UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
FIRESTONE PACIFIC FOODS, INC.,	)	**Docket No. EPCRA-10-2007-0204**
	)	
Respondent.	)	

INITIAL DECISION

By Accelerated Decision previously issued, Respondent Firestone Pacific Foods, Inc. was found liable for violating Section 312(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11022(a), by failing to timely submit for calendar year 2005 an Emergency and Hazardous Chemical Inventory Form identifying the presence of 500 or more pounds of the hazardous chemical ammonia at its fruit processing facility in Vancouver, Washington to the State Emergency Response Commission, the Local Emergency Planning Committee, and the local fire department as alleged in Counts 1 to3 of the Complaint, respectively. Herein, Respondent is found liable for violating EPCRA Section 312(a) by failing to timely submit the same such forms to the same three entities for calendar years 2001-2004, as alleged in Counts 4-15 of the Complaint. Pursuant to Subsection 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), an aggregate civil administrative penalty in the amount of $42,690 is imposed on Respondent for these fifteen violations.

Before: Susan L. Biro
Chief Administrative Law Judge

Issued: March 24, 2009

Appearances:

For Complainant:

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I. PROCEDURAL HISTORY

The U.S. Environmental Protection Agency, Region 10 (EPA or Complainant) initiated this action on September 6, 2007 by filing a fifteen (15) count Administrative Complaint charging Respondent Firestone Pacific Foods, Inc. (Firestone), with violating Section 312(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11022(a). Specifically, the Complaint alleges that for five consecutive calendar years (2001-2005) Respondent violated EPCRA Section 312(a) by failing to timely submit an Emergency and Hazardous Chemical Inventory Form (Inventory Form) identifying the presence of 500 or more pounds of the hazardous chemical ammonia at its fruit processing facility in Vancouver, Washington to: (a) the State Emergency Response Commission (Counts 1, 4, 5, 6, 7); (b) the Local Emergency Planning Committee (Counts 2, 8, 9, 10, 11); and (c) the local fire department (Counts 3, 12, 13, 14, 15). The Complaint proposes the imposition of an aggregate penalty in the amount of $42,690 for these fifteen violations. On October 11, 2007, Firestone filed a terse single-page Answer to the Complaint denying the violations and the truth of almost all of the underlying factual allegations, and requesting a hearing thereon. Thereafter, pursuant to a Prehearing Order, the parties submitted their Prehearing Exchanges.

On February 29, 2008, Complainant filed a Motion for Partial Accelerated Decision as to Liability seeking determination of Respondent's liability only as to those counts of the Complaint pertaining to calendar year 2005 (Counts 1-3), which each allege that Respondent failed to timely submit the required Inventory Form to one of the three designated recipients. Firestone subsequently filed an Opposition to the Motion wherein it did not dispute EPA's allegations that it was required to file such forms for calendar year 2005 with the three recipients and that it did not timely do so. Instead, Firestone's Opposition raised the affirmative defense that Complainant was estopped from obtaining judgment against it on the 2005 violations as a result of the representations EPA's inspectors made to it in April and June of 2006 that no adverse action would be taken against Respondent if the company submitted the requisite forms "soon." By Order dated May 1, 2008, Accelerated Decision in favor of Complainant was granted as to Respondent's liability on Counts 1-3 of the Complaint.

On June 3, 2008, a hearing was held as to Respondent's liability on the remaining counts of the Complaint (Counts 4-15) and the appropriate penalty, if any, to be imposed for the violations found.[1] Complainant presented the testimony of three witnesses at hearing: Theodore J. Mix, Suzanne E. Powers, and Zackary I. Schmitz. Respondent presented two witnesses' testimony at hearing: Zackary I. Schmitz and Stanley A. Firestone. Further admitted into

[1] By agreement of the parties, the hearing in this matter was conducted via video conference between EPA's facilities in Portland, Oregon, where the parties, their counsel, the witnesses and the court reporter were all located, and EPA's Administrative Courtroom in Washington, D.C., where the undersigned Presiding Officer was situated. The Tribunal is grateful to the parties for their cooperation in facilitating the hearing being held in this manner. Citation to the transcript of the hearing will be in the following form: "Tr. __."

evidence was the parties' Joint Set of Stipulated Facts and Exhibits dated May 30, 2008 (cited hereinafter as "Stip. ___"). Tr. 14-15. In addition, by such stipulation and/or upon motion granted, Complainant's Exhibits 1-27 and Respondent's Exhibit 1 were admitted into evidence (cited hereinafter as "C's Ex. __" or "R's Ex. 1.")[2] Tr. 13-15, 32, 34, 87.

[2] There was some confusion initially at hearing as to the correct identification of Respondent's Exhibit 1. Tr. 100-103. Respondent's Prehearing Exchange had identified for hearing one witness, Zackary Schmitz, and one exhibit - an e-mail dated March 8, 2007 from Deborah Needham to Stanley Firestone, which was attached thereto. Respondent then filed a Motion to Amend [its] Prehearing Exchange to expand the scope of testimony of Mr. Schmitz, which was granted by Order dated May 29, 2008. On May 21, 2008 (thirteen days before hearing), Respondent mailed to the undersigned a Second Motion to Amend Pre-Hearing Exchange (Second Motion) to add as an exhibit a letter from Mr. Firestone to Robert Hartman (Complainant's counsel) dated January 12, 2007, (a copy of which was *not* attached to the Motion), as well as to add the testimony of Mr. Firestone (and Zackary Schmitz) as to the matters within that letter. Tr. 182-85. Unfortunately, the envelope containing the Second

Post-Hearing Briefs were filed in this case by Complainant on July 7, 2008 (C's Brief) and Respondent on August 1, 2008 (R's Brief), on which date the record closed.

Motion was received damaged by the EPA mailroom and underwent security screening by the Senate Post Office, delaying its receipt by the Tribunal's Office until June 2, 2008, as a result of which the Motion did not come to the attention of the undersigned prior to the hearing which began the following morning. Tr. 183-84. Moreover, very late in the evening of June 2, 2008, Respondent provided a copy of Mr. Firestone's letter to the Tribunal's Office via e-mail although it did not bring to the Court's attention its previous filing of the Second Motion related thereto or that EPA did not object to the Second Motion. Being unaware of the pendency of the unopposed Second Motion, and in light of the document's late submission and the fact that it appeared on its face to be correspondence exchanged for the purposes of settlement inadmissible in evidence under Consolidated Rule 22.19(a) (40 C.F.R. § 22.19(a)) and Rule 408 of the Federal Rules of Evidence referred to therein, this Tribunal did not throughly review the document before hearing. As a result the undersigned initially mistakenly believed that Respondent's Exhibit 1 was the one exhibit Firestone submitted with its Prehearing Exchange. Subsequently, Respondent clarified that the sole exhibit it was offering into evidence as its "Exhibit 1" was the January 12, 2007 letter, and Complainant indicated that it did not object to the letter's admission, nor to Mr. Firestone's testimony thereon, despite the late submission of the evidence and/or the fact that it related to settlement discussions between the parties. Tr. 102-03, 184-85.

II. EPCRA SECTION 312

As indicated above, the sole statutory provision Respondent is alleged to have violated in this case is EPCRA Section 312, which provides in pertinent part as follows:

> (a) Basic requirement.
>
> (1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this title referred to as an "inventory form") to each of the following:
>
> (A) The appropriate local emergency planning committee [LEPC].
> (B) The State emergency response commission [SERC].
> (C) The fire department with jurisdiction over the facility.
>
> (2) The inventory form . . . shall be submitted . . . annually . . . on March 1, and shall contain data with respect to the preceding calendar year. . . .
>
> * * *
>
> (b) Thresholds. The Administrator [of EPA] may establish threshold quantities for hazardous chemicals covered by this section below which no facility shall be subject to the provisions of this section.

42 U.S.C. §§ 11022(a), (b). *See also*, 40 C.F.R. §§ 370.1-370.41 (regulations establishing reporting requirements under EPCRA).[3]

[3] Under EPCRA, "facility" means "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person)"; the term "person" includes a corporation; "material safety data sheet" means the sheet required to be developed under 29 C.F.R. c 1910.1200(g); and

The regulations implementing the Occupational Safety and Health Act of 1970 (OSHA), referred to in EPCRA Section 312 above, mandate that "[e]mployers shall have a material safety data sheet (MSDS) in the workplace for each hazardous chemical which they use." 29 C.F.R.

"hazardous chemicals" are those designated under 29 C.F.R. c 1910.1200(c). 42 U.S.C. §§ 11049(4)-(7), 11021(a), (e). EPA has created and published templates for the inventory forms required to be submitted under EPCRA Section 312. *See*, 40 C.F.R. § 370.40 (Tier I form), 40 C.F.R. § 370.41 (Tier II form); C's Ex. 2.

§ 1910.1200(g). *See also*, 29 C.F.R. § 1910.1200(b)(1),(b)(2)("all employers [are] to provide information to their employees about the hazardous chemicals to which they are exposed, by means of . . . material safety data sheets . . . This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.").[4]

"Hazardous chemicals" under OSHA include those listed in 29 C.F.R. Part 1910, Subpart Z. 29 C.F.R. § 1910.1200(d)(3)(I). Ammonia (CAS No. 7664-41-7) is on that list. *See*, 29 C.F.R. § 1910.1000 Table Z-1 (Limits for Air Contaminants); C's Ex. 1 at 9. Thus, OSHA requires employers to have material safety data sheets for ammonia if it is used in their workplace. In its regulations, EPA has designated ammonia as an "extremely hazardous substance" pursuant to 42 U.S.C. § 11002(a)(2), and in regard thereto established the presence of 500 pounds at any one time during the preceding calendar year as the "threshold quantity" of the chemical triggering the reporting provisions of EPCRA Section 312(a). 40 C.F.R. § 370.20(b), 40 C.F.R. Part 355, Subpart D, Appendices A and B (Lists of Extremely Hazardous Substances and their Threshold Planning Quantities); Tr. 23. Therefore, under EPCRA Section 312(a), the owner or operator of a facility where 500 pounds or more of ammonia was present during the calendar year is required to prepare and submit by March 1 of the following year an Inventory Form reporting such presence to the appropriate LEPC, SERC, and fire department. C's Ex. 1.

[4] For the purpose of this OSHA regulation, an "employer" is defined as "a person engaged in a business where chemicals are . . . used;" "material safety data sheet (MSDS)" means "written or printed material concerning a hazardous chemical which is prepared in accordance with paragraph (g) of this section;" "exposed" means "that an employee is subjected in the course of employment to a chemical that is a physical or health hazard, and includes potential (e.g. accidental or possible) exposure;" "subjected" in terms of health hazards "includes any route of entry (e.g. inhalation, ingestion, skin contact or absorption);" and "foreseeable emergency" means "any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace." 29 C.F.R. § 1910.1200(c).

III. FINDINGS OF FACT

Respondent Firestone Pacific Foods, Inc. is a small (20 person) private corporation which was formed in 1984 as a fruit production and distribution enterprise. C's Exs. 7, 10; R's Ex. 1. At all times, Stanley Firestone has been the sole owner, president, vice-president, and secretary of the company, which in 2006 had annual sales of $3.1 million. Tr. 91, 189; C's Ex. 7 p. 3; C's Ex. 10. In 1993, Firestone built and opened its current processing facility located at 4211 NW Fruit Valley Road in Vancouver, Washington. R's Ex. 1; C's Ex. 3 p. 2; C's Ex. 10; Stip. 1. Each year at its facility, five to ten million pounds of fresh fruit berries are processed, packed, and stored in a refrigerator or freezer for domestic and export distribution. C's Ex. 3 at 2; Tr. 18-19, 91-92, 94. Firestone utilizes a closed anhydrous ammonia refrigeration system in its processing.[5] Tr. 19. Such system was initially installed in 1993 by the Seattle Refrigeration Co. and included a 24"x12' high pressure ammonia receiver capable of holding 1,100 lbs. of ammonia when 80% full.[6] C's Ex. 27; Tr. 195-96, 205. Subsequently, Firestone engaged

[5] "Anhydrous" means "without water." The chemical *compound* ammonia (NH_3) is generally referred to as *anhydrous* ammonia to distinguish it from household ammonia (ammonia hydroxide), which is generally a *solution* of ammonia and water. *See,* Hawley's Condensed Chemical Dictionary 63 (11th Ed. 1987); C's Ex. 1. Anhydrous ammonia functions as a refrigerant in that when pressurized it phases from a gas to a liquid. Then, once the pressure is released, the liquid ammonia proceeds to boil and vaporize back into its gaseous state (its boiling point is -33.34° C), concomitantly absorbing ambient heat from the refrigerator area, after which, in a closed loop system, it is re-pressurized and cooled back to a liquid state allowing the thermodynamic cycle to start again. *Id*., Tr. 19, 68-69, 73; C's Ex. 1, 3.

[6] A high pressure receiver, usually the largest vessel in a closed refrigeration system, provides storage for ammonia in its liquid state when it is not in circulation in other parts of the system and is designed to store the whole supply of liquid ammonia in the event the system is shut down. Tr. 19-20, 70-71, 77. Such receivers are generally operated at no more than 80%

PermaCold Engineering, Inc. to expand its refrigeration system. C's Ex. 8. Since 2005, Respondent's refrigeration system has held 1,820 pounds of ammonia. Stip. 7; C's Ex. 8.

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capacity for safety reasons. Tr. 85.

On April 28, 2006, two EPA investigators, Theodore (Ted) Mix and Harry Bell, conducted an EPCRA compliance inspection of Firestone's facility. C's Exs. 3, 11, 19; Tr. 16-18, 40-41. The investigators observed that the facility had two freezer rooms cooled by its ammonia refrigeration system. Such system included a high pressure receiver (an orange oblong cylindrical tank) and three rectangular condensers located outside the processing building, as well as three compressors situated inside the building. C's Ex. 3 at 2; C's Ex. 4; Tr. 22-23, 67-68, 71, 75-76. During the inspection, Zackary Schmitz, Firestone's Operations Manager, advised the investigators that the refrigeration system contained approximately 4,000 pounds of anhydrous ammonia. C's Ex. 3 at 3, C's Ex. 19; Tr. 21, 38-39, 54, 79-80, 90, 96. In addition, Mr. Schmitz indicated that the company had never filed any EPCRA Inventory Forms, explaining that it was unaware of Act's requirements. C's Ex. 19; Tr. 23, 43-44; Stips. 4-6. Consequently, Mr. Mix then "spent quite a bit of time" explaining the regulatory requirements to Mr. Schmitz. Tr. 23. He also provided Mr. Schmitz with a packet containing blank Inventory Forms accompanied by a written set of instructions for completing and filing the forms (C's Ex. 2), and reviewed with him how to complete and file the forms with the three requisite recipient entities.[7] Tr. 22-24, 41, 55, 61-63, 117; C's Ex. 3 at 3; C's Exs. 15, 19, 21. Additionally, Mr. Mix counseled Mr. Schmitz that there were significant penalties for noncompliance with EPCRA, that he should complete and file the missing Inventory Forms for 2005 "right away" and "as soon as possible" (as the March 1, 2006 deadline for filing for the 2005 reporting year had already passed)" and that although "it wasn't [Mr. Mix'] total decision about any kind of enforcement action," EPA would consider the inspection as "a compliance assistance inspection provided the required filings were promptly submitted to the required entities." C's Ex. 3 p. 3; C's Exs. 15, 19; Tr. 24-25, 41, 45-46, 55. To further aid compliance, Mr. Mix provided Mr. Schmitz with his business card and advised him that both he and Sadie Whitener, the SERC employee responsible for the State of Washington's EPCRA program, would be happy to answer any additional questions he had and/or assist him in completing the forms. Tr. 62-63.

Unfortunately the inspection occurred at a time when Mr. Schmitz was "busy on another project," involving irrigation of 40 acres of blueberries that Firestone was growing in another city. Tr. 117; C's Ex. 3 at 3. As a result, neither Mr. Schmitz nor anyone else at the company promptly proceeded to complete and file the Inventory Forms, nor did anyone at Firestone contact the investigators to notify them of the circumstances causing the filing delay. Tr. 117, 66. In mid-May, according to Mr. Mix, he attempted to contact Mr. Schmitz by telephone regarding the non-filings. Tr. 25; C's Exs. 3, 15. Unable to reach him in person, Mr. Mix left a

[7] It appears undisputed in this case that the applicable SERC is the Washington State Department of Ecology, the applicable LEPC is the Clark Regional Emergency Services Agency (CRESA), and the applicable fire department is the Vancouver Fire Department. *See*, C's Ex. 3; Tr. 47-48, 165; Stips. 3-6.

message on Mr. Schmitz's voicemail regarding the required filings and again offering his assistance and that of Sadie Whitener in completing the forms. C's Ex. 15; Tr. 25, 65-66. Mr. Mix's message further reiterated the possibility that noncompliance could result in "serious financial penalties." Tr. 25.

Mr. Schmitz testified at hearing that he started to gather the necessary data to complete the forms in June 2006. Tr. 97, 108-109, 111; R's Ex. 1. In connection therewith, he obtained a Material Safety Data Sheets (MSDS) on ammonia from PermaCold Engineering, Inc. (PermaCold), the company's current refrigeration maintenance contractor. Tr. 107, 108. In addition, he shut down the company's refrigeration system and pumped all of the ammonia therein out to the high pressure receiver. Tr. 97. By observing the ammonia therein through the sight glass, Mr. Schmitz concluded at that point that the receiver was half-filled to its maximum capacity of 4,000 pounds, or in his estimation contained approximately 2,000 pounds of ammonia. *Id*. Mr. Schmitz further testified at hearing that he then quickly completed the EPCRA Inventory Forms for 2005, placed them in envelopes he addressed to the three designated recipient entities (the SERC, LEPC, and fire department), and left them in the ordinary course of business with the other outgoing mail, for delivery to the post office by Mr. Firestone. Tr. 109-110, 119. Mr. Schmitz admitted, however, that he never followed up to verify whether these envelopes were actually mailed by Mr. Firestone and/or received by the intended recipients. Tr. 109-110,119-120. Mr. Schmitz further alleged at hearing that he subsequently realized that, in his haste to complete the forms, he had mistakenly dated his signature thereon with the month of "March" (15, 2006), instead of "June." Tr. 110-112. Therefore, he asserted, he prepared a second set of Inventory Forms on which he placed the correct signature date of "June 15, 2006" and separately submitted them to the three entities by mail or fax. Tr. 112-114.

Not one of the six separate Inventory Forms allegedly mailed and/or faxed by Firestone in June 2006 was ever received by its intended recipient. R's Ex. 1; C's Exs. 16-18. Further, Mr. Schmitz never returned Mr. Mix's telephone call or otherwise attempted to advise him that he had filed the missing Inventory Forms. Tr. 66-67. In September 2006, Mr. Mix followed up on Firestone's compliance by contacting each of the recipient entities, all of whom indicated that Firestone still had not filed a 2005 Inventory Form. C's Ex. 3 p. 4; C's Exs. 13, 14, 17, 18, 22; Tr. 25-26, 48-50. Thereafter, EPA proceeded to handle the investigation as an enforcement case, rather than a compliance matter, and in October 2006 prepared a written Investigation Report and in December 2006 formally notified Firestone in writing of its alleged EPCRA Section 312 violations and potential monetary penalties therefor.[8] C's Ex. 3; R's Ex. 1

In response to EPA's notice of violations, Firestone "resubmitted" its 2005 Inventory

[8] EPA's Investigation Report also identified Respondent as having committed EPCRA Section 311 violations, 42 U.S.C. § 11021, based upon its failure to submit MSDSs of its hazardous chemicals or a list thereof, to the SERC, LEPC, and fire department. C's Ex. 3. However, no Section 311 violations are alleged in this action.

Forms to the three entities. R's Ex. 1. The forms, received on or about December 21, 2006 by the SERC, LEPC and fire department, evince a March 15, 2006 signature date, and indicate that in 2005 Firestone stored at its facility a maximum of 4000 lbs. and an average of 2000 lbs. of ammonia in a pressurized container located outside its building.[9] C's Exs. 16-18, 22-24.

Shortly thereafter, in January 2007, Firestone wrote to EPA proffering circumstances vitiating and/or mitigating the alleged violations and seeking a penalty accommodation. R's Ex. 1. Among the representations it made therein was the statement that "[i]n 1996, 2000, and 2003 the facility expanded. It was not until our 2003 expansion that our anhydrous ammonia quantity surpassed the 500 pound limit . . . ." *Id*. *See also*, C's Ex. 23.

In February 2007, each of the three recipients entities received from Firestone a timely filed 2006 Inventory Form, dated February 20, 2007 along with a "Revised" Inventory Form for the 2005 calendar year, dated "June 15, 2006." C's Exs. 16-18, 22, 24; Tr. 120. The 2006 Form and the Revised 2005 Form both indicate that the maximum and average amount of ammonia stored by Respondent at its facility during those reporting periods was 2000 pounds, rather than 4000 lbs. as Firestone had indicated in the 2005 Inventory Forms it had previously filed. C's Exs. 16-18, 22, 24.

No amicable resolution having been reached, EPA initiated this action on September 6, 2007. On or about April 6, 2008, seven months after this action began, and 37 days past the filing deadline, Firestone submitted its EPCRA Inventory Form for calendar year 2007 to the SERC, LEPC, and the fire department. Tr. 36-37, 114-115.

IV. LIABILITY DETERMINATION ON COUNTS 4-15

[9] These Inventory Forms also reported the presence at the facility of a maximum amount 2100 lbs of propane and 9000 lbs of nitrogen. The forms appear to be xeroxed copies of each other except for being individually signed by Mr. Schmitz and dated "03/15/06." C's Exs. 16-18, 22-24.

As indicated above, Respondent's liability under EPCRA § 312(a) for its failure to timely file its *2005* Inventory Forms, as alleged in Counts 1-3 of the Complaint, was determined before hearing by accelerated decision. Thus, the liability issues for hearing were limited to those set forth in Counts 4-15 relating to calendar years 2001-2004. In its Post-Hearing Brief, Respondent admits that more than 500 pounds of ammonia was present at its facility during *2004*, and that it did not timely file Inventory Forms in regard thereto. R's Brief at 1-2. As it concedes therein, these admissions further definitively establish Respondent's liability under EPCRA Section 312(a) in regard to its non-filings for the 2004 calendar year, as alleged in Counts 7, 11, and 15 of the Complaint.[10] R's Brief at 2, 5, 26.

Additionally, Respondent's Brief opens by stating that, while the Agency has alleged EPCRA violations pertaining to *2001*-2004, "[i]t has not sought a penalty for 2001 because doing so would offend the relevant statute of limitations. [] Subsequent discussion will focus only on the years 2002-2004." R's Brief at 1 (citing Tr. 136). Respondent's Brief, however, does not contain any statute of limitations argument in regard to the 2001 violations nor does it move for judgment in its favor in regard thereto based upon such defense. It is further observed that Respondent did not raise a statute of limitations defense in its Answer, by motion before hearing, or at hearing, and at no point has the Agency requested or acquiesced to the dismissal of the counts pertaining to 2001 (Counts 4, 8, and 12).

Rule 22.15 of the Consolidated Rules of Practice which govern this proceeding provides in pertinent part that "[w]here respondent . . . contends that is entitled to judgment as a matter of law, it shall file . . . a written answer" and that "[t]he answer shall . . . state: [t]he circumstances or arguments which are alleged to constitute the grounds of any defense." 40 C.F.R. §§ 22.15(a),(b). If a Respondent fails to expressly raise an affirmative defense such as the statute of limitations in its Answer or otherwise prior to hearing so as to provide adequate opportunity for argument to be presented in opposition thereto, it is deemed waived; "the [trial] court ordinarily should not raise it *sua sponte*." *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 223 n. 69, 1997 EPA App. LEXIS 7, *125 n. 69 (EAB 1997) (quoting *Davis v. Bryan*, 810 F.2d 42, 44 (2nd Cir. 1987)). Therefore, since Respondent has not expressly raised a statute of limitations defense as to its liability on Counts 4, 8, and 12 pertaining to 2001, it remains incumbent upon this Tribunal to rule upon Respondent's liability in regard thereto as well as the counts of violation pertaining to 2002 and 2003 (Counts 5-6, 9-10, 13-14).

A. The Parties' Respective Positions on the Sole Liability Issue Remaining

As acknowledged by both parties in their Briefs, the only disputed factual issue in regard

[10] Respondent's Brief also states that it "concedes a penalty of $1,500.00 for 2004." R's Brief at 5.

to Respondent's liability on the nine counts remaining at issue is whether the amount of ammonia present at its facility during those years (2001-03) met the threshold limit of 500 or more pounds, triggering the filing requirement of EPCRA Section 312(a). R's Brief at 2; C's Brief at 9. Complainant bears the "burdens of presentation and persuasion" on this issue. 40 C.F.R. § 22.24(a). The standard of proof under the Consolidated Rules is a preponderance of the evidence. 40 C.F.R. § 22.24(b).

In support of its claim that more than 500 pounds of ammonia was present at Respondent's facility in calendar years 2001-2003, Complainant relies upon the testimony of Respondent's president Stanley Firestone, information provided to Suzanne Powers of EPA by the Seattle Refrigeration Co., and the testimony of Mr. Mix regarding the State of Washington Department of Labor inspection records of Firestone's pressure vessels. C's Brief at 10.

First, Complainant asserts that Mr. Firestone testified at hearing that the quantity of ammonia in its refrigeration system remained constant between 1993, the date the system was initially installed by the Seattle Refrigeration Co., and 2004. C's Brief at 13 (citing Tr. 192-195). Thus, Complainant postulates - if the system operated with more than 500 pounds of ammonia in 1993, it did so each year thereafter including during the relevant years of 2001-2003. C's Brief at 13.

Following though with this analysis, as proof that Respondent's refrigeration system contained more than 500 pounds of ammonia when first installed in 1993, Complainant cites to the testimony of Ms. Suzanne Powers, EPA Region 10's EPCRA Enforcement Coordinator (C's Ex. 12), concerning a telephone conversation she had on January 28, 2008 with Bob Pederson of the Seattle Refrigeration Co. (Tr. 84-85), and her memorandum memorializing such conversation (C's Ex. 27), which states as follows:

> I spoke with Bob Pederson of Seattle Refrigeration Co. in regard to their records regarding Firestone Pacific Foods, Vancouver, WA. According to Mr. Pederson, Seattle Refrigeration installed a 24"X12' high pressure ammonia receiver at the Firestone Facility in 1993. According to Mr. Pederson this vessel hold [sic] approximately 1,100 pounds of ammonia at 80% full. Mr. Pederson also recalls there being more than 500 pounds of ammonia in the system when they changed out a compressor later that same year at Firestone, although he cannot recall exactly how much ammonia was present at the time.

C's Brief at 14. At hearing, Ms. Powers expounded on this conversation, explaining that Mr. Pederson indicated to her that "he believed strongly" that Firestone's refrigeration system in 1993 had more than 500 pounds of ammonia in it, based upon personal recollection as well as his knowledge of the size of the system and the size of the operation, which suggested to him that it would likely require more than 500 pounds to operate. Tr. 85-86.

As additional proof that Respondent's system contained more than 500 pounds of ammonia during the relevant period of 2001-2003, Complainant lastly points to the testimony of

Mr. Mix to the effect that the high pressure ammonia receiver he observed in use at Firestone's facility during his 2006 inspection is *the same pressure vessel* (a 50 sq. ft. 2000 Morfab ammonia high pressure storage vessel located outside its compressor room (NB # 8626)), which the records of the State of Washington's Department of Labor and Industries (DOL) indicate has been present and in continuous operation at Respondent's facility since 1993. C's Brief at 14, Tr. 28-29, 74-75; C's Exs. 25, 26. EPA notes that Respondent has acknowledged that its current high pressure receiver uses 1,820 pounds of ammonia. C's Ex.8.

In counterpoint, Respondent asserts that there is "no credible evidence that the [500 pound] threshold was reached prior to 2004," asserting that "there is no direct evidence as to exactly how much ammonia was contained within Firestone's refrigeration system during the years 2002 and 2003," and a "close analysis" of the "circumstantial evidence" EPA is relying upon is "insufficient to prove anything." R's Brief at 2.

Respondent's argument begins by citing the testimony of its president, Stanley Firestone, that the company completed an expansion of its refrigeration system in 2004. R's Brief at 2 (citing Tr. 192-94). The expansion included the installation of a "flooded coil" which greatly increased the amount of ammonia required to operate the system. *Id*. As a result, since the 2004 expansion was completed, the system has been using approximately 1,820 pounds of ammonia. Beyond that, Respondent asserts, there is no direct evidence in the record as to the amount of ammonia used by its system at any other point in time and certainly not in 2002 and 2003. R's Brief at 2.

For example, Mr. Mix's testimony to the effect that shortly before hearing a PermaCold representative told him that Firestone's system could not operate with less than 500 pounds of ammonia, is "not helpful," Firestone asserts, in that there is no indication as to whether that statement is applicable to the system as it existed prior to the 2003-2004 expansion or thereafter. R's Brief at 3 (citing Tr. 36). Respondent also queries as to why Mr. Mix did not obtain from the PermaCold representative information fixing in time the relevance of this statement, insinuating that, because the conversation occurred shortly before hearing, it is likely that Mr. Mix would have done so, and further hypothesizing that in fact, he did, and that the representative told him that there was less than 500 pounds in the system in 2002-2003. *Id.* Respondent further points out that while Mr. Mix acknowledged preparing a memorandum of such conversation, "EPA did not even attempt to present it at hearing," while it offered other memoranda memorializing the inspector's conversations and inspection. *Id.* (citing Tr. 31, C's Exs. 3, 13-15, 21, 22, 24).

Firestone further asserts that the Tribunal should also disregard Ms. Powers' testimony regarding her conversation with a representative of Seattle Refrigeration and her memorandum relating thereto.[11] Respondent suggests that Seattle Refrigeration's statement is unsupported by

[11] Respondent notes in its Brief that Ms. Powers' Memorandum (C's Ex. 27) was "admitted over objection," but provides no argument suggesting that such ruling was in error. R's Brief at 4. Therefore, the admission of such exhibit into the record is not being reconsidered

documentation which "EPA presumably could have asked for and received," it is based upon a "recollection of events fifteen years in the past" regarding one customer with whom "Seattle Refrigeration no longer does business," and that "the system has changed since 1993" and the "precise nature of these changes has never been clarified with any precision." R's Brief at 4.

DOL records proffered do not evidence the amount of ammonia on site during the disputed period either, Respondent proclaims. While such records do reflect that one 1993 Morfab low pressure receiver is on site, Respondent avers, that unit was purchased in 2001, citing the testimony of Mr. Firestone in support thereof. R's Brief at 4 (citing Tr. 201-203).

B. Conclusion, Findings and Discussion

After due consideration, it is found that Complainant has proffered sufficient evidence and it is further found that based upon a preponderance of the evidence, more than 500 pounds of ammonia was present at Firestone's facility during calendar years 2001-2003.

In reaching this conclusion, it is observed that Complainant's analytic reasoning of the issue is sound. Respondent has never claimed that its refrigeration system used significantly less ammonia at any point after its initial installation in 1993. R's Brief at 2, R's Ex. 1, Tr. 193-94. Thus, if there is sufficient credible evidence that the system used more than 500 pounds of ammonia in 1993, then *a priori*, it did so each year thereafter, including during the years 2001-2003, at issue here. And, in fact, the record does contain such evidence.

Specifically, such evidence consists of the opinion of Mr. Pederson of Seattle Refrigeration (as conveyed through the testimony of Ms. Powers), that the amount of ammonia in Firestone's system in 1993 exceeded 500 pounds. This statement is deemed reliable and worthy of significant weight because, *inter alia*, the record reflects that Ms. Powers is a credible witness and her hearing testimony conveying the substance of the conversation was corroborated by a written record she created contemporaneously with such conversation (C's Ex. 27); and that at the time Mr. Pederson proffered this opinion he was generally familiar with ammonia refrigeration systems as a result of being in that business for at least 15 years, and also had personal knowledge of Firestone's specific refrigeration system as installed by his company in 1993. Respondent's arguments raised in an attempt to discredit this evidence and the alternative evidence it proffers purporting to show that its refrigeration system contained less than 500 pounds of ammonia until 2004, are unpersuasive.

In particular, there is no merit to Respondent's challenge to Ms. Powers' testimony on the basis that she lacks credibility because she acted as "an advocate" for the EPA, refused to "acknowledge seemingly obvious propositions" on cross-examination, and failed to consider a

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herein.

number of factors that could serve to reduce the penalty. R's Brief at 24-25. Ms. Powers' testimony at hearing was credible and forthright. Tr. 81-89, 122-162. Upon cross-examination, she honestly acknowledged the truth of the assertions Respondent's counsel presented to her regarding the limits of her memoranda, her conversation with Mr. Pederson, her knowledge of certain matters, and the factors she took into account in calculating the penalty. Tr. 88-89, 142-43, 145-48. Moreover, the record documents that Ms. Powers generally acted with great integrity and to the benefit of the Respondent to the greatest extent that could reasonably be expected of her throughout this proceeding. For example, upon receipt of PermaCold's letter suggesting that Firestone's refrigeration system contained half the ammonia quantity which the company previously indicated it held, Ms. Powers immediately reduced the proposed penalty. Ms. Powers also proposed no penalty for Respondent's non-filings for the 2001 calendar year, although clearly she could have and placed the burden on Respondent to raise a statute of limitations defense thereto. C's Ex. 7 p. 6; Tr. 136. In addition, because she believed that the proposed penalty for the EPCRA Section 312 violations was, by itself, sufficiently high to deter future violations, Ms. Powers declined to prosecute the EPCRA Section 311 violations. Tr. 140; C's Ex. 7. Finally, the record suggests that Ms. Powers engaged in settlement negotiations with Respondent over an extended period prior to initiating this action. Tr. 150.

Respondent is also in error in suggesting that Mr. Pederson's representations to Ms. Powers in regard to the amount of ammonia in Firestone's system in 1993 should be "disregarded" because they are based solely upon "a [personal] recollection of events fifteen years in the past." R's Brief at 4. In fact, Ms. Powers testified at hearing that upon being initially contacted by her, Mr. Pederson responded that while "he remembered the facility," he "needed to go find the file" so he could refresh his memory and have the documents in front of him when he spoke. Tr. 84. Ms. Powers agreed and Mr. Pederson subsequently returned her call indicating at that point that he had his company's files on Firestone's system in front of him. *Id*. As such, Mr. Pederson was not, in fact relying solely upon his personal memory of events from 15 years earlier when he opined to Ms. Powers that Firestone's system in 1993 contained more than 500 pounds of ammonia or that the system because of its use and size, which Mr. Pederson specifically described to her as a 24"x12" high pressure receiver, capable of containing 1100 pounds of ammonia at 80% full, would likely require more than 500 pounds of ammonia to operate. Tr. 85-86, C's Ex. 27.

There is also no support in the record for Firestone's attempt to discredit Mr. Pederson's opinion by intimating that he may have had a desire to place Firestone in an unfavorable light because Respondent "no longer does business" with Seattle Refrigeration. R's Brief at 4. In particular I note that neither Mr. Firestone nor Mr. Schmitz testified that Firestone's relationship with Seattle Refrigeration ended on a sour note. Further, nothing in Ms. Powers' testimony suggested that Mr. Pederson explicitly or implicitly conveyed to her any negative feelings towards Firestone. Moreover, any such nefarious motivation Mr. Pederson might conceivably have possessed in regard to Firestone would have in all likelihood been extinguished by the fact that Mr. Pederson was knowingly dealing with a government official as part of a formal investigation, that he voluntarily represented to such official that his statements were supported by company records, and that he reasonably could have anticipated being subsequently requested

to testify, submit a confirmatory sworn statement, and/or produce supporting records. Under such circumstances, with no obvious gain to be achieved from indicting Firestone, it is reasonable to expect that Mr. Pederson would be circumspect in his representations rather than bombastic.

Additionally, Respondent's assault on Complainant's evidence from Seattle Refrigeration on the basis that the Agency neglected to introduce into evidence the company's records, also fails, as Respondent cites no authority suggesting that Complainant was required to introduce such records. R's Brief at 4. It is in fact black letter law that a party may prove a matter through witness testimony, even though the same matter is contained in a writing. *See e.g., R & R Associates, Inc. v. Visual Scene, Inc*., 726 F.2d 36 (1st Cir. 1984)(the "best evidence" requirement does not prohibit a witness from testifying to fact simply because fact can be supported by written documentation); *D'Angelo v. United States*, 456 F. Supp. 127 (D. Del 1978), *aff'd* 605 F2d 1194 (3rd Cir. 1979)(the "best evidence rule" comes into play only when terms of writing are being established and an attempt is made to offer secondary evidence to prove contents of original writing).

Finally, and perhaps most significantly, it is noted that the only evidence Respondent proffered at hearing which contravenes Mr. Pederson's opinion that Firestone's system in 1993 operated with more than 500 pounds of ammonia, was the testimony of its president, Stanley Firestone. At hearing Mr. Firestone stated that it was his "understanding" that the system when first installed in 1993 contained only 400 pounds of ammonia. Tr. 195. He further recalled that later on in that first year, when the system was found not to be performing per the requirements, a single-stage compressor was changed out to a compound compressor, and in connection therewith, Seattle Refrigeration removed "a little ammonia," "because it had gone out at a high level," but he did not know exactly how much. Tr. 195-96, 198. Mr. Firestone acknowledged, however, that his "understanding" was not based upon any personal knowledge he had as to the amount of ammonia in the system. Rather, his understanding was based upon his current recollection of what a Seattle Refrigeration technician had *once* told him, fifteen years ago, in 1993. Tr. 195-96. Furthermore, unlike Mr. Pederson, Mr. Firestone admitted that his memory in this regard had not been recently refreshed by a review of any contemporaneously created documentation. Tr. 196. In addition, the weight potentially attributable to Mr. Firestone's testimony in this regard was substantially undermined by the admissions he made suggesting the unreliability of the technician's statement itself. Specifically, Mr. Firestone admitted at hearing that, at the time the statement was allegedly made, the technician had not pumped all of the ammonia into the high pressure receiver nor undertaken a calculation or measurement of the amount of ammonia in the system and, most importantly, that you *"wouldn't know the quantity [of ammonia] unless we transferred it out to the high pressure receiver.* " Tr. 195, 200 (italics added). *See also*, Tr. 70. Moreover, the record reflects that, unlike Mr. Pederson, Mr. Firestone has no particular interest, expertise, knowledge or experience in regard to ammonia refrigeration systems in general, or even his own system in particular, especially in regard to the amount of ammonia contained therein, as he indicated during hearing that he never really inquired or knew the quantity of ammonia in the system at any point until this case was initiated. Tr. 194-197. Taking all these factors into consideration, Mr. Firestone's testimony as to his "understanding" of

the amount of ammonia in the system in 1993, is deemed of insignificant weight, and is overcome by the reliability and credibility of the opinion of Mr. Pederson.

Moreover, separate and apart from the conclusions which can be reasonably drawn as to the quantity of ammonia in Firestone's system in 2001-2003 based upon the amount therein in 1993, there is other sufficient credible evidence in the record which indicates that *by 2001,* Respondent's refrigeration system had been significantly expanded to such an extent that it is more likely than not that, by that point and thereafter, it required at least 500 pounds of ammonia to operate. In connection with this matter, Respondent has consistently alleged that the company expanded its original refrigeration system in 1996, 2000, 2003 and/or 2004. R's Ex. 1, Tr. 192-93, 197. At hearing, Mr. Firestone's full description of the first two expansions was that: "[i]n 1996 we added one coil, a floor coil, and in 2000 we added a freezing tongue." Tr. 197. He opined that neither of those first two expansions increased the system's "capacity or amount of ammonia needed," but just effected a change in how or where its product was being frozen. *Id*.

The next expansion, he testified concerning on direct, doubled the capacity of the company to store its fruit product in a refrigerated environment to 1.5 million pounds. Tr. 192. This third expansion, carried out by PermaCold, consisted of the installation of a "second freezer" and a new "flooded coil" system in lieu of the old "flowing" system. Tr. 192-93, 199. Mr. Firestone explained that this flooded coil required much more ammonia to operate and "that's where our number jumped up." Tr. 193. As a result, after this expansion Mr. Firestone conceded, the amount of ammonia used by the refrigeration system went up to 1,820 pounds, where it has remained constant ever since. Tr. 193-94.

In his January 12, 2007 letter to the EPA, Mr. Firestone expressly dated the point at which its ammonia exceeded the 500 pound threshold as "our 2003 expansion," although he also represented therein that "[i]n 2004 we spent in excess of $112,000 on improvements to the ammonia refrigeration system that increased both the quality control and safety . . . liquid level controllers, high level controls, and duel pressure relief valve assemblies improv[ing] operational and emergency safety of the system." R's Ex. 1. At hearing, however, Mr. Firestone suggested the 2003 expansion and 2004 improvements were effectively one ongoing project, explaining that, it "started . . . in 2003, the system was installed in 2004, and the ammonia was added in *July 2004*." Tr. 194. Mr. Firestone, however, could not state *how much* ammonia was in the system in June 2004, or how much was added to the system in July 2004, but offered that "[w]e have only added ammonia, *to my knowledge*, in the 2004 expansion." Tr. 193 (italics added).

It is noted that the record contains no documentation or third party testimony independently corroborating the Respondent's account of its expansions in 2000 or 2003/2004. On the other hand, it does contain information gathered from independent third-parties which strongly suggest that Respondent's description and dating of its expansions may not be completely accurate.

Specifically, Mr. Mix testified at hearing to a conversation he had regarding Firestone's refrigeration system with Randy S. Cieloha, PermaCold's vice president of sales. Tr. 76; C's Ex.

8. During that conversation, Mr. Cieloha advised Mr. Mix that "when they [PermaCold] did the modernization there [at Firestone], they installed a *new high pressure receiver*, a new freezer room, two more coils, *a low pressure receiver, and a larger condenser*." *Id*. (italics added). This statement suggests that the expansion of Firestone's system undertaken by PermaCold was actually a bit more extensive than that described by Mr. Firestone.

Furthermore, while Firestone has claimed that its refrigeration system underwent expansions in 1996, 2000 and 2003/2004, with only the last such expansion increasing the ammonia requirements, the DOL's records suggest otherwise. Specifically, DOL's records indicate that it initially inspected the pressure vessels at Firestone in December 1993, presumably when the facility first opened using its original refrigeration system as installed by Seattle Refrigeration that year. At that point, DOL documented the presence of one (1) active [high] pressure vessel - a 40 square foot 1993 Morfab used for ammonia storage (NB # 3815), located in Respondent's compressor room.[12] C's Exs. 25, 26. DOL subsequently reinspected Firestone's facility and certified the presence of that same one (*and only one*) high pressure receiver (NB # 3815) two years later in December 1995 and then again four years later in October 1997. *Id*.; Tr. 200-01. However, in *August and September of 2001*, DOL inspected again and at that point certified in operation at Respondent's facility that same original receiver (NB # 3815), *plus five (5) additional* pressure vessels in operation, including a *50 sq. ft.* 1989 Morfab high pressure receiver located inside in the processing area (NB # 1833) and another *50 sq. ft.* 2000 Morfab high pressure receiver located outside the compressor room (NB # 8626), a *2001* Brunner "AT" type storage vessel in the processing area, as well as two 1988 Frick chillers (10 sq. ft and 20 sq. ft., respectively) situated in the compressor room. C's Exs. 25, 26; Tr. 76, 116, 201-02, 181. DOL's records indicated that both of the new 50 sq. ft. Morfab units (NB #s 1833 & 8626) were being used to store ammonia under pressure and the chillers (compressors/condensers) were being used for processing/heat exchange. C's Ex. 26. Further, in 2003 and 2005, DOL reinspected those same *six* (6) pressure vessels at Respondent's facility, including the three active ammonia storage pressure vessels, *and no others*. C's Ex. 25, 26. Thus, DOL's records evidence that the significant expansion of Firestone's refrigeration system as described and undertaken by PermaCold, including the installation of two additional high pressure receivers and two new chillers, *occurred by 2001*.

In addition, as acknowledged in Respondent's Brief, Mr. Cieloha of PermaCold opined to Mr. Mix that "Firestone's system could not function efficiently with less than five hundred (500) pounds of ammonia." R's Brief at 2-3 (citing Tr. 36). While Respondent does not challenge the accuracy of PermaCold's opinion, it does chastise Mr. Mix for failing to learn "whether that statement applied to the system as it existed *prior to the 2003-2004 expansion."* R's Brief at 2-3 (italics added). However, such omission appears immaterial in light of DOL's records

[12] Morfab is a name of the manufacturer of the vessel. C's Ex. 26. The year stated identifies when the pressure vessel was built. *Id*. The unique NB ["National Board" of Boiler and Pressure Vessel Inspectors] number assigned to a vessel reflects its registration with the Board. *Id*.

evidencing that the bulk of the PermaCold's expansion of the Firestone's system actually occurred *by 2001*, and not in 2003-2004.

Moreover, the record also contains other evidence buttressing the conclusion that Firestone's refrigeration system's requirements exceeded 500 pounds with the 2001 expansion. As indicated earlier, it was Seattle Refrigeration's opinion that Firestone's original refrigeration system, with only one small (24"x12'/40 sq. ft.) high pressure receiver, would require more than 500 pounds of ammonia to operate. Mr. Firestone thought the original system operated with approximately 400 pounds. Even if, *arguendo*, one accepts Mr. Firestone's lower figure, it can reasonably be deduced from that number that it is more likely than not that the expanded refrigeration system in operation at the facility in 2001 certainly required more than 500 pounds of ammonia to operate since it had a new larger (42"x18'/50 sq. ft.) high pressure ammonia receiver, as well as an additional larger low pressure receiver (50. sq. ft), which together more than tripled the liquid ammonia storage capacity of the system.[13] C's Ex. 25, 26. In addition, by 2001, Respondent had added two new chillers to its system, increasing its capacity to cool and compress a greater amount of ammonia vapor. *Id*. Common sense and experience suggest that Respondent would not have incurred the acquisition, operation, and maintenance cost of an additional 100 sq. ft. of pressurized ammonia storage unless it was necessary and thus, by 2001, it needed to store more than the 1100 pounds of ammonia its original receiver was capable of safely accommodating. The alternative scenario offered by Respondent, that even after the system's vast expansion in 2001, it was still operating with less than 500 pounds of ammonia is just inherently unbelievable. *United States v. Santarsiero*, 566 F. Supp. 536 (S.D.N.Y. 1983)(judge is entitled to consider all the facts presented to him and to draw reasonable inferences from those facts based upon his common sense and experience); *Abad v. Bayer Corp*., 531 F. Supp. 2d 957, 966-967 (N.D. Ill. 2008)(In weighing the credibility of witnesses, a court is entitled to consider the inherent plausibility of the testimony. If the testimony runs counter to the judge's common sense, or the judge's own experience, to the extent he or she has any experience that is relevant, this is a factor that can weigh against acceptance of the opinion.).

Further, Respondent cannot successfully subvert the import of DOL's records, as it attempts to do, by merely citing to Mr. Firestone's statement that "to my knowledge" the ammonia in the system only increased in 2004. Tr. 193. First, the record is replete with evidence that Mr. Firestone had little or no personal knowledge of, or interest in, the ammonia level in his refrigeration system. His "understanding" as to the ammonia input into the system initially came only from the offhand remark once made by a technician sent to repair the system. Tr. 195. At hearing, he admitted that he never inquired of PermaCold, *even after this case began*, as to the amount of ammonia the system contained in 2001-2004. Tr. 197. In his 2007 letter to the EPA, he represented that the ammonia level surpassed the 500 lb. threshold "in 2003," but at hearing

[13] It is noted that Firestone's original 24"x12' high pressure cylindrical receiver would have a volume of approximately 81 cubic feet (using the standard formula $V=.\pi r^2 h$). Permacold indicated that Firestone's new 42" by 18' high pressure receiver had a volume of approximately 167 cubic feet, essentially twice as large as its old receiver. C's Ex. 8.

he said it was "July 2004." R's Ex. 1. Nevertheless, he could not state at hearing how much ammonia was in the system in June or added in July 2004. Tr. 194. Overall, Mr. Firestone's testimony did not give the impression that he certainly would have been aware as to if and when ammonia was added to the system.

Second, it is noted that DOL's records unequivocally demonstrate that Mr. Firestone did not, *or could not*, fully and accurately recollect at hearing the important events related to the expansion of his refrigeration system. Specifically, Mr. Firestone testified on direct examination that the second expansion of the system in 2000 only involved the addition of a freezing tongue, and did not increase the system's capacity, and the third expansion occurred in 2004 and involved only a second freezer and flooding coil. Tr. 197. As such, he omitted from his narrative on the history of the system's expansion, the company's purchase and installation of five new pressure vessels, including two additional receivers and two chillers, sometime between October 1997 and August 2001. Tr. 197, 193-94. Such an oversight seems particularly significant in light of Mr. Firestone's admission that he is responsible for tracking the company's expenditures and that the company had spent "more than $250,000" in capital expenditures on its refrigeration system beyond the original construction, plus $140,000 in contracted operation and maintenance. Tr. 193; R's Ex. 1 p. 3. It is additionally observed that even when this Tribunal attempted to refresh Mr. Firestone's recollection as to the equipment added to the system by 2001, his memory in regard thereto remained faulty. For example, when asked if DOL's records reflecting his company's purchase of a new high pressure receiver, *etc.,* in 2000-2001 was correct, Mr. Firestone stated "I believe so," but then erroneously recalled "trading in" his original receiver for the new one.[14] Tr. 201-02. Mr. Firestone was even given an opportunity thereafter to reconsider his recollection of a trade-in, when asked by the Tribunal how such a memory could be reconciled with DOL's records documenting that the original receiver (NB # 3815) remained in operation on site after the new receiver was added. However, Mr. Firestone's only response at this point was "I don't know." *Id.* Further, at that point in his testimony, Mr. Firestone recalled that he purchased the new receiver in 2000/2001 because PermaCold just happened to have an extra one available at the time and he was "looking forward" to a "future expansion." Tr. 201-204. This memory too appears inconsistent with DOL's records indicating that Respondent's refrigeration system underwent a broad expansion, with the addition of a number of machines, all around that same time and the fact that at that point excess capacity which would be used in an expansion was already built into Firestone's existing receiver with total capacity (at 80%) of 1100 pounds. C's Ex. 26. In addition, going beyond the issue of the system's expansion, the record reflects that during his testimony Mr. Firestone mis-remembered or mis-spoke on numerous occasions. For example, he gave the date of his company's incorporation was 1994, when it was 19*84*, and the year of the technician's representation to him as 2000, rather than 19*93*. Tr. 189, 195. While such misstatements could be attributable to

[14] Mr. Firestone also recalled that when the smaller receiver was allegedly replaced with one significantly larger high pressure receiver in 2001, the remaining ammonia in the old receiver was reinstalled in the new one, and he did not recall purchasing any additional ammonia in 2001. Tr. 201-04

simple witness anxiety, when considered together with other testimony and Mr. Firestone's demeanor at hearing, they color a picture of a person who is not particularly detail oriented especially with regard to dates. Thus, Mr. Firestone's memory alone is not a sufficiently reliable source of evidence as to when ammonia was or was not added to the system.

Third, the weight of Mr. Firestone's testimony regarding the 2003/2004 expansion is further diminished by the testimony of Mr. Schmitz. While Mr. Schmitz did corroborate Mr. Firestone's testimony generally regarding an expansion in 2004, he *did not* confirm Mr. Firestone's claim that ammonia was not added to the system until 2004, and, in fact, Mr. Schmitz' testimony undercut that claim. Specifically, Mr. Schmitz testified at hearing that, in 2004, PermaCold constructed for the company a second 60 sq. ft. refrigerator, adding two coils and piping. Tr. 174-75, 95, 98. 180. However, he stated that he did not "recall seeing *anything* about the quantity of ammonia" in PermaCold's bid for the 2004 project when he reviewed it. Tr. 97-98 (italics added). Such a statement suggests that PermaCold did not, in fact, dramatically increase the amount of ammonia in the system by some 1300 pounds (from approximately 500 to 1820 lbs.) at that point, a conclusion which, interestingly, would be consistent with Mr. Firestone's letter of January 12, 2007 to EPA wherein he described the 2004 improvements as only involving improvements in "quality control and safety." R's Ex. 1. As such, Mr. Schmitz's testimony creates even more doubt as to the reliability of Mr. Firestone's recollection regarding ammonia being first added to the system in 2004 and not beforehand, such as in 2001 when the additional receivers and other equipment came on-line.

Fourth, it is noted that not all of Mr. Firestone's testimony is or needs to be discredited for a decision to be made consistent with DOL's records. To the contrary, his recollection that it was the installation of a flooded coil system which triggered the need for more ammonia may be consistent with DOL's records. According to Seattle Refrigeration, Respondent's original 40 sq. ft. ammonia pressure receiver (NB # 3815) was capable of holding only 1,100 pounds of ammonia at 80% capacity. However, the 2001 addition of *two* larger *50 sq. ft.* high pressure ammonia storage vessels tripled the ammonia capacity to more than 3,300 pounds, and allowed for a flooded coil system which Mr. Firestone indicated required 1820 pounds of ammonia to operate. Mr. Firestone's testimony that the flooded coil was installed in lieu of the existing flowing system may actually refer to an installation that occurred in 2001 and the addition of one or two new coils for the new refrigerator in 2004.

Therefore, upon consideration of all the evidence adduced in this matter, I find Respondent violated Section 312(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11022(a), by failing to timely submit for calendar years 2001-2004 an Emergency and Hazardous Chemical Inventory Form identifying the presence of 500 or more pounds of the hazardous chemical ammonia at its fruit processing facility in Vancouver, Washington to the State Emergency Response Commission, the Local Emergency Planning Committee, and the local fire department as alleged in Counts 4-6, 8-10, 12-14 of the Complaint.

V. PENALTY

Section 22.27(b) of the Consolidated Rules of Practice that govern this proceeding provides in pertinent part that:

> . . . the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any *criteria set forth in the Act* relating to the proper amount of a civil penalty, *and must consider any civil penalty guidelines issued under the Act*.

40 C.F.R. § 22.27(b)(italics added).

A. The Act's Civil Penalty Criteria

EPCRA § 325(c)(1) provides that any person violating EPCRA § 312 "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation,"[15] but neglects to furnish criteria to guide the assessment of civil penalties under that provision. 42 U.S.C. § 11045(c)(1).

As a result, the penalty criteria relating to violations of EPCRA § 304, the emergency notification provisions, which are set forth in EPCRA § 325(b), 42 U.S.C. § 11045(b)(1)(c), have been relied upon to guide administrative penalty assessments for Section 312 violations. *See e.g., Bituma-Stor, Inc*., EPA Docket No. EPCRA-7-99-0045, 2001 EPA ALJ LEXIS 16 *19 (ALJ 2001), *John K. Tebay, Jr.*, EPA Docket No. EPCRA-III-236, 1999 EPA ALJ LEXIS 73 *6 (ALJ 1999), *F.C. Haab Company, Inc.*, EPA Docket No. EPCRA-III-154,1998 EPA ALJ LEXIS 46 *5-6 (ALJ 1998). EPCRA § 325(b) establishes two classes of administrative penalties for violations of EPCRA § 304. Class I violations carry a maximum penalty of $25,000 *per*

[15] As adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461), as amended by the Debt Collection Improvement Act of 1996 (31 U.S.C. § 3701), the maximum civil penalty recoverable under EPCRA § 312 for violations that occurred "between January 30, 1997 and March 15, 2004," is $27,500, and for those occurring "after March 15, 2004" is $32,500. *See* 40 C.F.R. Parts 19, 27; C's Ex. 6. In addition, EPCRA § 325(c)(3) provides that "[e]ach day a violation [under EPCRA § 312] . . . continues shall . . . constitute a separate violation." 42 U.S.C. § 11045(c)(3). Pursuant thereto, it has been held that EPA has the statutory authority to assess multi-day penalties for violating the annual reporting requirement of EPCRA Section 312(a) for up to one year after the reporting deadline. *See*, *Loes Enterprises, Inc.*, EPA Docket No. EPCRA-05-2005-0018, 2006 EPA ALJ LEXIS 39 *34 (ALJ 2006). Thus, in this case, the Agency could have sought up to $32,500 for *each day* the violations alleged in Counts 1-3, 7, 11, and 15 continued (relating to filings for the 2004 and 2005 calendar years) and up to $27,500 for *each day* the other nine violations relating to filings for previous calendar years continued.

violation, and Class II violations carry a maximum penalty of $25,000 *for each day the violation continues*. 42 U.S.C. §§ 11045(b)(1)(A), (b)(2)(A).

In determining the appropriate penalty for a Class I violation of Section 304, EPCRA § 325(b)(1)(C) directs consideration of the "nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. 42 U.S.C. § 11045(b)(1)(C). In determining the appropriate penalty for a Class II violation of Section 304, EPCRA § 325(b)(2) directs the use of the factors enumerated in Section 16 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 1615. The factors listed under TSCA § 16 are identical to those found under EPCRA § 325(b)(1)(C) for Class I violations except that the former includes consideration of the effect of the penalty on the violator's ability to continue to do business (rather than "ability to pay") and omits inquiry into the violator's economic benefit or savings.[16] 15 U.S.C. § 1615.

Finally, the Environmental Appeals Board ("EAB") has consistently held, pursuant to Section 22.24 of the Rules of Practice (40 C.F.R. § 22.24), that in every case, EPA bears the burden of proving that the proposed penalty is appropriate after considering all the "applicable statutory penalty factors." *See, e.g., B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 217 (EAB 1997); *Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 756 (EAB 1997); *James C. Lin*, 5 E.A.D. 595, 599 (EAB 1994); *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). Where, as in this case, there are no "applicable statutory penalty factors," the EAB has held that EPA must alternatively prove that the proposed "penalty is appropriate in light of the particular facts and circumstances of the case." *Woodcrest Manufacturing, Inc.*, 7 E.A.D. 757, 773-774 (EAB 1998)(emphasis removed)(citation omitted). The standard of such proof required is a "preponderance of the evidence." 40 C.F.R. § 22.24(b).

B. EPA's Civil Penalty Guidelines

As indicated above, the procedural Rules governing this proceeding require that "any civil penalty guidelines" issued by the Agency under the Act must be considered, and further provide that deviations from the amount of penalty recommended to be assessed in the complaint be accompanied by specific reasons therefor. *See,* Rule 22.27(b)(40 C.F.R. §22.27(b)). However, the Administrative Procedure Act, 5 U.S.C. §§551-559, which also governs this proceeding, provides that penalty guidelines issued by the Agency without the benefit of notice and comment are not to be unquestionably applied as if they were a rule with "binding effect."

[16] "Inability to pay" and "ability to continue in business" are analogous concepts and the same evidentiary burdens apply. *Commercial Cartage Co.*, 7 E.A.D. 784, 807 (EAB 1998). Respondent has not alleged either factor to be relevant to the penalty calculation here.

See, Employers Ins. of Wausau, 6 E.A.D. at 755-762. Thus, in setting the penalty, this Tribunal has "the discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where circumstances warrant." *DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995).

On September 30, 1999, EPA issued an Enforcement Response Policy ("ERP") for, *inter alia*, EPCRA § 312 violations. C's Ex. 5. The stated purpose of the ERP is to "ensure that enforcement actions for violations of . . . EPCRA § . . . 312 are legally justifiable, uniform and consistent; that the enforcement response is appropriate for the violations committed; and that persons will be deterred from committing such violations in the future." C's Ex. 5 p. 3.

The ERP utilizes a matrix or chart to first determine the appropriate range of the "preliminary deterrence (base) penalty" accounting for the "nature, extent, gravity and circumstances" of the particular violation. C's Ex. 5 p. 9. The "nature" of the violation is taken into account in the ERP through the establishment of an individual matrix for each type of EPCRA violation. *See e.g.,* C's Ex. 6 at 20-C (Civil Penalty Matrix for EPCRA Section 312 violations occurring after March 15, 2004). In regard to a Section 312 violation, the "extent" of the violation is taken into account by measuring the deviation from the reporting requirement in terms of the untimeliness of the inventory submission and the "gravity" is determined by measuring the quantity of substance which went unreported. *Id*.

In terms of extent of the violation, the ERP § 312 matrix identifies three levels of deviation: a Level 1 violation occurs when a respondent fails to submit the required form within 30 days after the reporting deadline; a Level 2 violation occurs when a respondent submits the required form more than 20 days but less than 30 days after the reporting deadline; and a Level 3 violation occurs when a respondent submits the required form more than 10 days but less than 20 days after the reporting deadline. C's Ex. 5 at 14-15, 21; C's Ex. 6 at 20-C. In determining the gravity of the violation, the ERP matrix also identifies three levels of deviation in terms of the quantity of the chemical unreported: Level A applies when the amount of the hazardous chemical which went unreported was greater than 10 times the reporting threshold; Level B applies when the amount of the hazardous chemical which went unreported was greater than 5 times but less than 10 times the reporting threshold; and Level C applies when the amount of the hazardous chemical which went unreported was greater than 1 times the reporting threshold but less than or equal to 5 times the reporting threshold. C's Ex. 5 at 16-17, 21; C's Ex. 6 at 20-C.

After the extent and gravity levels are determined for the violation, the matrix provides a range in the amount of the penalty which may be imposed.[17] From this monetary range the

[17] The ERP provides that in regard to first time violators of EPCRA § 312, a Notice of Noncompliance may be issued in lieu of a monetary penalty action, where: "(1) no other . . . EPCRA violations were simultaneously discovered; (2) fewer than five chemicals were stored in quantities greater than the minimum threshold level; (3) the stored chemicals were in quantities less than five times the minimum threshold level; and (4) none of the chemicals stored was an extremely hazardous substance. C's Ex. 5 at 8. While a first time violator, Respondent does not fall within this provision because the unreported chemical (ammonia) is designated by EPA as an

Agency chooses the exact amount of base penalty it deems appropriate considering the specific "circumstances" of the violation such as the potential for harm as measured by "the potential for emergency personnel, the community, and the environment to be exposed to hazards posed by noncompliance; the adverse impact noncompliance has on the integrity of the . . . EPCRA program; the relative proximity of the surrounding population, the effect noncompliance has on the LEPC's ability to plan for chemical emergencies; and any actual problems that first responders and emergency managers encountered because of the failure to notify (or submit reports) in a timely manner." C's Ex. 5 at 17.

After the base penalty is determined taking into account the nature, extent, gravity and circumstances of the violation, the ERP provides that the Agency may then consider "Adjustment Factors" relating to the specific *violator* such as the ability to pay/continue in business, prior history of violations, degree of culpability, economic benefit or savings, size of business, attitude, supplemental environmental projects, and voluntary disclosure, and "other matters as justice may require." C's Ex. 5 at 9, 17, 24-32. The ERP provides Agency personnel with guidance as to when each such adjustment is deemed applicable and the extent of the adjustment which may be made in response thereto. *Id*.

C. EPA's Proposed Penalty Calculation

Suzanne Powers, EPA's EPCRA Enforcement Coordinator for Region 10, testified at hearing that she calculated the penalties proposed by Complainant in this case relying upon the statutory factors and the ERP. Tr. 81, 122-125; C's Exs. 5, 7, 9. Specifically, Ms. Powers stated that she first determined the nature of the violations, finding them to be Section 312 "community right-to-know preparedness and planning violations," rather than emergency response violations. Tr. 127-28, 130-31. Then she fixed the extent level (untimeliness) of each violation at "Level 1," in that the reports were not submitted within 30 days after the filing deadline. Tr. 131-32; C's Ex. 9. As to the gravity of the violations, *i.e.,* the quantity of the chemical unreported, Ms. Powers assessed the violations to be at "Level C" - greater than 1 but less than 5 times the minimum reporting threshold. Tr. 132-33; C's Ex. 9. In doing so, Ms. Powers explained that she initially considered the violations as Level B because Respondent had told the inspectors that it had 4,000 pounds of ammonia at the facility. C's Ex. 7; Tr. 132-33. However, when Firestone subsequently provided her with a letter from PermaCold indicating that its high pressure receiver had a charge of only 1,800 pounds, she reduced the gravity Level to "C." Tr. 132-33, 161.

Imputing these two levels (Extent Level 1, Gravity Level C) into the ERP's matrix for Section 312 violations occurring after March 15, 2004, suggested that a base penalty ranging from $8,061 to $16,119 per violation would be appropriate. C's Ex. 6 p. 20-C; Tr. 133-34. To choose a specific penalty amount from within that range, Ms. Powers explained that she then considered the particular circumstances of the violations at hand, *i.e.,* their potential for harm.

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extremely hazardous substance.

Among the circumstances she considered were the fact that ammonia is a particularly hazardous substance since it is a compressed gas, maintained under pressure, and in the event of a fire or unexpected release from a systems failure "it expands very, very rapidly into the environment and can spread very quickly;" that ammonia is a "very toxic chemical" because it is "hydrophilic" (water loving) and will target mucus membranes affecting a person's nose, eyes and breathing; that there are homes and a grade school "within a stone's throw of the facility;" and that by her calculation "approximately 2200 people within point six miles could potentially be killed if 2000 pounds were released from the facility." Tr. 134-35. *See also*, C's Ex. 1. Based upon these circumstances, Ms. Powers judged that an appropriate penalty in this case would be at the high end of the range. Tr. 135. However, because she "wanted to make sure that it was a penalty that could compel compliance and was reasonable" Ms. Powers testified that she chose $12,500, a sum almost exactly in the middle of the range, as the base penalty for *each of the three 2005 calendar year filing violations* (Counts 1-3). Tr. 134-36.

As to the violations for the previous three filing years (2002-2004), finding no special circumstances to warrant otherwise, Ms. Powers testified that she followed the ERP and assessed only a single flat penalty amount of $1,500 for each such *year* of violation, for a total of $4,500 for the nine violations set forth in Counts 5-7, 9-11, and 13-15. Tr. 136, 140; C's Ex. 5 at 23, C's Ex. 7 at 2, 6. As to the three filing violations for the 2001 calendar year, Ms. Powers proposed no penalty "because we were running into a five-year statute of limitations."[18] Tr. 136.

[18] The applicable statute of limitations at issue, 28 U.S.C. § 2462, provides that "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." The violations for the 2001 calendar year arguably accrued on or about March 2, 2002, the day after the filing deadline and as such, to avoid a statute of limitations argument being potentially raised in defense, an action on them would have needed to be commenced by March 1, 2007. While the inspection of Firestone's facility occurred on October 18, 2006, it appears that Ms. Powers did not undertake her penalty assessment in this case until July 30, 2007 (*see*, C's Ex. 7) and the case was not instituted in September 2007. As a result, Respondent could have raised a viable statute of limitations defense to the 2001 violations it was charged with in this action and presumably did not because the Agency was not seeking a penalty in regard thereto.

Thereafter, Ms. Powers considered the various adjustment factors relating to the violator which are set forth in the ERP. Tr. 137-140. Her analysis determined that there was no factual basis warranting a downward adjustment to account for "inability to pay " because a Dun & Bradstreet Report (C's Ex. 10) indicated that Respondent's annual sales exceeded $3.1 million and the proposed penalty constituted less than 1% thereof. Tr. 137-38; C's Ex. 7. Ms. Powers also concluded that there was no factual basis for an upward adjustment in the penalty based upon the Respondent having a prior history of violation. Tr. 138. In addition, Ms. Powers explained that she made no adjustment either up or down in the penalty based upon the Respondent's culpability, because she concluded that this case fell within the ERP's "non-adjustment" culpability "Level II," applicable to situations where "the violator had sufficient knowledge to recognize the hazard created by his/her conduct, or significant control over the situation to avoid committing the violation." Tr. 138, 159-60. Ms. Powers asserted that she found no basis for characterizing Respondent's culpability in this case as either Level I - *i.e.* a wilful violation (justifying a penalty increase) or Level III (justifying a penalty decrease) on the basis that the Respondent lacked control over the situation so as to prevent the occurrence of the violation. C's Ex. 7; Tr. 138-39. Furthermore, Ms. Powers testified that she did not find any basis for reducing the base penalty "for other matters as justice may require" as there were none, nor for the (small) size of Respondent's business, as the ERP indicates that this factor only applies "prior to issuance of the complaint." Tr. 139-40, 147. She also found inapplicable the downward adjustment factors of a supplemental environmental project or voluntary disclosure.[19] Tr. 139-40; C's Exs. 7, 23.

As a result of her analysis, Ms. Powers concluded that the only ERP adjustment factor applicable in this case was that of "economic benefit or savings." C's Ex. 7 at 3-5, C's Ex. 9. As to that factor, relying upon the Table in the ERP which identifies the costs associated with EPCRA compliance as determined by the Agency in 1996/97, she adjusted the penalty upward by a total of $690 to account for the economic benefit Respondent incurred as a result of not familiarizing itself with EPCRA's requirements ($604) and not completing and submitting an Inventory Form ($86). Tr. 139; C's Ex. 5 at 29 (ERP Table II "Costs Associated with EPCRA/CERCLA 103 Compliance."); C's Ex. 7 at 4, 7.

Thus, as indicated by Ms. Powers, the total penalty of $42,690 proposed by the Agency consists of $37,500 representing the total of the base penalties of $12,500 for each of the three

[19] Ms. Powers further testified that, while she calculated a penalty for Respondent's EPCRA §311 violations which she identified in her October 2006 investigation report, she did not propose any additional penalties for the § 311 violations because she was trying to be "consistent and fair in coming up with a penalty." Tr. 140; C's Ex. 7 at 2 (indicating proposed penalty for Section 311 violations calculated as $29,100).

2005 year violations, the sum of $4,500 representing the flat penalty amount of $1,500 for each of the three previous years of non-compliance, and $690 reflecting the economic benefit of one year of non-compliance. C's Ex. 7 at 6, C's Ex. 9. Based upon her 17 years of experience, Ms. Powers opined at hearing that the proposed penalty is fair and consistent with previous penalties she has calculated. Tr. 140-41; C's Ex. 12. However, she then qualified her opinion in this regard stating that had she known at the time she calculated the penalty that Firestone would not file its 2006 Inventory Form in a timely manner, she would have proposed a higher penalty. *Id*.

D. Respondent's Statutory Challenge to Three 2005 Filing Year Penalties

In its post-hearing Brief, Respondent raises a statutory challenge to the legality of being charged with three Section 312 violations for failing to submit an Inventory Form for calendar year 2005, and concomitantly being potentially assessed an aggregate penalty of $ 37,500 therefor, which Firestone notes is above the statutory penalty limit of $ 32,500 for Section 312 violations occurring after March 15, 2004. Specifically, Respondent argues that "[t]here is nothing in that statute that says the failure to file with each of the three agencies amounts to *a separate violation of the statute*." R's Brief at 8 (italics added). The "verbiage" of EPCRA § 312(a)(1) imposing the legal requirement on owners of covered facilities to file Inventory Forms, "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 with only one agency is in violation. An entity that files with two agencies is in violation," Respondent asserts. R's Brief at 8, 11. "Any entity that understands the [EPCRA] reporting requirement will file Tier II forms with all relevant agencies or none at all." R's Brief at 9.

Further Firestone argues, "[a]ny reasonable construction of the term '*each such violation*'" in the phrase in EPCRA § 325(c)(1) that "any person who violates [§ 312] . . . shall be liable . . . for a civil penalty in an amount not to exceed $25,000 for *each such violation*," "must refer to an instance of failing to file Tier II forms with *all* of the relevant agencies," since "the statute makes it clear that compliance requires filing with each agency [and] nothing in the statute says that the failure to file with each agency amounts to a separate violation . . . ." R's Brief at 10 (italics added). "[I]f 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," Firestone claims. *Id.* at 8. Certainly, Firestone implores, EPA cannot impose a penalty in such circumstances above the current statutory limit of $32,500 for EPCRA § 312(a)(1) violations.

In support of these arguments, Respondent cites to federal case law for the "well-recognized rule that statutes imposing penalties . . . must be strictly construed," and asserts that a party may not be subject to liability or penalties not clearly authorized by statute. R's Brief at 8. Additionally, Respondent cites to the decision *in Loes Enterprises, Inc*., EPA Docket No. EPCRA-05-2005-0018, 2006 WL 3406334 (ALJ 2006)(Order Denying Respondent's Motion for Accelerated Decision), for the proposition that the Agency may seek total penalties in excess of the statutory maximum for "each violation" of EPCRA nonfiling *only* if it gave prior notice of its intent to seek daily penalties under EPCRA 325(c)(3) (providing that "[e]ach day a violation

described in [EPCRA 312(c)](1) . . . continues shall, for the purposes of this subsection, constitute a separate violation.). R's Brief at 10. It points out that in the instant matter the Agency has not alleged continuing violations or indicated it is seeking daily penalties. Thus, Respondent characterizes the Complaint as "alleging a series of 'one-time' violations" which, as applied in this case to Respondent's 2005 non-filings, results in a penalty of $37,500 which impermissibly exceeds the statutory maximum. *Id.* at 6-7.

With regard to the multiple violations and penalties being consistent with the ERP, Respondent notes that the ERP is a policy that "has not been promulgated as a regulation and does not have the force of law." R's Brief at 5. Therefore, to the extent that it is "not consistent with the statutory scheme," it is inapplicable. R's Brief at 7-8. Moreover, by tripling the number of violations possible in a single filing year, the EPA creates a "multiplier" which is then "used to rachet up the penalty amount," undermining the very intent of its ERP which is to proportionally assess penalties from "a minimum of $2,014 to a maximum of $32,500 *based upon the amount of hazardous chemicals an entity maintains*." R's Brief at 9(emphasis added). For example, while it had only 3.3 times the relevant threshold of ammonia, by assessing penalties on a per filing entity basis, the Agency is effectively charging Respondent the maximum statutorily permitted penalty amount for non-filing, the same penalty which a non-filing entity which had 10 times or more of a chemical above the reporting limit would be subject. *Id*. In these circumstances, Respondent suggests, "[o]ne could at least understand a penalty of one-third (3.3 divided by 10) of the maximum [penalty of $32,500] or $10,833.00," but the proposed penalty of $37,500, it argues, violates EPCRA and cannot be imposed. R's Brief at 9, 11.

EPA did not address this multiple violation/multiple penalty issue in its post-hearing Brief nor did it file a reply brief.

As a preliminary matter, it is noted that in making this statutory argument, Respondent appears to be at least in part, implicitly, seeking reconsideration of this Tribunal's Order on Accelerated Decision dated May 1, 2008, in which it was found to have committed three separate EPCRA § 312 violations as a result of its failure to timely submit its Inventory Form for the 2005 calendar year to each of the three recipient entities designated in the statute (the SERC, the LEPC, and the fire department).

The Consolidated Rules of Practice do not specifically provide for reconsideration of interlocutory orders. *See*, 40 C.F.R. Part 22, *et seq*. However, it has been held that a motion for reconsideration of an Administrative Law Judge's order is subject to the same standard of review as that for orders of the Environmental Appeal Board (EAB). *See e.g., Rogers Corporation*, Docket No. TSCA-I-94-1079, 1997 EPA ALJ LEXIS 53 (ALJ, December 18, 1997)(Order Denying Respondent's Motion for Reconsideration or for a Stay); *Oklahoma Metal Processing, Inc.*, EPA Docket No. TSCA-VI-659C, 1997 EPA ALJ LEXIS 16 * 2 (ALJ, June 4, 1997)(Order Denying Motion for Reconsideration)(requiring a motion for reconsideration of an interlocutory order not only to meet the EAB's standard for reconsideration under 40 C.F.R. § 22.32, but also to demonstrate that a variance from the rules, which do not provide for reconsideration of ALJ orders and decisions, will further the public interest); *Ray & Jeanette Veldhuis*, EPA Docket No. CWA-9-99-0008, 2002 EPA ALJ LEXIS 47 * 7 (ALJ, Aug. 13, 2002)(Order Denying Motion to

Reopen Hearing and Denying Motion to Stay)("assuming that a motion for reconsideration from an initial decision may be brought properly before an administrative law judge, such motion would be subject to the same standard of review as that of the EAB").

> As to reconsideration of its Orders the EAB has stated -
>
> Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. . . .
>
> The filing of a motion for reconsideration 'should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.'. . . A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider.

Hawaii Electric Light Company, Inc., 8 E.A.D. 66, PSD Appeal Nos. 97-15 through 97-22, slip op. at 6 (EAB, March 3,1999)(Order Denying Motion for Reconsideration and Lifting Stay) (citing, *inter alia, Publishers Resource, Inc. v. Walker-Davis Publications, Inc*., 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion . . . ."); *Southern Timber Products*, 3 E.A.D. 880, 889 (EAB 1992)("reconsideration of a Final Decision is justified by an intervening change in the controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice."); *City of Detroit*, TSCA Appeal No. 89-5 (CJO Feb. 20, 1991)(unpublished order)("A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.").

The standard enunciated by the EAB for reconsideration is similar to that used by Federal trial courts under Federal Rule of Civil Procedure 60(b), with which courts may grant relief from judgment for, *inter alia*, "obvious errors of law, apparent on the record." *Van Skiver v. United States*, 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied*, 506 U.S. 828 (1992)(*citing Alvestad v. Monsanto Co.*, 671 F.2d 908, 912-13 (5th Cir.), *cert. denied*, 459 U.S. 1070 (1982)). Motions for reconsideration are not for presenting the same issues ruled upon by the court, either expressly or by reasonable implication. *United States v. Midwest Suspension & Brake*, 803 F. Supp. 1267, 1269 (E.D. Mich. 1992), *aff'd*, 49 F.3d 1197 (6th Cir. 1995). However, some courts have stated that a motion for reconsideration is appropriate where the court has mistakenly decided issues outside of those the parties presented for determination. *United States v. MPM Contractors, Inc.*, 767 F. Supp. 231 (D. Kan. 1990); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

A review of the case file evidences that Firestone did not raise a statutory argument challenging the number of violations charged for calendar year 2005 in its opposition to EPA's

Motion for Accelerated Decision. Furthermore, Respondent's post-hearing Brief does not suggest that it is raising this argument at this time because of "any newly discovered evidence." Thus, the only potential basis for reconsidering this Tribunal's prior holding with regard to Respondent being liable for three separate violations for its failure to file its 2005 Inventory form with the SERC, LEPC, and fire department, would be that it represents a "clearly erroneous" legal conclusion.

In this regard, it is noted that Respondent has not cited any authority, nor has any been found, which specifically addresses the appropriate "unit of violation" under EPCRA 312(a)(1). However, in regard to other statutes, the EAB has indicated that traditional principles of statutory construction apply for the purpose of determining the unit (number) of violations or penalties which may be charged or imposed from proscribed conduct. *See e.g., McLaughlin Gormley King Co.*, 6 E.A.D. 339, 344-46 and n.6 (EAB 1996))(the language of FIFRA § 12(a)(2)(Q), stating that it is unlawful to "falsify all or part of any information relating to the testing of a pesticide," provides that only one violation can result from a singular false compliance statement, even if such statement is false in four respects, because the "unit of violation" is based on the act of submitting a false statement, not on the number of reasons for the statement being false.); *Microban Products Company*, 9 E.A.D. 674 (EAB, 2001)(Congress intended the unit of violation under FIFRA § 12(a)(1)(A) and (E) to be the statutorily defined act to "distribute or sell" and the fact that the sale or distribution may be unlawful for several reasons does not increase the number of sales or distributions which is the only basis upon which a penalty may be assessed.). *See also*, *Consumers Scrap Recycling, Inc*., EPA Docket No. CAA-5-2001-002, 2002 EPA ALJ LEXIS 48 *6-7 (ALJ 2002)(holding that under Clean Air Act regulations providing for either recovery of refrigerant "or" verification of refrigerant evacuation prior to disposal of a small appliance the Agency may not charge or assess a penalty for a violation of both sections), *aff'd in pertinent part*, 11 E.A.D. 269, 283-4 (EAB 2004); *Atlas Refinery, Inc*., EPA Docket No. TSCA-02-99-9142, 2000 EPA ALJ LEXIS 12, *26 (ALJ 2000)(interpretation which treats the failure to report each chemical for the Toxic Substances Control Act Inventory Update Rule as a separate and distinct violation of TSCA § 15(3)(B) more nearly accords with the purpose and spirit of TSCA); *Isochem North Am., LLC,* EPA Docket No. TSCA-02-2006-9143, 2007 EPA ALJ LEXIS 37, *72 (ALJ 2007)(same); *Donnally Corp.,* EPA Docket No. CWA-A-O-009-94, 1996 EPA ALJ LEXIS 20, 13-14 (ALJ 1996)(Under the Clean Water Act respondent cannot be charged with both a monthly average violation and a daily maximum violation of the same effluent limitation for a particular month).

The fundamental principle of statutory construction is that such analysis must always begin with the language of the statute itself, and if such language has a plain and unambiguous meaning, the inquiry ends there. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999). Where Congress' intent is clear from the plain language of the statute, that is the end of the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984); *Microban Products Co.*, 11 E.A.D. 425, 446 (EAB 2004)(language of the Act itself is the primary consideration in interpreting any statute).

EPCRA § 312(a) provides in relevant part that:

> (1) The owner . . . [of a facility subject to the Act] shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this chapter referred to as an "inventory form") to *each* of the following:
>
> (A) The appropriate local emergency planning committee [LEPC].
> (B) The State emergency response commission [SERC].
> (C) The fire department with jurisdiction over the facility.

42 U.S.C. § 11022(a)(1)(italics added).

Respondent interprets this whole provision as creating a singular "requirement," such that the failure to comply in whole or in part with the filing obligations thereunder would subject the violator to no more than *one* violation and *one* penalty under the language of EPCRA § 325(c)(1) providing that "[a]ny person . . . who violates *any requirement* of section 312 . . . shall be liable to the United States for a civil penalty in an amount not to exceed . . . [$32,500] for *each such violation*." 42 U.S.C. § 11045(c)(1)(italics added).

EPA's position as expressed in the ERP on the other hand, provides that the "failure to . . . submit required reports to *each point of compliance* is a *separate violation*." Ex. 5 p.9 (italics added). The term "point of compliance" is defined in the ERP as the various entities designated to receive submissions and notices under EPCRA (*i.e.*, the SERC, LEPC, and the fire department). *Id.* Thus, EPA has interpreted EPCRA §312(a) as imposing *three separate* Inventory Form provision "requirements" each of which if violated could result in the imposition of the maximum penalty permitted under EPCRA 325(c)(1) if a violator failed to file with all three entities in a single year.

The word "requirement" means "something that is called for or demanded: a requisite or essential condition." Webster's Third New International Dictionary of the English Language Unabridged 1929 (2002). There is no dispute that Section 312(a) "requires," that is, calls for, or demands, that a covered facility provide all three recipient entities identified therein with a copy of its yearly inventory form.[20] The only issue is whether such filing requirement is singular or

[20] The fact that EPCRA § 312(a) is entitled "basic requirement" (singular) is not significant in terms of its interpretation in that descriptive headings immediately preceding the text of a statutory section do not constitute part of the statute and are not controlling in regard to its construction or interpretation. 2A Sutherland Statutory Construction § 47:14 (6th Ed. 2000)("statutory captions are merely catchwords and should not be read to inject legislative intent"). Headings of sections "cannot undo or limit that which text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947). Moreover, in any case, such singularity, even if part of the statute itself, would have no interpretive significance in that 1 U.S.C. § 1 provides that "[i]n determining the meaning of any Act of Congress . . . words importing the singular include and apply to several persons, parties or things . . ." *See also*, 2A Sutherland Statutory Construction § 47:34 (6th Ed. 2000)(it is a well established rule of statutory construction that "legislative terms which are singular in form may apply to multiple subjects,"

multiple. Upon consideration of the language of the statute, particularly its punctuation, it is determined that EPCRA § 312(a) contains separate and multiple filing requirements.

"[A]n act should be read as punctuated" and "[w]hen punctuation discloses a proper legislative intent or conveys a clear meaning the courts should give weight to it as evidence." 2A Sutherland Statutory Construction § 47:15 (6th Ed. 2000)(*citing inter alia Fithian v. St. Louis & S.F. Ry. Co.*, 188 F. 842, 845 (1911)(holding grammatical construction of the language used strengthened by punctuation makes statutory language clear and unambiguous); *State v. Flynn*, 464 A.2d 268, 271 (N.H. 1983)("Although the legislature is not compelled to follow technical rules of grammar and composition, a widely accepted method of statutory construction is to read and examine the text of the statute and draw inferences concerning its meaning from its composition and structure."). Upon examination, it is noted that EPCRA § 312(a)(1) is written and punctuated such that it does not unite in a single continuous sentence the obligation to provide the three recipient entities with inventory forms. Rather, it individually lists each such entity, in three physically differentiated, alphabetically sequenced subprovisions (A)-(C). As such, the statute's structure provides a unique code citation to the obligation to provide each entity with an inventory form. Further, each of the three subprovisions ((A)-(C)) concludes with a "." -- a period or full stop – a punctuation mark used to complete independent sentences, rather than being conjoined to the others by commas or semicolons and/or a final conjunction such as "and." Strunk, William & White, E.B., The Elements of Style, 6-7 (2nd Ed. 1972). *See also*, Webster's Third New International Dictionary Unabridged 46a (2002) ("a period usually terminates a sentence that is neither interrogatory or exclamatory.") As such, Section 312(a)(1)'s structure and punctuation are highly indicative of a legislative intent to make the obligation to provide each entity with an inventory form a separate "requirement" or "unit of violation."

Furthermore, it is a cardinal rule of statutory construction that every term in a statute should be construed as having a meaning distinct in some way from the other terms, and that statutory interpretations that render language superfluous are to be avoided. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999); *United States v. Victoria Peguero*, 920 F.2d 77, 81 (1st Cir. 1990); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985)("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous."); 2A Sutherland Statutory Construction §§ 46:05, 46:06 (6th Ed. 2000)("[n]o clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute" and ". . . each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole."). It is noted in this regard that Respondent's reading of Section 312(a)(1) would seem to give no meaning or make superfluous the word "each," which means "one of two or more distinct individuals," in the statutory phrase directing that a form shall be provided "to *each* of the following [entities]," because Respondent's interpretation would conjoin the

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noting that there is a presumption in favor of multiple subjects).

obligation imposed thereunder into one joint requirement rather than three distinct ones to which the term "each" would be properly applicable. Webster's Third New International Dictionary of the English Language Unabridged 713 (2002). Moreover, if Respondent's interpretation of the provision were correct, in lieu of the word "each" one would expect to read the word "all," indicative of a class or group and the members or components thereof. *Id.* at 54.

Additionally, the rationale offered for Respondent's statutory interpretation - the notion that an entity aware of EPCRA's requirements would file with either all three designated recipients or none at all (R's Brief at 9), is simply factually untrue. Facilities have partially non-complied with the filing requirements of EPCRA § 312 and have been so charged. *See e.g., Robert K. Tebay, Jr.*, EPA Docket No. EPCRA-III-236, 2000 EPA ALJ LEXIS 95 (ALJ 2000)(violator charged with failure to submit inventory forms only to the SERC, having submitted the requisite form to the fire department). More importantly, it is noted that under such partial filing circumstances, Respondent's statutory interpretation would unfairly subject the partial violator, perhaps someone who attempted to comply with the statute in good faith, to the same maximum penalty as someone who failed to file at all, who made no good faith efforts at compliance. *Martin Electronics, Inc.*, 2 E.A.D. 381, 391 (CJO 1987)(holding that separate penalties should be assessed for failure to file three forms relating to the same hazardous waste activities, as charging only one penalty for the three violations would be unfair to a respondent who violated only one RCRA requirement and who is also charged one penalty). In addition, Respondent's construction of the statute would make it difficult, if not impossible, to calculate an appropriate penalty under the provision of EPCRA § 325(c)(1) that "[e]ach day a violation described in paragraph (1) or (2) continues shall, for purposes of this subsection, constitute a separate violation," (42 U.S.C. § 11045(c)(1)), where for example, the violator files late with each entity on a different date, or only files with some and not others. *Cf., Loes Enterprises, Inc.*, EPA Docket No. EPCRA-05-2005-0018, 2006 EPA ALJ LEXIS 39 *34 (ALJ 2006)(holding violation of Section 312(a) may be continuing violation subjecting violator to multi-day penalties under 325(c)); *Woodcrest Mfg., Inc. v. United States EPA*, 114 F. Supp. 2d 775, 779 (N.D. Ind. 1999)("Congress set out severe penalties in EPCRA for a company required to report under the reporting provisions that fails to do so, as much as $ 25,000 for each violation. . . . The statute goes on to say that each day the company fails to file the required reports is an additional violation. Obviously, an unsuspecting company can accumulate enormous fines in a relatively short period of time.").

Moreover, the provision allowing EPCRA non-filing violations to accrue with each passing day is indicative of a legislative intent to read expansively the number of potential violations provided for, rather than to restrict such number as Respondent's interpretation suggests. Such intent is further supported by the word "any" in the phrase of EPCRA Section 325(c) "any requirement of section 11022 or 11023 . . . shall be liable . . . for a civil penalty . . ."of up to $25,000. 42 U.S.C. § 11045(c)(1). "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997)(quoting Webster's Third New International Dictionary at 97). *See also*, *Norfolk S. Rwy. Co. v. Kirby*, 543 U.S. 14, 31-32 (2004)(the word "any" gives the word it modifies an "expansive meaning" when there is "no reason to contravene the clause's obvious meaning."); *HUD v. Rucker*, 535 U.S. 125, 130-31 (2002). Thus, the word "any," taken together

with the term "requirement," supports EPA's broader interpretation of Section 312(a) as imposing three separate filing "requirements" upon covered facilities.

Finally, it has been recognized that in regard to "regulatory programs which are deemed essential to the public welfare, interpretive attention may concentrate on the remedial character of the legislation to produce a liberal interpretation that enables the full benefits of the program to be realized." 3 Sutherland Statutory Construction § 65:3 (6th Ed. 2000)(*citing inter alia, Continental Pipe Line Co. v. Belle Fourche Pipeline Co.,* 372 F. Supp. 1333 (D. Wyo. 1974). Congress passed EPCRA in 1986 largely as a response to a chemical release disaster which occurred in Bhopal, India resulting in the deaths of thousands. *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237, 1238 (7th Cir. 1996). EPCRA's intent is "to provide the public with important information on the hazardous chemicals in their communities and to establish emergency planning and notification requirements which would protect the public in the event of a release of hazardous chemicals. H.R. Conf. Rep. 99-962, at 281 (Oct. 3, 1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3374. By designating three recipient entities -- the LEPC, the SERC and the local fire department – for the Inventory Forms, EPCRA encourages and facilitates public access of information on hazardous chemicals in their community by offering a choice of points of contact. The multiplicity of designated recipients also increases the likelihood of adequate emergency planning for an unexpected release. Imposing a separate penalty upon a violator for failing to timely file its Inventory Form with each of the three entities increases the likelihood of full compliance with the filing requirements and thus enables the full benefits of the program to be realized.

In a sum, for the reasons stated above, I find Respondent's failure to timely submit the required 2005 annual Inventory Form to the SERC, the LEPC, and the fire department constitutes three separate violations of EPCRA §312(a)(1), and each such violation subjects Respondent to the imposition of the maximum civil penalty allowed under EPCRA § 325(c)(1).

E. Respondent's Challenges to EPA's ERP Penalty Calculation for the 2005 Violations

In its post-hearing Brief, Respondent also challenges almost every aspect of EPA's proposed penalty calculation under the ERP in regard to the 2005 violations, stating that "EPA has given no particular or precise reason for seeking $12,500 [per violation for Counts 1-3] as opposed to any other sum within the range . . . [and] the facts do not support its analysis."[21] R's Brief at 11. Firestone suggests that "[b]ased upon the totality of the circumstances, a base penalty of $5,750 is more sensible." R's Brief at 15.

As to the "nature" of the violations, for example, Firestone notes that the violations at issue here involve a simple failure to file a Tier II form with the appropriate agencies. "No one claims that there has been any release of ammonia at the Firestone plant [and] [p]resumably, reporting violations should be considered less severe than release violations," Respondent observes. R's Brief at 11-12. It further claims that defining the"extent" of the violations in terms of how late the forms were filed "makes no sense in the context of a 'one time' violation as here," explaining: "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 the local agencies involved in this case, that the delay inhibited ability to plan. No such evidence was presented." R's Brief at 12. Similarly with regard to "circumstances," Respondent notes that the ERP interprets the "circumstances"of the violation in terms of the harm that could occur in the event of a release and the inability of local agencies to plan. It suggests that EPA's penalty overstates the significance of this factor by failing to sufficiently account for the fact that its facility is located in an industrial area and engages in proper maintenance and employs safety measures, which together have been effective in preventing any release from occurring. R's Brief at 12-13. Moreover, Firestone points out that there is no evidence in the record that any of the recipient entities changed their emergency response plans upon receipt of its Tier II form and thus there is no evidence that the absence of the form inhibited their ability to plan. R's Brief at 12. In any case, the Vancouver Fire Department was "well acquainted with Firestone," in that it had inspected the facility and assisted in its preparation of emergency evacuation procedures, Respondent states. *Id.*

Firestone further quarrels with EPA's "gravity" assessment based upon the amount of hazardous chemicals on site. Respondent argues that if measures are in place to prevent release and if no release has occurred at its facility, then this factor is lessened, proclaiming that "[t]here is necessarily less risk from the inability to plan for an event that it [sic] unlikely to occur." R's Brief at 13. It also observes that EPA actions in regard to it belie any claim that these were particularly "grave" violations, noting that Mr. Mix did not immediately inspect the facility after

[21] In its post-hearing Brief, Respondent raises no argument in opposition to the two $1,500 proposed penalties for 2002 and 2003, and "concedes a penalty of $1,500.00 for 2004." R's Brief at 5. Thus, only the Agency's penalty calculation as to the 2005 violations is at issue.

discovering its non-filing status but waited until he had other reasons to be in the area. Moreover, even after the inspection, Mr. Mix did not act promptly to advise the fire department or other recipient entities concerning the amount of ammonia present on site so they could update their emergency plans. R's Brief at 14. Further, Respondent notes there is no evidence that any local agencies or citizens had concerns or filed complaints regarding its operations, again insisting that it is significant that the local fire department was aware of the facility and that there is no evidence that any entity changed its plans in response to its filing. R's Brief at 14.

Firestone also challenges the $690 economic benefit component of the penalty, suggesting that EPA "did not indicate exactly how it computed this sum." R's Brief at 16. Respondent claims that, in fact, it incurred no economic benefit from its nonfiling because it does not hire an outside contractor to prepare the forms, but rather impresses such responsibility upon its employee, Zackary Schmitz, and it only took him 20-30 minutes to complete the forms. R's Brief at 16. Under these circumstances, the nominal economic benefit sought by the Agency should not be assessed, Respondent asserts, noting that the ERP (C's Ex. 5, p. 28), allows for waiver of it when the economic benefit is less than $5,000. R's Brief at 17.

Additionally, Respondent implores its entitlement to various downward penalty adjustments. Specifically, it suggests its culpability for the violations is minimal on the basis that at the time of the violations it had no knowledge of EPCRA nor the amount of ammonia in its system and that it would have needed to know both to comply with EPCRA. R's Brief at 16. It "seeks to comply with all regulations it knows about," Firestone asserts. R's Brief at 15. Further, Respondent insinuates that its culpability is reduced by virtue of the fact that it "engaged a consultant to advise [it] concerning EPCRA," and that such consultant, *i.e*. PermaCold, "had not provided Firestone with sufficient information" to come into compliance. *Id*. In support thereof, it cites the testimony of Mr. Schmitz (tr. 172-74) as evidencing that it was "heavily dependent on PermaCold for all issues and matters relating to its refrigeration system [and that] [i]t follows PermaCold's recommendations." Firestone suggests that its reliance on such a specialized contractor was not only reasonable, but laudable, in that having its own employees, who were not as sophisticated in hazardous substances, deal with the refrigeration system "could be disastrous." R's Brief at 15-16.

Moreover, Respondent argues that it has displayed both the "cooperation" and "willingness to settle" components entitling it to the "benefit of a significant reduction" based upon "attitude." R's Brief at 17-18. As to evidence thereof, Firestone avers that it provided EPA with evidence as to the amount of ammonia in its system and wrote to EPA indicating its willingness to settle, citing R's Ex.1. R's Brief at 17. It suggests that it is unfair to characterize its cooperation negatively on the basis that it did not provide EPA evidence as to the amount of ammonia in its system at the time of the 2003-2004 expansion, because there is no evidence in the record that EPA asked for such evidence or that such information was in fact "knowable," since Mr. Mix testified that he contacted PermaCold to learn this information but then did not testify as to what information he received on the subject, suggesting he received none. R's Brief at 17-18.

Respondent also claims that its level of cooperation should not be adversely effected by the fact that the recipient entities did not receive its Inventory Forms shortly after the April 2006 inspection, because Mr. Schmitz completed the forms and put them for mailing in June, and "Why the forms did not get to agencies shortly thereafter remains a mystery." R's Brief at 18. Further, Firestone suggests that "[t]his delay must be weighed against the apparent lack of urgency that EPA displayed in making inquiry to Firestone once it suspected that it was not complying with EPCRA requirements." *Id*. Furthermore, it should not be deprived of a reduction based upon attitude because settlement did not occur, Respondent advocates, because it was willing to settle and would have had EPA not wanted more from Firestone than it was willing to pay. R's Brief at 18. Failure to accept the settlement terms offered by the Agency is not an acceptable reason to deny a reduction for cooperation, Respondent claims, citing this Tribunal's decision in *Mark Fastow and Fiberglass Specialties, Inc*., EPA Docket. No. EPCRA-09-97-0013, 1998 WL 846751 (ALJ 1998). *Id.*

Penultimately, Respondent claims in its Brief that a number of factors at play in this case militate toward reduction of the penalty on the basis of "other factors as justice may require." R's Brief at 19. The first such factor cited is the absence of any release. Under this factor, Firestone argues that because it had adequate measures in place to prevent a release, the necessity for its compliance with EPCRA was reduced and so should be its penalty since the purpose of the Act was to allow for contingency plans to be made in the event of a release. *Id*. It boasts that its facility is "state of the art," includes "failsafe measures to insure that there will be no releases of the ammonia," is well maintained, and carefully monitored by employees and sensors. R's Brief at 19-20. The second "justice" factor cited by Firestone is "size of business." R's Brief at 20. In this regard it states that the ERP allows for a 15% reduction to be granted to entities just like Respondent, *i.e.*, first time violators whose business employees less than 100 people and whose annual corporate sales are less than $20 million, but limits the Agency to reducing it prior to filing the complaint. C's Ex. 5 p. 31. Respondent challenges the fairness of such limitation noting that it is being denied the reduction merely because it did not settle before the Complaint was filed which was beyond its control since EPA determined when to file the Complaint. R's Brief at 20-21. Respondent points to the "preexisting agency knowledge," specifically the Vancouver Fire Department's awareness of its facility, as the third justice factor warranting a reduction in penalty. R's Brief at 21. Firestone notes that the fire department knew it used ammonia in its refrigeration system in that it had reviewed plans and inspected its facility in connection with the company's expansions. *Id*. It characterizes that department's knowledge as "the most critical of all the agencies because it has operational responsibility in the event of any release." Therefore, Respondent claims its "knowledge ameliorates any concern that might be engendered due to the failure to file Tier II forms in a timely fashion." R's Brief at 21. Buttressing this argument, Respondent once more points to the dearth of evidence that any entity made any change to its emergency response plans based upon the filing of Firestone's Tier II forms. *Id*.

As its fourth "justice" factor, Respondent proffers that it has engaged in "other projects," specifically that in 2007 it had Mr. Schmitz attend a first responders' training program put on by PermaCold at a cost of $500, and second, at an anticipated cost of $10,000, the company has undertaken steps to upgrade its ammonia detection system so that it will notify Firestone's

security monitoring firm in the event of a release which will allow for rapid notification of the fire department. R's Brief at 22. "EPA's Standing," is the final "justice" factor cited by Respondent, under which it proclaims that "EPA should not be seeking penalties from others when it is arbitrarily and capriciously ignoring its own statutory obligations," *i.e.* to regulate greenhouse gasses, citing as evidence thereof to the holding in *Massachusetts v. EPA*, 127 S.Ct 1438, 1463 (2007) and quoting from a newspaper editorial.[22] R's Brief at 21-24.

The final argument raised by Respondent in its Brief in regard to the penalty in this case concerns the credibility of Ms. Powers and Mr. Mix. As to Ms. Powers, Firestone suggests that she acted as an "advocate" for the Agency during her testimony as evidenced by "the great effort required on cross-examination to have her acknowledge seemingly obvious propositions" and that her "expert" opinion on the penalty calculation was impeached by her acknowledgment that she failed to consider a number of factors that could serve to reduce the penalty under the ERP "or simple notions of what might be just under the circumstances." R's Brief at 24-26. As to Mr. Mix, Respondent raises the issue of his credibility arising from his conversation with PermaCold and his preparation of a memorandum memorializing such conversation, which was never submitted into evidence for consideration. R's Brief at 26.

F. Evaluation of EPA's Penalty Calculation and Respondent's Challenges Thereto

1. Nature, Extent, Gravity, Circumstance of the Violations.

Despite Respondent's suggestion otherwise, it is clear that the Agency has correctly identified the "nature" of the violations at issue here as stemming from EPCRA's annual Inventory Form filing requirements, rather than as arising from any type of release from the facility. That being said, however, Respondent's follow-up point concerning its expectation that as such, its violations would not be subject to as severe a penalty as release-type violations, has a certain initial logical appeal. In weighing the violations, one might expect filing violations to be of a more minor nature, in that at most the risk of harm is potential rather than actual as in the case with violation arising out of an expected or emergency release of a hazardous substance. Nevertheless, a review of the statute shows that when Congress enacted EPCRA it established the same maximum penalty of $25,000 for first-time violations arising from failing to either file the requisite inventory forms under § 312, the forms regarding releases under § 313, or even the emergency notification forms under § 304. 42 U.S.C. §§ 11045(b)(1), (c)(1). Such equality in penalties suggests that the legislators in fact viewed compliance with all these statutory requirements as equally important. EPA's ERP is consistent with the statute to the extent that its range of penalties provided for by EPA in various matrices is the same. Therefore, the concerns Respondent raises as to EPA's characterization of the "nature" of the violation do not warrant reconsideration of penalty.

[22] This editorial was not offered by Respondent in evidence at hearing.

As to "extent," Firestone basically objects to its 2005 violations being placed in the highest of the three categories in the matrix as a result of the forms being filed more than 30 days after the deadline, claiming essentially that filing one day late is the same as filing three hundred days late. While I agree that in terms of whether a violation itself has occurred, the length of time a form is filed after the deadline has passed is irrelevant. However, in terms of comparatively evaluating the "extent" of the violation's deviation from the legal requirement, time *is* relevant. EPCRA has two objectives with regard to the annual filing inventory filing requirements. The first is to fulfill the public's right to access information concerning toxic chemicals manufactured, processed or otherwise used and/or released at facilities in their communities and the contents of the emergency response plans related thereto. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 86 (1998), *Huls America, Inc. v. Browner,* 83 F.3d 445, 446-447 (D.C. Cir. 1996), *Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.,* 61 F.3d 473, 474 (6th Cir. 1995), 42 U.S.C. §§ 11001(a), (c); C's Ex. 20. Obviously, an Inventory Form filed as in this case *more than 9 months late* deprived the public of its right to access the information to which it was entitled to a far greater extent than one filed 5, 10 or 20 days late. EPCRA's second objective is to insure that the Federal, state, and local emergency planners and responders have access to information about hazardous chemicals within the community so that they are able to create viable plans of operation in the event of a release. *Id*. Again, by filing many months after the deadline, Respondent deprived the emergency planners and local responders of the information they needed in the event of an emergency and/or to plan for an emergency, to a far greater extent than if the forms had merely been filed a few days or weeks later. In fact, it is likely that such a late filing prevented LEPC planners from even considering Firestone's information with that provided by others who timely filed in connection with their annual review of their emergency response plans as provided for EPCRA. 42 U.S.C. § 11003; C's Ex. 20. The fact that no specific evidence was presented by EPA to the effect that Respondent's delay in filing inhibited the recipient entities' ability to plan or that those entities changed their plans upon receipt of Firestone's information is immaterial. The statute itself clearly emphasizes the importance of timely filing. Therefore, EPA's classification of the extent of Respondent's 2005 violations in the highest of the three categories based upon the lateness of the filing is justified.

Further invalid is Firestone's claim that, even though EPA classified the 2005 violations in the lowest of the three "gravity" categories set forth in the ERP, such assessment is nevertheless overinflated because the risk of a release occurring was lessened by the existence of safety measures which have effectively prevented a release from occurring. The mere fact that the facility has not yet experienced a release of ammonia neither proves the sufficiency of existing safety measures nor that the risk entailed by the violations was minimal. EPCRA's inventory filing provisions address, *inter alia,* the need to engage in advance planning in regard to responding on an emergency basis to an unforeseen, and perhaps as yet, unforeseeable, release of hazardous substances. Such non-routine releases can be the result of an accident, such as equipment failure, negligence or intentional conduct, such as employee sabotage, and generally prove the truth of the adage that "the best laid schemes of mice and men often go awry."[23] The

[23] For example, at hearing, Mr. Mix testified that the pipes or coils in the outside compressors can develop pinhole leaks, dissipating ammonia and its smell out into the

space shuttle disasters, nuclear plant meltdowns, the World Trade Center collapses, and the Bhopal incident itself, are but a few examples that "it happens." Thus, the mere fact that, to date, no release has occurred from the facility, does mean that one could not have occurred or that none will ever occur in the future. If that was the case, the DOL would have no need to continually reinspect the pressurized vessels in Respondent' facility, and the fact that it does evidences the increased risk of releases from such vessels, regardless of what they contain. Furthermore, if such a release event did occur at Firestone's facility, it could cause almost 2,000 pounds of ammonia, an *extremely hazardous substance*, to be released into the community, and result in the death of approximately 2200 people with point six miles of the facility, according to Ms. Powers' testimony. Tr. 135. *See also*, C's Ex. 1 (MSDS indicating exposure to ammonia can cause severe skin burns, permanent blindness, and "life-threatening pulmonary edema," and that it is harmful to aquatic and wildlife and is a water pollutant). Firestone's failure to submit its Inventory Forms in a timely manner prevented the fire department, SERC and LEPC from having access to the information necessary to plan for such an unexpected occurrence. It also prevented the public, including those perhaps considering building homes and schools within a "stone's throw" of the facility, from fully evaluating the risks posed by the neighborhood.

There is also no merit to Firestone's suggestion that the "gravity" of the violations is erroneously evaluated because the Vancouver Fire Department would not have significantly benefitted from the information it would have received had Respondent timely filed its Inventory Form in that it was already "well acquainted" with the facility. Mr. Firestone acknowledged at hearing that while the fire department was generally aware of Firestone's facility and that it

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atmosphere, which delays prompt discovery of the release. Tr. 72. In addition, Mr. Schmitz testified that Respondent's refrigeration system had had in the past an oil problem which effected its performance, and repair of which (the draining of the high temperature oil in the compressors), can cause ammonia loss. Tr. 99, 72.

operated an ammonia system, it was unaware of the amount of ammonia maintained therein. Tr. 199-200. *See also*, C's Ex. 3 p. 4; C's Exs. 13, 14, 17, 18, 22; Tr. 25-26, 48-50, 56. Unquestionably, the quantity of hazardous chemicals maintained on premises is exactly the specific type of important information a first responder needs to have in the event of an unexpected release and is exactly the information the fire department would have had in its possession had Firestone filed its Inventory Forms with the Department in a timely manner.[24]

This conclusion is not altered by either the fact that Mr. Mix did not immediately inspect the facility after discovering its non-filing status but rather waited until he had other reasons to be in the area, or the fact that post-inspection he did not expeditiously advise the fire department or other recipient entities concerning the amount of ammonia present on site so they could update their emergency plans. Pre-inspection, Mr. Mix had no basis for evaluating the compliance status or risk posed by the facility so as to make an informed determination that it was deserving of an expedited inspection. Post-inspection, Mr. Mix wrongly, but reasonably, anticipated that Firestone would be imminently filing its Inventory Forms obviating the need for him to feel compelled to "immediately" give third-parties notice. Moreover, the record documents that Mr. Mix did contact the recipient entities concerning Respondent's facility within a couple of weeks after the inspection, although there is no evidence suggesting that he was obliged to do so. C's Exs. 3, 15.

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[24] Interestingly, Mr. Firestone, as well as Mr. Schmitz, testified to the fact that until the company undertook to complete the Section 312 Inventory Forms, and in connection determined with certainty the amount of ammonia in its system, it did not know the quantity therein. Tr. 97. It was because of this dearth of knowledge that Mr. Schmitz erroneously advised Mr. Mix at the time of the inspection that the system had 4000 pounds of ammonia, twice what it actually contained. Tr. 21, 97-98. Mr. Schmitz also testified that the company did not have a MSDS for any hazardous chemicals, including ammonia, in its files or available to its employees until it prepared its Inventory Forms. Tr. 106-07. Thus, had a release occurred beforehand, neither Mr. Schmitz nor Mr. Firestone would have even been able to accurately advise the firefighters on site as to the type and quantity of the hazardous chemicals present at the facility, suggesting to even a greater extent the gravity of Firestone's failure to complete and file its inventory forms. Tr. 199-200.

Further, Respondent's plea for a gravity reduction based upon the fact that the record does not evidence that any local agencies or citizens had concerns or filed complaints regarding Firestone's operation can only be characterized as ironic. By failing to ever file its Inventory Forms with the designated entities before the inspection, Respondent effectively secreted the critical information about its hazardous chemicals which might have triggered concerns among the local agencies and citizens. Thus, the absence of such concerns or complaints might evidence that citizens and the local community had no concerns about Respondent's operation, including its hazardous chemicals, or, alternatively, it can evidence the import of inventory filings in that without such filings local agencies and citizens have no way of obtaining information on the hazardous chemicals in their community.

In light of all the foregoing, EPA's assessment of the gravity of the violations based upon the quantity of the chemical unreported, as "Level C," *the lowest of the three levels provided for by the matrix*, seems more than reasonable.

Similarly fallacious is Firestone's claim that EPA's proposed penalty calculation overstates the "circumstances" of the violations because the risk of harm was minimized by virtue of the location of its facility in an industrial area and its employment of maintenance and safety measures to prevent a release. First of all, the facility it is not situated in an *exclusively* industrial area, but rather, as Mr. Mix testified, in a "mixed area" with factories, farming and *homes*. Tr. 50-52, 172. Ms. Powers' observed that "there's homes within a stone's throw of the facility and also a grade school." Tr. 135. Clark County, where the facility is located, has a population of 300,000. Tr. 166. Second, while the refrigeration system has a number of parameters to keep it functioning, and/or monitors to measure that it is functioning properly, and to shut it down if it is not, the safety measures at the facility "preventing a release" only consist of employee monitoring of the system's performance and an ammonia detector designed to sound a loud siren in the event of release. Tr. 167-170. The system is not monitored by employees on-site 24/7, 365 days a year. Tr. 169, 171. Mr. Schmitz testified that the maintenance crew that comes in on Saturdays "periodically look in to monitor it," and one manager checks the system on Sunday, although a plant manager lives in a home in the vicinity of the plant who would be in "proximity and deal with the situation" if the alarm went off. Tr. 169, 171. However he did not know if the system tracks the amount of ammonia from which a leak could be determined in the event of siren failure. Tr. 177. The upgraded safety measures testified to by Mr. Schmitz at hearing, which would monitor more areas of the refrigeration system and provide 24/7 monitoring with a signal to be sent offsite to a monitoring center in the event of a release (important if a leak occurred on a weekend), were only under consideration, but not yet in place. Tr. 170-171. As such, Ms. Powers' analysis and determination that the circumstances of the violations, taking into account the foregoing factors as well as others such as the toxicity of ammonia, support choosing a base penalty from the middle of the range in the matrix, of $12,500, is sound.

2. Economic Benefit

Firestone's challenge to the $690 economic benefit component of the penalty on the basis

that it incurred no such benefit because it used an employee (Mr. Schmitz) rather than an independent contractor to prepare the forms and it only took Mr. Schmitz 20-30 minutes to prepare the form, is also faulty. Tr. 108. First, Mr. Schmitz testified that it took him 20-30 minutes to prepare the forms *after* he gathered the MSDS for all of the company's chemical suppliers *and* "took some time" to read the instructions on the form because it was "kind of difficult – to make out." Tr. 108. Thus, Respondent significantly underestimates the time involved in compliance. EPA has estimated that it takes a number of hours to initially read and understand the regulations and then to develop and submit the form. C's Ex. 5 p. 29. Second, because the company did not expend its resources, specifically Mr. Schmitz' work time, preparing the 2005 inventory forms for timely filing by March 2006, as it was legally obligated to do, it was instead able to expend such valuable limited resources on other company activities from which it presumably financially benefitted. That this was the case is evident from Mr. Schmitz' explanation at hearing as to why he did not promptly complete the forms even after the inspection, that is, he was too busy working on a blueberry irrigation project Firestone had in another city. Tr. 117. In order to encourage companies to value regulatory compliance as highly as more direct profit making activities and create a level playing field for competing businesses, it is essential that the government recover any economic benefit attributable to non-compliance. The amount sought here of $690 representing such economic benefit as determined *ten years ago*, in 1997 by EPA, seems eminently fair.

3. Downward Penalty Adjustments - Culpability, Attitude, Other Factors

As indicated above, Firestone seeks a downward adjustment in the penalty proposed by the Agency on a number of grounds. First, it characterizes itself as having minimal culpability for the violations based upon its lack of knowledge of both EPCRA and the quantity of ammonia in its system, and the fact that it had retained a "consultant," PermaCold, whom it suggests failed in its obligation to provide it with sufficient information regarding EPCRA. R's Brief at 15-16. In this regard it is noted that EPCRA is a strict liability statute; "intent" is not an element of liability, and lack of intent is not a basis for penalty reduction. As observed by the Seventh Circuit: "it must be remembered that liability and punishment serve similar purposes. To find a party liable despite its lack of culpability, but then to reduce, significantly, the applicable penalty based on this lack of culpability, would certainly undermine the goals of the statute. *Steeltech Ltd. v. EPA*, 273 F.3d 652, 656 (7th Cir. 2001)(*citing Steeltech Ltd. v. EPA*, 105 F. Supp. 2d 760, 767 (W.D. Mich. 2000)("The EPA's decision not to limit the penalties for unintended violations was reasonable because such a policy might have . . . the effect of encouraging a lack of diligence on the part of regulated facilities . . . ."). Moreover, Firestone proffers no compelling mitigating circumstances for excusing its ignorance of EPCRA or its ammonia, such as being a newly established business, under new ownership, or having a newly acquired refrigeration system. On the other hand, Mr. Mix opined that 70-80% of the business facilities in Washington State are aware of EPCRA's requirements and each year, approximately 3,500 such facilities file Inventory Forms. He also testified that the LEPC had a "very aggressive outreach program" and each year held three to six workshops on EPCRA throughout the state for facilities.[25] Tr. 58-59.

[25] It is also noted that prior to instituting this matter, EPA had instituted a number of

Thus, it would be unjust to reward Firestone for its ignorance of the law when so many other local businesses, some perhaps direct competitors of Firestone, have undertaken the time and effort to become informed and comply.

Additionally, it is observed that the evidence in this case does not support shifting some or all of the culpability for the violations from Firestone to PermaCold. At the time of the inspection in 2006, Mr. Schmitz identified PermaCold only as the "contractor performing routine maintenance." C's Ex. 3 p. 3. Similarly, Mr. Firestone described PermaCold in his 2007 letter to EPA as only having been "retained to operate and maintain our ammonia refrigeration system." R's Ex 1. While there was testimony at hearing to the effect that PermaCold had at some point designed and installed Firestone's expanded refrigeration system, the record makes clear that by 2005, PermaCold was primarily, if not exclusively, merely providing Firestone with maintenance services on its system, and then only "upon request and generally once a month." Tr. 92, 166, 179. Neither Mr. Schmitz nor Mr. Firestone testified to entering into any agreement at any point under which PermaCold was retained as an "environmental consultant" or otherwise was tasked with any responsibility for Firestone's EPCRA compliance and/or filings. Tr. 173. Thus, the responsibility for EPCRA compliance or lack thereof remained totally upon the Respondent.

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other EPCRA enforcement actions in cases involving anhydrous ammonia including at least one in Washington State, which one might reasonably anticipate could be another avenue through which the local business community would receive notice of the regulatory requirements. *See e.g.*, *Multistar Industries, Inc.*, EPCRA-10-2004-0058, 2005 EPA ALJ LEXIS 33 (June 13, 2005) (Othello, Washington business charged with six violations of EPCRA 312 for non-filing of Inventory forms reporting presence of anhydrous ammonia).

Also belied by the record is Respondent's claimed entitlement to a reduction based upon its positive "attitude." R's Brief at 17-18. The record in fact documents the opposite in that it shows that the company ignored Mr. Mix's initial attempts to cajole it into immediate compliance, choosing instead to give other business matters higher priority. Then, there is the fact that all six of the Inventory Forms allegedly sent by mail and/or fax "mysteriously" disappeared, raising more than a scintilla of doubt as to the credibility of the testimony given in regard thereto.[26] A more cynical view of the facts would suggest that Firestone actually only prepared and filed its Inventory Forms after it received EPA's Notice of Violation with a penalty demand, some eight months after the inspection. Further, Respondent did not undertake to carefully and thoroughly complete the 2005 and 2006 Inventory Forms it finally submitted in that, for example, each erroneously indicates that its ammonia is stored in an above ground tank under "ambient" temperature and pressure. C's Ex. 22. *Cf*. C's Ex. 8 (PermaCold letter of March 23, 2007 indicating that the ammonia is stored in a *high pressure* receiver at *85°*). *See also*, C's Ex. 23 (SERC e-mail indicating that Firestone's Inventory Form was missing information and/or contained inappropriate temperature codes). Then, of course, there is the fact that even while this penalty action was pending against it, Respondent filed its 2007 Inventory Form late, and the only explanation given therefor was that we "discussed turning them in much earlier and somehow I [Mr. Schmitz] – never did it."[27] Tr. 114-15. Finally, it is noted that Respondent chose to "artfully plead" in its Answer and basically deny every allegation made therein, including that ammonia in excess of 500 pounds was ever present at its facility, that it did not timely submit the requisite Inventory Forms, and even that it owned or operated a fruit processing facility in Vancouver, Washington. *See*, Answer.

No more persuasive are the multiple grounds upon which Respondent claims to be

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[26] After listening to his testimony, observing his demeanor, and considering the other evidence admitted into the record, it is hard to give any credence to Mr. Schmitz' claim regarding having *twice*, in June 2006, created, addressed, mailed and/or faxed the three Inventory Forms, not one of which was ever received by its addressee. Tr. 109-13. Similarly difficult to accept was Mr. Schmitz' testimony that he had not intentionally backdated one set of the Inventory Forms but rather had merely "accidentally" misdated all three of them as having been signed in March, rather than June 2006, because he was "very busy." Tr. 110-12. Misdating consecutive months at the end of one and the beginning of another is understandable and common, but thinking it is March when its June, the next season, no matter how busy you are, is *unusual*. All in all, Mr. Schmitz' demeanor at hearing conveyed the impression of a very bright and eager young man, justifiably proud of having climbed up the company ladder, from laborer to operations manager, who was willing to do whatever was required to succeed in business and satisfy his employer's expectations. Tr. 115. As such, his recollections appeared colored by perhaps an unconscious self-interest to portray himself as nothing less than a diligent employee. Tr. 105-06.

[27] Moreover, testimony at hearing suggested that this action did not prompt the company to undertake to become fully informed of its regulatory obligations under EPCRA. *See*, Tr. 190-91.

entitled to penalty mitigation under the aegis of "other factors as justice may require." For example, first, while it is true that no release occurred at its facility to date, suggesting its safety measures have so far been adequate, as indicated above, the purpose of EPCRA is both to plan for the unexpected and to give the public notice of hazardous substances in their community. Firestone's failure to submit its Inventory Reports thoroughly thwarted both goals. Second, although Respondent is a small business, and the ERP permits the Agency to mitigate the penalty imposed on such businesses which are first-time violators, as noted by Respondent the ERP restricts such reduction to settlements occurring before a complaint is filed, when presumably EPA has yet to incur substantial litigation costs. While this Tribunal is not bound by such limitation in the ERP, there is nothing in the record here which particularly prompts it to grant Respondent a reduction on the basis that it is a small business at this point. Third, as previously discussed, while the Vancouver Fire Department was apparently aware of Respondent's facility and that ammonia was present there, *like Respondent*, it was unaware of exactly how much ammonia was present on site - critical information it (and Respondent) only acquired when Respondent prepared filed its Inventory Forms. Moreover, neither of the other two entities (the SERC and LEPC), which were obligated by law to prepare for emergencies involving hazardous substances, had any knowledge of Respondent's facility. As such, the limited knowledge of the fire department does not warrant a penalty reduction.

Fourth, Respondent's "other projects,"specifically sending Mr. Schmitz to a "first responders training program" at a cost of $500 and/or its plans to spend $10,000 upgrading its ammonia detection system sensor system, do not justify a penalty reduction on the basis of being an environmentally beneficial project. To obtain a penalty reduction for an environmentally beneficial project not required by law under the rubric of "other factors as justice may require," Respondent has to show a "nexus between the nature of the violation and the environmental benefit to be derived from the project," and the steps taken and monies spent on a project. *Spang*, 6 E.A.D. at 249, 1995 EPA App. LEXIS 33 *61 (EAB 1995). Further, "no project, however close the nexus, should be credited unless the penalty which would otherwise be assessed would work an injustice." *Id*. at *62. At hearing, Mr. Schmitz stated that he attended a one day course given by PermaCold on ammonia safety and training, but he could not recall if it covered EPCRA and EPCRA reporting, and admitted that it did not cover compliance obligations regarding ammonia storage. Tr. 179. He also more generally denied having attended any workshops on EPCRA or any environmental compliance requirements, stating that he had never "been told of any to attend." Tr. 118, 170, 179. Thus, there is at best a tenuous "nexus" between the EPCRA non-reporting violations and Mr. Schmitz training class. Furthermore, as to Respondent's upgrade of its ammonia detection system, there is no evidence in the record as to the steps taken or monies spent by Respondent on the project to date. In fact, both at hearing and in its post-hearing Brief, Respondent has characterized this project as "anticipated," for the future, even though DOL suggested such improvements be made over a year and a half ago, in December 2007. Tr. 170-71, Tr. 179-180. As such, this project would not qualify for a reduction as an environmentally beneficial project under the criteria set forth in *Spang.* Additionally, it is noted that there is simply no evidence in this case that would support a finding that failing to give Respondent a downward adjustment based upon the training program and/or its plans to upgrade its monitoring system would work an "injustice." The Respondent is a successful business, which has raised no issues as to its ability to pay the proposed penalty. The

penalty is not excessive in light of the violations themselves nor the circumstances related thereto. Therefore, no adjustment is made to the penalty in consideration of Respondent's "other projects."

Respondent's final "justice" factor offered in mitigation of the penalty is "EPA's Standing," under which it proclaims that "EPA should not be seeking penalties from others when it is arbitrarily and capriciously ignoring its own statutory obligations," *i.e.* to regulate greenhouse gasses. Not surprisingly, Firestone cites no authority for mitigating the penalty on this basis and none has been found. Regardless of whether EPA is fulfilling its mission to Respondent's satisfaction in other spheres, it in no way impedes its right to do so in regard to EPCRA in general and as to Respondent specifically.

Lastly, the record does not support Firestone's attack upon the credibility of the testimony of Ms. Powers and Mr. Mix. While their testimony might not have been to its liking, Respondent has not directed this Tribunal to any evidence that it was false, inconsistent, or misleading in whole or in part. Both Ms. Powers and Mr. Mix testified to matters of which they had first-hand knowledge or statements made by others with such knowledge, as to which they freely acknowledged the limitations thereof. Their testimony did not appear particularly influenced by self-interest, bias or prejudice. To the contrary, it appeared limited, fair and balanced, and in large measure not controverted. Furthermore, such witnesses' testimony cannot be diminished by Respondent's unsupported speculation attributing some significance to Complainant's counsel's choice to not introduce records relating thereto into evidence. If it deemed them significant, Respondent could have subpoenaed such records to be produced at hearing and then offered them in evidence if it deemed warranted. *See*, 40 C.F.R. § 22.40(b)(1). Prior thereto, it could have obtained such records from Complainant by requesting additional discovery thereof under Rule 22.19(f) (40 C.F.R. § 22.19(f)) or the Freedom of Information Act (5 U.S.C. § 552). In sum, based upon the witnesses' testimony and demeanor as personally observed by this Tribunal, and other the evidence adduced at hearing, such credibility attack appears to be utterly without foundation.

Upon consideration of the factors set forth in EPCRA § 325(b)(1)(C), 42 U.S.C. § 11045(b)(1)(C), including "nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," I find it is appropriate to impose an aggregate penalty in the amount of $42,690 for the fifteen EPCRA Section 312(a) violations for which Respondent has been found liable.[28]

[28] The aggregate penalty is imposed herein for *all* 15 violations, even though Ms. Powers testified at hearing that she had not calculated a proposed penalty for those pertaining to 2001. It is noted that despite such testimony, the Agency's post-hearing Brief requests that a penalty of $42,690 be imposed for the violations covering calendar years "2001-2005." C's Brief at 31-33. More importantly, the Complaint proposed the imposition of three separate $1,500 penalties, *one for each of the three recipient entities* (the SERC (Counts 4-7), LEPC (Counts 8-11) and fire department (Counts 12-15)), to whom Respondent failed to submit its Inventory Report, in "*2001*, 2002, 2003, and 2004." *See*, Complaint, ¶ 4.3 (emphasis added). Rule 22.27(b) provides

in pertinent part that "[i]f the Presiding Officer determines that a violation has occurred and *the complaint seeks a civil penalty*, the Presiding Officer shall determine the amount of the recommended penalty." 40 C.F.R §. 22.27(b)(italics added). Thus, it is within the purview of this Tribunal to impose a penalty for the 2001 violations upon which Respondent was found herein. Nevertheless, this Tribunal exercises its discretion and imposes no greater total penalty than that calculated by Ms. Powers under the ERP for the 2002-2004 violations, although penalties above the amount proposed by EPA have been imposed on other occasions. *See*, *Behnke Lubricants, Inc*., FIFRA-05-2007-0025, 2008 EPA LEXIS 42 (ALJ December 30, 2008)(Initial Decision increasing the penalty above that proposed by the Agency in the Complaint by 10% based upon Respondent's culpability). *See also, Bell and Howell Co.*, 1983 EPA ALJ LEXIS 5, 19-20 (EPA ALJ 1983)(Presiding Officer is "free to assess a penalty different from that recommended by the guidelines, and complaint, if [he] had reason to regard the recommended penalty as inappropriate), *affirmed in part and modified in part*, 1 E.A.D. 811, 822-23 (CJO 1983)(Presiding Officer is not required to assess penalty in amount shown in the matrix; evidence adduced at a hearing can justifying deviations (up or down) therefrom); *Martex Farms, S.E.*, 13 E.A.D. ___ (EAB 2008), 2008 EPA App. LEXIS 8, *73 (EAB 2008)("Board has the discretion to review the ALJ's penalty assessment on a de novo basis and assess a penalty, which may be 'higher or lower than the amount recommended to be assessed in the [Initial D]ecision . . . or from the amount sought in the complaint . . . .' 40 C.F.R. § 22.30(f).")

In light of the statutory penalty determination factors and the evidence in this case, I find appropriate the imposition of an aggregate civil penalty in the amount of $42,690 upon Respondent Firestone Pacific Foods, Inc. for violating Section 312(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11022(a), by failing to timely submit for calendar years 2001- 2005 an Emergency and Hazardous Chemical Inventory Form identifying the presence of 500 or more pounds of the hazardous chemical ammonia at its fruit processing facility in Vancouver, Washington to the State Emergency Response Commission, the Local Emergency Planning Committee, and the local fire department as alleged in Counts 1-15 of the Complaint.

ORDER

1. Respondent Firestone Pacific Foods, Inc. is herein found liable on Counts 4-15 of the Complaint.

2. For the total fifteen (15) violations of the EPCRA found to have been committed in this proceeding, Respondent Firestone Pacific Foods, Inc., is hereby assessed an aggregate civil penalty of $42,690.00.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashiers' check in the requisite amount, payable to the **Treasurer, United States of America**, and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

4. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check;

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11;

6. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals
Board is taken within thirty (30) days after this Initial Decision is served upon the parties

pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

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Susan L. Biro
Chief Administrative Law Judge

Date: March 24, 2009
Washington, DC