

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
Future Foam, Inc. )  
Council Bluffs, Iowa, and )  
Newton, Kansas )  
 )  
Respondent )

Docket No. EPCRA-07-2009-0004

**CONSENT AGREEMENT AND FINAL ORDER**

The United States Environmental Protection Agency, Region 7 (EPA or Complainant), and Future Foam, Inc. (Respondent), have agreed to a settlement of this action before filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b), 22.18(b)(2).

**Section I**

**Jurisdiction**

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 325 of the Emergency Planning and Community Right to Know Act of 1986 (EPCRA), 42 U.S.C. § 11045.

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 313 of EPCRA, 42 U.S.C. § 11023, and the regulations promulgated thereunder and codified at 40 C.F.R. § 372, governing the submission of toxic chemical release inventories by owners and operators of covered facilities.

**Section II**

**Parties**

3. The Complainant, by delegation from the Administrator of the EPA, and the Regional Administrator, EPA, Region 7, is the Director, Air and Waste Management Division, EPA, Region 7.

4. The Respondent is Future Foam, Inc., 1610 Avenue N, Council Bluffs, Iowa 51501.

### Section III

#### Statutory and Regulatory Background

5. Section 313(a) of EPCRA and 40 C.F.R. § 372.30 provides that an owner or operator of a facility that meets the criteria set forth in EPCRA Section 313(b) and 40 C.F.R. § 372.22 is required to submit annually to the Administrator of EPA and to the State in which the facility is located, no later than July 1<sup>st</sup> of each year, a toxic chemical release inventory reporting form (Form R) for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, processed, or otherwise used at the facility during the preceding calendar year in quantities exceeding the thresholds under EPCRA Section 313(f) and 40 C.F.R. § 372.28.

6. Section 313(b) of EPCRA and 40 C.F.R. § 372.22 provides that the requirements of Section 313(a) and 40 C.F.R. § 372.30 apply to an owner and operator of a facility that has 10 or more full-time employees; is in Standard Industrial Classification major group codes 10 (except 1011, 1081, and 1094), 12 (except 1241), or 20 through 39; industry codes 4911, 4931, or 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce), or 4953 (limited to facilities regulated under the Resource Conservation and Recovery Act), or 5169, 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis); and that manufactures, processes, or otherwise uses one or more toxic chemicals listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65 in quantities in excess of the applicable thresholds established under EPCRA Section 313(f) and 40 C.F.R. § 372.28.

7. Section 325(c) of EPCRA, 42 U.S.C. § 11045(c), and 40 C.F.R. Part 19 authorize EPA to assess a penalty of up to \$32,500.00 for each violation of Section 313 of EPCRA that occurred after March 15, 2004, through January 12, 2009, and up to \$37,500.00 for violations of Section 313 of EPCRA that occurred after January 12, 2009.

### Section IV

#### General Factual Allegations

8. On October 29, 2007, an authorized EPA representative conducted an inspection of Respondent's facility located at 400 North 10<sup>th</sup> Street, Council Bluffs, Iowa 51503, to determine compliance with Section 313 of EPCRA. Additionally, a subsequent review of records requested on August 4, 2008, was conducted.

9. Respondent is a person as defined in Section 329(7) of EPCRA, 42 U.S.C. § 11049(7).

10. Respondent is the owner and operator of a facility as defined in Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).

11. Respondent has 10 or more full-time employees as defined at 40 C.F.R. § 372.3.

12. The facility's primary Standard Industrial Classification code is 3086 as defined by 40 C.F.R. § 372.3.

### **VIOLATIONS**

13. The Complainant hereby states and alleges that Respondent has violated EPCRA and federal regulations promulgated thereunder, as follows:

#### **Count I**

14. The facts stated in paragraph 8 through 12, above, are herein incorporated.

15. The October 29, 2007, inspection of Respondent's facility and subsequent record review revealed that, in calendar year 2006, Respondent manufactured, processed, or otherwise used toluene diisocyanate (mixed isomers) in excess of 10,000 pounds at its Iowa facility.

16. Toluene diisocyanate (mixed isomers) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

17. Respondent failed to submit a Form R for calendar year 2006 for toluene diisocyanate (mixed isomers) to the Administrator of EPA and to the State of Iowa by July 1, 2007.

18. Respondent's failure to submit a Form R for calendar year 2006 by July 1, 2007, is a violation of Section 313 of EPCRA and of the requirement of 40 C.F.R. § 372.

19. Respondent's failure to comply with 40 C.F.R. Part 372, as set forth above, is a violation of Section 313 of EPCRA, 42 U.S.C. § 11023.

#### **Count II**

20. The facts stated in paragraph 8 through 12, above, are herein incorporated.

21. The October 29, 2007, inspection of Respondent's facility and subsequent record review revealed that, in calendar year 2006, Respondent manufactured, processed, or otherwise used toluene diisocyanate (mixed isomers) in excess of 10,000 pounds at its facility located at 520 South Payton Street, Newton, Kansas 67114.

22. Toluene diisocyanate (mixed isomers) is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

23. Respondent failed to submit a Form R for calendar year 2006 for toluene diisocyanate (mixed isomers) to the Administrator of EPA and to the State of Kansas by July 1, 2007.

24. Respondent's failure to submit a Form R for calendar year 2006 by July 1, 2007, is a violation of Section 313 of EPCRA and of the requirement of 40 C.F.R. § 372.

25. Respondent's failure to comply with 40 C.F.R. Part 372, as set forth above, is a violation of Section 313 of EPCRA, 42 U.S.C. § 11023.

### **Count III**

26. The facts stated in paragraph 8 through 12, above, are herein incorporated.

27. The October 29, 2007, inspection of Respondent's facility and subsequent record review revealed that, in calendar year 2006, Respondent manufactured, processed, or otherwise used diethanolamine in excess of 10,000 pounds at its Iowa facility.

28. Diethanolamine is a toxic chemical listed under Section 313(c) of EPCRA and 40 C.F.R. § 372.65.

29. Respondent failed to submit a Form R for calendar year 2006 for diethanolamine to the Administrator of EPA and to the State of Iowa by July 1, 2007.

30. Respondent's failure to submit a Form A for calendar year 2006 by July 1, 2007, is a violation of Section 313 of EPCRA and of the requirement of 40 C.F.R. § 372.

31. Respondent's failure to comply with 40 C.F.R. Part 372, as set forth above, is a violation of Section 313 of EPCRA, 42 U.S.C. § 11023.

### **Section V**

### **CONSENT AGREEMENT**

1. Respondent and EPA agree to the terms of this Consent Agreement and Final Order and Respondent agrees to comply with the terms of the Final Order portion of this Consent Agreement and Final Order.

2. For purposes of this proceeding, Respondent admits the jurisdictional allegations set forth above, and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent

proceeding to enforce the terms of the Final Order portion of this Consent Agreement and Final Order.

3. Respondent neither admits nor denies the factual allegations set forth above.
4. Respondent waives its right to a judicial or administrative hearing on any issue of fact or law set forth above and its right to appeal the Final Order portion of this Consent Agreement and Final Order.
5. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorney's fees incurred as a result of this action.
6. This Consent Agreement and Final Order addresses all civil and administrative claims for the EPCRA violations identified above, existing through the effective date of this Consent Agreement and Final Order. Complainant reserves the right to take enforcement action with respect to any other violations of EPCRA or other applicable law.
7. Respondent certifies by the signing of this Consent Agreement and Final Order that to the best of its knowledge, Respondent's facilities are in compliance with all requirements of Section 313 of EPCRA, 42 U.S.C. § 11023, and all regulations promulgated thereunder.
8. The effect of settlement described in paragraph 6 is conditional upon the accuracy of the Respondent's representations to EPA, as memorialized in paragraph 7, above, of this Consent Agreement and Final Order.
9. Respondent consents to the issuance of the Final Order hereinafter recited and consents to the payment of the civil penalty in the amount of Five Thousand Eight Hundred Thirty-Nine Dollars (\$5,839.00) as set forth in paragraph 1 of the Final Order.
10. **Supplemental Environmental Project:** In response to the violations of EPCRA in this Consent Agreement and Final Order and in settlement of this matter, although not required by EPCRA or any other federal, state, or local law, Respondent agrees to implement a supplemental environmental project (SEP), as described in paragraphs 11 and 12, below, which the parties agree is intended to secure significant environmental or public health protection and improvement.
11. Within sixty (60) days of the effective date of this Consent Agreement and Final Order, Respondent shall complete the SEP by purchasing the following equipment for the designated fire departments below for use in emergency response actions including responses to hazardous substance and chemical spills:

Council Bluffs, Iowa Fire Department:  
"Betts" Emergency Unloading Fixture  
MC306/DOT406 Dome Lid Simulator  
Lid Loc Dome Clamp Kit (set of 5)  
Megger DET3TD Earth/Ground Resistance Tester  
Hazmat Static Grounding Kit

Newton, Kansas Fire Department:  
"Betts" Emergency Unloading Fixture  
MC306/DOT406 Dome Lid Simulator  
Lid Loc Dome Clamp Kit (set of 5)  
Megger DET3TD Earth/Ground Resistance Tester  
Hazmat Static Grounding Kit

12. The total expenditure for the SEP shall be not less than Twenty-Three Thousand, One Hundred Thirty-Four Dollars (\$23,134.00). All work required to complete the SEP shall be performed in compliance with all federal, state, and local laws and regulations.

13. Within sixty (60) days of completion of the SEP, Respondent shall submit a SEP Completion Report to EPA. The SEP Completion Report shall contain the following information:

- a) a detailed description of the SEP as implemented;
- b) a description of any operating problems encountered and the solutions thereto;
- c) a description of the specific environmental and/or public health benefits resulting from implementation of the SEP;
- d) itemized costs, documented by copies of purchase orders, receipts, or canceled checks; and
- e) certification that the SEP has been fully implemented pursuant to the provisions of this Consent Agreement and Final Order.

14. In itemizing its costs in the SEP Completion Report, Respondent shall clearly identify and provide acceptable documentation for all eligible SEP costs. Where the SEP Completion Report includes costs not eligible for SEP credit, those costs must be clearly identified as such. For purposes of this paragraph, "acceptable documentation" includes invoices, purchase orders, or other documentation that specifically identifies and itemizes the individual costs of the goods and/or services for which payment is being made. Canceled drafts do not constitute acceptable documentation unless such drafts specifically identify and itemize the individual costs of the goods and/or services for which payment is being made.

15. The SEP Completion Report shall include the following statement of Respondent, through an officer, signed and certifying under penalty of law the following:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that, based on inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.

16. The SEP Completion Report shall be submitted to the following:

Fatima Ndiaye (AWMD/CRIB)  
U.S. Environmental Protection Agency, Region 7  
901 N. Fifth Street  
Kansas City, Kansas 66101.

17. Respondent agrees that failure to submit the SEP Completion Report shall be deemed a violation of this Consent Agreement and Final Order and Respondent shall become liable for stipulated penalties pursuant to paragraph 22, below.

18. No portion of Respondent's expenditures on the SEP required under this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for state or local income tax purposes. Additionally, for federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

19. Respondent agrees that in any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP, Respondent shall include a statement that the SEP was undertaken in connection with the settlement of an enforcement action taken by the U.S. Environmental Protection Agency for violations of EPCRA.

20. Respondent hereby certifies that, as of the date of this Consent Agreement and Final Order, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation; nor is the Respondent required to perform or develop the SEP by any other agreement, grant, or an injunctive relief in this or any other case. Respondent further certifies that it has not received, and is not presently negotiating to receive, credit in any other enforcement action for the SEP.

21. After receipt of the SEP Completion Report described in paragraph 13, above, EPA will notify Respondent, in writing, regarding: a) any deficiencies in the SEP report itself along with a grant of an additional thirty (30) days for Respondent to correct any deficiencies;

or b) indicate that EPA concludes that the project has been completed satisfactorily; or  
c) determine that the project has not been completed satisfactorily and seek stipulated penalties in accordance with paragraph 22 herein.

**22. Stipulated Penalties:**

a. In the event that Respondent fails to comply with any of the terms or provision of this Consent Agreement and Final Order relating to the performance of the SEP described in paragraphs 11 and 12, above, and/or to the extent that actual expenditures for the SEP do not equal or exceed the cost of the SEP described in paragraphs 11 and 12, above, Respondent shall be liable for stipulated penalties according to the provisions set forth below:

i) Except as provided in subparagraph ii), for a SEP which has not been completed satisfactorily pursuant to this Consent Agreement and Final Order, Respondent shall pay a stipulated penalty to the United States in the amount of Seventeen Thousand Five Hundred and Fifteen Dollars (\$17,515.00).

ii) If the SEP is not completed in accordance with paragraphs 11 and 12, but the Complainant determines that the Respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty.

iii) If the SEP is completed in accordance with paragraphs 11 and 12, but the Respondent spent less than 90 percent of the amount of money required to be spent for the project, Respondent shall pay a stipulated penalty to the United States in the amount of the difference of the amount spent and Twenty-One Thousand Eight Hundred Ninety-Three Dollars (\$21,893.00).

iv) If the SEP is completed in accordance with paragraphs 11 and 12, and the Respondent spent at least 90 percent of the amount of money required to be spent for the project, Respondent shall not be liable for any stipulated penalty.

v) For failure to submit the SEP Completion Report required by paragraph 13, above, Respondent shall pay a stipulated penalty in the amount of \$100.00 for each day after the due date of the Completion Report stated in paragraph 13, above, until the report is submitted.

b. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be in the sole discretion of EPA.



c. Stipulated penalties for paragraph a.v) above shall begin to accrue on the day after performance is due, and shall continue through the final day of the completion of the activity.

d. Respondent shall pay stipulated penalties not more than fifteen (15) days after receipt of written demand by EPA for such penalties. The method of payment shall be in accordance with the provisions of paragraph 1 of the Final Order.

23. Nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.

24. This Consent Agreement and Final Order shall apply to and be binding upon EPA and Respondent and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters herein comply with the terms of this Consent Agreement and Final Order.

25. The undersigned representative of Respondent certifies that he or she is fully authorized to enter the terms and conditions of the Consent Agreement and Final Order and to legally bind Respondent to it.

26. **Late Payment Provision:** Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and charge to cover the costs of processing and handling delinquent claims. Interest will therefore begin to accrue on a civil or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States tax and loan rate in accordance with 31 C.F.R. § 9019(b). A charge will be assessed to cover the debt collection, including processing and handling costs and attorney's fees. In addition, a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. Any such non-payment penalty charge on the debt will be accrued from the date the penalty becomes due and is not paid, 31 C.F.R. §§ 901.9(c) and (d).

27. Failure to pay the assessed penalty may result in the referral of this matter to the United States Department of Justice for collection. If payment is not received on or before the due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

### FINAL ORDER

Pursuant to the provisions of EPCRA, 42 U.S.C. § 11023, and based upon the information set forth in this Consent Agreement, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Five Thousand Eight Hundred Thirty-Nine Dollars (\$5,839.00), within thirty days of entry of this Final Order.

2. Payment shall be by cashier's or certified check which shall reference Docket Number EPCRA-07-2009-0004, and be made payable to the "United States Treasury" and remitted to:

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

3. A copy of the check shall simultaneously be sent to the following:

Regional Hearing Clerk  
United States Environmental Protection Agency, Region 7  
901 N. Fifth Street  
Kansas City, Kansas 66101; and

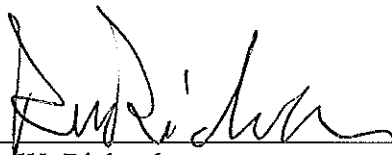
Robert W. Richards  
Assistant Regional Counsel  
United States Environmental Protection Agency, Region 7  
901 N. Fifth Street  
Kansas City, Kansas 66101.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

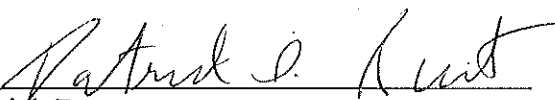
5. The effective date of this Order shall be the date on which it is signed by the Regional Judicial Officer.

6. This executed Consent Agreement and Final Order shall be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 7, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

COMPLAINANT:  
U. S. ENVIRONMENTAL PROTECTION AGENCY

By   
Robert W. Richards  
Assistant Regional Counsel

Date 10/19/09

By   
Patrick Bustos  
Chief, Chemical Risk Information Branch  
Air and Waste Management Division

Date 11/20/09

RESPONDENT:  
FUTURE FOAM, INC.

By Robert Heller

Title Vice President

Date October 8, 2009

IN THE MATTER OF Future Foam, Inc.  
Docket No. EPCRA-07-2009-0004

**IT IS SO ORDERED.** This Order shall become effective immediately.

Date: Nov. 16, 2009

Karina Borromeo

Karina Borromeo  
Regional Judicial Officer  
U.S. Environmental Protection Agency  
Region 7

IN THE MATTER OF Future Foam, Inc., Respondent  
Docket No. EPCRA-07-2009-0004

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to  
Attorney for Complainant:

Robert W. Richards  
Assistant Regional Counsel  
Region VII  
United States Environmental Protection Agency  
901 N. 5<sup>th</sup> Street  
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Robert Heller, Vice President  
Future Foam, Inc.  
1610 Avenue N.  
Council Bluffs, Iowa 51501

Dated: 11/16/09



Kathy Robinson  
Hearing Clerk, Region 7