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

June 28, 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 counteroffer dated April 20, 2016, our April 27, 2016 settlement conference, and Formosa's May 25, 2016 letter. EPA's specific response to Formosa's arguments regarding each individual count is set forth below. However, I want to address the overarching arguments that Formosa raised in the letters and our settlement conference, namely, the fair notice/non-apparent interpretations of allegedly ambiguous regulations arguments. According to Table 1 of Formosa's April 20, 2016 letter, Formosa argued that eight of the twelve regulations cited as violations were ambiguous. First of all, EPA does not agree that the regulations are ambiguous. Second, if EPA were to accept Formosa's arguments that these regulations were ambiguous (and thus unenforceable), its ultimate effect would be to eviscerate the RMP program. Other facilities would raise the same arguments, resulting in a toothless enforcement program and an increased risk of releases which could result in death, serious injury, and/or substantial property damage. Therefore, EPA rejects Formosa's fair notice/non-apparent interpretations of allegedly ambiguous regulations arguments, and will analyze Formosa's response on the merits.

1. Failure to Document Individuals by Name or Position in Organizational Chart 40 C.F.R. § 68.15(c)

Formosa's RMP System Chart (FPC001), which was submitted to EPA on August 22, 2014, named departments, as opposed to providing names of responsible individuals or positions (e.g., Superintendent – Maintenance Department), as required by 40 C.F.R. § 68.15(c). It was my understanding at our September 9, 2015 meeting that Formosa was going to submit a document(s) regarding this issue. It wasn't until EPA received Formosa's April 22, 2016 that EPA had confirmation that Formosa had complied with 40 C.F.R. § 68.15(e). If Formosa had previously submitted this document prior to our March 1, 2016 CAFO, EPA would not have alleged this violation in its CAFO. EPA will drop this Count. However, the revised organization chart that Formosa submitted (FPC 3246) is more confusing than before. We are not sure how to fix it.

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 off-site consequence analysis is done in part to determine whether a process is Program 1, Program 2, or Program 3. 40 C.F.R. § 68.10(b)(2) requires a determination whether the endpoint for a worst case release scenario is less than the distance to any public receptor. Public receptor is defined in 40 C.F.R. § 68.3 as meaning "offsite residences, institutions (e.g., schools, hospitals), industrial, commercial, and office buildings, parks, or recreational areas inhabited or occupied by the public without restriction by the stationary source where members of the public could be exposed to toxic concentrations, radiant heat, or overpressure, as a result of an accidental release." 40 C.F.R. § 68.39(d) provides that one must maintain data to estimate population and environmental receptors potentially affected.

When EPA requested this information on July 28, 2014, it received only a single page about population estimates, the Results of Consequence Analysis from RMP Comp, and some pages from Formosa's RMP Plan (FPC002 – FPC014). In its July 28, 2014 request, EPA also asked for maps for each scenario, but didn't receive anything. The information that EPA received on August 22, 2014 was not sufficient to estimate population, public receptors, and environmental receptors for its off-site consequence analysis.

In your May 25, 2016 submittal, you submitted the population estimate used in the RMP submitted to EPA. In your April 29, 2016 follow-up e-mail to our meeting, Formosa agreed that it "will obtain its support for list of environmental receptors". No such information was contained in your May 25, 2016 submittal. Formosa claims that it "also maintained the data used to estimate public and environmental receptors, to the extent required". However, your references to the RMP Guidance (Off-site Consequence Analysis Guidance) is misleading. 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". <u>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)</u>. 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 OCA, "<u>besides the information you are required to submit in your RMP</u>, you must maintain <u>other</u> 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).

Unless data is added to Marplot, Marplot uses Google Maps. For small circles, one can make out schools, etc. However, for a large radius (25 mile radius as used by Formosa), it is impossible to make such determinations from the computer screen. The only way to save your work is a screenshot, which for which there is an icon. One can save it as an image or copy to clipboard. We don't disagree that it can be kept in electronic format. However, it must be the same file that was used to make the worst case scenario so we can see exactly the information that Formosa used. Without maps, how can one identify the environmental receptors within the 25 mile radius? Therefore, EPA is not dropping Count Two. The $5,000 proposed penalty remains the same, since Formosa did not give a counteroffer on this Count.

3. Failure to Compile a Maximum Intended Inventory of Regulated Substances 40 C.F.R. § 68.65(c)(1)(iii)

EPA requested this information during its July 22 – 24, 2014 inspection, but no inventory was provided to the inspector during the inspection. Furthermore, according to Formosa's (b) (4) [redacted] If Formosa had previously submitted this document prior to our March 1, 2016 CAFO, EPA would not have alleged this violation in its CAFO. EPA will drop this Count.

4. Failure to Identify Hurricanes as a Hazard of the Process – 40 C.F.R. § 68.67

EPA previously agreed to drop this Count.

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 [redacted] missed deadlines for the VCM and PVC PHA findings and recommendations. (b) (4) [redacted] Formosa does not deny that there were [redacted] missed deadlines for the VCM and PVC PHA findings and recommendations.

For the VCM and PVC PHA findings and recommendations, Formosa developed a written schedule of when those actions were to be completed. There is no denying that Formosa failed to meet its own written schedule to complete [redacted] separate items for its VCM and PVC PHA according to the deadline it set for itself. Missing a deadline constitutes a violation.

For example, in *Randall Food and Drugs, Inc.*, OSHA Docket No. 02-1398 (October 27, 2003), the ALJ stated that

> [o]nce Randalls resolved to take action on the PHA team's recommendation, it was required under the terms of the standard to complete the action in accordance with the written schedule it had developed, or to document the reasons for failing to complete the actions. Randalls failed to complete the scheduled replacement of the relief valves as soon as possible or to document the reasons for that failure. The violation is established.

Slip op. at 8.

(b) (4) [redacted]. It failed to meet the deadline that it had established for itself. Following the Randall decision, Formosa is also in violation. Therefore, EPA is not dropping this Count. Several years had passed since the June 2008 Siting Study and the findings and recommendations were not satisfactorily addressed. If one doesn't establish deadlines, there is no pressure to address the items. There were also (b) (4) missed deadlines for the VCM and PVC PHA findings and recommendations. Potential significant hazards could go unaddressed which could result in catastrophic results. This justifies the upper level of the major/major matrix ($37,500).

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

Formosa is not disputing this violation. Formosa proposed a $500 penalty for this violation. EPA rejects this offer. Formosa was required to update the PVC PHA by (b) (4) [redacted], and the VCM PHA by (b) (4) [redacted] According to Formosa, the studies began in (b) (4) [redacted] (b) (4) [redacted] Therefore, Formosa didn't even begin the PHA process until after the PHAs were due. (b) (4) [redacted] In other words, the facilitator took a fresh look at the processes. A fresh look at the processes can result in identifying and addressing hazards that weren't previously considered, such as, what was identified as the cause of the October 14, 2011 incident (see discussion of Count Seven below). However, EPA will reduce the proposed penalty from $20,000 to $10,000 [moderate potential for harm and moderate deviation (lower level)].

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

On or about October 14, 2011, the NE-111 nitrogen heater for the molecular sieves ruptured. The heater is used to heat nitrogen gas to regenerate the sieve beds. The NE-111 nitrogen heater is part of the VCM process. A hazard associated with the VCM process is over pressuring the NE-111 nitrogen heater. However, the Incident Report stated that the PHA for the VCM process failed to recognize the potential for over pressuring the heater without a connected control device (FPC1265; FPC002916).

In Formosa's April 20, 2016 letter, Formosa claimed the following:

(b) (4) [redacted]

(b) (4) [redacted]

(b) (4) [redacted]

(b) (4) [redacted] The $37,500 penalty remains the same, since Formosa did not give a counteroffer on this Count.

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

On August 18, 2013, Formosa bypassed the low flow interlocks for the HCl, O_2, and ethylene feed to the D Oxy reactor to prevent the reactor from tripping due to spikes in flow without following the override procedure. On August 23, 2013, the low flow interlocks for HCl and ethylene feed to C Oxy reactor and the high flow interlock for O_2 feed to C Oxy reactor were preemptively bypassed without following the override procedure when an HCl leak was discovered that had the potential to shut down the plant. FPC1259. Formosa claims that it implemented its operating procedures, and that EPA's interpretation that an employee's failure to follow written procedures constitutes its failure to implement the procedures is not apparent from the regulation is not supported by the commonly understood meaning of the word "implement".

Contrary to Formosa's assertion, the definition of "implement" fully supports EPA's position. According to Dictionary.com, implement (verb) is defined as "to fulfill, perform, carry out, to put into effect according to or by means of a definite plan or procedure." In this case, Formosa develops the appropriate procedure, and then it is implemented (carried out/performed) by the employees. For example, assume Formosa develops a start-up procedure. It is not self-implementing. It is carried out or performed by the employees. Without the employees, it can't be implemented. What good are operating procedures if they are not followed? The same language "develop and implement" is used in 40 C.F.R. § 68.69(d) – "owner or operator shall develop and implement safe work practices". Under Formosa's logic, as long as Formosa has a hot work policy, it can't be penalized if a worker fails to follow the policy and people get killed as a result. This would be a ridiculous result. Also, Formosa's argument for this Count contradicts its argument on Count Nine – Failure to Conduct Management of Change. 40 C.F.R. § 68.75(a) provides that "the owner or operator shall establish and <u>implement</u> written procedures to manage changes." Formosa admits that it failed to conduct a management of change (even though it has a management of change procedures). Thus, Formosa is contradicting itself. Therefore, the $37,500 penalty remains the same, since Formosa did not give a counteroffer on this Count.

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

The NE-111 nitrogen heater for the molecular sieves is part of the VCM process. On or about October 2011, the Respondent replaced the dual action solenoid with a single action solenoid. The single action solenoid does not have a manual reset. The replacement of a dual action solenoid for a single action solenoid is not a "replacement in kind", and thus was a change in process equipment. The Incident Report stated that Formosa failed to conduct a management of change (MOC) prior to replacing a dual action solenoid with a single action solenoid.

FPC1265. Formosa admits that it failed to conduct a management of change, but claims that the penalty is too high, and application of the penalty policy yields a much lower amount.

Formosa proposed to classify the potential for harm as "major", and the extent of deviation as "moderate", at the lower level or $15,000. However, Formosa's failure to conduct an MOC constitutes a major deviation. According to the CAA 112(r) Enforcement Policy, a "major deviation" occurs when "the violator deviates from the requirements of the regulations or statute to such an extent that most (or important aspects) of the requirements are not met, resulting in substantial noncompliance." Formosa completed failed to conduct a management change analysis, as opposed to conducting an inadequate MOC analysis. This constitutes a major deviation, and therefore the proposed penalty remains classified as a major potential for harm/major deviation, or $37,500.

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

As of the July 2014 inspection, Formosa failed to timely determine and document an appropriate response to certain findings for both the November 2008 Compliance Audit and the October 2011 Compliance Audit. (b) (4) [redacted] For both Audits, (b) (4) [redacted] In fact, the October 2011 Audit stated the following regarding the 2008 Audit:

(b) (4) [redacted]

(b) (4) [redacted]

In *Delek Refining, Ltd.*, OSHRC Docket No. 08-1386 (May 9, 2011), a 2004/2005 audit report had 10 outstanding compliance audit findings at the time of the OSHA inspection on February 28, 2009. The ALJ concluded that "Delek did not exercise reasonable diligence to promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected." The ALJ also found that "failure to respond to deficiencies for almost three years was not prompt nor reasonable under the standard", and thus found Delek liable. As OSHA stated in Appendix C to its PSM regulation:

> Corrective action is one of the most important parts of the audit. It includes not only addressing the identified deficiencies, but also planning, followup, and documentation. The corrective action process normally begins with a management review of the audit findings. The purpose of this review is to determine what actions are appropriate, and to establish priorities, timetables, resource allocations and requirements and responsibilities. In some cases, corrective action may involve a simple change in procedure or minor maintenance effort to remedy the concern. Management of change procedures need to be used,

as appropriate, even for what may seem to be a minor change. Many of the deficiencies can be acted on promptly, while some may require engineering studies or in-depth review of actual procedures and practices. There may be instances where no action is necessary and this is a valid response to an audit finding. All actions taken, including an explanation where no action is taken on a finding, needs to be documented as to what was done and why.

It is important to assure that each deficiency identified is addressed, the corrective action to be taken noted, and the audit person or team responsible be properly documented by the employer. To control the corrective action process, the employer should consider the use of a tracking system. This tracking system might include periodic status reports shared with affected levels of management, specific reports such as completion of an engineering study, and a final implementation report to provide closure for audit findings that have been through management of change, if appropriate, and then shared with affected employees and management. This type of tracking system provides the employer with the status of the corrective action. It also provides the documentation required to verify that appropriate corrective actions were taken on deficiencies identified in the audit.

29 C.F.R. § 1910.1926, Appendix C, Item 14.

Therefore, EPA is not dropping this count. Since no counteroffer was made, the penalty remains the same. Given the time frame involved in correcting the violation, this justifies an upper limit moderate/moderate classification ($15,000).

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

EPA previously agreed to drop 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)

On July 28, 2014, EPA requested an example of a contractor periodic evaluation, which is required by 40 C.F.R. § 68.87(b)(5), (b) (4) [redacted] Formosa's response was received on August 22, 2014. The information submitted only shows that Formosa only had training records. There were no records that show that Formosa evaluated the contractors' performance. On April 21, 2015, EPA requested the latest evaluations of (b) (4) [redacted] required under 40 C.F.R. § 68.87(b)(5). In response, EPA received reports for each contractor dated December 18, 2014. These reports were each 5 pages long, and provided only a summary of the audit results. In your May 25, 2016 submittal, Formosa submitted a 34 page report of (b) (4) [redacted] does not meet the requirements of 40 C.F.R. § 68.87(b)(5).

Therefore, this Count remains for (b) (4) [redacted] However, the penalty calculation is changed from a major potential for harm, major deviation (low point) to a major potential for harm, moderate deviation (low point), or $15,000. The violation would not have been alleged against (b) (4) [redacted] if Formosa has submitted the documents we received on May 25, 2016 in response to either the July 28, 2014 or May 21, 2015 document requests.

Counteroffer

The following is a summary of EPA's counteroffer. The counteroffer includes a reduction in the size of violator component due to the information we received regarding the net worth of Formosa Plastics Corporation, Louisiana.

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)	$ 5,000
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	$ 37,500
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	$ 37,500
Count Nine – Failure to Conduct a Management of Change 40 C.F.R. § 68.75	$ 37,500
Count Ten – Failure to Timely Correct Deficiencies in 2008 and 2011 Compliance Audits – 40 C.F.R. § 68.79(d)	$ 15,000

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) ..... $ 15,000

Subtotal ..... $ 195,000

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

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

Total Gravity Based Penalty ..... $ 516,000

Adjustments

A. Degree of Culpability ..... $ 0

B. History of Violations ..... $ 0

C. Good Faith ..... $ 0

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 ..... $ 516,000

If you have any questions, please feel free to email me at pearson.evan@epa.gov or to call me at (214) 665-8074.

Sincerely,

Evan L. Pearson
Senior Enforcement Counsel