2009-01

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 Ross Avenue
Dallas, Texas 75202-2733

August 24, 2016

CONFIDENTIAL SETTLEMENT COMMUNICATION
CONTAINS CONFIDENTIAL BUSINESS INFORMATION Redacted

Mr. John King
Breazeale, Sachse & Wilson, L.L.P.
P.O. Box 3197
One American Place, 23rd Floor
Baton Rouge, LA 70821-3197

Dear John:

This letter is in response to Formosa's July 25, 2016 letter in which Formosa made a $131,250 counteroffer to EPA's June 28, 2016 $516,000 settlement offer. Despite this being the second round of offers/counteroffers, the parties are still far apart. Nevertheless, EPA offers the following in order to settle this case.

2. Failure to Maintain Data Used to Estimate Population and Environmental Receptors for the Offsite Consequence Analyses – 40 C.F.R. § 68.39(e)

The parties are no closer than they were regarding this violation. You stated that a facility is "not required to develop a list of all institutions and areas; you must simply check off which types of receptors are within the circle" and "most receptors can be identified from a local street map". As previously stated in our June 28, 2016 letter, these statements refer to identifying public receptors in the RMP Plan. It has nothing to do with maintaining the documentation required by 40 C.F.R. § 68.39(e). The RMP Plan is meant to be a summary; it is not part of the documentation required by 40 C.F.R. § 68.39(e). As stated in the Off-site Consequence Analysis Guidance, "besides the information you are required to submit in your RMP, you must maintain other records of your offsite consequence analysis on site. Under 40 C.F.R. § 68.39, you must maintain data used to estimate populations and environmental receptors potentially affected." Off-site Consequence Analysis Guidance at 12-4 (emphasis added). EPA offers to settle this Count for $1,000.

5. Failure to Ensure that PHA Findings and Recommendations are Resolved in a Timely Manner – 40 C.F.R. § 68.67(e)

This violation involved findings and recommendations from the June 2008 Siting Study and the February 2012 PHA Revalidations for the VCM and PVC processes. (b) (4) [redacted] There were (b)(4) missed deadlines for the VCM and PVC PHA findings and recommendations. (b) (4)

(b) (4) [redacted]

Missing a deadline constitutes a violation. When questioned about the status of (b) (4) [redacted] from the two PSM Audits, the Building Retrofit chart, and the VCM PHA Recommendation Tracking Spreadsheet, Formosa responded via a February 17, 2016 e-mail that (b) (4) [redacted][1] Given the long time that it has taken to address the recommendations, EPA offers to settle this Count for $30,000.

6. Failure to Update PHA Every Five Years - 40 C.F.R. § 68.67(f)

Formosa accepted EPA's offer of $10,000 for this Count.

7. Failure to Conduct an Adequate PHA for the VCM Process – 40 C.F.R. § 68.67

The CAFO alleges that the "PHA for the VCM process failed to recognize the potential for overpressuring the heater without a connected control device" and therefore failed to conduct an adequate PHA. Formosa contends that the (b) (4) [redacted] However, Formosa is misconstruing EPA's allegations in order to try and impeach its own conclusions in its Incident Report regarding the PHA.

(b) (4) [redacted] Even if one assumes that the Incident was solely caused by the failure to conduct a management of change, that doesn't mean that EPA cannot allege this as a violation. Also the penalty is based on the "potential for harm", not any actual harm.

On a related matter, Formosa contends that although the Incident Report (b) (4) [redacted]

[1] Given Formosa's ambiguous response to EPA specific request regarding the four different documents, EPA is unsure which items have been completed and which were still pending.

(b) (4) [redacted] This Count remains at $37,500.

8. Failure to Properly Implement Certain Operating Procedures – 40 C.F.R. § 68.69

First, EPA rejects Formosa's assertion that EPA cannot cite a company for a violation if one of its employees fails to follow the required operating procedure. This would render the operating procedures regulation meaningless. Second, Formosa claims that the procedures were followed except for the panelboard operator who did not log the override. However, the Incident Report (b) (4) [redacted] It ensures that the override is communicated to their relief or supervisor. As the Incident Report noted, "(b) (4) [redacted] Formosa also states that there was little potential for harm as only (b) (4) [redacted]. However, you are contradicting your own Incident Report, which states that (b) (4) [redacted]. EPA offers to settle this Count for $30,000.

9. Failure to Conduct a Management of Change – 40 C.F.R. § 68.75

Formosa offered $25,000 to settle this Count. EPA offers to settle this Count for 30,000.

10. Failure to Correct Timely Deficiencies in 2008 and 2011 Compliance Audits 40 C.F.R. § 68.79(d)

EPA accepts Formosa's offer of $10,000 to settle this Count.

12. Failure to Periodically Evaluate the Performance of Contractors in Fulfilling the Obligations Identified in 40 C.F.R. § 68.87(c) – 40 C.F.R. § 68.87(b)(5)

Since Formosa has submitted documentation regarding (b) (4) [redacted] EPA will drop this Count. This violation would not have been alleged had Formosa submitted the documents in response to either the July 28, 2014 or May 21, 2015 document requests.

Length of Time Adjustment

EPA is not adjusting the length of time component. It will remain at $126,000.

Size of Violator Adjustment

Formosa did not follow the 50% rule in calculating the size of violator adjustment. If Formosa had correctly followed the penalty policy in applying the 50% rule for the size of violator adjustment, its size of violator adjustment would have been $125,000, not $62,500. The 50% rule reduces the size of violator component to an amount equal to the rest of the penalty without the size of violator component included. For Formosa's counteroffer, it should have been $125,000 [$62,500 (seriousness) + $62,500 (length of time)]. This would have increased Formosa's penalty to $250,000 before taking a 30% reduction. EPA will continue to use the $195,000 figure until such time as the combined seriousness and length of time components is less than $195,000.

Good Faith Adjustment

EPA agrees to reduce the penalty by 10% ($46,950) for good faith. Therefore, EPA offers to settle this case for $422,500.

Counteroffer

The following is a summary of EPA's counteroffer.

Summary of Revised Penalty Calculations

Economic Benefit of Noncompliance	N/A
Count One – Failure to Document Individuals by Name or Position in Organizational Chart – 40 C.F.R. § 68.15(c)	Dropped
Count Two – Failure to Maintain Data Used to Estimate Population and Environmental Receptors for the Offsite Consequence Analyses 40 C.F.R. § 68.39(e)	$ 1,000
Count Three – Failure to Compile a Maximum Intended Inventory of Regulated Substances – 40 C.F.R. § 68.65(c)(1)(iii)	Dropped
Count Four – Failure to Identify Hurricanes as a Hazard of the Process 40 C.F.R. § 68.67	Dropped
Count Five – Failure to Ensure that PHA Findings and Recommendations are Resolved in a Timely Manner – 40 C.F.R. § 68.67	$ 30,000
Count Six – Failure to Update Process Hazard Analysis Every Five Years 40 C.F.R. § 68.67(f)	$ 10,000
Count Seven – Failure to Conduct an Adequate PHA for the VCM Process 40 C.F.R. § 68.67	$ 37,500
Count Eight – Failure to Properly Implement Certain Operating Procedures 40 C.F.R. § 68.69	$ 30,000

Count Nine – Failure to Conduct a Management of Change
40 C.F.R. § 68.75 ..... $ 30,000

Count Ten – Failure to Timely Correct Deficiencies in 2008 and
2011 Compliance Audits – 40 C.F.R. § 68.79(d) ..... $ 10,000

Count Eleven – Failure to Include the Date Incident Investigation Began
40 C.F.R. § 68.81(d)(2) ..... Dropped

Count Twelve – Failure to Periodically Evaluate the Performance of
Contractors in Fulfilling the Obligations Identified in 40 C.F.R. § 68.87(c)
40 C.F.R. § 68.87(b)(5) ..... Dropped

Subtotal ..... $ 148,500

Length of Time of Violation (60 months) ..... $ 126,000

Size of Violator (Net Worth - $227,027,299) ..... $ 195,000

Total Gravity Based Penalty ..... $ 469,500

Adjustments

A. Degree of Culpability ..... $

B. History of Violations ..... $

C. Good Faith (10% reduction) ..... ($ 46,950)

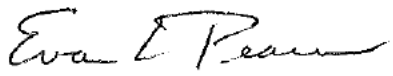
D. Economic Impact of the Penalty (Ability to Pay) ..... N/A

E. Offsetting Penalties Paid to Federal, State, Tribal,
and Local Governments or Citizen Groups for the
Same Violations ..... $ 0

Total Proposed Penalty ..... $ 422,550

Finally, since this case has dragged on for several months, the parties need to reach a settlement in principle on the penalty by October 17, 2016. In addition, EPA would also like to see a supplemental environmental project (SEP) proposal from Formosa. If you have any questions, please feel free to email me at pearson.evan@epa.gov or call me at (214) 665-8074.

Sincerely,



Evan L. Pearson
Senior Enforcement Counsel