



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

OCT 12 2018

REPLY TO THE ATTENTION OF:

ELECTRONIC SERVICE  
VIA EMAIL

Amy Wachs, Attorney  
The Plaza in Clayton  
190 Carondelet Plaza, Suite 600  
St. Louis, Missouri 63105

Re: Kemps, LLC, Rochester, Minnesota, Consent Agreement and Final Order  
Docket Nos. MM-05-2019-0001 EPCRA-05-2019-0001 CERCLA-05-2019-0001

Dear Ms. Wachs:

Enclosed please find a copy of the 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 October 12, 2018.

Please have your client pay the Comprehensive Environmental Response, Compensation and Liability Act civil penalty in the amount of \$17,500 in the manner prescribed in paragraph 47, and reference your check with the billing document number 2751930B001 and the docket number CERCLA-05-2019-0001.

Please have your client pay the Emergency Planning and Community Right-to-Know Act civil penalty in the amount of \$17,500 in the manner prescribed in paragraph 49, and reference your check with the docket number EPCRA-05-2019-0001.

Your client's payments are due on November 13, 2018.

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 Jon Micah Goeller, Assistant Regional Counsel, at (312) 886-3446. Thank you for your assistance in resolving this matter.

Sincerely,

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

MM-05-2019-0001

In the Matter of:

Kemps, LLC  
Rochester, Minnesota

Respondent.



Docket Nos.

EPCRA-05-2019-0001 CERCLA-05-2019-0001

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

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 Chief of Emergency Response Branch 1, Superfund Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. Respondent is Kemps, LLC, a corporation doing business in the State of Minnesota.

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 the alleged violations 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. 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), authorizes U.S. EPA to assess a civil penalty of up to \$25,000 per day of violation of CERCLA Section 103 and EPCRA Section 304. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015), amending 28 U.S.C. § 2461 note, and the implementing regulations at 40 C.F.R. Part 19 increased the statutory maximum penalty to \$54,789 per day of violation that occurred after November 2, 2015 and for which penalties are assessed on or after January 15, 2017 but before January 15, 2018.

#### 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 an owner or operator of the facility located at 406 North Broadway, Rochester, Minnesota (facility).

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

20. Respondent's facility consists of buildings, equipment, structure, equipment, pipe or pipeline, storage container, or any site or area where a hazardous substance has been stored, placed, or otherwise come to be located.

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

22. 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.

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

24. 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).

25. 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.

26. Anhydrous ammonia (CAS #7664-41-7) is classified as a physical or health hazard, a simple asphyxiant, or hazard not otherwise classified.

27. Anhydrous ammonia (CAS #7664-41-70) 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).

28. At all times relevant to this CAFO, Anhydrous Ammonia (CAS #7664-41-70) was produced, used or stored at Respondent's facility.

29. 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).

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

31. On November 17, 2015, at or about 7:30 p.m., Central Time, a release occurred from Respondent's facility of approximately 858 pounds of anhydrous ammonia (the release).

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

33. During the release, approximately 858 pounds of anhydrous ammonia emitted, or escaped into the ambient air and/or air.

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

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

36. Respondent had knowledge of the release on November 17, 2015, at approximately 7:30 p.m., Central Time.

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

38. The release was likely to affect Minnesota.

39. At all times relevant to this CAFO, the Minnesota Division of Homeland Security and Emergency Management was the SERC for Minnesota under Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).

40. Respondent notified the NRC of the release on November 17, 2015, at 9:33 p.m.

Central Time.

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

42. 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).

43. Respondent notified the Minnesota SERC of the release on November 17, 2015, at 9:43 p.m. Central Time.

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

45. 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).

#### Civil Penalty

46. Complainant has determined that an appropriate civil penalty to settle this action is \$ 17,500 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).

47. Within 30 days after the effective date of this CAFO, Respondent must pay a \$17,500 civil penalty for the CERCLA violation. Respondent must pay the penalty by sending a cashier's or certified check, payable to "EPA Hazardous Substance Superfund," to:

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

**CERCLA-05-2019-0001**

The check must note the following: In re Kemps, LLC, the docket number \_\_\_\_\_ of this CAFO and the billing document number 2751930B001

48. Complainant has determined that an appropriate civil penalty to settle this action is \$17,500 for the EPCRA 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 EPCRA/CERCLA Enforcement Response Policy.

49. Within 30 days after the effective date of this CAFO, Respondent must pay a \$17,500 civil penalty for the EPCRA violations. Respondent must pay the penalty by check payable to the "Treasurer, United States of America".

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

The check must note the following: In re Kemps, LLC and the docket number of this CAFO



**EPCRA-05-2019-0001**

A transmittal letter, stating Respondent's name, the case name, Respondent's complete address, the case docket number[s] 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

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

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

51. 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.

52. 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

53. Pursuant to 40 C.F.R. §§ 22.5 and 22.6, the parties consent to service of this CAFO by email at the following email addresses: goeller.jon@epa.gov (for Complainant) and amy.wachs@huschblackwell.com (for Respondent). See 40 C.F.R. §§ 22.5-6.

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

55. 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.

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

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

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

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

60. 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.

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

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

In the Matter of: Kemps LLC  
Docket No. MM-05-2019-0001

EPCRA-05-2019-0001 CERCLA-05-2019-0001

Kemps LLC, Respondent

9-24-18  
Date

Andrew J. Evans  
Andrew J. Evans  
Plant Manager  
Kemps, LLC

U.S. Environmental Protection Agency, Complainant

10/11/18  
Date

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

10/12/2018  
Date

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

In the Matter of: Kemps, LLC  
Docket No. MM-05-2019-0001

EPCRA-05-2019-0001

CERCLA-05-2019-0001

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.

10/12/18  
\_\_\_\_\_  
Date

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

In the Matter of: Kemps LLC  
Docket No. MM-05-2019-0001

EPCRA-05-2019-0001

CERCLA-05-2019-0001

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 October 12, 2018 in the following manner to the addressees:

Copy by Email

Attorney for Respondent: Amy Wachs  
amy.wachs@huschblackwell.com  
The Plaza in Clayton  
190 Carondelet Plaza  
Suite 600  
St. Louis, MO 63105

Copy by E-mail to

Attorney for Complainant: Jon Micah Goeller  
goeller.jon@epa.gov

Copy by E-mail to

Regional Judicial Officer: Ann Coyle  
Coyle.ann@epa.gov

Dated: October 12, 2018



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