Message

From: Welles, Laura [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D12D5767A8634F48935D8AA59F93D4F6-WELLES, LAU]
Sent: 11/18/2016 3:18:03 PM
To: Crossland, Andy [Crossland.Andy@epa.gov]; Saenz, Diana [Saenz.Diana@epa.gov]
Subject: FW: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO with EPA's revisions
Attachments: WholeFoods - Monitor Appendix.11.17.16.docx

Andy and Diana,

Below is John's correspondence with Whole Foods Market re: independent audit. Also – attached is the proposed appendix to the CAFO re: independent audit.

Thanks,
Laura

From: Fogarty, Johnpc
Sent: Thursday, November 17, 2016 12:23 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO with EPA's revisions

Hi folks -

Attached is the draft for the independent auditor provisions. This would be an appendix (the placeholder in paragraph 38 would refer to it). Here's a quick "roadmap" to help as you go through the draft:

Ex. 4 CBI

Please don't hesitate if you have questions, issues/concerns, etc. before we get together. Thanks, and talk to you soon.

From: Fogarty, Johnpc
Sent: Tuesday, November 15, 2016 4:16 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO with EPA's revisions

John & Jenn -

As I mentioned on the phone during our most recent call, we are planning to get you details on our thoughts for the third-party audit this week. Ahead of getting you actual proposed language for the CAFO (still drafting, but should have it to you in the next day or two), I thought it might be helpful to describe it in advance and also what the thinking is that's behind it.

We understand that what was on the table as a proposal in the region 6 settlements was an audit of all of the stores covered by those settlements. It would be a logical extension if we were to simply do the same here, so that the audit in this settlement would cover all of Whole Foods Market's stores nationwide. However, we're not sure that approach makes the most sense. For one thing, auditing several hundred stores nationwide strikes us as a costly and time-consuming effort (and it's also worth noting that prior settlements with auditors have covered only a single or a small number of facilities), and for another we're not sure it's strictly necessary for purposes of this agreement. So we were thinking that you all might be open to a different (and less expensive) approach.

We can still do a one-time "100% of all stores" audit if you all would prefer that, but the option that we are going to put on the table is to audit only a *representative subset* of stores in each of the regional groups. We think that auditing a smaller sample size can be a reliable indicator of Whole Foods Market's overall implementation of the program, because of the uniform system-wide nature of the consumer product "take-back" program. We are also going to propose to more narrowly tailor the scope of the audit (as compared to what was proposed for the region 6 settlements) so that it would cover only compliance with certain specified terms of the CAFO, rather than cover all hazardous waste management at the covered stores.

While we don't have a proposal for the number of stores that would make up the subset to be audited, we will need to make sure that the sample size is enough so that the audit results are representative, and so we'll need to work with you to come up with a reasonable figure. And in order to account for and accommodate any differences amongst the different regional groups/corporate entities in the Whole Foods Market system, we are proposing that the auditing would be conducted on a regional basis - that is, each of the different regional groups would be individually audited (and because the number of stores in each regional group varies, the subset of stores in each group to be audited will probably also vary).

We would anticipate that the outcome of the audit will confirm that the program is implemented as intended, and therefore that the results of the audit will be positive. To this end, I think it's important to note that we will not consider minor "deviations" in Whole Foods Market's implementation of the program to be a negative overall result. Therefore, we will propose that while the audit would cover implementation of the program as a whole (to include the enhanced program as covered in the appendices), only compliance with the provisions of paragraphs 35, 36 and 37 would be used to determine overall compliance.

In addition, we think it's still a positive overall result even if some noncompliance with those paragraphs is identified, provided that it's thereafter corrected. However, and since the audit covers only a subset of all stores, we'll need to provide for a contingency in case the results of the audit indicate a more extensive problem in implementation. To address this, we will propose that if the audit of a regional group shows one or more violations of paragraphs 35 through 37 at more than half of the stores audited, this could either be an anomalous result (i.e., it's not representative of the

compliance rate in that region), or it's an indicator of a more widespread issue. While we hope (and I would expect you all would hope as well) that the noncompliance rate will come nowhere close to this level, in case it does we are proposing that a confirmatory or followup audit of some number of additional stores within the regional group be conducted. If the confirmatory audit shows overall compliance (i.e., above the 50% level), then we would view the initial results as an anomaly. If the followup audit shows otherwise, we'd ask that Whole Foods Market work with the auditor to identify the "root cause" of the high noncompliance rate, and to implement any needed changes.

Sorry for the long-ish email. Hopefully this is clear but feel free to ask any questions. I've also attached a flowchart, which I think helps to more simply illustrate what's written above.

Thanks.

From: Welles, Laura
Sent: Thursday, November 10, 2016 7:47 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO with EPA's revisions

Hi John and Jenn,

It was good to touch base with you earlier today regarding the draft CAFO. Attached is the CAFO with EPA's revisions. As you'll find, the revisions reflect our discussion today re: universal waste, etc. I've also attached the EAB memo that John and I referenced today during the call.

As I mentioned to you on the phone, language regarding waivers, jurisdiction, statutory/regulatory background, alleged facts (see paragraphs 23-25), and effect of settlement/reservation of rights was put back into the document to meet the requirements of 40 CFR Part 22, specifically 22.13(b), 22.18(b) & (c), portions of 22.14(a), and 22.31(a). There were also changes made to some of your proposed language in the compliance provisions section. As we discussed today, our hope is to strike a balance between describing your program in the CAFO (holding it out as a model for other grocery stores) and respecting the details/specifics of the trainings, SOPs, tote system, etc. by placing in Appendices marked as CBI.

With regard to the appendices, it would be great if you could send us Appendix A in the next week or so. We want to have a better sense of the number of stores. If you recall, we'd like the list of stores to be organized by each corporate entity and region (e.g., North Atlantic), and then by state (or portion of the state).

Please let me or John know if you have any questions regarding the attached draft CAFO and EPA's revisions.

We look forward to seeing you in person in the coming weeks.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Wednesday, November 02, 2016 2:14 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Aminah Famili <AFamili@kingwilliamslaw.com>
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO

Dear John and Laura,

Thank you for taking the time to talk with us yesterday. As promised, attached is our proposed draft of the CAFO. We look forward to coordinating further with you on this.

My best,
Jennifer

Jennifer Hartman King, Managing Partner

KING WILLIAMS LLP
ATTORNEYS AT LAW

520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
Click Here for King Williams LLP News and Alerts

This email and any transmission with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please advise the sender via reply email and delete the email you received.

_____ This email and any transmission with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please advise the sender via reply email and delete the email you received.