UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of: **N&D Transportation Company, Inc.** 100 Industrial Drive North Smithfield, Rhode Island 02896, Respondent. Proceeding under Section 113(d) of the Clean Air Act and Section 325(c) of the Emergency Planning and Community Right-to-Know Act.	**CONSENT AGREEMENT** **AND** **FINAL ORDER** Docket Nos.: CAA-01-2021-0020 EPCRA-01-2021-0019

CONSENT AGREEMENT

A. PRELIMINARY STATEMENT

1. This is an administrative penalty assessment proceeding brought under Section 113(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7413(d), Section 325(c) of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045(c), and Sections 22.13(b) and 22.18(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), as codified at 40 C.F.R. Part 22.

2. Complainant is the United States Environmental Protection Agency, Region 1 ("EPA").

3. Respondent, N&D Transportation Company, Inc. ("N&D" or "Respondent"), is a Rhode Island corporation that operates as a regional trucking and warehousing business with its principal place of business located at 100 Industrial Drive in North Smithfield, RI (hereinafter, the "Facility").

4. Complainant and Respondent (collectively, the "Parties"), having agreed that settlement of this action is in the public interest, consent to the entry of this Consent Agreement ("Agreement" or "Consent Agreement") and accompanying Final Order ("Order" or "Final Order") without adjudication of any issues of law or fact herein, and Respondent agrees to comply with the terms of the Consent Agreement and Final Order (collectively, "CAFO").

B. JURISDICTION

5. This Consent Agreement is entered into under CAA Sections 113(a)(3)(A) and 113(d), 42 U.S.C. §§ 7413(a)(3)(A) and 7413(d), Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and the Consolidated Rules, 40 C.F.R. Part 22.

6. EPA and the United States Department of Justice have jointly determined that this matter is appropriate for an administrative penalty assessment under Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), and 40 C.F.R. § 19.4.

7. The issuance of this CAFO simultaneously commences and concludes this proceeding under the Consolidated Rules, as allowed by 40 C.F.R. § 22.13(b).

C. GOVERNING LAW

CLEAN AIR ACT STATUTORY AND REGULATORY AUTHORITY

General Duty Clause (GDC) Requirements

8. Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1), states that the purpose of Section 112(r) and its implementing regulations is "to prevent the accidental release and to minimize the consequences of any such release" of an "extremely hazardous substance."

9. Section 112(r)(1) of the CAA is referred to as the "General Duty Clause" or the "GDC." Under the GDC, among other things, owners and operators of stationary sources producing, processing, handling, or storing substances listed under CAA Section 112(r)(3), 42 U.S.C. § 7412(r)(3), or any other extremely hazardous substance, have a general duty, in the same manner and to the same extent as 29 U.S.C. § 654, to: (a) *identify hazards* that may result from accidental releases of such substances using appropriate hazard assessment techniques; (b) *design and maintain a safe facility* taking such steps as are necessary to prevent releases; and (c) *minimize the consequences of releases* that do occur.

10. The term "have a general duty in the same manner and to the same extent as section 654 of title 29 [of the U. S. Code]" means owners and operators must comply with the General Duty Clause in the same manner and to the same extent as employers must comply with the Occupational Safety and Health Act ("OSH Act") administered by the Occupational Safety and Health Administration ("OSHA").[1]

[1] Section 654 of the OSH Act provides, in pertinent part, that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" and "shall comply with occupational safety and health standards promulgated under this act." 29 U.S.C. § 654.

11. The term "extremely hazardous substance" ("EHS") means, without limitation, an extremely hazardous substance within the meaning of Section 112(r)(1) of the Act (including any chemical which may, as a result of short-term exposures associated with releases to the air, cause death, injury, or property damage due to its toxicity, reactivity, flammability or corrosivity[2]) and any regulated substance listed in CAA Section 112(r)(3) (including any substance listed in 40 C.F.R. § 68.130 or in 40 C.F.R. Part 355, Appendices A and B, published under Section 302 of EPCRA, 42 U.S.C. § 11002).

12. The term "accidental release" is defined by Section 112(r)(2)(A) of the CAA, 42 U.S.C. § 7412(r)(2)(A), as an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

13. The term "stationary source" is defined by Section 112(r)(2)(C) of the Act, 42 U.S.C. § 7412(r)(2)(C), in pertinent part, as any buildings, structures, equipment, installations, or substance-emitting stationary activities, located on one or more contiguous properties under the control of the same person, from which an accidental release may occur.

14. The General Duty Clause is a performance standard with requirements that often can be achieved in a variety of ways. EPA routinely consults chemical Safety Data Sheets ("SDSs"), codes, standards, and guidance issued by chemical manufacturers, trade associations, and fire prevention associations (collectively, "industry standards") to understand the hazards posed by using various EHSs and the standard of care that industry, itself, has found to be appropriate for managing such hazards. Industry standards consistently are relied upon by industry and fire prevention experts and sometimes incorporated into state building, fire, and mechanical codes. For facilities storing EHSs in warehouses, EPA often consults SDSs, National Fire Prevention Association ("NFPA") standards (such as NFPA 400 *Hazardous Materials Code* and NFPA 30 *Flammable Liquids Code*), state fire codes, and the Center for Chemical Process Safety's *Guidelines for Safe Warehousing of Chemicals* and *Guidelines for Safe Storage and Handling of Reactive Materials*.

Risk Management Plan (RMP) Requirements

15. Section 112(r) of the CAA authorizes EPA to promulgate regulations and programs to prevent and minimize the consequences of the accidental release of certain regulated substances and, in particular, Section 112(r)(3) mandates that EPA promulgate a list of substances that are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment if accidentally released. Section 112(r)(5), 42 U.S.C. § 7412(r)(5), requires that EPA establish, for each listed substance, a threshold quantity over which an accidental release is known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health. Section 112(r)(7)

[2] Senate Committee on Environment and Public Works, Clean Air Act Amendments of 1989, Sen. Report No. 228, 101st Congress, 1st Session 211 (1989).

of the Act, 42 U.S.C. § 7412(r)(7), requires EPA to promulgate requirements for the prevention, detection, and correction of accidental releases of regulated substances, including a requirement that owners or operators of certain stationary sources prepare and implement a Risk Management Plan ("RMP").

16. The regulations promulgated pursuant to CAA Section 112(r)(7) are found at 40 C.F.R. §§ 68.1-68.220 ("Part 68" or "RMP regulations"). Under Section 112(r)(7)(E), 42 U.S.C. § 7412(r)(7)(E), it is unlawful for any person to operate a stationary source subject to the RMP regulations in violation of those regulations.

17. The RMP regulations, at 40 C.F.R. § 68.130, list the substances regulated under Part 68 ("RMP chemicals" or "regulated substances") and their associated threshold quantities ("TQs") for accidental release prevention.

18. A "process" is defined at 40 C.F.R. § 68.3 as any activity involving a regulated substance, including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities. Storage in a warehouse generally is considered a single process.

19. Under 40 C.F.R. § 68.10, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process must comply with the requirements of Part 68 by no later than the latest of the following dates: (a) June 21, 1999; (b) three years after the date on which a regulated substance is first listed under 40 C.F.R. § 68.130; (c) the date on which a regulated substance is first present above a TQ in a process; or (d) for any revisions to this part, the effective date of the final rule that revises this part.

20. Each process in which a regulated substance is present in more than a TQ is a "covered process" under Section 68.3 of the RMP regulations and subject to one of three risk management Program levels where Program 1 is the least comprehensive and Program 3 is the most comprehensive. Pursuant to 40 C.F.R. § 68.10(g), a covered process is subject to Program 1 if, among other things, the distance to a toxic or flammable endpoint for a worst-case release assessment is *less* than the distance to any "public receptor" within the meaning of Section 68.3. Under 40 C.F.R. § 68.10(i), a covered process is subject to Program 3 if the process does not meet the eligibility requirements for Program 1 and is either in a specified NAICS code or subject to the OSHA process safety management ("PSM") standard at 29 C.F.R. § 1910.119. Under 40 C.F.R. § 68.10(h), a covered process that meets neither Program 1 nor Program 3 eligibility requirements is subject to Program 2.

21. Pursuant to 40 C.F.R. § 68.12, the owner or operator of a stationary source subject to the chemical accident prevention provisions of Part 68 is required to submit to EPA a single Risk Management Plan, as provided in 40 C.F.R. §§ 68.150 to 68.185. The RMP documents

compliance with Part 68 and, under 40 C.F.R. § 68.12(a), the owner or operator is required to submit an RMP that includes all covered processes.

22. Sections 113(a) and (d) of the CAA, 42 U.S.C. §§ 7413(a) and (d), provide for the assessment of civil penalties for violations of Section 112(r) of the CAA. Statutory maximum penalties for the CAA, as adjusted for inflation, are set forth in 40 C.F.R. Part 19.

EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT STATUTORY AND REGULATORY AUTHORITY

23. In accordance with Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), the owner or operator of a facility which is required to prepare or have available a material safety data sheet ("safety data sheet" or "SDS") for a hazardous chemical under the OSH Act shall submit to the state emergency response commission ("SERC"), local emergency planning committee ("LEPC"), and the fire department with jurisdiction over the facility, an SDS for each chemical present at the facility in quantities equal to or greater than the chemical-specific minimum threshold level established under EPCRA 311(b), 42 U.S.C. § 11021(b). Alternatively, Section 311(a) of EPCRA allows the owner or operator to submit a chemical list to the SERC, LEPC, and fire department. Pursuant to Section 311(d) of EPCRA, 42 U.S.C. § 11021(d), the SDS or list must be submitted within three months from when the owner or operator is first required to have an SDS for the chemical.

24. In accordance with Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), the owner or operator of a facility which is required under the OSH Act to prepare or have available an SDS for a hazardous chemical must prepare and submit an emergency and hazardous chemical inventory form (commonly known as "Tier I" or "Tier II" forms) to the SERC, LEPC, and the local fire department. Tier I or Tier II forms must be submitted annually, on or before March 1, and are required to contain chemical inventory information with respect to the preceding calendar year. Under EPCRA Section 312(b), 42 U.S.C. § 11022(b), EPA is authorized to establish minimum threshold levels of hazardous chemicals for purposes of Section 312(a).

25. The regulations promulgated pursuant to Sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021 and 11022, are found at 40 C.F.R. Part 370. Under 40 C.F.R. §§ 370.20, 370.30, and 370.32, the owner or operator of a facility that has present a quantity of a hazardous chemical meeting or exceeding the minimum threshold level must submit an SDS for each hazardous chemical to the LEPC, SERC, and local fire department. Alternatively, the owner or operator may submit a list of the hazardous chemicals for which the SDS is required ("chemical list"), grouped by hazard category, with the chemical or common name of each hazardous chemical as provided on the SDS and a description of the hazardous component of each hazardous chemical. The SDS or chemical list must be submitted within three months after the owner or operator is first required to prepare or have an SDS available for a hazardous chemical or after such chemical becomes present in an amount meeting or exceeding the threshold

established in 40 C.F.R. § 370.10(a). Under 40 C.F.R. §§ 370.20, 370.40, 370.44, and 370.45, the owner or operator of a facility subject to the reporting requirements of Part 370 that has a quantity of a hazardous chemical present at the facility in an amount meeting or exceeding the minimum threshold level must prepare and submit a Tier I or Tier II form to the LEPC, SERC, and local fire department. Pursuant to 40 C.F.R. § 370.45, Tier I or Tier II forms must be submitted annually, on or before March 1, and are required to contain chemical inventory information with respect to the preceding calendar year. The LEPC, SERC, or local fire department may request that a facility submit the more comprehensive Tier II form in lieu of the Tier I form, as has the State of Rhode Island.

26. In accordance with EPCRA Sections 311(b) and 312(b), the EPCRA regulations at 40 C.F.R. § 370.10(a) and 40 C.F.R. 355 establish minimum threshold levels for hazardous chemicals that trigger reporting requirements for the purposes of 40 C.F.R. Part 370. Minimum threshold limits (called threshold planning quantities or "TPQs") are established for specific EHSs and listed at 40 C.F.R. Part 355, Appendices A and B.

27. Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1), allows EPA to assess civil penalties for violations of EPCRA Section 312. Section 325(c)(2) of EPCRA, 42 U.S.C. § 11045(c)(2), allows EPA to assess civil penalties for violations of EPCRA Section 311. Statutory maximum penalties for EPCRA, as adjusted for inflation, are set forth in 40 C.F.R. Part 19.

D. ALLEGED STATEMENT OF FACTS AND VIOLATIONS

28. Respondent, N&D Transportation Company, Inc., engages in trucking and warehousing activities at the Facility. The Facility comprises approximately 10 acres and is a "stationary source" as that term is defined in Section 112(r)(2)(C) of the CAA, 42 U.S.C. § 7412(r)(2)(C) and, also, a "facility" as defined in 40 C.F.R. § 370.66. The Facility is about 500 feet from the Branch River, a tributary of the Blackstone River, and within one mile of a state highway (RI Rte. 146), an elementary school, a reservoir, and a number of businesses and residences.

29. Respondent is a "person" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e), against whom an administrative order may be issued under CAA Section 113(a)(3), 42 U.S.C. § 7413(a)(3). N&D is also a "person" under EPCRA Section 329(7), 42 U.S.C. § 11049(7), and 40 C.F.R. § 370.66.

30. At all times relevant to the allegations herein, N&D operated the Facility and was an "operator" within the meaning of Sections 112(r)(1) and 112(r)(7) of the CAA and 40 C.F.R. § 68.10.

31. On October 31, 2018, EPA and its contractors conducted an inspection (the "Inspection") at the Facility on Industrial Drive in North Smithfield. The purpose of the Inspection was to assess whether N&D was operating the Facility in compliance with federal environmental laws and regulations including, but not limited to, EPCRA Sections 302 – 312, 42 U.S.C. §§ 11002 – 11022, and CAA Section 112(r).

32. During the Inspection, among those areas of the Facility examined was a warehouse building occupying the northern portion of N&D's property (the "Warehouse"). The Warehouse, a single-story, approximately 30,000 square foot corrugated steel structure with a concrete slab foundation, is used to store a variety of products some of which are hazardous materials including flammables, combustibles, corrosives, toxics, and water-reactive or temperature-sensitive materials. Respondent's operation of the Warehouse at the Facility (the "Warehousing Process") falls within the meaning of a "process" under 40 C.F.R. § 68.3.

33. As part of N&D's operation of the Warehousing Process, Respondent stored between 97 and 128 separate hazardous chemicals products during calendar years 2015, 2016, 2017, 2018, and 2019, each of which was a reportable substance under Section 312 of EPCRA, some of which were EHSs subject to CAA GDC requirements (e.g., formaldehyde, toluene diisocyanate ("TDI") solution, peracetic acid, sulfuric acid), and some of which were EHSs under CAA Section 112(r) and the RMP regulations (e.g., formaldehyde and peracetic acid), at 40 C.F.R. § 68.130. The closest "public receptor," as defined in the RMP regulations, at 40 C.F.R. § 68.3, is less than 0.1 mile from the Warehousing Process at the Facility.

34. Formaldehyde is an RMP chemical listed at 40 C.F.R. § 68.130 with a TQ of 15,000 pounds. Any process involving formaldehyde in an amount over 1,000 pounds is subject to OSHA's PSM requirements at 29 C.F.R. § 1910.119. Formaldehyde also is an EHS under EPCRA Section 302 with a TPQ of 500 pounds listed at 40 C.F.R. Part 355, Appendices A and B.

35. TDI is an RMP chemical listed at 40 C.F.R. § 68.130 with a TQ of 10,000 pounds. TDI is also an EHS under EPCRA Section 302 with a TPQ of 500 pounds listed at 40 C.F.R. Part 355, Appendices A and B.

36. Peracetic acid is an RMP chemical listed at 40 C.F.R. § 68.130 with a TQ of 10,000 pounds. Peracetic acid is also an EHS under EPCRA Section 302 with a TPQ of 500 pounds listed at 40 C.F.R. Part 355, Appendices A and B.

37. Sulfuric Acid is an EHS under EPCRA Section 302 with a TPQ of 1,000 pounds listed at 40 C.F.R. Part 355, Appendices A and B.

38. The unanticipated emission of any of the chemicals listed in Paragraphs 34 through 37, either alone or in combination, into the ambient air from the Facility would

constitute an "accidental release," as that term is defined by Section 112(r)(2)(A) of the CAA, 42 U.S.C. § 7412(r)(2)(A).

39. During the Inspection, conditions were observed inside the Warehouse consisting, generally, of pallet racks stacked approximately eight shelves high with the tallest standing at about 40 feet from the floor. These pallet racks were arranged in approximately six aisles with pallet racks on both sides and various container types observed on the pallets including totes, drums, bags, rolls, intermediate bulk containers (IBCs), and cartons.

40. During the Inspection, a number of dangerous and/or potentially violative conditions were observed and documented by EPA in the Warehouse including, without limitation:

a. failure to evaluate hazardous substances for reactivity, toxicity, and incompatibility to ensure proper handling and storage of all materials in the Warehouse;
b. storage of incompatible chemicals together;
c. storage of water-reactive chemicals near sprinkler heads;
d. limited egress in chemical storage areas;
e. storage of chemicals in areas without appropriate containment, drainage, or spill control to prevent unpermitted discharge;
f. inadequate posting/labelling of chemical storage areas (interior and exterior); and
g. failure to notify State and local emergency response authorities (including local fire response personnel) of the presence of chemicals under EPCRA Sections 302, 311, and 312, 42 U.S.C. §§ 11002, 11021, and 11022.

See, e.g., NFPA 400 - 6.1.12.1, 6.1.12.2; NFPA 400 - 6.2.1.4.3, 6.2.1.4.4, 6.2.1.4.5; NFPA 400 - 6.1.3.2, 6.2.1.9.2, 6.2.1.9.3; NFPA 400 - 6.1.8.2.1; NFPA 400 - Annex C.

41. On or about January 15, 2019, a representative from the Rhode Island State Fire Marshal's Office ("State Fire Marshal") inspected the Facility to review N&D's compliance with the state fire code. Subsequently, the State Fire Marshal issued one or more violations report(s) alleging, among other things, that the Warehouse:

a. lacks a hazardous materials management plan for the safe storage of hazardous materials;
b. improperly stores hazardous materials including, among other things, highly toxic solids and liquids without approved hazardous materials storage cabinets and incompatible materials stored together (e.g., sodium hydrosulfite stored under acids which, if mixed, would produce toxic gas);
c. stores temperature sensitive hazardous materials in a room and with equipment that are not engineered for such use; and

d. employs portable, dry chemical fire extinguishers containing ammonium compounds in oxidizer storage areas where their use could cause the release of chlorine gas or explosive compounds.

See, e.g., NFPA 400 - 6.1.12.1, 6.1.12.2; NFPA 400 - 6.2.1.4.3, 6.2.1.4.4, 6.2.1.4.5; NFPA 400 - 6.1.8.2.1; NFPA 400 - 6.2.1.7.1; NFPA 400 - Annex C.

42. Based on information obtained at or as a result of the Inspection, Respondent handles or stores, or has in the past handled or stored, the following maximum inventory amounts for each of the extremely hazardous substances (EHSs) listed below as part of N&D's Warehousing Process at the Facility:

a. 42,390 pounds of formaldehyde (in 2018);
b. 5,500 pounds of TDI solution (in 2018);
c. 10,128 pounds of peracetic acid (in 2019); and
d. 2,826 pounds of sulfuric acid (mainly in lead-acid batteries in 2015, 2016, 2017, 2018, and 2019).

43. The Warehousing Process is or has been subject to OSHA's PSM requirements at 29 C.F.R. § 1910.119 because N&D stores or has in the past stored formaldehyde in an amount over the PSM threshold of 1,000 pounds.

44. In accordance with 40 C.F.R. § 68.10, Respondent's use, storage, and handling of formaldehyde in the Warehousing Process is or has in the past been subject to the requirements of RMP Program 3 because the process was subject to OSHA's PSM requirements and because the distance to a toxic or flammable endpoint for a worst case release of formaldehyde was greater than the distance to a public receptor. Respondent's use, storage, and handling of peracetic acid was subject to the requirements of RMP Program 2 because the worst-case release zone for the chemical was greater than the distance to a public receptor, but it is not subject to OSHA's PSM requirements.

45. On or about August 16, 2019, N&D submitted to EPA an initial RMP registration for the Warehousing Process which purported to address threshold quantities of the regulated substances formaldehyde, TDI, and hydrazine. On or about April 17, 2020, Respondent submitted an RMP De-Registration Form for the Warehousing Process seeking to de-register the Warehousing Process and come out from under Part 68 (the RMP regulations) citing the reason for de-registration as "[N&D] reduced inventory of all regulated substances below [threshold quantities]" and listing an effective date of March 9, 2020.

46. Based on information obtained at or as a result of the Inspection as well as subsequent, substantive communications with Respondent, on August 27, 2019, EPA issued a Notice of Violation and Administrative Order ("NOV/AO") containing EPA findings and

specifying compliance measures for N&D to implement within the Warehousing Operation. The NOV/AO cited N&D's violation of CAA RMP and GDC requirements and set forth a schedule under which Respondent must address the conditions of noncompliance described therein.

47. Respondent requested a conference concerning violations alleged in the NOV/AO and, on October 9, 2019, EPA and N&D held a conference. Under the provisions of the NOV/AO, the effective date of the NOV/AO was 10 days after the date of the conference.

48. Since in or around December 2019, Respondent worked on measures to bring the Facility's Warehouse into compliance with CAA RMP and GDC requirements, as applicable, and certified final compliance with the NOV/AO, on February 1, 2021.

49. In light of the above, Complainant alleges the following violations of CAA RMP, CAA GDC, and EPCRA requirements. By entering into this CAFO, Respondent does not admit nor deny any of the alleged violations.

Count 1: Failure to Perform GDC and/or RMP Hazard Identification/Analysis

50. Complainant realleges and incorporates by reference Paragraphs 1 through 49 of this document.

51. Respondent's operation of the Warehousing Process involves or has in the past involved the handling and storage of formaldehyde, TDI solution, and peracetic acid, each of which is a "regulated substance" within the meaning of 40 C.F.R. § 68.130.

52. Pursuant to 40 C.F.R. § 68.67, the owner or operator of a Program 3 process is required to perform an initial process hazard analysis on all covered processes. The process hazard analysis must identify, evaluate, and control the hazards involved in the process. Also, the owner or operator must comply with the documentation requirements of 40 C.F.R. § 68.67. Likewise, pursuant to 40 C.F.R. § 68.50, the owner or operator of a Program 2 process must conduct and document a process hazard review.

53. Under the RMP regulations, the owner or operator of a stationary source such as the Facility (including the Warehouse) may avoid being subject to the requirements of Part 68 by ensuring that all RMP chemicals are carefully managed and inventory levels strictly controlled such that the amount of any such regulated substance handled or stored in any process never exceeds its TQ under the RMP regulations.

54. Based on the above allegations, during those periods when N&D handled or stored formaldehyde and peracetic acid in excess of their TQs, Respondent failed to complete a process hazard analysis/review for the formaldehyde and peracetic acid handled and stored in the

Warehousing Process, in violation of CAA Section 112(r) and the RMP regulations at 40 C.F.R. Part 68.

55. Pursuant to the GDC at CAA Section 112(r)(1), owners and operators of stationary sources producing, processing, handling, or storing extremely hazardous substances have a general duty, in the same manner and to the same extent as Section 654 of Title 29, to identify hazards that may result from accidental releases of such substances, using appropriate hazard assessment techniques. Under the GDC, to identify hazards that may result from accidental releases of EHSs, owners and operators of stationary sources must determine: (a) the intrinsic hazards of the chemicals used in the processes; (b) the risks of accidental releases from the processes through possible release scenarios; and (c) the potential effect of these releases on the public and the environment.

56. The recommended industry practice and standard of care for warehouses to identify, analyze, and evaluate the potential hazards associated with storage of EHSs includes, among other things, using standard, industry-developed checklists, a "What If" analysis, a Hazard and Operability study, or a Consequence Analysis. *See, e.g.*, Section 2.3.1 of EPA's Guidance for Implementation of the General Duty Clause: Clean Air Act (CAA) Section 112(r)(1) (May 2000),[3] NFPA 400 Hazardous Materials Code (2010 and later editions), and the Center for Chemical Process Safety's *Guidelines for Safe Warehousing of Chemicals* and *Guidelines for Safe Storage and Handling of Reactive Materials*, Chapter 4.

57. As part of the Warehousing Process, Respondent handled or stored EHSs including, without limitation, formaldehyde, TDI, peracetic acid, and sulfuric acid without identifying the hazards that may result from accidental releases and without conducting a process hazard review using appropriate, industry-recognized hazard assessment techniques.

58. The unanticipated emission of any of the above-mentioned EHSs, including formaldehyde, TDI, peracetic acid, sulfuric acid, either alone or in combination, into the ambient air from the Facility would constitute an "accidental release," as that term is defined by Section 112(r)(2)(A) of the CAA, 42 U.S.C. § 7412(r)(2)(A).

59. By failing to identify hazards that may result from accidental releases of extremely hazardous substances handled or stored as part of the Warehousing Process, Respondent violated the General Duty Clause at Section 112(r)(1) of the Clean Air Act.

60. Accordingly, Respondent violated the hazard analysis and identification requirements of 40 C.F.R. §§ 68.67 and 68.50, and Sections 112(r)(1) and 112(r)(7)(E) of the CAA, 42 U.S.C. §§ 7412(r)(1) and 7412(r)(7)(E), and is properly subject to the assessment of civil penalties pursuant to CAA Section 113(d), 42 U.S.C. § 7413(d).

[3] Available at https://www.epa.gov/sites/production/files/documents/gendutyclause-rpt.pdf.

Count 2: Failure to Design and Maintain a Safe Facility (GDC)

61. Complainant realleges and incorporates by reference Paragraphs 1 through 60 of this document.

62. Under the GDC and CAA Section 112(r)(1), at all times relevant to the violations alleged in this CAFO, N&D had a general duty to design and maintain the Facility, including the Warehousing Process, as a safe facility taking such steps as are necessary to prevent a release of an EHS at or from the Facility.

63. The recommended industry practice and standard of care for designing and maintaining a safe warehouse or warehousing process are drawn from the industry standards set forth in Paragraphs 14 and 56, above.

64. At all times relevant to the allegations in this CAFO, based on the conditions identified in Paragraphs 40 and 41, above, Respondent failed in its general duty to design and maintain the Warehouse and the Warehousing Process as a safe facility taking such steps as are necessary to prevent a release of an extremely hazardous substance, in accordance with applicable industry standards.

65. Accordingly, Respondent violated Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1), on each and every day that it failed to design and maintain the Facility, including the Warehousing Process, as a safe facility taking such steps as are necessary to prevent a release of an EHS at or from the Facility, and is properly subject to the assessment of civil penalties pursuant to CAA Section 113(d).

Count 3: Failure to Submit a Risk Management Plan (RMP)

66. Complainant realleges and incorporates by reference Paragraphs 1 through 65 of this document.

67. Respondent's operation of the Warehousing Process involves or, in the past, has involved the handling and storage of formaldehyde and peracetic acid, each a "regulated substance" within the meaning of 40 C.F.R. § 68.3, in an amount which, for each substance, exceeded its respective threshold quantity (TQ) listed in 40 C.F.R. § 68.130.

68. The Warehousing Process is or, in the past, has been a "covered process," as defined by 40 C.F.R. § 68.3. At all times relevant to the allegations in this Count 3, the Warehousing Process was subject to the most stringent (Program 3) requirements of the RMP regulations at 40 C.F.R. § 68.10 because: (a) the distance to a toxic or flammable endpoint for a worst-case release of formaldehyde was more than the distance to a public receptor such that the

Warehousing Process was ineligible for Program 1; and (b) the Warehousing Process was subject to OSHA's PSM regulations.

69. Pursuant to 40 C.F.R. § 68.12(a), the owner or operator of a stationary source subject to the requirements of Part 68 is required to submit an RMP to EPA, as provided in 40 C.F.R. § 68.150. The RMP documents compliance with Part 68 in a summary format and, for a Program 3 process such as the Warehousing Process, must document compliance with the elements of the Program 3 Risk Management Program including, but not limited to, 40 C.F.R. Part 68, Subpart A (General Requirements and Management System to Oversee RMP Implementation), Subpart B (Hazard Assessment to Determine Off-Site Consequences of a Release), Subpart D (Program 3 Prevention Program), and Subpart E (Emergency Response Program).

70. Under the RMP regulations, the owner or operator of a stationary source such as the Facility (including the Warehouse) may avoid being subject to the requirements of Part 68 by ensuring that all potential RMP chemicals are carefully managed and inventory levels strictly controlled such that the amount of any such regulated substance handled or stored in any process never exceeds its TQ under the RMP regulations.

71. Based on the above allegations, during those periods when N&D handled or stored RMP chemicals in excess of their TQs, Respondent failed to prepare and submit to EPA an RMP for the Warehousing Process and, therefore, violated Section 112(r) of the Clean Air Act and the RMP regulations at 40 C.F.R. Part 68, and is properly subject to the assessment of civil penalties pursuant to CAA Section 113(d).

Count 4: Failure to Submit Chemical Inventory Forms under EPCRA Sections 311/312

72. Complainant realleges and incorporates by reference Paragraphs 1 through 71 of this document.

73. Respondent is the operator of a facility required by OSHA to prepare or have available an SDS for formaldehyde, TDI solution, peracetic acid, and sulfuric acid, each of which is an extremely hazardous chemical.

74. Pursuant to Section 312 of EPCRA, 42 U.S.C. § 11022, and 40 C.F.R. Part 370, commencing on or before the March 1 following the date upon which Respondent was required to prepare or have available an SDS for formaldehyde, TDI solution, peracetic acid, and sulfuric acid at or in connection with the Facility (including the Warehouse), and on or before March 1 of each year thereafter, Respondent was required to submit "emergency and hazardous chemical inventory forms," containing the data regarding formaldehyde, TDI solution, peracetic acid, sulfuric acid, and any other reportable substances at the Facility, required under Section 312, for the preceding calendar year ("Inventory Form"), to the appropriate LEPC, the SERC, and the fire

department with jurisdiction over the Facility. Under Section 311 of EPCRA, Respondent would have been required to provide an SDS or Chemical List (which can be the same as the Inventory Form) to the LEPC, SERC and fire department even earlier, namely, within three months of being required to prepare or have available an SDS for each hazardous chemical.

75. Based on information obtained at or as a result of the Inspection or EPA's subsequent investigation of this case, EPA finds that the amounts of formaldehyde, TDI solution, peracetic acid, and sulfuric acid that are specified in Paragraph 42, above, are or have in the past been present at the Facility in excess of the threshold planning quantities (TPQs) established under 40 C.F.R. § 370.10(a) and listed at 40 C.F.R. Part 355, Appendices A and B.

76. Based on information obtained at or as a result of the Inspection or subsequent EPA investigation, EPA finds that Respondent failed to report or reported late the presence at the Facility of one or more of the hazardous chemicals listed in Paragraph 42, above, despite being in operation with threshold amounts of one or more of such substances (namely, formaldehyde, TDI solution, peracetic acid, sulfuric acid) in excess of their respective TPQs in 2015, 2016, 2017, 2018, and/or 2019.

77. At the time of the Inspection, Respondent had not submitted SDSs or Tier II forms to the appropriate LEPC, the SERC, and the fire department with jurisdiction over the Facility for all of the hazardous chemicals present at the Facility including, but not limited to, those substances listed in the preceding Paragraph 76, as required by Sections 311 and 312 of EPCRA, 42 U.S.C. §§ 11021and 11022.

78. Pursuant to EPCRA Section 325(c)(3), 42 U.S.C. § 11045(c)(3), each day that N&D failed to timely submit to the appropriate LEPC, SERC, and fire department an SDS or Tier II form for any of the substances listed in this Count 4 (or any other hazardous chemicals present at the Facility in excess of their applicable TPQ) constitutes a separate violation of EPCRA.

79. Accordingly, Respondent's failure to submit or late submittal of the required Tier II forms for each of the reporting years 2015, 2016, 2017, 2018, and 2019 constitute separate violations of EPCRA Section 312 and 40 C.F.R. Part 370, each subjecting N&D to penalties under Section 325(c)(1) of EPCRA, 42 U.S.C. § 11045(c)(1). Likewise, each failure to comply with EPCRA Section 311 constitutes a separate violation, subjecting N&D to penalties under Section 325(c)(2) of EPCRA, 42 U.S.C. § 11045(c)(2).

E. TERMS OF CONSENT AGREEMENT

80. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

a. admits that EPA has jurisdiction over the subject matter alleged in this CAFO;
b. neither admits nor denies the specific factual allegations or alleged violations contained in this CAFO;
c. consents to the assessment of a civil penalty as stated below;
d. waives any right to contest the alleged violations of law set forth in Section D of this CAFO; and
e. waives its rights to appeal the Final Order accompanying this Consent Agreement.

81. For the purpose of this proceeding, Respondent:

a. agrees that this CAFO states a claim upon which relief may be granted against Respondent;
b. waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO, including any right of judicial review under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1);
c. consents to personal jurisdiction in any action to enforce this Consent Agreement or Final Order, or both, in the United States District Court for the District of Rhode Island; and
d. waives any rights it may possess at law or in equity to challenge the authority of EPA to bring a civil action in a United States District Court to compel compliance with the Consent Agreement or Final Order, or both, and to seek an additional penalty for such noncompliance, and agrees that federal law shall govern in any such civil action.

82. Respondent certifies that it has corrected the violations alleged in this CAFO and is currently in compliance with Section 112(r) of the CAA and Sections 311 and 312 of EPCRA. Respondent further certifies that its compliance at the Facility includes completion of all the requirements specified in Paragraphs 54 and 55 of the NOV/AO.

83. Pursuant to the relevant statutory penalty criteria in Sections 113(d)(2)(B) and 113(e) of the CAA, 42 U.S.C. §§ 7413(d)(2)(B) and 7413(e), and Section 325(c) of EPCRA, 42 U.S.C. § 11045, and after considering applicable EPA penalty policies and guidance, including the *Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68* (June 2012), the *Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act* (September 30, 1999), EPA amendments to those policies to account for inflation (effective January 15, 2020), and such other factors as justice may require, including Respondent's ability to pay the penalty and EPA findings under 40 C.F.R. § 13.18(a), EPA has determined that it is fair and proper to assess a civil penalty of $314,658 for the violations alleged in this matter. Respondent consents to the

issuance of this CAFO and consents for purposes of settlement to pay the civil penalty cited herein and in Paragraph 84, below.

Penalty Payment

84. Respondent agrees to:

a. pay the civil penalty of $314,658 ("Civil Penalty"), in two installments, within 60 calendar days of the Effective Date of this Agreement, by: (i) paying a first installment in the amount of $180,000 within 30 calendar days of the Effective Date of this Agreement; (ii) paying a second installment in the amount of $135,331 (which amount includes $673 in interest at a rate of 3 percent per annum) within 60 calendar days of the Effective Date of this Agreement; and (iii) if the due date for any installment payment falls on a weekend or federal holiday, paying such installment by the next business day; and,

b. pay the Civil Penalty using any method, or combination of methods, provided on the website http://www2.epa.gov/financial/additional-instructions-making-payments-epa, and identifying each and every payment with "Docket Nos. CAA-01-2021-0020 and EPCRA-01-2021-0019." Within 24 hours of payment of all or any portion of the Civil Penalty, send proof of each payment to: (i) Leonard Wallace, Environmental Scientist, at U.S. EPA, Region 1, 5 Post Office Square, Suite 100, Mail Code 05-1, Boston, MA 02109-3912, and by e-mail to Wallace.Len@epa.gov; and (ii) EPA Region 1 Regional Hearing Clerk by e-mail to R1_Hearing_Clerk_Filings@epa.gov.
"Proof of payment" means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to EPA requirements, in the amount due, and identified with "Docket Nos. CAA-01-2021-0020 and EPCRA-01-2021-0019."

Collection of Unpaid Civil Penalty

85. Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), specifies the consequences of failure to pay all or any portion of a penalty on time. Other actions EPA may take if Respondent fails to timely pay include: (a) referring the debt to a credit reporting agency or a collection agency pursuant to 42 U.S.C. § 7413(d)(5), 40 C.F.R. §§ 13.13, 13.14, and 13.33; (b) collecting the debt by administrative offset (i.e., the withholding of money payable by the United States or money held by the United States for a person), including referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H; (c) suspending or revoking Respondent's licenses or other privileges; or (d) suspending or disqualifying Respondent from doing business with EPA or engaging in programs EPA sponsors

or funds, 40 C.F.R. § 13.17. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

F. ADDITIONAL PROVISIONS

86. The terms, conditions, and compliance requirements of this CAFO may not be modified or amended except upon the written agreement of both Parties, and approval of the Regional Judicial Officer.

87. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.

88. By signing this CAFO, Respondent acknowledges that this document will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.

89. By signing this CAFO, the undersigned representative of Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.

90. By signing this CAFO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.

G. EFFECT OF CONSENT AGREEMENT AND ATTACHED FINAL ORDER

91. In accordance with 40 C.F.R. § 22.18(c), completion of the terms of this CAFO resolves only Respondent's liability for federal civil penalties for the violations specifically alleged above.

92. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.

93. This CAFO constitutes the entire agreement and understanding of the Parties and supersedes any prior agreements or understandings, whether written or oral, among the Parties with respect to the subject matter hereof.

94. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of the CAA, EPCRA, and other federal, state, or local laws or statutes. Nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations or be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

95. This CAFO in no way relieves Respondent or its employees of any criminal liability, and EPA reserves all its other criminal and civil enforcement authorities, including the authority to seek injunctive relief and the authority to undertake any action against Respondent in response to conditions which may present an imminent and substantial endangerment to the public health, welfare, or the environment.

96. Except as qualified by Paragraph 85 (overdue penalty collection), each party shall bear its own costs and fees in this proceeding including attorney's fees. Respondent specifically waives any right to recover such costs from EPA pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, or other applicable laws.

97. Complainant and Respondent, by entering into this Consent Agreement, each give their respective consent to accept digital signatures hereupon. Respondent further consents to accept electronic service of the fully executed CAFO through its legal counsel, by e-mail, to jcervenka@cgdesq.com. Respondent understands that this e-mail address may be made public when the CAFO and Certificate of Service are filed and uploaded to a searchable database.

H. EFFECTIVE DATE

98. Respondent and Complainant agree to issuance of the attached Final Order. Upon filing, EPA will electronically transmit a copy of the filed CAFO to the Respondent. This CAFO shall become effective after execution of the Final Order by the Regional Judicial Officer, on the date of filing with the Regional Hearing Clerk.

The foregoing Consent Agreement in this case, entitled *In the Matter of N&D Transportation Company, Inc.*, Docket Nos. CAA-01-2021-0020 and EPCRA-01-2021-0019, is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT:

Signature _____ Date 3/18/2021

Printed Name: David C. Duhamel

Title: President

Address: 100 Industrial Drive
North Smithfield, Rhode Island 02896

The foregoing Consent Agreement in this case, entitled *In the Matter of N&D Transportation Company, Inc.*, Docket Nos. CAA-01-2021-0020 and EPCRA-01-2021-0019, is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

JAMES CHOW Digitally signed by JAMES CHOW Date: 2021.03.24 15:50:51 -04'00'

_____

Signature and Date

James Chow, Deputy Director *for* Karen McGuire, Director
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency
Region 1 – New England

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of: **N&D Transportation Company, Inc.** 100 Industrial Drive North Smithfield, Rhode Island 02896, Respondent. Proceeding under Section 113(d) of the Clean Air Act and Section 325(c) of the Emergency Planning and Community Right-to-Know Act.	Docket Nos.: CAA-01-2021-0020 EPCRA-01-2021-0019

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b) and (c) of EPA's Consolidated Rules of Practice, Section 113(d) of the CAA, 42 U.S.C. § 7413(d), and Section 325(c) of EPCRA, 42 U.S.C. § 11045, the Consent Agreement is incorporated by reference into this Final Order and is hereby ratified. Respondent, N&D Transportation Company, Inc., is ordered to pay the civil penalty of $314,658 in the manner indicated. The terms of the Consent Agreement will become effective on the date it is filed with the Regional Hearing Clerk.

SO ORDERED THIS ___ DAY OF _____ 2021.

LEANN JENSEN Digitally signed by LEANN JENSEN
Date: 2021.04.01 17:09:58 -04'00'

LeAnn Jensen, Regional Judicial Officer
U.S. EPA, Region 1