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January 10, 2024

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U.S. EPA REGION 7
HEARING CLERK

**U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

BEFORE THE ADMINISTRATOR

In the Matter of

Nox-Crete, Inc.

Respondent.

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Docket No. MM-07-2023-0147

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Nox-Crete, Inc. (Respondent) have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties initiated pursuant to Section 113(d) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d), Section 109(b)(1) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9609(b)(1), and Section 325(b) and (c) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11045(b) and (c). Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), the Administrator and the Attorney General jointly determined that this matter, in which the first date of alleged violation occurred more than twelve months prior to the initiation of the administrative action, was appropriate for administrative penalty action.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent has violated Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1), Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Sections 304, 311, and 312 of EPCRA, 42 U.S.C. §§ 11004, 11021, 11022. Furthermore, this Consent Agreement and Final Order serves as notice pursuant to Section 113(d)(2)(A) of the CAA, 42 U.S.C. § 7413(d)(2)(A), of the EPA's intent to issue an order assessing penalties for these violations.

Parties

3. Complainant is the Director of the Enforcement and Compliance Assurance Division, Region 7, as duly delegated by the Administrator of EPA.

4. Respondent is Nox-Crete, Inc., a corporation doing business in the state of Nebraska.

Statutory and Regulatory Background

CAA

5. Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1), provides that owners and operators of stationary sources producing, processing, handling, or storing substances listed pursuant to Section 112(r)(3) of the CAA, 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 the Occupational Safety and Health Act, 29 U.S.C. § 654 *et. seq.*, to identify hazards which may result from accidental releases of such substances using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur. Section 112(r)(1) of the CAA is known as the “General Duty Clause.”

6. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), states that the Administrator may issue an administrative order against any person assessing a civil administrative penalty of up to \$25,000 per day of violation whenever, on the basis of any available information, the Administrator finds that such person has violated or is violating any requirement or prohibition of Section 112(r) of the CAA, 42 U.S.C. § 7412(r), and its implementing regulations. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$55,808 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 6, 2023.

CERCLA/EPCRA

7. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and the implementing regulations at 40 C.F.R. Part 302, require any person in charge of a facility to immediately notify the National Response Center (NRC) when a reportable quantity or more of a CERCLA hazardous substance is released in any 24-hour period, unless the release is federally permitted. The list of hazardous substances and their reportable quantities are codified in 40 C.F.R. Part 302, Table 302.4.

8. Section 304(a)(3) of EPCRA, 42 U.S.C. § 11004(a)(3), and the implementing regulations at 40 C.F.R. Part 355, require the owner or operator of a facility that produces, uses, or stores a hazardous chemical to immediately provide notice to the community emergency coordinator for the local emergency planning committees (LEPCs) for any area likely to be

affected by the release and to the State emergency response commissions (SERCs) of any State likely to be affected by the release, after a release of a hazardous substance occurs from a facility that requires a notification under Section 103(a) of CERCLA.

9. Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), and the implementing regulations at 40 C.F.R. Part 370, require that the owner or operator of any facility which is required to prepare or have available a material safety data sheet (MSDS or SDS) for a hazardous chemical under the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 651 *et seq.*, shall submit a material safety data sheet for each such chemical, or a list of such chemicals, to the appropriate LEPC; to the SERC; and to the fire department with jurisdiction over the facility. Section 311(d) further requires that the initial SDS or list be provided before three months after the owner or operator of a facility is required to prepare or have available a SDS for the chemical under the OSH Act.

10. Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370, require the owner or operator of a facility which is required by the OSHA to prepare or have available a SDS for a hazardous chemical, to prepare and submit to the SERC, community emergency coordinator for the LEPC and fire department with jurisdiction over the facility annually by March 1, an emergency and hazardous chemical inventory form (“Tier I” or “Tier II” as described in 40 C.F.R. Part 370) for the previous calendar year. The form must contain the information required by Section 312(d) of EPCRA, covering all hazardous chemicals present at the facility at any one time during the preceding year in amounts equal to or exceeding 10,000 pounds and all extremely hazardous chemicals present at the facility at any one time in amounts equal to or greater than 500 pounds or the threshold planning quantity designated by EPA at 40 C.F.R. Part 355, Appendices A and B, whichever is lower.

11. Under 29 C.F.R. § 1910.1200(b)(1), all employers are required to provide information to their employees about the hazardous chemicals to which they are exposed including, but not limited to, MSDS or SDS.

12. Section 109(b)(1) of CERCLA, 42 U.S.C. § 9609(b)(1), and Section 325(b)(2) and (c)(1) of EPCRA, 42 U.S.C. § 11045(b)(2) and (c)(1), authorize the Administrator to assess a civil penalty of up to \$25,000 per day of violation for violations of Section 103(a) of CERCLA, Section 304 of EPCRA, and Section 312 of EPCRA. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$67,544 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 6, 2023.

13. Section 325(c)(2) of EPCRA, 42 U.S.C. § 11045(c)(2), authorizes the Administrator to assess a civil penalty of up to \$10,000 for each violation of Section 311 of EPCRA. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, as amended, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19, increased these statutory maximum penalties

to \$27,018 for violations that occur after November 2, 2015, and for which penalties are assessed on or after January 6, 2023.

Definitions

CAA

14. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), defines “person” to include any individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency department, or instrumentality of the United States and any officer, agent, or employee thereof.

15. Section 112(r)(2)(A) of the CAA, 42 U.S.C. § 7412(r)(2)(A), defines “accidental release” as an unanticipated emission of a regulated substance or other extremely hazardous substance into the ambient air from a stationary source.

16. Section 112(a)(9) of the CAA, 42 U.S.C. § 7412(a)(9), defines “owner or operator” as any person who owns, leases, operates, controls, or supervises a stationary source.

17. Section 112(r)(2)(B) of the CAA, 42 U.S.C. § 7412(r)(2)(B), defines “regulated substance” as a substance listed under Section 112(r)(3) of the CAA, 42 U.S.C. § 7412(r)(3). These substances are codified in 40 C.F.R. § 68.130.

18. Under the General Duty Clause, the term “extremely hazardous substance” includes, but is not limited to, substances listed pursuant to Sections 112(r)(3) through (5) of the CAA, 42 U.S.C. § 7412(r)(3) through (5). Other “extremely hazardous substances” may include any substance that alone or in combination with other substances or factors may cause death, serious injury, or substantial property damages as a result of short-term exposures associated with releases to the air. *See* 40 C.F.R. § 1604.2, 84 Fed. Reg. 67899, 67905 (Dec. 12, 2019); 85 Fed. Reg. 10074, 10083 (Feb. 21, 2020); and Senate Committee on Environment and Public Works, Clean Air Act Amendments of 1989, Sen. Report No. 101-228, at 211, *reprinted in* 1990 U.S.C.C.A.N. 3385, 3596 (1989).

19. Section 112(r)(2)(C) of the CAA, 42 U.S.C. § 7412(r)(2)(C), defines “stationary source” as any buildings, structures, equipment, installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person, and from which an accidental release may occur.

CERCLA/EPCRA

20. Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), defines “facility” as any building, structure, installation, equipment, pipe or pipeline, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any

site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

21. Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), defines “hazardous substance” as, *inter alia*, any element, compound, mixture, solution, or substance designated pursuant to Section 102 of CERCLA.

22. Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A), defines “owner or operator” as any person owning or operating such facility.

23. Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), defines “person” as an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States government, State, municipality, commission, political subdivision of a State, or any interstate body.

24. Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), defines “release” as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment with exceptions not relevant here.

25. Section 329(3) of EPCRA, 42 U.S.C. § 11049(3), defines “extremely hazardous substance” as a substance on the list described in Section 302 of EPCRA, which is codified in 40 C.F.R. Part 355.

26. Section 329(4) of EPCRA, 42 U.S.C. § 11049(3), defines “facility” as all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person.

27. Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), with certain exceptions, defines the term “hazardous chemical” as having the meaning given such term by 29 C.F.R. § 1910.1200(c).

28. Under 29 C.F.R. § 1910.1200(c), a hazardous chemical is any chemical which is classified as a physical or health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard not otherwise classified.

29. Section 329(7) of EPCRA, 42 U.S.C. § 11049(7), defines “person” as any individual, trust, firm joint stock company, corporation, partnership association, State, municipality, commission, political subdivision of a State, or interstate body.

30. Section 329(8) of EPCRA, 42 U.S.C. § 11049(8), defines “release” as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment of any hazardous chemical, extremely hazardous substance, or toxic chemical.

General Factual Allegations

31. Respondent is, and at all times referred to herein was, a “person” as defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e), Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

32. Respondent owns and operates a concrete construction chemical manufacturing company in Omaha, Nebraska. Products include form release agents, curing compounds, sealers, coatings, bond breakers, and caulking compounds.

33. At all times relevant to this CAFO, Respondent was the owner and/or operator of a chemical storage warehouse at 1415 South 20th Street in Omaha, Nebraska 68108 (the Facility).

34. The Facility is a “stationary source” as defined by Section 112(r)(2)(C) of the CAA, 42 U.S.C. § 7412(r)(2)(C).

35. At all times relevant to this CAFO, Respondent produced, processed, handled and/or stored the following at the Facility: toluene diisocyanate 4-isomer (Chemical Abstract Service [CAS]) 584-84-9; diphenyl methane 4, 4-diisocyanate (CAS 101-68-8); formaldehyde or formalin (CAS 50-00-0); formic Acid (CAS 64-18-6); monoethanolamine (CAS 141-43-5); naphthalene (CAS 91-20-3); phenol (CAS 108-95-2); 2,6-dimethyl-4-heptanone (CAS 108-83-8); methyl isobutyl ketone (CAS 108-10-1); dipropylene glycol monomethyl ether (CAS 34590-94-8); 2-butoxyethanol (CAS 111-76-2); xylene mixed monomers (CAS 1333-20-7); cumene (CAS 98-82-8); ethyl acetate (CAS 141-78-6); morpholine (CAS 110-91-8); n-butyl alcohol (CAS 71-36-3); tert-butyl acetate (CAS 540-88-5); isobutyl alcohol (CAS 78-83-1); isopropanol (CAS 67-63-0); acetone (CAS 67-64-1); methyl ethyl ketone (CAS 78-93-3); toluene (CAS 108-88-3); methyl acetate (CAS 79-20-9); ethanol (CAS 64-17-5); ammonia (CAS 7664-41-7); and methanol (CAS 67-56-1).

36. Each of the substances listed in Paragraph 35 is an “extremely hazardous substance” within the meaning of Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1), commonly known as the General Duty Clause.

37. Respondent is subject to the requirements of Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1), because it is the owner and operator of a stationary source that is producing, processing, handling or storing substances listed pursuant to Section 112(r)(3), 42 U.S.C. § 7412(r)(3), and/or extremely hazardous substances pursuant to Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1).

38. At all times relevant to this CAFO, Respondent was an employer at the Facility.

39. At all times relevant to this CAFO, Respondent was in charge of the Facility.

40. Respondent’s Facility is a “facility” as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

41. Xylene, CAS No. 1330–20–7, is a “hazardous substance” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and has a reportable quantity of 100 pounds (lbs), as listed at 40 C.F.R Part 302, Table 302.4.

42. Tert-butyl acetate, CAS No. 540-88-5, is a “hazardous substance” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and has a reportable quantity of 5,000 lbs, as listed at 40 C.F.R. Part 302, Table 302.4.

43. Xylene, CAS No. 1330-20-7, is classified as a physical or health hazard, a simple asphyxiant, combustible gas, or hazard not otherwise classified and is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e) and 29 C.F.R. § 1910.1200(c).

44. Tert-butyl acetate, CAS No. 540-88-5, is classified as a physical or health hazard, a simple asphyxiant, combustible gas, or hazard not otherwise classified and is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e) and 29 C.F.R. § 1910.1200(c).

45. At all times relevant to this CAFO, xylene and tert-butyl acetate were produced, used or stored at Respondent’s Facility.

46. Urea hydrochloride, CAS No. 506-89-8, is classified as a simple asphyxiant, combustible gas, or hazard not otherwise classified and is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and 29 C.F.R. § 1910.1200(c). For purposes of EPCRA reporting requirements, urea hydrochloride has a minimum threshold level of 10,000 pounds, as listed in 40 C.F.R. § 370.10(a)(2).

47. Polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5, is classified as a simple asphyxiant, combustible gas, or hazard not otherwise classified and is a “hazardous chemical” within the meaning of Section 311(e) of EPCRA, 42 U.S.C. § 11021(e), and 29 C.F.R. § 1910.1200(c). For purposes of EPCRA reporting requirements, polyethylene glycol mono (tert-octyl phenyl) ether has a minimum threshold level of 10,000 pounds, as listed in 40 C.F.R. § 370.10(a)(2).

48. During at least one period of time in calendar year 2021, urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5, were each present at the Facility in an amount equal to or greater than the minimum threshold level.

49. OSHA requires Respondent to prepare, or have available, a MSDS or SDS for urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5.

50. On May 30, 2022, a large fire occurred at the Facility, which destroyed the chemical storage warehouse and resulted in the release of an estimated 659,543 pounds of

chemicals, including 40,262 pounds of extremely hazardous substances, as well as an evacuation order that affected approximately 2,461 people.

51. The unanticipated emission from extremely hazardous substances into the air as a result of the fire at the Facility constitutes an “accidental release” as defined by Section 112(r)(2)(a) of the CAA, 42 U.S.C. § 7412(r)(2)(A).

52. The fire at the Facility resulted the release of more than 100 lbs of xylene, CAS No. 1330-20-7, and 5,000 lbs tert-butyl acetate, CAS No. 540-88-5, in a 24-hour time period.

53. The fire at the Facility resulted in a “release” as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22) and Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).

54. The release affected the State of Nebraska, Douglas County, and Omaha, Nebraska.

55. At all times relevant to this CAFO, the Nebraska Emergency Management Agency was the SERC for Nebraska, the Douglas County Local Emergency Planning Committee was the LEPC for Douglas County, and the Omaha Fire Department was the fire department with jurisdiction over the Facility.

56. On July 19 through 20, 2022, EPA conducted an inspection at the Facility to evaluate Respondent’s compliance with Section 112(r) of the CAA, CERCLA, and EPCRA.

57. On March 24, 2023, EPA issued Respondent an information request pursuant to the CAA and EPCRA to obtain additional information regarding Respondent’s compliance status. On April 21, 2023, Respondent submitted a response to the information request.

Allegations of Violation

58. Complainant hereby states and alleges that Respondent has violated the CAA, CERCLA, EPCRA, and federal regulations promulgated thereunder as follows:

Count 1 Failure to Identify Hazards

59. The facts stated in Paragraphs 31 through 57 above are herein incorporated.

60. Section 112(r)(1) of the CAA requires owners and operators of stationary sources producing, processing, handling, or storing substances listed in 40 C.F.R. Part 68 or any other extremely hazardous substance to identify hazards which may result from accidental releases using appropriate hazard techniques.

61. The EPA inspection revealed that Respondent did not identify hazards which may result from releases using appropriate hazard assessment techniques, including the failure to identify hazards associated with operations involving flammable and combustible liquids to

ensure that fire and explosion hazards are addressed by fire prevention, fire control, and emergency action plans, which is an industry standard identified by the National Fire Protection Association (NFPA) 30 (Flammable and Combustible Liquids Code).

62. Respondent's failure to identify hazards which may result from accidental releases using appropriate hazard assessment techniques is a violation of Section 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1).

Count 2
Failure to Minimize the Consequences of Release

63. The facts stated in Paragraphs 31 through 57 above are herein incorporated.

64. Section 112(r)(1) of the CAA requires owners and operators of stationary sources producing, processing, handling, or storing substances listed in 40 C.F.R. Part 68 or any other extremely hazardous substance to minimize the consequences of accidental releases which do occur.

65. The EPA inspection revealed that Respondent did not adequately coordinate the planning of effective fire control measures with local emergency response agencies, which is an industry standard identified by NFPA 30.

66. Respondent's failure to minimize the consequences of an accidental release is a violation of 112(r)(1) of the CAA, 42 U.S.C. § 7412(r)(1).

Counts 3 - 5
Failure to Immediately Notify Authorities

67. The facts stated in Paragraphs 31 through 57 above are herein incorporated.

68. The May 30, 2022, release of xylene, CAS No. 1330-20-7, and tert-butyl acetate, CAS No. 540-88-5, required Respondent to immediately notify the NRC, SERC, and LEPC, pursuant to Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), Section 304(a)(3) of EPCRA, 42 U.S.C. § 11004(a)(3), and 40 C.F.R. Part 355.

69. Respondent did not notify the NRC of the release.

70. Respondent notified the SERC and LEPC of the release on July 28, 2022.

71. Respondent's failures to immediately notify the NRC, SERC, and LEPC of the release are violations of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), Section 304(a)(3) of EPCRA, 42 U.S.C. § 11004(a)(3), and 40 C.F.R. Part 355.

Counts 6 - 8
Failure to Submit SDS or List

72. The facts stated in Paragraphs 31 through 57 above are herein incorporated.

73. Respondent was required to submit an SDS or list for urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5, to the SERC, LEPC and local fire department by at least December of 2021, as required by Section 311(a) of EPCRA, 42 U.S.C. § 11021(a), and the implementing regulations at 40 C.F.R. Part 370.

74. Respondent did not submit a SDS or list for urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5 to the SERC, LEPC, and local fire department.

75. Respondent's failures to submit to the SERC, LEPC, and local fire department a SDS or list for urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5, are violations of Section 311 of EPCRA, 42 U.S.C. § 11021 and 40 C.F.R. Part 370.

Counts 9 – 11
Failure to Submit Tier II Form

76. The facts stated in Paragraphs 31 through 57 above are herein incorporated.

77. Respondent was required to submit to the SERC, LEPC, and local fire department on or before March 1, 2022, a completed emergency and hazardous chemical inventory form including urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5, for calendar year 2021, pursuant to Section 312(a) of EPCRA, 42 U.S.C. § 11022(a), and its implementing regulations at 40 C.F.R. Part 370.

78. Respondent did not submit a completed emergency and hazardous chemical inventory form including urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5, for calendar year 2021 to the SERC, LEPC and Fire Department.

79. Respondent's failures to submit to the SERC, LEPC, and Fire Department a completed emergency and hazardous chemical inventory form including urea hydrochloride, CAS No. 506-89-8, and polyethylene glycol mono (tert-octyl phenyl) ether, CAS No. 9036-19-5 by March 1, 2022, for calendar year 2021 are violations of Section 312(a) of EPCRA, 42 U.S.C. § 11022(a) and 40 C.F.R. § 370.40(a).

CONSENT AGREEMENT

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

- a. admits the jurisdictional allegations set forth herein;
- b. neither admits nor denies the specific factual allegations stated herein;
- c. consents to the assessment of a civil penalty, as stated herein;
- d. consents to the issuance of any specified compliance or corrective action order;
- e. consents to any conditions specified herein;
- f. consents to any stated Permit Action;
- g. waives any right to contest the allegations set forth herein; and
- h. waives its rights to appeal the Final Order accompanying this Consent Agreement.

81. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein and to completion of the SEP described below.

82. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

83. The parties consent to service of this Consent Agreement and Final Order electronically at the following e-mail addresses: *barton.kasey@epa.gov* (for Complainant) and *mlinn@nox-crete.com* (for Respondent). Respondent understands that the Consent Agreement and Final Order will become publicly available upon filing.

Penalty Payment

84. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of \$37,026 as set forth below.

85. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979078
St. Louis, Missouri 63197-9000

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

86. A copy of the check or other information confirming payment shall simultaneously be emailed to the following:

Regional Hearing Clerk
R7_Hearing_Clerk_Filings@epa.gov; and

Kasey Barton, Attorney
barton.kasey@epa.gov.

87. Respondent understands that its failure to timely pay any portion of the civil penalty or any portion of a stipulated penalty as stated in Paragraph 101 may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

Supplemental Environmental Project

88. In response to the violations of the CAA, CERCLA, and EPCRA alleged in this Consent Agreement and Final Order and in settlement of this matter, although not required by the CAA, CERCLA, EPCRA, or any other federal, state, or local law, Respondent shall complete the SEP described in this Consent Agreement and Final Order, which the parties agree is intended to secure significant environmental or public health protection and improvement.

89. Respondent shall complete the following SEP: Install a foam deluge fire suppression system in Respondent's manufacturing and raw material storage areas (known as the EP Room) at Respondent's production facility located at 1444 South 20th Street, Omaha, Nebraska. Respondent shall spend no less than \$244,230 on implementing the SEP. Respondent agrees that the SEP shall be completed within six (6) months of the Effective Date of this Consent Agreement and Final Order.

90. The SEP is consistent with applicable EPA policy and guidelines, specifically EPA's 2015 Update to the 1998 Supplemental Environmental Projects Policy (March 10, 2015).

91. The SEP advances at least one of the objectives of Section 112(r) of the CAA, CERCLA, and EPCRA by minimizing the consequences of accidental releases and reducing the risks to local emergency responders because foam deluge fire suppression is more effective than water fire sprinklers and will extinguish fires faster, as well as prevent reignition by suppressing flammable vapors. The SEP is not inconsistent with any provision of Section 112(r) of the CAA,

CERCLA or EPCRA. The SEP relates to the alleged violations, and is designed to reduce the adverse impact and overall risk to public health and the environment to which the alleged violations contribute by increasing safety and lowering the risk of explosion and fire at Respondent's production facility, which is located next to the Facility where the release occurred.

92. Respondent selected the SEP. This CAFO shall not be construed to constitute EPA approval of the equipment or technology purchased and installed by Respondent in connection with the SEP undertaken pursuant to this Consent Agreement and Final Order.

93. This SEP shall be performed in accordance with the requirements of this Consent Agreement and Final Order.

94. Within seven (7) months of the Effective Date of this Consent Agreement and Final Order, Respondent shall submit a SEP Completion Report to the EPA contact identified in Paragraph 97 below. The SEP Completion Report shall be subject to EPA review and approval as provided in Paragraph 98 below. The SEP Completion Report shall contain the following information:

- a. Detailed description of the SEP as implemented, including documentation of costs and copies of all purchase and delivery orders;
- b. Description of any problems encountered in implementation of the project and the solution thereto;
- c. Description of the specific environmental and/or public health benefits resulting from implementation of the SEP; and
- d. Certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order.

95. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all SEP costs. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Cancelled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

96. The SEP Completion Report shall include the statement of Respondent, through an officer, signed and certifying under penalty of law the following:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and

complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

97. The SEP Completion Report shall be submitted on or before the due date specified above to Lynelle Ladd, Compliance Officer, via email at *ladd.lynelle@epa.gov*.

98. SEP Completion Report Approval: The SEP Completion Report shall be reviewed in accordance with the procedures outlined in this paragraph. EPA will review the SEP Completion Report and may approve, approve with modifications, or disapprove and provide comments to Respondent. If the SEP Completion Report is disapproved with comments, Respondent shall incorporate EPA's comments and resubmit the SEP Completion Report within thirty (30) days of receipt of EPA's comments. If Respondent fails to revise the SEP Completion Report in accordance with EPA's comments, Respondent shall be subject to the stipulated penalties as set forth below.

99. Any public statement, oral or written, in print, film, internet, or other media, made by Respondent making reference to the SEP under this Consent Agreement and Final Order from the date of its execution of this Consent Agreement and Final Order shall include the following language:

This project was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency to enforce federal laws.

100. With regard to the SEP, Respondent certifies the truth and accuracy of each of the following:

- a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Respondent in good faith estimates that the cost to implement the SEP is \$224,230;
- b. That, as of the date of executing this Consent Agreement and Final Order, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- c. That the SEP is not a project that Respondent was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Consent Agreement and Final Order;
- d. That Respondent has not received and will not receive credit for the SEP in any other enforcement action;
- e. That Respondent will not receive reimbursement for any portion of the SEP from another person or entity;

- f. That for federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP; and
- g. Respondent is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in Paragraph 89.

101. Stipulated penalties for failure to complete SEP:

- a. In the event Respondent fails to comply with any of the terms or provisions of this Agreement relating to the performance of the SEP, including to the extent that the actual expenditures for the SEP do not equal or exceed the cost of the SEP, Respondent shall be liable for stipulated penalties according to the provisions set forth below:
 - i. If a SEP has not been completed satisfactorily and timely pursuant to this Consent Agreement and Final Order, Respondent shall pay a stipulated penalty to the United States in the amount of \$250 for each day after the SEP should have been completed until the SEP is fully implemented.
 - ii. For failure to submit the SEP Completion Report, Respondent shall pay a stipulated penalty in the amount of \$250 for each day after the report was originally due until the report is submitted.
- b. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.
- c. Stipulated penalties shall begin to accrue on the day after performance is due and shall continue to accrue through the final day of the completion of the activity or other resolution under this Consent Agreement and Final Order.
- d. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. Method of payment shall be in accordance with the provisions of the Penalty Payment section above. Interest and late charges shall be paid as stated in Paragraph 87 herein.
- e. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement

or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.

- f. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due under this Consent Agreement and Final Order.

Effect of Settlement and Reservation of Rights

102. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the CAA, CERCLA, EPCRA, or any other applicable law.

103. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to the EPA, as memorialized in the paragraph directly below.

104. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of the CAA, CERCLA, and EPCRA and their implementing regulations.

105. Full payment of the penalty proposed in this Consent Agreement shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of the CAA and regulations promulgated thereunder.

106. This Consent Agreement and Final Order constitutes an "enforcement response" as that term is used in EPA's *Clean Air Act Combined Enforcement Response Policy for Clean Air Act Sections 112(r)(1), 112(r)(7) and 40 C.F.R. Part 68* to determine Respondent's "full compliance history" under Section 113(e) of the CAA, 42 U.S.C. § 7413(e).

107. The CERCLA and EPCRA allegations in this Consent Agreement and Final Order constitute "prior violations" as that term is used in EPA's *Enforcement Response Policy for Sections 304, 311, and 312 of EPCRA and Section 103 of CERCLA* to determine Respondent's "prior enforcement history."

108. Complainant reserves the right enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

109. By signing this Consent Agreement, the undersigned representative of Respondent certifies that they are fully authorized to execute and enter into the terms and

conditions of this Consent Agreement and have the legal capacity to bind the party they represent to this Consent Agreement.

110. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

111. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

112. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

**RESPONDENT:
NOX-CRETE, INC.**

Michael Linn

Signature

12/22/23

Date

Michael A. Linn

Printed Name

CEO

Title

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

David Cozad
Director
Enforcement and Compliance Assurance Division

Date

Kasey Barton
Assistant Regional Counsel

Date

FINAL ORDER

Pursuant to Section 113(d) of the CAA, 42 U.S.C. § 7413(d), Section 109(b)(1) of CERCLA, 42 U.S.C. § 9609(b)(1), and Section 325(b) and (c) of EPCRA, 42 U.S.C. § 11045(b) and (c), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Karina Borromeo
Regional Judicial Officer

Date

CERTIFICATE OF SERVICE

(to be completed by EPA)

I certify that that a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of Nox-Create, Inc., EPA Docket No. MM-07-2023-0147, was sent this day in the following manner to the addressees:

Copy via E-mail to Complainant:

Kasey Barton
Office of Regional Counsel
barton.kasey@epa.gov

Lynelle Ladd
Enforcement and Compliance Assurance Division
ladd.lynelle@epa.gov

Milady Peters
EPA Region 7
peters.milady@epa.gov

Copy via E-mail to Respondent:

Michael Linn
CEO
Nox-Create Manufacturing, Inc.
1444 South 20th Street
Omaha, Nebraska 68108
m.linn@nox-crete.com

Dated this _____ day of _____, _____.

Signed