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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 RESPONSE TO MOTION FOR ACCELERATED DECISION**
	)	
	)	
_____	)	

Pursuant to 40 C.F.R. § 22.16(b), Respondent New Prime, Inc. submits this Response to Complainant's Motion for Accelerated Decision. Numerous genuine issues of material fact exist with respect to determining the amount of penalty and that determination is not appropriate for an accelerated decision. Further, and lest there be any confusion, Respondent has admitted liability in this case, and expressly stated so in its prehearing exchange. *Id.* at 5, ¶ E. At hearing, Respondent does not intend contest liability. Notwithstanding that admission, and for the reasons set out below, the Motion with regard to penalty should be denied.

TABLE OF CONTENTS

		Page
INTRODUCTION		1
ARGUMENT		3
I.	GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE AMOUNT OF THE PENALTY	3
	A. The Events Around the 2015 Fire Are Complicated and Relevant to Penalty	3
	B. The Scientific Issues in this Case are Complex, Relevant and Disputed	8
	C. Respondent's Lack of Prior Violations and Other Equitable Factors Should be Further Developed at Hearing	10
	D. This Case Does Not Warrant any Findings of Major/Major Under the RCRA Penalty Policy	11
	E. Complainant's Own Mistakes Call into Question the Reliability of its Evidence	13
	F. The Presiding Officer Is Not Bound by the RCRA Penalty Policy.	14
	G. Motions for Accelerated Decision on Penalty Are Disfavored	15
CONCLUSION		16

TABLE OF AUTHORITIES

Cases — Page

In re Aguakem Caribe, Inc., 2011 WL 7444586 (ALJ, Dec. 22, 2011). 15n.3

In re Andrew B. Chase, 2014 WL 3890099 (ALJ, 2014) 15, 15n.3

In re Berntsen Brass & Aluminum Foundry, Inc., 1998 WL 289234 (April 21, 1998) 16n.4

In re Carbon Injection Systems, No. RCRA-05-2011-0009 (ALJ, March 15, 2015) 15n.3

In re Dave Erlanson, Sr., 2018 WL 4859961 (Sept. 27, 2018) 16n.4

In re John A. Biewer Co. of Toledo, Inc., 15 E.A.D. 772 (2013) 10, 14, 15n.3

In re Lay Brothers, Inc., 1999 WL 363891 (March 12, 1999) 16n.4

In re M.A. Bruder and Sons, Inc., 2001 WL 1659339 (ALJ, 2001) 15n.3

In re Mercury Vapor Processing, No. RCRA-05-2010-0015 (ALJ, Dec. 14, 2012) 15n.3

In re Micro Pen of U.S.A., 1999 WL 362851 (ALJ, March 22, 1999) 16n.4

In re MRM Trucking, 1993 WL 426020 (August 18, 1993) 15n.3

In re Paco Swain Reality, L.L.C., 2014 WL 4649467 (July 23, 2014) 16n.4

In re Ram, Inc., 14 E.A.D. 357 (2009) 15n.3

In re Titan Wheel Corp., 2001 WL 499328 (ALJ May 4, 2001) 11

Statutes

42 U.S.C. § 6928(a)(3) 4

Regulations

40 C.R.R. Part 19 14

40 C.F.R. § 22.16(b) . . . . . front page

40 C.R.R. § 22.27(b) 14

INTRODUCTION

In its Motion for Accelerated Decision (EPA Motion), Complainant seeks the extraordinary remedy of having this Presiding Officer decide the penalty in this case without a hearing when numerous factual issues predominate. More specifically, Complaint asks the Presiding Officer, based on its written submission and without hearing from any witnesses, to assess a penalty of $631,402 against a company that has no prior history of violations, that does not regularly deal in hazardous waste as part of its business, that is in full compliance with the law, and that has trained its relevant employees to ensure this unfortunate event does not recur. And, importantly, EPA seeks the imposition of an almost two-thirds-of-a-million-dollar penalty where the barrels of paint at issue posed no substantial harm to human health or the environment.

Given that Complainant's Motion is premised on the absence of any contested issues of material fact and Respondent has already admitted liability, one would expect a concise argument by Complainant. Rather, Complainant uses 111 pages with 37 footnotes and hundreds of case and record citations to argue that the pre-hearing record is so uncontested, no hearing is needed. The length and complexity of Complainant's Motion belie its arguments.

Complainant's Motion with regard to penalty should be denied because genuine issues of material fact exist and predominate the record in this case. The facts and the science of this case are complex, as are the 42-page (plus attachments), single-spaced RCRA Penalty Policy and the 20-page, single-space penalty policy analysis that Complainant relies on to support its $631,402 proposed penalty. In seeking imposition of the foregoing penalty, Complainant also now seeks to correct numerous mistakes it made in calculating this penalty through its evolving submissions.

The complicated facts of this case - - the interpretation of which is disputed by the parties - - require a hearing to allow the Presiding Officer to consider the testimony of the combined 12

proposed fact and expert witnesses, to review over 85 proposed exhibits (65 of which are offered by EPA totaling well over a thousand pages) and to consider the arguments counsel will make in their post-hearing briefs. With this motion for accelerated decision on penalty, EPA wishes to deprive Respondent of its right to present substantial evidence in support of a more reasonable and fair penalty. Complainant also seeks to prevent Respondent's cross examination of EPA's witnesses at hearing to test the credibility of Complainant's proposed penalty.

The extensive documents and proposed testimony submitted by the parties show how confusion at the Idaho roadside fire - - involving multiple local, state and federal agencies - - contributed to Respondent's decision to deviate from its normal practice of retaining a third-party vendor with RCRA expertise to handle the roadside clean-up which in turn contributed to the mistakes Respondent made over the next year. Respondent's expert witness, a PhD toxicologist, will testify that the storage of the paint waste in Utah, contrary to EPA's contentions, posed a low potential risk to the local population and environment. The supporting declaration that accompanies this Response further supports Respondent's argument that a much lower penalty should be assessed.

The law is clear. The Presiding Officer must consider the applicable penalty policy but is not bound by it and may deviate from it if the evidence adduced at hearing supports a lower penalty. 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. The Motion should be denied.

ARGUMENT

I. GENUINE ISSUES OF MATERIAL FACT EXIST REGARING THE AMOUNT OF THE PENALTY.

Complainant portrays this case as a clear-cut application of the RCRA penalty policy where Complainant has reviewed all of the facts it deems relevant to that analysis. Complainant argues its proposed penalty should be assessed now because none of the information provided in Respondent's Prehearing Exchanges would change how its compliance officer calculated the proposed penalty. *See* EPA Brief at 67-68. The case is not so simple, and EPA's compliance officer is not the final arbiter of the penalty amount.

As demonstrated below, significant evidence exists to support Respondent's defense that the seriousness of the violations should be mitigated by various factors and considerations. The large penalty Complainant seeks in this case does not address the confusion at the original fire and how that effected Respondent's decisions and actions. Complaint also does not adequately address various equitable factors such as Respondent's lack of a prior history of violations, its lack of experience in dealing with hazardous waste cleanups of this magnitude or when hazardous waste management is required, its practice of retaining RCRA trained experts to manage the clean-up which it did not do here for reasons for more fully explained below. The company is now in full compliance with the law, and it has taken positive steps to ensure this unfortunate event does not recur. And, importantly, Respondent contests EPA's analysis of the potential harm to human health or the environment.

A. The Events Around the 2015 Fire Are Complicated and Relevant to Penalty.

Complainant argues that the events of the fire are not relevant to the calculation of the penalty in the instant matter. *See*, *e.g.*, EPA Brief at 30, 44. To the contrary, both parties have submitted a significant number of exhibits describing the multiple and confusing

communications and decisions made by government authorities in Idaho during the early morning hours of September 27, 2015 following the trailer fire because those events 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. *See*, *e.g.*, RX03-12. These events are relevant to the penalty in this case because "good faith efforts to comply," prior history of noncompliance and other factors are considered by the Presiding Officer when assessing a penalty.[1] *See* 42 U.S.C. § 6928(a)(3), RCRA Penalty Policy at 34-42.

The accidental fire that led to the destruction of the paint Respondent was hauling, occurred in the middle of the night on a remote stretch of highway in rural Idaho. When the emergency call came in regarding the fire, Respondent had to assess the situation from fifteen hundred miles away and based on incomplete information. Steve Field Declaration, attached as Exhibit A to this Response, at ¶ 6. Respondent's headquarters is in Springfield, Missouri, and it relied on communications and information from the local authorities on who was qualified to manage the clean-up and wreckage. *Id.*

The communications Respondent received from the local authorities were inconsistent. For example, middle-of-the-night communications between multiple state, federal and local responders, including the local fire department, Elmore County Dispatch, Idaho State Patrol, Idaho Department of Transportation and Idaho Department of Environmental Quality, resulted in miscommunications on nature of the paint waste and how to best deal with the aftermath of the trailer fire. *Id.* at ¶ 9. Ultimately, the on-scene fire chief and incident commander concluded: "It

[1] EPA goes to some length to disavow the importance of the allegations in its complaint regarding the events of September 27, 2015. *See* EPA Motion at 30 and Jacobson Declaration at ¶¶ 6-9. Respondent saw no relevance of those facts to liability in the complaint, and therefore declined to answer. The penalty analysis, CX04, was not part of the complaint, so Respondent could not contest the specifics of the penalty calculation. Respondent now contests CX04.

was our determination that it went from a haz-mat scene to a clean-up scene. We released Region IV Haz Mat after that discussion. B&W Wrecker was on scene when we left, they were going to be in charge of the clean up." RX05 at 3; see also RX11, p. 5 ("[Carl] Vaughn stated that he understood that the fire marshal who was in charge of the Prime trailer fire incident somehow made a determination that the waste was not hazardous in nature.")

Mr. Vaughn of the Idaho Transportation Department further described this confusion on the night of the fire:

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

RX11, pp. 7-8.

The clean-up of the site was handled by B&W Wrecking. According to Chief Janousek who was in charge of the scene, "Elmore County Dispatch is the entity that called out B & W Wrecking to respond to the incident." RX08, p. 2. An Idaho State Police trooper on scene was advised by B & W "they were qualified to conduct the cleanup" which this trooper in turn verified by calling the Idaho Department of Environmental Quality. *Id* at p. 3; *see, also* RX03 at 3 (Idaho State Communications Center Hazmat call log detailing call from ISP trooper to DEQ and "asking if B&W towing could clean up….").

As it turns out B&W was not authorized to remediate or transport hazardous waste. In fairness to B & W, it was apparently being told by the on-scene incident commander, Chief Janousek, that the scene was no longer a hazardous waste scene when it performed its cleanup.

B&W thereafter coordinated with an individual with Respondent's roadside assistance department the pick-up of the burned trailer and remaining intact paint barrels which remained on the trailer for transportation to Respondent's yard in Salt Lake City. Respondent, for its part, was interested in inspecting the trailer to assess whether it could determine the cause of the trailer fire. Field Decl. at ¶ 10.

Respondent did everything asked of it by the local authorities and regulators in hiring and relying on B&W to perform the clean-up and disposal of the materials destroyed by the fire. *Id.* at ¶ 9. It further trusted B &W in helping it coordinate the transportation of the damaged trailer and its remaining contents including the intact barrels of paint to its Utah facility in October 2015. *Id.* at ¶ 10. Many of Complainant's allegations stem from this transport of the burned material. *See, e.g.*, Complaint, Counts 1-3. In part because of the confused on-scene communications and the determination by local officials on who would clean up and manage the aftermath of the fire, Respondent made mistakes in the arrangement of the transport of the wreckage to Utah. Field Decl. at ¶ 10.

Complainant argues that none of the facts surrounding the Idaho fire and its aftermath are relevant. Instead, it argues, "only three pieces of information from this time period . . . are relevant [as to penalty]: the bill of lading . . . the SDS . . . and Respondent's communications with IDEQ." EPA Brief at 69. Complainant makes much of the fact that additional site cleanup was later required by a representative IDEQ, who expressed after the fact concern about the handling of trailer fire clean up including the adequacy of the roadside cleanup, and that a waste determination was later made of these roadside materials. Accordingly, Complainant argues that Respondent should have been alerted as to the nature of the materials it had moved to its Utah yard.

The additional roadside cleanup required by IDEQ was managed by a member of Respondent's safety department who dutifully hired a third-party company with RCRA expertise to oversee and appropriately manage the roadside clean up. Field Decl. at ¶ 12. The waste determination made in this process was apparently not communicated to Respondent's road assist representative who had arranged the transportation of the burned trailer and barrels to the Utah yard, and indeed Respondent had not hired, as it normally would, RCRA trained experts to manage this aspect of the fire aftermath based on the determination made by local authorities at the time of the fire. Field Decl. at ¶¶ 10, 12, 15.

Respondent does not dispute that the Bill of Lading (BOL) and the safety data sheet (SDS) show the presence of regulated constituent chemicals in the paint waste and that a waste determination was later made after the fire. Respondent does dispute, however, *how* those documents and the later waste determination were used and relied upon. Complainant argues that Respond knew or should have known of the RCRA implications from these documents. EPA Brief at 69. But that argument elides Respondent's lack of significant first-hand experience with RCRA, *see* Field Decl. at 14, or the full context of the communications with all governmental entities and contractors at the time, and its reliance on local authorities which caused it to deviate its normal practice of hiring RCRA trained experts to manage clean up in situations involving hazardous materials. In short, the story is more complicated than Complainant asserts.

All of these events, and more that will be described in greater detail at hearing, undermine EPA's Penalty Policy assessment of Counts 1, 2, 4 and 5 as "Major/Major." *See* CX04 at 5. Respondent has identified evidence in its Prehearing Exchange and in the Field Declaration to support the valid defense that the events surrounding the September 27, 2015 fire undercut EPA's allegations of bad faith and EPA's calculation that four of the five alleged

violations required the highest possible rating of "Major/Major."

Respondent wishes it had managed the above-described situations better and consistent with its corporate philosophy of doing things right and in compliance with the law. *See* Field Decl. at 13, 16. With that said, it actions and inaction here in allowing the materials to sit for several months in its yard were the product of poor communications and not an attempt to evade the law or to save money. Respondent looks forward to the opportunity to present these issues more fully at a hearing in this matter where the presiding officer may judge the sincerity of Respondent actions here and its good faith efforts to comply with the law.

B. The Scientific Issues in this Case are Complex, Relevant and Disputed.

Numerous 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. Respondent highlights two obvious ones here. Complainant argues in its Motion that the potential for harm assigned to the Count 3 of the Complaint related to storage of paint at Prime's Salt Lake City terminal was "moderate" under the Penalty Policy. EPA Brief at 85. Count 3 makes up the largest component of the proposed penalty ($426,056), Exhibit CX04 at 13, so any change from Minor to Moderate or changing the penalty range within either of those two designations can have an outsized effect on the size of the penalty.

The Policy states "[t]he RCRA requirements were promulgated in order to prevent harm to human health and the environment." Policy at 12. To address this issue, Respondent retained Dr. Elizabeth Walker as an expert toxicologist in this case and submitted in its Prehearing Exchange her expert report. In that report, Dr. Walker opined that the storage of the paint at the Salt Lake City depot posed a low risk to human health and the environment. RX20 at 1. That evidence directly contradicts EPA's interpretation of the facts. *Cf.*, *e.g.*, CX04 at 13-16

("Potential for Harm").

EPA, in its rebuttal prehearing exchange, named Dr. Keteles to rebut the expected testimony of Dr. Walker. The proposed testimony of Dr. Keteles, however simply states that "Dr. Keteles will testify in rebuttal to Respondent's proposed expert testimony related to the potential harms Respondent created by the violations." EPA Rebuttal Prehearing Exchange at 2. EPA's elliptical disclosure provides no substantive information about what Dr. Keteles will testify at hearing and essentially leaves unrebutted Dr. Walker's opinions on this issue as this stage of the proceedings. Unlike Respondents, who had Dr. Walker prepare an expert report, which was made part of the prehearing materials, Complaint has provided no expert report. At this stage of the litigation, Dr. Walker's expert opinion is uncontested, and at odds with EPA's non-expert assessment of harm to human health and the environment set out in Exhibit CX04.

Also, in its analysis of the Count 3 Penalty, EPA stated "it is logical to assume that workers were not informed that the drums contained hazardous waste. . ." *Id.* at 13. This assumes that workers were in contact or close proximity to the stored paint. They were not. The paint was stored in a fenced and locked yard, not open to the public, on an impermeable surface in an area where few, if any employees passed. Field Decl. at ¶ 11. Complainant also assumes, contrary to the to the findings of Dr. Walker, that the stored paint posed a hazard to people in close proximity to it. Dr. Walker opined that little if any volatile organic compounds were likely emitted from the stored paint in a manner that could affect human health as organic compounds would rapidly dissipate into the atmosphere. *See* RX20 at 3-4.

These two examples highlight some of the many errors EPA made in its analysis of the penalty and/or the different reasonable interpretations that can be drawn from the facts. For the reasons set forth here, and as will be explained in greater detail at hearing, genuine issues of

material fact exist regarding the potential for harm to human health and the environment.

C. Respondent's Lack of Prior Violations and Other Equitable Factors Should be Further Developed at Hearing.

Complaint argues that when its compliance officer, Ms. Jacobson, calculated her proposed penalty, and after reviewing Respondent's Prehearing Exchange, she saw no reason to change her calculations because she had already considered elements of the penalty policy such as good faith efforts, corporate culture, and lack of prior history of violations. EPA Motion at 67, 70. Respondent begs to differ.

The Environmental Appeals Board (EAB) has been clear that in cases such as this, where the Respondent has admitted liability, equitable factors related to penalty must be considered.

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

In re John A. Biewer Co. of Toledo, Inc., 15 E.A.D. 772, 2013 WL 686378 at *10 (2013).

The RCRA penalty policy is discretionary by nature. The EPA compliance officer in this case, Linda Jacobson, applied the facts of the case to the broad range of penalty factors to come up with a penalty number. She gave no credit to the company for good faith efforts, lack of prior violations, or its cooperative and timely responses to EPA's directives, among other things. *See* CX04 at 8-9. How one interprets the facts and which facts one relies on can make a large difference in the penalty under the policy. *See*, *e.g.*, Penalty Policy at 36 (other factors to consider "as well as any others deemed appropriate"). Despite this wide discretion, EPA argues that the Presiding Officer should adopt Ms. Jacobson's interpretation of the facts of the case without allowing Respondent to cross examine her at hearing.

Complainant cites *In re Titan Wheel Corp.*, 2001 WL 499328 (ALJ May 4, 2001) for the proposition that coming into compliance should not be considered a mitigating factor under the penalty policy. *Titan Wheel* Corp, which involved multiple violations of RCRA occurring over several years, was decided after the parties waived their right to an evidentiary hearing and submitted an agreed, joint statement of facts – neither of which has occurred in the present case. The ALJ in *In re Titan Wheel Corp* expressly found that "while Respondent did correct its violation, its delay in doing so demonstrates to the Court that Respondent was not expeditious in meeting its obligations for hazardous waste management. Therefore, its efforts do not evidence any good faith efforts to comply with RCRA." *Titan Wheel* did not hold that coming into compliance can never be a mitigating factor nor did it address the other myriad mitigating factors present here.

The absence of any prior history of such violations by Respondent, coupled with the evidence that Respondent fully and timely complied with all of EPA's directives to come into compliance in this case, trained up its relevant employees to deal with any future hazardous waste situations, as well as the proposed evidence of Respondent's corporate culture of emphasizing compliance with the law should be considered by the Presiding Officer before assessing a penalty. *See*, *e.g.*, Field Decl. at ¶ 7, 13.

D. This Case Does Not Warrant any Findings of Major/Major Under the RCRA Penalty Policy.

Complainant has characterized the wrongful handling of a truckload of paint in four of the five causes of action as Major/Major and in one as Moderate/Major under the RCRA Penalty policy. Exhibit CX04 at 5. That is, under the RCRA Penalty Policy, Complainant considers the "Potential for Harm" to be "major" and the "Extent of Deviation from the Requirement" to also be "major" for four of the five causes of action. *See* RCRA Penalty Policy at 15-17. Both

designations are the highest (worst) assignable under the Policy. And both designations require considerable judgment and discretion on the part of the EPA compliance officer doing the calculations. The difference between "major" and "moderate" designation under "potential for harm," for example, requires the EPA compliance officer to differentiate between "substantial risk" and "significant risk." *Id.* at 15.

As Complainant admits in its Motion, "[m]uch of the proposed testimony . . . warrants some degree of analysis by Complainant . . ." EPA Brief at 43. Respondent agrees. There is a lot of discretion one can apply in interpreting the statutory penalty factors and the RCRA Penalty Policy. And that discretion allows for an interpretation of both the statute and the Penalty Policy that results in a much lower penalty than that proposed by Complainant in this case.

Respondent is entitled to probe the extent that Complainant exercised that discretion in arriving at the proposed penalty of $631,402. How did EPA's penalty witness in the present case subjectively view "substantial?" Or determine that "moderate" designation was more appropriate than "minor?" How did she decide where to place Respondent in the instant case on the sliding scale of penalties within each matrix box? *See e.g.*, RCRA Penalty Policy at 18 (chart). While Exhibit EX04 sets out some of the answers to these questions, Respondent is entitled to probe beyond the superficial treatment EPA gives these subjects in its penalty policy analysis. As set out in more detail below, Complainant's aggressive view of the case is not supported by the facts, the statutory penalty considerations or EPA's RCRA Penalty Policy.

The appropriateness of the penalty is a mixed question of law and fact and, therefore, should be based on the evidence entered into the record at the close of the hearing. EPA's application of the RCRA Penalty Policy necessarily requires the use of discretion in assessing which facts should be considered and of those considered, how to assess them in the context of

the complex 42-page RCRA Penalty Policy. Complainant has chosen the most severe categories in the Penalty Policy matrix for most of the allegations in the complaint, yielding some of the highest penalties.

Respondent legitimately questions whether the facts of this case support such a draconian penalty based on discretionary factors set out in a Penalty Policy. Respondent has set forth sufficient facts in its Prehearing Exchange and in the Steve Field Declaration to show that there are mitigating factors to support findings of minor potential and minor deviation under the Penalty Policy, if the Presiding even choses to follow that policy in this case.

E. Complainant's Own Mistakes Call into Question the Reliability of it Evidence.

Concurrent with the present Motion, EPA has filed a Motion to Correct Complainant's Prehearing Exchange (Motion to Correct). In that motion, Complainant seeks permission from the Presiding Officer to make numerous corrections to Exhibit CX04, which is the Agency's penalty policy analysis in the instant matter. Exhibit CX04 explains Complainant's proposed penalty and is therefore one of the key documents in the case. It is cited throughout Complainant's present Motion. *See, e.g.*, EPA Motion at 4, 10, 17, 22, 43, 44, 68, 72, 74 and 76-97.

Complainant's requested corrections to Exhibit CX04 largely deal with mistakes made addressing economic benefit. *See* Motion to Correct at 1-3. As noted in Respondent's Prehearing Exchange, Respondent intends to challenge EPA's calculation of economic benefit in this case. Respondent's Prehearing Exchange at 8, ¶ 5. Given that Respondent intends to challenge this key piece of the proposed penalty, Complainant's late discovery of mistakes in that calculation underscores the need to allow Respondent the ability to cross examine Complainant's penalty witness at hearing on these admitted mistakes as well as others that may exist.

Complainant had five years to put this case together, and it still erred on the key element of this case – calculation of the penalty.[2] Complainant's mistakes, and others not yet disclosed, should be subject to further examination at hearing in order to develop a full, fair and comprehensive view of this case before submitting it to the Presiding Officer for the determination of an appropriate penalty.

F. The Presiding Officer Is Not Bound by the RCRA Penalty Policy.

The EAB has been clear: "the ALJ is under no legal obligation to impose a region's recommended penalty, even if the recommended penalty takes all of the recommended statutory factors into account." *In re John A. Biewer*, 2013 WL 686378 at *7. The statute provides broad discretion to the Presiding Officer in assessing a penalty in this matter. It says simply: "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 Consolidated Rules of Practice provide that the Presiding Officer shall, when assessing a penalty, consider that applicable statutory penalty criteria and any agency guidance issued under the statute. 40 C.R.R. § 22.27(b). In the present case, Complaint has calculated a penalty using its guidance entitled, "Revisions to the 1990 RCRA Civil Penalty Policy" (June 23, 2003), as updated by 40 C.F.R. Part 19.

To the extent that the Presiding Officer is required to consider, but is not bound by, the RCRA Penalty Policy, Respondent in the instant matter has already identified evidence in its prehearing exchange and the Dave Field Declaration to refute EPA's characterization of the

[2] Despite a comprehensive investigation occurring over many years, Complainant waited until 10 days before the end of the five-year statute of limitations to the file its complaint in this case. The accident occurred on September 27, 2015 and EPA filed the complaint in the present matter on September 17, 2020.

potential for harm and extent of deviation from the RCRA requirements. The EAB has held, "while penalty policies facilitate the application of statutory penalty criteria and serve as guidelines for the Agency, they are guidance. As such, they should not be treated as rules and need not be 'rigidly followed." *In re Andrew B. Chase*, 2014 WL 3890099 (EAB 2014) at *15. "[A]n ALJ need not strictly follow the relevant penalty policy and may depart from it as long as he or she adequately explains the reasons for doing so." *Id.*

A review of RCRA ALJ initial decisions shows EPA has a history of seeking high penalties that were significantly reduced by the that ALJ after hearing.[3] These cases show that ALJs frequently depart from the RCRA Penalty Policy to award substantially smaller penalties than requested by the EPA Regions once all of the facts of the case are set out in the appropriate narrative context at hearing.

G. Motions for Accelerated Decision on Penalty Are Disfavored.

Complainant recognizes in its Motion that motions for accelerated decision are seldom granted and the bar for granting them is high. EPA Brief at 8. The high bar is for good reason. Liability for pollution laws such as RCRA is strict and often relatively easy for the government to establish, but penalty assessment is not so straightforward. Numerous equitable and factual interpretations and due process concerns come into play that require a complete record be developed, and "[g]enerally there is reluctance to impose civil sanctions without providing the violator an opportunity for an oral evidentiary hearing." *In re MRM Trucking*, 1993 WL 426020

[3] *See, e.g.*, *In re Aguakem Caribe, Inc.*, 2011 WL 7444586 (ALJ, Dec. 22, 2011) ($332,996 proposed penalty reduced to $32,500); *In re Mercury Vapor Processing*, No. RCRA-05-2010-0015 (ALJ, Dec. 14, 2012) ($743,293 proposed a penalty reduced to $62,000); *In re Carbon Injection Systems,* No. RCRA-05-2011-0009 (ALJ, March 15, 2015) (ALJ assessed zero penalty in a case where EPA asked for $1,915,148); *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772 (2013) (zero penalty assessed); *In re Ram, Inc.*, 14 E.A.D. 357 (2009) (proposed penalty of $175,063 reduced to $86,012); *In re Andrew B. Chase*, 2014 WL 3890099 (ALJ, 2014) (proposed penalty of $263,069 reduced to $131,014); *In re M.A. Bruder and Sons, Inc.*, 2001 WL 1659339 (ALJ, 2001) ($64,900 proposed penalty reduced to $8,950). If one looks at non-RCRA ALJ initial decisions, a similar pattern is found. Other than default orders, ALJs seldom agree with EPA on its proposed penalty.

(ALJ, Aug. 18, 1993). Indeed, a review of the ALJ caselaw shows that ALJs frequently deny EPA's motions for accelerated decision on penalty for many of the same reasons Respondent raises here.[4] For this reason alone, and as set out above, Complainant's Motion as to penalty should be denied.

CONCLUSION

Respondent does not contest liability or that a fair and reasonable penalty should be paid. Respondent has admitted liability because it recognizes it made mistakes in the handling of the truck fire waste and it violated the law in the process. Respondent prides itself on running a law-abiding, ethical business. Indeed, it has no history of prior violations and no violations since this 2015 incident. It has learned from its mistakes here and taken the necessary steps to avoid future violations. The penalty phase of the case is where 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 that reflects the full context of the admitted violations. Complainant's Motion therefore should be denied.

[4] *See, e.g., In re Dave Erlanson, Sr.*, 2018 WL 4859961 (ALJ, Sept. 27, 2018) (motion denied because genuine issue of material facts exists regarding the degree of harm to the environment)**;** *In re Lay Brothers, Inc.*, 1999 WL 363891 (ALJ, March 12, 1999) (genuine issues of fact re penalty exist where respondent argues, *inter alia*, that its status as a "responsible corporate citizen" should be considered); *In re Paco Swain Reality, L.L.C.*, 2014 WL 4649467 (ALJ, July 23, 2014) (EPA failed to set out sufficient facts to support penalty and Respondent contested ability to pay)**;** *In re Berntsen Brass & Aluminum Foundry, Inc.*, 1998 WL 289234 (ALJ, April 21, 1998) (denying motion for acc. dec. as to penalty where respondent argued for reduction in penalty because respondent remedied violation as soon as it was brought to respondent's attention); *In re Micro Pen of U.S.A.*, 1999 WL 362851 (ALJ, March 22, 1999) (reserving determination of penalty for hearing where amount of penalty was disputed).

RESPECTFULLY SUBMITTED this 9th day of March 2021.

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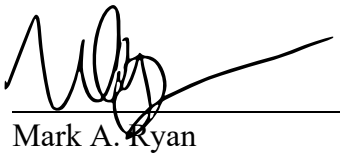

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March 2021, I filed Respondent's Response to Complainant's Motion for Accelerated Decision via the OALJ E-filing system and via email to:

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