



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

JAN 20 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[See List of Addressees – Attachment 1]

Re: Withdrawal of October 26, 2005 *De Minimis* Settlement Offer and Issuance of Revised *De Minimis* Settlement Offer Pursuant to Section 122(g) of CERCLA Regarding the Mercury Refining Superfund Site

Dear Sir/Madam:

As you are aware, on October 26, 2005, EPA sent you notice of your or, as the case may be, your client's liability as a potentially responsible party ("PRP") at the Mercury Refining Superfund Site ("Site"), located at 26 Railroad Avenue, on the border of the Towns of Guilderland and Colonie, Albany County, New York. Included in that notice letter was an offer to enter into a *de minimis* settlement with EPA pursuant to Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(g). Two hundred ninety two parties agreed to settle with EPA and signed the settlement agreement. On August 23, 2006, EPA published notice of the settlement for public comment. EPA received significant comments on the settlement. In light of some of those comments and for other reasons explained below, EPA is hereby withdrawing that settlement offer and issuing a revised settlement offer.

Enclosed herewith as Attachment 2 is EPA's response to the comments received during the public comment period. The majority of comments centered around 1) EPA's decision to use the weight of the item sent to the Site, and not the amount of mercury contained therein, as the basis for creating the waste-in list upon which the *de minimis* settlement was based, and 2) the relative liability of parties that sent mercury and/or mercury-containing materials to the Site after new retorts were installed and operated at the Site. As more fully explained in Attachment 2, EPA has decided to continue to base its waste-in list on the weight of the item shipped to the Site rather than the mercury content of the shipment as the commentors have requested. On the other hand, EPA agrees generally with the commentors that a change in operations at the Site limits the contribution of those parties who sent shipments of mercury and/or mercury-containing material to the Site after February 15, 1994 (not 1993 as stated by the commentors), when the new retort ovens with state-of-the-art pollution control equipment were operational.

EPA has also reconsidered its decision to exclude mercury-containing batteries from the waste-in list. As discussed more fully in the Updated Questions & Answers ("Updated Q&A") attached

hereto as Attachment 3, EPA has re-evaluated its position on batteries and has now included as waste, batteries containing mercury which were sent to the Site from locatable parties before May 11, 1995 when the Universal Waste Rule, 40 CFR Part 273, which specifically regulated the recycling of batteries, was enacted.

#### Revised *De Minimis* Settlement Offer

This letter invites you to enter into a revised *de minimis* settlement with EPA. EPA encourages PRPs to voluntarily perform or finance cleanup at Superfund sites by entering into settlement agreements. As discussed above, in addition to including batteries containing mercury sent to the Site prior to May 11, 1995, the enclosed *De Minimis* Settlement Administrative Order on Consent ("AOC") (Attachment 4) provides an 85% discount for all shipments of mercury and/or mercury containing material sent to the Site after February 15, 1994 (and as to batteries sent between February 15, 1994 and May 11, 1995), and includes recalculated settlement amounts for all *de minimis* parties utilizing up-to-date cost estimates and a revised formula for calculating each party's settlement amount. The enclosed Attachment 5 is a list of all *de minimis* parties who are being sent the revised *de minimis* settlement offer and their respective settlement amounts (ordered by weight) and the same list ordered alphabetically.<sup>1</sup> Also enclosed as Attachment 5 is the Revised Waste-in List for the Site which includes both *de minimis* parties (<1%) and major parties (>1%). Please note that EPA does not intend to negotiate the terms of the AOC. This AOC follows closely EPA's model consent order for *de minimis* parties and is used consistently throughout the United States with minimal exceptions. The AOC is the same as the previously signed settlement agreement with the exception of four changes to reflect updated cost information and payment procedures.<sup>2</sup> The AOC will not become effective until after it has been signed by EPA and the settling *de minimis* parties, the Attorney General approves the AOC, and EPA holds a 30-day public comment period on the settlement and thereafter EPA notifies you that the AOC is effective. The payments by the settling parties will be due within 30 days of the effective date of the AOC.

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<sup>1</sup> Attachment 5 includes all *de minimis* parties including parties that sent only batteries to the Site. Since the parties that sent only batteries to the Site did not receive EPA's October 26, 2005 letter, they are not recipients of this letter but rather a separate letter which is being sent simultaneously with this letter. This separate letter contains an identical settlement offer to the one included in this letter. Additionally, since the original 2005 settlement offer was made, EPA learned that numerous parties were unlocatable, bankrupt, insolvent or defunct and therefore they have been removed from the waste-in list. Additionally, 53 parties which sent batteries to the Site have not been included on the wastes-in list because EPA can no longer find the documentation for their transactions in our files. These 53 parties account for a combined 13,484.52 lbs. or 0.17% of the total waste to the Site.

<sup>2</sup> Paragraph 10 was changed to include EPA's current past costs. Paragraph 14 was amended to reflect EPA's current future cost estimate. Paragraphs 19 and 20 were changed to reflect new payment procedures.

The amount to be paid by each settling *de minimis* party represents that party's proportionate share of: (1) unreimbursed past response costs through October 31, 2008 (\$5,072,001.55); (2) EPA's estimated interim costs including certain costs associated with the performance of a treatability study, costs to close out the RI/FS contractor work and costs associated with contractor assistance to issue the revised settlement offer (\$181,500); (3) the projected cost of the remedial action to be implemented at the Site including projected EPA oversight costs (\$11,580,000); and (4) a 100% premium on all future and interim response costs to cover cost overruns or remedy failure (\$11,761,500). EPA has also recalculated the maximum amount appropriate for compensating for the existence of an orphan share ("MAAC") utilizing up-to-date information. EPA has determined that the MAAC is 25% of the ROD costs or \$2,770,000. The enclosed Updated Q & A (Attachment 3) provides additional information on the above costs and on the orphan share.

For this revised settlement offer, EPA has also revised the calculation utilized to arrive at each party's settlement amount. Rather than calculating a price per pound and then multiplying each party's contributing weight by that price per pound as we did for the original settlement, EPA has applied each party's adjusted percentage share to the total costs for the Site (including a 100% premium) reduced by the orphan share. This approach is simpler and is consistent with EPA's December 20, 1989 guidance entitled "Methodologies for Implementation of CERCLA Section 122(g)(1)(A) *De Minimis* Waste Contributor Settlements." The enclosed Updated Q&A explains the calculation EPA utilized.

Included with this letter as Attachment 6 is either the individual Transaction Summary Report you received with the original October 26, 2005 letter or, if you sent batteries to the Site before May 11, 1995, then your Transaction Summary Report has been amended to include the battery shipments.

EPA is aware that the financial ability of some PRPs to contribute toward the payment of response costs at a site may be substantially limited. If you believe and can document that you fall within this category, please contact the telephone information line for this Site at 866-353-0976 **within fourteen (14) days of the date of this letter** for information on "Ability to Pay Settlements." You will receive information about such settlements and a form to fill out with information about your finances and you will be asked to submit financial records including, but not necessarily limited to, federal tax returns. If EPA concludes that you have a legitimate inability to pay the full amount listed for you on Attachment 5, EPA may offer a schedule for payment over time or a reduction in the principal payment.

Finally, by this letter EPA advises you of a recent U.S. Supreme Court decision entitled, United States v. Atlantic Research Corporation, 172 S.Ct. 2331, 169 L.Ed. 2d 28 (June 11, 2007) (the "ARC decision"). As you may recall, EPA's October 26, 2005 letter and attached Q & A informed you, or your client, that by entering into the settlement, you, or your client, would resolve its liability to EPA for the Site, and also would be afforded the statutory protection from contribution actions found in Sections 122(g)(5) and 113(f)(2) of the Superfund law (CERCLA, 42 U.S.C. § 9622(g)(5) and 42 U.S.C. § 9613(f)(2)). In the ARC decision, however, the

Supreme Court ruled that a liable party in Atlantic Research Corporation's position could sue other liable parties under Section 107(a)(4)(B) of Superfund, 42 U.S.C. § 9607(a)(4)(B). Therefore, while you, or your client, may be protected from claims for contribution, some parties could try to sue you, or your client, for cost recovery under Section 107 of CERCLA.

The United States is still formulating its positions in light of the ARC decision. Therefore, it is not possible to say what positions the United States will take in the future regarding the ability of liable parties to assert claims to recover response costs under CERCLA Section 107 against parties that have already settled with the United States, including *de minimis* parties. Such claims could potentially circumvent the contribution protection provided to settled parties under CERCLA Section 113. It is also not possible to predict how the courts will rule in this area. However, the United States has taken the position in court that potentially responsible parties performing work under a settlement with the United States cannot sue *de minimis* parties under CERCLA Section 107. Furthermore, it has long been EPA's position that *de minimis* settlements are integral to the success of the Superfund program, and EPA has taken action to facilitate and protect *de minimis* settlements. This letter should not be construed as offering legal advice, and you should speak to a legal practitioner in this area of law should you want more information about the ARC decision.

By entering into the revised *de minimis* settlement and paying your settlement amount, you will resolve your liability to EPA for EPA past costs, interim costs (as explained above) and future cleanup and oversight costs at the Site. You will not be sued by EPA and you will not be forced into lengthy negotiations with EPA over what your share of the costs should be. By avoiding such negotiations, you can minimize many of the expenses that can be involved in resolving your liability.

Notwithstanding the ARC decision, we hope that you, or your client, will enter into the settlement to obtain the covenant not to sue and contribution protection it affords.

If you choose to participate in the *de minimis* AOC, please return the original of your signed signature page to Sharon Kivowitz at the following address:

Sharon E. Kivowitz  
Office of Regional Counsel  
U.S. Environmental Protection Agency - Region 2  
290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007

**If we do not receive your signed signature page within sixty (60) days of the date of this letter, we will conclude that you do not wish to participate in the *de minimis* settlement.**

**PLEASE DO NOT SEND YOUR PAYMENT AT THIS TIME.** After all signature pages are received, EPA will hold a 30-day public comment period. At end of the public comment period, EPA will notify you that the settlement is final and that payment of your settlement amount is

due.

EPA will be holding a meeting with interested *de minimis* parties in New York City. Please see Attachment 7 for details on the date, time, and location of the meeting as well as R.S.V.P. instructions.

Finally, on March 30, 2008 EPA published the Proposed Plan for the Site and requested public comment. On March 28, 2008, EPA mailed you a letter informing you of the issuance of the Proposed Plan and providing you with a link to EPA's website where a copy of the Plan could be obtained. On September 30, 2008, EPA issued the Record of Decision for the Site. The Record of Decision and other documents relevant to the Site can be found at <http://epa.gov/region02/superfund/npl/mercuryrefining/>.

If you have any questions or require additional information, EPA has set up a toll-free telephone information line for this Site at 866-353-0976 which you may make use of on any weekday between the hours of 10:00 am and 5:00 pm, EDT. Thank you for your cooperation and patience in this matter.

Sincerely yours,



Raymond Basso  
Strategic Integration Manager  
Emergency and Remedial Response Division

cc: Brian Davidson, NYSDEC

Enclosures:

- Attachment 1 - List of Addressees
- Attachment 2 - Response to Comments
- Attachment 3 - Updated Q&A
- Attachment 4 - *De Minimis* Settlement Consent Order
- Attachment 5 - Revised *De Minimis* Settlement Waste-in List with Settlement Amount (ordered by weight); Revised *De Minimis* Settlement Waste-in List with Settlement Amount (ordered alphabetically); and Revised Waste-in List
- Attachment 6 - Individual Transaction Summary Report
- Attachment 7 - Meeting Information and RSVP form