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BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Docket No. EPCRA-10-2007-0204

FIRESTONE PACIFIC FOODS, INC.,
Vancouver, Washington,

BRIEF

Respondent.

INTRODUCTION

The Administrative Law Judge has granted the motion for accelerated decision made by the Environmental Protection Agency (EPA). Firestone Pacific Foods, Inc., (Firestone Pacific) will make argument concerning other liability issues at the time of the hearing. It submits this brief on issues concerning the penalty EPA is seeking.

At bottom, EPA seeks penalties totaling \$42,690.00 for nothing more than failing to file a form. EPA does not contend that there has been any release of hazardous chemicals or that anyone has suffered any injury of any kind. The penalties EPA is seeking are simply not warranted under any sensible evaluation of this case.

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ARGUMENT

I. EPA Is Seeking Penalties Greater Than Allowed by Statute.

Firestone Pacific is charged under Section 312 of the Emergency Planning and Community Right-to-Know Act, or EPCRA. The statute requires reporting to three agencies. These are the appropriate local emergency planning committee; the State Emergency Response Commission; and the fire department with jurisdiction over the facility. The reports must be filed by March 1 for the preceding year. 42 U.S.C. §11022(1).

EPA claims that Firestone Pacific did not file the required forms with the three entities in question for calendar 2005. It seeks to levy a penalty of \$12,500.00 for failing to file with each agency to bring the total to \$37,500. It is also seeking penalties for prior years at the rate of \$1,500.00 per year. It does not seek penalties on a "per agency" basis for prior years. This method of assessing penalties appears to be based on language in EPA's Emergency Response Policy at pps. 9, 23. As EPA recognizes, however, its Emergency Response Policy does not carry the force of law. It is not the product of rule making. It is intended only for the internal use of EPA's employees. Finally, EPA reserves the right to deviate from the policy at any time. Emergency Response Policy, p. 3.

As indicated, Firestone Pacific is charged with a violation of 42 U.S.C. §11022(1), requiring submission of forms to three entities. It may seek a penalty of no more than \$25,000.00 "for each violation." 42 U.S.C. §11045(c)(1). Any reasonable construction of the term "violation" for the purposes of 42 U.S.C. §11045(c)(1) must refer to an instance of failing to file reports with any or all of the stated agencies. Any entity that understands the need to make the reports required

1 by EPCRA will understand that three reports are necessary. That entity can be expected to report to
2 all three necessary agencies or to none. There is no rational reason why an entity would decide to
3 report to, for example, the local fire department, but refuse to send a copy of the report to, for
4 example, the state agency. Certainly, there can be no rational deterrence function in treating the
5 failure to report to each agency as a separate violation. Once again, no rational reason exists to
6 report to one agency but not to another.

8 Congress has established a ceiling on penalties of \$25,000.00 per violation. The assessment
9 of penalties on a “per agency” basis has the effect of exceeding that ceiling. That, of course, is
10 impermissible.

11
12 EPA may argue for a construction of 42 U.S.C. §11045(c)(1) to allow for penalties on a
13 “per agency” basis. Such a construction is hardly clear from the language of 42 U.S.C. §11022 or
14 42 U.S.C. §11045(c)(1). In any event, that argument runs afoul of the well-recognized rule that
15 statutes imposing penalties—including those imposing civil penalties as here—must be strictly
16 construed, and a party may not be subject to any penalty not clearly authorized by statute. *C.I.R. v.*
17 *Acker*, 361 U.S. 87, 80 S.Ct. 144, 4 L.Ed.2d 127 (1959); *Haberern v. Kaupp Vascular Surgeions*
18 *Ltd. Defined Benefit Plan*, 24 F.3d 1491 (3d Cir. 1994); *Key Bank of Washington v. Concepcion*,
19 847 F.Supp. 844 (W.D. Wash. 1994). This rule applies both to liability and the penalties that are
20 imposed. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It also is
21 an outgrowth of the reluctance to increase penalties in the absence of a clear and definite legislative
22 directive. *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978).is seeking civil
23 penalties under the terms of EPCRA.
24
25

1 II. Other Factors Require Reduction of the Penalties EPA is Seeking.

2 EPA has chosen to calculate a base penalty of \$12,500.00. This is apparently based upon its
3 conclusion that the report was filed more than thirty (30) days after it was due and that the amount
4 of hazardous substances maintained by Firestone Pacific actual day of compliance of greater than
5 thirty (30) days and is more than the reporting threshold by a factor of more than one but less than
6 five times. The calculation made takes into account no "other circumstances" or "adjustment
7 factors" that could serve to reduce the penalty. This means that the suggested penalty should not be
8 applied.
9

10 The purpose of EPRCA is to allow planning for any release of hazardous materials. EPA
11 personnel have described the facility as "state of the art." This means that the facility includes all
12 necessary measures to eliminate the possibility of any release of hazardous substances.
13

14 Furthermore, there have been absolutely no releases. This means that no harm has come to
15 anyone by any perceived failure to file the required forms.

16 The purpose of EPCRA is to provide information regarding the presence of hazardous
17 chemicals in the community. 61C Am.Jur.2d *Pollution Control* §1506. Firestone Pacific's
18 operation is hardly a secret. It is well known in Clark County. In fact, when EPA personnel
19 inquired of local agencies about receiving the report, the Vancouver Fire Department reported that
20 it was aware of Firestone's operation. (Ex. 14) If the local agencies are aware of Firestone
21 Pacific's operation, then they can plan for any release, however unlikely that might be.
22

23 We can safely assume that the local agencies had necessary knowledge of the fact that
24 Firestone Pacific utilized ammonia by the spring of 2006. EPA personnel had the opportunity to
25

1 tour the Firestone plant in April of 2006. If we assume that they were desirous of ensuring local
2 agencies had the ability to plan, we can also assume that they notified the local agencies of their
3 findings.

4 As indicated in prior briefing, EPA personnel assured Firestone Pacific on several occasions
5 that no complaint would be filed if Firestone Pacific filed the necessary form "soon." That means
6 that there was certainly no urgency to filing the forms. It also means that a delay in the filing was
7 going to have an adverse effect on the ability of local agencies to plan for a release. Furthermore,
8 Firestone Pacific completed the form in June and sent it out. It was apparently received by one
9 agency during the summer of that year.
10

11 The Response Policy speaks of a 15% reduction in penalty based upon the dollar volume of
12 sales generated by a company and the number of people it employs. Based on those criteria,
13 Firestone Pacific is entitled to the 15% penalty reduction. However, the Response Policy goes on to
14 state that it is not available after a complaint is filed. Such a position is nonsensical. Complaints
15 are the mechanism by which penalties are assessed. State another way, EPA has it within its power
16 to cheat an entity out of the 15% reduction simply by filing a complaint.
17

18 There is one other relevant circumstance that must be considered. This circumstance
19 focuses on EPA, not Firestone Pacific. Discussion of this circumstance requires a discussion of the
20 origin and purpose of EPA.
21

22 The EPA was created in 1970 as an independent agency to consolidate the major
23 environmental responsibilities of the federal government. In creating the agency, President Richard
24 Nixon stated that the agency was necessary because the federal government was not then
25

1 “structured to make a coordinated attack on the pollutants that debase the air we breathe, the water
2 we drink, and the land that grows our food.” The agency was given responsibility to coordinate a
3 myriad of federal programs dealing with environmental issues. *Organization Plan #3 of 1970.*

4
5 The creation of the EPA came at a time when the public had begun to recognize the
6 necessity of environmental preservation. In the same way that Upton Sinclair’s *The Jungle* led to
7 the creation of the Food & Drug Administration in the early twentieth century, *Silent Spring*, by
8 Rachel Carson, first published in 1962 was instrumental in bringing environmental concerns to the
9 forefront of public discourse. This led to both the creation of the EPA and the passage of the
10 landmark National Environmental Policy Act (NEPA) also first passed in 1970. 42 U.S.C. §43831
11 *et seq.* In its early years, EPA was generally perceived as a bulwark against those who would
12 pollute the environment.
13

14 In more recent years, the EPA has lost its way. Few would disagree that the most pressing
15 environmental problem affecting the entire planet is the presence of greenhouse gases that leads to
16 climate change. Carbon dioxide is the most prevalent of those greenhouse gases. Nonetheless, and
17 in contravention of mainstream scientific opinion, the EPA denied a petition for rule making to
18 regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. 42 U.S.C. §7401
19 *et seq.* This caused twelve states, four local governments, and a number of private organizations to
20 sue the EPA. They alleged that it had abdicated its responsibility to regulate greenhouse gases. The
21 matter ultimately reached the United States Supreme Court. In December of 2007, the Court ruled
22 that the failure of the EPA to engage in rule making concerning greenhouse gases was “arbitrary
23
24
25

1 and capricious.” *Massachusetts et al. v. Environmental Protection Agency et al.*, ___ U.S. ___, 127
2 S.Ct. 1438, 1463, 167 L.Ed.2d 248 (2007).

3 *Massachusetts et al. v. Environmental Protection Agency et al.*, *supra*, was decided in
4 April of 2007. The plaintiff states waited for one year for the EPA to do something. It did virtually
5 nothing except adhere to its previous position. This caused the plaintiffs to initiate another action in
6 Federal District Court in Massachusetts to force the EPA to do that which the Supreme Court
7 ordered it to do.

8
9 Meanwhile, a number of states, most notably California, took steps to create automobile
10 emissions limits. The states requested a waiver from the EPA so that this legislation could become
11 effective. The EPA has steadfastly refused to grant this waiver.
12

13 In this case, the EPA is seeking to impose significant fines on a small, family-owned
14 corporation, Firestone Pacific Foods, Inc., that has caused no environmental harm. It is requesting
15 substantial civil penalties because the corporation did not timely file forms. No one contends that
16 there has been any release of hazardous chemicals at Firestone Pacific’s plant or that Firestone
17 Pacific does not maintain adequate precautions to see that no release occurs. No one contends that
18 Firestone’s operation was kept a secret from the local agencies that would have to deal with any
19 release. Therefore, instead of addressing an imminent environmental problem that will in all
20 probability lead to a catastrophe if not dealt with, the EPA chooses to prosecute a small, family-
21 owned corporation that has not caused any environmental damage of any kind.
22


23 EPA indicates that it seeks penalties for reasons of deterrence and to insure that emergency
24 planning can proceed. Firestone Pacific has learned what forms it must file and has filed them for
25

1 calendar 2006 as the record shows. It does not need to be deterred. As the assessment of fines was
2 reported in the local news, other Clark County companies have learned of their EPCRA duties. As
3 its operation was already known, there could be no interference with emergency planning. On the
4 other hand, it is the EPA whose actions must be questioned. It is charged with the duty of
5 environmental protection. Its responsibilities in the area of environmental protection render those
6 of Firestone Pacific largely inconsequential. EPA must deal with pressing environmental needs
7 and, in the final analysis, must comply with the direction of the United States Supreme Court.
8 EPA's actions to the contrary debase the importance of environmental protection. It cannot stand
9 before this tribunal and request the assessment of significant penalties on a small business until it
10 has complied with its own obligations under law.
11

12
13 Firestone Pacific Should Not Be Assessed for "Economic Benefit".

14 EPA seeks \$690.00 for what it considers to be the "economic benefit" of non-compliance.
15 How it came to this figure is not immediately apparent. No sensible person could ever conclude
16 that Firestone Pacific saved \$690.00 by not filing forms that consume less space than a letter sized
17 piece of paper and putting them in the mail. The forms in question are simply one more element of
18 overhead that must be borne. They present no particular economic burden.
19

20 DATED this 1 day of May, 2008.

21
22
23 
24 _____
25 BEN SHAFTON, WSB #6280
Of Attorneys for Firestone Pacific

CERTIFICATE OF SERVICE

THE UNDERSIGNED, states as follows: I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action. On the 1st day of May, 2008, I caused the document to which this Certificate is affixed to be served as follows:

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LORRIE VAUGHN