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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

IN THE MATTER OF:)	
)	Docket No. RCRA-08-2020-0007
New Prime, Inc.)	
)	
Respondent.)	RESPONDENT'S SUPPLEMENTAL
)	BRIEF RE ACCELERATED
_____)	DECISION

Pursuant to 40 C.F.R. § 22.16(b), Respondent New Prime, Inc. submits this supplemental brief regarding Complainant's Motion for Accelerated Decision.

On July 16, 2021 - - more than six months after Respondent filed its Prehearing Exchange on January 8, 2021 and more than four months after Respondent filed its opposition to Complainant's motion for accelerated decision - - Complainant submitted a rebuttal expert report to the expert report of Dr. Elizabeth Walker that Respondent had relied on in its opposition brief. The Walker report concluded that the storage of the burned paint in the corner of Respondent's

Salt Lake City truck yard, where it was not accessible by the public or near employees, did not pose a significant risk to human health or the environment. See RX20 at 1. Complainant filed no rebuttal expert report when it filed its rebuttal prehearing exchange on January 22, 2021. We addressed the issue of potential harm to human health and the environment and the lack of a rebuttal report in the Response Brief re Accelerated Decision that we filed on March 9, 2021 under the section heading “The Scientific Issues in this Case are Complex, Relevant and Disputed.” *See id.* at 8. EPA took issue with our arguments in its Reply Brief but did not include a rebuttal expert report. Now, four months after the completion of briefing and the motion was fully submitted for determination, EPA is attempting to fill a deficiency in its case and to bolster its argument for a large financial penalty that is disproportionate to the conduct at issue in this case.

The new rebuttal expert report from EPA confirms Respondent’s position that there is disagreement between the parties over how to interpret the evidence in this case. In short, there are disputed issues of material fact. EPA’s rebuttal report by Dr. Kristen Keteles concludes, “In summary, the improper storage of hazardous waste by Prime, Inc. created a substantial, unacceptable risk to human health and the environment.” CX66 at 9. Dr. Keteles’ conclusion stands in stark contrast to the conclusion of Respondent’s expert, Dr. Walker, who wrote in her January 8 report:

No evidence exists that any human or environmental harm or harmful exposure occurred from the primer stored at the Prime facility. Probability of exposure to primer by humans or environmental receptors is low: no individuals appear to have been in sufficient proximity for any duration to experience adverse effects; even if a leak in a drum had occurred this remains true. Given the evidence reviewed, my opinion is that the probability of the materials catching on fire is extremely low.

RX20 at 1.

In order to prevail on accelerated decision, the burden is on the moving party to show the absence of material issues of fact. *Arizona Environmental Container Corporation*, 2008 WL 3978678 at *6 (EPA ALJ August 12, 2008) and the motions for accelerated decision re penalty are seldom granted, implying that the burden is heightened for motions attempting to deprive Respondent of a hearing on the proper amount of the penalty. *See In the Matter of MRM Trucking*, 1993 WL 426020 (EPA ALJ August 18, 1993); Respondent's Response Brief at 15-16 and cases cited at n.4.

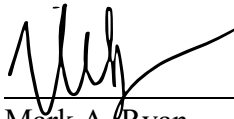
The primary goal of any environmental statute such as RCRA is to protect human health and the environment. That issue is and should be one of the primary concerns of the Presiding Officer in determining a penalty. Accordingly, the statute states: "In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." 42 U.S.C. § 6928(a)(3). The expert reports in this case go to the "seriousness of the violation," and they reach opposite conclusions. There is a dispute between the parties on the fact of environmental harm, which is one of the key elements of the case.

Complaint asserts that its proposed penalty of \$631,402 can be assessed on the documents alone without the need for an evidentiary hearing. But the parties do not agree on the facts or on the proper interpretation of those facts or how (or even if) they should be applied to the RCRA Penalty Policy. The two proposed PhD experts in this case will offer testimony regarding the potential threat to human and health and the environment (there is no evidence that anyone was harmed) that are at odds with one another. Their testimony and the documents they relied upon to reach their conclusions will be subject to testing by the opposing parties at hearing, thereby assisting the Presiding Officer in determining which of the two's testimony

better reflects the severity of the environmental harm given the disputed facts of this case. For that reason, and for the reasons set out in more detail in our Response Brief, Complainant's Motion for Accelerated Decision should be denied.

RESPECTFULLY SUBMITTED this 21st day of July 2021.

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A handwritten signature in black ink, appearing to read 'Mark A. Ryan', is written over a horizontal line.

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