

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 2

In The Matter of:

Kerry Biofunctional Ingredients, Inc.
d/b/a Kerry Bio Sciences,
Respondent.

Proceeding under Section 3008 of the Solid
Waste Disposal Act, as amended.

CONSENT AGREEMENT

AND

FINAL ORDER

Docket Number: RCRA-02-2017-7108

PRELIMINARY STATEMENT

This is a civil administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901, *et seq.* (referred to collectively as "RCRA" or the "Act").

Section 3008 of RCRA, 42 U.S.C. § 6928, authorizes the Administrator to enforce violations of the Act and the regulations promulgated or authorized pursuant to it. Complainant in these proceedings, the Director of the Division of Enforcement and Compliance Assistance ("DECA"), the United States Environmental Protection Agency ("EPA") Region 2, issued a "Complaint and Notice of Opportunity for Hearing" ("Complaint") on September 26, 2017 to Respondent Kerry Biofunctional Ingredients, Inc. d/b/a Kerry Bio Sciences ("Kerry"), which owns and operates a facility at 158 State Highway 320, Norwich, New York 13815 ("Norwich Facility"). The Complaint alleged that Respondent violated certain requirements of RCRA and regulations concerning the management of hazardous waste at its Norwich facility.

EPA and Respondent have subsequently engaged in settlement discussions with respect to the violations alleged in the aforementioned Complaint. Both EPA and Respondent have agreed that entering into this Consent Agreement/Final Order ("CA/FO") is an appropriate means of resolving the alleged noncompliance with the RCRA requirements that EPA believes existed at the Norwich facility without further litigation or other administrative action.

This CA/FO is being issued pursuant to, and under the authority of, 40 C.F.R. § 22.18(b). No adjudicated findings of fact or conclusions of law have been made. Respondent neither admits nor denies EPA's Findings of Fact and Conclusions of Law set forth below.

EPA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Respondent is Kerry.
2. Kerry is a corporation organized pursuant to the laws of the State of New York
3. Kerry is a subsidiary of Kerry Inc. whose North American Headquarters ("Kerry North America") is situated in Beloit, Wisconsin.
4. Respondent is a "person" as that term is defined in Section 1004(15) of the Act, 42 U.S.C. § 6903(15) and 6 New York Code of Rules and Regulations ("6 N.Y.C.R.R.") § 370.2(b).
5. Kerry is, and has been since May 2004, the owner and operator of a manufacturing facility ("facility") that has been engaged in the manufacture and distribution of ingredients for food manufacturers and provides savory ingredients, sweet ingredients, food coating systems, nutritional systems and specialty protein applications for the pharmaceutical industry.
6. Kerry, since at least February 24, 2014, is and has been both the "owner" and "operator" of the Norwich facility as these terms are defined in 6 N.Y.C.R.R. § 370.2(b).
7. Kerry in carrying out its manufacturing and pharmaceutical activities has been generating and continues to generate "hazardous waste" as defined in 6 N.Y.C.R.R. § 371.1(d).
8. As of February 24, 2014, and subsequent thereto, Kerry has been generating and continues to generate more than 1,000 kilograms ("kgs") of hazardous waste in a calendar month.
9. As of February 24, 2014, and subsequent thereto, Kerry is, and has been, a "generator" of hazardous waste as that phrase is defined in 6 N.Y.C.R.R. 370.2(b).
10. On or about July 14 — 15, 2016, a duly designated representative of EPA conducted an inspection of the Norwich facility, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, to determine Kerry's compliance with Subtitle C of RCRA and its implementing regulations, including New York's authorized hazardous waste regulations (the "2016 Inspection").
11. On or about December 2, 2016, EPA issued to Kerry a combined Notice of Violation ("NOV") and Request for Information ("IRL").
12. The NOV, which was issued pursuant to Section 3008 of the Act, 42 U.S.C. § 6928, informed Kerry that EPA had identified a number of potential RCRA violations at its facility and requested it to provide a description and documentation of the actions it had taken to correct the violations identified by EPA in that NOV.
13. The IRL, which was issued pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, sought, in part, information and documentation relating to Kerry's handling of hazardous waste and acute hazardous waste at its Norwich facility.

14. On or about January 4, 2017 and January 27, 2017, Kerry submitted its responses to the combined NOV and IRL ("January Responses").
15. As a result of the July 2016 Inspection and Kerry's January Responses, EPA representatives determined that Respondent at the time of the July 2016 Inspection, or at times prior thereto, had failed to: (1) make hazardous wastes determinations for certain waste-streams found at the Norwich facility; (2) keep a complete copy of each hazardous waste manifest for at least three years; and (3) meet the conditions necessary to accumulate hazardous waste without having obtained a permit or qualifying for interim status. EPA issued the Complaint alleging that these failures were violations of RCRA rules.
16. EPA and Kerry met to discuss the EPA determinations described in Paragraph 15, *supra*, and agreed to settle this matter by entering into this Consent Agreement.

CONSENT AGREEMENT

Pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18 of the Consolidated Rules of Practice, it is hereby agreed by and between the parties hereto, and voluntarily and knowingly accepted by Respondent, that Respondent, for purposes of this Consent Agreement and in the interest of settling this matter expeditiously without the time, expense or uncertainty of a formal adjudicatory hearing on the merits: (a) admits the jurisdictional allegations of the Complaint; (b) neither admits nor denies EPA's Findings of Fact and/or Conclusions of Law; (c) consents to the assessment of the civil penalty as set forth below; (d) consents to the issuance of the Final Order incorporating all the provisions of this Consent Agreement; and (e) waives its right to contest or appeal that Final Order.

Based upon the foregoing, and pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18, Respondent voluntarily and knowingly agrees to, and shall comply with, the following terms:

1. Respondent shall hereinafter, at its facility, comply with all the requirements cited in the Complaint.
2. Respondent hereby certifies that, as of the date of its signature to this Agreement, to the best of its knowledge and belief, it is in compliance with all the requirements cited in the Complaint.
3. This CA/FO is not intended, and shall not be construed, to waive, extinguish or otherwise affect Kerry's obligation to comply with all applicable federal, state and local laws and regulations relating to any generation, management, treatment, storage, transport or offering for transport, or disposal of hazardous waste by the Respondent.
4. Respondent shall pay a civil penalty to EPA in the total amount of **TWENTY THOUSAND (\$20,000) DOLLARS**. Such payment shall be made by cashier's or

certified check or by Electronic Fund Transfer (EFT). If the payment is made by check, then the check shall be made payable to the **Treasurer, United States of America**, and shall be mailed to:

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

The check shall be identified with a notation thereon listing the following: ***IN THE MATTER OF KERRY BIOFUNCTIONAL INGREDIENTS, INC. d/b/a KERRY BIO SCIENCES***, and shall bear thereon the **Docket No. RCRA-02-2017-7108**. If Respondent chooses to make the payment by EFT, then Respondent shall provide the following information to its remitter bank:

- 1) Amount of Payment.
 - 2) SWIFT address: **FRNYUS33, 33 Liberty Street, New York, NY 10045.**
 - 3) Account Code for Federal Reserve Bank of New York receiving payment: **68010727.**
 - 4) Federal Reserve Bank of New York ABA routing number: **021030004.**
 - 5) Field Tag 4200 of the Fedwire message should read **D 68010727**
Environmental Protection Agency.
 - 6) Name of Respondent: **Kerry Biofunctional Ingredients, Inc. d/b/a Kerry Bio Sciences**
 - 7) Number: **RCRA 02-2017-7108.**
5. The payment must be received at the above address (or account of EPA) on or before thirty (30) calendar days after the date of the signature of the Final Order, which is located at the end of this CA/FO. (The date by which the payment must be received shall hereinafter be referred to as the "due date")
- a. Failure to pay the requisite civil penalty amount in full according to the above provisions may result in the referral of this matter to the United States Department of Justice or Department of the Treasury for collection or other appropriate action.
 - b. Furthermore, if payment is not made on or before the date specified in this document, interest for said payment shall be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717, on the overdue amount from the date said payment was required to have been made through the date said payment has been received. In addition, a late payment handling charge of \$15.00 will be assessed for each thirty (30) calendar day period or any portion thereof, following the date the payment was to have been made, in which payment of the amount remains in arrears.
 - c. In addition, a 6% per annum penalty will be applied to any principal amount that has not been received by the EPA within ninety (90) calendar days of the deadline for payment. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid.
 - d. The civil penalty provided for herein constitutes "penalt[ies]" within the meaning of 26 U.S.C. § 162(f), and are not deductible expenditures for purposes of federal or state law.
6. Complainant shall mail to Respondent (to the representatives designated in Paragraph 7, *infra*, a copy of the fully executed CA/FO, and Respondent consents to service of the CA/FO upon it by an employee of EPA other than the Regional Hearing Clerk.

7. Except as the parties may otherwise in writing agree, all documentation and information required to be submitted in accordance with the terms and conditions of this Consent Agreement shall be sent to:

Charles Zafonte, Enforcement Officer
RCRA Compliance Assistance and Program Support Branch
Division of Enforcement & Compliance Assistance
US Environmental Protection Agency 2
290 Broadway
New York, New York 10007-1866

and

Gary H. Nurkin, Assistant Regional Counsel
Office of Regional Counsel
US Environmental Protection Agency
290 Broadway, Room 1621
New York, New York 10007

Unless the above-named EPA contacts are later advised otherwise in writing, EPA shall address any future written communications related to this matter (including any correspondence related to payment of the penalty) to Respondent at the following addresses:

Michael Rowbottom, Plant Manager
Kerry Biofunctional Ingredients, Inc.
158 State Hwy 320
Norwich, New York 13815

and

Steven J. Poplawski, Esq.
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

8. Full payment of the penalty described in Paragraphs 4 and 5 of the Consent Agreement, *supra*, shall only resolve Respondent's liability for federal civil penalties for the violation(s) and facts alleged in the Complaint issued in this matter. Full payment of this penalty shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
9. The provisions of this Consent Agreement shall be binding upon both Complainant and Respondent along with their authorized representatives and successors or assigns.

10. Kerry waives its right to request or to seek any Hearing on the terms and conditions set forth in the Consent Agreement and its accompanying Final Order and/or the Findings of Fact/Conclusions of Law, above.
11. The undersigned signatory for Respondent certifies that he/she is duly and fully authorized to enter into this Consent Agreement and all the terms and conditions set forth in this Consent Agreement.
12. Each party hereto agrees to bear its own costs and attorneys' fees in this matter.

RESPONDENT: **KERRY BIOFUNCTIONAL, INC. d/b/a KERRY BIO SCIENCES.**

BY: John Casey

Authorized Signature


NAME: JOHN CASEY

(PLEASE PRINT)

TITLE: VP of operations

DATE: 3/29/18

COMPLAINANT:



Dore LaPosta, Director
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency - Region 2
290 Broadway
New York, NY 10007


DATE: **APR - 5 2018**

In the Matter of Kerry Biofunctional Inc. d/b/a Kerry Bio Sciences
Docket No. RCRA-02-2017-7108

FINAL ORDER

The Regional Judicial Officer of EPA, Region 2 concurs in the foregoing Consent Agreement in the case of *In the Matter of Kerry Biofunctional, Inc. d/b/a Kerry Bio Sciences*, bearing Docket No. RCRA-02-2017-7108. Said Consent Agreement, having been duly accepted and entered into by the parties, is hereby ratified, incorporated into and issued as this Final Order, which shall become effective when filed with the Regional Hearing Clerk of EPA, Region 2. 40 C.F.R. § 22.31(b). This Final Order is being entered pursuant to the authority of 40 C.F.R. § 22.18(b)(3) and shall constitute an order issued under authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

DATED: April 9, 2018
New York, New York



Helen Ferrara
Regional Judicial Officer
U.S. Environmental Protection Agency-Region 2
290 Broadway
New York, New York 10007-1866

In the Matter of Kerry Biofunctional Ingredients, Inc. d/b/a Kerry Bio Sciences
Docket Number RCRA 02-2017-7108

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed CONSENT AGREEMENT and FINAL ORDER, bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and One Copy
By Hand:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency- Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

Copy by Certified Mail,
Return Receipt Requested:

Steven J. Poplawski, Esq.
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750

and

Michael Rowbottom, Plant Manager
Kerry Biofunctional Ingredients, Inc.
158 State Hwy 320
Norwich, New York 13815

Dated: April 10, 2018

Yvonne Mgr