BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	Docket No. EPCRA-10-2007-0204
FIRESTONE PACIFIC FOODS, INC., Vancouver, Washington,	CONCLUDING BRIEF
Respondent.	

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INTRODUCTION

This brief will address three separate issues in the following order. These are: (1) violations for 2001-2004; (2) the assessment of the penalty; and (3) credibility of witnesses.

VIOLATIONS FOR 2001-2004

I. The Precise Issue.

The Environmental Protection Agency (EPA) has alleged that Firestone Pacific Foods, Inc. (Firestone) failed to file Tier II reports for the years 2001-2004. It has not sought a penalty for 2001 because doing so would offend the relevant statute of limitations. (TR p. 136) Subsequent discussion will therefore focus only on the years 2002-2004.

Firestone is required to file the forms with the appropriate local emergency planning committee, the State Emergency Response Commission, and the fire department with jurisdiction over the facility. 42 U.S.C. §11022(a)(1). Forms must be filed for a year by March 1 of the succeeding year. 42 U.S.C. §11022(a)(2). Firestone does not have to file if the amount of hazardous chemicals at its facility is below the threshold EPA has established. 42 U.S.C. §11022(b). Ammonia is the hazardous chemical in question here. The threshold is five hundred (500) pounds. 40 CFR Part 355, Appendix A and B.

Firestone first filed Tier II forms after March 1, 2005. Firestone must concede, therefore, that a violation is present for the years 2002-2004 if the report was required for those years. Firestone must also concede that it had more than five hundred (500) pounds of ammonia at its

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plant during 2004. The issue presented, then, is whether there was five hundred (500) pounds of ammonia present in the system during 2002 or 2003.

II. There Is No Credible Evidence That the Threshold Was Reached Prior to 2004.

While there was five hundred (500) pounds of ammonia at the site in 2004, there is no reliable evidence as to how much ammonia was present during 2002 and 2003.

Firestone began an expansion in 2003 that was completed in 2004. The expansion doubled Firestone's ability to store product. Firestone added a flooded coil system at that time. That addition greatly increased the amount of ammonia the system used. Firestone's contractor, PermaCold Engineering, Inc. (PermaCold) submitted a letter, which is Exhibit 8, indicating an approximate charge of 1,820 pounds. That is the amount of ammonia after the 2003-2004 expansion was completed. (TR, pps. 192-4)

As EPA appears to agree, there is no direct evidence as to exactly how much ammonia was contained within the Firestone refrigeration system during the years 2002 and 2003. The entity most likely to know would be PermaCold, Firestone's refrigeration contractor. EPA could have solicited a statement from PermaCold or called a PermaCold representative to testify on this topic. It did not, however.

EPA asserts that there is sufficient "circumstantial evidence" to show that the threshold was reached during 2001-2003. A close analysis of the evidence shows the evidence EPA relies on is insufficient to prove anything.

The first piece of evidence that EPA relies on comes from Theodore Mix, its investigator. Mr. Mix testified that a PermaCold representative told him that Firestone's system could not

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function efficiently with less than five hundred (500) pounds of ammonia. (TR p.36) That was the sum of Mr. Mix's testimony. He did not learn — or did not tell us — whether that statement applied to the system as it existed prior to the 2003-2004 expansion. (TR, pps. 34-36) Mr. Mix's testimony is therefore simply not helpful.

Mr. Mix testified that he spoke to the PermaCold representative shortly before the hearing. At this time, he could be expected to know that the amount of ammonia in the system during the years 2001-2003 was a critical issue. One would think that Mr. Mix would have asked the PermaCold representative a simple and direct question—whether the system contained more than five hundred (500) pounds of ammonia during 2002 and/or 2003. Presumably, he would have obtained one of three possible answers—"yes," "no", or "I don't know." If the answer had been "yes," Mr. Mix would surely have reported the answer.

There are two conclusions that can be drawn from the testimony that Mr. Mix gave. First, he did not ask the PermaCold representative whether there was more than five hundred (500) pounds of ammonia in the system during the years 2002 and 2003. That conclusion is not likely given the issues in the case. The more likely conclusion is that the PermCold representative told him that there was not five hundred (500) pounds of ammonia in the system during the years in question or that the representative didn't know and/or had no good evidence one way or the other. Mr. Mix did prepare a memorandum of his conversation with the PermaCold representative. (TR p. 31) EPA did not even attempt to present it at the hearing. That memorandum may have cleared up this issue. Interestingly, it did offer his memorandum of his inspection of the Firestone facility and memoranda of his conversations with others. (Complainant's Exhibits 3, 13, 14, 15, 21, 22, 24)

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The next piece of evidence EPA relies on is a memorandum from Suzanne Powers concerning her conversation with a representative of Seattle Refrigeration, a prior refrigeration contractor. This was admitted over objection as Complainant's Exhibit 27. Ms. Powers testified that the representatives at Seattle Refrigeration Company stated that he installed a high pressure ammonia receiver in 1993 that would hold 1,100 pounds of ammonia at 80% full. According to Ms. Powers, the representative also stated that there was more than five hundred (500) pounds when he changed a compressor out later that year but could not remember the exact amount.

This testimony might have some bearing on how much ammonia was in the system in 1993. It should be disregarded for several reasons, however. First and foremost, the statement about the amount of ammonia is undocumented. EPA presumably could have asked for and received records from Seattle Refrigeration concerning this claim. Secondly, it is based on a recollection of events fifteen years in the past. Such statements about one customer with whom Seattle Refrigeration no longer does business should simply not be credited. Finally, the system has changed since 1993. The precise nature of these changes has never been clarified with any precision.

The third piece of information concerns the equipment that has been present on the site and inspected by the Department of Labor & Industries. There is one Morefab 1993 low pressure receiver still on site. (TR, p. 202) However, this equipment was purchased used in 2001. (TR, pps. 201, 203) The year of the equipment is therefore not significant. There is nothing in this evidence as to how ammonia was present on site. This evidence doesn't help either.

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III. Conclusion.

There simply is no credible evidence by which a trier of fact could conclude that the Firestone system contained more than five hundred (500) pounds of ammonia at any time prior to January 1, 2004. Therefore, there should be no finding of a violation for those years.

PENALTY ASSESSMENT

I. Introduction.

This section will address penalty sought for 2005. Firestone concedes a penalty of $1,500.00 for 2004.

II. Standards for Penalty Assessment.

In assessing a penalty, the Presiding Officer must consider the nature, circumstances, extent and gravity of the violation or violations, and with respect to the violator, the ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings of any result from the violation, and other such matters as justice may require. 42 U.S.C. §11045(d)(1)(c).

The Presiding Officer is also required to consider EPA's Enforcement Response Policy. 40 C.F.R. §22.27(b). That policy has not been promulgated as a regulation and does not have the force of law. (Complainant's Exhibit 5, p. 3) Therefore, the Presiding Officer must refrain from treating the Policy as a rule and must be prepared to "reexamine the basic propositions" on which the Policy is based in any case for which those propositions are placed in issue. Furthermore, the Presiding Officer is free to apply the Enforcement Response Policy or not to the case at hand. *In re: Steeltech Ltd*, 8 E.A.D. 577 (1999).

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Finally, EPA bears the burden of going forward with evidence to demonstrate the propriety of proposed penalty. It must also ultimately prove that the penalty is appropriate in light of the particular facts and circumstances of the case. *In re: Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757 (1998).

III. The Proposed Penalty for 2005 Is Not Consistent with Relevant Statutes.

a. EPA's Allegations.

EPA's Complaint alleges fifteen counts of violation of 42 U.S.C. §11022(a) for failure to file necessary forms for the years of 2001, 2002, 2003, 2004, and 2005 by March 1 of the succeeding year. It then proposed penalties based on 42 U.S.C. §11045(c)(1). The complaint contains nothing indicating that EPA is alleging that any of these were continuing violations or that it is seeking daily penalties as allowed by 42 U.S.C.§11045(c)(3). The Complaint must therefore be viewed as alleging a series of "one-time" violations of 42 U.S.C. §11022(a)(1). EPA's Penalty Calculation Worksheet is consistent with the Complaint. It specifically makes no claim for daily penalties.

The purpose of the Complaint is to put a respondent on notice of the basis of the complaint and the legal grounds for recovery, thus providing enough detail to fairly inform a respondent of the claims it must defend against. *In re Roger Antikiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218 (EAB 1999); *In re Environmental Protection Services, Inc.*, 2008 W.L. 464834, TSCA Appeal No. 06-1 (EAB 2008). By making no allegation that penalties were sought on a daily basis and by making no reference to 42 U.S.C. §11045(c)(3), EPA

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has limited itself to the penalties that might be allowed for a "one-time" violation of 42 U.S.C. §11022(a)(1).

b. The Statute Does Not Allow "Per Agency" Penalty Assessment.

EPA is seeking a penalty of $37,500.00 for 2005. It is seeking three "one time" violations of $12,500.00 for each of the three agencies that did not timely receive Tier II forms for that year. Its Enforcement Response Policy, set out in Exhibits 5 and 6, allows for determining a penalty in this fashion. The policy is not the product of rule making and therefore does not carry the force of law as noted above. As will be shown, the method of penalty calculation set out in the Enforcement Response policy is not consistent with the statutory scheme. And as applied in this case, it allows for a penalty that exceeds the statutory maximum.

Firestone is charged with a violation of 42 U.S.C. §11022(a)(1). That statute provides as follows:

> The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical. . . shall prepare and submit an emergency and hazardous chemical inventory form. . . to each of the following:
>
> (A) The appropriate local emergency planning committee.
>
> (B) The State emergency response commission.
>
> (C) The fire department with jurisdiction over the facility.

Compliance with this requirement can be achieved by sending Tier II information to each of these three agencies. 42 U.S.C. §11022(a)(2).

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The verbiage of this statute makes it clear that an entity is in violation if it does not provide the required forms to each of three distinct agencies. An entity that files no forms with any agency is in violation. An entity that files the forms with only one agency is in violation. An entity that files forms with two agencies is in violation.

For the purposes of this analysis, the most important aspect of the language of 42 U.S.C. §11022(a)(1) is what it doesn't say. There is nothing in that statute that says that the failure to file with each of the three agencies amounts to a separate violation of the statute. EPA, however, proposes to assess a penalty for 2005 on the basis that there were three separate violations, one for each agency. That is not, however, how the statute defines violations. The Enforcement Response Policy therefore is not consistent with the statutory scheme.

This view of the statutes follows the well-recognized rule that statutes imposing penalties — including civil penalties as here — must be strictly construed, and a party may not be subject to penalties not clearly authorized by statute. *C.I.R. v. Acker*, 361 U.S. 87, 80 S.Ct. 144, 4 F.Ed.2d 127 (1959); *Haberern v. Kaupp Vascular Surgeons, Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3rd Cir. 1994); *Key Bank of Washington v. Concepcion*, 847 F.Supp. 844 (W.D.Wash. 1994). This rule applies both to liability and penalties that may be imposed. *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It is also an outgrowth of the reluctance to increase penalties in the absence of a clear and definite legislative directive. *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978). In other words, if Congress had wanted to allow a penalty for each agency that did not receive a Tier II form, it would have explicitly said so. Since it did not, no such penalty can be imposed.

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Penalties must be assessed based upon the nature, circumstances, extent, and gravity of the violation. 42 U.S.C. §11045(b)(1), EPA's Enforcement Response Policy suggests penalty proportionality from a minimum penalty of $2,014.00 to a maximum of $32,500.00 based upon the amount of hazardous chemicals an entity maintains. (Complainant's Exhibit 6, p. 20-C) This proportional method can make sense to a point and in light of other factors. However, any semblance of proportionality is frustrated should a multiplier be used to ratchet up the penalty amount.

This case provides an example of the infirmity of the method used in the Enforcement Response Policy. Any entity that understands the reporting requirement will file Tier II forms with all relevant agencies or none at all. There can be no rational reason why that entity would file only with the fire department, for example, but not with the state agency. That is exactly what happened with Firestone. Because it was not aware of the requirement, it filed with no one. When it made filings, it directed them to all relevant agencies. As the Penalty Calculation Worksheet shows, the amount of ammonia Firestone has maintained is 3.3 times the relevant threshold. The matrix assesses penalties based on having one to ten times the threshold amount. It imposes the maximum of $32,500.00 on entities with ten times the threshold. One could at least understand a penalty of one-third (3.3 divided by 10) of the maximum or $10,833.00. But if that was the penalty amount for each agency, Firestone would be at the maximum. That makes no sense if proportionality based on amount is a measure of penalty assessment. Firestone would receive the same penalty as an entity that had fifteen times the threshold. And, as will be seen below, the other entity could not be assessed more than the statutory limit.

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c. EPA's Proposed Penalty Exceeds the Statutory Ceiling.

The relevant penalty provision is 42 U.S.C. §11045(c)(1). It allows for a penalty of no more than $25,000.00 "for each violation." 42 U.S.C. §11045(c)(1). EPA claims that the ceiling is $32,500 for violations occurring after 2004. 40 C.F.R §19.4.

Any reasonable construction of the term " each such violation" for the purposes of 42 U.S.C. §11045(c)(1) must refer to an instance of failing to file Tier II reports with all of the relevant agencies. This construction follows from the language of 42 U.S.C. §11022(a)(1). As indicated, that statute makes it clear that compliance requires filing with each agency. Furthermore, there is nothing in the statute that says that the failure to file with each agency amounts to a separate violation.

The rule of strict construction of penal statutes applies here as well. In the absence of a definitive statement from Congress that the penalty ceiling applies on a per agency basis, the statutes cannot be construed in that fashion.

A similar question was presented in *In the Matter of Loes Enterprises, Inc.*, 2006 W.L. 3406334, Docket No. EPCRA-05-2005-0018 (2006). The complaint in that case alleged that required submissions were late and were not made until a stated later date. It sought penalties greater than the statutory ceiling of $27,500 in two counts. The Administrative Law Judge in that matter determined that the complaint sufficiently put the Respondent on notice that EPA sought some level of daily penalties. She then held that the statutory scheme allowed penalties greater than the relevant ceiling amount because of the ability of EPA to seek daily penalties under 42 U.S.C. §11045(c)(3).

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Our case is different from *In the Matter of Loes Enterprises, Inc., supra.* EPA has given no hint of a desire to seek daily penalties in the Complaint and specifically indicated it was not seeking such penalties in the Penalty Calculation Worksheet.

In conclusion, the relevant statute defines a violation as the failure to file required forms with three agencies. A violation is present is the forms are not filed with each. EPA cannot impose penalties on a per agency basis. And it cannot use "per agency" calculation to exceed the statutory maximum. The proposed penalty of $37,500.00 violates relevant statutes for both reasons and cannot be imposed.

IV. Penalty Analysis.

a. Base Penalty.

i. Introduction.

The base penalty is computed based on four factors as set out in 42 U.S.C. §11045(b)(1)(C). These are the nature of the violation, the extent of the violation, the gravity of the violation, and the circumstances of the violation.

EPA has chosen a base penalty of $12,500.00. This was derived from its Enforcement Response Policy and Table II at Page 20-C of Exhibit 6. EPA has given no particular or precise reason for seeking $12,500.00 as opposed to any other sum within the range. As will be shown, the facts do not support its analysis.

ii. Nature of the Violation.

The nature of the violation is simply stated. It is the failure to file Tier II forms with the appropriate agencies. No one claims that there has been any release of ammonia at

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the Firestone plant. Presumably, reporting violations should be considered less severe than release violations.

iii. Extent.

EPA interprets the term "extent" to address how late the forms are filed. It is expressed in a matrix set out at Complainant's Exhibit 6, p. 20-C. This definition of "extent" makes no sense in the context of a "one time" violation as here. If the forms are not timely filed, there is a violation. If they are filed one day late, the violation is the same as if they are filed three hundred days late. EPA's view of extent might have some relevance if there was evidence from one of the local agencies involved in this case, that the delay inhibited the ability to plan. No such evidence was presented.

iv. Circumstances.

According to EPA, the term "circumstances" refers to the harm that could occur because of the violation. It includes the inability for local agencies to plan and the harm that could occur if a release occurred. (Complainant's Exhibit 5, p.17)

The inability to plan would be demonstrated by the local agencies in questions revising their emergency response plans once they received the Tier II forms from Firestone. These agencies are the Vancouver Fire Department and the Clark Regional Emergency Services Agency (CRESA). EPA presented no evidence that the presence or absence of information about Firestone caused them to change their emergency plans in any way.

It is significant in this regard that the Vancouver Fire Department was well acquainted with Firestone. It has inspected the Firestone facility and assisted in the preparation of

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emergency evacuation procedures. (TR p. 187; Complainant's Exhibit 14; Respondent's Exhibit 1) The fire department is the agency that has to respond in case of a release. If it was aware of Firestone, it had the opportunity to plan for any release from the Firestone facility.

Finally, the Firestone plant is in on Fruit Valley Road, an industrial area in Vancouver. (TR pps. 50-53) It is not in the middle of a residential area. This, factor, also limits the potential for harm.

The potential for harm is also lessened by measures to prevent a release and proper maintenance. These are discussed below. These measures have been effective. No one is aware of any release at the Firestone plant. (Joint Set of Stipulated Facts and Exhibits, Stipulated Facts, No. 8)

v. Gravity.

EPA believes gravity is directly proportional to the amount of hazardous chemicals on site. (Complainant's Exhibit 5, p. 15) If there has been no release and if measures are in place to prevent a release, that factor is necessarily lessened. There is necessarily less risk from the inability to plan for an event that it unlikely to occur.

In any event, EPA's own actions in this case would lead any reasonable person to conclude that the violation was not particularly "grave." Firestone came to Mr. Mix's attention when he found it on an internet list of cold storage warehouses in Washington. He then determined that Firestone was not in the Tier II database maintained by the Washington State Department of Ecology. Instead of immediately contacting Firestone and determining whether it

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was required to submit Tier II reports, Mr. Mix waited to contact Firestone until he had other reasons to be in the Portland Metropolitan area. (TR pps. 39-41)

There is no evidence that any local agencies or any citizen had concerns about Firestone's operation. None had complained to EPA about Firestone. (TR pps. 41-42) And the Vancouver Fire Department, at least, was aware of Firestone's operation. (Complainant's Exhibit 14; Respondent's Exhibit 1)

When Mr. Mix finally visited the Firestone facility on April 28, 2006, he came away with the belief that Firestone was required to submit Tier II forms. He did not, however, immediately contact the local fire department or emergency response agency to advise what he had learned so that those agencies could incorporate Firestone into their emergency response plans. (TR p. 47) He waited until September to contact them. (Exhibits 13-14)

Finally, there has been no evidence that any of the local agencies changed any emergency plans once they learned how much ammonia was at the Firestone facility.

If the 2005 violation should be seen as sufficiently grave to require a $37,500.00 penalty, Mr. Mix would have been expected to contact Firestone immediately to determine whether it was required to submit Tier II forms. If the absence of filing was so critical to local emergency response planning, Mr. Mix would have contacted the local agencies on the day of his inspection, April 28, 2006, to make sure they understood how much ammonia was at the Firestone facility. Instead, he waited until September to do so. The totality suggests that Firestone's failure to file the forms in a timely manner may not have been as grave a matter as EPA now claims.

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vi. Conclusion.

It would have been helpful if EPA had come forward with specific instances of base penalties that had been calculated in similar situations. It did not, however. Based on the totality of the circumstances, a base penalty of $5,750.00 is more sensible.

b. Adjustment Factors.

i. Introduction.

This portion of the brief will address adjustment factors, or factors concerning the violator. 42 U.S.C. §11045(b)(1)(C). It will repeat factors set out above. This is done in case the Presiding Officer believes that these matters are more appropriately considered as adjustment factors.

ii. Culpability.

As Mr. Mix testified, Firestone had no knowledge of the EPCRA requirements as of April of 2006. (TR pps. 43-44) Firestone seeks to comply with all regulations it knows about. And it had no knowledge of the amount of ammonia in the refrigeration system until 2007 receipt of Exhibit 8 from PermaCold. (TR, p. 188)

It is, of course, reasonable to expect everyone to know existing law. It is also reasonable, however, for a business to engage specialized contractors and rely on them for all matters within their purview. EPA claims that Firestone should have engaged a consultant to advise concerning EPCRA issues. That is precisely what Firestone has done. (TR p. 167) It is obviously heavily dependent on PermaCold for all issues and matters relating to its refrigeration system. It follows PermaCold's recommendations. (TR pps. 172-74) The alternative, especially

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when hazardous substances are involved, could be disastrous. For example, if a Firestone employee who lacked the sophistication of a PermaCold representative attempted to do something to the refrigeration system, the result could well be a release of ammonia.

Firestone needed both knowledge of its duties under EPCRA and knowledge of the amount of ammonia on site to comply with the act. Firestone's representatives knew of neither prior to April 28, 2006. It would be reasonable for Firestone to rely on PermaCold to advise as to EPCRA requirements. And it should be apparent that PermaCold had not provided Firestone with sufficient information prior that date. These factors must serve to reduce Firestone's culpability.

iii. Economic Benefit.

EPA is claiming an economic benefit of $690.00. It did not indicate exactly how it computed this sum. (TR, p. 139)

Firestone sees no economic benefit from any failure to comply. It is the duty of Zackary Schmitz to deal with environmental compliance. There is no evidence that his pay was affected in any way because of anything connected with the filing of Tier II forms. There is no evidence that Firestone had to pay some independent contractor to deal with compliance here. All Mr. Schmitz had to do was to gather information from suppliers. It then took him twenty to thirty minutes to complete the forms. (TR, pps. 107-8) This is simply one more form for Mr. Schmitz to complete. (TR, p. 172)

There simply is nothing in the record to show any economic benefit that Firestone may have obtained from not filing the forms in 2005. Economic benefit calculations are

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based on facts in the record. *In re: B.J. Carney Industries, Inc.*, 7 E.A.D. 171 (1997). On that basis, there is simply a failure of proof.

In any event, when the economic benefit is less than $5,000.00, the amount may be waived. (Exhibit 5, p. 28) With the minimal amount of economic benefit claimed here and in the absence of particular proof of any economic benefit, it is surprising that EPA made the claim in the first place. No economic benefit should be awarded here.

iv. Attitude.

The Enforcement Response Policy allows for a reduction based on attitude. This factor has two components. These are cooperation and willingness to settle. (Complainant's Exhibit 5, p. 31) Firestone has displayed both.

Firestone cooperated by providing evidence concerning the amount of ammonia in its system. This letter is set out in Complainant's Exhibit 8. On January of 2007, Stan Firestone wrote to EPA expressing a willingness to settle. (Respondents Exhibit 1)

EPA expresses concern that Firestone did not attempt to ascertain the amount of ammonia in the system prior to the 2003-2004 expansion. This argument assumes that the information was knowable. It must be remembered that Mr. Mix contacted PermaCold apparently to learn this precise information. He did not testify, however, as to what information he received on this subject. As indicated above, one of the conclusions that can be drawn here is that PermaCold was unable to supply this information. If PermaCold could not provide the information to Mr. Mix, it also could not provide the information to Firestone.

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The argument further assumes that EPA asked Firestone for information concerning the amount of ammonia in the system prior to the 2003-2004 expansion. There is no evidence in the record that it did. EPA's Enforcement Response policy defines cooperation as "provision of supporting documentation requested by EPA." (Complainant's Exhibit 5, p. 31) In the absence of a request, EPA cannot claim that Firestone did not cooperate.

EPA also suggests that Firestone did not complete Tier II forms sufficiently soon after the April 28, 2006, inspection. Zackary Schmitz completed the forms in June of 2006 and put them out for mailing. (TR pps. 97, 109) Why the forms did not get to agencies shortly thereafter remains a mystery. This delay must be weighed against the apparent lack of urgency that EPA displayed in making an inquiry to Firestone once it suspected that it was not complying with EPCRA requirements.

Firestone is clearly entitled to a reduction based on the willingness to settle. It cannot be deprived of this reduction because settlement did not occur. The reason that there was no settlement is that EPA wanted more from Firestone than it was willing to pay. (TR pps. 148-9) The failure of parties to reach a settlement cannot be used to deny a downward adjustment to a respondent who is willing to settle. As has been stated, such action "amounts to punishment for failing to accept settlement terms and is not an acceptable reason to deny a reduction for cooperation." *In re: Mark Fastow and Fiberglass Specialties, Inc.*, 1998 W.L. 846751, Docket No. EPCRA 09-97-0013 (1998).

Firestone should have the benefit of a significant reduction here.

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v. Other Factors as Justice May Require.

1. Introduction.

This factor grants broad discretion to reduce the penalty when other adjustment factors prove insufficient or inappropriate to achieve justice. *In re: Spang & Co.*, 6 E.A.D. 226, 249 (1995); *In re: Steeltech Ltd, supra.* This case presents a number of factors that militate toward reduction of penalty, some of which have been alluded to elsewhere.

2. Absence of Any Releases.

The purpose of EPCRA is to provide information regarding the presence of hazardous chemicals so that agencies can make contingency plans should a release occur. 61C Am.Jur.2d *Pollution Control* §1506. (TR, pps. 129-30) Obviously, there would be a greater necessity for compliance that would justify a greater penalty if adequate measures were not being taken to prevent a release.

The Firestone system includes a number of failsafe measures to insure that there will be no releases of the ammonia. As Mr. Mix recognized, the Firestone facility is "state of the art." (Exhibit 3, p. 2) PermaCold has set certain parameters for the Firestone refrigeration system. If any are reached, the system will shut down. (TR, pps. 166-67)

Inadequate maintenance of a refrigeration system can lead to a release of ammonia. Firestone does not scrimp on maintenance by having its own employees perform a function. PermaCold does the maintenance. It also makes the ultimate decision as to what maintenance is required and should be done. (TR, pps.172-74) Mr. Mix agreed that the

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system was well maintained. Specifically, he noted the absence of the smell of ammonia when he went into the compressor room. (TR p. 43)

The refrigeration system is also carefully monitored. If any Firestone employee sees anything untoward, he or she immediately contacts PermaCold. (TR, pps. 168-9) The plant has an ammonia sensor that is set to activate a loud siren if any release occurs. (TR, p. 168)

These measures appear to be effective. The parties have stipulated to the absence of any known release of ammonia since at least 2000. (Joint Set of Stipulated Facts and Exhibits, Stipulated Facts, paragraph 8)

Justice requires a lesser penalty for an entity that does not cause the problems EPCRA was meant to address. The absence of any releases together with the presence of systems to insure that there is no release requires a reduction in the penalty amount.

3. Size of Business.

EPA 's Enforcement Response Policy allows a reduction of 15% for first time violators whose business employees less than one hundred people and whose annual corporate sales are less than $20 million. Under the policy's terms, this reduction can only be granted prior to filing of a complaint. (Complainant's Exhibit 5, p. 31)

Clearly, Firestone qualifies for this reduction. Complainant's Exhibit 10 shows that it has twenty employees and sales volume of $3.1 million. The only reason EPA did not allow this reduction is because the matter was not settled prior to filing of the complaint.

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As EPA acknowledges, it controls this reduction because it controls when the complaint is filed. Filing occurred because the parties could not settle the matter. (TR, pps. 146-48) Once again, Firestone cannot be denied this reduction simply because the parties did not settle before filing. *In re: Mark Fastow and Fiberglass Specialties, Inc., supra.* Therefore, Firestone should have the benefit of this reduction.

4. Preexisting Agency Knowledge.

The Vancouver Fire Department, at least, was aware of the Firestone facility for a number or years. It reviewed plans and inspected the facility in connection with each of the company's expansions. The fire department also knew that Firestone used ammonia in the refrigeration system. (TR, p. 187) Captain Dan Monahan of the Vancouver Fire Department advised Mr. Mix of his knowledge of the Firestone operation when Mr. Mix spoke to Mr. Monahan on September 18, 2006. (Complainant's Exhibit 14)

The fire department's knowledge is the most critical of all of the agencies because it has operational responsibility in the event of any release. If it is aware of Firestone, it will not be surprised in the event of an untoward event. This knowledge ameliorates any concern that might be engendered due to the failure to file Tier II forms in a timely fashion.

Conversely, EPA has made no showing that the filing of the Tier II forms caused the Vancouver Fire Department to change emergency response plans based upon receipt of Tier II forms. For that matter, there is no evidence that the local emergency response agency, Clark Regional Emergency Services Agency (CRESA) has altered its emergency planning after receiving Tier II forms from Firestone.

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The fire department's knowledge combined with the absence of any evidence of alteration of emergency plans when Firestone filed Tier II forms demonstrates that the failure to file was less serious than it would have been in the absence of these factors. It requires a reduction of the penalty.

5. Other Projects.

Firestone has initiated two relevant measures. First of all, Zackary Schmitz, Firestone's operations manager, attended a first responders' training in 2007 put on by PermaCold. It provided training on how to respond to an incident. The course cost $500.00. (TR, pps. 170, 178-9) Firestone has also undertaken steps to upgrade the ammonia detection system. It would notify Firestone's security monitoring firm of any release of ammonia. This would allow for rapid notification of Vancouver Fire Department. The anticipated cost will exceed $10,000.00. (TR, pps. 170-1)

6. EPA's Standing.

As discussed in Firestone's earlier brief, EPA was once seen as a bulwark against those who would pollute the environment. At present, many are questioning its devotion to that mission. The concern stems from its failure to regulate greenhouse gases under the mandate of the Clean Air Act, 42 U.S.C. §7401 *et seq.* Twelve states, including Oregon and Washington, sued EPA on that account. In April of 2007, the United States Supreme Court ruled that EPA's failure to engage in rule making concerning greenhouse gases was arbitrary and capricious. *Massachusetts, et al. v. Environmental Protection Agency, et al.*, _____ U.S. __ _____, 127 S.Ct. 1438, 1463, 167 L.Ed.2d 248 (2007). In response to this position, EPA has done

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nothing except adhere to its previous position. Now, eighteen states, including Oregon and Washington, have filed another action in the United States District Court in Massachusetts to force EPA to comply with its court ordered responsibilities.

EPA's position has frustrated those in the Pacific Northwest in general and in the Portland/Metropolitan area in particular.[1] State and local governmental agencies in the area are working cooperatively on a massive transportation project known as the Columbia River Crossing. It aims to replace the antiquated bridge currently in use over the Columbia River on I-5 between Portland, Oregon, and Vancouver, Washington, and add mass transit.

Naturally, all relevant agencies, including EPA, were asked to comment on the project. EPA expressed concern that the new bridge would increase air pollution and greenhouse gases.

The Oregonian, Portland's daily newspaper, published an editorial on July 12, 2008, criticizing EPA for its contradictory positions. A copy of the editorial in electronic form is attached to this brief. Among other things, the editorial stated:

> So on the one hand, the EPA worries that a new bridge over the Columbia might increase greenhouse gas emissions. But on the other hand, the agency isn't sufficiently worried about such emissions that it would be willing to regulate them.
>
> That's nutty, though hardly surprising. Every position this administration has ever taken on global warming has been out of step or belated, and that includes President Bush's support earlier this week for long-

[1] Firestone is in Vancouver, Washington. That community is on the north bank of the Columbia River. Portland, Oregon, is on the south bank. The two cities adjoin.

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term targets for emission reductions after his seven years of rejecting such goals.

EPA is now demanding significant penalties from a small business that, to anyone's knowledge, has never caused any affirmative environmental harm. It does so at a time when no less an entity than the Supreme Court of the United States has found its failure to regulate greenhouse gases to be arbitrary and capricious. And virtually everyone agrees that the issue in question, climate change and global warming could well amount to the most significant environmental problem facing the entire planet. Considerations of justice will not allow an entity such as EPA to argue that others should be penalized when it has not complied with its obligations as determined by the highest court in the land. Stated more simply, EPA should not be seeking penalties from others when it is arbitrarily and capriciously ignoring its own statutory obligations.

Firestone makes this argument responsibly. It supports the efforts the states have made to compel EPA to regulate greenhouse gases.

CREDIBILITY OF WITNESSES

I. Suzanne Powers.

All witnesses should testify forthrightly about what they know and let the chips fall where they may. This rule applies with even greater force when the witness in question is a public servant. Forthright testimony includes observing the distinction between the witness and the advocate. A forthright witness never adopts the advocate's role. A witness who does not observe this rule sacrifices his or her credibility.

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Unfortunately, Suzanne Powers distinguished herself as an advocate. This is best seen by the great effort required on cross-examination to have her acknowledge seemingly obvious propositions. These included the fact that Mr. Mix could have inspected the Firestone facility at any time he wanted to (TR pps. 142-43); that in her penalty calculation, she gave no consideration to measures to reduce the risk of release although such measures could ameliorate any harm from the failure to file Tier II forms (TR pps. 144-46); and that EPA controls whether an entity can obtain the small business reduction because it controls the decision to file a complaint or settle (TR pps. 146-50)

Ms. Powers initially professed not to be aware that the Vancouver Fire Department was aware of the Firestone operation. When she was confronted with Exhibit 14, she relied on the narrowest possible construction of the language Mr. Mix used in his memorandum to argue that the fire department might not know of Firestone's refrigeration system. (TR p. 152) Of course, such an assertion is at odds with Mr. Firestone's testimony.

The parties stipulated that there had been no known release of ammonia from the Firestone facility. Ms. Powers would not acknowledge the import of that stipulation. She wanted to allow for the possibility that there had been a release even though she had not tried to verify with the Vancouver Fire Department that one had occurred. (TR pps. 154-56)

EPA appears to have presented Ms. Powers as an expert on penalty calculations. One recognized method of impeaching an expert is demonstrating that the expert has failed to take relevant matters into account in the formulation of any opinion. Ms. Powers acknowledged that she failed to consider a number of factors that could serve to reduce the penalty under EPA's

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Enforcement Response Policy or simple notions of what might be just under the circumstances. These are addressed above. She failed to give any rationale for her failure to do so. This factor detracts from the credibility of her testimony.

II. Theodore Mix.

Mr. Mix's credibility has been dealt with above in connection with his conversation with PermaCold and his preparation of a memorandum of that conversation without submitting it for consideration. Repeating that discussion is not necessary here.

CONCLUSION

In conclusion, there is insufficient proof of a violation for the years 2002 and 2003. Furthermore, the penalty EPA seeks for 2005 is not justified and is at odds with the statutory scheme.

DATED this 28 day of July, 2008.

BEN SHAFTON, WSB #6280
Of Attorneys for Firestone

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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 28th day of July, 2008, I caused the document to which this Certificate is affixed to be served as follows:

MR. ROBERT HARTMAN US ENVIRONMENTAL PROTECTION AGENCY REGION 10 1200 SIXTH AVE MS ORC-158 SEATTLE WA 98101	____ By hand delivery __X__ By first class mail* ____ By certified mail – return receipt requested*
HON SUSAN L BIRO CHIEF ADMINISTRATIVE LAW JUDGE US ENVIRONMENTAL PROTECTION AGENCY MAIL CODE 1900L 1200 PENNSYLVANIA AVE NW WASHINGTON DC 20460	____ By hand delivery __X__ By first class mail* ____ By certified mail – return receipt requested*

* with first class postage prepaid and deposited in Vancouver, Washington, United States of America.

CARON, COLVEN, ROBISON & SHAFTON, P.S.

Lorrie Vaughn

LORRIE VAUGHN
Assistant to Ben Shafton

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The Oregonian
Saturday, July 12, 2008
Edition: Sunrise, Section: Editorial, Page B04
SUMMARY: The agency refuses to regulate greenhouse gases but worries that a new Columbia bridge would increase them

Mixed messages from the EPA

A few weeks ago, Oregon and Washington state transportation planners met with *The Oregonian's* editorial board to discuss what one of them vowed would be "the world's greenest bridge" --a massive new Interstate 5 span over the mighty River of the West.

Now, however, the U.S. Environmental Protection Agency says plans for this Columbia River bridge aren't nearly green enough. An EPA review of the project says Northwest highway planners didn't adequately account for a number of environmental concerns, among them the possibility that the new span would increase air pollution.

Fair enough. Columbia River Crossing planners should back up and look deeper at the pollution question and other issues raised by EPA reviewers. Northwesterners, meanwhile, should fervently hope the redo can be done swiftly enough to still have this urgently needed project considered for the next transportation bill in Congress.

But on Friday, one day after the EPA criticism of the bridge planning made headlines, the Bush administration did something that left heads spinning here in the Northwest. EPA officials rejected regulating the heat-trapping gases blamed for global warming, saying it would cause the loss of too many jobs.

So on the one hand, the EPA worries that a new bridge over the Columbia might increase greenhouse gas emissions. But on the other hand, the agency isn't sufficiently worried about such emissions that it would be willing to regulate them.

That's nutty, though hardly surprising. Every position this administration has ever taken on global warming has been out of step or belated, and that includes President Bush's support earlier this week for long-term targets for emission reductions after his seven years of rejecting such goals.

Aside from its erratic pronouncements on climate-changing gas emissions, however, the EPA did appear to be doing its job in the bridge review. The agency called on bridge planners to look harder at the project's potential to kill salmon, harm neighborhoods, encourage sprawl and contaminate an aquifer that supplies Vancouver and Clark County's drinking water.

It's hard to conceive how the project's 5,850-page draft environmental impact statement could need any more pages. But Columbia Crossing planners should work expeditiously to address the EPA's issues.

Northwest economic vitality depends urgently on this bridge, and it should indeed be the greenest in the world.