

FILED

May 21, 2024

2:59 pm

U.S. EPA REGION 5
HEARING CLERK

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket Nos.
)	CERCLA-05-2024-0005
Kensing, LLC)	EPCRA-05-2024-0013
Kankakee, Illinois)	Proceeding to Assess a Civil Penalty Under
)	Section 109(b) of the Comprehensive
Respondent.)	Environmental Response, Compensation and
)	Liability Act, and Section 325(b)(2) of the
)	Emergency Planning and Community Right-
)	to-Know Act of 1986
)	

Consent Agreement and Final Order
Preliminary Statement

1. This is an administrative action commenced and concluded under Section 109(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. § 9609(b), and Section 325(b)(2) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045(b)(2), and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant is, by lawful delegation, the Manager of Emergency Response Branch 1, Superfund & Emergency Management Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. Respondent is Kensing, LLC, a corporation doing business in the State of Illinois.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), requires any person in charge of a facility to immediately notify the National Response Center (NRC) as soon as that person has knowledge of any release of a hazardous substance from the facility in an amount equal to or greater than the reportable quantity of the hazardous substance.

10. Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004, provide a mechanism to alert federal, state and local agencies that a response action may be necessary to prevent deaths or injuries to emergency responders, facility personnel and the local community. A delay or failure to notify could seriously hamper the governments' response to an emergency and pose serious threats to human health and the environment.

11. Section 304(a)(3)(A) of EPCRA, 42 U.S.C. § 11004(a)(3)(A), requires that the owner or operator of a facility must immediately provide notice, as described in Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), if a release of a hazardous substance in quantities equal to or greater than a reportable quantity occurs from a facility at which hazardous chemicals are

produced, used or stored and such release requires notice under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

12. Under Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), notice required under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), must be given immediately after the release by the owner or operator of a facility to the community emergency coordinator for the local emergency planning committee (LEPC) for any area likely to be affected by the release and to the state emergency response commission (SERC) of any state likely to be affected by a release.

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

14. 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.

15. Section 109(b) of CERCLA, 42 U.S.C. § 9609(b), and Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045 (b)(2), and 40 C.F.R. Part 19 authorize U.S. EPA to assess a civil penalty of up to \$69,733 per day of violation, for violations of CERCLA Section 103, and EPCRA Section 304, that occurred after November 2, 2015, and for which penalties are assessed on or after December 27, 2023, or other amounts as penalty levels may be later adjusted at 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

16. Respondent is a “person” as that term is defined under Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

17. Respondent is a “person” as that term is defined under Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

18. At all times relevant to this CAFO, Respondent was the owner/operator and in charge of the facility, located at 2525 S. Kensington Road, Kankakee, IL 60901.

19. Respondent's facility consists of a building or structure where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.

20. Respondent's facility is a "facility" as that term is defined under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

21. Respondent's facility consists of 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.

22. Respondent's facility is a "facility" as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

23. 1,2-dichlorethane, CAS #107-06-2 is a "hazardous substance" as that term is defined under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

24. 1,2-dichlorethane, CAS #107-06-2, has a reportable quantity of 100 pounds, as indicated at 40 C.F.R. Part 302, Table 302.4.

25. 1,2-dichlorethane is classified as a health hazard.

26. 1,2-dichlorethane, CAS #107-06-2 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).

27. At all times relevant to this CAFO, 1,2-dichloroethane was produced, used or stored at Respondent's facility.

28. Beginning on or about September 21, 2022, at or about 4:43 p.m., through on or about October 10, 2022, a release of 1,2-dichloroethane occurred from Respondent's facility (the release).

29. The release consisted of approximately 18,640 pounds of 1,2-dichloroethane.
30. The quantity over this time period yields a leak rate of 1002 pounds per day.
31. In a 24-hour time period, the release of 1,2-dichloroethane exceeded 100 pounds.
32. During the release, approximately 18,640 pounds of 1,2-dichloroethane was emitted into the air.
33. The release is a “release” as that term is defined under Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
34. The release is a “release” as that term is defined under Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).
35. Respondent had knowledge of the release on October 10, 2022, at or around 12:00 pm, CST.
36. Respondent had knowledge that the release was above the reportable quantity on October 10, 2022, at approximately 12:35 pm, CST.
37. The release required immediate notice under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).
38. The release required immediate notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).
39. The release was likely to affect Illinois.
40. At all times relevant to this CAFO, the Illinois Emergency Management Agency was the SERC for Illinois under Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).
41. The release was likely to affect Kankakee County.
42. At all times relevant to this CAFO, the Kankakee County LEPC was the LEPC for Kankakee County under Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).

43. Respondent notified the NRC of the release on October 10, 2022, at 1:12pm, CST.

44. Respondent did not immediately notify the NRC as soon as Respondent had knowledge that the release was above the reportable quantity.

45. Respondent's failure to immediately notify the NRC of the release is a violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

46. Respondent notified the Illinois SERC of release on October 10, 2022, at 1:24 p.m., CST.

47. Respondent did not immediately notify the SERC after Respondent had knowledge that the release was above the reportable quantity.

48. Respondent's failure to immediately notify the SERC of the release is a violation of Section 304(a) of EPCRA, 3542 U.S.C. § 11004(a).

49. To date, Respondent has failed to meet the immediate notification requirement to notify the LEPC.

50. Respondent did not immediately notify the LEPC after Respondent had knowledge that the release was above the reportable quantity.

51. Respondent's failure to immediately notify the LEPC of the release is a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

Civil Penalty

Failure to Timely Notify the NRC

52. Complainant has determined that an appropriate civil penalty to settle this action is \$18,750 for the CERCLA violation (failure to timely notify the NRC). In determining the penalty amount, Complainant considered the nature, circumstances, extent and gravity of the violations, and with respect to Respondent, its ability to pay, prior history of violations,

economic benefit or savings resulting from the violation and any other matters as justice may require. Complainant also considered 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 (EPCRA/CERCLA Enforcement Response Policy).

53. Within 30 days after the effective date of this CAFO, Respondent must pay a \$18,750 civil penalty for the CERCLA violation. Respondent must pay the penalty by an on-line payment. To pay on-line, go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter "SFO 1.1" in the search field. Open the form and complete the required fields.

Failure to Timely Notify the SERC and Failure to Notify the LEPC

54. Complainant has determined that an appropriate civil penalty to settle this action is \$56,250 for the EPCRA violations (failure to timely notify the SERC and failure to notify the LEPC). In determining the penalty amount, Complainant considered the nature, circumstances, extent and gravity of the violations, and with respect to Respondent, its ability to pay, prior history of violations, economic benefit or savings resulting from the violations and any other matters as justice may require. Complainant also considered U.S. EPA's EPCRA/CERCLA Enforcement Response Policy.

55. Within 30 days after the effective date of this CAFO, Respondent must pay a \$56,250 civil penalty for the EPCRA violations. Respondent must pay the penalty by an on-line payment. To pay on-line, go to www.pay.gov. Use the Search Public Forms option on the tool bar and enter "SFO 1.1" in the search field. Open the form and complete the required fields.

56. This civil penalty is not deductible for federal tax purposes.

57. If Respondent does not timely pay the civil penalty, 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.

58. 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.

59. Pursuant to 26 U.S.C. § 6050X and 26 C.F.R. § 1.6050X-1, EPA is required to send to the Internal Revenue Service (“IRS”) annually, a completed IRS Form 1098-F (“Fines, Penalties, and Other Amounts”) with respect to any court order or settlement agreement (including administrative settlements), that require a payor to pay an aggregate amount that EPA reasonably believes will be equal to, or in excess of, \$50,000 for the payor’s violation of any law or the investigation or inquiry into the payor’s potential violation of any law, including amounts paid for “restitution or remediation of property” or to come “into compliance with a law.” EPA is further required to furnish a written statement, which provides the same information provided to the IRS, to each payor (i.e., a copy of IRS Form 1098-F). Failure to comply with providing IRS Form W-9 or Tax Identification Number (“TIN”), as described below, may subject Respondent to a penalty, per 26 U.S.C. § 6723, 26 U.S.C. § 6724(d)(3), and 26 C.F.R. § 301.6723-1. In order to provide EPA with sufficient information to enable it to fulfill these obligations, EPA herein requires, and Respondent herein agrees, that:

- a. Respondent shall complete an IRS Form W-9 (“Request for Taxpayer

Identification Number and Certification”), which is available at <https://www.irs.gov/pub/irs-pdf/fw9.pdf>;

- b. Respondent shall therein certify that its completed IRS Form W-9 includes Respondent’s correct TIN or that Respondent has applied and is waiting for issuance of a TIN;
- c. Respondent shall email its completed Form W-9 to EPA’s Cincinnati Finance Center at wise.milton@epa.gov, within 30 days after the Final Order ratifying this Agreement is filed, and EPA recommends encrypting IRS Form W-9 email correspondence; and
- d. In the event that Respondent has certified in its completed IRS Form W-9 that it does not yet have a TIN but has applied for a TIN, Respondent shall provide EPA’s Cincinnati Finance Center with Respondent’s TIN, via email, within five (5) days of Respondent’s receipt of a TIN issued by the IRS.

General Provisions

60. The parties consent to service of this CAFO by email at the following valid email addresses: omeara.nidhi@epa.gov (for Complainant) and Karl.Karg@lw.com (for Respondent). Respondent understands that the CAFO will become publicly available upon filing.

61. Full payment of the penalty and compliance with this CAFO resolves only Respondent’s liability for federal civil penalties for the violations alleged in the CAFO.

62. 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.

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

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

65. This CAFO is a “final order” for purposes of U.S. EPA’s EPCRA/CERCLA Enforcement Response Policy.

66. The terms of this CAFO bind Respondent and its successors and assigns.
67. 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.
68. Each party agrees to bear its own costs and attorney's fees in this action.
69. This CAFO constitutes the entire agreement between the parties.

In the Matter of: Kensing, LLC
Docket Nos. CERCLA-05-2024-0005, EPCRA-05-2024-0013

Kensing, LLC, Respondent

5/13/2024

Date

Wesley Hassen

Wesley D. Hassen
SVP, Site Operations
Kensing, LLC

U.S. Environmental Protection Agency, Complainant

5/20/24

Date

JEFFREY
KIMBLE

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Jason El-Zein
Manager, Emergency Response Branch 1
Superfund & Emergency Management Division
U.S. Environmental Protection Agency
Region 5

5/20/24

Date

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Douglas Ballotti
Director
Superfund & Emergency Management Division
U.S. Environmental Protection Agency
Region 5

In the Matter of: Kensing, LLC
Docket Nos. CERCLA-05-2024-0005, EPCRA-05-2024-0013

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.

Date

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