UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

JAN 2 0 2008

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[See List of Addressees – Attachment 1]

Re: Notice of Potential Liability and Settlement Offer Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq., Mercury Refining Superfund Site, Towns of Colonie and Guilderland, Albany County, New York

Dear Sir or Madam:

This letter concerns the Mercury Refining Superfund Site (the "Site") located at 26 Railroad Avenue in the Towns of Colonie and Guilderland, Albany County, New York. As discussed in more detail below, on October 26, 2005, the United States Environmental Protection Agency ("EPA") sent notice of potential liability for the Site to companies and individuals that sent mercury and/or mercury-bearing materials, excluding batteries, to the Site. This letter is being sent to you because EPA is now sending such notice to certain additional parties who either sent mercury-bearing batteries to the Site or to parties who sent a combination of mercury-bearing batteries and other mercury-bearing material but because the amount of other mercury-bearing material was considered a *de micromis* amount (less than 200 lbs.), you were not included in EPA's original October 26, 2005 notice letter.

EPA is charged with responding to the release or threatened release of hazardous substances, pollutants and contaminants into the environment, and with enforcement responsibilities under the Superfund Law, (also known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 - 9675 ("CERCLA" or "Superfund")). EPA has documented the release and threatened release of hazardous substances into the environment at the Site.

From the late 1950s through 1998, the Site was used by Mercury Refining Company, Inc. ("Mereco") as a mercury reclamation facility where liquid mercury and mercury-bearing materials, including batteries, were brought. Through the mercury reclamation process, hazardous substances, including mercury, came to be disposed of at the Site. On September 1, 1983, the Site was placed on the National Priorities List ("NPL"), a list of the nation's highest priority sites, and the New York State Department of Environmental Conservation ("NYSDEC") became the lead agency for clean-up and enforcement at the Site. From the mid-1980s through 1998, Mereco entered into various settlements with NYSDEC and performed a number of cleanups and studies pursuant to the Superfund Law, the Resource Conservation Recovery Act

("RCRA") and New York State environmental laws. While some of the work required to be performed was completed, other tasks were not. In 1999, NYSDEC requested that EPA take over the Site and complete the work utilizing the Superfund. A further description of the Site and the activities which have already been undertaken can be found in the enclosed Updated Questions and Answers ("Updated Q & A") (Attachment 2).

In response to the release of hazardous substances and the threat of future such releases, EPA spent public funds and anticipates spending additional public funds to investigate and cleanup the Site. In particular, EPA has performed a remedial investigation and feasibility study ("RI/FS") and has issued a Proposed Plan and Record of Decision ("ROD"). EPA has also performed an extensive search for potentially responsible parties ("PRPs") that contributed mercury and mercury-bearing materials to the Site. These actions were undertaken and continue to be undertaken by EPA pursuant to CERCLA. As of October 31, 2008, EPA's unreimbursed past response costs at the Site are in excess of $5,000,000.

Notice of Potential Liability

Under CERCLA and other laws, responsible parties may be held liable for monies expended by the federal government in taking response actions at and around facilities where hazardous substances have been released, including investigative, planning, removal, remedial, and enforcement actions. Responsible parties also may be subject to orders requiring them to take response actions themselves.

Responsible parties under Section 107(a) of CERCLA include current and past owners or operators of a facility, persons who arranged for the treatment or disposal of hazardous substances which came to be disposed at a facility, and persons who accepted hazardous substances for transport to disposal or treatment facilities selected by such person.

By this letter, you are notified that EPA has reason to believe that for purposes of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), you arranged for the disposal or treatment of hazardous substances at the Site. Specifically, EPA has evidence that you arranged for the disposal or treatment at the Site of mercury which is a hazardous substance under CERCLA (*see* 42 U.S.C. § 9601(14)).

Proposed *De minimis* Settlement

Another purpose of this letter is to inform you that EPA believes that you are a small ("*de minimis*") waste contributor with respect to the Site and to invite you to enter into a *de minimis* settlement with EPA by entering into the enclosed Administrative Order on Consent ("AOC") (Attachment 3, hereto). This letter and the accompanying enclosures provide background information regarding the Superfund law, this Site in particular, *de minimis* settlements in general and how EPA derived your settlement amount.

EPA encourages PRPs to voluntarily perform or finance cleanup at Superfund sites by entering into settlement agreements with EPA. Section 122(g) of CERCLA, 42 U.S.C. §9622(g), allows EPA, in its discretion, to enter into "*de minimis* settlements" 1) with parties that contributed a

minimal amount of waste to a site and (2) where the contributed waste was of minimal or similar toxic effect as other waste sent to the site. A settlement with *de minimis* parties must also be in the public interest and involve only a minor portion of the cleanup costs at a site.

The information currently available to EPA indicates that the amount and toxicity of the mercury-bearing materials (batteries) contributed to the Site by you are minimal in comparison with other parties who contributed mercury and/or mercury-bearing materials to the Site. We believe that it would be in the public interest to enter into a *de minimis* settlement with you. EPA believes that the *de minimis* settlement will be a fair and equitable means for small waste contributors to resolve their potential liability for the Site. Simultaneously with this letter, EPA is making a similar offer to 372 *de minimis* parties that sent non-battery waste only or a combination of battery- and non-battery waste to the Site.

In October 2005, EPA sent a notice letter and *de minimis* settlement offer to 425 *de minimis* parties that sent mercury and/or mercury-bearing materials, excluding batteries. At that time, EPA believed that the parties that sent batteries to the Site would likely satisfy their burden under the Superfund Recycling Equities Act ("SREA"), Section 127 of CERCLA, 42 U.S.C. §9627, and therefore you did not receive such a letter because you sent only batteries to the Site. Two hundred ninety two *de minimis* 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, that offer was withdrawn and is being reissued.

EPA has also re-evaluated its position that all mercury-bearing batteries are exempt from liability under SREA and has concluded that it is appropriate to include 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. Section 127(e)(2)(C) of CERCLA, 42 U.S.C. §9627(e)(2)(C) states that, among other things, a party seeking to avail itself of the recycling exemption must show that "with respect to transactions involving other spent batteries, Federal environmental regulations or standards are in effect regarding the storage, transport, management, or other activities associated with the recycling of such batteries, and the person was in compliance with applicable regulations or standards or any amendments thereto." During its initial review, EPA considered the RCRA and the Hazardous and Solid Waste Amendment of 1984 provisions regarding storage, transport and management of hazardous waste as applicable. However, a further reading of the Section as well as a more extensive review of Congress's intent has caused EPA to conclude that SREA does not apply to batteries shipped to the Site prior to the enactment of the Universal Waste Rule on May 11, 1995, since this is when the recycling of batteries was first regulated. Thus, all known mercury-containing batteries sent to the Site before this date, from locatable parties, are now included on the waste-in list. The Updated Q&A provides additional information on EPA's re-evaluation of batteries and the application of SREA to this Site.

Enclosed herewith as Attachment 4 is EPA's response to the comments received during the public comment period on the original *de minimis* settlement. 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 4, 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 retorts with state-of-the-art pollution control equipment were operational.

In addition to including parties that sent mercury-containing batteries to the Site prior to May 11, 1995, the enclosed *De Minimis* Settlement Administrative Order on Consent ("AOC") (Attachment 3) 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).

With the inclusion of the batteries to the waste-in list, EPA has identified 433 locatable parties which sent 200 or more pounds of mercury and/or mercury-bearing materials to the Site.[1] Note that EPA considers such materials sent by locatable, non-*de micromis* parties to be Contributing Waste. Of the 433 parties, 421 parties are considered *de minimis* because individually they sent less than 1% of the Contributing Waste to the Site. The *de minimis* parties combined are responsible for 23% of the total Contributing Waste sent to the Site. Enclosed as Attachment 5 is a waste-in list identifying all parties that sent Contributing Waste to the Site, a a *de minimis* party list which includes all *de minimis party* settlement amounts, ordered by weight, and this same *de minimis* party list ordered alphabetically. Note that only the *de minimis* parties are being asked to sign the enclosed AOC.

Enclosed with this letter are several documents which should help you to understand your potential liability at the Site. They are: (1) the Updated Q & A, which answers various questions which we anticipate you may have relating to this matter (Attachment 2); (2) the AOC (discussed further below) including Appendix C to the AOC, which lists all of the *de minimis* parties and their respective payment amounts under the proposed AOC (Attachment 3); (3) the Revised Waste-In List and the Revised *De Minimis* Settlement Waste-in List with Settlement Amounts list discussed above (Attachment 5); (4) a printout listing the documentation in EPA's files indicating your contributions to the Site (Individual Transaction Summary) (Attachment 6); (5) EPA's response to the comments received during the public comment period on the original *de minimis* settlement (Attachment 4); and (6) supplemental information for small businesses subject to an EPA enforcement action (Attachment 7). Also enclosed, as Attachment 8, is a meeting R.S.V.P. form and self addressed stamped envelope, with directions and maps, which is further discussed below. Please note that these and other documents related to the Site can be found at http://epa.gov/region02/superfund/npl/mercuryrefining/.

[1] Since the original 2005 settlement offer was made, EPA learned that numerous parties were unlocatable, bankrupt, insolvent or defunct. Additionally, 53 parties which sent batteries to the Site have been deleted from the waste–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.

If you are willing to enter into the *de minimis* settlement with EPA, please sign the "Consent" page at the end of the AOC and return the original of your signed signature page to Sharon Kivowitz at the address set forth below **within sixty (60) days** from the date of this letter. **NO PAYMENT WILL BE DUE WITH THE SIGNATURE PAGE.** Please note that we do 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.

The AOC will not become effective until after it has been signed by the settling *de minimis* parties and EPA, 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.

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 is also providing the *de minimis* parties with a reduction of 25% of the ROD remedy costs to account for the shares of insolvent or defunct ("orphan") parties. The enclosed Updated Q & A (Attachment 2) fully explains how each party's individual settlement amount was calculated and includes how the orphan share was calculated.

Under CERCLA, EPA may seek to recover costs of cleanup from any or all parties that sent or transported hazardous substances to a site, regardless of the amount of waste they contributed, unless they are otherwise exempt from liability under CERCLA. EPA is not required to determine the exact share of any party's contribution to a site. In addition, any potentially responsible party that performs or finances cleanup at a Superfund site may bring a "contribution" suit to recover a portion of the costs from any other responsible parties.

By entering into the enclosed *de minimis* AOC, the *de minimis* parties will obtain certain benefits. First, the settlement will provide you with a "covenant not to sue." This covenant is an agreement by EPA not to pursue you further for EPA's costs related to the Site. This covenant will apply no matter how much the planned remedial action ultimately may cost.

In addition, the Superfund law provides protection from "contribution" suits for parties that settle with EPA. Under Sections 113(f)(2) and 122(g)(5) of CERCLA, a party "who has resolved its liability to the United States ... shall not be liable for claims for contribution regarding matters addressed in the settlement." EPA believes that by participating in the *de minimis* settlement, you will be paying your fair share of EPA past costs and the cleanup and oversight costs related to the upcoming remedial action. Thus, settling with EPA should protect you from lawsuits which might otherwise be brought by other responsible parties to seek contribution from you for remedial, oversight and EPA past costs which they may pay.

By this letter, EPA also 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"). In the ARC decision, 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 may be protected from claims for contribution, some parties could try to sue you 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.

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

Informational Meeting

EPA will be holding an informational meeting to give all *de minimis* parties an opportunity to ask EPA representatives general questions about CERCLA or specific questions about the Site or this *de minimis* settlement. The meeting will be held in New York City as noted in Attachment 8. Attendance at this meeting is voluntary. To R.S.V.P. for this meeting, follow the directions on Attachment 8.

To Contact EPA

How you wish to proceed in this matter is, of course, your decision. If you feel the need to speak to an attorney or to get legal advice, there are environmental law firms listed in the local telephone directory and lawyer referral services available through your local bar association. Although EPA cannot provide you with legal representation, we are available to answer factual questions about the Site and questions concerning the Superfund law. 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), if you need additional information regarding this matter.

Ability-To-Pay Information

EPA is aware that the financial ability of some parties 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 at the above-noted number **within fourteen days (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 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 on Appendix C of the enclosed AOC, EPA may offer a schedule for payment over time or a reduction in the principal payment.

How to Participate in the Settlement

If you choose to participate in the *de minimis* AOC, please return the original of your signed signature page **[but do not send in your payment]** to Sharon Kivowitz at the following address:

Sharon E. Kivowitz
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway, 17th 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. After all signature pages are received, EPA will hold a 30-day public comment period. At the end of the public comment period, EPA will notify you that the settlement is effective and that payment of your settlement amount is due within thirty (30) days of the effective date.

Small Business Concerns

For your information, enclosed as Attachment 7, is an information sheet intended to inform small businesses of their rights under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), Pub. L. No. 104-121, 110 Stat. 857 (1996), to comment to an Ombudsman about EPA enforcement activity. This information sheet also provides information on compliance assistance available to small businesses. EPA is including this information sheet without making a determination whether your company is a small business as defined by Section 222 of SBREFA or related provisions.

Thank you for your prompt attention to this matter.

Sincerely yours,

Raymond Basso,
Strategic Integration Manager
Emergency and Remedial Response Division

cc: Brian Davidson, NYSDEC
David P. Rosenblatt (Lead PRP Group Counsel), Burns & Levinson LLP

Enclosures:

Attachment 1 - List of Addressees
Attachment 2 - Updated Q&A
Attachment 3 - Administrative Order on Consent
Attachment 4 - EPA's Response to Comments
Attachment 5 – Revised Waste-in List and Revised *De Minimis* Settlement Waste-In List With Settlement Amounts (ordered by weight and alphabetically)
Attachment 6 - Individual Transaction Summary Report
Attachment 7 - Small Business Information Sheet
Attachment 8 – Meeting Information and RSVP