UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
New Prime, Inc.,	**)**	**Docket No. RCRA-08-2020-0007**
	)	
Respondent.	**)**	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

I. PROCEDURAL BACKGROUND

This matter commenced on September 21, 2020, when the Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency ("EPA"), Region 8 ("Complainant"), filed a Complaint and Notice of Opportunity for a Hearing under 42 U.S.C. § 6928(a) ("Complaint") against New Prime, Inc. ("Respondent" or "Prime"), a trucking company. The Complaint alleges that Respondent's actions following a fire involving one of its trailers violated the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* Specifically, the Complaint alleges, in five counts, that Respondent failed to make a hazardous waste determination concerning the cargo involved in the fire (drums of paint and primer products); failed to prepare a manifest for the transportation of hazardous waste; stored hazardous waste at its Utah facility without a permit; failed to properly manage hazardous waste containers; and failed to obtain an EPA identification number prior to storing hazardous waste. Compl. ¶¶ 72−94. The Complaint seeks a civil penalty in the amount of $639,675.[1] Compl. ¶¶ 95, 97.

Respondent filed its Answer to Complaint and Request for Hearing ("Answer") on October 21, 2020. The case file was transmitted to the Tribunal for adjudication on October 24, 2020, and the Presiding Officer was designated for this matter on November 2, 2020. A Prehearing Order, setting deadlines for the parties to engage in the prehearing exchange of information pursuant to 40 C.F.R. § 22.19, was also issued on November 2, 2020. The parties filed their Prehearing Exchanges ("PHX") in a timely fashion.[2]

Now pending before the Tribunal is the Motion for Accelerated Decision on Liability and Penalty ("Motion") filed by Complainant on February 22, 2021. Accompanying the Motion were a Memorandum in Support of Complainant's Motion ("Memorandum") and a Declaration

[1] Complainant adjusted the penalty amount in later filings. The assessed penalty amount Complainant presently argues for is $631,402. *See* Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability and Penalty (Feb. 22, 2021).

[2] Exhibits submitted with the parties' Prehearing Exchanges are designated in this manner: Complainant's Exhibits are labeled "CX," and Respondent's Exhibits are labeled "RX."

of Complainant's Penalty Witness, Linda Jacobson ("Jacobson Declaration"). Respondent filed a Response to Motion for Accelerated Decision ("Response") on March 9, 2021, accompanied by a Declaration of Respondent's Director of Safety, Steve Field ("Field Declaration"). Complainant filed a Reply to Respondent's Response ("Reply") on March 19, 2021.

On February 24, 2021, Complainant filed a Motion to Correct its Prehearing Exchange. This request concerned corrected versions of two exhibits. Respondent filed a Response to the Motion to Amend Complainant's Prehearing Exchange on March 9, 2021. Complainant filed its Reply to Response to Motion to Correct Complainant's Prehearing Exchange on March 18, 2021. The Motion to Correct Complainant's Prehearing Exchange was granted by Order on March 31, 2021.

On July 16, 2021, Complainant filed the Second Supplement to its Prehearing Exchange ("Second Supplement") to add a rebuttal expert report as an exhibit. On July 21, 2021, Respondent filed its Motion for Supplemental Briefing ("Supplemental Motion"). Complainant filed a Response to the Supplemental Motion on July 30, 2021 ("Supplemental Response").

As set out below, the Motion is **GRANTED in part** and **DENIED in part**. The Supplemental Motion is **DENIED**.

II. PRELIMINARY MATTERS

The Second Supplement adds a report (CX66) from Complainant's expert witness to rebut the conclusions in Respondent's expert report. Complainant explains that the Exhibit could not be included in its earlier prehearing exchange submissions because its expert witness "needed additional time to review the prehearing exchange information in order to prepare a rebuttal expert report." Second Suppl. at 2.

In the Supplemental Motion, Respondent asks permission to file a Supplemental Brief to address the issues raised in the Second Supplement because it was deprived of the opportunity to address these issues in its Response. Suppl. Mot. at 2–3. Respondent notes that Complainant's briefing on the present Motion had been completed for four months before Complainant filed its Second Supplement, and Respondent asserts that "[t]his dilatory report goes to the heart of this case, and indeed creates yet another set of disputed material facts between the parties." Suppl. Mot. at 2. The Supplemental Brief accompanies the Supplemental Motion and reiterates that there are disputed issues of material fact concerning the proper penalty amount. Suppl. Br. at 2–4.

In the Supplemental Response, Complainant avers that the Second Supplement was filed "solely for consideration if the Presiding Officer denies [the Motion]" and Complainant does not intend for it to be used to support the Motion. Suppl. Resp. at 1–3. Complainant asks the Tribunal to deny the Supplemental Motion. Suppl. Resp. at 3.

The Tribunal will take Complainant at its word. The Supplemental Motion is **DENIED**. The Tribunal will not consider CX66 as it evaluates the parties' positions on accelerated decision.

III. APPLICABLE LAW

Standard for Adjudicating a Motion for Accelerated Decision

Under the Consolidated Rules of Practice ("Consolidated Rules"), set forth at 40 C.F.R. Part 22:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if *no genuine issue of material fact exists* and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a) (emphasis added). As the Environmental Appeals Board ("Board") and this Tribunal have recognized, "[t]his standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the Federal Rules of Civil Procedure[.]" *Dave Erlanson, Sr.*, EPA Docket No. CWA-10-2016-1019, 2018 WL 4859961, at *2 (ALJ, Sept. 27, 2018) (Order on Complainant's Motion for Accelerated Decision); *see also Clarksburg Casket Co.*, 8 E.A.D. 496, 502 (EAB 1999) (explaining that the standard for accelerated decision "is similar to the summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure"). As such, the Board and this Tribunal refer to Rule 56 and its federal court jurisprudence for guidance on deciding motions for accelerated decision. *Erlanson*, 2018 WL 4859961, at *2 (citations omitted).

In line with the Supreme Court's jurisprudence, "the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact" but "the evidentiary material proffered by the moving party in support of its motion must be viewed in the light most favorable to the opposing party." *Lay Brothers, Inc.*, EPA Docket No. EPCRA-IV-97-067, 1999 WL 362891, at *4 (ALJ, Mar. 12, 1999) (Order Granting Complainant's Motion for Accelerated Decision as to Liability/Order Denying Complainant's Motion for Accelerated Decision as to Penalty) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). Like Rule 56, this "administrative summary judgment standard" requires a "timely presentation of a genuine and material factual dispute" by the non-movant—resolution of which requires an evidentiary hearing. *Green Thumb Nursery*, 6 E.A.D. 782, 793 (EAB 1997) (Final Order). If that requirement is not met, an accelerated decision may be based on the documentary record only, foregoing the evidentiary hearing. *Id.* at 793 n.23.

The moving party may satisfy its burden of "showing the *absence* of any genuine issue of fact" through citations to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[.]" *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970) (emphasis added); *id.* at 175 (Black, J., concurring); Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (interpreting this standard to mean that a movant must show "that there is an absence of evidence to support the nonmoving party's case"). If the moving party successfully meets its burden of production, that burden shifts to the nonmoving party, although the burden of persuasion remains with the moving party. *Catrett*, 477 U.S. at 330 (Brennan, J., dissenting). The nonmoving party then must present "affirmative evidence" and

can only defeat the motion if it offers "significant probative evidence tending to support" its position. *Anderson*, 477 U.S. at 249, 257 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

Accordingly, this Tribunal will deny a movant's motion for accelerated decision if a reasonable factfinder could find in favor of the nonmoving party (i.e., the dispute is *genuine*) on a point of fact that may affect the outcome of the proceeding (i.e., the fact is *material*). *Green Thumb Nursery*, 6 E.A.D. at 793 (citing *Anderson*, 477 U.S. at 248). A genuine issue of *material* fact requires more than a "mere existence of *some* alleged factual dispute[.]" *Anderson*, 477 U.S. at 247−48; *see also BWX Techs., Inc.*, 9 E.A.D. 61, 76 (EAB 2000) (requiring nonmoving party to provide "more than a *scintilla* of evidence on a disputed factual issue" to justify an evidentiary hearing). Meanwhile, the substantive law determines which facts are material to the matter at hand. *Anderson*, 477 U.S. at 248.

The evidentiary standard of proof for this matter is a "preponderance of the evidence." *Lay Brothers*, 1999 WL 362891, at *6 (citing 40 C.F.R. § 22.24). Under the Consolidated Rules, a complainant bears the burdens of presentation and persuasion that the violation occurred as the complaint purports and that the relief sought is appropriate. 40 C.F.R. § 22.24(a). A respondent bears the burdens of presentation and persuasion for affirmative defenses. *Id.*

Resource Conservation and Recovery Act

Congress enacted RCRA in 1976 "to promote the protection of health and the environment and to conserve valuable material and energy resources by . . . minimizing the generation of hazardous waste" "as expeditiously as possible." 42 U.S.C. § 6902(a)(6), (b). Subtitle C of RCRA, 42 U.S.C. §§ 6921−6939g, "directs the EPA to establish a comprehensive 'cradle to grave' system regulating the generation, transport, storage, treatment, and disposal of hazardous wastes." *Chem-Solv, Inc.*, EPA Docket No. RCRA-03-2011-0068, 2014 WL 2593697, at *38 (ALJ, June 5, 2014) (quoting *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 337 n.1 (1992)), *aff'd*, 16 E.A.D. 594 (EAB 2015). For purposes of RCRA, the term "hazardous waste" is defined as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5)(B).

RCRA's implementation relies on federal-state partnerships, whereby the EPA Administrator prioritizes "assisting and cooperating with States in obtaining full authorization of State programs under subchapter III." *Id.* § 6902(a)(7). Within subchapter III, Section 3006 allows States to seek authorization to administer their own hazardous waste programs. *Id.* § 6926(b). The State programs must be equivalent to the Federal program to receive authorization; once authorization is received, States have the power to issue and enforce permits for the storage, treatment, and disposal of hazardous waste. *Id.* The program administered by the state of Utah is authorized under Section 3006(b) of RCRA. *See* 40 C.F.R. § 272.2251; Utah: Final Authorization of State Hazardous Waste Management Program Revisions, 73 Fed. Reg. 29,987 (May 23, 2008). Section 3008(a) of RCRA allows the Administrator to enforce the

federally-authorized state hazardous waste programs established pursuant to Section 3006 of the Act. 42 U.S.C. § 6928(a).

As to the specific standards the law institutes to protect human health and the environment, Section 3002(a) of RCRA requires the Administrator to promulgate regulations establishing standards applicable to generators of hazardous waste, including: recordkeeping; labeling; using appropriate containers; providing information about the chemical composition of the waste to persons or entities transporting, treating, storing, or disposing of the waste; using a manifest system for transporting hazardous waste; and submitting reports to the Administrator or state agency. 42 U.S.C. § 6922(a); *see also id.* § 6903(12). Additionally, Section 3005 of RCRA obligates the Administrator to promulgate regulations requiring persons who own or operate an existing facility (or who are planning to build a new facility) for the treatment, storage, or disposal of hazardous waste to have a permit issued by the EPA or an authorized state. *Id.* § 6925.

Certain provisions of those regulations (and Utah's corresponding regulations) are relevant to the allegations here. Pursuant to regulation, a person who generates a solid waste must determine whether that waste is a hazardous waste. Utah Admin. Code R315-5-1.11[3]; *see also* 40 C.F.R. § 262.11. A generator who transports, or offers for transportation, a hazardous waste for off-site treatment, storage, or disposal is required to prepare a manifest. Utah Admin. Code R315-5-2.20(a). An owner or operator of a hazardous waste facility that treats or stores hazardous waste must have prior approval from the State for a hazardous waste permit for that facility. Utah Admin. Code R315-3-1.1(a).[4] An EPA identification number is also required for each such facility. Utah Admin. Code R315-8-2.2.[5] During storage, containers of hazardous waste must be kept closed and not handled in such a way that may cause a rupture or leak. Utah Admin. Code R315-7-16.4.[6]

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[3] Utah Administrative Code Rule R315-5 ("Hazardous Waste Generator Requirements") was repealed in its entirety and replaced by Rule R315-262, as published on February 1, 2016, in accordance with an effort to reformat and renumber the hazardous waste rules. Utah Office of Administrative Rules, DAR File No. 40121, https://rules.utah.gov/publicat/bulletin/2016/20160201/40121.htm.

[4] Utah Administrative Code Rule R315-3 ("Application and Permit Procedures for Hazardous Waste Treatment, Storage, and Disposal Facilities") was repealed in its entirety and replaced by Rule R315-270, as published on February 1, 2016, in accordance with the effort to renumber and reformat the hazardous waste rules. Utah Office of Administrative Rules, DAR File No. 40119, https://rules.utah.gov/publicat/bulletin/2016/20160201/40119.htm.

[5] Utah Administrative Code Rule R315-8 ("Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities") was repealed in its entirety and replaced by Rule R315-264, as published on February 1, 2016, in accordance with the effort to renumber and reformat the hazardous waste rules. Utah Office of Administrative Rules, DAR File No. 40124, https://rules.utah.gov/publicat/bulletin/2016/20160201/40124.htm.

[6] Utah Administrative Code Rule R315-7 ("Interim Status Requirements for Hazardous Waste Treatment, Storage, and Disposal Facilities") was repealed in its entirety and replaced by Rule R315-265, as published on February 1, 2016, in accordance with the effort to renumber and reformat the hazardous waste rules. Utah Office of Administrative Rules, DAR File No. 40123, https://rules.utah.gov/publicat/bulletin/2016/20160201/40123.htm.

IV. UNDISPUTED FACTS

Pursuant to 40 C.F.R. § 22.20(b)(2), the following are facts that Respondent has admitted and therefore are not in dispute:

(1) On or around September 24, 2015, Respondent was hired to ship four types of paint and primer products for Pittsburgh Paint and Glass ("PPG") from Springdale, Pennsylvania, to Portland, Oregon. The shipment included 72 drums and two pails of paint and primer products. Thirty-two of those drums were filled with PPG's Universal Urethane Yellow Primer. Compl. ¶¶ 30−31; Answer ¶ 5; CX06 at 2; CX40.

(2) On September 27, 2015, Respondent was transporting the paint[7] cargo in one of its trailers. The trailer caught fire in rural Idaho. Some drums fell out of the trailer; paint was released onto the road and the roadside. Compl. ¶¶ 36−39; Answer ¶ 5; CX07.

(3) On September 27, 2015, Respondent hired B&W Wrecker Services ("B&W") to remove the burned trailer and 32 burned drums of paint from the site of the fire. Compl. ¶¶ 44–45; Answer ¶¶ 6–7; Field Decl. ¶¶ 8–10.

(4) On approximately October 1, 2015, Respondent hired Brett's Towing to transport the burned trailer and burned drums of paint to Respondent's Facility in Salt Lake City, Utah ("Facility"). The Facility is located at 3720 West 800 South, Salt Lake City, Utah 84104. Compl. ¶¶ 27, 45; Answer ¶¶ 5, 7.

(5) Between October 1, 2015, and August 2, 2016, the trailer and drums of paint from the fire remained at the Facility. Compl. ¶¶ 46, 70; Answer ¶¶ 8, 15.

(6) On approximately August 2, 2016, Special Agents from the EPA-Criminal Enforcement Division (CID) conducted an initial inspection of the Facility. At that time, the trailer and drums of paint were stored outside at the Facility and covered by tarps. Compl. ¶ 47−48; Answer ¶ 8.

(7) On August 3, 2016, EPA-CID sent a letter to Respondent requesting that Prime not move or manipulate the burned trailer or the burned drums of paint waste at the Facility. Compl. ¶ 52; Answer ¶ 10.

(8) On August 24, 2016, EPA's National Enforcement Investigation Center ("NEIC") inspected the Facility. NEIC investigators conducted X-ray fluorescence spectrometry tests on all 32 drums during the field inspection. The results demonstrated that the contents of 20 drums contained materials consistent with strontium chromate primer. Compl. ¶¶ 53–55; Answer ¶ 11–13; CX10.

[7] Hereinafter, reference to "paint" should be understood to include both the "paint" and "primer" products.

(9) Further tests were conducted on eight of the drums that contained material consistent with strontium chromate primer. The results revealed flashpoints between 43 and 45 degrees Celsius and chromium levels above 35.0 mg/L for all eight drums. Compl. ¶¶ 60−61; Answer ¶ 15; CX10.

(10) Around April 2020, Respondent received an EPA Facility Identification Number—UTP000001644—for the Facility. Compl. ¶ 71; Answer ¶ 15.

V. THE PARTIES' ARGUMENTS ON ACCELERATED DECISION

In the Motion, Complainant requests that this Tribunal find Respondent liable for the five allegations of violation set forth in the Complaint—

> without a hearing because there are no material facts in dispute relating to any of the elements of proof required to find liability on any of the Counts; Complainant has shown that each element of each violation is proven by a preponderance of the evidence; and because Respondent has admitted liability for all Counts.

Mem. at 2. Complainant also requests that this Tribunal determine an appropriate penalty amount for each of the counts in the Complaint for which a finding of violation is made because "all information probative, material or relevant to calculating a penalty for each count already is in front of the Presiding Officer"; Complainant's "calculation of [a] proposed penalty for each Count reflects consideration of all probative and relevant information"; Complainant properly applied the statutory factors and RCRA Penalty Policy to the facts while viewing the evidence in the light most favorable to Respondent; and any testimony that Respondent's witnesses would offer at the hearing has already been considered in Complainant's penalty calculation. Mem. at 3−4.

In its Response, Respondent admits liability, acknowledging that it made mistakes and violated the law in handling the hazardous waste. Resp. at 16. However, Respondent contests the amount of proposed penalty and argues that a lower, more reasonable, and fairer penalty should be paid. Resp. at 1−2. Respondent contends that genuine issues of material fact are present that affect the amount of penalty and therefore Complainant has not met its burden of proof for an accelerated decision as to penalty. Resp. at 1–2.

The parties' arguments concerning Liability and Penalty are discussed in depth in the following sections.

Liability

Respondent has stated its intention to not contest liability at the hearing and has admitted its liability for the five alleged violations. Resp. at Cover Page, 1, 16; Resp't PHX at 5. Because of Respondent's admissions, and its assertion that it will not provide evidence to dispute the elements of liability, the Tribunal will make short shrift of the discussion of Respondent's

liability for the alleged violations in Counts 1 through 5. However, these admissions concern determinations of law, and this Tribunal has held previously that admissions to legal conclusions are not binding. *See Service Oil, Inc.*, EPA Docket No. CWA-08-2005-0010, 2006 WL 3406345, at *6 (ALJ, Mar. 7, 2006) (Order on Complainant's Motion for Accelerated Decision on Liability and Penalties). Accordingly, to grant accelerated decision, the Tribunal must be satisfied that no genuine issue of material fact exists and that a preponderance of the evidence evinces that Complainant is entitled to judgment as a matter of law. The Tribunal will evaluate each Count in turn.

Count 1: Failure to Make a Hazardous Waste Determination

Count 1 of the Complaint alleges that Respondent failed to make a hazardous waste determination for the 32 burned drums of paint solid waste in violation of 40 C.F.R. § 262.11, which is incorporated by reference at Utah Administrative Code R315-5-1.11. Compl. ¶¶ 72−75. Subpart 262.11 states that "[a] person who generates a solid waste . . . must make an accurate determination as to whether that waste is a hazardous waste in order to ensure wastes are properly managed according to applicable RCRA regulations." 40 C.F.R. § 262.11. In order to grant accelerated decision, the Tribunal must be convinced of the following: that (1) Respondent is a "person" (2) who generated a "solid waste" and (3) failed to determine whether that solid waste was hazardous.

Complainant must first demonstrate that Respondent is a "person" under the statute. For purposes of RCRA, a "person" may be a corporation. 42 U.S.C. § 6903(15). In its Answer, Respondent "admits it is a corporation licensed to do business and doing business in Utah[.]" Answer ¶ 4. The Tribunal is taking notice that "New Prime, Inc." is a "Domestic Corp" that registered with the Nebraska Secretary of State at a Springfield, Missouri, address, and that "New Prime, Inc" is a foreign corporation currently registered in Utah at the Salt Lake City address referenced in the Complaint and elsewhere. *See* Mem. at 24; Compl. ¶¶ 28, 65, and caption; RX16; RX17; CX10.[8] Accordingly, it is established that Respondent is a "person" subject to the requirements of the RCRA program.

Next, it must be demonstrated that Respondent generated solid waste. Complainant argues that the 32 drums of paint became "solid waste" after being burned in the trailer fire. Compl. ¶ 40. To support its contention, Complainant cites an email where one of Respondent's employees states "The trailer was fully engulfed by flames. It is a complete loss." Mem. at 54; CX42 at 5. Complainant also cites a loss claim submitted to Respondent by the original shipper, PPG. CX15. (The claim was paid by Respondent. CX08.)

Under RCRA regulations, "solid waste" includes any "discarded material"; as defined in the rule, materials that are abandoned by being disposed of, incinerated, and stored pending disposal are discarded materials that qualify as solid waste (with exceptions, none of which is

[8] *See* Official Nebraska Government Website, Secretary of State, Corporate & Business Search (searching for "New Prime"), *available at* https://www.nebraska.gov/sos/corp/corpsearch.cgi (last visited Mar. 31, 2022); State of Utah, Division of Corporations and Commercial Code, Business Search (searching for "New Prime"), *available at* https://secure.utah.gov/bes/ (last visited Mar. 31, 2022).

relevant here). 40 C.F.R. § 261.2(a), (b); *see also* Utah Admin. Code R315-2-2(a), (b).[9] More persuasive than the evidence Complainant cites that the drums and their contents were solid waste is the treatment of the drums while at the Facility. The paint contents of the burned drums were not salvaged for re-use, but were stored pending the investigation of the cause of the fire. Resp. at 6 (citing Field Decl. ¶ 10). The drums sat at the Facility, seemingly undisturbed, for months. CX10; Field Decl. ¶ 11; Resp't PHX at 6. There is evidence that the Shop Manager of the Facility made a preliminary inquiry about disposing of the drums before the EPA-CID visit. Resp't PHX at 3. After the EPA investigation, the drums and their contents were promptly disposed of. RX16. From Respondent's treatment of the drums, it seems clear that they were being stored until arrangements for their disposal were made (whenever Respondent finally did so). The drums and their contents were solid waste.

Relatedly, I must be satisfied that Respondent generated this solid waste, and the facts demonstrate this to be so. The paint was being transported in Respondent's trailer. The paint went from a useful product to solid waste due to the fire; Respondent was in possession of, and responsible for, the paint when the fire occurred. *See* Undisputed Facts Section, above. Respondent was the generator of this solid waste.

Finally, it must be demonstrated that there was no hazardous waste determination by Respondent. RCRA's implementing regulations require the generator of a solid waste to determine whether it is a hazardous waste. 40 C.F.R. § 262.11. Rule 262.11 lays out the steps to be taken when making a hazardous waste determination. *Id.* § 262.11(a)–(g). There is no evidence that Respondent engaged in this process at all, including assessing the characteristics of, or testing, the solid waste; maintaining the records underlying the determination; or identifying hazardous waste codes for the waste. *Id.* § 262.11(d), (f), (g). This lack of evidence, combined with Respondent's admissions, supports Complainant's allegation that no hazardous waste determination was made until after EPA-CID visited the Facility. Compl. ¶ 74; Answer ¶ 18.

In accordance with the foregoing discussion, I find that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law with respect to Respondent's liability for violating Utah Administrative Code R315-5-1.11. Accelerated decision regarding liability for Count 1 is **GRANTED**.

Count 2: Failure to Prepare a Manifest

In Count 2, Complainant alleges that Respondent did not prepare a manifest for Brett's Towing's transportation of the 32 burned drums of hazardous waste in the trailer from B&W's Lot in Boise, Idaho, to Respondent's Facility in Utah, thereby violating Utah Administrative Code R315-5-2.20(a). Compl. ¶¶ 76−80. Utah Administrative Code R315-5-2.20(a) states that

[9] Utah Administrative Code Rule R315-2 ("General Requirements – Identification and Listing of Hazardous Waste") was repealed in its entirety and replaced by Rule R315-261 and part of Rule R315-260, as published on February 1, 2016, in accordance with the effort to renumber and reformat the hazardous waste rules. Utah Office of Administrative Rules, DAR File No. 40118, https://rules.utah.gov/publicat/bulletin/2016/20160201/40118.htm.

"[a] generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage or disposal shall prepare a Manifest . . . ." The requisite "manifest" is "the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage." 42 U.S.C. § 6903(12); *see also* 40 C.F.R. § 260.10; Utah Admin. Code R315-1-1(b).[10] This alleged violation is comprised of the following elements, which must be established for accelerated decision to be rendered: that (1) the burned drums of paint waste were hazardous waste; (2) Respondent was the "generator" of the hazardous waste; (3) Respondent transported, or offered for transportation, the burned drums of paint for off-site treatment, storage, or disposal; and (4) Respondent did not prepare a hazardous waste manifest.

Complainant argues that "at least 20 of the 32 burned drums of paint waste are 'hazardous waste' that exhibit[] the ignitability . . . and toxicity characteristics of hazardous waste for chromium[.]" Mem. at 55; *see also* Compl. ¶¶ 54–55, 60−62. RCRA's implementing regulations and the Utah Administrative Code provide that a solid waste is a hazardous waste if it exhibits one of four characteristics, two of which are ignitability and toxicity. *See* 40 C.F.R. §§ 261.20, 261.21, 261.24; Utah Admin. Code R315-2-3, R315-2-9(d), R315-2-9(g). Samples from eight burned drums acquired during the NEIC inspection demonstrated flash points between 43 and 45 degrees Celsius, which meets the Utah regulatory threshold for ignitability of less than 60 degrees Celsius. CX10 at 37, 39–40; *see also* Utah Admin. Code R315-2-9(d); 40 C.F.R. § 261.21. Those eight samples also demonstrated levels of chromium between 36.8 and 352 mg/L, exceeding the regulatory level of 5 mg/L. CX10 at 37, 39–40; *see also* Utah Admin. Code R315-2-9(g); 40 C.F.R. § 261.24.

Complainant has established that eight of the 32 drums contained hazardous waste. *See* CX10. As to the other 12 that comprise the alleged 20 hazardous waste drums, however, Complainant seems to be making assumptions about them based on preliminary field test results. During the NEIC investigation, all drums were sampled for on-site X-ray fluorescence spectrometry (XRF); this procedure revealed that 20 of the drums "contained material consistent with a strontium chromate primer" with high, but "semi-quantitative," levels of chromium. CX10 at 37, 38, 42 & n.1. However, the Utah Administrative Code specifies the procedure for determining toxicity: Toxicity Characteristic Leaching Procedure (TCLP). Utah Admin. Code R315-2-9(g)(1); *see also* 40 C.F.R. § 261.24. The Utah Administrative Code also enumerates the acceptable tests for assessing ignitability, including utilization of a Setaflash Closed Cup Tester and the ASTM Standard D-3278-78 methodology. Utah Admin. Code R315-2-9(d)(1)(i). These processes were performed on samples from only eight drums, revealing that the contents of *those* eight drums met the ignitability threshold and contained chromium in excess of the level specified by regulation. CX10 at 37, 39–41.

No conclusions can be drawn about the ignitability or toxicity of the contents of the 12 drums which were not tested using TCLP or the Setaflash Closed Cup Tester. Those 12 drums

[10] Utah Administrative Code Rule R315-1 ("Utah Hazardous Waste Definitions and References") was repealed in its entirety and replaced by Rules R315-260-10, R315-260-11, R315-261-1(c), R315-270-2, and R315-270-6, as published on February 1, 2016, in accordance with the effort to renumber and reformat the hazardous waste rules. Utah Office of Administrative Rules, DAR File No. 40117, https://rules.utah.gov/publicat/bulletin/2016/20160201/40117.htm.

likely held strontium chromate primer but deductions about the ignitability and toxicity of their contents are unsupported by definitive test results. Complainant does not expound on any mathematical relationship between the "semi-quantitative" XRF results and the TCLP results. Nor does Complainant explain how the TCLP results for eight drums would allow this Tribunal to infer that the 12 untested drums also contained "hazardous waste." *See* Compl. ¶¶ 54–55, 59–62; CX10 at 39–40, 42. Similarly, Complainant's submissions are lacking a clarification of how the ignitability determination for eight of the drums applies to the remaining, untested 12.

At the accelerated decision stage, the evidence must be viewed in the light most favorable to the non-movant. Even though Respondent admits that at least 20 of the drums contained hazardous waste (Compl. ¶ 62; Answer ¶ 15), I must find that this allegation as it concerns the 12 untested drums is not supported by a preponderance of the evidence. Nevertheless, as the NEIC data for some drums satisfy the criteria for two of the characteristics of hazardous waste, I do find that eight of the 32 drums contained hazardous waste. This element is therefore established: hazardous waste was extant.[11]

It is also easily concluded that Respondent was the generator of this hazardous waste, as alleged by Complainant. Compl. ¶ 43. Under the regulations, a "generator" is "any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10; Utah Admin. Code R315-1-1(b); *see also* 42 U.S.C. § 6903(6). As established in Count 1, Respondent was the generator of solid waste: Respondent was in possession of, and responsible for, the paint drums when the fire occurred on its trailer. Since some of the waste was hazardous, and Respondent's "act or process" produced this hazardous waste, Respondent was the generator of hazardous waste.

Next, it must be demonstrated that the hazardous waste was transported or offered for transportation for off-site storage by Respondent. Under the regulations, "transportation" is "the movement of hazardous waste by air, rail, highway, or water." 40 C.F.R. § 260.10; Utah Admin. Code R315-1-1(b). Complainant alleges that Respondent shipped the hazardous waste from B&W's lot in Idaho to Respondent's Facility in Utah. Mem. at 55. Respondent admits to hiring Brett's Towing to transport the trailer and burned drums from Idaho to Utah. Compl. ¶ 45; Answer ¶ 7. As further support, Complainant cites an EPA-CID Investigative Activity Report of an agent's interview with the owner and the office manager of Brett's Towing. *See* CX29. In that exhibit, the agent relates that the office manager "was called by someone from Prime's 'break down' department to transport a burnt trailer in Idaho to Prime's facility in Salt Lake City, UT." CX29 at 1. Respondent's Safety Director confirms this series of events, in essence: "I am aware that after the initial clean-up, a Prime employee from our roadside assist department worked with B&W and arranged for the transportation of the burned trailer and remaining cargo load to Prime's yard in Salt Lake City." Field Decl. ¶ 10; *see also* Resp't PHX at 6 ("Respondent arranged to have the damaged trailer and its remaining contents including the intact barrels of paint moved to its Salt Lake City (SLC), Utah facility in October 2015.").

As defined by the regulations, "storage" is "the holding of hazardous waste for a

[11] If the parties wish to litigate the precise amount of hazardous waste at the penalty hearing, they may do so, as amount of hazardous waste is a factor in the penalty calculation. EPA, RCRA Civil Penalty Policy (2003), at 14.

temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." 40 C.F.R. § 260.10; Utah Admin. Code R315-1-1(b). It is undisputed that the burned trailer and the burned drums of paint were *stored* at the Facility—they were held there until they were disposed of. Field Decl. ¶ 5 (referencing when "the burned trailer and its remaining cargo was stored at Prime's trucking yard in Salt Lake City, Utah"), ¶ 11 ("I am informed and believe the trailer and paint barrels were stored in an area of the yard where few if any employees passed."), ¶ 12 (referring to the burned drums as "the cargo stored in Utah"); CX10 (photos showing the burned drums and trailer at the Facility on August 2, 2016); RX16 (documents relating to disposal of the drums). The initial intent of the storage seems to have been to investigate the fire's origin: Respondent's Safety Director states that the trailer had a legal hold placed on it so it could be inspected to determine the cause of the fire. Field Decl. ¶ 10. (It is unclear whether that investigation was resolved before the EPA-CID visit.) Thus, the evidence establishes that Respondent offered hazardous waste for transportation to the Facility for the purpose of storage.

Finally, Complainant must establish that Respondent failed to prepare a hazardous waste manifest. There is no evidence that a hazardous waste manifest for the burned drums of paint was created for their transportation from Idaho to Utah on October 1, 2015; the only manifests submitted as evidence concern the ultimate disposal of the trailer and drums in 2016. RX16; RX17. Moreover, Respondent admits that it "did not prepare a manifest for transportation of the 32 burned drums of hazardous waste to the Facility." Compl. ¶ 79; Answer ¶ 21. It is therefore established that no hazardous waste manifest was prepared for the transport of the hazardous waste to the Facility.

In accordance with the foregoing discussion, I find that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law with respect to Respondent's liability for violating Utah Administrative Code R315-5-2.20(a). Accordingly, accelerated decision with respect to liability for Count 2 is **GRANTED**.

Count 3: Storage Without a Permit

Utah Administrative Code R315-3-1.1(a) states that "[n]o person shall own, construct, modify, or operate any facility for the purpose of treating, storing, or disposing of hazardous waste without first submitting, and receiving the approval of the Executive Secretary for, a hazardous waste permit for that facility." In Count 3, Complainant alleges that Respondent violated this provision of the Utah Administrative Code when it stored at least 20 burned drums of hazardous waste at its Utah Facility for 10 months without obtaining a RCRA permit. Compl. ¶¶ 81−85. To prevail, Complainant must establish that: (1) the Utah Facility is a RCRA "facility" where Respondent treated, stored, or disposed of hazardous waste; (2) Respondent owned, constructed, modified, or operated the Facility; and (3) Respondent did not submit and receive approval for a hazardous waste permit for the Facility beforehand.

For the purposes of RCRA, a "facility" is defined as "[a]ll contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation." 40 C.F.R. § 260.10; Utah Admin. Code R315-1-1(b). The trapezoidal lot at 3720

West 800 South in Respondent's satellite photo exhibits, which includes the buildings, the paved sections, and the less developed sections, falls under the "facility" definition of RCRA. *See* RX14; RX15. As discussed above, the record demonstrates that the Utah Facility was used for storing hazardous waste—specifically eight drums of hazardous paint waste that were kept at the Facility from October 2015 to August 2016. Therefore, the Facility qualifies as a "facility" under RCRA, the purpose of which was, in part, to store hazardous waste. This element is deemed established.

As defined in the applicable regulations, an "owner" is "the person who owns a facility or part of a facility" and an "operator" is "the person responsible for the overall operation of a facility." 40 C.F.R. § 260.10; Utah Admin. Code R315-1-1(b). The Tribunal takes notice of the Salt Lake County Assessor's property record showing that the owner of "3720 W 800 S" is "New Prime, Inc."[12] Likewise, there is evidence that Respondent operates the Facility. For example, in August 2016, Respondent's attorney gave consent to search the Facility and Respondent's Operations Manager for the Facility was present during the search and received the receipt for the samples removed from the drums. CX30. Moreover, Respondent does not dispute that it is the owner and operator of the Facility. Compl. ¶ 27; Answer ¶ 5. As such, it is established that Respondent owned and operated the Facility.

Lastly, Complainant alleges that "[a]t no time has the EPA or the State of Utah issued a RCRA permit to Respondent to own and operate the Facility as a hazardous waste treatment, storage, or disposal facility." Compl. ¶ 84. There is no evidence that Respondent received a hazardous waste permit for the Facility before the burned drums of paint waste arrived on October 1, 2015. There is no evidence that Respondent applied for a permit at any time before August 2, 2016, by submitting to the Executive Secretary the information required by Utah Administrative Code R315-3-2, as applicable. Furthermore, Respondent admits that it did not receive a RCRA permit that would have allowed for the storage of hazardous waste at the Facility. Compl. ¶ 84; Answer ¶ 24. As such, Respondent's lack of a RCRA permit authorizing the storage of hazardous waste at the Facility has been established.

Consequently, I find there is no genuine issue of material fact with respect to Respondent's liability for violating Utah Administrative Code R315-3-1.1(a). Complainant is entitled to accelerated decision for Count 3; the Motion is **GRANTED** on the issue of Respondent's liability.

Count 4: Failure to Properly Manage Containers

Utah Administrative Code R315-7-16.4[13] mandates the following:

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[12] *See* Salt Lake County, Assessor, Parcel Search, *available at* https://slco.org/assessor/new/valuationInfoExpanded.cfm?parcel_id=15081010050000&nbhd=6860&PA= (last visited Mar. 31, 2022).

[13] Although Utah Administrative Code R315-7 is titled "Interim Status Requirements for Hazardous Waste Treatment, Storage, and Disposal Facilities," the regulations of this part extend to Respondent via Rule R315-7-16.1, which states that "[t]he rules in this section apply to the owners or operators of *all* hazardous waste management facilities that store containers of hazardous waste, except as provided

> (a) A container holding hazardous waste shall always be closed during storage, except when it is necessary to add or remove waste.
>
> (b) A container holding hazardous waste shall not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

Complainant alleges in Count 4 that Respondent failed to properly manage containers holding hazardous waste by storing burned drums of hazardous waste that were open and missing covers (bung caps). Compl. ¶¶ 86−90. The following must be established to warrant accelerated decision: (1) Respondent stored containers holding hazardous waste; and (2) those containers were not closed during storage; or (3) those containers were stored in a manner which may rupture the container or cause it to leak.

As established under Count 2, eight of the burned drums contained hazardous waste, and Respondent stored those burned drums of hazardous waste at its Facility. Further discussion of this element is not necessary.

Demonstrative of the improper management of the drums, Complainant alleges that several of the drums of hazardous waste stored at the Facility were open to the environment. Mem. at 57. The Complaint specifically alleges that "[d]uring the EPA-CID Inspection, the tarps covering the 32 burned drums were removed and *several* burned drums of paint waste on the trailer were stained with paint, and missing covers known as bung caps." Compl. ¶ 49 (emphasis added); *see also* Compl. ¶ 88 ("During the EPA-CID Inspection, several burned drums on the trailer were open and missing covers known as bung caps.").

First, Complainant's observation that some drums were stained with paint, without more, does not seem germane to the allegations at hand. That some of the drums were covered in dried paint does not demonstrate that the drums were not closed: It cannot be ascertained from the photographic exhibits (*see* CX10) whether a drum had a paint stain on its exterior because it leaked its contents onto itself while at the Facility or whether there was another source of the paint stain (for example, the paint could have originated from one of the drums that fell out of the trailer during the fire, *see* CX07, CX17, and CX18).

Next, Complainant alleges only that "several"—and not all—of the drums were missing bung caps. The Complaint declares that 20 of the 32 drums contained hazardous waste, Compl. ¶ 62, but, as highlighted above, the Tribunal can only conclude that eight of the drums contained hazardous waste based on the evidentiary submissions of the parties. Furthermore, it is unclear from the exhibits (*e.g.*, CX10) which specific drums—the eight drums confirmed as containing hazardous waste, the 12 drums whose contents were consistent with strontium chromate primer but otherwise untested for ignitability/toxicity, or the 12 other drums whose contents were inconsistent with strontium chromate primer—were open and missing their bung caps. The 24 drums that were not verified as holding hazardous waste could have *entirely* comprised the "several" drums which were missing bung covers and "open." With the evidence currently at

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otherwise in R315-7-8.1." Utah Admin. Code R315-7-16.1 (emphasis added). None of the exceptions in Rule R315-7-8.1 applies to Respondent.

hand, it is not possible to conclude that any of the eight hazardous waste drums did not have its bung cap securely in place.

Even though Respondent has stated it does not intend to contest liability, I must thoroughly examine the arguments in the Motion. Based on the evidence, I cannot find that this element has been established: The allegation that the drums of hazardous waste were not closed during storage is not supported by a preponderance of the evidence. *See* Utah Admin. Code R315-7-16.4(a).

The analysis does not end there, however. A violation of Utah Administrative Code R315-7-16.4 is yet established if the second condition is met: that the hazardous waste containers were stored in a manner which may rupture them or cause them to leak. The evidence demonstrates that was the case here. The photographs included in the Exhibits illustrate that all the drums (and therefore the drums of hazardous waste) were stored not in a permanent structure, but in the partially-destroyed trailer. CX10. The top portion of the trailer is missing and what remains of its walls terminate in jagged pieces of metal. CX10 at 28, 29, 31. The photographs also indicate that none of the drums was stored on a flat surface: All of the drums were leaning to some extent while standing on the trailer. CX10 at 30–32. Most noticeably, some were kept in a partially-elevated corner of the trailer, which caused them to tilt sharply. CX10 at 30, 32.

This manner of storage may have caused a rupture of a drum or may have caused a drum to leak. These drums were stored outside, where they could be subjected to strong winds or precipitation, with only a tarp to protect them. These drums were stored tilting on an uneven surface, and if one had tumbled into others, there could have been a cascade of falling drums. When the drums landed on each other, or on any of the other hard surfaces apparent in the photographic exhibits, *see* CX10, they could have ruptured or leaked. As a consequence, any of the eight drums that contained hazardous waste could have released its contents into the environment. Based on the above, I conclude that this element is established by a preponderance of the evidence.

Even though the standard for accelerated decision is not met for Utah Administrative Code R315-7-16.4(a), no reasonable factfinder could hold that the manner in which Respondent stored the drums did not violate the proscription of Utah Administrative Code R315-7-16.4(b). Thus, considering Utah Administrative Code R315-7-16.4, I find no genuine issue of material fact with respect to Respondent's liability concerning Count 4. Accelerated decision is warranted; the Motion as it relates to liability is **GRANTED**.

Count 5: Failure to Obtain an EPA Identification Number

In Count 5, Complainant alleges that Respondent stored hazardous waste at the Facility prior to obtaining an EPA identification number. Compl. ¶¶ 91−94. Utah RCRA regulations require that "[e]very facility owner or operator shall obtain an EPA identification number by applying to the Executive Secretary using [a specific form]." Utah Admin. Code R315-8-2.2. It has already been established that Respondent is the owner and operator of the Facility, *see* discussion of Count 3 above, so I need only evaluate whether Respondent obtained an EPA identification number for the Facility.

There is no evidence that Respondent obtained an EPA identification number before the drums of hazardous waste arrived at the Facility on October 1, 2015, or after they arrived for storage (and before August 2, 2016). Indeed, it seems that the Facility identification number was assigned only in April 2020. Compl. ¶ 71; Answer ¶ 15.[14] Respondent does not counter the contention that it did not have an EPA identification number when the drums of hazardous waste were stored at the Facility. Compl. ¶ 94; Answer ¶ 31. In light of these circumstances, this element is deemed established.[15]

Correspondingly, I find that no genuine issue of material fact exists with respect to Respondent's liability stemming from its violation of Utah Administrative Code R315-8-2.2, as alleged in Count 5. Accelerated decision is **GRANTED**.

Penalty

EPA's Penalty Policy

Having determined liability, I now consider Complainant's arguments in favor of accelerated decision as to the appropriate relief. RCRA authorizes the Administrator of EPA to, upon finding a violation of the statute, issue an order assessing a civil administrative penalty up to a statutory maximum.[16] 42 U.S.C. § 6928(a); 40 C.F.R. § 19.4. In determining the appropriate penalty, RCRA requires the EPA Administrator to consider "the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). To guide the calculation of penalty amounts in RCRA administrative actions, EPA has developed the RCRA Civil Penalty Policy ("Penalty Policy"), which was most recently updated in 2003. The Penalty Policy specifies the following methodology: (1) determine a gravity-based penalty

[14] *See* EPA, RCRAInfo Web, Hazardous Waste Sites Search by Site, https://rcrapublic.epa.gov/rcrainfoweb/action/modules/hd/handlerindex (search for Site ID "UTP000001644" in "Utah") (last visited Mar. 31, 2022).

[15] Complainant's argument notes that an EPA identification number was not obtained for the Facility *prior* to the storage of hazardous waste there. Compl. ¶ 94. By its plain terms, the Tribunal does not see a requirement for the acquisition of this number prior to commencement of regulated activities. Utah Admin. Code R315-8-2.2. That is neither here nor there, because the specific timing is not material to the present analysis of Respondent's liability. Respondent stored hazardous waste at the Facility. By doing so, an obligation was created to submit a specific form to the proper authority to notify that authority of regulated activities. Respondent failed to do so at any time. Therefore, liability is established.

[16] The statutory maximum is $37,500 for each day of each violation occurring between December 6, 2013, and November 2, 2015, and $102,638 for violations occurring after November 2, 2015, when penalties are assessed after December 23, 2020, but before January 12, 2022. 42 U.S.C. § 6928(a); 40 C.F.R. § 19.4. The Complaint stated that the statutory maximum was $101,439, which reflects the statutory maximum determined by EPA's inflation adjustment for 2020. Mem. at 17 n.17 (citing Civil Monetary Penalty Inflation Adjustment, 85 Fed. Reg. 1751, 1752 (Jan. 13, 2020)). Complainant explains that it included this amount in the original Exhibit CX04 for consistency purposes, and that this differential likely will not have a material effect on the penalties assessed for Counts 3, 4, and 5. Mem. at 17 n.17.

for the violation from the penalty assessment matrix; (2) add a "multi-day" component to violations that span multiple days; (3) adjust the gravity-based and multi-day components up or down based on case-specific factors; (4) add the economic benefit gained from non-compliance. Penalty Policy at 1.

According to the Penalty Policy, the gravity-based determination of the penalty includes consideration of (1) the potential for harm to human health and the environment and to the RCRA regulatory program, and (2) the extent of deviation from RCRA and its regulatory requirements. Penalty Policy at 12, 17. The potential for harm is broken down into (a) the risk of human or environmental exposure to hazardous waste and (b) the adverse effect noncompliance may have on the regulatory purposes of RCRA. Penalty Policy at 12–13. The risk of exposure factor is further broken down into (i) the likelihood (probability) of exposure and (ii) the potential seriousness (degree) of contamination. Penalty Policy at 14–15.

The gravity of the violation is evaluated in line with the above factors; accordingly, the potential for harm and the extent of deviation are each classified as "major," "moderate," or "minor." Penalty Policy at 12–19. A penalty matrix set out in the Penalty Policy assigns appropriate monetary ranges for each combination of categories, e.g., "major-major," "major-minor," etc. Penalty Policy at 19.

Regarding the multi-day component of the calculation, multi-day penalties are required for days 2−180 of violations that have gravity-based designations of major-major or major-moderate. Penalty Policy at 25.[17] For day 181 and beyond, multi-day penalties are discretionary. Penalty Policy at 25. The Penalty Policy provides a multi-day matrix for determining the dollar amount of the multi-day component. Penalty Policy at 26.

After summing the gravity-based and multi-day components of the penalty, the penalty may be adjusted upward or downward based on various "adjustment factors," such as "any good faith efforts to comply with the applicable requirements[,] . . . the degree of willfulness and/or negligence, history of noncompliance, ability to pay, and . . . environmental projects undertaken by the respondent." Penalty Policy at 33–34. The adjustment factors may increase, decrease, or not affect the penalty amount, but the penalty cannot exceed the statutory maximum. Penalty Policy at 34.

Under the Penalty Policy, EPA is required to reclaim "any significant economic benefit of noncompliance . . . that accrues to a violator from noncompliance with the law." Penalty Policy at 28. As such, EPA enforcement personnel must calculate economic benefit when calculating a proposed penalty and add any "significant" economic benefit to the penalty. Penalty Policy at 28. Violators can obtain an economic benefit when they delay or avoid compliance costs, or when noncompliance gives them a competitive advantage. Penalty Policy at 28. To simplify enforcement actions, the Penalty Policy establishes threshold levels for incorporating significant economic benefit into the penalty calculation. Penalty Policy at 28.

[17] Note that the page numbering in the Penalty Policy is incorrect: The page following 29 is 24. Thus, there are two pages labeled 25, and this reference refers to the second page 25. The subsequent page numbers cited in this section refer to the pages after this point in the document.

Importantly, penalty policies are "guidance" and should not be followed as strict rules. *Andrew B. Chase*, 16 E.A.D. 469, 487–88 (EAB 2014). Accordingly, Administrative Law Judges are not required to rigidly follow a penalty policy if they support their decisions with sufficient reasoning. *Id.*; *see also A.Y. McDonald Indus., Inc.*, RCRA Appeal No. 86-2, 2 E.A.D. 402, 1987 WL 109674, at *7 (EAB, July 23, 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."). The Consolidated Rules require this Tribunal to determine the appropriate amount of a penalty based on the evidence in the record, the penalty criteria in the applicable statute, and any civil penalty guidelines issued under the applicable statute. 40 C.F.R. § 22.27(b).

The parties' arguments concerning the calculation of penalty are set forth as follows:

Complainant's Memorandum

Complainant asserts that "all information probative, material or relevant to calculating a penalty for each count already is in front of the Presiding Officer." Mem. at 3. Complainant states that it has considered all probative and relevant information, including information in Respondent's Prehearing Exchange, and applied RCRA's statutory factors appropriately (via proper use of the Penalty Policy). Mem. at 3, 67–68. Complainant contends that the information has been viewed in a light most favorable to Respondent and that any information that Respondent's witnesses could have offered at a hearing was already considered by Complainant when it calculated the penalty (or was not relevant to the penalty). Mem. at 3–4, 67–68. Complainant declares that no argument raised by Respondent warrants a modification to the proposed penalty and reiterates that its calculation as described in Exhibit CX04 (and, therefore, the corrected version, Exhibit "CX04Cor"[18]) has already accounted for the facts Respondent asserts are relevant. Mem. at 67–68. Complainant therefore requests that the Tribunal grant accelerated decision and assess its proposed penalty of $631,402 for the five violations.[19] Mem. at 4, 102–03.

Complainant goes on to counter the arguments Respondent makes in its Answer and Prehearing Exchange submissions. Complainant explains how it considered the facts regarding the disposal of the materials generated during the first clean-up immediately after the fire; the events on the night of the fire and clean-ups of the fire site; and "Respondent's corporate culture, cooperation with the criminal investigation, efforts to comply, lessons learned, and education and process improvements." Mem. at 68. First, Complainant maintains that it did not account for the disposal of materials generated during the first clean-up in its calculation of the proposed penalties for any of the violations. Mem. at 68; *see also* Jacobson Decl. ¶¶ 6−9. Regarding the

[18] Complainant submitted a Motion to Correct Complainant's Prehearing Exchange on February 24, 2021, seeking to file a corrected version of Exhibit CX04 (with revised penalty amounts). On March 31, 2021, the Tribunal issued the Order on Motion to Correct Prehearing Exchange, allowing both Exhibits, CX04 and CX04Cor, to be included in Complainant's Prehearing Exchange. The Tribunal will utilize the updated version, Exhibit CX04Cor, when discussing its analysis of the penalty calculation.

[19] The proposed penalties for each count are as follows: Count 1 − $37,500; Count 2 − $36,207; Count 3 − $470,329; Count 4 − $43,683; Count 5 − $43,683. Mem. at 102−03.

events on the night of the fire and clean-ups at the site, Complainant deems only the following evidence relevant: the bill of lading, the safety data sheets ("SDSs") for the paint products in the trailer, and the communications between Respondent and the Idaho Department of Environmental Quality ("IDEQ") about the second clean-up.[20] Mem. at 68−69. Complainant proffers that "it is possible that during the response to the emergency the situation could have been changing rapidly, and communications could have been confusing" but then argues that the bill of lading, SDSs, and later IDEQ communications should have caused Respondent to reconsider the conclusions drawn from the initial communications. Mem. at 69.

Complainant also states that its penalty calculations considered Respondent's history of compliance, corporate culture, efforts to comply, cooperation during the criminal investigation, and implementation of an education program and process improvements following the investigation. Mem. at 70. Complainant contends the Penalty Policy is designed for first-time offenses, so no subtraction was made for Respondent's history of compliance. Mem. at 70–71. After noting that RCRA is a strict liability statute, Complainant explains that it did not adjust the proposed penalty because of Respondent's corporate culture, its new educational programs and processes, or its subsequent compliance. Mem. at 71−73. However, Complainant contends that it factored in Respondent's cooperation during the EPA investigation into all counts by selecting the midpoint instead of the high point of the cell range in the penalty assessment matrix, as allowed by the Penalty Policy. Mem. at 72. Complainant states that a respondent's "efforts to comply after being notified of the violations are already accounted for in the gravity-based calculation[,]" and therefore it does not need to apply "downward adjustments already taken into account by the penalty matrix." Mem. at 73 (quoting *Titan Wheel Corp. of Iowa*, 10 E.A.D. 526, 551 (EAB 2002)).

Complainant then described the penalty calculation for each count. Mem. at 73–98. Briefly, for Counts 1, 2, 4, and 5, Complainant classified both the potential for harm and the extent of deviation as major and viewed the violations as independent and non-continuous (a characterization that precluded the addition of a multi-day component). CX04Cor at 5, 7–8, 11–12, 17, 18–19. For Count 3, though, Complainant characterized the potential for harm as moderate and the extent of deviation as major, and classified the violation as multi-day.

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[20] References to "communications with IDEQ" and "the second clean-up" concern events outlined in Exhibit CX07. According to this Exhibit, IDEQ inspected the fire site in October 2015. The Exhibit documents that paint was observed at the scene. The Exhibit goes on:

> [I]DEQ staff informed Prime that paint remained at the Site, observed during the October 16, 2015 visit, and this waste needed to be handled appropriately by a contractor knowledgeable of environmental regulations and capable of performing a hazardous waste determination resulting in appropriate disposal. Prime ensured [I]DEQ that an environmental contractor would be hired to handle the remaining waste at the Site.

CX07 at 4. The Exhibit also documents that a sample of the waste remaining at the site was characterized as hazardous due to its chromium levels, and that a second clean-up and disposal was performed at the site of the fire. CX07 at 5.

That a second clean-up occurred does not appear to be disputed by Respondent. Field Decl. ¶ 12. But, Respondent disputes the weight Complainant assigns to these communications about the second clean-up in calculating a proposed penalty, as noted in the text. Resp. at 7.

CX04Cor at 5, 14. Complainant calculated an economic benefit of $10,800 for Count 1, which included "avoided costs" from not making a hazardous waste determination. CX04Cor at 9; Mem. at 77−79. For each violation, Complainant adjusted the penalty upward by 10% for willfulness and negligence. CX04Cor at 5, 8–9, 12, 14, 17, 19.

Finally, Complainant concludes that there is no need for a hearing because it is reasonable to suppose that additional relevant evidence would not be obtained from a hearing. Mem. at 98. Complainant proclaims that it has already accounted for Respondent's positions in the light most favorable to Respondent and that the Tribunal is able to independently assess the proposed penalty on its own. Mem. at 99. Therefore, Complainant argues it sufficiently demonstrated that a hearing is unnecessary. Mem. at 98–99.

Respondent's Response

In its Response, Respondent emphasizes that the facts of this case are complicated and contested, and that a hearing would give the Tribunal an opportunity to consider witness testimony, the exhibits, and the parties' post-hearing arguments. Resp. at 1–2. Respondent asks that the Motion be denied because:

> The evidence cited in this Response, which Respondent will further develop at hearing, shows that a far smaller penalty will serve the goals of justice in this case, and that Complainant has failed to meet its heavy burden of proving the absence of genuine issues of material fact as to its proposed penalty.

Resp. at 2. Respondent argues that "significant evidence exists to support Respondent's defense that the seriousness of the violations should be mitigated by various factors and considerations." Resp. at 3.

Respondent first asserts that the confusing communications at the scene of the fire "help explain why Respondent, attempting to coordinate matters from its headquarters in Springfield, Missouri, behaved the way it did in the aftermath of the fire." Resp. at 3–4. Respondent suggests that it made "good faith efforts to comply" with the local authorities who managed the clean-up and wreckage that should be considered by this Tribunal when assessing the penalty. Resp. at 4. Respondent notes that it relied on the local authorities for accurate information to address the safety issues and clean-up requirements because its headquarters are located 1,500 miles away. Resp. at 4 (citing Field Decl. ¶ 6); Field Decl. ¶ 1. Respondent contends that inconsistent communications between multiple local authorities at the site of the fire created miscommunications regarding the nature of the paint waste and how to deal with the clean-up of the fire. Resp. at 4. Respondent explains that the determination by the on-scene fire chief that the site transitioned from a hazardous materials scene to a clean-up scene was the reason that B&W, which was not authorized to handle hazardous waste, conducted the initial clean-up. Resp. at 4−5.

Accordingly, Respondent argues that the facts surrounding the fire and its aftermath are relevant to the calculation of penalty and disputes Complainant's position that the only probative pieces of information include the bill of lading, the SDSs, and the communications with IDEQ

regarding the second clean-up. Resp. at 6–8. In rejoinder to Complainant's contention that Respondent should have been aware of the hazardous nature of the burned materials after IDEQ required a second clean-up, Respondent explains that its safety department employee apparently did not communicate the waste determination to its road assist representative who arranged the transportation of the trailer to the Facility. Resp. at 6−7 (citing Field Decl. ¶ 12). Respondent clarifies that, consequently, it did not hire its own RCRA trained experts to manage the clean-up, deviating from its typical protocol. Resp. at 7. Respondent further counters Complainant's assertion that it should have known the RCRA implications of the SDSs and bill of lading by maintaining that it lacked first-hand experience with RCRA and relied on local authorities. Resp. at 7 (citing Field Decl. ¶ 14).

Respondent next discusses the scientific assessments involved in the penalty calculation. Respondent intends for an expert witness to testify at the hearing that the risk to people and the environment from the storage of paint waste at the Facility was low. Resp. at 8. Respondent maintains that its expert's opinion is uncontested and in disagreement with Complainant's "non-expert assessment of harm to human health and the environment set out in Exhibit CX04." Resp. at 9. Further, Respondent also argues that Complainant makes incorrect assumptions about the paint waste—that workers went near the stored paint and that the paint waste posed a hazard to those in close proximity to it—that Respondent disputes. Resp. at 9.

Additionally, Respondent alleges that Complainant does not adequately consider and credit equitable factors in its calculation of the proposed penalty, such as Respondent's lack of previous violations, corporate culture, and efforts to comply. Resp. at 3, 10. Respondent suggests that it will cross examine Complainant's penalty witness at the hearing to suss out how she exercised her discretion under the Penalty Policy. Resp. at 10. Respondent contests Complainant's designations of the violations as major-major (Counts 1, 2, 4, 5) and moderate-major (Count 3) under the Penalty Policy. Resp. at 11–13. Respondent also disagrees with Complainant's proposition that coming into compliance is not a mitigating factor. Resp. at 10. Respondent additionally disputes EPA's finding of economic benefit. Resp. at 13. Respondent concludes by stating that "Respondent is entitled to explain its side of the story and to demonstrate why the Presiding Officer should assess a more reasonable and fair penalty" and asks that the Motion be denied. Resp. at 16.

Complainant's Reply

In its Reply, Complainant asserts that it properly supported its Motion and that "Respondent has not identified any issues of material fact that are in dispute [and] all that remains are mixed questions of law and fact regarding an appropriate penalty for each violation." Reply at i, 2. Complainant reiterates that Respondent failed to make a hazardous waste determination for the paint waste, thereby violating RCRA for nearly a year, until EPA inspected the facility and sampled the paint drums. Reply at 1−2. Complainant highlights that it does not dispute any new facts raised by Respondent's Response and the Field Declaration. Reply at 4. Additionally, Complainant maintains that Respondent did not satisfy its burden in demonstrating that it will gain additional evidence about a disputed issue of material fact regarding penalty at a hearing. Reply at 5–6.

Complainant reemphasizes that the facts relating to the aftermath of the fire raised by Respondent are not in dispute, and instead reiterates that it has addressed its view of the confusing communications at the site of the fire and why they do not factor into its calculation of penalty. Reply at 6−8. Although Complainant acknowledges that Respondent disputes how it used and relied upon the SDSs, bill of lading, and hazardous waste determination made during the second clean-up, Complainant argues that Respondent failed to provide sufficient information to support its claim. Reply at 9−10.

Complainant also contests Respondent's assertion that complex scientific issues are in dispute regarding the "potential for harm to human health and the environment." Reply at 10–13. Citing its Memorandum, Complainant notes that it explicitly accepted Respondent's expert's opinions stating that Respondent's actions had a low probability of harming human health and the environment regarding Count 3 (storage of hazardous waste at the Facility without a permit). Reply at 11–12. Complainant disagrees with Respondent's argument that storage at the Facility posed a small potential for harm, and instead emphasizes the Penalty Policy's requirement to consider the adverse effect of noncompliance on the RCRA regulatory program and to weigh the probability of exposure based on the totality of the circumstances. Reply at 12. Ultimately, Complainant argues, Respondent has not met its burden because it has only pointed to undisputed facts, alluded that it would establish more facts at a hearing, and argued that the facts point to a different conclusion about the potential for harm than Complainant has proffered. Reply at 13.

In rejoinder to Respondent's argument that Complainant did not consider equitable issues and "other factors" in its calculation of the penalty policy, Complainant contends that it accounted for these factors but found they did not change the calculation of the proposed penalty. Reply at 14–15. Rather, Complainant asserts that the effect of these factors on the penalty is a mixed question of law and fact. Reply at 14−15. Complainant further maintains that its approach in calculating the proposed penalty was in line with Congressional intent and the Penalty Policy, and that it is not acting aggressively in this matter. Reply at 17. Ultimately, Complainant argues that its extensive documentation for how it reached the proposed penalty and Respondent's alleged failure to find material facts in dispute mean that it has met its initial burden to properly support the Motion. Reply at 17−18. Complainant then classifies its mistakes in the original Exhibit CX04 as "typographical errors" and alleges that Respondent failed to meet its burden of rebutting the economic benefit for Count 1. Reply at 18−19. Complainant closes by reiterating that the Tribunal is able to decide an appropriate penalty on the submissions of the parties without holding a hearing. Reply at 24.

Discussion

Under the standard for adjudicating a motion for accelerated decision, I am compelled to consider the evidentiary material in the light most favorable to Respondent. *See Anderson*, 477 U.S. at 255. To successfully oppose a motion for accelerated decision and demonstrate a need for a hearing, Respondent must provide "more than a *scintilla* of evidence on a disputed factual issue[.]" *BWX Techs.*, 9 E.A.D. at 76. The dispute does not have to be solely factual, however; this Tribunal has found that a hearing is called for where mixed questions of law and fact would benefit from further evidentiary development. *Freudenberg-NOK*, EPA Docket No. CWA-5-98-

006, 1999 WL 33313165, at *6, *8 (ALJ, May 14, 1999) (Order Denying Complainant's Motions for Accelerated Decision and to Strike Respondent's Affirmative Defenses); *see also Wolco, Inc.*, EPA Docket No. CWA-07-2001-0067, 2002 WL 31264259, at *3, *5–6 (ALJ, Sept. 9, 2002) (Order Denying EPA's Motion to Amend Complaint/Order Denying EPA's Motion for Accelerated Decision) (finding that EPA did not satisfy its burden for accelerated decision because respondent showed, based on an affidavit, that mixed questions of law and fact existed that required a hearing to resolve).

Upon consideration of the facts in the light most favorable to Respondent, I find that awarding Complainant accelerated decision on penalty is unwarranted. The Motion is **DENIED** as to penalty. To explain why accelerated decision is not appropriate, I start with an analysis of Count 4.

Count 4 alleges a failure to properly manage the containers, in violation of Utah Administrative Code R315-7-16.4, because, according to Complainant, "Respondent stored burned drums of hazardous waste that were left open with bung caps missing[.]" Compl. ¶ 90. Complainant relies on Exhibit CX04Cor to explain how it calculated the penalty for this count. The Exhibit, as it applies to Count 4, mainly discusses the "risk of human or environmental exposure to hazardous waste and/or hazardous constituents" when addressing the "potential for harm." Penalty Policy at 12; CX04Cor at 15–17. The Exhibit states that "[t]his violation posed a *substantial* risk of exposure of humans or other environmental receptors to hazardous waste or constituents . . . ." CX04Cor at 16 (emphasis added). The Exhibit notes that the storage conditions at the Facility deviated from how the SDS recommends the drums be stored (for example, according to the SDS, each container should be closed, protected from sunlight in a dry, cool, well-ventilated space, among other conditions; the Exhibit contends that some containers did not have bung caps and were stored outside in the Utah elements). CX04Cor at 7, 13, 15–16. The Exhibit relays that the investigators smelled odors when they inspected the containers. CX04Cor at 16; CX10. The Exhibit notes that "[i]n this case, EPA does not have direct evidence of spillage or leakage during transportation over 300 miles or during the over 300 days of storage. And, despite evidence of venting, EPA does not have direct evidence of harm to receptors from the venting." CX04Cor at 16. The Exhibit asserts that the test results for the drums revealed that their contents had chromium levels exceeding the regulatory level for toxicity and met the ignitability threshold; the Exhibit also declares that "[t]he burned drums were used to store 16,000 lbs of hazardous waste." CX04Cor at 16. The Exhibit concludes that "the drum storage at the Facility, particularly given the condition of the drums after the fire, including missing bung hole covers, exacerbated existing EJ [environmental justice] concerns based on a combination of social vulnerability factors and environmental stressors." CX04Cor at 17. As to the second component of the "potential for harm" factor, the exhibit makes the conclusory assertion that "[t]his violation . . . had a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program." CX04Cor at 16.

Respondent asserts that "[n]umerous contested issues exist throughout EPA's Penalty Policy analysis, CX04, regarding potential harm to human health and the environment, which is one of the key issues in this case." Resp. at 8. Respondent utilizes Exhibit RX20 as a basis to counter the conclusions in Exhibit CX04Cor. In Exhibit RX20,[21] Respondent's expert witness

[21] Complainant declares that Exhibit RX20 "relates to Count 3" and argues that its analysis should be

addresses the risk of human or environmental exposure posed by the storage of the containers at the Facility. RX20 at 1. This expert report states that the rate at which the primer changed from liquid to gas was low; the chromium compounds likely remained in the drums and did not evaporate; the volatile organic compounds in the primer likely evaporated during the fire; the odor noted by the inspectors was likely "the more volatile ingredients" but that they were probably present at low concentrations; exposure of employees and area residents was likely low based on how the containers were stored and where they were located; the area around the Facility is a "very low population area"; if the primer escaped from a drum, it likely would not have traveled beyond the "immediate soil"; and risk of ignition of the containers was likely low. RX20 at 1–5. For these reasons, the report concludes that "[t]he potential for and seriousness of exposure to health hazard risk under the stored conditions or resulting from a potential leak is assessed as low[.]" RX20 at 2.

I find that there is a factual dispute over "the seriousness of the violation," the statutory factor accounted for by the gravity-based component of the penalty. *See* 42 U.S.C. § 6928(a)(3); Penalty Policy at 2, 11 n.15, 12. As described above, the gravity-based component is in part comprised of the potential for harm factor, which is itself partially determined by the risk of exposure. Penalty Policy at 12. The risk of exposure is a combination of the (i) likelihood of exposure and (ii) the potential seriousness of contamination. Penalty Policy at 14–15. I find there are facts in dispute concerning both the likelihood of exposure and the potential seriousness of contamination; these disputed facts bear upon the penalty calculation, making accelerated decision as to penalty inappropriate.

I will start with the potential seriousness of contamination. According to the Penalty Policy, the "size[] and proximity of receptor populations" such as local residents are considered in the assessment of the potential seriousness of contamination. Penalty Policy at 15. Respondent argues that the immediate vicinity is industrial and a "very low population area" with about 150 people living in the 12.56 square miles surrounding the Facility—an area Respondent delineates by drawing a circle with a radius of 2 miles centered on the Facility. RX20 at 4. In contrast, Complainant examines the Block Group[22] containing the Facility, a

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limited to Count 3. Mem. at 53; Reply at 11–12. (Elsewhere, Complainant acknowledges that the exhibit may apply to the potential for harm for "perhaps Count 4." Mem. at 48.) Complainant accepts that "[i]t is possible, however, that [Exhibit RX20's conclusions] could be taken to mean that [Respondent's expert's] uncontested opinions apply to the potential for harm under all counts"; Complainant therefore proffers that "[i]n an abundance of caution, Complainant notes that [Respondent's expert's] report unambiguously states her analysis is limited to the potential for harm from Respondent's storage of the hazardous waste at Respondent's facility without a permit." Reply at 12.

The Tribunal has reviewed Exhibit RX20 and cannot find such limiting language. Even if the Exhibit stated that it was prepared to support Respondent's mitigation argument for Count 3, the Tribunal sees no reason why the Exhibit's analysis and conclusions would not equally apply to Count 4: Some of the analyses concerning the potential for harm bear directly on the allegation that the drums were improperly managed while stored at the Facility. Thus, the Tribunal will use Exhibit RX20 when evaluating the penalty arguments for Count 4.

(*See* n.23 for more discussion of the implications of improper curtailment of Exhibit RX20's use.)

[22] According to EPA's EJSCREEN website: "One key output from EJSCREEN is a standard printed report that describes a selected location. Sometimes the report might focus on a single Census 'block

16.19 square mile area that includes some lands further south, and asserts that 4061 people live in this "populated area." CX03 at 1; CX04Cor at 17. If both parties are accurate, then 3900 people live more than 2 miles from the Facility but within the confines of the Block Group's perimeter. It is not clear from the parties' submissions how risk to residents was impacted by distance from the Facility, especially since, as discussed below, the parties disagree on the likelihood of exposure to a leak of liquids or vapors from the drums. Hearing evidence concerning the risk of exposure to the residents who lived both in the immediate vicinity of the Facility and those who lived further away will assist the Tribunal in assessing the overall risk of exposure and assigning an appropriate penalty.

Another factor weighed in evaluating the potential seriousness of contamination is the quantity of wastes potentially released. Penalty Policy at 14. Complainant states that "[t]he burned drums were used to store 16,000 lbs of hazardous waste." CX04Cor at 16. Respondent does not directly contest this number in its Response, although Respondent does conclude that the "quantities of material" were "relatively low[.]" RX20 at 1. However, after examining the Exhibits, I have reason to believe that not all 16,000 pounds of waste were hazardous waste. The only indication of the weight of the wastes I could find was in Exhibit CX12, the waste manifest for the eventual destruction of the burned drums, which lists the weight of the 32 drums as 16,000 pounds. CX12 at 3. Yet, only 20—not 32—of the drums are alleged to have contained *hazardous* waste. Compl. ¶ 62; CX10 at 38–40, 42. And, based on the submissions of the parties, I can only find that eight of the drums contained hazardous waste, as discussed above in the Liability Section. Therefore, it does not seem to be the case that all 16,000 pounds of waste was comprised of waste categorized as hazardous. Additional testimony concerning the true amount of hazardous waste in the 32 drums will again aid the Tribunal in determining the potential seriousness of contamination and calculating the penalty.

As to the other part of the risk of exposure calculation, the likelihood of exposure to hazardous waste, I consider the potential for a leak of both liquid contents and vapors from the drums. Relevant to both types of possible leaks, Complainant asserts that "[a]ll 32 drums . . . stored at the Facility were burned" (Compl. ¶ 89), and that "[t]he post-fire condition of the drums created a circumstance where they were more likely to leak over time than a container that hasn't been through a fire" (CX04Cor at 15). The basis for the latter assertion is not explained in the Exhibit, and I am not convinced that it is incontrovertible that the fire compromised the drums in such a manner. This is especially arguable since, as Complainant concedes, there is no evidence that the drums were leaking their liquid contents; nor is there evidence that vapors were escaping from any part of the drums besides their uncapped bung holes (according to Complainant's allegations). CX04Cor at 16. Testimony about the impact of the fire on the drums would assist the Tribunal in determining how the state of the drums affected the likelihood of exposure of receptor populations to released hazardous waste, and therefore, the penalty calculation.

Regarding the potential for a leak of the liquid contents, as discussed above in the Liability Section, the manner in which the drums were stored—on an uneven surface on the remnants of the trailer—could have resulted in a rupture of or leak from a container. Again,

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group.' A block group is an area defined by the Census Bureau that usually has in the range of 600–3,000 people living in it. The US is divided into more than 200,000 block groups." EPA, How to Interpret a Standard Report in EJSCREEN, https://www.epa.gov/ejscreen/how-interpret-standard-report-ejscreen.

Complainant admits that there is no evidence of actual leakage of the liquid contents from the drums. CX04Cor at 16. Even so, Complainant argues that the potential for release of hazardous waste should be accounted for in the penalty. CX04Cor at 16 (citing Penalty Policy). Respondent asserts that even if a leak did occur, the drums were on a concrete pad and any paint was not likely to travel "beyond the immediate soil it seeped into" (RX20 at 5), a supposition perhaps supported by the photos of paint remaining in the soil at the site of the fire more than two weeks later (CX07 at 4, 82). Sorting out the aftereffects of a release of paint from the drums would aid the Tribunal in its assessment of the risk of exposure to receptor populations. Since the hazard posed by a leak is unclear, the Tribunal would be assisted by hearing evidence addressing the threat of exposure to the drums' liquid contents based on the manner of storage as it contemplates the penalty calculation.

Finally, I examine the potential for a release of vapors from the drums. Complainant notes that "several burned drums on the trailer were open and missing covers known as bung caps." Compl. ¶ 88. Complainant argues that Respondent "did not ensure that the drums were closed. In fact, the EPA CID inspector noted strong odor/fumes and the drums were missing bung caps when they investigated the Facility approximately 10 months after the fire[.]" CX04Cor at 16. As highlighted above in the Liability Section, not all the drums are alleged to have contained hazardous waste; only the contents of 20 of the 32 drums are alleged to qualify as hazardous waste (Compl. ¶ 62), and only eight of the drums are confirmed to have contained such waste. From the photos of the drums taken during the two investigatory visits, it is not possible to determine how many or which of the drums had missing bung caps. CX10 at 6–13, 29–32, 47–89. It is also not possible to conclude that the odors detected during the inspection were emanating from the drums identified as containing hazardous waste: There is no evidence that sampling was performed to determine the identity or concentration of the vapors. Even assuming arguendo that vapors did originate from some of the eight drums confirmed to contain hazardous waste, Respondent suggests that those vapors would rapidly dissipate (RX20 at 3, 4); conversely, Complainant suggests that "[t]he release of volatiles from the open drums into the air and the unmonitored storage without regular inspections of the containers for additional releases or leakage contributed to the local environmental stressors" (CX04Cor at 17). The nature of the vapors, their origin, and the repercussions of their leakage are ill-defined at this point. Again, the Tribunal would benefit from testimony that discusses the likelihood of exposure of receptor populations to hazardous waste vapors due to the way in which the drums were stored when it considers assigning a penalty.

In sum, there are material facts in dispute concerning both the likelihood of exposure and the potential seriousness of contamination (or, in the instances where Respondent does not spotlight a dispute itself, the Tribunal is not convinced that a preponderance of evidence supports Complainant's claim). The forthcoming development of evidence and resultant resolution of these disputes will trickle down into the analysis of the potential for harm and the subsequent penalty calculation for Count 4. For example, if evidence were to demonstrate that the probability of exposure was "low" and the potential seriousness of contamination was "low," as Respondent has asserted (*see* RX20 at 1), then, according to the Penalty Policy, the potential for harm would be classified as "minor" and a lower penalty appropriate. Penalty Policy at 12–16. On the other hand, if evidence were to confirm that the risk of exposure was "substantial," as Complainant has proposed (*see* CX04Cor at 16), then that finding would translate into a "major"

potential for harm under the Penalty Policy, and a higher penalty amount would be warranted.[23] Penalty Policy at 16. As should now be manifest, testimony concerning the wanting and disputed facts emphasized above would assist the Tribunal in resolving the discrepancies, evaluating the factors established by the Penalty Policy (if only to depart from them, *see Chase*, 16 E.A.D. at 487–88), and calculating a penalty. Thus, accelerated decision is inappropriate for Count 4 and a hearing is warranted.

Because there are factual discrepancies concerning Count 4 that require a hearing to resolve, I see no need to attempt to further parse or dissect the total penalty calculation at this point. Although determining a penalty for some of the violations may seem more straightforward (for example, determining a penalty for the failure to obtain an EPA identification number in Count 5), it will be worthwhile for the Tribunal to hear testimony before assigning a penalty for *any* of the other violations. The putative benefit of testimony applies, moreover, to the identical adjustments for negligence/willfulness[24] Complainant makes for each Count: Complainant seems to base this adjustment on what Respondent "should have been aware of" and "should have been able to determine." CX04Cor at 3, 5, 8–9. Respondent counters that what it was told at the scene of the fire ("the multiple and confusing communications") supports its appeal for mitigation of the penalty; at the heart of this argument is Respondent's assertion it made "good faith efforts to comply" and "did everything asked of it by the local authorities and regulators[,]" even though it did not grasp its RCRA obligations.[25] Resp. at 3–4, 6. Testimony

[23] The "adverse effect on statutory purposes" component and its contribution to the penalty computation is set aside for the moment. However, a cursory examination of what Complainant described as the adverse effect on statutory purposes for Count 4 highlights another discrepancy that necessitates a hearing.

Complainant's Exhibit CX04Cor states that the violation "had a significant adverse effect on statutory or regulatory purposes or procedures for implementing the RCRA program" (but does not explain this conclusory pronouncement). CX04Cor at 16. The "significant adverse effect" Complainant has ascribed to the violation would, standing alone, translate to a *moderate* potential for harm for Count 4 under the Penalty Policy. Penalty Policy at 16. When Complainant assessed the potential for harm, it instead found that Count 4 resulted in a *major* potential for harm because it classified the "risk of exposure" as substantial. CX04Cor at 16–17; Mem. at 91. This seems to be due to Complainant expressly eschewing consideration of Exhibit RX20 when calculating the penalty for Count 4. *See* n.21, above. Remarkably, Complainant has stated that it accepts Exhibit RX20's conclusions for the purposes of the Motion, even acknowledging that they, in part, would "support[] a finding of a moderate potential for harm to the environment, rather than major[,]" for Count 3. Mem. at 48–49, 65, 87; Reply at 11. If the conclusions of Exhibit RX20 had been used in the analysis for Count 4, this would have rated the potential for harm as (at most) moderate, and the moderate-major square in the penalty matrix would have been utilized, lowering the assessed penalty amount.

The incongruity concerning the proper scope of Exhibit RX20's conclusions is another reason a hearing to thoroughly assess the potential for harm for all Counts is required.

[24] The bases for these adjustments are, broadly, Complainant's allegations that Respondent should have considered the SDSs and bill of lading, as well as its communications with IDEQ, when contemplating its legal obligations towards the waste, and that not doing so, for a major shipping company, was negligent, if not willful. Mem. at 77, 82–83, 89–90, 93–94, 97; *see also* CX04Cor at 8–9.

[25] "Good faith efforts to comply with applicable requirements" is a statutory factor considered when assessing a penalty. 42 U.S.C. § 6928(a)(3). Respondent's arguments suggest that it views "good faith efforts" as its attempts to act lawfully and "do what's right" in the first instance—attempts it contends it

about what Respondent was *actually* cognizant of during this time period will assist the Tribunal in determining both whether Respondent made "good faith efforts" to maintain compliance with the law, and whether it acted negligently. Hence, granting accelerated decision as to appropriate penalties for the other four Counts is improper at this time.

Finally, further development of issues bearing on the assessment of a penalty in this matter seems prudent given the discretionary nature of determining penalties under RCRA and this Tribunal's preference against granting motions for accelerated decision as to the amount of penalty. *See MRM Trucking*, EPA Docket No. MWTA-II-89-0102, 1993 WL 426020, at *1 (ALJ, Aug. 18, 1993) (Decision and Order Upon Motion) (describing this Tribunal's "reluctance to impose civil sanctions without providing the violator an opportunity for an oral evidentiary hearing[,]" explaining that live testimony is helpful in making credibility determinations, and observing that it is "seldom clear" whether "additional relevant, material, and credible evidence would be obtained" during a hearing); *P&J Abatement, Inc.*, EPA Docket No. TSCA-V-C-01-91, 1994 WL 118727, at *3 (ALJ, Mar. 22, 1994) (Order Upon Motion for Accelerated Decision) (same). Accordingly, Complainant's request for accelerated decision as to the appropriate penalty to award in this proceeding is **DENIED**.

made in this situation, which were undercut by an erroneous assessment by local authorities about the nature of the waste and an internal failure of communication about the later IDEQ-mandated cleanup at the fire site. Field Decl. ¶¶ 6–12, 16; Resp. at 3–8. However, the Penalty Policy and Complainant suggest that "good faith efforts to comply with applicable requirements" turn on whether a respondent notified EPA of RCRA noncompliance before EPA detected such a violation. Mem. at 73; Penalty Policy at 35–36. The Tribunal sees no need to resolve this disagreement concerning the delimitation of "good faith efforts to comply" at this moment.

ORDER

(1) Respondent's Motion for Supplemental Briefing is **DENIED**.

(2) Complainant's Motion for Accelerated Decision is **GRANTED** as to Respondent's liability for the violations charged in the Complaint. Respondent is hereby found liable for violations of Utah Administrative Code R315-5-1.11; R315-5-2.20(a); R315-3-1.1(a); R315-7-16.4; R315-8-2.2.

(3) Complainant's Motion for Accelerated Decision is **DENIED** as to penalty for the violations charged in the Complaint.

(4) The hearing will proceed on the issues and claims relating to the calculation of the penalty for Counts 1–5, as described above.

(5) This Tribunal offers the parties an opportunity to participate in Alternative Dispute Resolution ("ADR") prior to the hearing. If both parties agree, a Neutral may be appointed to conduct ADR in an effort to resolve this matter.

- The parties are **ORDERED** to confer about this offer of ADR; Complainant shall submit a **Status Report** as to whether the parties have agreed to participate in ADR on or before **April 18, 2022**.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: April 4, 2022
Washington, D.C.

In the Matter of *New Prime, Inc.*, Respondent.
Docket No. RCRA-08-2020-0007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Accelerated Decision**, dated April 4, 2022, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

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Dated: April 4, 2022
Washington, D.C.