

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:	)	Docket Nos.	MM-05-2018-0002
	)		CERCLA-05-2018-0005
Birds Eye Foods, Inc.,	)		EPCRA-05-2018-0009
)		
	)	Date:	31 August 2018
Respondent.)		

COMPLAINANT’S INITIAL PREHEARING EXCHANGE

In accordance with the Prehearing Order issued by this Honorable Court on July 20, 2018, Complainant, the Branch Chief, Emergency Response Branch 1, Superfund Division, Region 5, United States Environmental Protection Agency (“U.S. EPA,” “Complainant” or “Agency”), through her/his undersigned attorneys, hereby files the instant Complainant’s Initial Prehearing Exchange pursuant to Section 22.19 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”), codified at 40 C.F.R. Part 22, § 22.19.

COMPLAINANT’S WITNESS LIST

Fact Witnesses

James Entzminger
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Generally, James Entzminger may testify about his educational background and employment experience; his receipt and review of relevant documentary evidence (attached), and how that evidence supports the factual allegations set forth in the Complaint; and the determination of the civil penalty proposed in the complaint. More specifically, Mr. Entzminger may testify about his knowledge of the Respondent's refrigeration system (based on his review of records provided by Birds Eye Foods, LLC, and/or his experience with similar or identical refrigeration systems). Mr. Entzminger may testify that anhydrous ammonia is a hazardous chemical within the meaning of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) with a 100-pound reportable quantity, and that it also is an extremely hazardous substance within the meaning of the Emergency Planning and Community Right-to-Know Act (EPCRTKA) with a 100-pound reportable quantity.

Mr. Entzminger will testify about the issuance of requests for information to Birds Eye Foods, LLC, in January 2015 and August 2016, the receipt of responses to those requests for information, and about his review of those responses to the requests for information and documents provided with those responses, and the inferences he drew from the information contained in those documents and the corresponding narrative responses to the requests for information. He also may provide testimony to explain how the information provided by Birds Eye Foods, LLC, in response to the requests for information demonstrated the following facts.

July 2013 Anhydrous Ammonia Release

1. From July 3 – 19, 2013, Birds Eye Foods, LLC, released from its refrigeration system and into the atmosphere and environment 26,080 pounds of anhydrous ammonia.
2. On at least one-day July 3 – 19, 2013, Birds Eye Foods, LLC, released from its refrigeration system and into the atmosphere and environment at least 100 pounds of anhydrous ammonia.

3. On July 3, 2013, Birds Eye Foods, LLC, added to its refrigeration system 6,020 pounds of anhydrous ammonia.
4. After Birds Eye Foods, LLC's, July 3, 2013, addition to its refrigeration system of anhydrous ammonia its employees noticed that the level of anhydrous ammonia in its refrigeration system continued to decline.
5. No later than July 17, 2013, Birds Eye Foods, LLC, released from its refrigeration system and into the atmosphere and environment anhydrous ammonia, as admitted in its Response, dated September 14, 2016, to Complainant's Comprehensive Environmental Response, Compensation and Liability Act Section 104(e) Information Request to Complainant, dated August 15, 2016.
6. July 17 - 19, 2013, Birds Eye Foods, LLC's, employees reported anhydrous ammonia odors at its facility.
7. On July 19, 2013, the concentration of anhydrous ammonia released from Birds Eye Foods, LLC's, refrigeration system and into the atmosphere and the environment was greater than the meter reading of 400 ppm, as admitted in Birds Eye Foods, LLC, Response, dated September 14, 2016, to Complainant's Comprehensive Environmental Response, Compensation and Liability Act Section 104(e) Information Request, dated August 15, 2016.
8. Birds Eye Foods, LLC's, anhydrous ammonia release was to the atmosphere.
9. Birds Eye Foods, LLC's, anhydrous ammonia release was to the environment.
10. On July 19, 2013, Birds Eye Foods, LLC, found one of its pressure relief valves leaking anhydrous ammonia from its refrigeration system and into the atmosphere, replaced the valve, and stopped the anhydrous ammonia release, as admitted in its Response, dated September 14, 2016, to Complainant's Comprehensive Environmental Response, Compensation and Liability Act Section 104(e) Information Request, dated August 15, 2016.
11. At 1:30 p.m. (Central Time), on July 19, 2013, Birds Eye Foods, LLC, first admitted it released from its refrigeration system and into the atmosphere and environment anhydrous ammonia.
12. At 2:13 p.m. (Central Time), on July 19, 2013, Birds Eye Foods, LLC, reported to the Minnesota Duty Officer and indicated that on July 19, 2013, it discovered it released from

its refrigeration system and into the atmosphere and environment 3,000 – 5,000 pounds of anhydrous ammonia.

13. Birds Eye Foods, LLC, failed to immediately notify the Minnesota State Emergency Response Commission as required by Section 304(a) of the Emergency Planning and Community Right-to-Know Act.
14. At 2:24 p.m. (Central Time) on July 19, 2013, Birds Eye Foods, LLC, reported to the National Response Center and indicated that that on July 19, 2013, it discovered it released from its refrigeration system and into the environment an unknown quantity of anhydrous ammonia.
15. Birds Eye Foods, LLC, failed to immediately notify the National Response Center as required by Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act.
16. Birds Eye Foods, LLC, failed to provide the Minnesota State Emergency Response Commission, as soon as practicable, within 30 days, with a written follow-up report for its release from its refrigeration system and into the atmosphere and environment 3,000 – 5,000 pounds of anhydrous ammonia, as required by Section 304(c) of the Emergency Planning and Community Right to Know Act.
17. On July 24, 2013, Birds Eye Foods, LLC, added to its refrigeration system 11,380 pounds of anhydrous ammonia.
18. On July 25, 2013, Birds Eye Foods, LLC, added to its refrigeration system 8,680 pounds of anhydrous ammonia.

September 2014 Anhydrous Ammonia Release

19. At approximately 6:00 p.m. (Central Time), on September 20, 2014, a Birds Eye Foods, LLC, employee observed an anhydrous ammonia cloud at its facility.
20. On September 20, 2014, Birds Eye Foods, LLC, released from its refrigeration system and into the atmosphere and environment 1,640 pounds of anhydrous ammonia.
21. At 7:30 p.m. (Central Time), on September 20, 2014, Birds Eye Foods, LLC, notified the Minnesota State Emergency Response Commission it released from its refrigeration system and into the atmosphere and environment 1,640 pounds of anhydrous ammonia.

22. Birds Eye Foods, LLC, notification to the Minnesota State Emergency Response Commission was 1 hour, 30 minutes, after its knowledge of its release from its refrigeration system into the atmosphere and environment of 1,640 pounds of anhydrous ammonia.
23. At 1:22 a.m. (Central Time), on September 21, 2014, Birds Eye Foods, LLC, notified the National Response Center it released from its refrigeration system and into the atmosphere and environment 1,640 pounds of anhydrous ammonia.
24. Birds Eye Foods, LLC's, notification to the National Response Center was 6 hours, 22 minutes, after its knowledge of its release from its refrigeration system and into the atmosphere and environment of 1,640 pounds of anhydrous ammonia.
25. As of June 13, 2018, Birds Eye Foods, LLC, failed to, as soon as practicable, within 30 days, submit to the Minnesota State Emergency Response Commission its written follow-up report for its release from its refrigeration system into the atmosphere and environment of 1,640 pounds of anhydrous ammonia.

Mr. Entzminger also may testify about his use of the ALOHA (Areal Locations of Hazardous Atmospheres) air dispersion modeling program (a computer program designed to model chemical releases for emergency responders and planners) in order to estimate the likely extent of dispersion of anhydrous ammonia caused by the releases at issue in the Complaint. He may testify that ALOHA is part of the CAMEO® software suite, software programs developed jointly by the Emergency Response Division within the National Oceanic and Atmospheric Administration (NOAA) in collaboration with the Office of Emergency Management of the U.S. Environmental Protection Agency. He may testify that ALOHA's primary purpose is to provide emergency response personnel with estimates of the spatial extent of some common hazards associated with chemical spills, and to provide estimates of the spatial extent of some of the hazards associated with the short-term accidental release of volatile and flammable chemicals.

Mr. Entzminger also may testify about the calculation of the civil penalty proposed in the complaint in this matter, and will explain why the proposed civil penalty of \$664,190.00 is

appropriate under the relevant and applicable U.S. EPA Penalty Policy, as well as all pertinent statutory factors. In connection with the penalty proposed in the complaint, Mr. Entzminger also may testify about his review of the Respondent's answers to a January 14, 2015, Information Request (which Response was dated February 19, 2015), in which Birds Eye Foods, LLC, identified its annual sales as \$941 million, and represented that it employed 1,963 employees. In addition, Mr. Entzminger may testify about previously reported releases of hazardous substances from the Respondent's facility, as documented in government databases (printouts of which are attached).

John Joseph Taschuk

Owner
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John Taschuk may testify about his former employment as a Safety Engineer at Birds Eye Foods, LLC. He may testify about his knowledge of the Respondent's refrigeration system, and about his investigation into and knowledge of the release of anhydrous ammonia from the Respondent's refrigeration system that occurred in July 2013. He may testify about his receipt of an Information Request from U.S. EPA in January 2015, and about his efforts to respond to that Information Request, as well as about the final response dated February 19, 2015, and documents provided to U.S. EPA with that response. Mr. Taschuk may testify about email correspondence (attached) or other communications between himself and the Respondent's management or supervisory personnel regarding the July 2013 ammonia release.

Mr. Taschuk may testify that, based on his investigation, he determined that the release of anhydrous ammonia from Birds Eye Foods, LLC's refrigeration system, which occurred between

July 3 and July 19, 2013, totaled approximately 26,080 pounds of anhydrous ammonia, and that the release on at least one day during this period would have equaled or exceeded 100 pounds of anhydrous ammonia. He may testify that, on July 3, 2013, Birds Eye Foods, LLC, added 6,020 pounds of anhydrous ammonia to its refrigeration system, and that after this addition of ammonia, the Respondent's employees noticed that the level of anhydrous ammonia in its refrigeration system continued to decline. He may testify that releases of anhydrous ammonia continued through July 17, 2013, and that employees of Birds Eye Foods, LLC, reported anhydrous ammonia odors at its facility between July 17 and July 19, 2013. Mr. Taschuk also may testify that, on July 19, 2013, the concentration of anhydrous ammonia released from Birds Eye Foods, LLC's refrigeration system and into the atmosphere and the environment was greater than the meter reading of 400 ppm, as admitted in Birds Eye Foods, LLC, Response, dated September 14, 2016, to Complainant's Information Request dated August 15, 2016.

Furthermore, Mr. Taschuk may testify that, on July 19, 2013, employees of Birds Eye Foods, LLC, found one of its pressure relief valves leaking anhydrous ammonia from its refrigeration system and into the atmosphere, replaced the valve, and stopped the anhydrous ammonia release. He also may testify that Birds Eye Foods, LLC, first admitted that, at 1:30 p.m. (Central Time), on July 19, 2013, it had released anhydrous ammonia from its refrigeration system and into the atmosphere and environment; and that, at 2:13 p.m. (Central Time), on July 19, 2013, Birds Eye Foods, LLC, reported to the Minnesota Duty Officer and indicated that on July 19, 2013, the company had discovered that it had released from its refrigeration system and into the atmosphere and environment 3,000 to 5,000 pounds of anhydrous ammonia.

Mr. Taschuk also may testify about information and records which he provided to U.S. EPA regarding the releases of ammonia from the Respondent's refrigeration system, his efforts to report such releases, and the response he received from management in Birds Eye Foods, LLC.

David Morrison

(Formerly with Minnesota Pollution Control Agency)
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Generally, David Morrison may be called as a rebuttal witness to testify as to his conversations with representatives of Birds Eye Foods concerning the July 19, 2013, release of anhydrous ammonia from the Respondent's refrigeration system, and about the reasons for certain statements which he made during those conversations.

Expert Witnesses

Greg Chomycia

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Generally, Greg Chomycia may be called in Complainant's case-in-chief and/or as a rebuttal witness to testify as an expert witness. He may testify about his educational background, employment experience, his knowledge of refrigeration systems, his review of relevant documentary evidence (attached), his knowledge and understanding of the Respondent's particular

refrigeration system, and how the evidence obtained in this case demonstrates that Birds Eye Foods, LLC, released anhydrous ammonia from its refrigeration system on the dates and in the amounts alleged in the Complaint. More specifically, Mr. Chomycia may testify that, based on his review of documents provided by the Respondent, Birds Eye Foods, LLC, released from its refrigeration system and into the atmosphere and environment 26,080 pounds of anhydrous ammonia between July 3 and July 19, 2013; that, on at least one-day between July 3 and July 19, 2013, Birds Eye Foods, LLC, released from its refrigeration system and into the atmosphere and environment at least 100 pounds of anhydrous ammonia; that on July 3, 2013, Birds Eye Foods, LLC, added to its refrigeration system 6,020 pounds of anhydrous ammonia, and after this addition of anhydrous ammonia, employees noticed that the level of anhydrous ammonia in its refrigeration system continued to decline; that between July 17 and July 19, 2013, Respondent's employees reported anhydrous ammonia odors at its facility; that no later than July 17, 2013, Birds Eye Foods, LLC, released from its refrigeration system anhydrous ammonia (as admitted in its September 14, 2016, Response to Complainant's Information Request dated August 15, 2016); that on July 19, 2013, the concentration of anhydrous ammonia released into the atmosphere and the environment was greater than the meter reading of 400 ppm, as admitted in Birds Eye Foods, LLC's Response to Complainant's Information Request dated August 15, 2016; that on July 19, 2013, employees of Birds Eye Foods, LLC, found one of the pressure relief valves in the refrigeration system leaking anhydrous ammonia from the refrigeration system; that after Respondent replaced the valve, the releases of anhydrous ammonia stopped (as admitted in its September 14, 2016, Response to Complainant's Information Request dated August 15, 2016).

Mr. Chomycia also may testify that, based on his review of documents provided by the Respondent, and also based on his experience and knowledge of anhydrous ammonia, the releases of anhydrous ammonia from Respondent's refrigeration system within a 24-hour period would have exceeded the reportable quantity of 100 lbs., and that the releases were to the atmosphere and the environment.

Lawrence Aleksandrich

Compliance Engineer
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Generally, Lawrence Aleksandrich may be called in Complainant's case-in-chief and/or as a rebuttal witness to testify as an expert witness. He may testify about his educational background, employment experience, his experience with and knowledge of ammonia refrigeration systems, his review of relevant documentary evidence (attached), and his understanding and expert opinions as to the nature and operation of the Respondent's refrigeration system. In addition, he may offer an expert opinion as to whether the releases of anhydrous ammonia from the Respondent's refrigeration system that occurred between July 3, and July 19, 2013, most likely were caused by a malfunctioning pressure relief valve, and as to whether at least 100 pounds of anhydrous ammonia were released in any 24-hour period from the Respondent's refrigeration system during the period between July 3 and July 19, 2013. Mr. Aleksandrich may testify as to when the Respondent should have known that a release of more than 100 lbs. of anhydrous ammonia within a 24-hour period had occurred, and he also may testify as to whether the releases of anhydrous ammonia were to the atmosphere and the environment. Complainant respectfully reserves the right

to amend this description of Mr. Aleksandrach's potential testimony based on Complainant's receipt of additional information, including but not limited to any information which the Respondent may supply in its prehearing exchange or supplements thereto.

COMPLAINANT'S LIST OF EXHIBITS

1. LaRoche Industries, Inc., Material Safety Data Sheet # 4001, Section 1: Chemical Product and Company Identification, Chemical Name: Anhydrous Ammonia. (CX 1, Bates Stamp Nos. 1-2).
2. U.S. EPA 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. (CX 2, Bates Stamp Nos. 2-36).
3. U.S. EPA Complaint to Birds Eye Foods, dated July 30, 2008. (CX 3, Bates Stamp Nos. 37-48).
4. U.S. EPA & Birds Eye Foods, Consent Agreement and Final Order, dated November 3, 2008. (CX 4, Bates Stamp Nos. 49-56).
5. State of Minnesota, Minnesota Duty Officer, Incident Report, for Birds Eye Foods, dated March 28, 2012, 6:05 p.m. (Central Time). (CX 5, Bates Stamp Nos. 57-58).
6. National Response Center, Incident Report # 1007157, Incident Description, for Birds Eye Foods, dated March 28, 2012, 8:57 p.m. (Eastern Time). (CX 6, Bates Stamp Nos. 59-64).
7. Birds Eye Foods, Process Safety & Risk Management – Incident Investigation Form, Incident Number: # 125163, dated April 8, 2012. (CX 7, Bates Stamp Nos. 65-70).
8. Birds Eye Foods, Letter to Kevin Leuer, Minnesota Emergency Response Commission, dated April 3, 2012. (CX 8, Bates Stamp Nos. 71-72).
9. U.S. EPA Request for Information to Birds Eye Foods, Inc., dated April 20, 2012. (CX 9, Bates Stamp Nos. 73-84).
10. Birds Eye Foods, LLC, Response to U.S. EPA Request for Information, dated May 15, 2012. (CX 10, Bates Stamp Nos. 85-138 and 141-142).
11. Hawkins, Inc., Memorandum of Sale of Anhydrous Ammonia to Pinnacle Foods, dated June 25, 2012. (CX 11, Bates Stamp Nos. 139-140).

12. TRI Pollution Prevention Report for Birds Eye Foods LLC and Ammonia, 2008-2013. (CX 12, Bates Stamp Nos. 143-190).
13. Birds Eye Foods, LLC, Tier Emergency and Hazardous Chemical Inventory Reporting Periods 2010-2016. (CX 13, Bates Stamp Nos. 191-252).
14. Birds Eye Foods, LLC, Form R, 2011 and 2013. (CX 14, Bates Stamp Nos. 253-268).
15. Hawkins, Inc., Memorandum of Sale of Anhydrous Ammonia to Pinnacle Foods, dated July 3, 2013. (CX 15, Bates Stamp Nos. 269-270).
16. Birds Eye Foods, LLC, E-Mail, dated July 4, 2013. (CX 16, Bates Stamp Nos. 271-272).
17. Spill Summary Report for NRC Report #1054446, for Birds Eye Foods, dated 19 July 2013, 3:24 p.m. (Eastern Time). (CX 17, Bates Stamp Nos. 273-276).
18. State of Minnesota, Minnesota Duty Officer, Incident Report, for Birds Eye Foods, dated July 19, 2013, 2:13 p.m. (Central). (CX 18, Bates Stamp Nos. 277-278).
19. NOAA's National Ocean Service, Office of Response and Restoration, ALOHA, How ALOHA Works. (CX 19, Bates Stamp Nos. 279-280).
20. U.S. EPA ALOHA Model of Birds Eye Foods Ammonia Release, July 2013. (CX 20, Bates Stamp Nos. 281-320).
21. Birds Eye Foods, Process Safety & Risk Management – Incident Investigation Form, Incident Number: # 135495, dated July 22, 2013. (CX 21, Bates Stamp Nos. 321-326).
22. Birds Eye Foods, LLC, E-Mail, dated July 22, 2013. (CX 22, Bates Stamp Nos. 327-328).
23. Airgas Delivery Order, dated July 24, 2013 of 11,380 gallons of Anhydrous Ammonia. (CX 23, Bates Stamp No. 329).
24. Airgas Delivery Order, dated July 25, 2013 of 8,680 gallons of Anhydrous Ammonia. (CX 24, Bates Stamp No. 330).
25. U.S. EPA Graphs of Pinnacle Foods, Refrigeration System Receiver Levels, dated June – August 2013. (CX 25, Bates Stamp Nos. 331-334).
26. Pinnacle Foods E-Mails, dated June 27, 2014. (CX 26, Bates Stamp Nos. 335-342).
27. Airgas Delivery Order to Birds Eye Foods, dated July 24, 2014, of 8,000 gallons of Anhydrous Ammonia. (CX 27, Bates Stamp Nos. 343-344).

28. State of Minnesota, Minnesota Duty Officer, Incident Report, for Birds Eye Foods, dated September 20, 2014, 7:40 p.m. (Central Time). (CX 28, Bates Stamp Nos. 345-346).
29. Environmental Protection Agency, Emergency Response Notification System, ERNS # 8035624 IRIS/NRC # 1095990, Incident Description for Birds Eye Foods, dated 21 September 2014, 1:22 a.m. (Eastern Time). (CX 29, Bates Stamp Nos. 347-350).
30. U.S. EPA Request for Information to Birds Eye Foods, dated January 14, 2015. (CX 30, Bates Stamp Nos. 351-362).
31. Pinnacle Foods E-Mails, dated January 29 & 23, 2015. (CX 31, Bates Stamp Nos. 363-364).
32. Birds Eye Foods Response, dated 19 February 2015, to U.S. EPA Request for Information to Birds Eye Foods, dated January 14, 2015. (CX 32, Bates Stamp Nos. 365-518).
33. Birds Eye Foods LLC, Tier II Emergency and Hazardous Chemical Inventory, Reporting Period From January 1, 2014 to December 31, 2014, dated February 28, 2015. (CX 33, Bates Stamp Nos. 519-524).
34. Birds Eye Foods (Tom Timm), E-Mail, dated March 11, 2015, to Pablo E. Cussatti, Subject: John Taschuk. (CX 34, Bates Stamp Nos. 525-526).
35. U.S. EPA Data for Birds Eye Foods LLC – Waseca Plant, EPA ID 1000 0005 8046, dated March 15, 2015. (CX 35, Bates Stamp Nos. 527-546).
36. Birds Eye Foods, Human Resources, Letter, John Taschuk Termination, dated March 16, 2015. (CX 36, Bates Stamp Nos. 547-548).
37. Pinnacle Foods – 2014 Performance Review Form for John Joseph Taschuk, dated March 19, 2015. (CX 37, Bates Stamp Nos. 549-558).
38. U.S. EPA Conservation Record with Steve Tomlyanovich and John Taschuk, dated May 15, 2015. (CX 38, Bates Stamp Nos. 559-560).
39. U.S. EPA Request for Information to Birds Eye Foods, dated August 15, 2016. (CX 39, Bates Stamp Nos. 561-574).
40. U.S. Department of Labor, Complaint Statement, John J. Taschuk, dated 2 October 2015. (CX 40, Bates Stamp Nos. 575-578).
41. Birds Eye Foods Response, dated September 14, 2016, to U.S. EPA Request for Information to Birds Eye Foods, dated August 15, 2016. (CX 41, Bates Stamp Nos. 579-872).

42. U.S. Postal Service, Certified Mail Receipts, dated June 2018, for U.S. EPA Complaint to Birds Eye Foods, LLC. (CX 42, Bates Stamp Nos. 873-874).
43. Larry Aleksandrich, Expert Witness for Complainant, Resume/Curriculum Vitae. (CX 43, Bates Stamp Nos. 875-880).
44. U.S. EPA ALOHA Model of Birds Eye Foods Ammonia Release, September 20, 2014. (CX 44, Bates Stamp Nos. 881-884).

REQUIRED TIME TO PRESENT COMPLAINANT'S CASE

Complainant will require approximately one (1) to (2) days to present its case-in-chief.

PROOF OF SERVICE OF THE COMPLAINT

On June 18, 2018, CT Corporation System, Inc., Registered Agent for Service of Process for Birds Eye Foods, LLC, received the Complaint. See U.S. Postal Service Certified Mail Receipts, signed and dated by CT Corporation System, Inc., dated June 18, 2018 (CX 42, Bates Stamp Nos. 873-874).

EXPLANATION OF FACTUAL AND/OR LEGAL BASES FOR ALLEGATIONS DENIED IN RESPONDENT'S ANSWER

ALLEGATION DENIED: Par. 24. Between June 21 and July 19, 2013, Respondent spilled, leaked, emitted, discharged, or allowed to escape or leach, into the ambient air, approximately 34,000 pounds of Ammonia CAS# 7664-41-7.

FACTUAL / LEGAL BASES FOR ALLEGATION: The allegation in Paragraph 24 of the Complaint is based on the following evidence: Invoices listed as Attachment 37 to Birds Eye Foods' Response, dated September 14, 2016, to CERCLA Section 104(e) Information Request dated August 15, 2016 (CX 41, Bates Stamp Nos. 579-872); Sales Order No. 1715561, from Hawkins, Inc., dated July 3, 2013 (CX 15), listing 6,020 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; a delivery

order from Airgas, dated July 24, 2013 (CX 23), listing 11,380 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; and a delivery order from Airgas, dated July 25, 2013 (CX 24), listing 8,680 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system. These records demonstrate that substantial quantities of anhydrous ammonia were being lost from the Respondent's refrigeration system during the relevant time period.

ALLEGATION DENIED: Par. 25. Between June 21 and July 19, 2013, Respondent spilled, leaked, emitted, discharged, or allowed to escape or leach, into the ambient air, 1,001 pounds of Ammonia CAS# 7664-41-7 during at least one 24-hour.

FACTUAL / LEGAL BASES FOR ALLEGATION: The allegation in Paragraph 25 of the Complaint is based on the following evidence: Invoices listed as Attachment 37 as provided in Birds Eye Foods' Response, dated September 14, 2016, to Complainant's CERCLA Section 104(e) Information Request dated August 15, 2016 (CX 41); Sales Order No. 1715561, from Hawkins, Inc., dated July 3, 2013 (CX 15), listing 6,020 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; a delivery order from Airgas, dated July 24, 2013 (CX 23), listing 11,380 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; and a delivery order from Airgas, dated July 25, 2013 (CX 24), listing 8,680 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system. These records, together with statements in Respondent's narrative responses to the information requests which indicate that its representatives noticed (or reasonably should have noticed) that the refrigeration

system was losing ammonia even after adding these quantities of anhydrous ammonia to the system, demonstrate that at least 1,001 pounds of ammonia would have been released in at least one 24-hour period.

ALLEGATION DENIED: Par. 26. Therefore, Respondent “released” Ammonia CAS# 7664-41-7 (Release 1) as that term was defined under Section 101(22) of CERCLA, 41 U.S.C. § 9601(22).

FACTUAL / LEGAL BASES FOR ALLEGATION: The allegation in Paragraph 26 of the Complaint is based on the following: CERCLA defines the term “Environment” as (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States. 42 U.S.C. § 9601(8). CERCLA defines the term “Release” to include any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. 42 U.S.C. § 9601(22); 40 C.F.R. Part 302.3.

Based on documentary evidence provided by the Respondent, there was a release to the environment within the meaning of CERCLA and its implementing regulations. The evidence supporting this conclusion includes the following: Invoices listed as Attachment 37 to Birds Eye Foods’ Response, dated September 14, 2016, to Complainant’s CERCLA Section 104(e) Information Request dated August 15, 2016 (CX 41); Sales Order No. 1715561, from Hawkins,

Inc., dated July 3, 2013 (CX 15), listing 6,020 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; a delivery order from Airgas, dated July 24, 2013 (CX 23), listing 11,380 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; and a delivery order from Airgas, dated July 25, 2013 (CX 24), listing 8,680 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system.

Furthermore, the Birds Eye Foods, Waseca, Minnesota 56093, Log Sheet, presenting receiver levels of anhydrous ammonia, which was provided by the Respondent in response to the information requests (see CX 41), listed the amount of anhydrous ammonia (reported as a height) that was in the refrigeration system. The lowest amount of anhydrous ammonia in the refrigeration system's receiver on July 1, 2013, was 12.5 inches and the highest was 26.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 2, 2013, was 9.5 inches and the highest was 25.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 3, 2013, was 10.0 inches and the highest was 27.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 4, 2013, was 26.5 inches and the highest was 30.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 5, 2013, was 15.5 inches and the highest was 76.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 6, 2013, was 12.0 inches and the highest was 21.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 7, 2013, was 15.0 inches and the highest was 30.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 8, 2013, was 12.5 inches and the highest was 30.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 9, 2013, was 11.5 inches and the highest was 30.5 inches. The lowest amount of anhydrous

ammonia in the receiver on July 10, 2013, was 12.0 inches and the highest was 28.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 11, 2013, was 10.5 inches and the highest was 26.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 12, 2013, was 12.0 inches and the highest was 26.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 13, 2013, was 11.0 inches and the highest was 19.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 14, 2013, was 11.0 inches and the highest was 25.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 15, 2013, was 9.0 inches and the highest was 24.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 16, 2013, was 11.0 inches and the highest was 20.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 17, 2013, was 9.0 inches and the highest was 23.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 18, 2013, was 9.0 inches and the highest was 12.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 19, 2013, was 8.0 inches and the highest was 11.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 20, 2013, was 9.0 inches and the highest was 12.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 21, 2013, was 9.0 inches and the highest was 18.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 22, 2013, was 8.5 inches and the highest was 16.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 23, 2013, was 8.0 inches and the highest was 23.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 24, 2013, was 22.0 inches and the highest was 34.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 25, 2013, was 39.5 inches and the highest was 42.0 inches. CX 41, Bates Stamp Nos. 601-701. The logs were provided by Birds Eye Foods and demonstrate that the

amount of anhydrous ammonia that was in the system, reported as a height, continued to decline during July 2013 until anhydrous ammonia was added to the refrigeration system on July 24 and 25, 2013.

ALLEGATION DENIED: Par. 27. Therefore, Respondent “released” Ammonia CAS# 7664-41-7 (Release 1) as that term was defined under Section 329(8) of EPCRA, 42 U.S.C. § 11049(8).

FACTUAL / LEGAL BASES FOR ALLEGATION: The Emergency Planning and Community Right-to-Know Act (EPCRTKA) and its implementing regulations define “Environment” to include water, air, and land and the interrelationship that exists among and between water, air, and land and all living things. 42 U.S.C. § 11049(2); 40 C.F.R. Part 355.61. EPCRTKA and its implementing regulations also define “Release” as any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles) of any hazardous chemical, EHS, or CERCLA hazardous substance. 42 U.S.C. § 11049(8); 40 C.F.R. Part 355.61.

As explained above, Birds Eye Foods’ September 2016 Response to Complainant’s CERCLA Section 104(e) Information Request dated August 15, 2016, including documents provided by the Respondent, supplied the evidence proving that a release of anhydrous ammonia to the environment within the meaning of EPCRTKA (as well as a “release” within the meaning of CERCLA) occurred.

ALLEGATION DENIED: Par. 28. Respondent's Release 1 migrated beyond the facility's boundaries.

FACTUAL / LEGAL BASES FOR ALLEGATION: EPCRTKA defines the term "Facility" as all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person (or by any person that controls, is controlled by, or under common control with, such person). *Facility* includes manmade structures, as well as all-natural structures in which chemicals are purposefully placed or removed through human means such that it functions as a containment structure for human use. For purposes of emergency release notification, the term includes motor vehicles, rolling stock, and aircraft. 42 U.S.C. § 11049(4); 40 C.F.R. Part 355.61.

U.S. EPA conducted Aerial Locations of Hazardous Atmospheres (ALOHA) air dispersion models demonstrating, based on weather conditions, where an anhydrous ammonia release would travel based on concentration, for the period of July 4-19, 2013 (CX 20, Bates Stamp Nos. 281-320). The results of the modeling (attached) support Complainant's conclusion that the release migrated beyond the boundaries of the Respondent's facility.

Moreover, Birds Bye Foods' September 14, 2016, Response to the August 15, 2016, Information Request admitted in Response #20 that "The vapor was released into the atmosphere."

ALLEGATION DENIED: Par. 29. Respondent's Release 1 was likely to affect Minnesota.

FACTUAL / LEGAL BASES FOR ALLEGATION: U.S. EPA performed ALOHA air dispersion modeling for the period of July 4-19, 2013 (CX 20, Bates Stamp Nos. 281-320),

which demonstrated, based on weather conditions, where an anhydrous ammonia release would travel based on concentration. The results of this modeling demonstrated that the anhydrous ammonia release at issue would have traveled beyond the Birds Eye Foods facility's boundaries to other areas within the State of Minnesota. EPCRTKA regulations (40 C.F.R. Part 355.42(a)) provide that "You must provide the immediate emergency release notification information and the written follow-up notification to:...(2) The SERC of any State likely to be affected by the release."

ALLEGATION DENIED: Par. 30. Respondent had knowledge of Release 1 as it occurred.

FACTUAL / LEGAL BASES FOR ALLEGATION: Birds Eye Foods' Response to Complainant's CERCLA Section 104(e) Information Request dated August 15, 2016 (CX 41), included the following records demonstrating that the Respondent reasonably should have known that a release of anhydrous ammonia in excess of the 100 lbs. reportable quantity had occurred: Sales Order No. 1715561, from Hawkins, Inc., dated July 3, 2013 (CX 15), listing 6,020 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; a delivery order from Airgas, dated July 24, 2013 (CX 23), listing 11,380 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system; and a delivery order from Airgas, dated July 25, 2013 (CX 24), listing 8,680 pounds of anhydrous ammonia delivered and placed into Birds Eye Foods, LLC's ammonia refrigeration system. These records, together with statements in Respondent's narrative response to the information requests which indicate that its representatives reasonably should have noticed that the refrigeration system was losing ammonia even after adding these quantities

of anhydrous ammonia to the system, demonstrate that the Respondent should have been aware that, based on the magnitude of anhydrous ammonia which needed to be replaced, one or more releases of anhydrous ammonia in excess of the 100 lbs. reportable quantity had occurred.

Furthermore, Birds Eye Foods' September 14, 2016, Response to the August 15, 2016, Information Request (CX 41), included, in Response number 6, the following statement: "The release related to the 7/19/13 event was due to a leaking 1 inch safety valve on compressor #20 but could have been sporadically leaking with reports of odors that could not be found." In Response #18, Birds Eye Foods stated: "*A portable ammonia detector was used and vapor found to be coming out of stack #10. It was further investigated to determine that it was the relief valve on compressor #20 that was leaking. Several compressors discharge into the header leading to stack #10. Since compressor #20 has a dual relief valve system the leaking valve was taken offline and the vent stack was re-checked with no further Ammonia leaks detected.*" Response #25 stated "*The release related to the 7/19/13 event was due to a leaking 1" safety valve on compressor #20 that was determined to have started on July 7/17/13 but could have been sporadically leaking for a couple of weeks before that based on decreasing receiver levels and reports of odors that could not be found.*" In response to the instruction, "Explain how you determined the onset and mitigation of the release and what documents or information you relied on to make your determination," the Respondent stated, "The compressor room staff received a report of an odor of Ammonia." Finally, Birds Eye Foods' Response #40 stated that, at "1:30 PM" Respondent had knowledge of an ammonia release from the facility. These statements indicate that the Respondent had constructive knowledge, if not actual knowledge, of a release in excess of the reportable quantity.

Finally, the refrigeration system receiver logs which listed the amount of anhydrous ammonia in the system (in terms of a height) further prove that the Respondent legally had knowledge of at least one release of anhydrous ammonia in excess of the reportable quantity during the time period alleged in the Complaint. The lowest amount of anhydrous ammonia in the receiver on July 1, 2013, was 12.5 inches and the highest was 26.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 2, 2013, was 9.5 inches and the highest was 25.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 3, 2013, was 10.0 inches and the highest was 27.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 4, 2013, was 26.5 inches and the highest was 30.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 5, 2013, was 15.5 inches and the highest was 76.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 6, 2013, was 12.0 inches and the highest was 21.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 7, 2013, was 15.0 inches and the highest was 30.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 8, 2013, was 12.5 inches and the highest was 30.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 9, 2013, was 11.5 inches and the highest was 30.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 10, 2013, was 12.0 inches and the highest was 28.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 11, 2013, was 10.5 inches and the highest was 26.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 12, 2013, was 12.0 inches and the highest was 26.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 13, 2013, was 11.0 inches and the highest was 19.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 14, 2013, was 11.0 inches and the highest was

25.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 15, 2013, was 9.0 inches and the highest was 24.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 16, 2013, was 11.0 inches and the highest was 20.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 17, 2013, was 9.0 inches and the highest was 23.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 18, 2013, was 9.0 inches and the highest was 12.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 19, 2013, was 8.0 inches and the highest was 11.5 inches. The lowest amount of anhydrous ammonia in the receiver on July 20, 2013, was 9.0 inches and the highest was 12.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 21, 2013, was 9.0 inches and the highest was 18.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 22, 2013, was 8.5 inches and the highest was 16.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 23, 2013, was 8.0 inches and the highest was 23.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 24, 2013, was 22.0 inches and the highest was 34.0 inches. The lowest amount of anhydrous ammonia in the receiver on July 25, 2013, was 39.5 inches and the highest was 42.0 inches. Even a cursory review of any of these receiver logs would have alerted the Respondent to the fact that significant quantities of anhydrous ammonia were being lost from the refrigeration system. See also CX 25, Bates Stamp Nos. 331-334 (graphs prepared by U.S. EPA, summarizing data from receiver level logs).

ALLEGATION DENIED: Par. 33. Respondent failed to provide the Minnesota SERC with written follow-up emergency notice of Release 1 as of September 14, 2016.

FACTUAL / LEGAL BASES FOR ALLEGATION: In its September 14, 2016, Response to the CERCLA Section 104(e) Information Request dated August 15, 2016 (CX 41), specifically in Response #45, Respondent answered “No” in response to an inquiry as to whether a written follow-up emergency notice had been furnished to the Minnesota SERC.

ALLEGATION DENIED: Par. 37. Respondent’s Release 2 migrated beyond the facility’s boundaries.

FACTUAL / LEGAL BASES FOR ALLEGATION: EPCRTKA and its implementing regulations define “Facility” as all buildings, equipment, structures, and other stationary items that are located on a single site or on contiguous or adjacent sites and that are owned or operated by the same person (or by any person that controls, is controlled by, or under common control with, such person). *Facility* includes manmade structures, as well as all-natural structures in which chemicals are purposefully placed or removed through human means such that it functions as a containment structure for human use. For purposes of emergency release notification, the term includes motor vehicles, rolling stock, and aircraft. 42 U.S.C. § 11049(4); 40 C.F.R. Part 355.61

ALLEGATION DENIED: Par. 38. Respondent’s Release 2 was likely to affect Minnesota.

FACTUAL / LEGAL BASES FOR ALLEGATION: U.S. EPA performed ALOHA air dispersion modeling for the September 20, 2014, release, to determine (based on weather conditions) where an anhydrous ammonia release would travel based on concentration. The results of this modeling demonstrated that the September 20, 2014, release would have traveled

past the boundaries of the Birds Eye Foods facility to other areas of the State of Minnesota. See CX 44 (ALOHA modeling results for September 20, 2014, ammonia release).

EPCRTKA regulations (40 C.F.R. Part 355.42(a)) provide that “You must provide the immediate emergency release notification information and the written follow-up notification to:...(2) The SERC of any State likely to be affected by the release.”

ALLEGATION DENIED: Par. 39. At or about 6:00 p.m. (Central), September 20, 2014, Respondent had knowledge of Release 2.

FACTUAL / LEGAL BASES FOR ALLEGATION: Complainant issued a CERCLA Section 104(e) Information Request to Respondent dated January 14, 2015 (CX 30, Bates Stamp Nos. 351-362). Respondent’s Response to the January 14, 2015, Information request, dated February 19, 2015 (CX 32, Bates Stamp Nos. 365-518), admitted, in Response #45, that there was a release of anhydrous ammonia from the Birds Eye Foods facility on “20 September 2014 at approximately 1800 hours.” In Response #47, Birds Eye Foods stated as follows: *“Straight line winds struck the facility at approximately 1800 hours on 20 September 2014. Personnel reported to the severe weather shelters and electricity was lost. When winds subsided, Maintenance and Compressor Room personnel inspected the facility for integrity. One personnel reported over the radio the smell of ammonia. Area inspection was increased to check outside the building and on the roof. A vapor cloud was observed in the heavy rain from a maintenance person, notification made to the Compressor Room, and isolation of the line began. Due to the release, the Plant Manager thought it prudent to call the Minnesota Duty Officer (circa 1930 hours) and then call the EH&S Manager in to work with the site personnel to see if ammonia RQ was exceeded.*

Power was lost to the City of Waseca and the facility. Due to power lines being down to the facility, electricity was not restored until approximately 0045 hours on 21 September 2014. Only emergency power from the site generator for our lift station, and emergency lights were available. Our 88K pound ammonia system has nine subdivisions where ammonia in the vicinity can be contained. Upon power restoration, the High Pressure Receiver (HPR) did not indicate a loss because all systems were not brought online, and the challenged line was isolated. The challenged line was identified after the hail and heavy rain subsided. The Compressor Room personnel and EH&S staff estimated pipe content while descending the roof, called the National Response Center (circa 0100 hours 21 September 2014), and informed the Plant Manager. Work started Sunday and by Monday, the damaged line was repaired. This allowed ammonia to circulate in the entire system. It was at this time that the HPR indicated a 1-2% lower level than pre-storm. A professional firm was then contacted to calculate our loss.”

Given the magnitude of the release (1,640 lbs.), which Respondent admits in its Answer to the Complaint (see Complaint, Par. 34, and Answer, Par. 34), and the fact that Respondent’s employees observed a “vapor cloud” of ammonia gas, it is Complainant’s contention that the Respondent reasonably should have known that a release in excess of the 100 lbs. reportable quantity had occurred, and that Respondent had this knowledge at the time or shortly after the release occurred at 6:00 PM on September 20, 2014.

ALLEGATION DENIED: Par. 44. As soon as Respondent had knowledge of Release 1, Respondent failed to immediately notify the NRC, in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

FACTUAL / LEGAL BASES FOR ALLEGATION: In its September 14, 2016, Response to the August 15, 2016, Information Request (CX 41), specifically in Response #43, Birds Eye Foods stated, “Yes, Kathy Randall EHS Manager at the time contacted the NRC at 2:24 PM (Central) on July 19th, 2013.” Thus, Respondent admitted that notification to the NRC was not made until July 19, 2013, at 2:24 PM. Complainant’s position is that this did not constitute “immediate” notification.

ALLEGATION DENIED: Par. 47. As soon as Respondent had knowledge of Release 1, Respondent failed to immediately notify the SERC, in violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

FACTUAL / LEGAL BASES FOR ALLEGATION: In its September 14, 2016, Response to the August 15, 2016, Section 104(e) Information Request (CX 41), Respondent stated in Response #43 that, “Yes, Kathy Randall EHS Manager at the time contacted the Minnesota duty Officer at 2:13PM on July 19th, 2013.” Thus, Respondent admitted that notification to the SERC was not made until July 19, 2013. Complainant’s position is that this did not constitute “immediate” notification.

ALLEGATION DENIED: Par. 50. As soon as practicable after Release 1, Respondent failed to provide the SERC a written follow-up emergency notice in violation of Section 304(c) of EPCRA, 42 U.S.C. § 11004(c).

FACTUAL / LEGAL BASES FOR ALLEGATION: In response to the August 15, 2016, CERCLA Section 104(e) Information Request, Respondent admitted that it did not provide a

written follow-up emergency notice to the Minnesota SERC (see CX 41, Request for Information, Par. 45, and Response #45, stating “No”). On July 13, 2010, the U.S. Environmental Protection Agency defined “as soon as practicable” to be with 30 days after the release. *See* Federal Register Volume 75, Number 133, Thursday, July 13, 2010, Pages 39852-39859).

ALLEGATION DENIED: Par. 53. As soon as Respondent had knowledge of Release 2, Respondent failed to immediately notify the NRC in violation of Section 103(a) of CERCLA, 42 U.S.C. § 9603(a).

FACTUAL / LEGAL BASES FOR ALLEGATION: In response to Complainant’s CERCLA Section 104(e) Information Request dated January 20, 2015 (CX 30), Birds Eye Foods provided a Response dated February 19, 2015 (CX 32). In Response #48, the Respondent admitted that “Yes, John J Tasckuk EH&S Manager for the Waseca facility contacted the National Response Center at 0100 hours on 21 September 2014.” Thus, the Respondent admitted that notification to the NRC was not made until approximately seven hours after the release had occurred. As stated above, Complainant’s position is that, considering the magnitude of the release (1,640 lbs.), and the fact that Respondent’s employees observed a “vapor cloud” of ammonia gas, Respondent reasonably should have known that a release in excess of the 100 lbs. reportable quantity had occurred at or shortly after the time of the release (approximately 6:00 PM on September 20, 2014). Therefore, Respondent’s notification to the NRC on September 21, 2014, at approximately 1:00 AM was not “immediate” notification.

ALLEGATION DENIED: Par. 56. As soon as Respondent had knowledge of Release 2, Respondent failed to immediately notify the SERC in violation of Section 304(a) of EPCRA, 42 U.S.C. § 11004(a).

FACTUAL / LEGAL BASES FOR ALLEGATION: In its response to Complainant's CERCLA Section 104(e) Information Request dated January 20, 2015 (CX 30), Birds Eye Foods provide a Response dated February 19, 2015 (CX 32). In Response #49 (which asked whether Birds Eye Foods had notified the Minnesota SERC), the Respondent stated "Yes, Mr. Phil Brewer, Plant Manager for Waseca notified on 20 September 2014 at approximately 1930 hours." Thus, the Respondent admitted that notification to the Minnesota SERC was not made until approximately one and a half hours after the release had occurred. As stated above, Complainant's position is that, considering the magnitude of the release (1,640 lbs.), and the fact that Respondent's employees observed a "vapor cloud" of ammonia gas, Respondent reasonably should have known that a release in excess of the 100 lbs. reportable quantity had occurred at or shortly after the time of the release (approximately 6:00 PM on September 20, 2014). Therefore, Respondent's notification to the SERC on September 20, 2014, at approximately 7:30 PM was not "immediate" notification.

ALLEGATION DENIED: Par. 64. Complainant calculated the CERCLA penalties by evaluating the facts and circumstances of this case with specific reference to U.S. EPA's policy titled 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.

FACTUAL / LEGAL BASES FOR ALLEGATION: See CX 2, Bates Stamp Nos. 2-36 -- U.S. EPA 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. See also narrative explanation of proposed penalty, below.

ALLEGATION DENIED: Par. 67. Complainant calculated the EPCRA penalties by evaluating the facts and circumstances of this case with specific reference to U.S. EPA's policy titled 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.

FACTUAL / LEGAL BASES FOR ALLEGATION: See CX 2, Bates Stamp Nos. 2-36 -- U.S. EPA 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. See also narrative explanation of proposed penalty, below.

RELEVANT EPA GUIDANCE

See 75 Fed. Reg., 39852-39859 (Thursday, July 13, 2010), or go to the following internet link <https://www.gpo.gov/fdsys/pkg/FR-2010-07-13/pdf/2010-17031.pdf>.

**EXPLANATION OF FACTORS CONSIDERED AND METHODOLOGY UTILIZED TO
CALCULATE THE PROPOSED CIVIL PENALTY**

The civil penalty proposed in the Complaint was calculated in accordance with the 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. The factors considered in determining the appropriate civil penalty to propose in the Complaint, and the specific methodology used to calculate the penalty, are explained below.

NARRATIVE EXPLANATION OF PROPOSED PENALTIES IN COUNTS 1, 2 AND 3

A: FACTORS THAT APPLY TO THE VIOLATION

NATURE:

Count 1: CERCLA 103 – The facility failed to immediately notify the National Response Center (NRC) of the release of a hazardous substance equal to or greater than its reportable quantity (RQ).

Count 2: EPCRA 304(a) - The facility failed to immediately notify the State Emergency Response Commission (SERC) of an area likely to be affected.

Count 3: EPCRA 304(c) – The facility failed to submit a written follow up report to the SERC.

EXTENT:

Count 1 – CERCLA 103(a) – The facility notified the NRC at 2:24 p.m. Central Time, on July 19, 2013. This notification was over 2 hours after the facility had knowledge of the release.

Level 1 of the Enforcement Response Policy matrix is appropriate, because the Respondent notified the NRC over 2 hours after knowledge of the release.

Count 2 - EPCRA 304(a) - The facility notified the SERC at 2:13 p.m. Central Time on, July 19, 2013. This notification was over 2 hours after the facility had knowledge of the release. Level 1

of the Enforcement Response Policy matrix is appropriate, because the Respondent notified the SERC greater than 2 hours after knowledge of the release.

Count 3 - EPCRA 304(c) - The facility never submitted a written follow-up report to the SERC after the release. Level 1 of the Enforcement Response Policy matrix is appropriate, because the Respondent had not submitted a written follow-up report to the SERC within 30 days of the release.

GRAVITY: 34,000 pounds of anhydrous ammonia was released / 100-pound RQ = 340 X RQ. Level A of the Enforcement Response Policy matrix is appropriate, because the release was greater than 10 times the RQ.

CIRCUMSTANCES: Between June 21, 2013, and July 19, 2013, (28 days) there was a release of approximately 34,080 pounds of ammonia. In June 2013 the E&H Manager requested a purchase of ammonia due to low receiver level readings. On July 3, 2013, 6,020 pounds of ammonia is added to the system to bring it up to operating level. However, based on their logs for this time period the 6,020 pounds did not bring the system up to operating level. Instead, the quantity of ammonia in the receiver kept falling. During this time period employees kept smelling ammonia. On July 17, 2013, the compressor room noticed a continued drop in ammonia quantity based on the site glass on the receiver. An onsite electrician formally reported a strong smell of ammonia at ground level outside the plant on the residential side of the street. Representatives of Birds Eye Foods, LLC claim that they investigated the odor complaints but could not find a release. On July 19, 2013, they further investigated and found a stack relief valve discharging ammonia outside. They identified this release by attaching an ammonia sensor to a long pole and trying to get it downwind in the stack stream on top of the roof. The

maximum identifiable reading on the sensor is 400 parts per billion and the sensor exceeded that level. They could have done this each time someone reported an ammonia smell and identified the release much sooner. On July 19, 2013, they notified the SERC of a 3,000 – 5,000-pound release of ammonia. Eleven minutes after notifying the SERC, Birds Eye Foods, LLC notified the NRC of a release of an unknown amount of ammonia. John Taschuk, a whistleblower who was the E&H Manager from December 2013 to March of 2015, claims he knew of a release of approximately 20,000 pounds of ammonia which occurred in July 2013. On July 24 and July 25, 2013, a total of 26,080 pounds of ammonia was added to their system to bring them up to operating level. In response to an EPA Information Request, representatives of Birds Eye Foods, LLC claim that they released less than 100 pounds of ammonia between July 17 – 19, 2013. EPA believes Birds Eye Foods, LLC released approximately 34,080 pounds of ammonia between June 21, 2013, and July 19, 2013, with sudden drops in ammonia levels between June 21, 2013, and June 23, 2013, then steadily going down with another sudden drop between July 17, 2013, and July 19, 2013. On average this is over 1,175 pounds per day ($34,080/29 = 1,175$). Ammonia is a CERCLA hazardous substance and an EPCRA extremely hazardous substance with a 100-pound RQ. Birds Eye Foods, LLC failed to exercise due diligence to find the release, failed to timely report these releases to the NRC and SERC and failed to provide an accurate written follow-up report to the SERC within 30 days of the release(s).

One objective of the emergency notification provisions is to alert the federal and State officials that a response action may be necessary to prevent injuries or deaths to the emergency response personnel, and the local community. Thus, a failure to report in a manner that meets the standard required by the statute or rule could result in harm to human health and the

environment. In addition, this denies the public access to information that they may legally obtain.

This facility is located in a residential area. The release migrated off site and posed a risk to the community. The facility did not exercise due diligence in responding to ammonia odors and investigating if, and when, a release had occurred. Complainant selected “High” for the circumstances of this case.

MULTI-DAY PENALTIES: The U.S. Environmental Protection Agency included multi-day penalties for failing to submit the written follow-up report to the SERC. The penalty includes 1,121 days of multi-day penalties at 1% of the \$37,500 base penalty or \$375 each. The multi-day penalties were calculated from July 19, 2013, until the date when the Information Request Response was received, September 14, 2016.

B: FACTORS THAT APPLY TO THE VIOLATOR

ABILITY TO PAY: Based on the information available to EPA at this time it appears that this Respondent has the ability to pay the penalty. For example, the Respondent represented in response to a January 2015 Information Request that its annual sales are approximately \$941 million. If an inability-to-pay claim can be substantiated, then EPA will adjust the penalty accordingly.

PRIOR HISTORY OF VIOLATIONS: On July 30, 2008, EPA filed an administrative complaint against Birds Eye Foods, LLC, and a Consent Agreement and Final Order was filed on November 3, 2008. There is more than 5 years between November 3, 2008 and July 2013. No adjustment was made to the penalty for prior history of violations.

DEGREE OF CULPABILITY: The respondent either had sufficient knowledge to recognize the hazard created by his/her conduct, or had significant control over the situation to avoid the violation. No adjustment was made to the penalty for culpability.

ECONOMIC BENEFIT OR SAVINGS: Minimal – there is no substantial cost associated with notifying the NRC, the SERC, and providing the SERC with the written follow-up report. No adjustment was made to the penalty for economic benefit.

OTHER MATTERS AS JUSTICE MAY REQUIRE: In deciding on a penalty the enforcement team decided to treat the entire time period as one release and assessing three penalties for failure to provide notification to the NRC and SERC, and for the failure to submit a written follow-up report to the SERC. If, on average, 1,175 pounds of ammonia was released, at least 1,001 pounds was released on any one day in this time period, putting the penalty at greater than 10 times the RQ on any one day. The penalty includes 1,121 days of multi-day penalties at 1% of the \$37,500 base penalty or \$375 each. The multi-day penalties were calculated from July 19, 2013, until the Information Request Response was received on September 14, 2016.

Prior to issuance of the complaint, EPA may reduce a proposed base penalty by 15 percent for first-time violators whose business employs 100 or fewer people, and whose annual total corporate entity sales are less than \$20 million except where the facts and circumstances preclude any reduction. Birds Eye Foods, LLC is not a first-time violator, and its annual sales are approximately \$941 million. The facts do not meet the criteria for a size of business reduction to the penalty.

The last adjustment has two components: cooperation and willingness to settle. EPA may reduce the penalty up to 25 percent based on respondent's cooperation throughout the

compliance evaluation/enforcement process. Factors include respondent's responsiveness and expeditious provision of supporting documentation requested by EPA, cooperation and preparedness during the settlement process, and speed and completeness of achieving compliance. EPA believes that a greater penalty reduction should be given to those respondents who come into compliance prior to the initiation of an EPA investigation. EPA may reduce the penalty up to an additional 10 percent should the respondent and EPA agree to a settlement in principle within 90 days from the date of the issuance of the complaint.

NARRATIVE EXPLANATION OF PENALTIES FOR COUNTS 4, 5 AND 6

A: FACTORS THAT APPLY TO THE VIOLATION

NATURE:

Count 4: CERCLA 103(a) – The facility failed to immediately notify the National Response Center (NRC) of the release of a hazardous substance equal to or greater than its reportable quantity (RQ).

Count 5: EPCRA 304(a) - The facility failed to immediately notify the State Emergency Response Commission (SERC) of a release that is likely to affect an area.

Count 6: EPCRA 304(c) – The facility failed to submit a written follow up report to the SERC within 30 days of the release.

EXTENT:

Count 4 – CERCLA 103(a) – The facility notified the NRC at 1:22 a.m. Central Time on September 21, 2014. This notification was 2 hours and 12 minutes after the facility had knowledge of the release. Level 1 of the Enforcement Response Policy matrix is appropriate, because the Respondent notified the NRC over 2 hours after knowledge of the release.

Count 5 - EPCRA 304(a) - The facility notified the SERC at 7:30 p.m. CT on September 20, 2014. This notification was 1 hour and 20 minutes after the facility had knowledge of the

release. Level 2 of the Enforcement Response Policy matrix is appropriate, because the Respondent notified the SERC greater than 1 hour but less than 2 hours after the release.

Count 6 - EPCRA 304(c) - The facility never submitted a written follow-up report to the SERC after the release. Level 1 of the Enforcement Response Policy matrix is appropriate, because the Respondent had not submitted a written follow-up report to the SERC within 30 days of the release.

GRAVITY: 1,640 pounds released / 100-pound RQ = 16.4 X RQ. Level A of the Enforcement Response Policy matrix is appropriate, because the release was greater than 10 times the RQ.

CIRCUMSTANCES: Around 5:00 p.m. on September 20, 2014, a storm front came through Waseca, Minnesota, with straight line winds. The storm tore parts of the roof up and bent a liquid line going to the North Plate Chiller accumulator on their ammonia refrigeration system. The flange going to the strainer was leaking. An employee called and stated that he could smell anhydrous ammonia across the street by Pea Receiving. Someone said on the radio that it was coming from the roof. Russ G (Compressor Room Operator) then proceeded to close the liquid header in engine room 2 for the North Plate Chiller and Cob Chiller. Personnel reported to the severe weather shelters and electricity was lost. When winds subsided, maintenance and compressor room personnel inspected the facility for integrity. An employee reported over the radio the smell of ammonia. Area inspections were increased to check outside the building and on the roof. A vapor cloud was observed in the heavy rain from a maintenance person.

Notification was made to the Compressor Room, and isolation of the line began. Jason Stencel and James Hawes (Maintenance Manager RMP-PSM) went up to the roof from the motor room and Dayton Drahiem (Compressor Room Operator) went up to the roof from Pea

prep. Dayton had opened the door to a cloud of anhydrous ammonia. James Hawes and Jason Stencel could get to the roof from the Motor Room and watch the cloud dissipate. Russ G. (Compressor Room Operator) went up to the roof after he had gotten the liquid king valve closed through Pea prep, and by the time he got up there the cloud was gone so he was able to go investigate the situation. Once he got over by the accumulator he could see that the leak was coming from the flanges on both sides of the solenoid; he proceeded to isolate the strainer and solenoid for that vessel, and it appeared the leak was contained. Liquid ammonia becomes a gas when it leaves the pressurized system, and it couldn't be contained. He might have meant it had stopped leaking. The Compressor Room personnel and EH&S staff estimated pipe content while descending from the roof. The EH&S staff were present on the roof and would have seen the cloud. They should have assumed a release in a reportable quantity had occurred and made notification shortly after 6:00 p.m. Central Time, on September 20, 2014. The release was secured within 10 minutes. Based on the above information I believe constructive knowledge occurred sometime between 6:00 p.m. Central Time and 6:10 p.m. Central Time on September 20, 2014. Birds Eye Foods, LLC should have known 100 pounds was released on September 20, 2014. Due to the release, the Plant Manager thought it prudent to call the Minnesota Duty Officer and then call the EH&S manager in to work with site personnel to see if the RQ for ammonia had been exceeded. If they had reason to think they should call the SERC they should have also called the NRC. The morning of September 21, 2014, Mike Sutlief arrived; Dave and Mike went up to look at the damage, while doing that they found a second leak on top of the accumulator. The vessel was isolated so the loss on that was just what was in the vessel and attached piping.

The Compressor Room personnel and EH&S staff estimated pipe content while descending from the roof, called the NRC around 1:22 a.m. on September 21, 2014, and informed the Plant Manager. I believe they had constructive if not actual knowledge of a release of 100 pounds by the time they secured the release at 6:10 p.m. on September 20, 2014. By this time, they smelled the ammonia across the street at Pea Receiving. They thought it prudent to notify the SERC at 7:30 p.m. on September 20, 2014, and should have also notified the NRC. Appropriate people were present throughout the event with knowledge of the system and should have been able to realize 100 pounds was released when they seen the cloud and knew the storm tore up part of the roof and bending a pipe on the ammonia system. These events would not be quick to fix.

One objective of the emergency notification provisions is to alert the federal and State officials that a response action may be necessary to prevent injuries or deaths to the emergency response personnel, and the local community. Thus, a failure to report in a manner that meets the standard required by the statute or rule could result in harm to human health and the environment. In addition, this denies the public access to information that they may legally obtain.

This facility is located in a residential area. The release migrated off site and posed a risk to the community. Since there was a severe storm occurring it is unlikely there would be many people outside. For this reason, Complainant chose "Medium" for the circumstances of this case.

MULTI-DAY PENALTIES:

The written follow-up EPCRA 304(c) violation continued for 142 days. The base penalty is day one and multi-day penalties were calculated at 1% of the base penalty for 141 days. The

release occurred on September 20, 2014. The ERP allows 30 days to submit the report with no penalty. October 20, 2014 is day one of the violation. Multi-day penalties were calculated from October 20, 2014 until the Information Request response was received on February 19, 2015. The receipt of the Information Request response was the date EPA knew a violation occurred.

B: FACTORS THAT APPLY TO THE VIOLATOR

ABILITY TO PAY: Based on the information available to the U.S. Environmental Protection Agency at this time it appears this facility has the ability to pay the penalty. As noted above the Respondent represented in response to a January 2015 Information Request that its annual sales are approximately \$941 million. If an inability to pay claim can be substantiated, then EPA will adjust the penalty accordingly.

PRIOR HISTORY OF VIOLATIONS: On July 30, 2008, EPA filed an administrative complaint against Birds Eye Foods, LLC and a Consent Agreement and Final Order was filed on November 3, 2008. There is more than 5 years between November 3, 2008 and July 2013. No adjustment was made to the penalty for prior history of violation.

DEGREE OF CULPABILITY: The respondent either had sufficient knowledge to recognize the hazard created by his/her conduct, or had significant control over the situation to avoid the violation. No adjustment was made to the penalty for culpability.

ECONOMIC BENEFIT OR SAVINGS: Minimal – there is no substantial cost associated with notifying the NRC, SERC or submitting the written follow-up report. No adjustment was made to the penalty for economic benefit.

OTHER MATTERS AS JUSTICE MAY REQUIRE: Prior to issuance of the complaint, EPA may reduce the proposed base penalty by 15 percent for first-time violators whose business employs 100 or fewer people, and whose annual total corporate entity sales are less than \$20 million except where the facts and circumstances preclude any reduction. Birds Eye Foods, LLC is not a first-time violator, and its annual sales are approximately \$941 million. The facts do not meet the criteria for a size of business reduction to the penalty.

The last adjustment has two components: cooperation and willingness to settle. EPA may reduce the penalty up to 25 percent based on respondent's cooperation throughout the compliance evaluation/enforcement process. Factors include respondent's responsiveness and expeditious provision of supporting documentation requested by EPA, cooperation and preparedness during the settlement process, and speed and completeness of achieving compliance. EPA believes that a greater penalty reduction should be given to those respondents who come into compliance prior to the initiation of an EPA investigation. EPA may reduce the penalty up to an additional 10 percent should the respondent and EPA agree to a settlement in principle within 90 days from the date of the issuance of the complaint.

Complainant respectfully reserves the right to amend or supplement this Prehearing Exchange upon reasonable notice to counsel for the Respondent and this Court.

Respectfully Submitted,

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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:	)	Docket Nos. MM-05-2018-0002
	)	CERCLA-05-2018-0005
Birds Eye Foods, Inc.,	)	EPCRA-05-2018-0009
)	
	)	Date: 31 August 2018
Respondent.)	

CERTIFICATE OF SERVICE

I hereby certify that today I filed with the Office of Administrative Law Judge E-Filing System at www.epa.gov/alj, and thus also provided the Presiding Officer Administrative Law Judge Christine Donelian Coughlin a copy of **COMPLAINANT'S INITIAL PREHEARING EXCHANGE**.

I hereby certify that today I also issued to Jodi Arndt Labs, Counsel to Respondent, via e-mail at jodi@lcojlaw.com, one copy of **COMPLAINANT'S INITIAL PREHEARING EXCHANGE**.

August 31, 2018
Date

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