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December 16, 2015

VIA EMAIL AND OVERNIGHT COURIER
FedEx tracking no. 7752 2237 6798

Jill C. Zimmerman, Environmental Engineer
Air Quality Division, Michigan Department of Environmental Quality
Cadillac Place
3058 West Grand Boulevard, Suite 2-300
Detroit, Michigan 48202-6058

**Re: Michigan Department of Environmental Quality's Notice of Violation dated
November 23, 2015**

Dear Ms. Zimmerman:

On December 1, 2015, Solutia Inc.'s (Solutia) Trenton, Michigan facility (the Site) received the Michigan Department of Environmental Quality (MDEQ) Notice of Violations dated November 23, 2015 (the NOV). The NOV directs that Solutia provide within 21 calendar days of the date of the NOV (i.e. by December 14, 2015) a written response regarding the alleged noncompliance or, if Solutia believes there were no violations, that Solutia explain its position. On Friday, December 11, 2015, you granted the Site an additional two days, up to and including Wednesday, December 16, 2015, to submit this response. Solutia now timely responds to the MDEQ's NOV.

For the reasons discussed in greater detail below, Solutia respectfully requests that the MDEQ withdraw the NOV.

INTRODUCTION

The Site is currently classified as a "synthetic area source" of hazardous air pollutants (HAP) under Clean Air Act (CAA) Section 112 because its Renewable Operating Permit (MI-ROP-B2155-2009a) (its Permit or the Permit) limits source-wide emissions of individual HAPs, including vinyl acetate (VA), to less than the 10 tons per year (tpy) major source threshold. The NOV alleges that accidental releases of VA occurring at the Site resulted in exceedances of (a) the Site's source-wide 9 tpy, 12-month rolling average limit on VA emissions and (b) the 10 tpy major source emission threshold under Section 112(b) of the Clean Air Act.¹ As such, the MDEQ alleges the Site not only violate the Permit, but is now also a "major source" of HAP.

¹ The NOV cites 40 C.F.R. Part 63, which is that part of the Federal Regulations implementing CAA Section 112.

As discussed below, the accidental release events involving VA were the result of sudden, infrequent, and not reasonably preventable malfunctions meeting the affirmative defense to enforcement under Mich. Admin. Code r. 336.1915 (2015). Solutia requests that the MDEQ exercise its enforcement discretion and not pursue enforcement for these events as they were beyond the Site's control. Regardless of whether the MDEQ exercises enforcement discretion, longstanding U.S. Environmental Protection Agency (EPA) policy provides that it would be inappropriate to reclassify the Site as a CAA Section 112 major source based on temporary exceedances of the 10 tpy major source threshold.

Under these circumstances, Solutia respectfully requests the MDEQ withdraw the NOV.

I. THE SEVEN RELEASE EVENTS IDENTIFIED IN THE NOV WERE MALFUNCTIONS FOR WHICH MDEQ ENFORCEMENT DISCRETION IS APPROPRIATE

The U.S. Environmental Protection Agency (EPA) has long recognized that

[e]ven equipment that is properly designed and maintained can sometimes fail, and imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner or operator may not be appropriate. Accordingly, a state or EPA can exercise its "enforcement discretion" to refrain from taking an enforcement action in these circumstances.²

Like Michigan, the EPA defines a "malfunction" as

...any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner which causes, or has the potential to cause, the emission limitations in an applicable standard to be exceeded. Failures that are caused in part by poor maintenance or careless operation are not malfunctions.³

² Memorandum, State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown, from Steven A. Herman, Asst. Admin. for Enforcement and Compliance Assurance and Robert Perciasepe, Asst. Admin. for Air and Radiation, to Reg. Administrators, Sept. 20, 1999. See Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions, from Kathleen M. Bennett, Asst. Admin. for Air, Noise and Radiation, to Reg. Admin., Sept. 28, 1982 ("Generally, EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate.").

³ 40 C.F.R. § 63.2 (2015).

While EPA currently evaluates malfunctions on a case-by-case basis and relies on its inherent discretion to forego enforcement where, as here, the events meets this definition, the MDEQ's regulations contain an affirmative defense for malfunctions.⁴

The Michigan rules require that the MDEQ consider evidence that the alleged emissions violations resulted from a malfunction in determining whether the department will pursue enforcement.⁵ If the MDEQ determines that the alleged emissions violations resulted from a malfunction, the MDEQ may use enforcement discretion to not pursue enforcement.⁶ Regulated entities such as Solutia may submit to the MDEQ for its consideration in determining whether the alleged violation resulted from a malfunction evidence, as applicable, corresponding to the elements described in Rule 336.1915(3)(a) through (m).

In Attachments A through G of this letter, Solutia provides affirmative defense reports for each of the seven malfunction events identified in the NOV. As you will see, each of these events substantially meets the affirmative defense elements provided in Rule 336.1915(3)(a) through (m). As malfunctions, the VA emission associated with these events should not be attributed to the site for purposes of determining compliance with either the Section 112(b) 10 tpy major source threshold or the 9 tpy, 12-month rolling average limit in the Permit as the emissions were beyond Solutia's reasonable control. If the MDEQ disagrees with Solutia's conclusion that these events satisfy the affirmative defense elements, we would appreciate understanding the basis for that determination.

For this reason, Solutia requests that the MDEQ exercise the enforcement discretion expressly provided to it in Rule 336.1915(2), to neither take enforcement for these events nor count them as emissions giving rise to an exceedance of the foregoing major source threshold or permitted emission limit.

II. LONGSTANDING EPA POLICY HOLDS THAT A SYNTHETIC AREA SOURCE SHOULD REMAIN SO CLASSIFIED NOTWITHSTANDING TEMPORARY EXCEEDANCE OF THE CAA SECTION 112 "MAJOR SOURCE" 10 TPY INDIVIDUAL HAP LIMIT

Even if the MDEQ declines to exercise enforcement discretion, which Solutia believes would be inappropriate, the seven malfunction events identified in the NOV would at most constitute permit violations but not result in a reclassification of the Site as a CAA Section 112 "major source", which is longstanding EPA policy.

EPA first articulated this policy in 1989, in a final rule revising requirements for state implementation plan submittals relating to the federal enforceability of state-issued

⁴ Mich. Admin. Code r. 336.1915 (2015).

⁵ Id. § 336.1915(1).

⁶ Id. § 336.1915(2).

permit conditions.⁷ A copy of this rulemaking is provided as Attachment H. In discussing related enforcement issues, EPA stated in this rule that “there are three options available to EPA for when a federally enforceable State permit” limiting a source’s potential to emit (PTE) is violated. First, the agency can enforce the permit limitations under CAA Section 113, while allowing the source to remain minor.⁸ According to EPA, “this is appropriate where, despite the permit violations, it appears that the source intends to adhere to the emissions limitations in the future.”⁹ Second, EPA can treat the source as major and require it to be permitted as such. “This course is appropriate where the source, through a change in business plans, or through the belated realization that its original plans cannot accommodate the design or operational limitations reflected in its minor source permit, can no longer adhere to the limitations in that permit, and so exceeds them.”¹⁰ Finally, where EPA determines that the source originally sought a limit with the intention of circumventing permitting requirements, and did not intend to comply with the limit in the long term, it is appropriate to bring enforcement action and require permitting as a major source.¹¹

The 1989 final rule pertained specifically to New Source Review permitting, but EPA has applied the same approach to limits on PTE under other programs, including specifically under CAA Section 112. In particular, a 1995 EPA policy memorandum cites the 1989 final rule in stating that where a source violates a synthetic minor requirement under Section 112, it is up to the permittee to decide whether it wants to remain minor or become major:

Violations of limits imposed by the rule or general permit that limit potential to emit constitute violations of major source requirements. In other words the source would be violating a “synthetic minor” requirement which may result in the source being treated as a major source under Titles I and V. The 1989 Federal Register Notice provides for separate enforcement and permitting treatment depending on whether the source subsequently chooses to become a major or remain minor.¹²

This memorandum (a copy of which is Attachment I) still represents EPA policy regarding the violation of federally-enforceable permit limitations on PTE.¹³

⁷ Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 54 Fed. Reg. 27274, 27280 (June 28, 1989) (Attachment H).

⁸ Id. 27280.

⁹ Id.

¹⁰ Id.

¹¹ Id.

¹² Memorandum from Kathie A. Stein, Guidance an Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits, at 9-10 (Jan. 22, 1995) (Attachment I).

¹³ See, e.g., Disapproval of California Air Plan Revisions, South Coast Air Quality Management District, Proposed Rule, 80 FR 73156, 73158 (Nov. 24, 2015) (citing the 1995 policy guidance as still applicable); Approval and Promulgation of Implementation Plans; Wisconsin; General and Registration Permit Programs, Final Rule, 71 FR 5979, 5981 (Feb. 2, 2006) (citing the 1995 policy guidance as still applicable).

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In this case, Solutia's Trenton, Michigan site can comply with its source-wide VA permit limit and does not wish to be treated as a major source. If the Site were reclassified as a major source, it could potentially be subject to the requirements of the Miscellaneous Organic National Emissions Standard for Hazardous Air Pollutants (the MON) (40 C.F.R. Part 63, Subpart FFFF), which would be extremely burdensome and entirely inappropriate based on the occurrence of unpreventable malfunctions. Therefore, pursuant to longstanding EPA policy, it would not be appropriate to reclassify the Site as a major source of HAP.

CONCLUSION

Solutia believes that the seven release events identified in the NOV were malfunctions meeting Michigan's affirmative defense. As such, Solutia requests that the MDEQ exercise enforcement discretion for these events and forego enforcement since these events were beyond the Site's control. In addition, it is longstanding EPA policy that a synthetic area source like the Site whose emissions temporarily exceed the permit limit established to maintain synthetic area source status, but which can comply with this limit going forward, does not automatically become major. It is only if the source cannot, or elects not to, comply with the enforceable limitation on a continuing basis that it is appropriate to treat the source as major. Since Solutia's emissions sources can meet the synthetic area source emissions limits in the Permit, Solutia wishes to remain, and should remain, a synthetic area source. For these reasons, Solutia respectfully requests that the MDEQ withdraw the NOV.

If the MDEQ disagrees with Solutia's stated positions, we request to meet with the appropriate MDEQ officials as soon as possible in the new year to understand the agency's perspective. Should you have any questions regarding Solutia's above stated positions, please feel free to contact me at (734) 672-7895 or by email at ceande1@eastman.com. With kind regards, I am

Very truly yours,

SOLUTIA INC.



Charles E. Anderson
Environmental Specialist

Attachments A-I