

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

-----X
)
In the Matter of:)
)
) CONSENT AGREEMENT AND
) FINAL ORDER
)
Birds Eye Foods, Inc.)
90 Linden Oaks)
)
) Under Section 109 of the
) Comprehensive Environmental
) Response, Compensation and
) Liability Act, 42 U.S.C. § 9609, and
Rochester, New York,)
) Section 325 of the Emergency
) Planning, and Community Right to
) Know Act, 42 U.S.C. § 11045
)
Respondent.)
-----X

2009 JAN 30 AM 7:48
REGIONAL HEARING
CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II

I. PRELIMINARY STATEMENT

Complainant, the United States Environmental Protection Agency (“EPA”), Region II, and Respondent, Birds Eye Foods, Inc., by their undersigned representatives, hereby consent and agree as follows:

1. EPA initiated this proceeding for the assessment of civil penalties pursuant to Section 109 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9609, and Section 325 of the Emergency Planning and Community Right to Know Act (“EPCRA”), 42 U.S.C. § 11045, by issuing an Administrative Complaint, Docket No. CERCLA-02-2007-2025 (hereinafter, “Complaint”), against Respondent on September 28, 2007.
2. On May 30, 2006, Respondent was the owner and/or operator of a facility located at 40 Stevens Street, Oakfield, New York (hereinafter, the “Facility”).
3. The Complaint charged Respondent with the following counts:
 - a. One count for violation of CERCLA § 103 for Respondent’s failure to immediately notify the National Response Center of the May 30, 2006 release of ammonia (anhydrous) from the Facility; and
 - b. One count for violation of EPCRA § 304 for Respondent’s failure to immediately notify the state emergency response commission of the May 30, 2006 release of ammonia (anhydrous) from the Facility.
4. Respondent hereby certifies that it has fulfilled all reporting obligations for the violations cited in the Complaint.
5. Respondent admits the jurisdictional allegations set forth in the Complaint.

6. Pursuant to Section 109 of CERCLA and Section 325 of EPCRA, and taking into consideration the nature of the violations and other relevant factors, EPA has determined that an appropriate civil penalty to settle this action is thirty-nine thousand dollars (\$39,000).
7. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the assessment of the civil penalty cited in the foregoing paragraph.
8. Respondent agrees to pay a total of thirty-nine thousand dollars (\$39,000) as a civil penalty for the counts alleged in the Complaint and set forth in Paragraph 3 above, as described below.

Payment of the CERCLA portion of the penalty (Count I, \$19,500) shall be made by cashier's or certified check payable to the "Treasurer, United States of America." The check shall be identified with a notation of the name and docket number of this case (set forth in the caption on the first page of this document) and shall be sent to:

US Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
PO Box 979076
St. Louis, MO 63197-9000

Payment of the EPCRA portion of the penalty assessed (Count II, \$19,500) shall be made by sending a cashier's or certified payable to the "Treasurer, United States of America." The check shall be identified with a notation of the name and docket number of this case (set forth in the caption on the first page of this document) and shall be sent to:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

A copy of the check and any transmittal letter shall be sent to each of the following:

Jocelyn P. Scott
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, New York 10007

and

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region II
290 Broadway, 17th Floor
New York, New York 10007.

Respondent agrees to make such payments on or before thirty (30) calendar days after the date of signature of the Final Order at the end of this document (hereafter referred to as the "due date").

- a) Failure to pay the penalty in full according to the above provisions may result in the referral of this matter to the U.S. Department of Justice or the U.S. Department of the Treasury for appropriate enforcement, including collection of the amount set forth in Paragraph 8, plus allowable interest and such other penalties as provided for in this Consent Agreement.
 - b) Further, if payment is not received on or before the due date, Respondent agrees to the assessment of interest, at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, Respondent agrees to pay a late payment handling charge of \$15 for each thirty (30) day period (or any portion thereof) following the due date in which the balance remains unpaid.
 - c) Respondent also agrees that a 6% per annum penalty will also be applied on any principal amount not paid within ninety (90) days of the due date.
9. The penalties specified in Paragraph 8, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of State or federal taxes.

II. GENERAL PROVISIONS

10. Respondent neither admits nor denies the factual allegations contained in Paragraphs 1, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 19, 20, and 21 of the Complaint. Respondent waives any right to contest the allegations contained in the Complaint and/or to appeal the Final Order accompanying this Consent Agreement.
11. Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions between EPA staff and the Regional Administrator or Deputy Regional Administrator of EPA Region II, and further waives the right to be served with and to reply to any memorandum or communication addressed by EPA staff to the

Regional Administrator or Deputy Regional Administrator, where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the attached Final Order.

12. This Consent Agreement and Final Order shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, State, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, State or local permit. Nothing in this Consent Agreement and Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of Respondent. Compliance with this Consent Agreement and Final Order shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.
13. Each party to this action shall bear its own costs and attorney fees.
14. Full and complete satisfaction of the requirements of this Consent Agreement and Final Order shall resolve Respondent's liability for federal civil penalties for the violations and facts alleged in the Complaint.
15. The person signing below on behalf of Respondent hereby certifies that he or she is fully authorized by Respondent to execute this Consent Agreement on behalf of Respondent and to legally bind Respondent to this Consent Agreement in accordance with all of the terms and conditions contained herein.
16. The Director of the Emergency and Remedial Response Division of EPA Region 2 has been delegated the authority to sign the Consent Agreement in this action, and the Regional Administrator of EPA Region 2 has been delegated the authority to sign the Final Order in this action.
17. Respondent consents to service upon Respondent of a copy of this Consent Agreement and Final Order by any EPA employee, in lieu of service made by the EPA Region 2 Regional Hearing Clerk.

Consent Agreement In the Matter of Birds Eye Foods, Inc.
Docket No. CERCLA-02-2007-2025

For Respondent
Birds Eye Foods, Inc.:

Linda Nelson
Signature

Date: 12-21-07

Linda Nelson
Name (Printed or Typed)

VP - Corp. Controller
Title (Printed or Typed)

Consent Agreement In the Matter of Birds Eye Foods, Inc.
Docket No. CERCLA-02-2007-2025

For Complainant
U.S. Environmental Protection Agency:



George Pavlou, Director
Emergency and Remedial Response
Division, Region II

Date: 1/14/08

In the Matter of Birds Eye Foods, Inc., Docket No. CERCLA-02-2007-2025

FINAL ORDER

The Consent Agreement In the Matter of Birds Eye Foods, Inc., Docket No. CERCLA-02-2007-2025, signed on behalf of Respondent Birds Eye Foods, Inc. and the Environmental Protection Agency, is hereby approved, incorporated herein, and issued by U.S. EPA, as a Final Order. The effective date of this Final Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA, Region II, New York, New York.

1-14-08

Date

Alan J. Steinberg

Alan J. Steinberg
Regional Administrator
U.S. EPA, Region II