

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

<b>In the Matter of:</b>	)	<b>Docket Nos. CERCLA-05-2023-0004 EPCRA-05-2023-0005</b>
	)	
<b>CB Manufacturing Company, Inc. operating as Pepsi Beverages Company</b>	)	<b>Proceeding to Assess a Civil Penalty Under Section 109(b) of the Comprehensive Environmental Response, Compensation and Liability Act, and Section 325(b)(2) of the Emergency Planning and Community Right- to-Know Act of 1986</b>
<b>Oshkosh, Wisconsin, Respondent.</b>	)	
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**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), 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 CB Manufacturing Company, Inc. operating as Pepsi Beverages Company, a corporation doing business in the State of Wisconsin.

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 and conclusions of law 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)(1) of EPCRA, 42 U.S.C. § 11004(a)(1), 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 an extremely 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. Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), requires that, as soon as practicable after a release which requires notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a), the owner or operator of the facility must provide written follow-up emergency notice setting forth and updating the information required under Section 304(b), 42 U.S.C. § 11004(b).

14. 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).

15. 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.

16. Section 109(b) of CERCLA, 42 U.S.C. § 9609(b), Section 325(b)(2) of EPCRA, 42 U.S.C. § 11045(b)(2), and 40 C.F.R. Part 19 authorizes U.S. EPA to assess a civil penalty of up to \$62,689 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 January 12, 2022, or other amounts as penalty levels may be later adjusted at 40 C.F.R. Part 19.

### **Factual Allegations and Alleged Violations**

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

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

19. At all times relevant to this CAFO, Respondent was an owner or operator of the facility located at 2541 W. 20<sup>th</sup> Street, Oshkosh, Wisconsin (facility).

20. At all times relevant to this CAFO, Respondent was in charge of the facility.

21. Respondent’s facility consists of a building, structure, installation, equipment, pipe, or pipeline, storage container, or any site or area where a hazardous substance has been deposited, stored, placed, or otherwise come to be located.

22. Respondent’s facility is a “facility” as that term is defined under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

23. 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.

24. Respondent’s facility is a “facility” as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

25. Anhydrous ammonia (CAS #7664-41-7) is a “hazardous substance” as that term is defined under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

26. Anhydrous ammonia (CAS #7664-41-7) has a reportable quantity of 100 pounds, as indicated at 40 C.F.R. Part 302, Table 302.4.

27. Anhydrous ammonia is classified as a physical or health hazard, a simple asphyxiant, or hazard not otherwise classified.

28. Anhydrous ammonia (CAS #7664-41-7) 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).

29. At all times relevant to this CAFO, Respondent produced, used, or stored anhydrous ammonia at the facility.

30. Anhydrous ammonia (CAS #7664-41-7) is an “extremely hazardous substance” according to Section 302(a)(2) of EPCRA, 42 U.S.C. § 11002(a)(2).

31. Anhydrous ammonia (CAS #7664-41-7) has a reportable quantity of 100 pounds, as indicated at 40 C.F.R. Part 355, Appendix A.

32. On July 29, 2020, at or about 12:01a.m., a release occurred from Respondent’s facility of approximately 1035 pounds of anhydrous ammonia (the release).

33. In a 24 hour time period, the release of anhydrous ammonia exceeded 100 pounds.

34. During the release, approximately 735 pounds escaped into the ambient air/air.

35. The release is a “release” as that term is defined under Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

36. The release is a “release” as that term is defined under Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).

37. Respondent had knowledge of the release on July 29, 2020, at approximately 12:01 a.m.

38. The release was one for which notice was required under Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

39. The release required notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

40. The release required written follow up notice to the SERC under Section 304(c).

41. The release required written follow up notice to the LEPC under Section 304(c).

42. The release was likely to affect Wisconsin.

43. At all times relevant to this CAFO, Wisconsin Emergency Management was the SERC for Wisconsin under Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).

44. The release was likely to affect Winnebago County.

45. At all times relevant to this CAFO, the Winnebago County Local Emergency Planning Committee was the LEPC for Winnebago County under Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).

**Count 1** (failure to immediately notify NRC)

46. Complainant incorporates paragraphs 1 through 45 of this CAFO as if set forth in this paragraph.

47. Respondent notified the NRC of the release on July 29, 2020, at 4:28 a.m.

48. Respondent did not immediately notify the NRC as soon as Respondent had knowledge of the release.

49. 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).

**Count 2** (failure to immediately notify SERC)

50. Complainant incorporates paragraphs 1 through 45 of this CAFO as if set forth in this paragraph.

51. Respondent notified the Wisconsin SERC of the release on July 29, 2020, at 6:59 a.m.

52. Respondent did not immediately notify the SERC after Respondent had knowledge of the release.

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

**Count 3** (failure to immediately notify LEPC)

54. Complainant incorporates paragraphs 1 through 45 of this CAFO as if set forth in this paragraph

55. Respondent notified the Winnebago County LEPC of the release on July 29, 2020, at 7:00 a.m.

56. Respondent did not immediately notify the LEPC after Respondent had knowledge of the release.

57. 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).

**Count 4** (failure to provide written follow up to the SERC)

58. Complainant incorporates paragraphs 1 through 45 of this CAFO as if set forth in this paragraph.

59. Respondent provided written follow-up emergency notice to the SERC on August 12, 2021.

60. Respondent did not provide the SERC with written follow-up emergency notice of the release as soon as practicable after the release occurred.

61. Respondent's failure to provide written follow-up emergency notice to the SERC as soon as practicable after the release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

**Count 5** (failure to provide written follow up to the LEPC)

62. Complainant incorporates paragraphs 1 through 45 of this CAFO as if set forth in

this paragraph.

63. Respondent provided written follow-up emergency notice to the LEPC on August 12, 2021.

64. Respondent did not provide the LEPC with written follow-up emergency notice of the release as soon as practicable after the release occurred.

65. Respondent's failure to provide written follow-up emergency notice to the LEPC as soon as practicable after the release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

#### **Civil Penalty**

66. Complainant has determined that an appropriate civil penalty to settle this action is \$30,524 for the CERCLA violation. In determining the penalty amount, Complainant considered the nature, circumstances, extent, and gravity of the violation, 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).

67. Within 30 days after the effective date of this CAFO, Respondent must pay a \$30,524 civil penalty for the CERCLA violation. Respondent must pay the penalty online at [www.pay.gov](http://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.

68. Complainant has determined that an appropriate civil penalty to settle this action is



\$122,098 for the EPCRA violations. 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, effect on ability to continue to do business, 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.

69. Within 30 days after the effective date of this CAFO, Respondent must pay a \$122,098 civil penalty for the EPCRA violations. Respondent must pay the penalty online at [www.pay.gov](http://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.

70. Respondent must send a copy of each payment via email to:

Regional Hearing Clerk (E-19J)  
[r5hearingclerk@epa.gov](mailto:r5hearingclerk@epa.gov)

Robert Mayhugh (SE-5J)  
[Mayhugh.robert@epa.gov](mailto:Mayhugh.robert@epa.gov)

Robert H. Smith (C-14J)  
[smith.roberth@epa.gov](mailto:smith.roberth@epa.gov)

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

72. 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.

73. 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.

### **General Provisions**

74. The parties consent to service of this CAFO by email at the following valid email addresses: smith.roberth@epa.gov (for Complainant) and [DPatrick@taftlaw.com](mailto:DPatrick@taftlaw.com) (for Respondent). Respondent understands that the CAFO will become publicly available upon filing.

75. 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.

76. 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.

77. 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.

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

79. This CAFO is a "final order" for purposes of U.S. EPA's EPCRA/CERCLA Enforcement Response Policy.

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

81. 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.

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

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

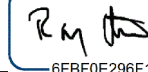
**In the Matter of: CB Manufacturing Company, Inc. operating as Pepsi Beverages Company, Oshkosh, Wisconsin**  
**Docket Nos. CERCLA-05-2023-0004 EPCRA-05-2023-0005**

**CB Manufacturing Company, Inc. operating as Pepsi Beverages Company, Respondent**

12/12/2022

Date

DocuSigned by:



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Raymundo Ontiveros  
Manufacturing Senior Director  
CB Manufacturing Company, Inc.  
operating as Pepsi Beverages Company

**In the Matter of: CB Manufacturing Company, Inc. operating as Pepsi Beverages  
Company, Oshkosh, Wisconsin**  
Docket Nos. CERCLA-05-2023-0004 EPCRA-05-2023-0005

**U.S. Environmental Protection Agency, Complainant**

December 15, 2022  
Date

**MATTHEW  
MANKOWSKI** Digitally signed by  
MATTHEW MANKOWSKI  
Date: 2022.12.15  
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Jason El-Zein  
Manager, Emergency Response Branch 1  
Superfund & Emergency Management Division  
U.S. Environmental Protection Agency  
Region 5

December 15, 2022  
Date

**DOUGLAS  
BALLOTTI** Digitally signed by  
DOUGLAS BALLOTTI  
Date: 2022.12.15  
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Douglas Ballotti  
Director  
Superfund & Emergency Management Division  
U.S. Environmental Protection Agency  
Region 5

**In the Matter of: CB Manufacturing Company, Inc. operating as Pepsi Beverages Company, Oshkosh, Wisconsin**

**Docket Nos. CERCLA-05-2023-0004 EPCRA-05-2023-0005**

**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