



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

July 16, 2018

REPLY TO THE ATTENTION OF E-19J

Honorable Susan L. Biro
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

RE: In the Matter of: Birds Eye Foods, LLC
Docket Nos. MM-05-2018-0002
CERCLA-05-2018-0005
EPCRA-05-2018-0009
Complaint Date: June 13, 2018
Total Proposed Penalty: \$664,190.00

Dear Judge Biro:

Pursuant to 40 C.F.R. § 22.21(a) I have enclosed the Respondent's Answer to an Administrative Complaint and Request for Hearing.

Please assign an Administrative Law Judge to this case.

If you have questions, please contact me at (312) 886-3713.

Sincerely,

A handwritten signature in blue ink that reads "LaDawn Whitehead". The signature is stylized and includes a long horizontal flourish extending to the right.

LaDawn Whitehead
Regional Hearing Clerk

Enclosures

cc: Jodi Arndt Labs
CONWAY, OLEJNICZAK & JERRY, S.C.
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July 12, 2018



VIA FEDEX

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

RE: In the Matter of: Birds Eye Foods, LLC
Docket Nos: MM-05-2018-0002
CERCLA-05-2018-0005
EPCRA-05-2018-0009

Dear Clerk:

Enclosed please find an original and one (1) copy of Respondent, Birds Eye Foods, LLC's Answer, Affirmative Defenses and Request for Hearing in the above-referenced matter. Pursuant to Section 22.5 of the Consolidated Rules, a copy of the Answer, Affirmative Defenses and Request for Hearing is being provided to Jeffery M. Trevino. The foregoing service is acknowledged in the Certificate of Service attached to Respondent's Answer.

Thank you.

Very truly yours,

LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.

By: *Jodi Arndt Labs*

Jodi Arndt Labs

JAL:cjl (441723.070-#2891666)

Enclosures

c: Jeffery M. Trevino, Office of Regional Counsel (w/enc.)
Kelley Maggs, c/o Birds Eye Foods, LLC

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
Birds Eye Foods, LLC)
Waseca, Minnesota)
Respondent.)



Docket Nos: MM-05-2018-0002
CERCLA-05-2018-0005
EPCRA-05-2018-0009

ANSWER, AFFIRMATIVE DEFENSES AND REQUEST FOR HEARING

NOW COMES the above-named Respondent by counsel, Law Firm of Conway, Olejniczak & Jerry, S.C., and as and for its Answer, Affirmative Defenses and Request for Hearing to the Complainant's Complaint, admits, denies and alleges as follows:

Complaint

1. In answering Paragraph 1, Respondent admits.
2. In answering Paragraph 2, Respondent admits.
3. In answering Paragraph 3, Respondent admits.

Statutory and Regulatory Background

4. In answering Paragraph 4, Respondent states that this paragraph expresses a legal conclusion to which no response is required.
5. In answering Paragraph 5, Respondent states that this paragraph expresses a legal conclusion to which no response is required.
6. In answering Paragraph 6, Respondent states that this paragraph expresses a legal conclusion to which no response is required.
7. In answering Paragraph 7, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

8. In answering Paragraph 8, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

9. In answering Paragraph 9, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

10. In answering Paragraph 10, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

General Allegations

11. In answering Paragraph 11, Respondent admits.

12. In answering Paragraph 12, Respondent admits.

13. In answering Paragraph 13, Respondent admits.

14. In answering Paragraph 14, Respondent admits.

15. In answering Paragraph 15, Respondent admits.

16. In answering Paragraph 16, Respondent admits.

17. In answering Paragraph 17, Respondent admits.

18. In answering Paragraph 18, Respondent admits.

19. In answering Paragraph 19, Respondent admits.

20. In answering Paragraph 20, Respondent admits.

21. In answering Paragraph 21, Respondent admits that it used or stored Ammonia CAS# 7664-41-7 at the facility.

22. In answering Paragraph 22, Respondent admits.

23. In answering Paragraph 23, Respondent admits.

24. In answering Paragraph 24, Respondent denies that it released approximately 34,000 pounds of Ammonia CAS# 7664-41-7 between June 21 and July 19, 2013. Respondent

further asserts that it did not experience a release that exceeded the reportable quantity (RQ) during any 24-hour period between June 21 and July 19, 2013, or during any other 24-hour period during 2013. Respondent asserts that the Complainant is improperly relying on ammonia purchase records for the time frame of June 21 through July 19, 2013 to establish that Respondent released approximately 34,000 pounds of ammonia.

25. In answering Paragraph 25, Respondent denies that it released 1,001 pounds of Ammonia CAS #7664-41-7 during any 24-hour period between June 21 and July 19, 2013.

26. In answering Paragraph 26, Respondent denies.

27. In answering Paragraph 27, Respondent denies.

28. In answering Paragraph 28, Respondent denies.

29. In answering Paragraph 29, Respondent denies.

30. In answering Paragraph 30, Respondent denies that it had knowledge of a reportable release as identified by the Complainant as "Release 1"; Respondent asserts that it discovered a release of Ammonia CAS# 7664-41-7 at the facility on or about July 19, 2013, at which time it immediately reported the release to the Minnesota State Emergency Response Commission (SERC) and the National Response Center (NRC). Respondent further asserts that it reported the release to the Minnesota SERC and NRC prior to it having formally calculated the quantity of ammonia released; after completing its investigation, it was determined that the release was actually less than 100 pounds per day and, therefore, Respondent was not technically required to report such release.

31. In answering Paragraph 31, Respondent admits that it reported a release of ammonia to the Minnesota SERC at approximately 2:13 p.m. CST on July 19, 2013; Respondent

denies the allegations to the extent that the Complainant defines “Release 1” as a release occurring between June 21 and July 19, 2013.

32. In answering Paragraph 32, Respondent admits that it reported a release of ammonia to the NRC at approximately 2:24 p.m. CST on July 19, 2013; Respondent denies the allegations to the extent that the Complainant defines “Release 1” as a release occurring between June 21 and July 19, 2013.

33. In answering Paragraph 33, Respondent denies the allegations; Respondent asserts that it did not have an obligation to provide the Minnesota SERC with any written follow-up emergency notice of the release it reported on July 19, 2013 as Respondent had determined that the release was not a reportable release. Respondent further asserts that it had follow-up communications with the Minnesota SERC after the original report on July 19, 2013 and that the Minnesota SERC advised Respondent that it did not require anything further from Respondent concerning the reported release because Respondent had determined that the release was below the reporting threshold of 100 pounds.

34. In answering Paragraph 34, Respondent admits.

35. In answering Paragraph 35, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

36. In answering Paragraph 36, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

37. In answering Paragraph 37, Respondent denies.

38. In answering Paragraph 38, Respondent denies.

39. In answering Paragraph 39, Respondent denies that it had knowledge of a reportable release of ammonia at or about 6:00 p.m. CST on September 20, 2014. Respondent

affirmatively asserts that a severe storm involving hail and heavy winds went through Waseca, Minnesota around 6:00 p.m. CST on September 20, 2014; during the storm event, a portion of the facility's roof was peeled up causing it to hit some piping that ultimately caused some leaks from a weld and flange while the system was actively running ammonia to a plate chiller used for cooling process water. Maintenance personnel responded to the leak immediately upon discovery.

40. In answering Paragraph 40, Respondent admits that it notified the Minnesota SERC of Release 2 at or about 7:30 p.m. CST on September 20, 2014. Respondent affirmatively states that it immediately notified the Minnesota SERC as soon as the facility had knowledge that a reportable quantity of ammonia may have been released on September 20, 2014. During the storm, the facility experienced power outages and problems with its phones, both land lines and cellphones, which made it difficult to contact the Minnesota SERC and/or NRC "immediately" as defined and interpreted by the Complainant (i.e., extenuating circumstances); even local emergency services had problems communicating via emergency radios during the storm.

41. In answering Paragraph 41, Respondent admits that it notified the NRC of Release 2 at or about 1:22 a.m. CST on September 21, 2014. Respondent affirmatively states that it immediately notified the NRC as soon as the facility had knowledge that a reportable quantity of ammonia was released on or about September 20/21, 2014 and as soon as the facility had the capability of notifying the NRC of Release 2.

42. In answering Paragraph 42, Respondent admits.

Count 1

43. In answering Paragraph 43, Respondent reasserts and incorporates by reference all responses to Paragraphs 1 - 42 as if restated herein.

44. In answering Paragraph 44, Respondent denies. Respondent affirmatively states that it immediately notified the NRC of an ammonia release when it discovered an ammonia leak at the facility on July 19, 2013 that may resulted in a release of ammonia that exceeded the reportable quantity. Respondent further states that it was not required to report the release described by the Complainant as Release 1 to the NRC as Respondent did not have a release that exceeded the reportable quantity on or about July 19, 2013, or during any other 24-hour period between the subject time frame of June 21 and July 19, 2013.

45. In answering Paragraph 45, Respondent states that this paragraph expresses a legal conclusion to which no response is required and to the extent a response is required, Respondent denies. Respondent affirmatively states that it immediately notified the NRC of a release of ammonia on July 19, 2013 when it discovered an ammonia leak that may have resulted in a release that exceeded the reportable quantity. Respondent further states that there was no day during the subject time frame of June 21 through July 19, 2013 wherein it actually had a release of ammonia that was reportable and thus Respondent was not required to notify the NRC of any release.

Count 2

46. In answering Paragraph 46, Respondent reasserts and incorporates by reference all responses to Paragraphs 1 - 45 as if restated herein.

47. In answering Paragraph 47, Respondent denies. Respondent affirmatively states that it notified the Minnesota SERC immediately upon discovery of a leak of ammonia that may

have exceeded the reportable quantity. Respondent further states that it was not required to report the release described by the Complainant as Release 1 to the Minnesota SERC as Respondent did not have a release that exceeded the reportable quantity on or about July 19, 2013, or during any other 24-hour period between the subject time frame of June 21 and July 19, 2013.

48. In answering Paragraph 48, Respondent states that this paragraph expresses a legal conclusion to which no response is required and to the extent a response is required, Respondent denies. Respondent affirmatively states that it immediately notified the Minnesota SERC of a release of ammonia on July 19, 2013 when it discovered an ammonia leak that may have resulted in a release that exceeded the reportable quantity. Respondent further states that there was no day during the subject time frame of June 21 through July 19, 2013 wherein it actually had a release of ammonia that was reportable and thus Respondent was not required to notify the Minnesota SERC of any release.

Count 3

49. In answering Paragraph 49, Respondent reasserts and incorporates by reference all responses to Paragraphs 1 - 48 as if restated herein.

50. In answering Paragraph 50, Respondent denies and affirmatively asserts that no written follow-up emergency notice was required for the release that occurred on or about July 19, 2013, primarily due to the fact that the release of ammonia on July 19, 2013 (or any other 24-hour period during the time frame asserted by Complainant) was less than 100 pounds.

51. In answering Paragraph 51, Respondent states that this paragraph expresses a legal conclusion to which no response is required and to the extent a response is required, Respondent denies.

Count 4

52. In answering Paragraph 52, Respondent reasserts and incorporates by reference all responses to Paragraphs 1 - 41 as if restated herein.

53. In answering Paragraph 53, Respondent denies. Respondent notified the NRC of Release 2 immediately upon discovery of a second leak on the roof that the facility was not aware of when it repaired the initial leak that occurred around 6:00 p.m. CST on September 20, 2014. The facility was not able to discover the second leak until power had been restored and employees were allowed to return to the facility after being evacuated during the storm; such discovery was made at or about 12:45 a.m. on September 21, 2014.

54. In answering Paragraph 54, Respondent states that this paragraph expresses a legal conclusion to which no response is required and to the extent a response is required, Respondent denies.

Count 5

55. In answering Paragraph 55, Respondent reasserts and incorporates by reference all responses to Paragraphs 1 - 54 as if restated herein.

56. In answering Paragraph 56, Respondent denies.

57. In answering Paragraph 57, Respondent states that this paragraph expresses a legal conclusion to which no response is required and to the extent a response is required, Respondent denies.

Count 6

58. In answering Paragraph 58, Respondent reasserts and incorporates by reference all responses to Paragraphs 1 - 57 as if restated herein.

59. In answering Paragraph 59, Respondent admits. Respondent affirmatively states that it was its understanding that the facility's EH&S manager had submitted the follow-up report as was required by Respondent's written policies; facility personnel had reviewed a draft report prepared by the EH&S manager and thus presumed it had been mailed out. It was not until the Complainant's investigation that Respondent learned that the EH&S manager had not mailed the actual follow-up report to the Minnesota SERC.

60. In answering Paragraph 60, Respondent states that this paragraph expresses a legal conclusion to which no response is required and to the extent a response is required, Respondent denies.

Proposed CERCLA Penalty

61. In answering Paragraph 61, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

62. In answering Paragraph 62, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

63. In answering Paragraph 63, Respondent states that this paragraph sets forth the relief requested by the Complainant and thus no response is required. Respondent objects to the relief requested and asserts that Complainant has failed to fairly and/or properly consider and apply the factors set forth in 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, dated September 30, 1999 (Enforcement Response Policy) when determining the base penalty and any adjustments to the base penalty.

64. In answering Paragraph 64, Respondent denies and further asserts that the Enforcement Response Policy was not attached to or otherwise enclosed with the Complaint.

Proposed EPCRA Penalty

65. In answering Paragraph 65, Respondent states that this paragraph expresses a legal conclusion to which no response is required.

66. In answering Paragraph 66, Respondent states that this paragraph sets forth the relief requested by the Complainant and thus no response is required. Respondent objects to the relief requested and asserts that Complainant has failed to fairly and/or properly consider and apply the factors set forth in the Enforcement Response Policy

67. In answering Paragraph 67, Respondent denies and further asserts that the Enforcement Response Policy was not attached to or otherwise enclosed with the Complaint.

AFFIRMATIVE DEFENSES

Respondent, Birds Eye Foods, LLC, asserts the following affirmative defenses:

1. Respondent did not have a release of ammonia that exceeded the reportable quantity of 100 pounds during any 24-hour period between June 21 and July 19, 2013, and thus Respondent did not have a legal obligation to immediately notify the Minnesota SERC and/or NRC of a release from the facility.

2. Respondent did not have a legal obligation to provide the Minnesota SERC a written follow-up emergency notice per Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), as Respondent did not have a reportable release during any 24-hour period between June 21 and July 19, 2013.

3. Respondent immediately notified the Minnesota SERC as soon as the facility had knowledge that a reportable quantity of ammonia may have been released on September 20, 2014.

4. Respondent immediately notified the NRC as soon as the facility had knowledge that a reportable quantity of ammonia was released on or about September 20/21, 2014 and as soon as the facility had the capability of notifying the NRC of Release 2.

5. A civil administrative complaint is not an appropriate response for the alleged violations of EPCRA § 304 and CERCLA § 103 as the facts and circumstances support instead the issuance of a notice of noncompliance (NON).

6. The Complainant has failed to properly and/or fairly consider the appropriate factors when determining the base penalty for the alleged violations set forth in the Complaint, including the nature of the violation, the extent of the violation, the gravity of the violation, and the circumstances of the violation.

7. The Complainant has failed to properly and/or fairly consider the appropriate factors when determining and applying adjustments to its base penalty calculation for the alleged violations set forth in the Complaint.

8. The alleged delay in notification to the Minnesota SERC and/or NRC did not hamper federal or state response activities or pose serious threats to human health and the environment.

9. There were extenuating circumstances that prevented the immediate notification of the Minnesota SERC and/or NRC of the ammonia release that was caused by the severe storms experienced at the facility on September 20, 2014.

10. Respondent acted in good faith to comply with the requirements of EPCRA § 304 and CERCLA § 103 as to its obligation to immediately notify the Minnesota SERC and/or NRC of a release that exceeded the reportable quantity of a hazardous chemical.

11. Respondent has cooperated fully with the Complainant during its compliance evaluation / enforcement process.

12. Respondent asserts the affirmative defense of laches in that the Complainant unreasonably delayed in undertaking its action, particularly concerning Release 1, as defined by Complainant in its Complaint; such delay resulted in prejudice to the Respondent.

REQUEST FOR HEARING

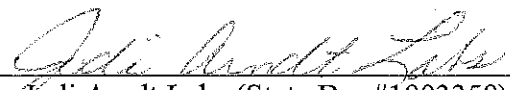
Respondent requests a hearing in this matter.

ADDITIONAL RELIEF REQUESTED

Respondent requests that the Complainant's Complaint be dismissed with prejudice; and that Respondent be awarded all costs and expenses of this action, including all attorneys' fees incurred in its defense.

Dated this 12th day of July, 2018.

LAW FIRM OF CONWAY OLEJNICZAK & JERRY, S.C.
Attorneys for Respondent, Birds Eye Foods, LLC

By: 
Jodi Arndt Labs (State Bar #1003359)

POST OFFICE ADDRESS:

231 South Adams Street
Green Bay, WI 54301
P.O. Box 23200
Green Bay, WI 54305-3200
(920) 437-0476

In the Matter of: **Birds Eye Foods, LLC, Waseca, Minnesota**
Docket Nos.: **MM-05-2018-0002, CERCLA-05-2018-0005, EPCRA 05-2018-0009**

CERTIFICATE OF SERVICE

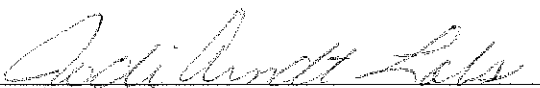
I, Jodi Arndt Labs, certify that I filed the original and one copy of the Answer, Affirmative Defenses and Request for Hearing with the Regional Hearing Clerk, Region 5, U.S. Environmental Protection Agency, via overnight delivery with Federal Express, addressed as follows:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

I further certify that I mailed a copy of the Answer, Affirmative Defenses and Request for Hearing to Jeffery M. Trevino, Associate Regional Counsel by first-class mail, postage prepaid, addressed as follows:

Jeffery M. Trevino
Associate Regional Counsel (C-14J)
U.S. EPA
77 W. Jackson Boulevard
Chicago, IL 60604

On the 12th day of July, 2018.



Jodi Arndt Labs
Attorney for Birds Eye Foods, LLC

In the Matter of: Birds Eye Foods, LLC

Docket Nos. MM-05-2018-0002
CERCLA-05-2018-0005
EPCRA-05-2018-0009

Certificate of Service

I certify that I served the original and one copy of the Respondent's Answer and case file via certified mail to:

CERTIFIED MAIL RECEIPT NUMBER: 7009 1680 0000 7666 2178

Honorable Susan L. Biro
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

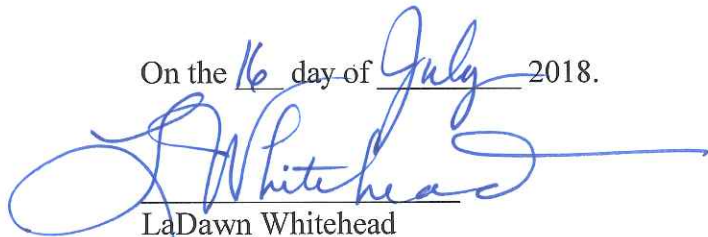
I certify that I served a copy of the Respondent's Answer by electronic mail to:

Ann Coyle, Regional Judicial Officer
coyle.ann@epa.gov

Jodi Arndt Labs, CONWAY, OLEJNICZAK & JERRY, S.C.
jodi@lcojlaw.com

Jeffery M. Trevino, Associate Regional Counsel
trevino.jeffery@epa.gov

On the 16 day of July 2018.



LaDawn Whitehead
Regional Hearing Clerk
Region 5