



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

JUL 30 2008

REPLY TO THE ATTENTION OF:

SC-6J

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mark Chicos, Plant Superintendent  
Birdseye Foods  
400 - 4<sup>th</sup> Street SW  
Waseca, Minnesota 56093

Re: In the Matter of Birdseye Foods, Waseca, Minnesota  
Docket Nos. CERCLA-05-2008-0010 EPCRA-05-2008-0021

MM-05-2008-0025 <sup>FDJ</sup>

Dear Mr. Chicos:

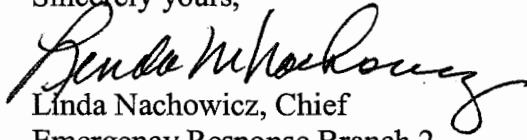
I have enclosed a Complaint filed against Birdseye Foods under Section 109(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. § 9609(b), and Sections 325(b)(2) of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 11045(b)(2). The Complaint alleges violations of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304(a) of EPCRA, 42 U.S.C. §§ 11004(a).

As provided in the Complaint, if you would like to request a hearing, you must do so in your Answer to the Complaint. Please note that if you do not file an Answer with the Regional Hearing Clerk within 30 days of your receipt of this Complaint, the Presiding Officer may issue a default order and the proposed civil penalty will become due 30 days later. Mail your Answer to Tamara Carnovsky, Associate Regional Counsel (C-14J), U.S. EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

In addition, whether or not you request a hearing, you may request an informal settlement conference by contacting Ruth McNamara at (312) 353-3193. If you have any legal questions, please contact Tamara Carnovsky, Associate Regional Counsel at (312) 886-2250.



Sincerely yours,

A handwritten signature in black ink, appearing to read "Linda Nachowicz". The signature is fluid and cursive, written over the typed name and title.

Linda Nachowicz, Chief  
Emergency Response Branch 2

Enclosures (3) Administrative Complaint  
Enforcement Response Policy  
Civil Administrative Rules of Practice

cc: Steve Tomlyanovich  
MN SERC

Re: In the Matter of Birdseye Foods, Waseca, Minnesota  
Administrative Complaint



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5 CERCLA-05-2008-0010

RECEIVED  
REGIONAL REGISTER CLERK  
JUN 20 01 20 2008

In the Matter of: ) Docket No. EPCRA-05-2008-0021  
)  
)  
Birdseye Foods )  
Waseca, Minnesota )  
)  
)  
Respondent. )  
\_\_\_\_\_ )

**Complaint**

1. This is an administrative proceeding to assess a civil penalty 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).

2. The Complainant is, by lawful delegation, the Chief of the Emergency Response Branch 2, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. The Respondent is Birdseye Foods, a corporation doing business in the State of Minnesota.

**Statutory and Regulatory Background**

4. 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 hazardous substance's reportable quantity.

5. 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).

6. Under Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), notice required under 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 state emergency planning commission (SERC) of any state likely to be affected by a release.

7. 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 and state agencies that a response action may be necessary to prevent deaths or injuries to emergency responders, facility personnel and local community. A delay or failure to notify could seriously hamper the governments' response to an emergency, and could pose serious threats to human health and the environment.

8. Under 29 C.F.R. § 1910.1200(d)(3), chemicals listed in 29 C.F.R. Part 1910, Subpart Z are hazardous.

### **General Allegations**

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

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

11. At all times relevant to this Complaint, Respondent was an owner or operator of the facility located at 400 – 4<sup>th</sup> Street, Waseca, Minnesota (facility).

12. At all time relevant to this Complaint, Respondent was in charge of the facility located at 400 – 4<sup>th</sup> Street, Waseca, Minnesota (facility).

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

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

15. 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.

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

17. Ammonia is listed as a toxic and hazardous substance under OSHA regulations at 29 C.F.R. Part 1910, Subpart Z, and 29 C.F.R. § 1910.1000, Table Z-1.

18. 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).

19. At all times relevant to this Complaint, ammonia was produced, used or stored at the facility.

20. Ammonia is an "extremely hazardous substance" according to Section 302(a)(2) of EPCRA, 42 U.S.C. § 11002(a)(2).

21. Ammonia has a reportable quantity of 100 pounds, as indicated at 40 C.F.R. Part 355, Appendix A.

22. 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).

23. Ammonia CAS #7664-41-7 has a reportable quantity of 100 pounds, as indicated at 40 CFR Part 302, Table 302.4.

24. On June 4, 2006, at or about 5:32 p.m. CT, a release occurred from Respondent's facility of approximately 700 pounds of ammonia (the release).

25. In a 24 hour time period, the release of ammonia exceeded the 100 pound RQ.

26. During the release, the approximately 700 pounds of ammonia spilled, leaked, pumped, poured, emitted, discharged,, escaped, leached, dumped, or disposed into the navigable waters, waters of the contiguous zone, ocean waters, surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air.

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

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

29. Respondent had knowledge of the release on June 4, 2006 at approximately 5:32 p.m. Central Time.

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

31. The release was likely to affect the state of Minnesota.

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



### **Count 1**

33. Complainant incorporates paragraphs 1 through 32 of this Complaint as if set forth in this paragraph.

34. Respondent notified the NRC of the release on June 5, 2006, at 9:38 a.m. Eastern Time.

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

36. 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**

37. Complainant incorporates paragraphs 1 through 32 of this Complaint as if set forth in this paragraph.

38. Respondent notified the Minnesota SERC of the release on June 4, 2006, at 8:10 p.m. Central Time.

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

40. 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).

### **Proposed CERCLA Penalty**

41. Section 109(b) of CERCLA, 42 U.S.C. § 9609(b), authorizes U.S. EPA to assess a civil penalty of up to \$25,000 per day of violation of CERCLA Section 103. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19, increased the statutory maximum penalty to \$27,500 per day of violation that

occurred from January 31, 1997 through March 15, 2004. and to \$32,500 per day of violation for violations that occurred after March 15, 2004.

42. Section 109(a)(3) of CERCLA, 42 U.S.C. § 9609(a)(3), requires U.S. EPA to consider the nature, circumstances, extent and gravity of the violations, a violator's ability to pay, prior history of violations, degree of culpability, economic benefit or savings resulting from the violation, and any other matters that justice may require, when assessing an administrative penalty under Section 109(b) of CERCLA.

43. Based upon an evaluation of the facts alleged in this Complaint and the factors in Section 109(a)(3) of CERCLA, Complainant proposes that the U.S. EPA assess a civil penalty against Respondent of **\$24,178** for the CERCLA violation alleged in Count 1 of this Complaint.

44. Complainant calculated the CERCLA penalty by evaluating the facts and circumstances of this case with specific reference to the 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, a copy of which is enclosed with this Complaint.

#### **Proposed EPCRA Penalty**

45. Section 325(b) of EPCRA, 42 U.S.C. § 11045(b), authorizes U.S. EPA to assess a civil penalty of up to \$25,000 per day of violation of EPCRA Section 304. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19, increased the statutory maximum penalty to \$27,500 per day of violation that occurred from January 31, 1997 through March 15, 2004, and to \$32,500 per day of violation for violations that occurred after March 15, 2004.

46. Based upon an evaluation of the facts alleged in this Complaint, and after considering the nature, circumstances, extent and gravity of the violations, the violator's ability to pay, prior history of violations, degree of culpability, economic benefit or saving resulting from the violations, and any other matters that justice may require, Complainant proposes that the U.S. EPA assess a civil penalty against Respondent of **\$24,178** for the EPCRA violation alleged in this Complaint.

47. Complainant calculated the EPCRA penalty by evaluating the facts and circumstances of this case with specific reference to 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, a copy of which is enclosed with this Complaint.

**Total CERCLA and EPCRA penalty: \$48,356**

**Rules Governing this Proceeding**

The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) at 40 C.F.R. Part 22 govern this proceeding to assess a civil penalty. Enclosed with the Complaint served on Respondent is a copy of the Consolidated Rules.

**Filing and Service of Documents**

Respondent must file with the U.S. EPA Regional Hearing Clerk the original and one copy of each document Respondent intends as part of the record in this proceeding. The Regional Hearing Clerk's address is:

Regional Hearing Clerk (E-13J)  
U.S. EPA, Region 5  
77 W. Jackson Boulevard  
Chicago, IL 60604

Respondent must serve a copy of each document filed in this proceeding on each party pursuant to Section 22.5 of the Consolidated Rules. Complainant has authorized Tamara Carnovsky to receive any Answer and subsequent legal documents that Respondent serves in this proceeding. You may telephone Tamara Carnovsky at (312) 886-2250. Her address is:

Tamara Carnovsky (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 W. Jackson Boulevard  
Chicago, IL 60604

#### **Terms of Payment**

Respondent may resolve this proceeding at any time by paying the proposed penalty by sending a certified or cashier's check for the CERCLA violation 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

and by sending a certified or cashier's check for the EPCRA violation payable to the "Treasurer, United States of America," to:

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

Respondent must include the case name, docket number and the billing document number on the check and in the letter transmitting the check. Respondent must simultaneously send

copies of the check and transmittal letter to the Regional Hearing Clerk and Tamara Carnovsky at the addresses given above, and to:

Ruth McNamara, (SC-6J)  
Chemical Emergency Preparedness  
and Prevention Section  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

**Answer and Opportunity to Request a Hearing**

If Respondent contests any material fact alleged in this Complaint or the appropriateness of any penalty amount, or contends that it is entitled to judgment as a matter of law, Respondent may request a hearing before an Administrative Law Judge. To request a hearing, Respondent must file a written Answer within 30 days of receiving this Complaint and must include in that written Answer a request for a hearing. Any hearing will be conducted in accordance with the Consolidated Rules.

In counting the 30-day period, the date of receipt is not counted, but Saturdays, Sundays, and federal legal holidays are counted. If the 30-day time period expires on a Saturday, Sunday, or federal legal holiday, the time period extends to the next business day.

To file an Answer, Respondent must file the original written Answer and one copy with the Regional Hearing Clerk at the address specified above.

Respondent's written Answer must clearly and directly admit, deny, or explain each of the factual allegations in the Complaint; or must state clearly that Respondent has no knowledge of a particular factual allegation. Where Respondent states that it has no knowledge of a particular factual allegation, the allegation is deemed denied. Respondent's failure to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation.

Respondent's Answer must also state:

- a. the circumstances or arguments which Respondent alleges constitute grounds of defense;
- b. the facts that Respondent disputes;
- c. the basis for opposing the proposed penalty; and,
- d. whether Respondent requests a hearing.

If Respondent does not file a written Answer within 30 calendar days after receiving this Complaint, the Presiding Officer may issue a default order, after motion, under Section 22.17 of the Consolidated Rules. Default by Respondent constitutes an admission of all factual allegations in the Complaint and a waiver of the right to contest the factual allegations. Respondent must pay any penalty assessed in a default order without further proceedings 30 days after the order becomes the final order of the Administrator of U.S. EPA under Section 22.27(c) of the Consolidated Rules.

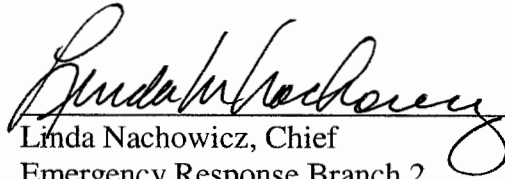
#### **Settlement Conference**

Whether or not Respondent requests a hearing, Respondent may request an informal conference to discuss the facts alleged in the Complaint and to discuss settlement. To request an informal settlement conference, Respondent may contact Ruth McNamara at (312) 353-3193.

Respondent's request for an informal settlement conference will not extend the 30-day period for filing a written Answer to this Complaint. Respondent may simultaneously pursue an informal settlement conference and the adjudicatory hearing process. Complainant encourages all parties against whom it proposes to assess a civil penalty to pursue settlement through informal conference. However, Complainant will not reduce the penalty simply because the parties hold an informal settlement conference.

U.S. Environmental Protection Agency, Complainant

7/29/08  
Date

  
Linda Nachowicz, Chief  
Emergency Response Branch 2  
Superfund Division

In the Matter of:  
Birdseye Foods, Waseca, Minnesota  
Docket Nos.

CERCLA-05-2008-0010

EPCRA-05-2008-0021

MM-05-2008-0005 <sup>208</sup>

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In the Matter of:

Birdseye Foods, Waseca, Minnesota

Docket Nos CERCLA-05-2008-0010 EPCRA-05-2008-0021

MM-05-2008-0005 <sup>PRB</sup>

Certificate of Service

I, Ruth McNamara, certify that I filed the original and one copy of the Complaint, docket numbers CERCLA-05-2008-0010 EPCRA-05-2008-0021 <sup>MM-05-2008-0005 PRB</sup> with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, and that I mailed a copy to the Respondent by first-class, postage prepaid, certified mail, return receipt requested, along with 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, and the Enforcement Response Policy, by placing them in the custody of the United States Postal Service addressed as follows:

Mike Chicos  
Plant Superintendent  
Birdseye Foods  
400 - 4<sup>th</sup> Street SW  
Waseca, Minnesota 56093

on the 30<sup>th</sup> day of July, 2008.

Ruth McNamara

Ruth McNamara  
U.S. Environmental Protection Agency  
Region 5

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