

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

RECEIVED

CERCLA-05-2008-0010 NOV - 3 2008

In the Matter of: )  
)  
Birds Eye Foods, Inc. )  
Waseca, Minnesota )  
)  
Respondent. )  
\_\_\_\_\_ )

Docket Nos. EPCRA-05-2008-0021  
MM-05-2008-0005 REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL PROTECTION AGENCY  
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 Community Right-to-Know  
Act of 1986

**Consent Agreement and Final Order**

1. The Complainant is, by lawful delegation, the Chief of the Chemical Emergency Preparedness and Prevention Section, Emergency Response Branch 2, United States Environmental Protection Agency (U.S. EPA), Region 5.
2. The Co-Complainant is, by lawful delegation, the Chief of the Emergency Response Branch 2, United States Environmental Protection Agency (U.S. EPA), Region 5.
3. On July 30, 2008, U.S. EPA filed the Complaint in this action against Respondent Birdseye Foods. U.S. EPA subsequently learned that the correct spelling of Respondent's corporate name is as it appears in the caption above. The Complaint alleges that Respondent violated Section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(a), by failing to immediately notify the National Response Center of a release of approximately 700 pounds of ammonia which occurred at its facility in Waseca, Minnesota on June 4, 2006, and violated Section 304(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11004(a), by failing to immediately notify the Minnesota State Emergency Response Commission (SERC) of the June 4, 2006 release.

4. Respondent did not file an Answer or request a hearing under Section 325(b)(1) of EPCRA, 42 U.S.C. § 11045(b)(1), or Section 109(a)(2) of CERCLA, 42 U.S.C. § 9609(a)(2).

**Stipulations**

5. Respondent admits the jurisdictional allegations in the Complaint and neither admits nor denies the factual allegations in the Complaint.

6. Respondent waives any right to contest the allegations in the Complaint and its right to appeal this Consent Agreement and Final Order (CAFO).

7. The parties consent to the terms of this CAFO.

8. The parties agree that settling this action without further litigation, upon the terms in this CAFO, is in the public interest.

**Civil Penalty**

9. In consideration of the nature, circumstances, extent and gravity of the alleged violations and Respondent's ability to pay, Complainant has determined that an appropriate civil penalty to settle this action is \$48,356.

10. Within 30 days after the effective date of this CAFO, Respondent must pay a \$24,178 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. EPA  
Superfund Payments  
Cincinnati Finance Center  
P.O. Box 979076  
St. Louis, MO 63197-9000

BDF 24050930 B002 *JS*

Within 30 days after the effective date of this CAFO, Respondent must pay a \$24,178 civil penalty for the EPCRA violations. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

Within 30 days after the effective date of this CAFO, Respondent must pay a \$24,178 civil penalty for the EPCRA violations. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

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

BD# 27509 44 E003 *js*

11. A transmittal letter, stating Respondent's name, the case title, Respondent's complete address, the case docket number and the billing document number must accompany the payment. Respondent must send a copy of the check(s) and transmittal letter to:

Regional Hearing Clerk, (E-13J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604-3511

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

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

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

13. 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.

14. 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**

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

16. This CAFO does not affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

17. 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.

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

19. This CAFO is a "final order" for purposes of U.S. EPA's Enforcement Response Policy for Section 103 of CERCLA.

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

21. 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.

22. Each party agrees to bear its own costs and fees, including attorneys' fees, in this action.

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

**In the Matter of:**

**Birds Eye Foods, Inc.**

**Docket Nos.** CERCLA-05-2008-0010  
EPCRA-05-2008-0001  
MM-05-2008-0005

**Birds Eye Foods, Inc. Respondent**

10/16/08  
Date

Elizabeth Robinson Brett  
Elizabeth Robinson Brett  
General Counsel

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

10/17/08  
Date

Ruth McNamee for  
Mark Horwitz, Chief  
Chemical Emergency Preparedness  
and Prevention Section

10/22/08  
Date

Linda Nachowicz  
Linda Nachowicz, Chief  
Emergency Response Branch 2  
Superfund Division

10/23/08  
Date

Lawrence J. Schmitt  
for Richard C. Karl, Director  
Superfund Division

**In the Matter of:**

**Birds Eye Foods, Inc.**

**Docket Nos** CERCLA-05-2008-0010  
EPCRA-05-2008-0021  
MM-05-2008-0005

RECEIVED

NOV - 3 2008

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY

**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.

10/29/08

Date

Walter W. Kovalich  
for

Lynn Buhl  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5

**In the Matter of:**

**Birds Eye Foods, Inc.**

**Docket Nos.** CERCLA-05-2008-0010

EPORA-05-2008-0021

MM-05-2008-0005 Certificate of Service

RECEIVED  
NOV - 3 2008

REGIONAL HEARING CLERK  
U.S. ENVIRONMENTAL  
PROTECTION AGENCY.

I, Ruth McNamara, certify that I hand delivered the original of the Consent Agreement and Final Order, docket numbers  
to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, personally served a copy on the Regional Judicial Officer, and mailed a duplicate original by first-class, postage prepaid, certified mail, return receipt requested, to Birds Eye Foods Inc.'s Counsel by placing it in the custody of the United States Postal Service addressed as follows:

Lisa Robinson Brett  
General Counsel  
Birds Eye Foods, Inc.  
90 Linden Oaks  
Rochester, New York 14625

on the 3rd day of November, 2008

  
Ruth McNamara  
U.S. Environmental Protection Agency  
Region 5