



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

JAN 04 2011

REPLY TO THE ATTENTION OF:

SC-5J

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Paul W. Parmele, Esq.
Legal Department
The Kroger Co.
1014 Vine Street
Cincinnati, OH 45202

Re: The Kroger Co., Newark, Ohio, Consent Agreement and Final Order, Docket
Nos. **MM-05-2011-0002** **EPCRA-05-2011-0006** **CERCLA-05-2011-0004**

Dear Mr. Parmele:

Enclosed please find a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. The U.S. Environmental Protection Agency has filed the other original CAFO with the Regional Hearing Clerk on JAN 04 2011.

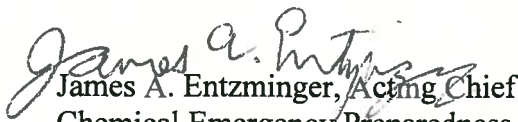
Please pay the CERCLA civil penalty in the amount of \$5,400 in the manner prescribed in paragraph 66, and reference your check with the billing document number 2751130B004 and the docket number(s) CERCLA-05-2011-0004.

Please pay the EPCRA civil penalty in the amount of \$21,600 in the manner prescribed in paragraph 67, and reference your check with the billing document number 2751144E004 and the docket number(s) EPCRA-05-2011-0006.

Your payments are due on February 3, 2011.

Please feel free to contact Ginger Jager at (312) 886-0767 if you have any questions regarding the enclosed documents. Please direct any legal questions to Charles Mikalian, Associate Regional Counsel, at (312) 886-2242. Thank you for your assistance in resolving this matter.

Sincerely,


James A. Entzminger, Acting Chief
Chemical Emergency Preparedness
and Prevention Section

Enclosure

cc: Jeff Beattie, OH SERC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

MM-05-2011-0002

In the Matter of:)
)
The Kroger Co.)
Newark, Ohio)
Respondent.)
_____)

Docket No. EPCRA-05-2011-0006 CERCLA-05-2011-0004
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

RECEIVED
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Consent Agreement and Final Order

Preliminary Statement

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

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 Director of the Superfund Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. The Respondent is The Kroger Co., a corporation doing business in the State of Ohio.

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 this 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 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 hazardous substance's reportable quantity.

10. Section 304(a)(1) of EPCRA, 42 U.S.C. § 11004(a)(1), requires the owner or operator of a facility to 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).

11. Under Section 304(b) of EPCRA, 42 U.S.C. § 11004(b), the owner or operator of a facility must give the notice required under 304(a) of EPCRA, 42 U.S.C. § 11004(a),

immediately after the release, 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 planning commission (SERC) of any state likely to be affected by a release.

12. Section 304(c) of EPCRA, 42 U.S.C. § 11004(c), requires the owner or operator of the facility to provide written follow-up emergency notice setting forth and updating the information required under Section 304(b), 42 U.S.C. § 11004(b), as soon as practicable after a release which requires notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

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

14. 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), authorize 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 Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19 increased these statutory maximum penalties to \$37,500 per day of violation for violations that occurred after January 12, 2009.

Factual Allegations and Alleged Violations

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

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

17. At all times relevant to this CAFO, Respondent was an owner or operator of the facility located at 1701 Tamarack Road, Newark, Ohio 43055 (Facility).

18. At all time relevant to this CAFO, Respondent was in charge of the Facility.
19. The Facility consists of a building, structure, installation, equipment, or 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.
20. The 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.
21. The Facility is a "facility" as that term is defined under Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
22. The Facility is a "facility" as that term is defined under Section 329(4) of EPCRA, 42 U.S.C. § 11049(4).
23. Ammonia, designated with Chemical Abstract Service (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). Ammonia, CAS # 7664-41-7, is hereinafter referred to as "ammonia."
24. Ammonia has a reportable quantity of 100 pounds as indicated at 40 C.F.R. Part 302, Table 302.4.
25. 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.
26. Ammonia 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).
27. At all times relevant to this CAFO, Respondent produced, used, or stored ammonia at the Facility.

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

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

30. On October 11, 2009, at or about 5:30 a.m., a release of ammonia (Release) occurred from the Facility.

31. In a 24 hour time period, the Release of ammonia exceeded 100 pounds.

32. During the Release, ammonia spilled, leaked, pumped, poured, emitted, emptied, discharged, escaped, dumped, or disposed into the air.

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

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

35. Respondent had knowledge of the Release on October 11, 2009.

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

37. The Release required notice under Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

38. The Release was likely to affect Ohio.

39. At all times relevant to this CAFO, the Ohio State Emergency Response Commission was the SERC for Ohio under Section 301(a) of EPCRA, 42 U.S.C. § 11001(a).

40. The Release was likely to affect Licking County, Ohio.

41. At all times relevant to this CAFO, the Licking County Emergency Planning Committee was the LEPC for Licking County, Ohio under Section 301(c) of EPCRA, 42 U.S.C. § 11001(c).

Count 1
(Failure to Immediately Notify NRC)

42. Complainant incorporates Paragraphs 1 through 41 of this CAFO as if set forth herein.

43. Respondent notified the NRC of the Release on October 12, 2009 at or about 7:15 a.m.

44. Respondent did not immediately notify the NRC as soon as Respondent had knowledge of the Release.

45. 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
(Failure to Immediately Notify Ohio SERC)

46. Complainant incorporates Paragraphs 1 through 41 of this CAFO as if set forth herein.

47. As of October 13, 2009, Respondent had not notified the Ohio SERC of the Release.

48. Respondent did not immediately notify the Ohio SERC after Respondent had knowledge of the Release.

49. Respondent's failure to immediately notify the Ohio SERC of the Release is a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

Count 3

(Failure to Immediately Notify Licking County LEPC)

50. Complainant incorporates Paragraphs 1 through 41 of this CAFO as if set forth herein.

51. As of October 13, 2009, Respondent had not notified the Licking County LEPC of the Release.

52. Respondent did not immediately notify the Licking County LEPC after Respondent had knowledge of the Release.

53. Respondent's failure to immediately notify the Licking County LEPC of the Release is a violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

Count 4

(Written Follow-up Notice to Ohio SERC)

54. Complainant incorporates Paragraphs 1 through 41 of this CAFO as if set forth herein.

55. Respondent provided written follow-up emergency notice of the Release to the Ohio SERC on December 22, 2009.

56. Respondent did not provide the Ohio SERC written follow-up emergency notice of the Release as soon as practicable after the Release occurred.

57. Respondent's failure to provide written follow-up emergency notice to the Ohio SERC as soon as practicable after the Release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

Count 5

(Written Follow-up Notice to Licking County LEPC)

58. Complainant incorporates Paragraphs 1 through 41 of this CAFO as if set forth herein.

59. Respondent provided written follow-up emergency notice of the Release to the Licking County LEPC on December 22, 2009.

60. Respondent did not provide the Licking County LEPC written follow-up emergency notice of the Release as soon as practicable after the Release occurred.

61. Respondent's failure to provide written follow-up emergency notice of the Release to the Licking County LEPC as soon as practicable after the release occurred is a violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

CERCLA Penalty

62. In consideration of the facts alleged in this CAFO, the factors in Section 109(a)(3) of CERCLA, and Respondent's agreement to perform a supplemental environmental project (SEP), U.S. EPA has determined that an appropriate civil penalty to settle the CERCLA violation alleged in this CAFO is \$5,400.00.

63. 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)."

EPCRA Penalty

64. In consideration of the facts alleged in this CAFO 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, any other matters that justice may require, and Respondent's agreement to perform a SEP, U.S. EPA has determined that an appropriate civil penalty to settle the EPCRA violations alleged in this CAFO is \$21,600.00.

65. 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)."

Terms of Payment

66. Within 30 days after the effective date of this CAFO, Respondent must pay a \$5,400.00 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:

[for checks sent by regular U.S. postal service]

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

[for checks sent by express mail]

U.S. Bank
Government Lockbox 979076 U.S. EPA Superfund Payments
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

The check must note the following: In the Matter of: The Kroger Co., the docket number of this CAFO and the billing document number CERCLA-05-2011-0004 and BD# 2751130B004

67. Within 30 days after the effective date of this CAFO, Respondent must pay a \$21,600.00 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:

[for checks sent by regular U.S. postal service]

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

[for checks sent by express mail]

U.S. Bank
Government Lockbox 979077 U.S. EPA Fines and Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

The check must note the following: In the Matter of: The Kroger Co., the docket number of this CAFO and the billing document number EPCRA-05-2011-0006 and BD# 2751144E004

68. A transmittal letter, stating Respondent's name, In the Matter of: The Kroger Co., 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-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3511

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

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

69. The civil penalties required by this CAFO are not deductible for federal tax purposes.

70. If Respondent does not timely pay the civil penalties, or any stipulated penalties due under Paragraph 83 below, U.S. EPA may bring an action to collect any unpaid amounts with interest, handling charges, nonpayment penalties and the United States' enforcement expenses for the collection action. The validity, amount(s) and appropriateness of the civil penalty and/or stipulated penalties are not reviewable in a collection action.

71. 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.

Supplemental Environmental Project

72. Within 90 days of the effective date of this CAFO, Respondent must complete at the Facility a SEP designed to protect the environment or public health by decreasing the likelihood, and reducing the extent of, future releases from the refrigeration system at the Facility.

73. Respondent must complete the SEP by performing the following activities involving the refrigeration system at the Facility:

- Install an automatic shutoff valve to enable the rapid and automatic isolation of a portion of the refrigeration system in the event of a release or equipment failure
- Install eight remote ammonia sensors to allow for more effective monitoring of refrigerated areas of the Facility
- Between the condensing pressure and control pressure receiver, install a solenoid-type check valve designed to improve the operation and efficiency of the refrigeration system at the Facility
- Develop and install an algorithm that will interpret outdoor wet bulb and dry bulb temperatures and improve system efficiency

74. Respondent agrees to operate the installed equipment for a minimum of three years after installation.

75. Respondent must spend at least \$60,000 to purchase and install the equipment and to otherwise design and implement all activities necessary to perform the SEP.

76. Respondent certifies that it is not required to perform or develop the SEP by any law, regulation, grant, order, or agreement, or as injunctive relief as of the date it signs this CAFO. Respondent further certifies that it has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

77. U.S. EPA may inspect the Facility at any time to monitor Respondent's compliance with this CAFO's SEP requirements.

78. Within 30 days after completion of the SEP, Respondent must submit a SEP completion report to U.S. EPA. This report must contain the following information:

- a. A detailed description of the SEP as completed;
- b. An itemized list of costs of goods and services used to complete the SEP documented by copies of invoices, purchase orders, or canceled checks that specifically identify and itemize the individual costs of the goods and services; and
- c. A certification that Respondent has completed the SEP in compliance with this CAFO.

79. Respondent must submit all notices and reports required by this CAFO by first class mail to Ginger Jager of the Chemical Emergency Preparedness and Prevention Section at the address specified in Paragraph 68 above.

80. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

81. Following receipt of the SEP completion report described in Paragraph 78 above, U.S. EPA must notify Respondent in writing that:

- a. Respondent has satisfactorily completed the SEP and the SEP report;
- b. There are deficiencies in the SEP as completed or in the SEP report and U.S. EPA will give Respondent 30 days to correct the deficiencies. The parties may agree in writing to extend this 30 day period; or
- c. Respondent has not satisfactorily completed the SEP or the SEP report and U.S. EPA will seek stipulated penalties under Paragraphs 82 and 83.

82. If Respondent violates any requirement of this CAFO relating to the SEP,

Respondent must pay stipulated penalties to the United States as follows:

- a. Except as provided in subparagraph (b) immediately below, if the SEP has not been completed satisfactorily pursuant to this CAFO, Respondent shall pay a stipulated penalty to the United States in the amount of \$ 48,000.00;
- b. If the SEP is not completed in accordance with Paragraph 73, but U.S. EPA determines that Respondent: i) made good faith and timely efforts to complete the project; and ii) certifies, with supporting documentation, that Respondent spent at least 90 percent of the amount of money required to be spent was expended on the SEP, Respondent shall not be liable for any stipulated penalty;
- c. If the SEP is completed in accordance with Paragraph 73, but Respondent spent less than 90 percent of the amount of money required to be expended on the SEP, Respondent shall pay a stipulated penalty to the United States in the amount of \$ 12,000.00;
- d. If the SEP is completed in accordance with Paragraphs 73, and Respondent spent at least 90 percent of the amount of money required to be expended for the SEP, Respondent shall not be liable for any stipulated penalty; and
- e. For failure to timely submit the SEP completion report, Respondent shall pay a stipulated penalty as follows.

<u>Penalty Per Day</u>	<u>Period of Noncompliance</u>
\$ 100	1st through 14th day
\$ 250	15th through 30th day
\$ 500	31st day and beyond

These penalties will accrue from the date Respondent was required to meet each deadline, until it achieves compliance with the deadline.

83. Respondent must pay any stipulated penalties within 15 days of receiving U.S. EPA's written demand for the penalties. Respondent will use the method of payment

specified in Paragraphs 66-71 above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

84. Any public statement that Respondent makes referring to the SEP must include the following language, "Respondent undertook this project under the settlement of the United States Environmental Protection Agency's enforcement action against Respondent for violations of the Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right-to-Know Act."

85. Dispute Resolution

- a. Unless otherwise expressly provided for in this CAFO, the dispute resolution procedures of this Paragraph shall be the exclusive mechanism for resolving disputes arising under this CAFO. The Parties shall attempt to resolve any disagreements concerning this CAFO expeditiously and informally.
- b. If Respondent objects to any U.S. EPA action taken pursuant to this CAFO, Respondent shall notify U.S. EPA in writing of its objection(s) within 10 business days following Respondent's receipt of written notice from U.S. EPA of such action, unless the objection(s) has/have been resolved informally. U.S. EPA and Respondent shall have 14 business days from U.S. EPA's receipt of Respondent's written objection(s) to resolve the dispute (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of U.S. EPA. Such extension may be granted verbally but must be confirmed in writing to be effective.
- c. Any agreement reached by the Parties pursuant to this Paragraph shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this CAFO. If the Parties are unable to reach an agreement within the Negotiation Period, an U.S. EPA management official at the Branch Chief level or higher will issue a written decision. U.S. EPA's decision shall be incorporated into and become an enforceable part of this CAFO. Respondent's obligations under this CAFO shall not be tolled by submission of any objection for dispute resolution under this Paragraph.
- d. Following resolution of the dispute, as provided by this Paragraph, Respondent shall fulfill the requirement that was the subject of the dispute

in accordance with the agreement reached or with U.S. EPA's decision, whichever occurs. Respondent shall proceed in accordance with U.S. EPA's final decision regarding the matter in dispute, regardless of whether Respondent agrees with the decision. If Respondent does not agree to fulfill the requirement in accordance with U.S. EPA's final decision, U.S. EPA reserves the right in its sole discretion to seek enforcement of the decision, to seek stipulated penalties, and/or to seek any other appropriate relief.

86. Force Majeure If an event occurs which causes or may cause a delay in completing the SEP as required by this CAFO:
- a. Respondent must notify U.S. EPA in writing within 10 business days after learning of an event which caused or may cause a delay in completing the SEP. The notice must describe the anticipated length of the delay, its cause(s), Respondent's past and proposed actions to prevent or minimize the delay, and a schedule to carry out those actions. Respondent must take all reasonable actions to avoid or minimize any delay. If Respondent fails to notify U.S. EPA according to this Paragraph, Respondent will not receive an extension of time to complete the SEP.
 - b. If the parties agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, the parties will stipulate to an extension of time no longer than the period of delay.
 - c. If U.S. EPA does not agree that circumstances beyond the control of Respondent caused or may cause a delay in completing the SEP, U.S. EPA will notify Respondent in writing of its decision and any delays in completing the SEP will not be excused.
 - d. Respondent has the burden of proving that circumstances beyond its control caused or may cause a delay in completing the SEP. Increased costs for completing the SEP will not be a basis for an extension of time under subparagraph b, above. Delay in achieving an interim step will not necessarily justify or excuse delay in achieving subsequent steps.

87. Nothing in this CAFO is intended to nor will be construed to constitute U.S. EPA approval of the equipment or technology installed by Respondent in connection with the SEP under the terms of this CAFO.

88. For Federal income tax purposes, Respondent will neither capitalize into inventory or basis, nor deduct any costs or expenditures incurred in performing the SEP.

General Provisions

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

90. 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.

91. Respondent certifies that, to the best of its knowledge and belief, the Facility is presently in compliance with Section 103(a) of CERCLA, 42 U.S.C. § 9603(a), and Section 304 of EPCRA, 42 U.S.C. § 11004.

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

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

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

95. Each person signing this CAFO 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.

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

97. All notices or other correspondence sent from U.S. EPA to Respondent pursuant to this CAFO shall be sent to the following persons:

The Kroger Co.
1014 Vine Street
Cincinnati, Ohio 45202
Attn: Bob Kuhlmann

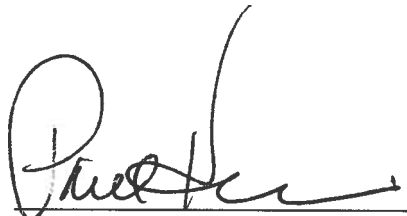
The Kroger Co.
1014 Vine Street
Cincinnati, Ohio 45202
Attn: Paul W. Parmele, Esq.

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

In the Matter of:
The Kroger Co.
Docket No.

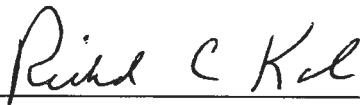
The Kroger Co., Respondent

12/9/10
Date


Name: Paul W Heldman
Title: Executive Vice President

U.S. Environmental Protection Agency, Complainant

12-16-10
Date


Richard C. Karl, Director
Superfund Division



In the Matter of:

The Kroger Co.

Docket No.

MM-05-2011-0002 and EPCRA-05-2011-0006 and CERCLA-05-2011-0004

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.

12-21-10

Date



Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency
Region 5

RECEIVED

JAN 04 2011

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:

The Kroger Co. Newark, Ohio

Docket No.

MM-05-2011-0002 + EPCRA-05-2011-0006 + CERCLA-05-2011-0004

Certificate of Service

I, Ginger Jager, certify that I hand delivered one original and one copy of the Consent Agreement and Final Order to the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, personally served a copy on the Regional Judicial Officer, and mailed one original by first-class, postage prepaid, certified mail, return receipt requested, to Paul W. Parmele, Esq., by placing them in the custody of the United States Postal Service addressed as follows:

Paul W. Parmele, Esq.
Legal Department
The Kroger Co.
1014 Vine Street
Cincinnati, Ohio 45202-1100

RECEIVED
JAN 04 2011
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

on the 4th day of January, 2011.

Ginger Jager

Ginger Jager
U.S. Environmental Protection Agency
Region 5