



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 14 2018

REPLY TO THE ATTENTION OF:

ELECTRONIC SERVICE
VIA EMAIL

Jodi Arndt Labs
Attorney for Birds Eye Foods, LLC
Conway, Olejniczak & Jerry, S.C.
231 South Adams Street
Post Office Box 23200
Green Bay, Wisconsin 54305-3200

Re: Birds Eye Foods, LLC, Waseca, Minnesota, Consent Agreement and Final Order
Docket Nos: MM-05-2018-0002; CERCLA-05-2018-0005; EPCRA-05-2018,0009

Dear Ms. Arndt Labs:

Enclosed please find a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The U.S. Environmental Protection Agency has filed the original CAFO with the Regional Hearing Clerk on December 14, 2018.

Please have your client pay the Comprehensive Environmental Response, Compensation and Liability Act civil penalty in the amount of \$75,000 in the manner prescribed in paragraph 9, and reference each check with the billing document number 2751930B002 and the docket number CERCLA-05-2018-0005.

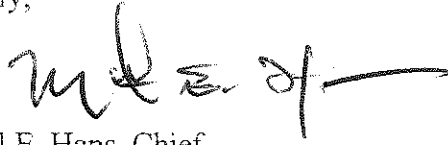
Please have your client pay the Emergency Planning and Community Right-to-Know Act civil penalty in the amount of \$75,000 in the manner prescribed in paragraph 10, and reference the check with the docket number EPCRA-05-2018-0009.

Your client's payments are due January 14, 2019.

Please feel free to contact James Entzminger at (312) 886-4062 if you have any questions regarding the enclosed documents. Please direct any legal questions to Jeffery M. Trevino, Associate Regional Counsel, at (312) 886-6729.

Thank you for your assistance in resolving this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "M. E. Hans", with a long horizontal stroke extending to the right.

Michael E. Hans, Chief
Chemical Emergency Preparedness
and Prevention Section

Enclosure

cc: Steve Tomlyanovich
Division of Homeland Security
and Emergency Management
445 Minnesota Street, Suite 223
St. Paul, Minnesota 55101

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:	)	Docket Nos. MM -05-2018-0002
	)	CERCLA-05-2018-0005
Birds Eye Foods, LLC,	)	EPCRA -05-2018-0009
Waseca, Minnesota,)	
	)	Proceeding to Assess a Civil Penalty Under
	)	Section 109(b) of the Comprehensive
Respondent.	)	Environmental Response, Compensation and
	)	Liability Act, 42 U.S.C. § 9609(b), and Section
	)	325(b)(2) of the Emergency Planning and
	)	Community Right-to-Know Act, 42 U.S.C.
	)	§ 11045.



CONSENT AGREEMENT AND FINAL ORDER

1. The Complainant is, by lawful delegation, the Chief of Emergency Response Branch 1, Superfund Division, United States Environmental Protection Agency Region 5 (U.S. EPA).
2. On June 13, 2018, U.S. EPA filed the Complaint in this action against Respondent Birds Eye Foods, LLC. The Complaint alleges that Respondent violated Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9603(a), by failing to immediately notify the National Response Center of a release which occurred at its facility in Waseca, Minnesota, between June 21 and July 19, 2013; violated Section 304(a) of Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11004(a), by failing to immediately notify the Minnesota State Emergency Response Commission (SERC) of the June 21 – July 19, 2013, release; violated Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), by failing to provide a written follow-up emergency notice to the Minnesota SERC as soon as practicable after the June 21 – July 19, 2013, release occurred; violated Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), by failing to immediately notify the

National Response Center of a release which occurred at its facility in Waseca, Minnesota, on September 20, 2014; violated Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), by failing to immediately notify the Minnesota State Emergency Response Commission (SERC) of the September 20, 2014, release; and violated Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), by failing to provide a written follow-up emergency notice to the Minnesota SERC as soon as practicable after the September 20, 2014, release occurred.

3. Respondent filed an Answer and requested a hearing under Section 325(b)(1)(B) of EPCRA, 42 U.S.C. § 11045(b)(1)(B), and Section 109(a)(2)(B) of CERCLA, 42 U.S.C. § 9609(a)(2)(B).

Stipulations

4. Respondent admits the jurisdictional allegations in the Complaint and neither admits nor denies the factual allegations in the Complaint, other than those it admitted in its Answer.

5. Respondent waives any right to contest the allegations in the Complaint and waives its right to appeal this Consent Agreement and Final Order (CAFO).

6. The parties consent to the terms of this CAFO.

7. The parties agree that settling this action without further litigation, upon the terms in this CAFO, is in the public interest.

Civil Penalty

8. In consideration of the nature, circumstances, extent and gravity of the violations alleged in the Complaint, and the Respondent's ability to pay, any prior history of violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, including Respondent's agreement to perform the supplemental environmental projects described in Paragraphs 15 - 17, below, Complainant has

determined that an appropriate civil penalty to settle this action is \$75,000 for the CERCLA violations and \$75,000 for the EPCRA violations.

9. Within 30 days after the effective date of this CAFO, Respondent must pay a Seventy-Five Thousand Dollar (\$75,000) civil penalty for the CERCLA violations by sending a cashier's or certified check in the amount of \$75,000, payable to "EPA Hazardous Substance Superfund," to:

U.S. EPA
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

10. Within 30 days after the effective date of this CAFO, Respondent must pay a Seventy-Five Thousand Dollar (\$75,000) civil penalty for the EPCRA violations by sending a cashier's or certified check in the amount of \$75,000, payable to the "Treasurer, United States of America," to:

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

11. A transmittal letter, stating Respondent's name, the case title, Respondent's complete address, the case docket number, and the billing document number, if any, must accompany the payment. Respondent must send a copy of the check(s) and transmittal letter to:

Regional Hearing Clerk, (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3511

James Entzminger, (SC-5J)
Chemical Emergency Preparedness and
Prevention Section
U.S. EPA, Region 5 77 West
Jackson Blvd. Chicago, IL 60604

Jeffery M. Trevino (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5 77 West
Jackson Blvd. Chicago, IL 60604

12. These civil penalties are not deductible for federal tax purposes.
13. If Respondent does not timely pay the civil penalties or any stipulated penalties due under paragraphs 9, 10, and 28, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and the United States enforcement expenses for the collection action. The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.
14. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, U.S. EPA will assess a 6 percent per year penalty on any principal amount 90 days past due.

Supplemental Environmental Project

15. Respondent must complete a Supplemental Environmental Project (SEP) at its Waseca, Minnesota, facility, to detect, signal by alarm, and minimize the impact of any release of anhydrous ammonia at its facility to protect human health and the environment.
16. Respondent must complete its SEP as follows:
 - (A) By July 1, 2019, Respondent shall install and operate an anhydrous ammonia detection system capable of alarming (both audio and visual) at levels

of 25 ppm and greater in areas of its Waseca, Minnesota facility where anhydrous ammonia is utilized. The anhydrous ammonia detection system shall include the following anhydrous ammonia sensors and alarms: (1) a series of at least 20 anhydrous ammonia sensors consisting of (a) a set of Calibration Technologies NH₃ Ammonia Sensors (specific model to be determined during the formal design of project) in those areas of the facility where humidity is not a concern on the operation of sensors and (b) a set of anhydrous ammonia sensors (the specific manufacturer and type to be determined during the formal design of project) installed in parts of the facility where humidity levels pose a concern on the operation of sensors; and, (2) 14 Audio and Visual Alarms (to alarm upon detection of anhydrous ammonia levels of 25 ppm and greater) and associated equipment. Respondent shall provide to U.S. EPA a Written Report of its Compliance with this provision by August 1, 2019.

(B) By December 31, 2019, Respondent shall install and operate at its Waseca, Minnesota, facility integrated emergency controls to de-energize as appropriate, control valves, pumps, fans, process equipment, and compressors, to remove the driving force of anhydrous ammonia in release scenarios. The integrated emergency controls will include: a Central and Computerized Electronic Control Panel System to electronically integrate its Anhydrous Ammonia Refrigeration System with its Anhydrous Ammonia Sensors and Audio and Visual Alarms, in order to electronically and promptly (1) detect anhydrous ammonia releases of 25 ppm and greater; (2) trigger Audio and Visual Alarms; (3) immediately deactivate or isolate the affected part or components of the Anhydrous Ammonia Refrigeration System; and (4) to minimize the potential for releases of anhydrous ammonia at or above the reportable quantity of 100 pounds during a rolling 24-hour period. Respondent shall provide to U.S. EPA a Written Report of its Compliance with this provision by January 31, 2020.

17. Respondent must expend at least Four-Hundred and Twenty-Five Thousand Dollars (\$425,000.00) on its SEP.

18. Respondent must appropriately operate and use the SEP equipment at least through December 31, 2024. Respondent must submit an annual report or letter confirming the operation and maintenance of the SEP on or about February 28, 2021, February 28, 2022, February 28, 2023, February 28, 2024, and February 28, 2025.

19. Respondent certifies as follows:

- a. Birds Eye Foods, LLC, is not required to perform or develop the SEP by any law, regulation, order, or agreement (other than this CAFO) or as injunctive

relief as of the date that I am signing this CAFO.

- b. Birds Eye Foods, LLC, has not received and will not receive credit for this SEP in any other enforcement action.
- c. Birds Eye Foods, LLC, is not a party to any open federal financial assistance transaction that is funding or could be used to fund the same activity as the SEP.
- d. To the best of my knowledge and belief **after reasonable inquiry**, there is no such open federal financial transaction that is funding or could be used to fund the same activity as the SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal submitted to U.S. EPA within two years of the date that I am signing this CAFO (unless the project was barred from funding as statutorily ineligible). For purposes of this certification, the term "open federal financial assistance transaction" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose performance period has not expired.
- e. All cost information provided to U.S. EPA in connection with U.S. EPA's approval of the SEP is complete and accurate, and Birds Eye Foods, LLC, in good faith estimates that the cost to implement the SEP is \$425,000.00.
- f. The SEP is not a project that Birds Eye Foods, LLC, was planning or intending to perform or implement other than in settlement of the claims resolved in the CAFO.
- g. Birds Eye Foods, LLC, will not receive from another person or entity any reimbursement for any portion of the SEP.
- h. For federal income tax purposes, Birds Eye Foods, LLC, will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

20. U.S. EPA may inspect the facility at any time to monitor Respondent's compliance with this CAFO's SEP requirements.

21. Respondent must maintain copies of the underlying research and data for all reports submitted to U.S. EPA according to this CAFO. Respondent must provide the documentation of any underlying research and data to U.S. EPA within seven (7) days of U.S. EPA's request for the information.

22. Respondent must submit the reports required by the scope of work under Paragraph 16, above, to U.S. EPA.

23. Respondent must submit an SEP completion report to U.S. EPA by February 28, 2020. This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Description of any operating problems and the actions taken to correct the problems;
- c. Itemized costs of goods and services used to complete the SEP documented by copies of invoices, purchase orders or canceled checks that specifically identify and itemize the individual costs of the goods and services;
- d. Certification that Respondent has completed the SEP in compliance with this CAFO; and,
- e. Description of the environmental and public health benefits resulting from the SEP (quantify the benefits and pollution reductions, if feasible).

24. Respondent must submit all notices and reports required by this CAFO by first class mail to Mr. James Entzminger of the Chemical Emergency Preparedness and Prevention Section at the address specified in paragraph 11.

25. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

26. Following receipt of the SEP completion report described in paragraph 23, above, U.S. EPA must notify Respondent in writing that:

- a. U.S. EPA has determined that Respondent has satisfactorily completed the

SEP and the SEP completion report; or

- b. There are deficiencies in the SEP as completed, or in the SEP completion report, and U.S. EPA will give Respondent 30 days to correct the deficiencies; or
- c. U.S. EPA has determined that Respondent has not satisfactorily completed the SEP or the SEP completion report, and U.S. EPA will seek stipulated penalties under paragraph 28.

27. If U.S. EPA exercises option b, above, Respondent may object in writing to the deficiency notice within 10 days of receiving the notice. The parties will have thirty (30) days from U.S. EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, U.S. EPA will give Respondent a written decision on its objection. Respondent will comply with any requirements that U.S. EPA imposes in its decision. If Respondent does not complete the SEP as required by U.S. EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 28, below.

28. If Respondent violates any requirement of this CAFO relating to the SEPs, Respondent must pay stipulated penalties to the United States as follows:

- a. Except as provided in subparagraph b, below, if Respondent did not complete the SEP satisfactorily, according to the requirements of this CAFO, including the schedule set forth in paragraph 16, Respondent must pay a stipulated penalty of \$281,723.00.
- b. If Respondent did not complete the SEP satisfactorily, but U.S. EPA determines that Respondent made good faith and timely efforts to complete the SEP and certified, with supporting documents, that it spent at least 90 percent of the amount set forth in paragraph 17, Respondent will not be liable for any stipulated penalty under subparagraph a, above.
- c. If Respondent completed the SEP satisfactorily, but spent less than 90 percent of the amount set forth in paragraph 17, Respondent must pay a stipulated penalty of \$42,500.00.
- d. If Respondent does not submit timely the SEP completion report or any other report required by paragraphs 16 and 23, Respondent must pay stipulated penalties in the following amounts for each day after the report was due until

it submits the report:

<u>Penalty Per Violation Per Day</u>	<u>Period of Violation</u>
\$100.00	1st through 14th day
\$250.00	15th through 30th day
\$500.00	31st day and beyond

29. U.S. EPA's determinations of whether Respondent completed the SEP satisfactorily and whether Respondent made good faith and timely efforts to complete the SEP will bind Respondent.

30. Respondent must pay any stipulated penalties within fifteen (15) days of receiving U.S. EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraphs 9-11, above, and will pay interest, handling charges and nonpayment penalties on any overdue amounts. At the time U.S. EPA makes a demand for any stipulated penalties it will also send a copy of that demand to U.S. EPA's Cincinnati Finance Center via email at CINWD_AcctsReceivable@epa.gov.

31. Any public statement that Respondent makes referring to the SEP must include the following language, "Respondent undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against Respondent for violations of Section 103(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9603(a); Section 304(a) of Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11004(a); and Section 304(c) of EPCRA, 42 U.S.C. § 11004(c)."

32. If an event occurs that causes or may cause a delay in completing the SEP as required by this CAFO:

- a. Respondent must notify U.S. EPA in writing within 10 days after learning of an event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify U.S. EPA according to this paragraph, Respondent will not receive an extension of time to complete the SEP.
- b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.
- c. If U.S. EPA does not agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, U.S. EPA will notify Respondent in writing of its decision and any delays in completing the SEP will not be excused.
- d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

33. Nothing in this CAFO is intended to nor will be construed to constitute U.S. EPA approval of the equipment or technology installed by Respondent in connection with the SEP under the terms of this CAFO.

34. For federal income tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

General Provisions

35. Pursuant to 40 C.F.R. §§ 22.5 and 22.6, the parties consent to service of this CAFO by e-mail at the following email addresses: trevino.jeffery@epa.gov (for Complainant) and jodi@lcojlaw.com (for Respondent). See 40 C.F.R. §§ 22.5-6.

36. This CAFO resolves only Respondent's liability for federal civil penalties for the violations alleged in the Complaint.

37. This CAFO does not affect the rights of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

38. Respondent certifies that it is complying with Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004.

39. This CAFO does not affect Respondent's responsibility to comply with CERCLA, EPCRA and other applicable federal, state and local laws and regulations.

40. This CAFO is a "final order" for purposes of U.S. EPA's 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.

41. The terms of this CAFO bind Respondent and its successors and assigns.

42. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

43. Each party agrees to bear its own costs and attorney's fees, in this action.

44. This CAFO constitutes the entire agreement between the parties.

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

Birds Eye Foods, LLC, Respondent

11/30/18
Date

Kmaggs
Kelley Maggs
Executive Vice President
Birds Eye Foods, LLC

U.S. Environmental Protection Agency, Complainant

12-11-2018
Date

Jo - El -
Jason El-Zein, Chief
Emergency Response Branch 1
Superfund Division
Region 5
U.S. Environmental Protection Agency

12/13/2018
Date

D. Ballotti
Douglas Ballotti, Acting Director
Superfund Division
Region 5
U.S. Environmental Protection Agency

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

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

12/14/18
Date

Ann L. Coyle
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

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 sent a true and correct copy of the foregoing Consent Agreement and Final Order, which was filed on December 14, 2018 in the following manner to the addressees:


Copy via E-Mail to Honorable Christine Donelian Coughlin, Administrative Law Judge, to coughlin.chrisitne@epa.gov;

Copy via E-Mail to Jodi Arndt Labs, Attorney for Respondent, to jodi@lcojlaw.com;

Copy via E-Mail to Jeffery M. Trevino, Attorney for Complainant, to trevino.jeffery@epa.gov;

Copy via E-Mail to Ann Coyle, Regional Judicial Officer, Region 5, U.S. EPA, at coyle.ann@epa.gov;

Dated:

December 14, 2018 

LaDawn Whitehead
Regional Hearing Clerk
Region 5
U.S. Environmental Protection Agency