

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

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| In the matter of |) | U.S. EPA Docket No. |
| |) | RCRA 09-2015-0011 |
| CLEAN HARBORS |) | |
| BUTTONWILLOW, L.L.C., |) | Complainant's Prehearing Exchange |
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| <u>Respondent.</u> |) | |

Complainant's Prehearing Exchange

COMPLAINANT, the United States Environmental Protection Agency, Region 9 (EPA), by and through its counsel, in response to the Chief Administrative Law Judge's December 16, 2015 PREHEARING ORDER, and pursuant to Title 40 of the Code of Federal Regulations (40 CFR) §22.19(a), respectfully submits this COMPLAINANT'S PREHEARING EXCHANGE as follows:

I. **Prehearing Exchange Directed to All Parties**

A. **Identification of Witnesses**

1. **United States Environmental Protection Agency, US EPA, Region 9**

a. **Kandice Bellamy, Environmental Specialist, Fact Witness**

Complainant may call Kandice Bellamy as a potential fact witness. Ms. Bellamy is an Environmental Specialist within Complainant's Enforcement Division, working out of Complainant's San Francisco, CA. office. Prior to approximately February of 2013, Ms. Bellamy worked performing many of the same duties in Complainant's Waste Management Division. Ms. Bellamy is one of two EPA Inspectors and Enforcement Officers currently assigned to this matter. Ms. Bellamy attended Complainant's inspection of Respondent's

Buttonwillow, CA facility (the Buttonwillow facility) on or about October 18-22, 2010. Ms. Bellamy will testify concerning her observations during that inspection, Complainant's overall investigation of the activities at the Buttonwillow facility including the investigatory work that she undertook, and her work with Respondent and its representatives, on RCRA compliance for the Buttonwillow facility. Ms. Bellamy may also testify concerning a follow-up visit to the Buttonwillow facility that she and other regulatory inspectors participated in on or about February 27, 2013. Ms. Bellamy will testify concerning compliance and other records maintained by EPA in connection with Respondent's management of hazardous waste at the Buttonwillow facility, including its State-issued hazardous waste permit, and this action. Ms. Bellamy will also testify concerning calculation of EPA's proposed penalty, including the basis for the economic benefit calculation, for the violations alleged. Ms. Bellamy may also authenticate records relating to the Buttonwillow facility that she generated and/or that are maintained in Complainant's Enforcement Division and, previously, its Waste Management Division files for this matter, including photographs, correspondence and other records relating to this matter.

b. Richard Francis, Environmental Engineer, Fact Witness

Complainant may call Richard Francis as a potential fact witness. Mr. Francis is an Environmental Engineer within Complainant's Enforcement Division, working out of Complainant's San Francisco, CA. office. Mr. Francis is one of two EPA Inspectors and Enforcement Officers currently assigned to this matter. Mr. Francis will testify concerning Complainant's overall investigation of the activities at the Buttonwillow facility including the investigatory work that he undertook, and his work with Respondent and its representatives, on

RCRA compliance for the Buttonwillow facility. Mr. Francis will testify concerning the notice provided to the State of California in advance of the filing of the Complaint in this matter, and compliance and other records maintained by EPA in connection with Respondents' management of hazardous waste at the Buttonwillow facility, including its State-issued hazardous waste permit, and this action. As set forth below in more detail, Mr. Francis will also testify concerning the calculation of EPA's proposed penalty, including the basis for the economic benefit calculation, for the violations alleged. Mr. Francis may also authenticate records relating to the Buttonwillow facility that he generated and/or that are maintained in Complainant's Enforcement Division files for this matter.

c. Kaoru Morimoto, Environmental Engineer, Manager, Fact Witness

Complainant may call Kaoru Morimoto as a potential fact witness. Mr. Morimoto is currently manager of the Information Management Section within Complainant's Enforcement Division. However, until late in 2014, including at the time of the October 2010 inspection, Mr. Morimoto was an Environmental Engineer within Complainant's Enforcement Division (and, prior to the creation of the Complainant's consolidated Enforcement Division in approximately February of 2013, Complainant's Waste Management Division), working out of Complainant's San Francisco, CA. office. Prior to his promotion, Mr. Morimoto was the lead EPA Inspector and Enforcement Officer assigned to this matter. Mr. Morimoto attended Complainant's inspection of the Buttonwillow facility on or about October 18-22, 2010, along with Ms. Bellamy and others. Mr. Morimoto will testify concerning his observations during that inspection, his investigation of the activities at the Buttonwillow facility, and his work with Respondent and its representatives on RCRA compliance for the Buttonwillow facility. Mr.

Morimoto may also testify concerning a follow-up visit to the Buttonwillow facility that he and other regulatory inspectors participated in on or about February 27, 2013. Mr. Morimoto may be called to testify concerning compliance and other records maintained by EPA in connection with Respondent's management of hazardous waste, including its State-issued hazardous waste permit, and this action. Mr. Morimoto may also be called to testify concerning his personal involvement in the calculation of EPA's proposed penalty for the violations alleged, if necessary. Mr. Morimoto may also authenticate records relating to the Buttonwillow facility that he generated and/or that are maintained in Complainant's Enforcement Division and, previously, its Waste Management Division files for this matter, including the Inspection Report (CX-3), photographs, and other records and correspondence pertinent to this matter.

- d. Joel Jones, Supervisory Environmental Protection Specialist, Fact Witness

Complainant may call Joel Jones as a potential fact witness. Mr. Jones is a Supervisory Environmental Protection Specialist within Complainant's Enforcement Division, working out of Complainant's San Francisco, CA. office. Mr. Jones may be called to testify concerning the notice provided to the State of California in advance of the filing of the Complaint in this matter.

2. **California Department of Toxic Substances Control.**

- a. Edward Nieto – Supervising Hazardous Substances Engineer I, Fact Witness/State Government Representative

Complainant may call Edward Nieto as a potential fact witness in his capacity as a representative of the California Department of Toxic Substances Control (DTSC). Mr. Nieto is a Supervising Hazardous Substances Engineer I at the DTSC. Mr. Nieto supervises staff whose primary duties are the permitting of hazardous waste facilities, including Respondent's

Buttonwillow, CA facility, among numerous others. Mr. Nieto is expected to testify that DTSC's current official positions regarding the allegations contained in the Complaint in this matter pertaining to provisions contained in Respondent's existing hazardous waste permit are consistent with Complainant's interpretations. Mr. Nieto may also authenticate records relating to the Buttonwillow facility that are maintained in DTSC's hazardous waste permitting files.

3. **U.S. EPA Consultant.**

- a. **Jonathan S. Shefftz, Independent Consultant/Financial Expert, Expert Witness**

Complainant may call Mr. Shefftz to testify regarding the economic benefit associated with Respondent's violations. A copy of Mr. Shefftz's resumé is included in this Prehearing Exchange as CX-13.

4. **Other Witnesses.**

Complainant does not, at this time, anticipate the need to call any additional witnesses. Complainant respectfully reserves the right, however, to supplement its witness list upon adequate notice to Respondents and the Chief Administrative Law Judge. In addition, Complainant reserves the right to call other witnesses identified by the Respondent or needed in response or rebuttal to Respondent's defenses.

B. **Exhibits.**

An index is provided below that identifies the exhibits included with this Prehearing Exchange.¹

¹ Complainant's counsel has signed this Prehearing Exchange, which includes its "attached" exhibits. And, one certificate of service is being filed that covers the filing and service of Complainant's Prehearing Exchange and each of its exhibits. To make it easier for the parties

1. **Index to Complainant's Exhibits:**

- CX-1 Print out of website information from Delaware Secretary of State's corporate listing for Clean Harbors Buttonwillow, LLC.²
- CX-2 Print out of website information from California Department of Toxic Substances Control permit status "activities" page for Respondent's Buttonwillow facility.³
- CX-3 Complainant's June 2, 2011 RCRA Compliance Evaluation Inspection Report for Respondent's Buttonwillow facility, (Inspection Dates: October 18-22, 2010). Complainant's Exhibit CX-3 has been broken down into CX-3A and CX-3B, which are further identified as follows:
- CX-3A Complainant's June 2, 2011 RCRA Compliance Evaluation Inspection Report for Respondent's Buttonwillow facility, (Inspection Dates: October 18-22, 2010) and its Attachments 1 through 9 (of 21 Attachments).
- CX-3B Attachments 10 through 21 to Complainant's June 2, 2011 RCRA Compliance Evaluation Inspection Report for Respondent's Buttonwillow facility, (Inspection Dates: October 18-22, 2010).
- CX-4 1996 Hazardous Waste Treatment, Storage and Disposal Permit issued by the California Department of Toxic Substances Control to Respondent for the Buttonwillow facility.
- CX-5 Respondent's Part B Permit Application for a RCRA Permit for the Buttonwillow facility dated July 17, 1991 (Vols. I-V).

and the Office of Administrative Law Judge to access each exhibit, each is being filed as a separate PDF file, identified by "CX" number. The PDF exhibit files have been saved in a "Reduced Size" format. Enabling "Text Recognition" in each such file would increase the file sizes and that step has not been taken with respect to these exhibit files. In addition, in order to enable service by email on Respondent's counsel, where any one exhibit's size exceeds Complainant's email limit of 34 MB, such exhibit has been broken up into smaller PDF files and further identified by letter, *e.g.*, CX 3A and CX 3B, as indicated on the Index below.

² Url: <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx>.

³ Url: http://www.envirostor.dtsc.ca.gov/public/hwmp_profile_report.asp?global_id=CAD980675276&starttab.

- CX-6 Respondent's January 26, 2011 Correspondence, in response to Complainant's request for information, with Attachment 1 (of 1) and select appendices to Attachment 1 (four of the ten appendices [Nos. 4, 5, 6, and 7] are included as part of this exhibit). Complainant's Exhibit CX-6 has been broken down into CX-6A, CX-6B, CX-6C and CX-6D, which are further identified as follows:
- CX-6A Respondent's January 26, 2011 Correspondence, in response to Complainant's request for information, with Attachment 1 and the first 1464 pages of Appendix 4 to Attachment 1.⁴
- CX-6B The remaining 939 pages of Appendix 4 to Attachment 1 of Respondent's January 26, 2011 Correspondence.
- CX-6C Appendices 5 and 6 to Attachment 1 of Respondent's January 26, 2011 Correspondence.
- CX-6D Appendix 7 to Attachment 1 of Respondent's January 26, 2011 Correspondence.
- CX-7 Complainant's November 23, 2011 Notice of Violation and Request for Information directed to Respondent with Attachments I, II and III.⁵
- CX-8 Respondent's February 28, 2012 Correspondence, in response to Complainant's request for information, with Attachment 1 (of 1) and select appendices to Attachment 1 (three of the fourteen appendices [Nos. 1, 8 and 14] are included as part of this exhibit).
- CX-9 Complainant's November 15, 2012 Notice of Intent to File an Administrative Penalty Complaint directed to Respondent.
- CX-10 23 Photographs of Respondent's Buttonwillow facility taken by US EPA representatives in February of 2013.
- CX-11 US EPA Region IX Re-delegation No. R9 1280.04, dated September 17, 1997; Revised Region IX Re-delegation No. R9-8-9-A, dated February 11, 2013; Revised Region IX Re-delegation No. R9-8-9-A, dated January 22, 2016; and Ratification Memo dated January 22, 2016.

⁴ Excluding the page identifying the beginning of Appendix 4.

⁵ The Compliance Evaluation Inspection Report, which was included with Complainant's November 23, 2011 Correspondence as an enclosure is not included as part of this Exhibit, but is included as Complainant's Exhibit CX-3 instead.

- CX-12 US EPA National Delegation No. 8-9-A, dated May 11, 1994; Amended National Delegation No. 8-9-A, dated April 16, 2015; and Transmittal Memo for Amended National Delegation No. 8-9-A, dated April 16, 2015.
- CX-13 Resumé for US EPA consultant and anticipated expert witness, Jonathan S. Shefftz.
- CX-14 Title 22 of Barclay's Official California Code of Regulations, Division 4.5, dated May 31, 1991, as initially authorized by Complainant in 1992.
- CX-15 Tolling Agreement for Claims Under the Solid Waste Disposal Act Relating to Clean Harbors, dated 12/23/13, and First Amendment to Tolling Agreement for Claims Under the Solid Waste Disposal Act Relating to Clean Harbors, dated 2/6/15.
- CX-16 Memorandum entitled Land Disposal Restriction (LDR) Requirements dated April 11, 2014.⁶
- CX-17 Redacted Agenda from California DTSC-EPA Region IX Quarterly Managers Meeting dated Wednesday September 30, 2015.⁷
- CX-18 Letter dated October 29, 2014 from Douglas McDaniel, Chief, Waste and Chemical Section, Enforcement Division, US EPA Region IX, to Paul Kewin, Chief, Enforcement and Emergency Response Division, California DTSC.
- CX-19 Revisions to Section 6 (Contingency Plan) of Respondent's Part B Permit Application/Modification to Respondent's RCRA Hazardous Waste Treatment Storage and Disposal Facility pertaining to Respondent's Contingency Plan, dated March 7, 2006 and January 4, 2010.
- CX-20 Print out from Container Exchange Website.⁸

⁶ Url: [http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/3F1968129D4501A185257CE60070B1C0/\\$file/14843.pdf](http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/3F1968129D4501A185257CE60070B1C0/$file/14843.pdf).

⁷ Redactions relate to matters unrelated to either the Respondent or the Respondent's Buttonwillow facility.

⁸ Url: <http://www.containerexchanger.com/bulk-containers/metal-bins-for-sale>.

2. **Other Exhibits**

Complainant respectfully reserves the right to supplement its exhibit list upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises. In addition, Complainant may request the Court to take official notice of appropriate matters in accordance with 40 CFR § 22.22(f).

C. **Location of Hearing and Estimated Time for Complainant's Case**

Pursuant to 40 CFR §§22.19(d) and 22.21(d), Complainant requests that the hearing be located in downtown San Francisco, California, which is the location of the Complainant's Region 9 office. The Chief Administrative Law Judge may hold the hearing either at the US EPA Regional Office or at another location within downtown San Francisco, California that may be requested by the Respondent. Respondent's business is located in Buttonwillow, California. Buttonwillow is approximately 260 miles from downtown San Francisco, California.

Complainant believes that conducting the hearing in San Francisco is preferred to Buttonwillow, since: (1) there may be more options to secure hearing rooms located in San Francisco; (2) San Francisco will be a more convenient location for airline flights; and (3) San Francisco is convenient for counsel for the Respondent, whose office is located in San Francisco, and Complainant.

The Complainant anticipates that its direct case will take approximately three (3) days and does not anticipate a need for any translation services.

II. Prehearing Exchange Directed to Complainant

A. Documents in Support of Factual Allegations Not Admitted

Documents in support of the factual allegations in the Complaint are included as exhibits and are identified (by “CX” numbers) in the following table, which includes summaries (in italics) and references to the paragraph numbers of specific factual allegations set forth in the Complaint. Additional explanations relating to the factual allegations are also included, where appropriate. However, any additional explanations and documents supporting factual allegations that were admitted in Respondent’s Answer or supporting legal allegations are omitted from the table below.

| Paragraph from Complaint | Factual Allegations and Brief Narrative Explanation, If Appropriate | Documents in Support of Factual Allegations |
|---------------------------------|--|--|
| ¶1 | <i>Respondent Clean Harbors Buttonwillow, L.L.C. is a Delaware Corporation.</i> | CX-1 |
| ¶6 | <i>A permit renewal application for Respondent’s facility in Buttonwillow, CA was submitted to the California DTSC on October 1, 2005 and is currently under review.</i> | CX-2 |
| ¶22 | <p><i>Respondent was engaged in the “storage” of hazardous waste as defined in California’s Health & Safety Code and regulations at the time of the violations alleged in the Complaint.</i></p> <p>Respondent owns and operates a hazardous waste treatment, storage, and disposal facility in Buttonwillow, California. It is engaged in the storage of hazardous waste at this facility.</p> <p>Respondent stored hazardous waste during the time of the violations alleged in the Complaint.</p> | <p>CX-2 CX-3 CX 4 CX-5 CX-6 CX-8 CX-10 CX-14 CX-19</p> |

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| ¶24 | <p><i>Respondent was engaged in the “disposal” of solid and hazardous waste as defined in California’s Health & Safety Code and regulations at the time of the violations alleged in the Complaint.</i></p> <p>Respondent operates a hazardous waste treatment, storage and disposal facility where it disposes of hazardous waste.</p> <p>This activity occurred during the time of the violations alleged in the Complaint.</p> | <p>CX-2 CX-3 CX-4 CX-5 CX-6 CX-8 CX-14 CX-19</p> |
| ¶25 | <p><i>Respondent was engaged in the “land disposal” of hazardous waste as defined in California’s regulations at the time of the violations alleged in the Complaint.</i></p> <p>Respondent treats, stores and disposes of hazardous waste which is restricted from land disposal above certain land disposal treatment standards established for such hazardous waste.</p> <p>These activities occurred during the time of the violations alleged in the Complaint.</p> | <p>CX-3 CX-4 CX-5 CX-6 CX-8 CX-14 CX-16</p> |
| ¶26 | <p><i>Respondent generated, stored, treated and/or disposed of “hazardous waste” as defined in California’s Health and Safety Code and regulations at the time of the violations alleged in the Complaint.</i></p> <p>Respondent operates a hazardous waste treatment storage and disposal facility where it manages hazardous waste.</p> <p>These activities occurred during the time of the violations alleged in the Complaint.</p> | <p>CX-3 CX-4 CX-5 CX-6 CX-8 CX-14 CX-19</p> |
| ¶29 | <p><i>The purpose of EPA’s October 2010 hazardous waste inspection at Respondent’s Buttonwillow facility was to determine the facility’s compliance with RCRA.</i></p> | <p>CX-3</p> |
| ¶30 | <p><i>Complainant determined that Respondent violated Sections 3004 and 3005 of RCRA.</i></p> | <p>CX-3 CX-7 CX-9 CX-11 CX-12</p> |

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| ¶31 | <i>Complainant determined that Respondent violated provisions of the California hazardous waste program, and the facility's hazardous waste permit.</i> | CX-3 CX-7 CX-9 CX-11 CX-12 |
| ¶33 | <i>The EPA Administrator delegated the authority to commence this action to the EPA Regional Administrator for Region IX, who has re-delegated this authority to the Director of the Enforcement Division.</i> | CX-11 CX-12 |
| ¶34 | <i>Complainant provided notice to the State prior to commencing this action.</i> | CX-17 CX-18 |
| ¶36 | <i>The 1996 Permit requires compliance with Chapter 6.5 of Division 20 of the California Health and Safety Code and Title 22 of the Code of California Regulations, Division 4.5.</i> | CX-4 |
| ¶38 | <i>Permit Condition II.B.3. in the 1996 Permit requires that Respondent ensure that waste received at a hazardous waste management unit meet the acceptance criteria for that unit and any other criteria specified in the operation plan for the unit.</i> | CX-3 CX-4 CX-5 |
| ¶39 | <i>Permit Condition II.B.1. of the 1996 Permit requires compliance with the facility's waste analysis plan and the waste analysis plan prohibits final placement of hazardous waste in a landfill if the hazardous waste is restricted from land-disposal under either California or Federal requirements.</i> | CX-3 CX-4 CX-5 |
| ¶44 | <i>Condition II.R.1 in the 1996 Permit establishes requirements relating to the management of treated hazardous waste at Respondent's Buttonwillow, CA facility pending disposal or retreatment of the waste.</i> | CX-4 |
| ¶45 | <i>Condition II.R.1 in the 1996 Permit prohibits Respondent from mixing more than one stabilization batch in a waste curing area prior to post-treatment verification analysis that the wastes meet all applicable land disposal restriction requirements.</i> | CX-4 |
| ¶46 | <i>Condition II.R.1 in the 1996 Permit imposes conditions on Respondent if more than one stabilization batch of waste is stored in a waste curing area prior to post-treatment verification analysis that the wastes meet all applicable land disposal restriction requirements.</i> | CX-4 |

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| ¶47 | <i>Conditions imposed on Respondent under the 1996 Permit, Condition II.R.1., include provisions II.R.1.(a) through (e), relating to the waste curing bins required for storage of more than one stabilization batch of hazardous waste in the waste curing area.</i> | CX-4 |
| ¶48 | <i>Condition II.R.1. of the 1996 Permit provides that the term “bin” for the purposes of this condition only includes prefabricated or fabricated in place receptacles, either disposable or reusable, as described in the Supplemental Landfill Operations Plan.</i> | CX-3 CX-4 CX-5 |
| ¶49 | <i>At the time of the October 2010 EPA inspection, Respondent had placed and was storing more than one stabilization batch of treated hazardous waste in the waste curing area prior to post-treatment verification analysis that the wastes met all applicable land disposal restrictions.</i> | CX-3 CX-6 CX-8 |
| ¶51 | <i>At the time of EPA’s October 2010 inspection, approximately 76 put piles of the Respondent’s treated hazardous waste were wrapped in plastic as described in paragraph 50 and not placed in waste curing bins in the waste curing area atop the landfill known as WMU-34.</i> | CX-3 CX-6 CX-8 CX-10 |
| ¶54 | <p><i>To date, Respondent has provided no information demonstrating that storage of hazardous waste put piles above land disposal restriction standards over a year was performed for the purpose of accumulating sufficient quantities of hazardous waste to facilitate proper recovery, treatment, or disposal of such waste.</i></p> <p>EPA’s 2010 inspection report includes information indicating that Respondent’s representative was asked if there was a purpose behind storing put piles in the waste curing area over a year and that the representative replied in the negative.</p> <p>In addition, Respondent’s “put piles” of treated hazardous waste placed on top of the landfill unit WMU-34 had each already been treated at least once.</p> <p>Moreover, the put piles stored atop WMU-34 over a year were ultimately re-treated and disposed in the landfill after EPA’s 2010 inspection.</p> | CX-3 CX-4 CX-5 CX-6 CX-8 CX-10 |

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| | Hazardous waste in the put piles was not being stored there for the purpose of accumulating sufficient quantities of hazardous waste to facilitate proper recovery, treatment, or disposal of such waste. | |
| ¶67 | <p><i>At the time of EPA's October 2010 inspection, approximately 21 hazardous waste put piles had been stored atop the landfill known as WMU-34 for over 45 days.</i></p> <p>While some put-piles were stored atop WMU-34 for longer than a year, as set forth in Paragraphs 55 through 66 of the Complaint, a number of put piles were stored there for over 45 days. Such storage was not for the purpose of accumulating sufficient quantities of hazardous waste to facilitate proper recovery, treatment, or disposal of such waste.</p> | <p>CX-3 CX-6 CX-8 CX-10</p> |

Complainant respectfully reserves the right to supplement this list upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises.

B. Information and Documentation Pertaining to the Assessment of a Penalty

This civil administrative enforcement action was brought pursuant to Section 3008(a) of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. § 6928(a).

Section 3008(a) of RCRA dictates that,

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).

Given this directive, factual information relevant to the assessment of a penalty for the violations would include:

1. Number of days that Respondents violated the applicable requirements;

2. Number of days that Respondents violated the applicable requirements after Respondents had actual knowledge of the violations;
3. Type of hazardous wastes and hazardous waste constituents involved in Respondents' violations;
4. Quantity of hazardous wastes involved in Respondents' violations;
5. Toxicity of hazardous wastes involved in Respondents' violations;
6. Potential for harm to humans or public health because of Respondents' violations;
7. Potential of harm to the environment or environmental receptors as a result of Respondents' violations;
8. Impact of Respondents' violations on the federal hazardous waste management regulatory program;
9. Respondents' actual and constructive knowledge about the applicable waste management requirements;
10. Respondents' history of past, same or similar, waste management violations; and
11. The economic benefit that accrued to Respondents as a result of violating the applicable waste management requirements.

Complainant is seeking the assessment of a penalty in this matter, but has not specified a proposed penalty in the Complaint. Therefore, Complainant hereby identifies the following information it considers relevant to the assessment of a penalty in this matter, including all factual information and supporting documentation relevant to the assessment of a penalty, and a copy, or a statement of the internet address (URL), of any policy or guidance intended to be relied on by Complainant in calculating a proposed penalty. In accordance with 40 CFR §22.19(a)(4), Complainant reserves the right and intends to file a document in this action specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any penalty criteria set forth in RCRA within 15 days after Respondent files its prehearing information exchange.

1. Factual Information and Supporting Documentation Upon Which Complainant Intends to Rely in Calculating Proposed Penalty:

| | Factual Information Relevant to Assessment of Penalty | Supporting Documents |
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| 1. | Respondent is a sophisticated commercial operator of a hazardous waste treatment, storage and disposal facility located on approximately 320 acres of land. | CX-3 |
| 2. | Respondent utilized plastic sheeting instead of bins or containers -- as required by its hazardous waste management permit -- to store treated hazardous waste atop WMU-34 at its Buttonwillow facility pending verification that treatment standards were met. | CX-3 CX-4 CX-6 CX-8 CX-10 |
| 3. | Respondent treats a number of different hazardous wastes in the Stabilization Treatment Unit (STU) at the Buttonwillow facility. | CX-3 CX-4 CX-5 CX-6 CX-8 |
| 4. | Respondent has been using plastic sheeting instead of bins or containers for this purpose since approximately 1996, the time it began operating its Stabilization Treatment Unit (STU) at the Buttonwillow facility. | CX-3 CX-4 CX-6 CX-8 CX-10 |

| | Factual Information Relevant to Assessment of Penalty | Supporting Documents |
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| 5. | As of the date of this Prehearing Exchange, Respondent continues to use plastic sheeting instead of bins or containers to store this treated hazardous waste pending verification that treatment standards were met. | CX-3 CX-4 CX-6 CX-8 CX-10 |
| 6. | Respondent stored put piles of treated hazardous waste above RCRA land disposal restrictions treatment standards and in violation of RCRA and its hazardous waste management permit without undertaking either retreatment or off-site disposal of the hazardous waste in a timely manner. | CX-3 CX-6 CX-8 |
| 7. | At the time of the violations alleged, Respondent was not storing the hazardous waste in put piles solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal. | CX-3 CX-4 CX-5 CX-6 CX-8 |
| 8. | Certain put piles of hazardous waste stored atop WMU 34 during the period of the violations alleged were tested for and failed to meet applicable Land Disposal Restrictions treatment standards. | CX-3 CX-6 CX-8 |
| 9. | At least one put pile of hazardous waste stored atop WMU 34 during the period of the violations alleged had been left atop WMU 34 for approximately 723 days (from approximately October 30, 2008 to approximately October 23, 2010), or approximately 358 days of storage over one year. This pile had been tested for and failed to meet applicable Land Disposal Restrictions treatment standards after its initial treatment in the STU. | CX-3 CX-6 CX-8 |
| 10. | At least one put pile of hazardous waste stored atop WMU 34 during the period of the violations alleged was tested for and failed to meet applicable Land Disposal Restrictions treatment standards after being treated multiple times in the STU. During the time period from approximately June 6, 2009 to approximately November 1, 2010, this put pile was stored atop WMU for approximately 513 days, or approximately 148 days of storage over a year. This put pile was not treated successfully to meet Land Disposal Restrictions treatment standards until approximately December 14, 2010. | CX-3 CX-6 CX-8 |
| 11. | Numerous put piles of hazardous waste treated in the STU were left atop WMU-34 after sampling results showed the piles did not meet applicable land disposal restrictions treatment standards, but the piles were not moved back into the STU or otherwise shipped off-site for disposal within a reasonable time period. | CX-3 CX-6 CX-8 |

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| 12. | Respondent was not adequately tracking hazardous waste put piles at its Buttonwillow facility such that it left numerous piles of treated hazardous waste that failed to meet land disposal restrictions atop WMU-34 for significant time periods without retreating the waste or sending it off-site for disposal. | CX-3 CX-4 CX-6 CX-8 |
| 13. | There would be costs associated with Respondent's compliance with its hazardous waste management permit and the permit's conditions in terms of using bins or containers for the storage of treated hazardous waste pending verification that treatment standards were met and the Respondent has, to date, not incurred these costs. | CX-3 CX-4 CX-5 CX-6 CX-8 |
| 14. | The costs associated with plastic sheeting used to wrap put piles stored atop WMU-34 were less than the costs Respondent would otherwise have incurred in acquiring bins or containers in which to store treated hazardous waste pending verification that land disposal restrictions standards were met. | CX-3 CX-6 CX-8 CX-10 CX-20 |
| 15. | Complainant estimates that the number of bins that Respondent would need to acquire would equate roughly to the number of waste piles observed stored atop WMU-34. | CX-3 CX-6 CX-8 CX-10 |
| 16. | Complainant and Respondent entered into a Tolling Agreement to toll any applicable statute of limitations with respect to this matter. | CX-15 |
| 17. | To date, Respondent has provided no information to Complainant tending to demonstrate that Respondent may have an inability to pay a civil penalty in this matter. | CX-3 CX-6 CX-8 |

Complainant respectfully reserves the right to supplement the foregoing upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises.

2. Guidance and Policies Upon Which Complainant Intends to Rely in Calculating Proposed Penalty:

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| 1. | RCRA Civil Penalty Policy dated June 23, 2003 | http://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf |
| 2. | September 2004 Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to the Debt Collection Improvement Act of 1996, Effective October 1, 2004) | http://www.epa.gov/sites/production/files/documents/mod-memo.pdf |
| 3. | Adjusted Penalty Matrices for the RCRA Civil Penalty Policy dated January 11, 2005 | http://www.epa.gov/sites/production/files/documents/rcpprevisedtables2005.pdf |

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| 4. | December 2008 Amendments to US EPA's Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009) | http://www.epa.gov/sites/production/files/documents/amendmentstopenaltypolicies-implementpenaltyinflationrule08.pdf |
| 5. | April 6, 2010 Revision to Adjusted Penalty Policy Matrices Package issued November 16, 2009 | http://www.epa.gov/sites/production/files/documents/revisionpenaltypolicy04910.pdf |
| 6. | Amendments to the US Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013) | http://www.epa.gov/sites/production/files/2014-01/documents/guidancetoamendepapenaltypolicyforinflation.pdf |
| 7. | A Framework for Statute Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties | http://www.epa.gov/sites/production/files/documents/penasm-civpen-mem.pdf |
| 8. | December 15, 1995 Guidance on the Use of Penalty Policies in Administrative Litigation | http://www.epa.gov/sites/production/files/documents/gpoladminlitig-mem.pdf |
| 9. | February 16, 1984 Policy on Civil Penalties: EPA General Enforcement Policy #GM 21 | http://www.epa.gov/sites/production/files/documents/epapolicy-civilpenalties021684.pdf |
| 10. | June 29, 2015 Guidance on Evaluating a Violator's Ability to Pay a Civil Penalty in an Administrative Enforcement Action | http://www.epa.gov/sites/production/files/2015-06/documents/atp-penalty-evaluate-2015.pdf |
| 11. | December 19, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty | http://www.epa.gov/sites/production/files/documents/civilpenalty-violators.pdf |
| 12. | December 2003 Hazardous Waste Civil Enforcement Response Policy | http://www.epa.gov/sites/production/files/documents/finalerp1203.pdf |
| 13. | May 1997 Modification to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996) | http://www.epa.gov/sites/production/files/2014-01/documents/penpol.pdf |

Complainant respectfully reserves the right to supplement the foregoing upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises.

C. **Factors and Methodology Utilized in Calculating Proposed Penalty**

Mr. Francis will testify that he prepared a proposed penalty to support the request for assessment of a civil penalty set forth in the Complaint. He will explain that he used the RCRA Civil Penalty Policy, June 2003 (Penalty Policy) and revisions to the Penalty Policy's penalty matrices, dated April 6, 2010, and other guidance and policies listed above to calculate a proposed penalty.

Mr. Francis will explain that the Penalty Policy is based upon Section 3008 of RCRA, 42 U.S.C. §6928, which requires consideration of the seriousness of the violation and any good faith efforts to comply with applicable requirements. He will also explain that the Penalty Policy also calls for consideration of other factors in calculating a proposed RCRA civil penalty, including willfulness or negligence, history of non-compliance, ability to pay, the economic benefit of the non-compliance and other factors as justice may require.

Mr. Francis will explain what the Complainant's proposed penalty is and how the Complainant derived its proposed penalty for this action, including how the multi-day component of the proposed penalty was calculated and the basis for the economic benefit component of the proposed penalty. He will also explain that the time frames in which the violations alleged in the Complaint occurred dictate the maximum civil penalty for each day of violation.

Mr. Francis will briefly explain the Penalty Policy methodology he used to determine the gravity component of the proposed penalty. He will explain that the gravity component examines two factors – the potential for harm as a result of each violation (Potential for Harm) and the extent of deviation from the regulatory or permit requirement (Extent of Deviation). He

will explain that the Penalty Policy directed him to consider whether the violations represented a Major, Moderate, or Minor Potential for Harm and Extent of Deviation. He will explain that the Penalty Policy generally identifies a Major violation as one which represents either a substantial risk of exposure or a substantial deviation from applicable requirements. He will explain that a Moderate violation is generally one that represents a significant risk of exposure or significant deviation from applicable requirements. He will also explain that a Minor violation is one that represents a low risk of exposure or adverse impact on the RCRA regulatory program.

Mr. Francis will explain that the Potential for Harm and Extent of Deviation factors form the “x” and “y” axes of a nine-cell penalty matrix. Each axis is further divided into a Major, Moderate or Minor category. Within each cell is a monetary range for the appropriate proposed penalty.

Mr. Francis will explain that, in developing the proposed penalty, he followed the Penalty Policy and examined two elements for Potential for Harm – the risk of harm or environmental exposure to hazardous waste and/or hazardous constituents that may be posed by non-compliance (Risk of Exposure) and the adverse effect non-compliance may have on regulatory or statutory purposes or procedures (Harm to the RCRA Program).

Mr. Francis will explain that, when he examined the Risk of Exposure, he looked at both the probability of a release and the potential seriousness of contamination. He will testify that he examined whether or not there was evidence of any releases or mismanagement of hazardous waste, the adequacy of provisions for detecting and preventing releases, the quantity and toxicity of wastes potentially released and the likelihood of transport of contaminants to air, water or groundwater. Mr. Francis will also testify that, when he examined Harm to the RCRA Program,

the Penalty Policy directed him to consider all regulatory requirements as fundamental to the continued integrity of the RCRA program. Mr. Francis will explain that, when he examined the Extent of Deviation, he determined the degree of compliance with a particular requirement. He will explain that the Penalty Policy explains that the degree of compliance may range from substantial compliance to total disregard for the requirement.

Mr. Francis will testify that he also calculated a multi-day component to be included as part of Complainant's proposed penalty in this action to account for the duration of the alleged violations. He will also testify regarding adjustment factors set forth in the Penalty Policy that he considered, including good faith efforts to comply/lack of good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, and other unique factors.

Mr. Francis will testify that he considered all the facts available to him as a result of the inspection report, the information requests and other information available to him. Mr. Francis will explain that he calculated the penalty based on the violations observed -- as recorded in the inspection report -- by other EPA inspectors during the October 18 – 22, 2010 RCRA Compliance Evaluation Inspection.

Ms. Bellamy will testify regarding the information she collected to form the basis for the calculation of the economic benefit to the Respondent from the violations alleged in the Complaint. If necessary, Ms. Bellamy may also be called to testify regarding the factors and methodology used in calculating the proposed penalty for this action.

Mr. Morimoto may also be called to testify regarding the factors and methodology used in calculating the proposed penalty for this action, if necessary.

Mr. Shefftz will testify regarding the calculation of the economic benefit to the Respondent from the violations alleged in the Complaint.

Complainant respectfully reserves the right to update the information above at the time that it files its statement in accordance with 40 CFR §22.19(a)(4) specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any penalty criteria set forth in RCRA. Unless directed otherwise by the Chief Administrative Law Judge, Complainant intends to file that statement within 15 days after Respondent files its prehearing information exchange.

D. EPA Guidance Documents

In addition to the documents identified above with respect to the calculation of Complainant’s proposed penalty in this matter, Complainant intends to rely upon the following EPA guidance documents, policies and preambles with respect to the allegations set forth in the Complaint.

| | <i>EPA Guidance Document, Policy and/or Preamble Name</i> | <i>URL or citation</i> |
|----|--|-------------------------------------|
| 1. | Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits | 45 Fed. Reg. 24360 (April 9, 1980). |
| 2. | Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Actions Orders, and the Revocation, Termination or Suspension of Permits | 63 Fed. Reg. 9464 (Feb. 25, 1998). |
| 3. | Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits | 64 Fed. Reg. 40138 (July 23, 1999). |
| 4. | Civil Monetary Penalty Inflation Adjustment Rule (40 CFR Parts 19 and 72) | 69 Fed. Reg. 7121 (Feb. 13, 2004). |
| 5. | Civil Monetary Penalty Inflation Adjustment Rule | 73 Fed. Reg. 75340 (Dec. 11, 2008). |

| | <i>EPA Guidance Document, Policy and/or Preamble Name</i> | <i>URL or citation</i> |
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| 6. | Technical Correction for the Civil Monetary Penalty Inflation Adjustment Rule | 74 Fed. Reg. 626 (Jan. 7, 2009). |
| 7. | Civil Monetary Penalty Inflation Adjustment Rule | 78 Fed. Reg. 66643 (Nov. 6, 2013). |
| 8. | Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CAA Prevention of Significant Deterioration; CWA National Pollutant Discharge Elimination System; and Section 404 Dredge or Fill Programs (Proposed Rule) | 44 Fed. Reg. 34244 (June 14, 1979). |
| 9. | Consolidated Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CAA Prevention of Significant Deterioration; CWA National Pollutant Discharge Elimination System; and Section 404 Dredge or Fill Programs (Final Rule) | 45 FR 33290 (May 19, 1980). |
| 10. | Hazardous Waste Management System: Identification and Listing of Hazardous Waste | 45 Fed. Reg. 33119, (May 19, 1980), as amended at 48 Fed. Reg. 14293, (Apr. 1, 1983). |
| 11. | Standards for Generators of Hazardous Waste | 45 Fed. Reg. 33142, (May 19, 1980), as amended at 45 Fed. Reg. 86970, (Dec. 31, 1980). |
| 12. | Standards for Transporters of Hazardous Waste | 45 Fed. Reg. 33150, (May 19, 1980), as amended at 45 Fed. Reg. 86968, (Dec. 31, 1980). |
| 13. | Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities | 45 Fed. Reg. 33153, (May 19, 1980). |
| 14. | Environmental Permit Regulations: RCRA Hazardous Waste; SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration | 48 Fed. Reg. 14146, (Apr. 1, 1983). |
| 15. | Hazardous Waste Management System; Definition of Hazardous Waste; "Mixture" and "Derived-From" Rules | 57 Fed. Reg. 7632, (Mar. 3, 1992). |
| 16. | California; Final Authorization of State Hazardous Waste Management Program | 57 Fed. Reg. 32726, (July 23, 1992). (See also CX-14.) |

| | <i>EPA Guidance Document, Policy and/or Preamble Name</i> | <i>URL or citation</i> |
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| 17. | California: Proposed Authorization of State Hazardous Waste Management Program Revision | 66 Fed. Reg. 33037, (June 20, 2001). |
| 18. | California: Final Authorization of State Hazardous Waste Management Program Revision | 66 Fed. Reg. 49118, (Sept. 26, 2001). |
| 19. | California: Proposed Authorization of State Hazardous Waste Management Program Revision | 75 Fed. Reg. 60398, (Sept. 30, 2010). |
| 20. | California: Final Authorization of State Hazardous Waste Management Program Revision | 76 Fed. Reg. 62303, (Oct. 7, 2011). |
| 21. | April 11, 2014 Memorandum from Barnes Johnson, Director, Office of Resource Conservation and Recovery, Office of Solid Waste and Emergency Response, US EPA, entitled: Land Disposal Restriction (LDR) Requirements. | http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/3F1968129D4501A185257CE60070B1C0/\$file/14843.pdf Also attached as Exhibit CX-16. |
| 22. | September 2005 RCRA Training Module “Introduction to Land Disposal Restrictions (40 CFR Part 268),” Office of Solid Waste and Emergency Response, EPA 530-K-05-013. | http://www.epa.gov/sites/production/files/2015-09/documents/ldr05.pdf |
| 23. | Hazardous Waste Management System: Land Disposal Restrictions (Proposed Rule) | 51 Fed. Reg. 1602, (Jan. 14, 1986). |
| 24. | Hazardous Waste Management System: Land Disposal Restrictions (Final Rule) | 51 Fed. Reg. 40572, (Nov. 7, 1986). |
| 25. | Land Disposal Restrictions for First Third Scheduled Wastes (Proposed Rule) | 53 Fed. Reg. 17578, (May 17, 1988). |
| 26. | Land Disposal Restrictions for First Third Scheduled Wastes (Final Rule) | 53 Fed. Reg. 31138, (Aug. 17, 1988). |
| 27. | Land Disposal Restrictions for Third Third Scheduled Wastes (Final Rule) | 55 Fed. Reg. 22520, (June 1, 1990). |
| 28. | 9551.1987(01) LAND DISPOSAL RESTRICTIONS CLARIFICATIONS dated January 20, 1987 (RCRA Online [RO] 12845.) | http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/F32B1F623BA4B6FC8525670F006C0579/\$file/12845.pdf |

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| 29. | 9551.1987(05) RCRA/SUPERFUND HOTLINE MONTHLY SUMMARY FEBRUARY 87 Land Disposal Restrictions (RO 12851.) | http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/14D7D136E2082DAC8525670F006BC332/\$file/12851.pdf |
| 30. | 9554.1989(02) PLACEMENT OF STABILIZED WASTES THAT DO NOT MEET LAND RESTRICTION REQUIREMENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, MAY 5 1989 (RO 13281) | http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/9E6A556F24028D3D8525670F006C1E89/\$file/13281.pdf |
| 31. | 9497.1989(03) RECYCLING OF LEAD-ACID BATTERIES OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE NOV 17 1989 (RO 13339.) | http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/1E6CE0B22D42BE868525670F006C0432/\$file/13339.pdf |
| 32. | Land Disposal Restrictions Storage Prohibition and Decharacterized Wastes (RO 14048) | http://yosemite.epa.gov/osw/rcra.nsf/0c994248c239947e85256d090071175f/E103C2F60E4FD9308525670F006C2B2A/\$file/14048.pdf |

Complainant respectfully reserves the right to supplement the foregoing information upon adequate notice to Respondent and the Chief Administrative Law Judge, if the need arises.

Respectfully submitted,

U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: Mimi Newton 2/5/2016

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ATTORNEY FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing COMPLAINANT'S PREHEARING EXCHANGE dated February 5, 2016, and its attached COMPLAINANT'S EXHIBITS numbered CX 1 through CX 20, were sent this day in the following manner to the addressees listed below:



2/05/2016

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Date

One PDF Copy of Original Document and Separate (and in some cases multiple) PDF Copies of Each Exhibit Uploaded to OALJ E-Filing System for both:

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