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October 22, 2020

By Express Mail, Tracking # 9510 8066 1911 0296 3478 73

Solicitor of Labor
U.S. Department of Labor
Room N-2420
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: APPEAL of OSHA Response to FOIA request, August 20, 2020, tracking number 896248, and the OSHA response thereto.

Dear Inspector General:

This is an appeal regarding the incomplete and excessively redacted FOIA response to my above-referenced FOIA request.

I represent 52 former and current employees of ConMed Corp. in claims for Workers Compensation benefits and concurrent civil tort claims against ConMed and other defendants alleging violations of OSHA regulation 1910.1047. These violations caused many injuries including cancer and death by workplace exposure to EtO, which was due to negligent and fraudulent actions by the defendants.

On March 26, 2019, EtO testing results showed that EtO levels exceeded OSHA permissible exposure limits for an 8 hour time-weighted average at the ConMed warehouse in Lithia Springs, Georgia. OSHA inspected ConMed on or about March 26, 2019 and several additional days close thereto, but did not include these inspection activities in its FOIA disclosures as discussed further herein, nor in its "Citation and Notification of Penalty" issued to ConMed and dated 9/25/2019. No ConMed employees knew of the EtO testing results, most never heard of EtO, and most didn't learn of the testing result until April, 26, 2019, when a ConMed manager held meetings to inform them of the EtO exposure, but to down-play the significance of the exposure and lead the employees to believe that there was no threat to their health and no real problem.

Also on March 26, 2019, a ConMed employee filed an OSHA complaint alleging unsafe work conditions at the ConMed warehouse in Lithia Springs. She did not complain about EtO because she didn't know it existed, was present in the warehouse, or was a threat to her health – she complained about general safety chaos and problems

at ConMed. Ms. Mahdiyar was the investigating officer for this March 26, 2019 complaint, apparently Inspection #1400790. She was also responsible for investigating the EtO exposures and contacted me about several of my clients who had been exposed to the poison. I had several significant questions for her, so Ms. Mahdiyar advised me to speak to her supervisor, the OSHA area director, Mr. Jeffrey Stawowy.

On September 3, 2019 I met with Mr. Stawowy and Ms. Kristin Murphy of the OSHA /Atlanta -West Area Office. I gave them numerous digital and paper files, photos, and videos that showed EtO monitors at the ConMed warehouse alerting for high levels of EtO throughout the warehouse with apparent management knowledge. I provided the names of several employees who had lodged several separate and distinct complaints with OSHA about the high levels of EtO at the workplace and asked Mr. Stawowy to initiate new investigations for each such complaint. Some of the photos I provided showed employees who had taken ill in the warehouse, some on stretchers, and some who were taken to the nearest hospital for emergency room treatment. Mr. Stawowy acknowledged receipt of the videos, photos and documents in several emails to me. See Exhibit A, pages 73, 76, 83, 84, and 86.

I asked Mr. Stawowy to initiate a new investigation based on the evidence I had provided to him regarding these illnesses and ambulance rides from ConMed for emergency treatment. I also asked for new investigations into the photos and videos which showed the EtO monitors alarming on specific dates, often showing Over Limits for the device, meaning that the EtO levels exceeded 100 ppm. I gave Mr. Stawowy the names of my 16 ConMed clients (I now represent 52 ConMed current and former employees in the same matter), so OSHA could interview them. Ms. Mahdiyar interviewed many of them, if not all. However, inexplicably, Mr. Stawowy refused to open new investigations for any of the complaints filed by the ConMed employees or for the evidence I provided him. Instead, he insisted on categorizing them as part of the 3/26/2019 complaint and investigation, which had just a few weeks left before the investigation period closed.

OSHA took EtO measurements at ConMed, but they were taken after significant advance notice by the OSHA Atlanta-West office was given to ConMed managers. I gave evidence to Mr. Stawowy that the ConMed Office would, after learning of a pending OSHA visit, delay delivery of EtO sterilized medical equipment and would keep the large tractor-trailers off the ConMed property, waiting until after the OSHA inspectors had arrived, taken measurements, and left. I asked Mr. Stawowy to cease announcing his future inspections at ConMed because of the deliberate EtO level manipulation engaged in by ConMed managers. Mr. Stawowy informed me that there was nothing he could do about that deliberate manipulation by the ConMed managers.

As indicated in the third paragraph herein, OSHA issued a "Citation and Notification of Penalty" to ConMed on 9/25/2019. ConMed appealed the citation. OSHA therefore filed a Complaint, OSHRC Docket No. 19-1631, Region IV, Inspection No. 1400790. Many of my clients became a party to the DOL/OSHA action against ConMed and I represented them in the case. Not one bit of evidence I gave Mr. Stawowy and none of my client's statements were formally submitted as evidence in the case. OSHA then settled with ConMed. Part of the settlement agreement was that ConMed

was required to conduct EtO abatement actions within a certain period of time and to inform OSHA of its compliance with the settlement terms.

The enclosed disk with 474 pages of emails between myself and the OSHA Atlanta -West Area office support the statements made herein. See Exhibit A attached.

To determine the extent of Mr. Stawowy's communications with and investigations and inspections of ConMed and those of his staff in the OSHA Atlanta-West area office, I filed a FOIA request on August 20, 2020 for all EtO related documents, emails, etc. that were directly or indirectly related to ConMed. That request is attached as Exhibit B; it was assigned tracking number 896248.

On Oct 13, 2020 I followed up with Mr. Thomas Hicks of the DOL FOIA office and was informed that 5 days earlier the OSHA West-Atlanta office had responded. I informed Mr. Hicks that no response had been received. I was then contacted by Ms. Stoner of the local OSHA Atlanta-West office and informed that the response had been too big to email and was shipped to me on a CD. She could not find the tracking number or the package, so she promised to send me a copy of the first response sent to me. Ms. Stoner eventually told me that the response had never been shipped. I asked her how did Mr. Hicks see the status in the FOIA control system as completed and a response had been shipped to me. She couldn't explain it and admitted it had never been shipped. She sent me a copy of the report and CD which I received on Friday, October 16th. The cover letter was digitally signed by Jeffrey Stawowy on October 15, 2020, confirming that they had never sent me a previous response. See Exhibit A, emails, and Exhibit C, Mr. Stawowy's FOIA response letter.

The FOIA disclosures provided by Mr. Stawowy were minimal. Not a single photo, video, or document that either I or my clients provided was included in Stawowy's minimal disclosure. No statement made by any of my clients or other employees of ConMed were included in the un-redacted part of the response, nor did it appear that they were among the redacted responses. Nothing was included regarding the Citation and Notification of Penalty, related communications, or any inspection notes, papers, reports, or other related documents. The disclosures were labeled left and right sides 1428552 and left and right sides 1428553, apparently inspection numbers, one of which seemed to focus on a forklift violation, not part of my request, though the forklift documents were sprinkled with EtO information, apparently a mix-up by the OSHA Atlanta-West office. The FOIA response did not include any documents related to Ms. Mahdiyar's Inspection #1400790, which was the inspection used as the basis for the OSHA complaint against ConMed, her interview notes from interviews with my clients, her photos and on-site records, her reports, nor any of her extra- or intra-agency emails responsive to my FOIA request. The response also omitted all responsive emails shared between Mr. Stawowy, Ms. Murphy and internal or external parties regarding EtO, which lie within the scope of the response as set forth by my request.

Mr. Stawowy's FOIA response failed to include any documents or information in any form from the core inspection, #1400790, conducted over ConMed Corporations' ethylene oxide poisoning of its employees and related to my FOIA request for all ethylene oxide related material that was directly or indirectly related to ConMed Corporation. Mr. Stawowy disclosed a few documents related to two other inspections, #1428552 and #1428553, but he relied on exceptions to the Freedom of Information Act

to deny access to many documents, files, and information which should have been disclosed. Furthermore, the FOIA request was not limited to inspections, yet Mr. Stawowy deliberately reduced the scope of my request under Federal Freedom of Information Act to a much narrower scope limited to his formal inspections. Mr. Stawowy does not get to conduct his operations in a secret manner akin to a foreign spy agency.

Mr. Stawowy relied on Exemption 4 to redact and limit my access to 22 pages of computer generated forms and/or notes containing commercial or financial and/or trade secret information. ConMed Corporation's operations in Lithia Springs, Georgia are not of a privileged or confidential nature, are not financial nature and do not utilize trade secrets – they are basic warehousing functions, receipt of packages, break-down and temporary storage of those packages, and re-shipping and distributing the contents of the packages to ConMed end users. The only secret involved was the amount of ethylene oxide present in the warehouse in violation of OSHA's very own standards set forth in OSHA regulation 1910.1047. Mr. Stawowy's use of Exemption 4 is unjustified. It should be denied, removed, and all information hidden by that wrongful use of Exemption 4 disclosed and made available for my and my client's perusal in full satisfaction of OSHA reg 1910.1047 and other OSHA-related regulations, and the purpose and intent of the Freedom of Information Act. If Exemption 4 is applicable, it should be tailored to its narrowest application to preserve the intent and purpose of the Act – the public's right to government-collected and maintained information.

Exemption 7(C) was also deployed by Mr. Stawowy to deny my and my clients' rights to access at least 166 pages of responsive information. Exemption 7(C) allows the withholding of information contained in files compiled for law enforcement purposes if production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Mr. Stawowy explained his generous use of Exemption 7(C) as his agency's effort "at determining whether a protected privacy interest exists, we must evaluate not only the nature of the personal information found in the records, but also whether release of that information to the general public could affect that individual adversely. Thus, we must consider whether release of even seemingly innocuous personal information could lead to the harassment or annoyance of an individual through unsolicited inquiries. We find that release of personal identifying information withheld here reasonably could be expected to have a negative impact on an individual's privacy."

Mr. Stawowy's interpretation of the statutory exemption is curtailed by the language of the exemption. That is, the exemption is designed to prevent an unwarranted invasion of **personal privacy**. The members of a corporation's management team do not have a right to personal privacy for their corporate activities, especially when those activities poison the surrounding neighborhoods or causes the poisoning illnesses and death of its employees. In fact, OSHA regulations, including 1910.1047 **grants the employees** a right to certain information related to ethylene oxide in the workplace. Additionally, OSHA regulations and other federal law grants the public the right to make unsolicited inquiries under circumstances such as those in the matter of ConMed Corporation and ethylene oxide poisoning of employees and the environment. Mr. Stawowy appears to be protecting and preempting certain individuals from justified and legally enforceable scrutiny.

The FOIA request I submitted to OSHA requested all ethylene oxide information of any kind that is or was related directly or indirectly to ConMed Corporation. **Personal privacy** is not impinged in any way in any information subject to disclosure under the Act in this matter. Furthermore, if personal privacy is impinged as a result of a violation of the law, that is a public matter and a law breaker has no right to hide his or her violative activities behind a narrow exemption to the purpose and intent of the Freedom of Information Act – to preserve the public’s right to information gathered at the expense of the taxpayer. Once again, the only personal information here is the names of the individuals responsible for policies, procedures, and managing the conditions that resulted in ethylene oxide present in the warehouse in violation of OSHA’s very own standards set forth in OSHA regulation 1910.1047. Mr. Stawowy’s use of Exemption 7(C) is unjustified. It should be denied, removed, and all information hidden by that wrongful use of the exemption disclosed and made available for my and my client’s perusal in full satisfaction of OSHA reg 1910.1047 and other OSHA-related regulations, and the purpose and intent of the Freedom of Information Act. If Exemption 7(C) is applicable, it should be tailored to its narrowest application to preserve the intent and purpose of both the exemption and the Act – the public’s right to government-collected and maintained information balanced against the right to personal privacy. In other words, instead of redacting 166 pages of responsive information, Mr. Stawowy should be directed to redact the **names of the individuals** whose personal privacy he is claiming to protect. This narrow use of the exemption is the required use of the exemption, if it actually applies, not the blanket obliteration of hundreds of pages of critical and responsive information.

Mr. Stawowy also obliterated at least 119 pages under the heavily applied 7(D) exemption. Exemption 7(D) of the Act protects from disclosure information that reasonably could be expected to identify persons or entities providing data to the government in confidence or under circumstances implying confidentiality. So – Mr. Stawowy implies that he obliterated 119 complete pages because he or someone in his office told someone that information they were providing would be in confidence or implied that it would be confidential. However, many interviewees in this matter were told that their statements were not confidential and could be used in a manner subject to public disclosure. Even if an interviewee was told or implied that their communications with OSHA were confidential, the broad strangulation of full page after page of critical information just to prevent the release of an individual’s name or identity is excessive and unjustified use of Exemption 7(D). Such a one-sided use of the exemption to protect an individual’s identity at the excessive expense of denying the public’s right to page after page of responsive information is a perversion of the exemption and a violation of the Act in and of itself. Similar to the argument previously presented against Mr. Stawowy’s perverted use of exemption 7(C), the only information that could identify individuals who communicated with OSHA, other than my many clients, are the names of the individuals responsible for policies, procedures, and managing the conditions that resulted in ethylene oxide present in the warehouse in violation of OSHA’s very own standards set forth in OSHA regulation 1910.1047. Mr. Stawowy’s use of Exemption 7(D) is unjustified. It should be denied, removed, and all information hidden by that wrongful use of the exemption disclosed and made available for my and my client’s perusal in full satisfaction of OSHA reg 1910.1047 and other OSHA-related regulations, and the purpose and intent of the Freedom of Information

Act. If Exemption 7(D) is applicable, it should be tailored to its narrowest application to preserve the intent and purpose of both the exemption and the Act – the public’s right to government-collected and maintained information balanced against the right to confidentiality of the identity of the individual. In other words, instead of redacting 119 pages of responsive information, Mr. Stawowy should be directed to redact the **names of the individuals** whose identity he is claiming to protect. This narrow use of the exemption is the required use of the exemption, if it actually applies, not the strangulation of hundreds of pages of critical and responsive information.

In summary, Mr. Stawowy and perhaps other members of the OSHA Atlanta-West office appear to have ignored numerous new OSHA complaints of EtO poisoning at the ConMed warehouse, ignored ConMed’s failure to report the multiple times that employees became so ill at the ConMed facility that they either had to be transported for medical assistance, or ambulances had to be called, ignored photographic, video and documentary evidence of high levels of EtO at the ConMed warehouse, and deliberately hid the extent of EtO complaints and injuries by hiding evidence under the rubric of the initial complaint that was independent of many other later EtO complaints. Mr. Stawowy appears to have then attempted to seal his secrets and hide the truth by engaging in wrongful, exorbitant and excessive use of FOIA exceptions for basic activities engaged in by ConMed, a warehousing facility, and for detailed statements provided by my clients to his inspectors, including those given to Ms. Mahdiyar. Further, Mr. Stawowy did not produce a single document, email, or other information his office received from ConMed regarding its compliance with the settlement agreement to which some of my clients were represented as a party.

For the above stated reasons, I ask that you direct the OSHA Atlanta-West office to rescind and minimize the excessive redactions sufficiently to effect their purpose and to maximize the disclosure of information pursuant to the purpose and intent of the Act, disclose the wrongly redacted information, disclose the many omitted documents and information requested, and obtain and disclose all responsive information from archive storage.

Thank you for your kind assistance.

Sincerely,



Kevin G. Moore
Attorney At Law

ENCL: Ex A, CD of OSHA Emails;
Ex B, FOIA Request;
Ex C, FOIA Response Cover Letter

EXHIBIT A
CD OF OSHA EMAILS
(Enclosed)

EXHIBIT B
FOIA REQUEST



An official website of the United States government
Here's how you know

UNITED STATES DEPARTMENT OF JUSTICE



FOIA.gov

MENU

Thank you for visiting FOIA.gov, the government's central website for FOIA. We'll continue to make improvements to the site and look forward to your input. Please submit feedback to National.FOIA.portal@usdoj.gov

Submission ID: 153391

Success!

Your FOIA request has been created and is being sent to the Occupational Safety & Health Administration.

You'll hear back from the agency confirming receipt in the coming weeks using the contact information you provided. If you have questions about your request, feel free to reach out to the agency FOIA personnel using the information provided below.

Contact the agency



FOIA Requester Service Center

202-693-2009



Thomas G. Hicks, Sr., FOIA Public Liaison

202-693-5427



Christopher Durso, FOIA Officer, Room N3647

200 CONSTITUTION AVENUE, NW
Washington, DC 20210

Request summary

Request submitted on **August 20, 2020**.

The confirmation ID for your request is **153391**.

The confirmation ID is only for identifying your request on FOIA.gov and acts as a receipt to show that you submitted a request using FOIA.gov. This number does not replace the information you'll receive from the agency to track your request. In case there is an issue submitting your request to the agency you selected, you can use this number to help.

Contact information

Name

KEVIN MOORE

Mailing address

5805 STATE BRIDGE RD
STE G-368
JOHNS CREEK, GA 30097
United States

Phone number

770-616-3787

Fax number

888-316-0399

Company/organization
MOORE INJURY LAW, LLC

Email
KM@MOOREINJURLAW.ORG

Your request

All documents related in whole or in part to ethylene oxide as they relate directly or indirectly to ConMed Corporation located in Lithia Springs, Georgia from 01/01/2010 to the present, including but not limited to all correspondence of any type, paper or electronic, all internal memorandums for the record, all emails, all digital information, all electronically stored information, all telephone records, all text messages, all gas testing and reporting records regardless of source or type, and all hearing or administrative action documents and information of any type.

Fees

What type of requester are you?

other

Fee waiver

yes

Fee waiver justification

The disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of OSHA regarding the protection of the public and employees from harmful work conditions at the ConMed location. This request is not primarily in the commercial interest of the requester.

The amount of money you're willing to pay in fees, if any

<https://www.foia.gov/request/agency-component/d61082df-27a4-4fa9-88f1-123f886a309f/>

The amount of money you're willing to pay in fees, if any
A reasonable amount if the waiver is denied.

Request expedited processing

Expedited processing

no



FOIA.gov

FOIA ACT

Office of Information Policy (OIP)

U.S. Department of Justice

Suite 11050

1425 New York Avenue, N.W.

Washington, D.C. 20530

E-mail: National.FOIAPortal@usdoj.gov

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EXHIBIT C
FOIA RESPONSE COVER LETTER

U.S. Department of Labor

Occupational Safety and Health Administration
Atlanta West Area Office
1885 North Park Place SE, Suite 525
Atlanta, Georgia 30339



Moore Injury Law, LLC
Attn: Kevin G. Moore, Esq.
5805 State Bridge Road
Suite G368
Johns Creek, GA 30097

Re: Freedom of Information Act Request #896248: Inspection: ConMed/Insp. #1428552, 1428553, 1309443, 1465596, 1400790

Dear Mr. Moore:

This decision is in response to your Freedom of Information Act (FOIA) request dated August 20, 2020 and received in our office on August 25, 2020 requesting records concerning ConMed. We located the records you seek with the exception of inspections 1309443, 1465596, 1400790; these inspections have been retired and must be retrieved from the National Archive Center. We located inspections 1428552 and 1428553 and conducted a review of the material you requested. After reviewing this information, we have made the following release determination.

Information regarding ConMed is being released only to you. If this request had come from a member of the general public, we might have withheld some of this information under one or more FOIA exemptions.

We have determined the following pages may be released with redaction regarding Inspection #1428552 (159 pages):

1. 5 pages of computer generated forms and/or notes containing financial and/or trade secret information, were redacted pursuant to Exemption 4.
2. 19 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(C).
3. 13 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(D).

We also determined the following pages must be withheld in full:

1. 4 pages of computer generated forms and/or notes containing financial and/or trade secret information were redacted pursuant to Exemption 4.
2. 81 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(C).
3. 4 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(D).

We have determined the following pages may be released with redaction regarding Inspection #1428553 (222 pages):

1. 13 pages of computer generated forms and/or notes containing financial and/or trade secret information, were redacted pursuant to Exemption 4.
2. 55 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(C).
3. 18 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(D).

We also determined the following pages must be withheld in full:

1. 11 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(C).
2. 82 pages of computer generated forms and/or notes with personal identifying information, were redacted pursuant to Exemption 7(D).

FOIA requires that agencies generally disclose records. Agencies may withhold requested records only if one or more of nine exemptions apply.

Exemption 4 of FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). This exemption is intended to protect two categories of information in agency records: (1) trade secrets; and (2) certain confidential or privileged commercial information. We are withholding certain privileged or confidential information pursuant to Exemption 4. When applying this part of exemption 4, the terms “commercial or financial” should not be narrowly construed to include proprietary information only. Rather, they should be given their ordinary meaning.

Exemption 7(C) of FOIA permits an agency to withhold information contained in files compiled for law enforcement purposes if production “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Thus, the purpose of Exemption 7(C) is to protect the privacy of any person mentioned in law enforcement records. In determining whether a protected privacy interest exists, we must evaluate not only the nature of the personal information found in the records, but also whether release of that information to the general public could affect that individual adversely.

Thus, we must consider whether release of even seemingly innocuous personal information could lead to the harassment or annoyance of an individual through unsolicited inquiries. We find that release of personal identifying information withheld here reasonably could be expected to have a negative impact on an individual’s privacy.

Exemption 7(D) of FOIA protects from disclosure information that reasonably could be expected to identify persons or entities providing data to the government in confidence or under circumstances implying confidentiality. 5 U.S.C. § 552(b)(7)(D). The applicability of Exemption 7(D) does not end with termination of an inspection because the potential harm or scrutiny that a confidential informant may be subjected is not dependent upon the phase of an inspection.

Rather, potential harm may result from the mere fact that an individual communicated with the government. We have withheld the noted materials pursuant to Exemption 7(D) to protect from disclosure information that reasonably could be expected to identify persons or entities providing data to the government in confidence or under circumstances implying confidentiality.

When records in our possession are compiled by a state or local agency, our practice is to direct the requester to that state or local agency. We are taking no action regarding these records. Rather, if you are interested in these directly, you should directly contact the agency. If you are unable to obtain these documents from these agencies, please feel free to contact us again and we will process them under the FOIA.

There are no fees associated with this request.

You have the right to appeal this decision with the Solicitor of Labor within 90 days from the date of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statements or arguments. The appeal should also include a copy of your initial request and a copy of this letter. If you appeal, you may mail your appeal to: Solicitor of Labor, U.S. Department of Labor, Room N-2420, 200 Constitution Avenue, N.W., Washington, D.C. 20210 or fax your appeal to (202) 693-5538.

Alternatively, you may email your appeal to foiaappeal@dol.gov; appeals submitted to any other email address will not be accepted. The envelope (if mailed), subject line (if emailed), or fax cover sheet (if faxed), and the letter indicating the grounds for appeal, should be clearly marked: "Freedom of Information Act Appeal."

You also may contact the Office of Government Information Services (OGIS) for assistance. OGIS offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

You may mail OGIS at the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001. Alternatively, you may email or contact OGIS through its website at: ogis@nara.gov; Web: <https://ogis.archives.gov>.

Finally, you can call or fax OGIS at: telephone: (202) 741-5770; fax: (202) 741-5769; toll-free: 1-877-684-6448. It is also important to note that the services offered by OGIS, is not an alternative to filing an administrative FOIA appeal.

If you have any questions about this FOIA determination, please contact this office at (678) 903-7301.

Sincerely,
**Jeffery M.
Stawowy**

Digitally signed by Jeffery M. Stawowy
DN: cn=Jeffery M. Stawowy, o=OSHA

Jeffery Stawowy
Area Directors