UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

JAN 2 0 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[See List of Addressees – Attachment 1]

Re: Response to Comments and Notice of Withdrawal of Original *De Minimis* Settlement and Issuance of Revised *De Minimis* Settlement offer to *De Minimis* Parties pursuant to Section 122(g) of CERCLA; Mercury Refining Superfund Site

Dear Sir/Madam:

As you are aware, on October 26, 2005 the U.S. Environmental Protection Agency ("EPA") sent you, or, as the case may be, your client, a letter notifying you, or your client, that you or your client is a potentially responsible party ("PRP") at the Mercury Refining Superfund Site ("Site"), located at 26 Railroad Avenue on the border of the Towns of Colonie and Guilderland, Albany County, New York. In that letter, we also informed you that EPA was simultaneously issuing notice letters and a *de minimis* settlement offer to 425 *de minimis* PRPs. Of these 425 *de minimis* PRPs, 292 parties agreed to settle with EPA and signed the *de minimis* settlement agreement. On August 26, 2006 EPA published that *de minimis* settlement for public comment. Many of you commented on that settlement. As discussed below, that settlement was not finalized and has been withdrawn.

Enclosed 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 new retort ovens with state-of-the-art air pollution control equipment were operational.

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

found at the website identified below, EPA has re-evaluated its position on batteries and has now included all mercury-containing batteries 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. As a result of the comments, for settlement purposes only, in addition to including batteries containing mercury sent to the Site prior to May 11, 1995, EPA is providing an 85% discount for all mercury and/or mercury containing materials sent to the Site after February 15, 1994 (and as to batteries, between February 15, 1994 and May 11, 1995), thereby reducing the post-February 15, 1994 shares attributable to such parties by 85%. EPA has made this adjustment to the waste-in list for all parties, not just the *de minimis* parties.

Simultaneous to the issuance of this letter, EPA is sending a letter withdrawing the previous *de minimis* settlement offer and issuing a revised *de minimis* settlement offer which takes into account all batteries sent to the Site prior to May 11, 1995 and which provides an 85% discount for all mercury and/or mercury containing materials sent to the Site after February 15, 1994. EPA is also simultaneously sending a notice letter and settlement offer to the parties that sent batteries to the Site prior to May 11, 1995 and who did not receive EPA's original October 2005 settlement offer. EPA considers all viable and locatable parties that sent less than 1% of the mercury-containing waste, including mercury-containing batteries sent prior to May 11, 1995, to the Site (adjusted for post-1994 shipments) to be *de minimis*.[1] The *de minimis* parties account for 23% of the total adjusted weight sent to the Site.

As a result of the changes to the waste-in list, certain parties that were considered major parties when the original *de minimis* settlement offer was made are now considered *de minimis* parties (Clean Venture/Cycle Chem, Inc., Exelon Corp., Rochester Gas and Electric Corp., New York State Electric and Gas, and Goodyear Rubber Co. of Southern California) and one party, Radiac Research Corp., which was originally a *de minimis* party, is now considered a major party. Other parties considered major parties when the original *de minimis* settlement offer was made (Doolan Recovery Technologies, Simmons Refining Company, Pioneer Americas, Inc., and EaglePicher, Inc.) are either bankrupt or defunct and they, and their shares, have been removed from the waste-in list. The enclosed Attachment 3 is a revised waste-in list which includes all viable, non-*de micromis*, non-battery parties and battery parties with shipments before May 11, 1995 with weights adjusted as discussed above.[2] Other changes to the revised *de minimis*

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[1]Parties that sent less than 200 lbs. to the Site are considered *de micromis* and are exempt from liability under Section 107(o) of CERCLA, 42 U.S.C. §9607(o). If a party's post-1994 adjusted weight falls below 200 lbs. that party is still considered *de minimis* and has been sent a settlement offer because the adjustment that reduces their share below 200 lbs. was performed by EPA for settlement purposes only and these parties are not *de micromis* under the statutory definition.

[2] 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

settlement include updated cost estimates consistent with future cost estimates found in the Proposed Plan, updated past and interim costs, and a revised methodology for calculating each *de minimis* party's settlement amount.

Copies of the letter to the *de minimis* parties, the letter to the battery-only parties that had not received our October 2005 letter, the revised *De Minimis* Administrative Order on Consent ("AOC"), and Updated Q&A can be found on EPA's website by using the following link:

http://epa.gov/region02/superfund/npl/mercuryrefining/

Once the *De Minimis* AOC has been signed, EPA will publish notice of the settlement in the Federal Register. EPA will accept comments on the revised settlement in accordance with Section 122(i) of CERCLA, 42 U.S.C. §9622(i).

Finally, as you are aware, EPA issued the Record of Decision ("ROD") for the Site on September 30, 2008. EPA intends to send "special notice" letters to you, or your clients, inviting you, or your clients, to enter into settlement negotiations with EPA to fund and perform the remedy selected in the ROD, in the near future.

For your convenience, attached hereto as Attachment 4 is an individual Transaction Summary Report identifying all shipments you, or your client, sent to the Site. Many of you requested and received this report after the October 26, 2005 notice letter was sent. The Transaction Summary Report attached hereto includes battery shipments you, or your client, sent to the Site prior to May 11, 1995. If you, or your client, did not send batteries to the Site then the attached Transaction Summary Report is identical to the report you received from EPA in 2005.

If you have any questions, please call Sharon Kivowitz, Assistant Regional Counsel, at 212-637-3183, Leilani Davis, Assistant Regional Counsel, at 212-637-3249 or Tom Taccone, Remedial Project Manager, at 212-637-4281.

Sincerely yours,

Raymond Basso

Raymond Basso
Strategic Integration Manager
Emergency and Remedial Response Division

cc: Brian Davidson, NYSDEC

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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.

Enclosures:

Attachment 1 - List of Addressees
Attachment 2 - Response to Comments
Attachment 3 – Revised Waste-in List
Attachment 4 - Individual Transaction Summary Report