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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 PREHEARING BRIEF**
	)	
_____	)	

Pursuant to the Presiding Officer's Order dated May 9, 2022, Respondent New Prime, Inc. (Prime) submits this Prehearing Brief. Respondent has admitted liability in the present case, so the only issues to resolve at hearing deal with the appropriate penalty. For the reasons set out below, Complainant EPA's proposed penalty of $631,402 should be rejected in favor of a more reasonable penalty based on the mitigating circumstances and facts to be adduced at hearing.

TABLE OF CONTENTS

INTRODUCTION

In the present case Complainant proposes that the Presiding Officer assess a penalty of $631,402 for the RCRA violations Respondent readily admits it made. If accepted by the Presiding Officer, this would be one of the largest RCRA penalties every assessed in a contested administrative proceeding. And it would be assessed against an otherwise law-abiding company that made an honest mistake that resulted in the underlying violations. More specifically, Respondent intends to establish at the hearing:

- it has no prior history of violations of this nature notwithstanding that it has been in business for over 50 years as one of America's largest motor carriers and its trucks travel hundreds of millions of miles each year,
- it does not regularly deal in the transportation and management of hazardous waste as part of its business, and should a hazardous waste situation of any significance or complication occur, it is the company's practice to hire a third-party administrator with hazardous materials expertise to oversee and manage any clean-up,
- although the company deviated from the above-described practice here in part because of confusion at the fire scene, the company has learned from the 2015 fire and aftermath at issue here, and put in place procedures to prevent a reoccurrence of this isolated incident,
- it immediately and responsibly remedied the violation when notified by EPA,
- it presently is in full compliance with the law,
- it has not had a violation of any environmental law of any significance in the seven years since the underlying accident occurred in the present case,

- it has trained its relevant employees and put in place procedures to ensure this unfortunate event does not recur, and
- the burned barrels of paint temporarily stored at its Salt Lake City facility did not cause any actual harm to public health or the environmental nor did they pose any substantial risk of harm to human health or the environment.

The facts that will be established at hearing will show that EPA's reliance on its complex RCRA Penalty Policy is misguided. In addition to the errors EPA admits it made in calculating the penalty, Prime will prove at hearing that EPA's proposed penalty inappropriately applied the Major/Major designation -- the highest penalty assessment possible -- to most of the violations noted in the Complaint. Prime will show at hearing that a much lower penalty assessment under the statute and the Penalty Policy is appropriate given the evidence that will be adduced at hearing.

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, caused no actual harm to human health or the environment and posed a low potential risk of the same.

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 are not necessarily established by

> 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 Presiding Officer must consider the RCRA Penalty Policy but she is not bound by it and may deviate from it if the evidence adduced at hearing supports a lower penalty. The evidence that Prime will develop at hearing will show that a smaller penalty is appropriate in this case. Complainant cannot meet its burden of proving that the outsized penalty it proposes here is either fair or justified under the facts of this case.

ARGUMENT

I. THE FACTS WILL SHOW EPA'S LARGE PROPOSED PENALTY IS UNJUSTIFIED.

The evidence Respondent will adduce at hearing will show that the large penalty proposed by EPA is not supported by the facts. Taken as a whole, Prime's mistake in not properly transporting and temporarily storing the burned paint drums is a RCRA violation that mandates a much more modest penalty.

A. The Events Around the 2015 Fire Dictate a Smaller Penalty.

The documents and the testimony of Prime's witnesses will describe 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. Those events are important because they 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. *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 seven years ago in the middle of the night on a remote stretch of highway in rural Idaho. The testimony of Steve Field will show that 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. 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.

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 the nature of the paint waste and how to best deal with the aftermath of the trailer fire. Ultimately, the on-scene fire chief and incident commander concluded: "It 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 burned trailer to assess whether it could determine the cause of the trailer fire.

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. Based on the recommendation of local regulators regarding who was best qualified to perform the clean-up, Prime trusted B&W including to help coordinate the transportation of the damaged trailer and its remaining contents including the intact barrels of paint to its Utah facility in

October 2015. 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.

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. 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 did not hire, as it normally would, a third-party RCRA-trained company to manage this aspect of the fire aftermath. Therein lies Prime's mistake.

It is important to note, and the evidence adduced at hearing will show, that Respondent's mistakes were not an attempt to avoid compliance with the law, to save money or to shirk the company-wide philosophy of doing what is right. They were mistakes that, once brought to Prime's attention, were immediately remedied.

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 Respondent knew or should have known of the RCRA implications from these documents. But that argument elides Respondent's lack of significant first-hand experience with RCRA, 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.

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* CX04Cor 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 regrets that it did not manage the above-described situations better and consistent with its corporate philosophy of doing things right and in compliance with the law. With that said, its 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.

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

Under EPA's RCRA Penalty Policy the designation Major/Major for the two categories "potential for harm" and "extent of deviation" represents the worst possible violation. Both designations are the highest (worst) assignable under the Policy. No designation ranks more serious.

In the present case, Complainant has characterized the wrongful handling of a truckload of paint as Major in nine of the ten boxes in its penalty matrix. *See* CX04Cor at 5. Four of the five causes of action are designated Major/Major and one as Moderate/Major under Complainant's RCRA Penalty Policy analysis. *Id.* 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" in nine of the ten categories based on the facts it has reviewed. *See* RCRA Penalty Policy at 15-17.

Determining which box in the RCRA Penalty Policy matrix to put a violation in requires considerable judgment and discretion on the part of the EPA compliance officer doing the calculations.[1] 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. Taking Count 3 as an example, the range under the Policy in the moderate/major box is $440 to $2,420 and EPA chose $2,295. Those are huge spreads within a box (moderate/major) assuming EPA even chose the correct box. Which box in the Policy one chooses and what range within that box makes a huge difference in the final proposed penalty.

As Complainant has admitted, "[m]uch of the proposed testimony . . . warrants some degree of analysis by Complainant . . ." EPA Brief in Supp. of Mot. for Acc. Dec. at 43. Respondent agrees. One can apply a wide degree of discretion in interpreting the statutory penalty factors and the RCRA Penalty Policy. Reasonable minds can disagree significantly on how to apply EPA's policy to the facts of any particular case, especially the present one. And the evidence that will be adduced at hearing will show that EPA incorrectly exercised that discretion. The facts of this case allow 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 legitimately disputes Complainant's contention that the facts of this case support $631,402 penalty based on discretionary factors set out both in the statute and in the

[1] The EPA employee who performed the penalty policy analysis here, Exhibit CX04Cor, was Linda Jacobson, but she will not be testifying. Rather, EPA has substituted Kristen McNeill, who did not perform the penalty policy analysis at the heart of this case, to testify as to how it was prepared.

Penalty Policy. The evidence that will be introduced at hearing will show there are mitigating factors to support findings of lesser designations under the Penalty Policy, if the Presiding Officer chooses to follow that policy in this case. EPA cannot carry its burden of persuasion on the amount of the proposed penalty.

C. The Burned Paint Did Not Harm Human Health or the Environment.

Potential harm to human health and the environment is one of the key issues in this case. Complainant has argued 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. Count 3 makes up the largest component of the proposed penalty ($426,056), Exhibit CX04Cor 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, Dr. Elizabeth Walker will testify as an expert toxicologist in this case and she has prepared an expert report. RX20. In that report, Dr. Walker opines that the storage of the paint at the Salt Lake City depot posed a low risk to human health and the environment. *Id.* at 1.

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 testimony Prime will offer at hearing will show that 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. Complainant also assumes, contrary to the findings of Dr. Walker, that the stored paint posed a hazard to people in close proximity to it. Dr. Walker will testify 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.

D. Respondent's Lack of Prior Violations and Other Equitable Factors Support an Assessment of a Smaller Penalty.

Complaint has argued that when it calculated the proposed penalty, and after reviewing Respondent's Prehearing Exchange, it saw no reason to change her calculations because it had already considered elements of the penalty policy such as good faith efforts, corporate culture, and lack of prior history of violations. EPA Br. in Supp. of Mot. For Acc. Dec. at 67, 70. We disagree.

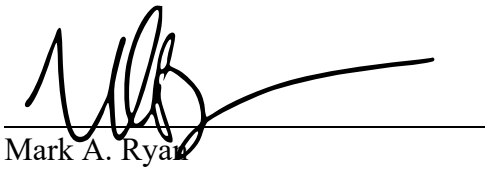
The RCRA penalty policy is discretionary by nature. The EPA compliance officer in this case, Linda Jacobson, applied the facts of the case to the broad range of penalty factors to come up with a penalty number. She gave no credit to the company for good faith efforts, lack of prior violations, or its cooperative and timely responses to EPA's directives, among other things. *See* CX04 at 8-9. Complainant avers that its substitute penalty witness, Kristin McNeill, will testify to the exact same conclusions that Ms. Jacobson reached. 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").

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.

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 aftermath of the 2015 trailer fire regarding the handling of the paint waste and it violated the law in the process. Respondent prides itself on running a law-abiding, ethical business. Indeed, Prime has no history of violations of this nature and no such violations in the seven years since this 2015 incident. It has learned from its mistakes here and taken the necessary steps to avoid future violations. At the hearing, Respondent will provide important and mitigating context to the violations here and demonstrate that the Presiding Officer should assess a more reasonable and modest penalty.

RESPECTFULLY SUBMITTED this 7th day of October 2022.



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October 2022, I filed Respondent's Prehearing Brief via the OALJ E-filing system and via email to:

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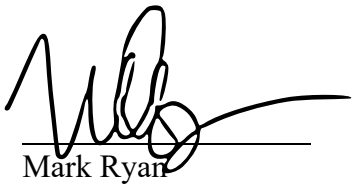

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