

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

In the matter of)	U.S. EPA Docket No.
)	RCRA 09-2015-0011
CLEAN HARBORS)	
BUTTONWILLOW, L.L.C.,)	Complainant's Penalty Statement in
)	Accordance with 40 CFR §22.19(a)(4)
)	
)	
)	
<u>Respondent.</u>)	

Complainant's Penalty Statement in Accordance with 40 CFR §22.19(a)(4)

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) and COMPLAINANT'S PREHEARING EXCHANGE, respectfully submits this COMPLAINANT'S PENALTY STATEMENT IN ACCORDANCE WITH 40 CFR §22.19(a)(4) as follows:

Complainant did not specify a proposed penalty in the Complaint but did identify the factual information it considers relevant to the assessment of a penalty in Complainant's Prehearing Exchange. This Penalty Statement specifies the penalty that Complainant now recommends and explains how the recommended (or proposed) penalty was calculated in accordance with the penalty assessment criteria set forth under Section 3008(a) of the Resource Conservation and Recovery Act, as amended, (RCRA), 42 U.S.C. §6928(a).

Complainant respectfully submits the following information in support of a recommendation that a civil penalty of TWO MILLION, TWO HUNDRED AND SIXTY-

THREE THOUSAND, ONE HUNDRED AND SIXTY-SIX DOLLARS (\$2,263,166.00) be assessed against the Respondent as a result of the violations alleged in this action.

Complainant has calculated this recommended penalty in accordance with the penalty criteria set forth in RCRA Section 3008(a). Complainant has also relied on and considered the documents and factors -- as well as factual information -- cited in its Complaint, in its Prehearing Exchange, in its Rebuttal Prehearing Exchange, and in Respondent's Prehearing Exchange.

A. Methodology and Factors Considered in Calculating Complainant's Recommended Penalty

As explained in Complainant's Prehearing Exchange, Section 3008(a) of RCRA requires that the Administrator 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). Pursuant to this directive, Complainant has undertaken an evaluation of the factors set forth and facts and documents identified in Complainant's and Respondent's respective Prehearing Exchanges to derive its recommended penalty of \$2,263,166.00.

Complainant will present evidence at the hearing of this matter that its calculation of the recommended penalty was undertaken in accordance with 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 identified previously in Complainant's Prehearing Exchange.

Complainant will present evidence that the Penalty Policy is based upon Section 3008 of RCRA, 42 U.S.C. §6928, and that, in addition to requiring that Complainant consider the expressly enumerated statutory factors of the seriousness of the violation and any good faith efforts to comply with applicable requirements, the Penalty Policy 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.

Complainant will introduce evidence demonstrating that, while the nature of the allegations in the Complaint focus on violations of two distinct components of RCRA's land disposal restrictions, (*i.e.*, (i) the violation of the prohibition on storage of restricted waste; and (ii) the violation of the facility's permit conditions with respect to its use of plastic sheeting for waste storage), Complainant's calculation of its recommended penalty relies solely on the facts surrounding the latter component of the allegation. Thus, this recommended penalty is based on the facts pertaining to Respondent's storage of restricted hazardous waste on plastic sheeting instead of within a bin or container as required by Respondent's permit. While Complainant does not at this time recommend adding a separate component to the recommended penalty for Respondent's violation of RCRA's prohibition against the storage of land disposal restricted hazardous waste, Complainant nonetheless reserves the right to submit an alternative recommended penalty based on the facts associated with this alternative component of Respondent's violations, as alleged, upon adequate notice to Respondent and the Chief Administrative Law Judge, if appropriate.

1. Gravity-Based Component

Complainant's recommended penalty calculation includes the development of an initial gravity component of the recommended penalty based on an examination of two factors – the potential for harm as a result of the violation (Potential for Harm) and the extent of deviation from the regulatory or permit requirement posed by the violation (Extent of Deviation).

a. *Potential for Harm*

Whether the Potential For Harm is considered “Major,” “Moderate” or “Minor” involves an examination of two elements:

- 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).

Complainant will demonstrate at hearing that, in evaluating the Risk of Exposure, Complainant considered both the probability of a release and the potential seriousness of contamination. These considerations included any evidence that there was 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.

Complainant will also demonstrate that, in evaluating Harm to the RCRA Program, consideration was given to any impacts posed by the alleged violation to the continued integrity of the RCRA program.

b. *Extent of Deviation*

Pursuant to the Penalty Policy, whether the Extent of Deviation of the violation is considered “Major,” “Moderate” or “Minor” involves an examination of the degree to which the violation at issue renders the requirement inoperative. In other words, Complainant evaluated whether the violation involved substantial non-compliance with the requirement, or substantial compliance, or whether the scope of the non-compliance fell somewhere in-between.

c. *The Matrix Value*

As part of the calculation of the gravity-based component of its recommended penalty, Complainant referred to the Penalty Policy's nine-cell penalty matrix, which includes an "x" and "y" axis for Potential for Harm and Extent of Deviation. Each axis is further divided into a Major, Moderate or Minor category. Within each cell is a monetary range for the appropriate proposed penalty. The matrix has been updated for inflation over the years, and Complainant utilized the matrix cell appropriate for the time period associated with the recommended penalty, as explained more fully below. Within the range of penalties associated with a particular matrix cell, Complainant chose and recommends a specific figure be assessed as the gravity-based component of the penalty, for the reasons described below.

2. The Multi-Day Component

In developing the recommended penalty, Complainant also considered the continuing nature of Respondent's non-compliance with its permit conditions in calculating a "multi-day" component for the recommended penalty figure. The initial date of the violation would be captured in the gravity-based component of the recommendation and the penalty for the remaining successive days of the violations period would be captured as part of the multi-day component. Complainant refers to the Penalty Policy's multi-day matrix cell, as adjusted for inflation, in calculating the multi-day component of the recommended penalty. And again, within the range of penalties associated with a particular multi-day matrix cell, Complainant chose and recommends a specific figure be assessed as the multi-day component of the penalty, for the reasons described below.

3. Adjustment Factors

As explained in more detail below, the adjustment factors set forth in the Penalty Policy were also considered in calculating the recommended penalty, including good faith efforts to comply or lack of good faith, the degree of willfulness or negligence involved in the violation, the facility's history of noncompliance, the Respondent's ability to pay a penalty, and other unique factors.

4. Economic Benefit

The recommended penalty also includes an economic benefit component, which represents the financial benefit that accrued to the Respondent, either because it avoided costs or delayed costs of compliance that it would otherwise have incurred. The economic benefit component is also explained in more detail below.

B. Complainant's Recommended Penalty

1. Gravity-Based Component

a. *Potential for Harm*

Complainant determined that the Potential for Harm from the use of plastic sheeting instead of boxes or containers to store treated piles of hazardous waste, pending the receipt of treatment verification sampling results, should be considered "Moderate."

i. Risk of Exposure

In determining that the potential for harm posed by Respondent's use of plastic sheeting in violation of its permit should be "Moderate," Complainant first considered the risk of human or environmental exposure to hazardous waste or its constituents that could occur as a result of the violation. This analysis included looking at both the likelihood that human or other

environmental receptors could be exposed to hazardous waste and/or hazardous constituents and the degree of such potential exposures.

In accordance with the Penalty Policy, factors Complainant considered in making this determination included whether there was any evidence of a release or any evidence of waste mismanagement at the facility. Complainant considered the fact that numerous piles of treated waste failed treatment standard verification sampling but, at the time of EPA's 2010 inspection of the facility, were left untreated far longer than necessary. In many instances, piles of land disposal restricted waste sat well over a year.

While batches of treated waste could theoretically be tracked based on the numbers assigned to piles, which included the dates of treatment, the fact that these piles were not re-processed in a timely manner is an indication that there was no actual ongoing "management" of these piles for significant time periods. The absence of any signs of active management of the treated piles after sampling showed treatment was unsuccessful is an indication of the actual "mismanagement" through neglect of these land disposal restricted piles.

Photos taken of the facility during a 2013 visit by EPA inspectors show that the plastic used to wrap the piles was torn in some places, which could allow wind dispersal of land disposal restricted waste, especially fine particulate dust. Complainant considered that entire area where the piles were being stored appeared to be dusty and raised concerns among EPA's inspectors about the effectiveness of the plastic sheeting to contain the treated waste.

Complainant also considered the adequacy of any provisions Respondent made at the facility for detecting and preventing a release such as monitoring for releases or undertaking inspection procedures. Complainant is unaware of any precautions that the facility was taking to

monitor wind dispersal of waste near the piles or inspect the area to ensure the integrity of the plastic sheeting, to observe whether waste particulate was escaping from the piles or to sample soils around the piles to ensure that waste was not released into the environment.

Complainant also considered the degree of any potential exposure that might result from Respondent's violation. In examining the degree of any potential exposure, Complainant considered both the quantity and toxicity of any wastes that may potentially be released as a result of the violation.

Respondent accepts a variety of hazardous waste for treatment in the Stabilization Treatment Unit (STU) at the Buttonwillow facility. At the time of EPA's 2010 inspection, numerous piles of treated hazardous waste were being stored in the waste staging area that had been sampled and demonstrated not to meet applicable land disposal restrictions standards. Respondent's own data demonstrated that the piles failed to meet treatment standards for a variety of different contaminants, such as cadmium, nickel, mercury, and lead. Waste contaminated with such levels of metals is prohibited from land disposal because, above those levels, it is deemed too toxic for disposal on the land.

In addition, information provided by the Respondent indicates that substantial quantities of hazardous wastes were stored above treatment standards in the staging area. One pile alone was estimated to contain approximately 22.8 tons of treated hazardous waste. At the time of the 2010 inspection, there were approximately 9 piles of treated hazardous waste that had failed treatment standards and had been stored in the staging area for over a year and an additional 21 piles of treated waste had been stored there for over 45 days.

In considering the degree of any potential exposure that might result from Respondent's violation, Complainant also considered the likelihood of transport of contamination by way of environmental media such as through the air or through groundwater. Air dispersal of waste was considered the most likely means of transport of contamination, given the actual and potential integrity of the plastic used to wrap the piles.

Complainant also considered the existence, size, and proximity to the facility of receptor populations (e.g., local residents, fish, and wildlife, including threatened or endangered species) and sensitive environmental media (e.g., surface waters and aquifers). Although there is some evidence that the endangered Kern Mallow Plant (*Eremalche Kernensis*) is present on the site, Complainant considered the most significant potential receptors in terms of air dispersal of contaminants to be workers at the facility.

ii. Risk of Harm to the Regulatory Program

In evaluating the Potential for Harm from the violation, Complainant also considered the impact the violation could have on the Federal and State hazardous waste management regulatory programs. Respondent's use of plastic sheeting instead of the bins or containers expressly required in its permit does have a negative impact on the regulatory program. In its Prehearing Exchange, Respondent argues that the term "bin" should not be accorded a common, everyday meaning. But Respondent's permit was published for public comment prior to being finalized and the publically available permit documents do not provide any explanation regarding an alternative meaning for the term "bin" that would include "plastic sheeting." Interpretations of permit language that are at odds with common, everyday usage of words, and which are not clearly explained to the public at the time permits are proposed, can undermine public

confidence in regulators who oversee and enforce those permits. To allow facilities to unilaterally interpret permit conditions without affording the public an opportunity to review and comment on these interpretations runs afoul of RCRA's permit processes that specifically call for public notice of permit conditions.

As a result of all these considerations, Complainant determined that the overall Potential for Harm posed by Respondent's use of plastic sheeting instead of the boxes or containers called for in its permit may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents and may have a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program.

Complainant determined that the violation does not pose a substantial risk of exposure of humans or other environmental receptors to hazardous waste or constituents and does not create a substantial adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program. However, Complainant also determined that the violation poses more than just a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents and may have more than just a small adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program. As a result, Complainant determined that this violation poses a Moderate Potential for Harm.

b. *Extent of Deviation*

Complainant evaluated Respondent's post-treatment waste management practices in terms of whether it completely disregarded its permit conditions, or whether it met most of the important aspects of the permit conditions with respect to these piles of treated waste, or if its actions fell somewhere in-between. Complainant determined that the Respondent has

significantly deviated from the requirements of its permit and, therefore, that the Extent of Deviation should be considered Moderate.

For example, Complainant notes that, at times, there appear to be temporary wooden fencing placed around the entire area where the piles are placed pending verification that they meet applicable treatment standards and that this fencing may be lined with more plastic sheeting. Complainant does not agree that temporary fencing around the entire area comports with the intent of the permit, because the fencing is not erected around each pile, and definitely does not constitute the “bin” or “container” envisioned in the permit. However, Complainant concedes that there appear to have been, at times, some attempt at fencing off the area.

Complainant also concedes that placing piles on the plastic sheeting means the piles are not deposited directly on the ground. And, while Complainant believes that RCRA’s land disposal restrictions as well as the intent of the permit were to require the waste be put into containers or bins with walls to contain the waste, the plastic sheeting that is wrapped around the waste does, to some extent, prevent dispersal of the waste. However, Complainant disagrees that the plastic sheeting, which is subject to rupture or breakage, as evidenced in Complainant’s 2013 photographs of the piles, constitutes the type of sturdy, walled unit that promises to remain intact, especially over prolonged periods of outdoor storage.

Complainant maintains, therefore, that Respondent has deviated significantly from its permit conditions with respect to the management of treated waste pending verification that treatment standards are met and, therefore, that the Extent of Deviation should be considered Moderate.

c. *Recommended Matrix Value*

The Penalty Policy's gravity-based matrix, as adjusted for inflation, includes a range of between \$7,090.00 and \$11,330.00 for violations that present a Moderate Potential for Harm and a Moderate Extent of Deviation. Complainant recommends a Gravity-Based Component of the penalty using a figure from the middle of this range, at \$9,210.00.

The selection of the exact penalty amount within each cell is left to the discretion of enforcement personnel in any given case. The range of numbers provided in each matrix cell serves as a "fine tuning" device to allow enforcement personnel to better adapt the penalty amount to the gravity of the violation and its surrounding circumstances. In this case, Complainant has analyzed and relies on the case-specific factors described above and on other factors in selecting the recommended \$9,210.00 figure from this range. The additional factors considered included the seriousness of the violation relative to other violations falling within the same matrix cell, the environmental sensitivity of the area potentially threatened by the violation, and the size and sophistication of the violator. For example, the size and sophistication of the Respondent warranted a higher value within the cell, while the environmental sensitivity of the area potentially threatened by the violation warranted a lower value. As a result of all these considerations, Complainant determined that a figure taken from the middle of the range was appropriate.

2. Multi-Day Component

Complainant intends to demonstrate at hearing that Respondent has been utilizing plastic sheeting instead of bins or containers since its permit was issued in 1996. Respondent's Prehearing Exchange provides evidence that this practice continues through the present. The

violation has in fact continued for approximately 20 years and, as a result, Complainant has determined that a multi-day component of the penalty it recommends be assessed against Respondent is appropriate.

The Penalty Policy states that multi-day penalties are presumed appropriate for days 2-180 of violations with moderate-moderate gravity-based designations, such as this. Therefore, multi-day penalties should be sought in accordance with the Penalty Policy, unless there are case-specific facts overcoming the presumption. It also states that assessing multi-day penalties beyond the first 181 days of violation for moderate-moderate gravity-based violations are discretionary.

The Penalty Policy indicates that, where a violation continues for more than one day, enforcement personnel have the discretion to calculate a penalty for the entire duration of the violation. However, enforcement personnel are directed to first calculate the penalty based on the period of violation occurring within five years of the date the complaint will be filed.

In this case, therefore, Complainant recommends that the penalty calculation include a multi-day component that captures a 5 year period of violation (1,825 days). This approach is supported by the continuing nature of the violation over an approximately 20 year period through to the present day, with no clear end of the violation in sight. While Complainant does not believe that assessing a multi-day component for an entire 20 year period is appropriate, neither does it believe that cutting off the multi-day component at 181 days is appropriate. Therefore, Complainant recommends that the multi-day component of the penalty be calculated at 1,824 days, (1,825 days minus the first day of non-compliance, which is picked up in the Gravity-Based Component of the recommended penalty figure).

Complainant also recommends that the Moderate-Moderate multi-day matrix cell be chosen to harmonize the multi-day component with the gravity-based component of the recommended penalty. In selecting the appropriate value within this cell, Complainant considered the specific facts of this case in the context of the Penalty Policy's broad goals of: (1) ensuring fair and consistent penalties which reflect the seriousness (gravity) of violations, (2) promoting prompt and continuing compliance, and (3) deterring future non-compliance.

For many of the same reasons that Complainant recommends the gravity-based component of the penalty include a figure chosen from the middle of the Moderate-Moderate gravity matrix, Complainant recommends that the multi-day component include a figure chosen from the middle of the Moderate-Moderate multi-day matrix range. As adjusted for inflation, the multi-day matrix cell range for Moderate-Moderate violations is from \$360 to \$2,230.

Complainant, therefore, recommends a multi-day penalty of \$1,295 be assessed for the 1,824 days of violation immediately preceding the date of such award. (If, for example, a penalty is assessed against Respondent on August 1, 2016, it should be assessed to cover the 5 year period [less one day] prior to the date of that award, or from August 1, 2011 through August 1, 2016.)

The total multi-day component recommended by Complainant is \$2,362,080.00, (\$1,295.00 multiplied by 1,824 days of violation).

3. Adjustment Factors

While the seriousness of a violation is considered in determining the appropriate gravity-based penalty component, it may be appropriate to adjust the penalty up or down on the basis of other circumstances pertaining to the violation at hand. These other factors may include the reasons the violation was committed, the intent of the violator, and other factors related to the

violator that are not considered in choosing the appropriate cell from the matrix. The Penalty Policy includes adjustments that can be used to reflect individual circumstances associated with violations on a case by case basis.

RCRA Section 3008(a)(3) states that in assessing penalties, Complainant must take into account any good faith efforts to comply with the applicable requirements. In addition, the Penalty Policy sets out several other adjustment factors to consider, including: the degree of willfulness and/or negligence, history of noncompliance, ability to pay, environmental projects, and other unique factors.

a. *Good Faith Efforts to Comply*

In evaluating whether to adjust a penalty downward for good faith efforts to comply or upward for a lack of good faith, Complainant considered whether Respondent relied on written statements by the State or EPA regarding storage of treated waste on plastic sheeting. Complainant recommends a downward adjustment of the penalty by 5% to account for Respondent's good faith efforts to comply.

While Respondent argues that it has relied on DTSC's purported acceptance of the plastic sheeting instead of the bins or containers called for in the permit, it has not produced definitive written statements justifying this reliance. However, although it remains uncertain the extent to which State inspectors actually physically inspected the area where piles were stored temporarily pending verification that treatment levels were met, Complainant recognizes that some State-generated inspection reports may have been ambiguous with respect to whether the use of plastic sheeting comported with applicable permit conditions. Indeed, questions were clearly raised by

State enforcement personnel over the years about this practice and no definitive written resolution of the question appears to have been secured by the Respondent for its own records.

Complainant also considered that part of Respondent's Prehearing Exchange wherein a former California Department of Toxic Substances Control (DTSC) representative is identified who is prepared to testify on behalf of Respondent with respect to the understanding that he purportedly had with Respondent while he worked on permits for hazardous waste facilities at the California DTSC. Complainant considered that Respondent's apparent reliance on a State employee's understanding could justify a downward adjustment of the penalty for good faith efforts to comply.

However, any purported reliance on unwritten representations by the State or State employees as to the acceptability of using plastic sheeting instead of bins and containers would be partially counter-balanced by Respondent's failure to immediately take steps to correct its violation *after* Complainant notified Respondent that it considered use of the plastic sheeting a permit violation.

Based on these competing considerations, Complainant determined that a 5% downward adjustment of the penalty is warranted on the basis of Respondent's good faith efforts to comply.

b. *Degree of Willfulness/ Negligence*

In evaluating Respondent's degree of willfulness or negligence in violating the condition that it store its treated waste in bins or containers pending confirmation that treatment of the waste was successful, Complainant considered how much control Respondent had over the practices giving rise to the violation, the foreseeability that the practices would give rise to a violation, whether Respondent took reasonable steps to avoid the violation, whether Respondent

knew or should have known of the hazards associated with the conduct and whether Respondent knew or should have known of the legal requirement it was violating.

Although Complainant determined that most of the factors involved in determining the level of Respondent's willfulness or negligence were weighed toward an upward adjustment of the penalty (*i.e.*, Respondent was in control of whether the waste was stored in bins or containers or on and wrapped in plastic, and Respondent knew what its permit conditions were and in fact drafted the Supplemental Landfill Operations Plan at issue), Complainant has concluded that no upward adjustment of the penalty is appropriate in this case.

In reaching this conclusion, Complainant considered that, although Respondent argues that the physical limitations of the STU somehow dictate the use of plastic sheeting instead of bins or containers, during the 20 years that it undertook this practice, Respondent did not seek a clarification of the permit conditions through a permit modification request to the State. Complainant also considered the fact that Respondent has apparently only sought such clarification in its permit renewal application, as evidenced in the information provided in Respondent's Prehearing Exchange.

The Penalty Policy does not support a downward adjustment of the penalty for the absence of willfulness or negligence. As a result, and in consideration of the totality of the circumstances tending to support an upward adjustment, Complainant recommends that no adjustment upward be made to the penalty on the basis of willfulness or negligence.

c. *History of Non-Compliance*

The Penalty Policy allows upward adjustment of the penalty where the violator has previously violated RCRA or State hazardous waste laws at the same or at a different site. While

Respondent has some history of violations at its Buttonwillow, California facility, Complainant is not recommending an upward adjustment of the penalty based on the Respondent's history of non-compliance in this action. Complainant is unaware of any formal enforcement of the permit condition requiring that treated waste be stored in bins or containers pending treatment verification either with respect to the Buttonwillow facility or any other facility operated by Respondent. Moreover, the number and types of violations previously identified at the Buttonwillow, California facility do not necessarily warrant an upward adjustment of the penalty in this case, because of the size and complexity of the facility's operations.

Complainant does perceive of a direct nexus between the violations of RCRA's prohibition against storage of land disposal restricted waste, as set forth in the Complaint, and the violation of Respondent's permit condition requiring the use of bins and containers. The delays in re-processing waste that failed to meet land disposal restrictions treatment standards are evidence of Respondent's failure to comply with the permit conditions associated with the storage of treated waste. The permit specifically required adequate management and tracking of the piles. Respondent allowed numerous piles to sit at the site for significant periods of time after results showed the piles failed to meet treatment standards. This specific area of non-compliance could justify an upward adjustment of this penalty for the history of non-compliance. However, Complainant has taken Respondent's lack of proper management of the piles into account in calculating the gravity-based component and, as a result, recommends no upward adjustment for the Respondent's history of non-compliance.

d. *Ability to Pay*

Respondent is a sophisticated commercial operator of a hazardous waste treatment, storage and disposal facility. Complainant has no information that would tend to demonstrate that Respondent has an inability to pay a seven-figure penalty, such as the one recommended here. For this reason, Complainant determined that no downward adjustment to the penalty for inability to pay is appropriate.

e. *Environmental Project*

Complainant has no information that would justify a downward adjustment of its recommended penalty on the basis of Respondent undertaking an appropriate environmentally beneficial project. Therefore, no downward adjustment is recommended.

f. *Other Unique Factors*

Complainant makes no recommendation for either an upward or downward adjustment of its recommended penalty based on any other unique factors associated with this action or the violations alleged in the Complaint.

4. Economic Benefit Component

The Penalty Policy directs Complainant to calculate an “economic benefit” component to be added to the gravity-based penalty component whenever a violation results in “significant” economic benefit to the violator. Economic benefit may result from delaying or avoiding compliance costs, or when an illegal competitive advantage is achieved through noncompliance.

In this case, Complainant evaluated the economic benefit to Respondent from not using boxes or containers in which to store treated hazardous waste pending verification that treatment at the Buttonwillow facility was successful.

Complainant determined that Respondent has delayed – and continues to delay – the costs of purchasing and/or modifying the necessary boxes, bins, and/or containers.

In calculating the economic benefit component of Complainant’s recommended penalty, Complainant’s expert witness, Jonathan Shefftz,¹ who was identified in Complainant’s Prehearing Exchange, used standard financial cash flow and net present value analysis techniques, based on modern and generally accepted financial principles. Such an approach is the underpinning of any capital budgeting exercise, and is the standard approach by which alternative investments should be judged according to any financial economics or corporate finance text.

First, Mr. Shefftz calculated the “on-time” costs for compliance measures that would have been necessary had Respondent undertaken them at an earlier point in time so as to prevent the violations that are alleged to actually have occurred. He compared these costs to the “delay” costs for compliance measures that Respondent has incurred or can be expected to incur to stop the violations at issue in this case. These calculations incorporate adjustments for inflation over the intervening years from when the costs are currently estimated to when they would have been incurred at the times of both the “on-time” and “delay” compliance scenarios. Mr. Shefftz then adjusted for the tax deductions available for these costs.

Next, Mr. Shefftz calculated the present value of the costs, or “cash flows.” Finally, he subtracted the present value of the delayed compliance from the present value of the on-time

¹ Complainant continues to work with Mr. Shefftz to create an expert report detailing his economic benefit calculation. Due to unforeseen impediments to obtaining contracting authorization and funding, Mr. Shefftz’ expert witness report was not able to be finalized in time to include it with Complainant’s Prehearing Exchange. It will, therefore, when final, be the subject of an anticipated Motion by Complainant for Leave to Supplement its Prehearing Exchange.

compliance to determine the economic benefit that the Respondent has gained. By contrast, the calculations for annually recurring costs that are entirely avoided over the period of noncompliance are somewhat more straightforward, since the economic benefit is equal to the entire after-tax net present value of those avoided costs.

In performing his calculation, Mr. Shefftz considered the date that Respondent should have acquired the boxes or containers in which to store treated waste as December 1, 1996, a date Complainant estimated as the approximate start of Respondent's non-compliance with its 1996 Permit.²

In light of the fact that Respondent continues to use plastic sheeting instead of boxes or containers, Mr. Shefftz then used October of 2016 as the anticipated date of compliance for the purpose of his calculation. He has also pointed out to the Complainant that, if the compliance measures are delayed even further, then the economic benefit will actually be higher than what he calculated.

Using the Container Exchange website provided to him by Complainant, Mr. Shefftz used 57x44x42" steel collapsible container, plus modification labor costs. He also adjusted the cost estimates for inflation to account for when these costs should have been incurred and to when they are anticipated to be incurred. For the container costs, he used the Producer Price Index ("PPI") and for the modification costs, he used the Employment Cost Index ("ECI"), both published by the U.S. Department of Labor's Bureau of Labor Statistics.

Mr. Shefftz conservatively omitted any possible shipping costs, as well as any possible state and/or local sales taxes from his calculation. The listing for containers he used for pricing

² Complainant asserts that recouping Respondent's economic benefit for the entire period of the violation is appropriate.

can be viewed at: <http://www.containerexchanger.com/bulk-containers/metal-bins-for-sale/used-57x44x42-steel-collapsible-container/S002530>.

Mr. Shefftz's calculation is based on a rough estimation that approximately 51 containers, currently costing approximately \$115 each, should have been purchased as of December 1, 1996 and that approximately 1 hour of labor, at a rate of \$40 per hour using current hourly wage rates, would be required for each container for the purposes of making any adjustments, such as welding or reconfiguring of each container. Mr. Shefftz concluded that the economic benefit posed by this violation based on the information provided to him would amount to approximately \$10,441. Complainant recommends including this economic benefit figure in any penalty to be assessed against Respondent.

5. Calculation of Recommended Penalty

Complainant's calculation of its recommended penalty in this action is summarized as follows:

Gravity-Based Penalty from Matrix (range = \$7,090 to \$11,330)	\$9,210
(a) Potential for Harm - Moderate	
(b) Extent of Deviation - Moderate	
Multi-Day Matrix Value (range = \$360 to \$2,230)	\$1,295
The number of days of violation (1825) minus 1	1824
The number of days of violation (1824) multiplied by the multi-day matrix value (\$1,295)	\$2,362,080
Total of Gravity-Based and Multi-Day Components	\$2,371,290
Percent increase/decrease for good faith (5% of \$2,371,290 = \$118,565)	-5.0%

Percent Increase for Willfulness/Negligence	0.0%
Percent Increase for history of non-compliance	0.0%
Percent increase for other unique factors	0.0%
Total Adjustments	-5.0%
Revised Penalty Number based on Adjustments ($\$2,371,290$ minus $\$118,565$)	$\$2,252,725$
Economic benefit	$\$10,441$
Total recommended penalty ($\$2,252,725 + \$10,441$)	$\$2,263,166$

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,

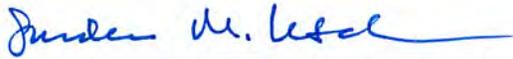
U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: *Mimi Newton* 3/4/16

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing COMPLAINANT'S PENALTY STATEMENT dated March 4, 2016, was sent this day in the following manner to the addressees listed below:



3/04/2016

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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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