congress did not provide for consideration of prior history of violations as a penalty factor in RCRA. The RCPP does, however, provide for consideration of a prior "history of noncompliance." *Id.* at 37. But, as with its overly-narrow interpretation of good faith, EPA's application of the prior history factor is equally constrained. In fact, under the RCPP, lack of a prior history is not considered. If the respondent has a prior violations(s), the penalty is increased. If the respondent has never run afoul of the law, it receives no credit. *Id.*; Tr. v.2 at 56:16-58:1.

Complainant's penalty memo, CX04Cor, reflects this one-sided approach. In each of the five tables summarizing the penalties proposed for each of the five counts of the Complaint, EPA has noted "N/A" for "History of Noncompliance." CX04Cor at 6, 10, 13, 15, and 18. Ms. McNeil testified that no credit was given to Prime for an absence of any prior violations. Tr. at 56:14-58:1; 280:17-19. Prime's clean prior record was simply not considered by EPA – "N/A." Given the lack of any statutory guidance, the absence of any prior or subsequent history of RCRA violations should be a mitigating factor in assessing the penalty.

II. EVEN IF APPLIED, THE RCPP YIELDS A MUCH LOWER PENALTY WHEN PROPERLY APPLIED.

For the various reasons discussed above, the Presiding Officer should divert from the RCPP. But even if she analyzes this case under the Policy, the resulting penalty should be significantly smaller than proposed here by EPA. In Counts 1, 2, 4, and 5, Complainant assessed Harm as major and in Count 3 as moderate. The bulk of that proposed penalty is Count 3, which is $426,056 as set forth in Exhibit C04Cor (but $478,602 in paragraph 97 of the Complaint). The proper classification for harm in Count 4 is minor, not moderate, which results in a substantial reduction in the overall penalty.

A. Complainant's Assessment of the Risk of Exposure is Wrong and Not Consistent with its Own Penalty Policy.

Complainant argues that for four of the five counts in the Complaint, the potential for harm under the RCPP is major – the highest possible category. For Count 3, it was assessed as moderate. Moving from moderate to minor for Count 3 alone reduces the penalty by hundreds of thousands of dollars. But use of both the moderate and major designations here is unsupported by the facts and is inconsistent with the RCPP.

1. Complainant Failed to Account for Probability of Exposure.

A flaw in Complainant's case is its failure to adhere to its own RCPP to consider the probability of exposure. If Complainant cannot show how likely it was that the storage of the burned paint in Salt Lake City posed a significant risk to Prime workers or the local population or to the environment, it cannot make its case for harm. Potential for harm is one of the two main factors in the RCPP Matrix. *See id.* at 18. Harm is measured as major, moderate of minor. *Id.* at 15. Each of those designations revolves around risk. Major harm poses a "substantial risk of exposure," moderate harm is "significant risk," and minor harm is "relatively low risk." *Id.*

The RCPP states: "The risk of exposure presented by a given violation depends *on both the likelihood* that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents and the degree of such potential exposure." RCPP at 13 (emphasis added). EPA measures the risk of exposure by evaluating the "probability of exposure" and the "potential seriousness of contamination." *Id.*; CX04Cor at 1. Therefore, when evaluating the Potential for Harm, which is half of the RCPP matrix, the RCPP instructs EPA to evaluate the "Risk of Exposure," which, in turn requires an evaluation of the "Probability of Exposure."

Complainant concluded that the storage of the trailer in Salt Lake City "posed a significant risk of exposure of humans or other environmental receptors to hazardous waste . . ." CX04Cor at 13. But Complaint offered no evidence at hearing that it evaluated the probability of exposure. Complainant's RCPP analysis, CX 04Cor, makes no mention of probability of exposure and Complainant's expert, Dr. Keteles testified that she did not consider probability of exposure in her analysis, Tr. v.4 at 234:11-20, even though the RCPP clearly states that EPA should do so.

Dr. Ketele's Expert Report states: "A completed exposure pathway exists when there is evidence of, using one's best professional judgment, a *strong likelihood* of human or ecological receptors coming in contact with site related contaminants." CX66 at 8 (emphasis added). A remote isolated storage location in an outdoor lot where workers do not often visit does not create a "strong likelihood" of exposure. Just the opposite is true. The probability (likelihood) of exposure is low. Dr. Keteles report also talks about "likelihood of imminent and substantial endangerment" from exposure. The evidence adduced at hearing shows that Prime workers moved the trailer once and twice helped EPA, at EPA's direction, access the trailer and move the drums, all without PPE, and no evidence was offered at hearing to suggest anyone suffered any

injuries. Tr. v.4, at 38:11-39:8; v.2 at 40:18-43:2. In fact, Complaint's penalty witness admitted there was no evidence of any workers being exposed. Tr. v.2 at 238:18-22. It stands to reason that Dr. Keteles' conclusion regarding imminent and substantial endangerment proved unfounded.

Ms. McNeil testified that EPA generally considers probability of exposure, Tr. v.4 at 38:7-11, but when pressed on cross examination, she could not point to any analysis of probability of exposure other than a general statement that EPA considers probability of exposure as part of risk to human health and the environment. Tr. v.4 at 235:10-236:13. When asked on cross examination to point out where a discussion of probability of exposure is in the Complainant's RCPP analysis, she could not. *Id.*

RCRA is intended to manage hazardous waste in a manner that reduces the potential for harm in the event of a release. "Potential for Harm" is one of the two major penalty criteria in the RCPP. Under the terms of EPA's own RCPP, if Complainant has not evaluated probability of exposure - - and offered evidence to support that evaluation - - its potential-for-harm argument is unsupported. Complainant in this case offered no such evidence and its expert witness testified that she did not even consider probability of exposure.

2. The Potential for Harm was Low.

By contrast, Respondent put into evidence expert testimony regarding the probability of exposure at the Salt Lake City facility. Dr. Walker wrote in her expert report, and later testified at hearing that the probability of exposure and fire was low at the Salt Lake City facility based on the how and where the trailer was stored. RX 20, *passim*; Tr. v.4 at 11:5-15. The facts are important.

The facts surrounding the storage of the trailer in Salt Lake City are largely undisputed. The Prime Salt Lake City yard is located in an industrial park not far from the Salt Lake City international airport. Tr. v.4 at 14:15-16:3; RX 13-15; RX 20 at 4. The yard is enclosed by a fence with guards or locked gates at the entrances. It is surrounded mostly by open space or other warehouses and is bounded to the north by an active rail line. *Id.* The nearest residential area is approximately two to three miles away. *Id. See also* Stip. ¶ 29 ("This Facility is located in an industrial part in Salt Lake City with no adjacent residential neighborhoods.")

When the burned trailer arrived at the Prime Salt Lake City yard on October 1, 2015, it was placed in the back corner of the yard in an area known as the "bone yard," Tr. v.4, at 38:4-10, where damaged equipment is generally kept. The area was considered "out of the way" where no trucks or people go. Tr. v.4 at 34:20-35:8. Because the trailer had been involved in a fire, a "legal hold" was placed on the trailer which Salt Lake City personnel understood meant they "literally don't touch it. It sits there." Tr. v.4 at 32:7 – 33:2. The trailer was located approximately 200 feet (approx. 67 yards) from the shop, which was the nearest building on the Prime Salt Lake City yard. Tr. v.4 at 26:7-11; 120:21-122:2. The trailer was stored in the open air and was not covered with a tarp until approximately July 2016. Tr. v.4 at 138:1-11. It was stored on an asphalt pad, Tr. v.4 at 47:3-6; 124:3-20, Stip. ¶ 30, and there was a "lack of nearby waterways," that could carry away any potential spill. CX04Cor at 14.

While largely forgotten about and left undisturbed during the time it was stored in the Salt Lake City yard, the trailer on one occasion was moved by forklift a short distance to accommodate construction in the vicinity, a task that took a few minutes. Tr. v.4, at 38:11 – 39:8. The only other time Prime employees went near it was at the request of EPA during the two inspections. Tr. v.2 at 40:18-43:2.

What is in dispute is what potential harm the waste paint posed to human health and the environment. While there is no proof of any actual harm to human health or the environment as a result of the storage of the paint in the bone yard - - and EPA offered none - - Complainant maintains that *potential* for harm to human health and the environment was "significant." CX04Cor. at 13. Complainant's case is entirely hypothetical and not supported by facts.

Despite the isolated storage location, Complainant maintains without evidence that workers would have been exposed to it. Ms. McNeil, however, agreed on cross-examination that there was no evidence that workers went back to the boneyard more than noted above, where they could have theoretically been exposed to paint fumes. Tr. v.2 at 239:16-20. She also admitted that Complainant had no proof of any actual harm. Tr. v.2 at 238:17-239:1. As part of Complainant's penalty analysis, it *assumed*, contrary to the evidence adduced at hearing, that workers were present near the stored trailer, *See* CX04Cor at 13; Tr. v.2 at 237:5-10; 238:13-16; 243:17-244:1.

Respondent's expert witness, Dr. Elizabeth Walker, offered a contrary narrative based on the facts. In both her expert report and her testimony, Dr. Walker concluded the probability of exposure was low as was the potential for serious contamination. RX 20, *passim*, Tr. v.4 at 112:5-15. She also concluded that a fire was unlikely because the drums had already burned removing much of the volatile organic chemicals. *Id.* She concluded that EPA's test method for determining ignitability was biased because it was a "closed-cup" measurement, which did not mimic the open-air nature of the storage. Tr. v.4 at 126:1-127:10. The fire in Idaho may have originally been caused by a tire that ignited. The heat needed to ignite a tire is 750 degree Fahrenheit. Tr. v.3 at 347:4-12. The Idaho fire completely engulfed the barrels of paint in flames.

See CX 18 at 10; CX 7 at 78-80. And finally, there was no ignition source present in the Salt Lake City yard. Tr. v.4 at 127:10.

The assessment of the potential for harm as low is critical because when low risk is used to calculate penalty under the RCPP, the potential harm of the violation drops from "moderate" to "minor." RCPP at 15. Given how the matrixes assess increasingly larger penalties for each category of harm, whether the risk is low or high plays a very large role in the size of the penalty. In the RCPP matrix on page 18 (one day violation), the inflation-adjusted penalties for minor (low potential for harm) are $2,647 - $5,293, but jump to a range of $35,299 - $44,124 for major (substantial potential). The multi-day matrix on page 26 of the RCPP similarly jumps from a range of $177 to $1,059 for minor to a range of $706 to $3,883 for moderate. Whether a Potential Harm is major, moderate or minor makes a big difference.

Dr. Walker assessed that the potential for harm was low because the trailer was in a corner of the yard on an asphalt pad, Tr. v.4 at 124:3-20; Stip. ¶ 30, where no workers were present, *id.* at 120:13-19, and the nearest residential area was approximately two to three miles away. RX 20 at 4; Tr. v.4 at 15:18-21; 138:15-21. The asphalt pad is significant because had any paint leaked it would not have soaked into the ground. RX 20 at 5; Tr. v.4 at 124:3-20. There was no evidence of any leakage during the EPA inspection. Stip. ¶ 13. Dr. Walker further testified that the dispersion of the fumes from the barrels would have had little effect on the local environment because they would have disbursed quickly in the wind. Tr. v.4 at 138:1-11.

Complainant attempts in its post hearing brief to refute Dr. Walker's conclusions. *See* EPA PHB at 41-45. Complainant offered the testimony of Dr. Kristen Keteles as rebuttal. Dr. Keteles reached the opposite conclusion of Dr. Walker, but her conclusions lacked the foundation underlying Dr. Walker's testimony. All of Dr. Keteles opinions where hypothetical,

and not based on actual conditions at the site. *See id*. Dr. Keteles' opinions on risk are based on people and animals theoretically having access to the trailer. *Id.* She did not assess probability of exposure. Tr. v.4 at 234:11-20. Rather, her analysis focused on whether a human *could* be exposed to the trailer. *See* CX66 at 8.

Dr. Keteles' opinions were simply at odds with the facts. Mr. Singleton, who was the only witness to testify who had been inside the Salt Lake City yard, testified that the yard was fenced off from public access with locked gates manned by guards and no workers generally went near the burned trailer. Tr. v.4 at 26:13-27:7. EPA offered no testimony to the contrary. No evidence was proffered regarding animals in the storage area.

Complainant also points to the high concentrations of volatile organic compounds measured at the drums to refute Dr. Walker's opinion that the fumes would have quickly dissipated. EPA PHB at 45. But those measurements were taken only 2 inches above the drum bunghole, not in the surrounding air. *See* Tr. v.4 at 243:5-21.

If EPA's position is correct that *any* hypothetical exposure results in substantial risk, then all RCRA violations will rank major for the harm factor under the RCPP. That simply cannot be the case. Almost any RCRA waste stored anywhere will hypothetically be accessible by humans and animals. The evidence adduced at hearing shows that the boneyard was not open to the public and the paint was stored away from workers in the open where fumes could readily dissipate, and, as Dr. Walker testified, posed a low probability of exposure.

3. EPA's Actions in Not Warning Anyone Reflected its View that the Potential for Exposure Was Low.

EPA's lack of action with regard to the trailer in 2015-16 belie its arguments that potential for harm was significant for Count 3 and substantial for Counts 1, 2, 4 and 5. When EPA first learned of the existence of the trailer on August 2, 2015, it ordered Prime the next day

in writing to not move or handle the trailer in any way. CX11, Stip. ¶¶ 17, 25. Prime complied. Tr. v.4 at 48:21-49:5 Stip. ¶ 25. Importantly, that letter contained no warnings of the potential danger the trailer might pose to Prime workers or the local community, and it required Prime to leave the trailer where it was in the condition it was in until cleared by EPA to dispose it. "You are hereby immediately requested to: **refrain from moving, tampering, altering, discarding, and/or relocating <u>any</u> items on site.** . ." CX11 at 2 (emphasis in original). EPA was originally notified of the burned trailer the night of the fire, CX07 at 8, and EPA CID had the SDS documents early on in the investigation and knew that the paint was listed as a hazardous material, hence the investigation. EPA cannot claim that at the time of the August 2 preservation letter, it did not know or reasonably should have known what was in the burned barrels on the trailer.

If there was a significant risk of exposure from the storage of the trailer -- in August, which is one of the hottest months of the year -- why did EPA order Prime to leave it there and forbid Prime to touch it, all without any recommendations or reminders to warn local authorities or to take any remedial actions. The answer, of course, is that EPA recognized that the potential for exposure was low, notwithstanding the position it has now taken in this litigation.

Only after EPA had conducted at least two inspections of the trailer, was Prime authorized to dispose of it at a hazardous waste landfill on September 19, 2015. Tr. v.2 at 272:16-273:9; v. 3 at 29:7-35:14; Stip. ¶ 26. Six weeks elapsed between the EPA hold letter and the authorization to dispose of the trailer. *Id*. During the inspections, EPA never advised any of the Prime employees who were assisting to wear personal protective equipment (PPE). Tr. v.2 at 276:3-5;v.4 at 43:9-16. Nor did EPA ever instruct or advise Prime to cordon off the area where the trailer was stored. Nor did EPA warn Prime Employees who were helping during the

inspections that the paint was dangerous. Tr. v.2 at 275:6-13; v.4 at 48:5-20. EPA also never notified local government or first responders of the presence of a supposedly hazardous condition. Tr. v.2 at 273:10-274:22.

If the storage of the waste paint in the corner of Prime's fenced and locked facility posed a significant risk to human health or the environment, EPA surely would have warned Prime's Salt Lake City employees, local government and first responders. But it did nothing because it properly recognized the potential for exposure was low. That EPA in this litigation now advances a different position to buttress an enhanced penalty calculation must be seen for what it is. EPA's position now does not change its actions taken at the time it was directing management of the waste and fully aware of the constituency of the paint products.

B. Changing the Harm Assessments Has a Large Impact on the Penalty.

Dr. Walker's unrebutted testimony was that the probability of exposure for the storage of the paint in Salt Lake City was low. (Dr. Keteles testified that she did not consider probability of exposure. Tr. v.4 at 234:11-20.) A low probability equates to a minor potential for harm under the RCPP. Using Complainant's methodology of choosing the midpoint of the range,[2] if one drops from Complainant's moderate/major in Count 3 to minor/major, the Complainant's calculated penalty drops from $462,056 to $121,634, a drop of $340,422, and reduces Complainant's total proposed penalty by more than half without adjusting any of the calculated penalties for the other four counts or without making any change to Complainant's "Extent of Deviation" assessments (all of which were major). *See* Tr. v.2 at 245:22-246:2; 246:18-20. If one chooses the low end of the range for minor/major, the math shows that the penalty for Count 3

[2] The RCPP allows the EPA compliance officer broad discretion to impose different penalties. For example, in the present case, Complainant chose the midrange of the moderate/major box for Count 3, which calculated out to be $2,295. CC04Cor at 13. The range available to the compliance officer was $706 to $3,883. Tr. v.2 at 245:5-9. That is a substantial range, especially when multiplied by 179 days of violation.

would be only $34,851 ($177 x 179 days = $31,683 plus 10% = $34,851), which would reduce the total penalty by an even larger sum.

With respect to the other four counts, all of which were assessed as major harm (substantial risk of exposure), a similar significant drop in the RCPP-calculated penalties occurs when harm is reduced from major to minor using the mid-range penalties.

Count 1	$3,509 ($4,350 + $2,130/2 + 10%)[3]
Count 2	$3,509 (same)
Count 3	$121,634
Count 4	$4,367 ($5,293 + $2,647/2 + 10%)
Count 5	$4,367 (same)
TOTAL	$137,386

In its penalty analysis for Count 1, Complainant stated that Prime's failure to make a hazardous waste analysis resulted in the storage of the trailer in Salt Lake City for 300 days, alleging that was the potential harm. CX04Cor at 7. Counts 4 and 5 also are based on potential harm during storage in Salt Lake City. As discussed above, the probability of exposure in Salt Lake City was low, so the Potential for Harm should also be low, which is $3,509, assuming the middle of the penalty range as EPA did.

By lowering the Potential for Harm to minor for each of the five counts, but sticking with EPA's choice of mid-range, the total penalty would be $137,386. If the low end of the range is chosen, the total would be $47,693. And that leaves Complainant's major assessment for Extent of Deviation untouched.

[3] Complainant used the 2010 Inflation Adjustment memo to calculate the midrange of the major harm for Count 1. This calculation is based on the midpoint of the range for minor harm from the same 2010 memo. Economic Benefit is excluded for reasons set out in II.C. in this Brief.

C. Complainant Failed to Show Any Economic Benefit.

Economic benefit represents the amount of money the violator saved by its noncompliance. In Count 1, Complainant assigned an economic benefit of $10,800. CX04Cor at 5, 6 and 9. EPA found no economic benefit for any of the other counts. *See id.* at 5; EPA PHB at 27-28. Complainant based its conclusion on the assumption that Prime should have sent the paint waste to a lab for corroboration that it was hazardous waste, a point that has never been in contention. The truck contained paint that the SDS indicated contained hazardous material. It burned. It was taken intact back to Salt Lake City and stored. No one has ever questioned what was on the burned truck in Salt Lake City. Complainant therefore erred in concluding that Prime should have tested the paint.

In its RCPP analysis, Complainant states that it "considers the least expensive means of compliance when calculating economic benefit." CX04Cor at 9. It concludes that "[a]lthough the SDS and other documents . . . *would serve as a reasonable basis* for determining the drums contain hazardous waste, *it is also reasonable* to assume that Prime would have decided to test the waste . . . ." *Id.* (emphasis added). Not testing would have cost zero dollars. Testing would have cost $10,800. Contrary to its claim that it "considers the least expensive means of compliance," Complainant chose the higher number after concluding that both methods would be reasonable.

Despite claiming it would use the least expensive means of compliance, it chose the most expensive – testing – and in doing so failed to follow its own guidance. Because Prime never contested that the paint it was hired to haul for PPG contained hazardous materials, and the drums that were burned on the side of the road in Idaho stayed on the trailer that was transported to and stored in Salt Lake City, it stands to reason that no lab work was required. The chain of

custody of the drums was very easy to follow and uncontested. Complainant's first statement regarding economic benefit is correct, "the SDS and other documents . . . would serve as a reasonable basis for determining the drums contain hazardous waste." *Id.* Prime gained no economic benefit from its noncompliance.

III. A PENALTY BETWEEN $50,000 AND $150,000 WOULD BE A REASONABLE SANCTION IN THIS CASE.

The statutory penalty factors dictate a much smaller penalty in this case. As noted above, the RCRA statutory penalty factors, which are the only legally-binding guidance on assessing a penalty in this case, are simple. They state: "In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). The seriousness of the violation is low because storage of the paint was not likely to expose anyone, Prime gained nothing from the delay in disposing of the truck and it made good faith efforts to come immediately into compliance once its mistake was pointed out to it.

A. The Record Shows Low Probability of Harm and No Actual Harm to Human Health or the Environment.

As noted in detail in section II.A. above, Prime established at hearing that the probability of exposure was low. Also, as established above, there is no evidence that any harm occurred either to human health or the environment. Because the probability of any hypothetical harm to human health or the environment was low, and no actual harm was done, the large penalty Complainant proposes here is unwarranted. And, as noted above, Complainant took no actions to warn Prime, its employees, local responders, the Salt Lake City mayor or anyone else of the supposedly toxic nature of this trailer full of burned paint barrels, actions by the Complainant

which are consistent with the probability of exposure being low. All of this supports the imposition of a much smaller penalty.

B. Prime Made Good Faith Efforts to Comply.

The statute requires the Presiding Officer to consider "any good faith efforts [by Prime] to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). As noted throughout this litigation, Prime has freely admitted its liability here and admitted that it made mistakes in the handling of the aftermath of the middle-of-the-night roadside fire in Idaho in 2015. Mr. Field testified candidly that he wishes he could turn the clock back and do things better. Tr. v.3 at 356:10-357:17. The disposal of the truck was done according to the law-abiding way Prime does its work. *See* Tr. v.3 at 31:11-33:22.

1. Prime Has Little Experience with RCRA.

In assessing Prime's good faith efforts to comply, circumstances are important. As noted above, Prime is not in the hazardous waste or underground storage business, two areas regulated by RCRA that generate most, if not all the case law. *See* Tr. v.3 at 298:15-18. Prime specializes in hauling refrigerated food and pharmaceuticals.[4] Tr. v. 3 at 300:2-9; 301:2-11. The undersigned is unaware of another RCRA case against a trucking company that specializes in refrigerated cargo. Because Prime does not regularly work under RCRA, and because a fire of the sort that started the chain of events leading to this case has occurred once in the company's fifty-two year history, it is safe to say that Prime lacked the experience in 2015 to effectively deal with this situation. Yes, it could have done better, but it was also the first time it had encountered a hazardous waste situation such as this.

[4]Complainant, in its PHB at p. 26, n. 35, asserts that the undersigned misled the Presiding Officer regarding Prime's hauling of Covid vaccines. Counsel inadvertently misspoke regarding Prime's frontline efforts during the pandemic where Prime delivered Covid test kits, not vaccines, and heroically operated during a time when the U.S. economy largely shut down. Tr. v.3 at 301:12-302:21.

The record is clear, however, that once the mistake was brought to Prime's attention, it cooperated with the EPA, Tr. v.2 at 101:16-102:2; v.4 at 40:11-43:2, Stip. ¶ 12, and quickly remedied the situation once EPA authorized it to do so. This was mostly new territory for Prime. Typical cleanup issues for Prime involve leaked diesel fuel from a puncture truck gas tank or leaked radiator fluid after a truck hits a deer. Tr. v.3 at 332:10-20.

2. The Events Surrounding the Fire Caused Confusion.

Various hearing exhibits describe the multiple and confusing communications and decisions made by emergency responders and government authorities in Idaho during the early morning hours of September 27, 2015, following the trailer fire. *See*, *e.g.*, RX03-12. The confusion surrounding this event, provides important context to Prime's actions and its attempt to coordinate a roadside cleanup from its headquarters in Springfield, Missouri. In such situations, Prime must rely on the information and guidance it receives from emergency personnel on scene. Tr. v.3 at 331:19-332:6. As Prime Director of Safety Steve Field testified:

> We're always taking our lead from the emergency personnel. At the end of the day, we have to do whatever they require of us. In this case, we made the mess, we need to get the mess cleaned up. In our eyes, they're the boss, they're the authority, we take our guidance from them on what needs to be done.

Id.

The accidental fire that engulfed the barrels of paint Respondent was hauling, occurred in the middle of the night on a remote stretch of highway in rural Idaho. Stip. ¶ 7; RX05. When the emergency call was received regarding the fire, Respondent had to assess the situation from fifteen hundred miles away. Tr. v.3, 336:4-5. Respondent's headquarters are located in Springfield, Missouri, and it relied on communications and information from the local authorities on who was qualified to manage the clean-up and wreckage, in this case B&W Wrecking. Tr. V.3, 334:22-335:22; *see, also* testimony of Prime driver Drake, v.2 at 343:5-8 ("Q So the fire

department was there, and the state trooper was there, and they turned the scene over to B&W for clean up? A Yes.")

The communications between the local authorities on scene created significant confusion regarding the nature of the clean-up and what remained of the load in the aftermath of the intense fire which engulfed the entirety of the trailer load. *See* Tr. v.3 at 73:19 -77:20. This was precipitated by the on-scene fire chief and incident commander who concluded: "It was our determination that it went from a haz-mat scene to a clean-up scene. We released Region IV Haz Mat after that discussion. B&W Wrecker was on scene when we left, they were going to be in charge of the clean up." RX05 at 3; *see also* RX11, p. 5 ("[Idaho Transportation Department representative Carl] Vaughn stated that he understood that the fire marshal who was in charge of the Prime trailer fire incident somehow made a determination that the waste was not hazardous in nature.") The Boise Fire Department's Region Response Team 4, referred to above, is highly specialized in managing hazardous waste and was present on scene to assist in managing the incident prior to being released from the scene. Tr. V.3, at 52-54:

> Mr. Vaughn further described this confusion on the night of the fire:
>
> > Vaughn stated that the Prime trailer fire was a confusing situation. When asked to what he attributed this confusion, Vaughn stated that the whole problem started when Fire Chief Janousek announced his determination that the scene was no longer a hazardous materials scene and that it had transitioned into a cleanup situation. … Vaughn stated that when Chief Janousek announced that the scene was no longer hazardous, the ITD and everyone else associated with the incident simply assumed that the waste associated with the location of the Prime trailer fire was nothing other than solid waste.

RX11, pp. 7-8.

Indeed, the intensity of the fire provides a ready explanation for why the various government personnel on scene accepted the fire chief's determination that the scene was no longer a hazardous materials scene. Tr. V.3, 77:13-20. As Mr. Field testified during the hearing:

"it was a significant fire, and it had reached the point where as best our folks there -- meaning our night folks there, that it was not going to be considered a hazardous cleanup. That the product basically had been consumed within the fire, and there already was a crew out there, B&W, a wrecker company out there that felt that they had the ability to clean that up." Tr. V. 3, 331:10-18.

Extensive communications and coordination occurred on scene and in the fire aftermath between multiple state, federal and local responders including the local fire department, Elmore County Dispatch, Idaho State Patrol, Idaho Department of Transportation and Idaho Department of Environmental Quality. *See, e.g.* RX03, pp. 1-3. EPA Region 10 also was contemporaneously notified and acknowledged the incident. *Id.* At 2; Tr. V.3, 54:21 – 55:9.

As noted above, the clean-up of the site was handled by B&W Wrecking. According to Chief Janousek, the incident commander in charge of the scene, "Elmore County Dispatch is the entity that called out B & W Wrecking to respond to the incident." RX08, p. 2. The Idaho State Police Sergeant on scene was advised by B & W "they were qualified to conduct the cleanup" which ISP Sgt. Bonner in turn verified by calling the Idaho Department of Environmental Quality (IDEQ). Tr. V.3, 67:5 – 68:6; *see, also* RX03 at 3 (Idaho State Communications Center Hazmat call log detailing call from ISP Sgt. Bonner to IDEQ and "asking if B&W towing could clean up….").[5]

As it turns out B&W was not authorized to remediate or transport hazardous waste. In fairness, B&W and others were told by the on-scene incident commander, Chief Janousek, that

[5] Curiously, the notation on the call log from September 27, 2015 regarding DEQ's involvement in allowing B&W to perform the clean-up was omitted from the call log later provided to EPA, CID by another DEQ representative. *Compare* CX07 at 9 with RX03 at 3; *see, also* Tr. V.3, pp. 66-68. This material omission was never explained by Complainant.

the scene was no longer a hazardous waste scene when it performed its cleanup. And Idaho State Police Sgt. Bonner, who worked within the commercial vehicle section at ISP which handles hazardous materials transportation issues within Idaho (Tr. V.3, 56, 5-10), consulted with the IDEQ about B&W performing the clean-up and permitted B&W to proceed following this consultation.

B&W thereafter coordinated with an individual with Respondent's road assist department to pick up the burned trailer and remaining intact paint barrels which remained on the trailer for transportation to a safe location, in this case Respondent's yard in Salt Lake City. Tr. v.3 at 342-344; Stip. ¶ 9. Respondent, for its part, was interested in inspecting the trailer to assess whether it could determine the cause of the trailer fire and whether another entity was responsible for the losses associated with the fire. Tr. V. 3, 342:3-18. To that end, a legal hold was placed on the trailer and its remnants while stored in Respondent's yard in Utah. *Id.;* Tr. v.4 at 36:7-13.

Respondent acknowledges its safety department did not adequately communicate with its road assist department regarding the load and the transportation of the trailer remnants to Salt Lake City. Tr. V.3, 342:10 – 343:1. This lack of communication likely contributed to former Prime road assist employee David Oheim mistakenly concluding the original load consisted of water based paint which he communicated to the entity hired to transport the trailer to Salt Lake City. Tr. V.3, 176:3-15.[6] Notwithstanding this honest mistake by Mr. Oheim, Respondent did everything asked of it by the local authorities and regulators in hiring and relying on B&W to perform the clean-up and disposal of the materials destroyed by the fire. It trusted B &W to help

[6] The record reflects Oheim was not alone in this confusion as an on-scene ITD representative similarly concluded water-based paint was involved. *See* CX54 at 1; Tr. V.3, 176:16 – 177:16.

coordinate the transportation of the damaged trailer and its remaining contents including the intact barrels of paint to its Utah facility in October 2015.

Respondent wishes it had managed the above-described situations better and consistent with its corporate philosophy of doing things right and in compliance with the law as further described below. With that said, Respondent's actions and inaction here in facilitating the transportation of the trailer and allowing the materials to sit for several months in its Utah yard were the product of poor communications and not an attempt to evade the law or to save money. As summarized by Prime's Safety Director Field:

> Again, the responsibility rests with me, but it's not as if it was a complex solution. If we could go back in time to that day, and I get that phone call again, I'd go great, let me get a hold of PES, and we wouldn't be sitting here today. But I can't change what happened, but what I can do is change the future. and being the one that's ultimately responsible, making sure it doesn't happen. It's an embarrassment to me, it's an embarrassment to Prime that we're sitting here, and I understand the government's position, we should have done better.
>
> Q Were any of the decisions that were made in this case done with the intention of avoiding compliance with the law, saving money?
>
> A No to both cases. We need to comply with the law, we're good corporate citizens, we make mistakes, but we need to comply with the law, and there are some things that you can't skimp on, and one of them is a cleanup of this type. And yeah, it was after the fact, but we did spend a lot of money basically doing the best we could to remediate the ground in Idaho, properly dispose of the drums, and the trailer in Utah. This is not an issue where I don't think we can afford this, or there's a way to do this more cheaply, it doesn't come into play in our decisions.

Tr. V.3, 356:10 – 357:17.

3. Prime Cooperated with EPA, Immediately Came into Compliance When Notified of its Error, and Made Changes to Operations to Prevent Future Violations.

Prime cooperated fully with EPA once alerted to the EPA investigation in the summer of 2016, and Complainant agrees. EPA PHB at 13, Stip. ¶ 12. It is also undisputed that Prime

immediately came into compliance once EPA lifted the order to leave the trailer in place. Stip. ¶¶ 25, 26.

Importantly, Prime has made operational changes to ensure this kind of mistake does not recur. At the Prime headquarters level, Steve Field and Bill Sprague testified regarding the changes the company has made. Mr. Field testified that Prime has changed its process for dealing with events such as this. In 2015, Safety and Roadside Assist shared the duties. Today, only one program lists what is on legal hold and follows up on that. Tr. v.4 at 344:4-20; 350:8-12; 353:20-354:5. This will ensure that there is proper follow up in the event of another hazmat situation. *Id.* at 354:11-355:13. Safety will now dictate to Roadside Assist what happens to a truck involved in a hazmat situation. *Id.* at 355:20-356:18.

Bill Sprague testified that the company now always errs on the side of caution when it comes to calling in a RCRA hazardous waste contractor up front to deal with a potential hazmat problem. Tr. v.3 at 399:7-400:10. Prime now has magnets with the hazmat contractor's name and phone number "all over the safety department." *Id.* at 400:11-15. As Mr. Field testified: "If we could go back in time to that day, and I get that phone call again, I'd go great, let me get a hold of PES, and we wouldn't be sitting here today." Tr. V.3, 356:12 – 15.

Finally, at the field office level, Brian Singleton testified that the trailer ended up sitting where it did so long because different teams within Prime were not communicating. In 2015, "we were very siloed." Tr. v. 4 at 50:15-16. The company has now broken down the silos between departments to increase communication to prevent this kind of mistake from happening again. Tr. v.4 at 50:8-51:7. It made mistakes and those mistakes have been corrected. But it does not follow that Prime in any way committed bad faith in dealing with the unexpected fire and its aftermath or respecting its obligations under RCRA.

C. Prime is a Good Corporate Citizen.

"Do your best. Do what's right. Treat others as you want to be treated." Prime's company motto is recited from memory by Prime employees. These are not simply empty words. This tribunal had the opportunity to observe and judge the character of four Prime employees at the hearing and listen to these employees describe the significance of these words at Prime. *See* Tr. v.2 at 321:4-11 (Drake), v.3 at 319:2-21 (Field), v.3 at 397:20-398:8 (Sprague), and v.4 at 51:10-15 (Singleton). As Mr. Singleton succinctly stated when asked about the Prime motto:

> Q Is that something you actually believe?
>
> A It's how I raise my family, sir.

V.4 at 51:13-15. And Mr. Sprague, a former police officer, now a Safety Supervisor at Prime testified:

> Q You know it from memory?
> A It's been instilled in me since my interview, and I use those words every day when I speak with my drivers.
> Q And what do you mean that you use those words every day? Are they just words on a piece of paper, or do they have more meaning than that to you?
> A They have a lot more meaning than that to me, and it's not just Prime. I feel if we can satisfy those three things, we'll not only be successful, but we'll be doing it the correct way. And I bring those up when I meet with my drivers, because a lot of what we want them to do is to do their best, and do what's right. And then it's up to us to treat them the way we want them to be treated.

Tr. v.3 at 398:5-21.

Kelly O'Neill, an experienced former EPA CID Agent and longtime EPA supervisor also testified regarding his own impressions of the company. (Lest there be any doubt regarding the reliability of Mr. O'Neill's opinions, EPA witness and Special Agent Mark Callaghan testified that Mr. O'Neill is a person with integrity that he respects both personally and professionally. Tr. V.1, 234:3-7.) According to Mr. O'Neill who worked for decades in federal law enforcement, Prime and its employees live by the company's ethos:

> Having done this work for almost 30 -- almost 40 years, I've got a pretty sensitive BS meter. And I don't know how many companies have, you know, let me read their mission statement or their ethos printed in pretty fashion on the wall. And after you start speaking with the number of folks that I spoke to at Prime, you figure out that those statements are statements that reside on a wall. And that was certainly not my impression with Prime. I had the very clear conclusion, not just suggestion, that this how they work -- they do work that way. Or, number one, they go somewhere else. They're not employed there. Either they embrace that mission statement and the culture of the entity, or they're not working there anymore. And I was -- I'm very confident in saying that Prime impressed me more with their activities and who they are than any other company I have ever had the pleasure and sometimes the displeasure of investigating.

Tr. v.3 at 168:4 – 169:19.

Thus, it comes as no surprise that compliance with the law is paramount at Prime. *See, e.g.,* Tr. v.3 at 320:15-21 (Field), 401:9-13 (Sprague). It follows that this matter is the first RCRA violation brought against Prime despite decades in the trucking business and billions of miles traveled over America's roads. CX04Cor at 9 (first violations); Complainant's Post Hearing Brief at 12 (penalty calculated based on first time violations and Complainant has no evidence to the contrary); Stip. ¶ 39 (billions of miles traveled); Field, Tr. v.3 at 304:6 (Prime founded in 1970). The underlying facts that gave rise to the present violation are clearly an outlier in the company history, and as discussed herein, Prime has taken steps to ensure that this type of violation does not recur.

Prime is an industry leader including in safety, which is a top priority if not the first priority at Prime. *See,* Tr. v.3 at 390:22-395:19 (Sprague); v.3 at 307:20-313:10, *id.* at 322:1 (Field); v.2 at 321:12-14 and 324:1-325:13 (Drake). Prime is well respected in the industry and by the people who work for Prime including its drivers. *See, e.g.* Drake, Tr. v.2 at 318:15-19 ("During the time at CR England on the road, me and my wife both talked to drivers, you know, out there on the road a lot. And it seemed like Prime -- everybody we talked to from Prime was

very positive."); Field, v.3, 321:3-322:13 (Prime is an industry leader and it's not unusual to have associates stay with the company for 30 years and more).

Prime not only supports its employees, but it also generously gives back to the community. The hearing was replete with references to Prime's extensive charitable endeavors including support of military veterans, law enforcement and first responders, local hospitals, a program to help needy children at Christmas, and the like s*ee, e.g.* Tr. v.3 at 322-323, 396-397 as well as Prime's heroic efforts during the pandemic to continue to deliver food and otherwise keep our country running. *Id.* at 301-302.

Prime is a good corporate citizen and Complainant does not assert otherwise – indeed how could it. The situation here, which commenced in 2015 with the chaos of an early morning roadside trailer fire was a one-off mistake by a good company. Prime's actions and inactions, while violations of RCRA, were not motivated by any improper purpose or desire to avoid compliance with the law. No further violations have occurred since, nor are they likely to occur again given the lessons learned and the corrective measures implemented by Prime, and the good people who carry out this company's mission.

D. Assessing a Penalty Between $50,000 and $150,000 Will Serve the Goals of Specific and General Deterrence.

The role of a civil penalty is to deter future violations both by this Respondent and other similarly-situated persons and entities that are required to comply with RCRA. *See*, *e.g.*, *Conservation Law Foundation, Inc. v. Shell Oil. Co.*, 2022 WL 4292183 (D. Conn. 2022) at *9. If the purpose of penalizing a RCRA violator is to deter similar future violations, then the penalty amount should reflect both the severity of the violation and the facts regarding good faith efforts to comply as informed by the RCRA statutory penalty factors: "the seriousness of the

violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3).

Looking at the case law, it is clear that EPA primarily brings RCRA cases against entities that work under RCRA every day: underground storage tanks (UST), metal processors, battery recyclers and the like. *See*, *e.g.*, cases cited in Section I.C. *infra*. In each of those cases and other like them, the violators either knew in advance that they had on-going RCRA obligations or they did little to nothing to comply after learning. Prime fits neither of those patterns. It is a company that does not deal with RCRA on a daily basis, had never before had a RCRA violation, and which immediately came into compliance with the law once notified of its one-time mistake.

Prime's history of compliance and subsequent absence of any violations shows that Prime need not be heavily penalized in order to ensure it will comply with the law going forward. It has been seven years since the 2015 fire that resulted in the violations in this case, and Prime has had no subsequent RCRA violations even though Prime has operated thousands of trucks driving millions of miles per year and has not logged a single RCRA violation since. *See* Tr. v.3 at 317:1-9.

Most importantly, as noted in detail above, Prime's storage of the trailer posed a low probability of harm to human health or the environment and no harm was actually caused by the inadvertent storage of the burned trailer in Salt Lake City. Because Prime accepted responsibility for its mistake, cooperated with EPA and immediately came into compliance once notified of its mistake, and has instituted institutional changes to prevent future violations, the company has already been deterred from future violations. As Mr. Field testified: "It's an embarrassment to me, it's an embarrassment to Prime that we're sitting here and I understand the government's position, we should have done better." Tr. v.3 at 356:19-22, Stip. ¶ 35.

Specific deterrence has been achieved and indeed, Prime has had no subsequent violations in the more than seven years since the Idaho fire, and it has made changes to its operations to ensure this unfortunate one-time event does not recur. That leaves the issue of general deterrence for other similarly-situated violators. Given Prime's lack of prior relevant RCRA experience and the odd chain of circumstances that caused this violation at an otherwise law-abiding company, it is unlikely that a $631,402 penalty is not needed to deter others in the regulated community from committing future similar violations of this kind.

A penalty in the range of $50,000 to $150,000 is appropriate in this case. The Presiding Officer should deviate from the RCPP entirely and assess a penalty based on the statutory penalty factors that is consistent with prior case law and with the unique facts of this case. The statute states that the Presiding Officer shall consider the "seriousness of the violation" when calculating the penalty. As noted at length, the violation did not pose a serious threat of harm to human health or the environment.

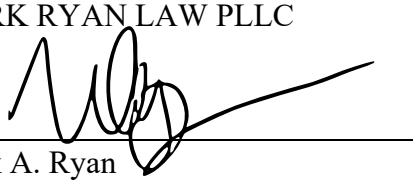
If the Presiding Officer decides to adopt the RCPP, a much lower penalty is still appropriate under the policy. As noted in Section II.B., above, a reasonable alternative to Complainant's RCPP analysis would be a penalty in the range of $50,000 to $150,000. Leaving EPA's "Extent of Deviation" assessment intact but making a finding of minor harm to reflect the proven low probability of exposure would bring the penalty down to $47,693 to $137,386 depending on whether a low or mid-range penalty is deemed appropriate for a minor/major determination. Under either analysis, Prime will be sufficiently deterred from possible future violations and the message to the regulated community will be that even honest mistakes with a low probability of harm will be treated seriously.

CONCLUSION

The accident occurred in September of 2015. EPA began its investigation that fall, and ultimately decided after a lengthy investigation that a criminal prosecution was not warranted given the facts of the case. EPA then waited until almost exactly five years after the fire to file this case. This is not a normal RCRA case where the respondent is in the underground storage tank, metal recycling, battery disposal or chemical processing business. Prime is a trucking company that specializes in hauling food and pharmaceuticals. The $631,402 penalty EPA seeks here for a one-time violation by an otherwise law-abiding company is unjustified and should be rejected. Prime accepts that it violated the law, it fixed the problem and hasn't violated in the more than seven years since. A penalty in the range of $50,000 to $150,000 is far more equitable and suffices to punish Prime where no significant threat to human health or the environment was involved.

RESPECTFULLY SUBMITTED this 3rd day of February 2023.

MARK RYAN LAW PLLC



Mark A. Ryan
WSBA No. 18279

Scott McKay
NEVIN, BENJAMIN & McKAY LLP

Attorneys for Respondent New Prime, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February 2023, I filed Respondent's Post Hearing Brief via the OALJ E-filing system and via email to:

Laurianne M. Jackson
Senior Assistant Regional Counsel
Regulatory Enforcement Section
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Jackson.laurianne@epa.gov

Charles Figur
Senior Assistant Regional Counsel
Regulatory Enforcement Section
U.S. Environmental Protection Agency, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Figur.charles@epa.gov

Mark Ryan