

In the Matter of
K&N’s Foods USA, LLC
Fulton, New York
Respondent.

Docket No. CAA-02-2023-1203

CONSENT AGREEMENT AND
FINAL ORDER

PRELIMINARY STATEMENT

1. This consent agreement (“Consent Agreement”) and final order (“Final Order”) (together known as a “CAFO,”) is issued pursuant to Section 113(d) of the Clean Air Act (“CAA”), 42 U.S.C. § 7413(d). The Complainant in this action is the Director of the Enforcement and Compliance Assurance Division of the United States Environmental Protection Agency (“EPA”), Region 2, who has been delegated the authority to institute this action. Respondent is K&N’s Foods USA, LLC (“Respondent”).

2. EPA and the U.S. Department of Justice have determined, pursuant to Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), that EPA may pursue this matter through administrative enforcement action.

3. Pursuant to Section 22.13 of the revised Consolidated Rules of Practice, 40 Code of Federal Regulations (“C.F.R.”) § 22.13(b), where parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CAFO pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3).

4. It has been agreed by the parties to this CAFO that settling this matter by entering this CAFO pursuant to 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3) is an appropriate means of resolving specified claims against Respondent without litigation. Compliance with the terms and conditions of this CAFO shall resolve those alleged violations set forth below.

STATUTORY BACKGROUND

5. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), provides for the assessment of penalties for violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r).

6. Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), requires the Administrator to promulgate release prevention, detection, and correction requirements regarding regulated substances in order to prevent accidental releases of regulated substances. EPA promulgated

regulations in 40 C.F.R. Part 68 to implement Section 112(r)(7) of the CAA, the former of which sets forth the requirements of risk management programs that must be established and implemented at stationary sources subject to this Section of the CAA. The regulations at 40 C.F.R. Part 68, Subparts A through G, require owners and operators of stationary sources that are subject to these requirements to, among other things, develop and implement (a) a management system to oversee the implementation of the risk management program elements, and (b) a risk management program that includes, among other things, a hazard assessment, an emergency response program, and for processes subject to Program 2 or Program 3 requirements, a prevention program. Pursuant to 40 C.F.R. Part 68, Subparts A and G, the risk management program for a stationary source that is subject to these requirements is to be described in a risk management plan (“RMP”) that must be submitted to EPA and updated every five years.

7. Subsections 112(r)(3) and (5) of the CAA, 42 U.S.C. §§ 7412(r)(3) and (5), require the Administrator to promulgate a list of regulated substances, with threshold quantities. EPA promulgated a regulation at 40 C.F.R. Part 68, Subpart F, that implements Sections 112(r)(3) and (5) of the CAA, and that lists the regulated substances and their threshold quantities.

8. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. § 7412(r)(7), and 40 C.F.R. §§ 68.10, 68.12, and 68.150, an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process shall comply with the requirements of 40 C.F.R. Part 68 (including, but not limited to, the requirement for submission of an RMP to EPA), no later than June 21, 1999, or three years after the date on which such regulated substance is first listed under 40 C.F.R. § 68.130, or the date on which the regulated substance is first present in a process above the threshold quantity, whichever is latest.

9. The regulations set forth at 40 C.F.R. Part 68 separate the covered processes into three categories, designated as Program 1, Program 2, and Program 3. A covered process is subject to Program 3 requirements, as per 40 C.F.R. § 68.10(i), if: (a) the process does not meet one or more of the Program 1 eligibility requirements set forth in 40 C.F.R. § 68.10(g); and (b) either the process is listed in one of the specific North American Industry Classification System codes found at 40 C.F.R. § 68.10(i)(1), or the process is subject to the United States Occupational Safety and Health Administration process safety management standard set forth in 29 C.F.R. § 1910.119. As required by 40 C.F.R. § 68.10(h), a facility must register its RMP-covered process as a Program 2 process if it does not meet the requirements of either Program 1 or Program 3.

10. The regulations set forth at 40 C.F.R. § 68.12(d) require that the owner or operator of a stationary source with a Program 3 process undertake certain tasks, including, but not limited to, development and implementation of a management system (pursuant to 40 C.F.R. § 68.15) and the implementation of prevention program requirements.

FINDINGS OF FACT

11. Respondent is the owner and/or operator of a facility located at 607 Phillips Street, Fulton, New York (“the Facility”), which uses anhydrous ammonia in its refrigeration process at the Facility.

12. EPA conducted an inspection of the Facility on or about May 30, 2019, to assess compliance with Section 112(r)(7) of the CAA (the “Inspection”) and the regulations at 40 C.F.R. Part 68.

13. At the time of the Inspection, Respondent had not submitted an RMP to EPA.

14. EPA provided a copy of the report for this Inspection (“Inspection Report”) to Respondent by letter dated June 28, 2019. The letter requested that Respondent provide to EPA additional information including a compliance schedule for correcting the potential findings outlined in the Inspection Report.

15. On August 9, 2019, Respondent submitted a response to EPA's letter, and this response included a July 26, 2019 report regarding the ammonia system. The report estimated that the amount of anhydrous ammonia in the refrigeration system at the Facility was 13,054 pounds. This amount is above the threshold quantity for anhydrous ammonia of 10,000 pounds.

16. As the ammonia process at the Facility contains ammonia above the threshold quantity, Respondent is subject to the risk management requirements of 40 C.F.R. Part 68 regarding this process.

17. Pursuant to Section 112(r)(7) of the CAA, 42 U.S.C. §7412(r)(7), and 40 C.F.R. §§ 68.10(a), 68.12, and 68.150, Respondent, as an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process, should have complied with the requirements of 40 C.F.R. Part 68 (including, but not limited to, submission of an RMP to EPA).

18. Respondent entered an Administrative Order on Consent with EPA, Index No. CAA-02-2019-1012, dated September 26, 2019 (the “Order”), which required Respondent to perform certain actions at the Facility to come into compliance with the requirements of Section 112(r)(7) of the CAA and 40 C.F.R. Part 68, and thereafter Respondent took such actions.

EPA CONCLUSIONS OF LAW

19. Respondent is, and at all times referred to herein was, a “person” within the meaning of Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

20. The Facility is a stationary source pursuant to 40 C.F.R. § 68.3.

21. Anhydrous ammonia is a regulated substance pursuant to Sections 112(r)(2) and (3) of the CAA and 40 C.F.R. § 68.3.

22. The threshold quantity for anhydrous ammonia, as listed in 40 C.F.R. § 68.130, Tables 1 and 2, is 10,000 pounds.

23. Respondent handles and stores, and has handled and stored, anhydrous ammonia in a process at the Facility in quantities exceeding the threshold quantity.

24. As described in the Order, at the time of the Inspection, Respondent had not submitted an RMP and had not fully complied with the applicable risk management requirements of 40 C.F.R. Part 68 regarding this process, including, but not limited to:

- a. the development and implementation of a management system pursuant to 40 C.F.R. §68.15;
- b. a hazard assessment pursuant to the requirements of 40 C.F.R. §§ 68.20-68.42;
- c. a prevention program pursuant to the requirements of 40 C.F.R. §§ 68.65-68.87;
- d. an emergency response program pursuant to the requirements of 40 C.F.R. §§ 68.90-68.96; and
- e. the submission of an RMP pursuant to the requirements of 40 C.F.R. §§ 68.150-68.195.

25. EPA has determined that Respondent's failures to comply fully with the requirements of 40 C.F.R. Part 68 regarding the Facility constitute violations of Section 112(r) of the CAA, 42 U.S.C. § 7412(r). Respondent is therefore subject to the assessment of penalties under Section 113(d) of the CAA, 42 U.S.C. § 7413(d).

CONSENT AGREEMENT

26. Based upon the foregoing, and pursuant to Section 113(d) of the CAA 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), Complainant and Respondent hereby agree on the following provisions.

27. For the purpose of this proceeding and in the interest of an expeditious resolution of this matter, pursuant to 40 C.F.R. § 22.18(b)(2), Respondent (a) admits the jurisdictional basis for this matter, (b) admits the Findings of Fact set forth above, (c) consents to the assessment of the civil penalty set forth below, (d) consents to the issuance of the attached Final Order, and (e) waives its right to contest the allegations and its right to appeal the attached Final Order.

28. Respondent neither admits nor denies the EPA Conclusions of Law set forth above.

29. This CAFO and any provision herein shall not be construed as an admission in any criminal or civil action or other administrative proceeding, except in an action or proceeding to enforce or seek compliance with the provisions of this CAFO.

30. Respondent consents to the issuance of this Consent Agreement and consents for the purposes of settlement to the payment of the civil penalty cited herein.

31. Respondent agrees to pay a civil penalty in the total amount of **twenty-four thousand dollars** (\$24,000), as described below. Payment of the penalty must be received by EPA on or before thirty (30) calendar days after the effective date of the Final Order, which as described in the Final Order is the date of filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, New York, New York. Such payment shall be made at the Pay.gov website using the following link:
<https://www.pay.gov/public/form/start/11751879>.

The following information must be included on the payment form:

- i. Amount of payment: \$24,000
- ii. Name of Respondent: K&N's Foods USA, LLC
- iii. Docket No.: CAA- 02-2023-1203

To ensure the payment is recorded properly, Respondent is required to notify EPA contemporaneously with the payment. Respondent shall send an email message or letter that references the date of the payment, the payment amount, the docket number of this CAFO, and Respondent's name and address to the following:

Francesco Maimone, Physical Scientist
Air Compliance Branch
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 2
290 Broadway, 21st Floor
New York, NY 10007-1866
Maimone.Francesco@epa.gov

Jocelyn Scott
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
Scott.Jocelyn@epa.gov

and

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866
Maples.Karen@epa.gov

Payment must be received pursuant to the provisions above.

32. If Respondent fails to make full and complete payment of the civil penalty that it is required to pay under this CAFO, this case may be referred by EPA to the United States Department of Justice and/or the United States Department of the Treasury for collection. In such an action, pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), and 31 U.S.C. § 3717, Respondent shall pay the following amounts:

- a. Interest. If Respondent fails to make payment, or makes partial payment, interest shall accrue on any unpaid portion of the assessed penalty at the rate established pursuant to 31 U.S.C. § 3717 and 26 U.S.C. § 6621 from the payment due date through the date of full payment.
- b. Handling Charges. Pursuant to 31 U.S.C. § 3717(e)(1), a handling charge of fifteen dollars (\$15.00) shall be paid per month, or any portion thereof, if any portion of the assessed penalty is not paid within thirty (30) days of the payment due date.
- c. Attorney Fees, Collection Costs, Nonpayment of Penalty. If Respondent fails to pay the amount of an assessed penalty on time, pursuant to Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5), in addition to such assessed penalty and interest and handling assessments, Respondent shall also pay the United States' enforcement expenses, including but not limited to attorney's fees and costs incurred by the United States for collection proceedings, and a quarterly non-payment penalty for each calendar quarter during which such a failure to pay persists. Such non-payment penalty shall be ten percent (10%) of the aggregate amount of Respondent's outstanding penalties and non-payment penalties accrued from the beginning of such quarter.

33. The penalty specified in Paragraph 31, above, shall represent civil penalties assessed by EPA and shall not be deductible for purposes of state or federal taxes.

General Provisions

34. This Consent Agreement is being voluntarily and knowingly entered into by the parties in full settlement of Respondent's alleged violations of the CAA set forth above in the Findings of Fact and EPA Conclusions of Law.

35. This Consent Agreement shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, State, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, State, or local permit. Except for the alleged violations resolved herein, compliance with this Consent Agreement shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.

36. Full and timely payment of the penalty described in Paragraph 31 above shall resolve Respondent's liability for federal civil penalties for the violations and facts described

above in the Findings of Fact and EPA Conclusions of Law. Full payment of this penalty shall not affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

37. This Consent Agreement and any provision herein is not intended to be an admission of liability in any adjudicatory or administrative proceeding except in an action, suit, or proceeding to enforce this Consent Agreement or any of its terms and conditions.

38. Respondent explicitly waives any right to request a hearing as to the matters addressed herein and/or contest any allegations in this Consent Agreement and explicitly waives any right to appeal the attached Final Order.

39. Each party hereto shall bear its own costs and attorneys' fees in the action resolved by this Consent Agreement.

40. This Consent Agreement shall be binding on Respondent and its successors and assigns.

41. Each of the undersigned representatives to this Consent Agreement certifies that he or she is duly authorized by the party whom he or she represents to enter into the terms and conditions of the Consent Agreement and to bind that party to it.

42. Respondent consents to service upon Respondent of a copy of this Consent Agreement by any EPA employee, in lieu of service made by the EPA Region 2, Regional Hearing Clerk.

In the Matter of K&N's Foods USA, LLC, Docket Number CAA-02-2023-1203

For Respondent
K&N's Foods USA, LLC:



Signature

Date: 9/28/23

Jon McDonald

Name (Printed or Typed)

General Manager

Title (Printed or Typed)

Jon.McDonald@KandNs.us

Email Address (Printed or Typed)

CAA-02-2023-1203

In the Matter of K&N's Foods USA, LLC, Docket Number CAA-02-2023-1203

For Complainant
U.S. Environmental Protection Agency, Region 2:

Dore LaPosta, Director
Enforcement and Compliance Assurance Division

Date: _____

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Docket Number CAA-02-2023-1203

FINAL ORDER

As Regional Judicial Officer of the EPA, Region 2, I ratify the foregoing Consent Agreement. The Consent Agreement, entered by the Complainant and Respondent to this matter, is hereby approved, incorporated herein, and issued as a Final Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, New York, New York.

Helen Ferrara
Regional Judicial Officer
U.S. Environmental Protection
Agency – Region 2
290 Broadway
New York, New York 10007-1866

Date: _____