



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

In the Matter of:)
Birds Eye Foods, Inc.,) Docket Nos. MM-05-2018-0002
) CERCLA-05-2018-0005
) EPCRA-05-2018-0009
)
Respondent.)

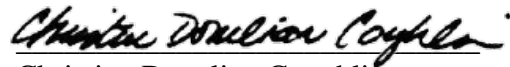
ORDER ON COMPLAINANT'S MOTION FOR A COURT RULING THAT THE ANSWER DOES NOT CONSTITUTE A MOTION TO DISMISS THE COMPLAINT

On June 13, 2018, the Chief of the Emergency Response Branch 1, Superfund Division, United States Environmental Protection Agency, Region 5 ("Complainant") initiated this proceeding by filing a Complaint against Birds Eye Foods, LLC ("Respondent") under Section 109(b) of the Comprehensive Environmental Response, Compensation and Liability Act, 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, 42 U.S.C. § 11045(b)(2). On July 16, 2018, Respondent filed an Answer, Affirmative Defenses and Request for Hearing ("Answer"). Notably, Respondent lists 12 alleged affirmative defenses in its Answer and then requests at the conclusion of its Answer that the Complaint be dismissed with prejudice. Answer at 10-12.

On July 25, 2018, Complainant filed a Motion for a Court Ruling that the Answer does not Constitute a Motion to Dismiss the Complaint ("Motion") and, in the alternative, a Response to the Answer which Requests the Court Dismiss the Complaint ("Response"), as well as a Memorandum ("Memo") in support. Complainant attached to these documents copies of emails exchanged between Respondent's counsel of record and Complainant's counsel of record on July 24, 2018. First noting that Respondent's counsel advised in that exchange that Respondent was not treating its Answer as a formal motion to dismiss at that time, Complainant proceeds to argue that the Answer does not satisfy the criteria for all motions set forth in the applicable procedural rule at 40 C.F.R. § 22.16(a) and thus does not constitute a motion to dismiss. Memo at 4-5 (citing Palm Harbor Homes, Inc., 2000 EPA ALJ LEXIS 66 (Order on Motion for Accelerated Decision, Request for Dismissal, and Motion to Amend Answer)). Alternatively, if Respondent's Answer is construed as containing a motion to dismiss, Complainant urges that it be denied, again because Respondent's alleged affirmative defenses and request for dismissal fail to satisfy the criteria set forth at 40 C.F.R. § 22.16(a). Memo at 5-6. In response, Respondent filed a letter on August 2, 2018, in which Respondent advises that it does not object to Complainant's Motion seeking a ruling that the Answer does not constitute a motion to dismiss.

For the reasons cited by Complainant, and given the absence of any objection from Respondent, I conclude that Respondent's Answer does not constitute a motion to dismiss. Accordingly, Complainant's Motion is hereby **GRANTED**. If Respondent intends to pursue dismissal of this matter, a request for that relief shall be made as a separately filed and served motion in accordance with the requirements of 40 C.F.R. §§ 22.5 and 22.16.

SO ORDERED.



Christine Donelian Coughlin
Administrative Law Judge

Dated: August 7, 2018
Washington, D.C.

In the Matter of *Birds Eye Foods, LLC*, Respondent.
Docket Nos. MM-05-2018-0002, CERCLA-05-2018-0005, EPCRA-05-2018-0009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for a Court Ruling that the Answer does not Constitute a Motion to Dismiss the Complaint**, dated August 7, 2018, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.



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Paralegal Specialist

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Dated: August 7, 2018
Washington, D.C.