

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION II

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IN THE MATTER OF:	)	U.S. EPA Docket No.
	)	CERCLA-02-2009-2006
MERCURY REFINING SUPERFUND SITE	)	
Towns of Guilderland and Colonie, New York	)	<b>ADMINISTRATIVE ORDER</b>
	)	<b>ON CONSENT</b>
Proceeding under Section 122(g)(4)	)	
of the Comprehensive Environmental	)	
Response, Compensation, and	)	
Liability Act of 1980, as amended,	)	
42 U.S.C. 9622(g)(4).	)	
-----X	)	

**I. JURISDICTION**

1. This Administrative Order on Consent (“Consent Order” or “Order”) is issued pursuant to the authority vested in the President of the United States by Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(g)(4), to reach settlements in actions under Section 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607. The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency (“EPA”) by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987). This authority was further delegated to the EPA Regional Administrators by EPA Delegation Nos. 14-14-C and 14-14-D and redelegated within Region II to the Director of the Emergency and Remedial Response Division by Regional order No. R-1200, dated November 23, 2004.

2. This Administrative Order on Consent is issued to the persons, corporations, or other entities identified in Appendix A (“Respondents”). Each Respondent agrees to undertake all actions required by this Consent Order. Each Respondent further consents to and will not contest EPA’s jurisdiction to issue this Consent Order or to implement or enforce its terms.

3. EPA and Respondents agree that the actions undertaken by Respondents in accordance with this Consent Order do not constitute an admission of any liability by any Respondent. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Consent Order, the validity of the Statement of Facts or Determinations contained in Sections IV and V, respectively, of this Consent Order.

## **II. STATEMENT OF PURPOSE**

4. By entering into this Consent Order, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows Respondents to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, and the claims of the Respondents which have been or could have been asserted against the United States with respect to this Site, thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a substantial number of potentially responsible parties from further involvement at the Site; and

c. to obtain settlement with Respondents for their fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons, and to provide for full and complete contribution protection for Respondents with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

## **III. DEFINITIONS**

5. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Order, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Order" or "Order" shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, the Order shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "Paragraph" shall mean a portion of this Consent Order identified by an Arabic numeral.

h. "Parties" shall mean EPA and the Respondents.

i. "Respondents" shall mean those individuals, corporations, or other entities listed in Appendix A.

j. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

k. "Section" shall mean a portion of this Consent Order identified by a Roman numeral.

l. "Site" shall mean the Mercury Refining Superfund Site, which includes the property known as 26 Railroad Avenue located on the border of the Towns of Guilderland and Colonie, Albany County, New York and is generally shown on the map attached as Appendix B.

m. "Tracked Waste" shall mean all hazardous substance-containing materials sent or brought to the Site for treatment or disposal, other than batteries.

n. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **IV. STATEMENT OF FACTS**

6. The Mercury Refining Site was operated by Mercury Refining Company, Inc. ("Mereco") from the late-1950's until 1998 as a mercury reclamation facility. During this time, special "retort" ovens were used to heat mercury-bearing materials to recover mercury, which was then further processed and refined on the Site before being sold. EPA has catalogued over 7,200,000 pounds of material which was sent to the Site for mercury reclamation.

7. Mercury, which is a hazardous substance as that term is defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), has been released at or from the Site, and there is a threat of

further such releases into the environment. In the course of Site processing operations, air emissions, discharges of mercury-containing wastes into a storm sewer, dumping of mercury-containing residues from the retort process, other sloppy materials handling, and a fire, caused mercury to be released onto the soils and into groundwater and surface water at the Site.

8. From 1983, when the Site was placed on the National Priorities List, through November 1999, the lead agency with respect to the planning and implementation of response actions at the Site under the National Contingency Plan, 40 CFR Part 300, was the New York State Department of Environmental Conservation (“NYSDEC”). In November 1999 NYSDEC requested that EPA take over the lead in the remediation of the Site under the Superfund program.

9. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. Such response actions have included the performance of a Remedial Investigation/Feasibility Study, issuance of a proposed plan and a responsible party search.

10. In performing these response actions, EPA has incurred and will continue to incur response costs at or in connection with the Site. EPA has incurred \$5,599,391.35 in response costs through October 31, 2008.

11. In accordance with a 2003 settlement, EPA collected \$497,389.80 from Mereco and is currently collecting, pursuant to a payment plan, \$30,000 plus Interest, from Leo Cohen, the owner and founder of Mereco. This settlement was based on Mereco’s and Leo Cohen’s ability to pay.

12. Each Respondent arranged for disposal or treatment at the Site, or arranged with a transporter for transport for disposal or treatment at the Site, of a hazardous substance owned or possessed by such Respondent.

13. The amount of Tracked Waste contributed to the Site by each Respondent is less than 1.0% of the total amount of Tracked Waste contributed to the Site by persons or entities whom EPA has been able to locate. In addition, the amount of hazardous substances contributed to the Site by each Respondent is less than 1% of the total amount of hazardous substances at the Site. The hazardous substances contributed by each Respondent to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site. The amount of Tracked Waste contributed to the Site by each Respondent is listed on Appendix C.

14. EPA estimates that the total response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by other persons is approximately 17,361,000. The payment required to be made by each Respondent pursuant to this Consent Order is a minor portion of this total amount.

## **V. DETERMINATIONS**

15. Based upon the Statement of Facts set forth above and on the administrative record for this Site, EPA has determined that:

a. The Mercury Refining Superfund Site is a “facility” as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. Each Respondent is a “person” as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

c. Each Respondent is a “potentially responsible party” within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).

d. There has been an actual or threatened “release” of a “hazardous substance” from the Site as those terms are defined in Section 101(22) and (14) of CERCLA, 42 U.S.C. § 9601(22) and (14).

e. The actual or threatened “release” caused the incurrence of response costs.

f. Prompt settlement with each Respondent is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).

g. As to each Respondent, this Consent Order involves only a minor portion of the response costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).

h. The amount of hazardous substances contributed to the Site by each Respondent and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Respondent are minimal in comparison to other hazardous substances at the Site within the meaning of Section 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A).

## **VI. ORDER**

16. Based upon the administrative record for the Site and the Statement of Facts and Determinations set forth above, and in consideration of the promises and covenants set forth herein, the following is hereby AGREED TO AND ORDERED:

## **VII. PAYMENT**

17. Within 30 days after the effective date of this Consent Order, each Respondent shall pay to the EPA Hazardous Substance Superfund the amount set forth for such Respondent in Appendix C to this Consent Order.

18. Each Respondent's payment includes an amount for: a) past response costs incurred at or in connection with the Site; b) projected future response costs to be incurred at or in connection with the Site; and c) a premium to cover the risks and uncertainties associated with this settlement, including but not limited to, the risk that total response costs incurred or to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, or by any other person, will exceed the estimated total response costs upon which Respondents' payments are based.

19. Each payment shall be made by electronic funds transfer ("EFT"). To effect payment via EFT, each Respondent shall instruct its bank to remit payment in the required amount via EFT using the following information, or such other updated EFT information:

- . Amount of payment
- . Bank: **Federal Reserve Bank of New York**
- . Account code for Federal Reserve Bank account receiving the payment: **68010727**
- . Federal Reserve Bank ABA Routing Number: **021030004**
- . SWIFT Address: **FRNYUS33**
- . 33 Liberty Street
- . New York, NY 10045
- . Field Tag 4200 of the Fedwire message should read:  
**D 68010727 Environmental Protection Agency**
- . Name of remitter:
- . Agreement and Order Index number: **CERCLA-02-2009-2006**
- . Site/spill identifier: **02-76**

The total amount to be paid by Respondents pursuant to Paragraph 17 shall be deposited by EPA in the Mercury Refining Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

20. At the time of payment, Respondent shall send notice that such payment has been made by email to [acctsreceivable.cinwd@epa.gov](mailto:acctsreceivable.cinwd@epa.gov), and to:

U.S. Environmental Protection Agency  
Cincinnati Finance Office  
26 Martin Luther King Drive  
Cincinnati, OH 45268

**and**

Sharon E. Kivowitz  
Mercury Refining Site Attorney  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007

### **VIII. FAILURE TO MAKE PAYMENT**

21. If any Respondent fails to make full payment within the time required by Paragraph 17, that Respondent shall pay Interest on the unpaid balance. In addition, if any Respondent fails to make full payment as required by Paragraph 17, the United States may, in addition to any other available remedies or sanctions, bring an action against that Respondent seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), for failure to make timely payment.

### **IX. CERTIFICATION OF RESPONDENT**

22. By signing this Consent Order, each Respondent certifies, individually, that, to the best of its knowledge and belief, it:

a. if requested by EPA, has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

### **X. COVENANT NOT TO SUE BY UNITED STATES**

23. In consideration of the payments that will be made by Respondents under the terms of this Consent Order, and except as specifically provided in Section XI (Reservations of Rights by United States), the United States covenants not to sue or take administrative action against any of the Respondents pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for each Respondent upon receipt of that Respondent's payment as required by Section VII. With respect to each Respondent, individually, this covenant not to sue is conditioned upon: a) the satisfactory performance by Respondent of all obligations under this Consent Order; and b) the veracity of the information provided to EPA by Respondent relating to Respondent's involvement with the Site. This covenant not to sue extends only to Respondents and does not extend to any other person.

## **XI. RESERVATIONS OF RIGHTS BY UNITED STATES**

24. The United States reserves, and this Consent Order is without prejudice to, all rights against Respondents with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 23. Notwithstanding any other provision of this Consent Order, the United States reserves all rights against Respondents with respect to:

- a. liability for failure to meet a requirement of this Consent Order;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; or
- d. liability based upon the ownership or operation of the Site, or upon the transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Order by Respondent.

25. Notwithstanding any other provision in this Consent Order, the United States reserves, and this Consent Order is without prejudice to, the right to institute judicial or administrative proceedings against any individual Respondent seeking to compel that Respondent to perform response actions relating to the Site, and/or to reimburse the United States for additional costs of response, if information is discovered which indicates that such Respondent contributed hazardous substances to the Site in such greater amount or of such greater toxic or other hazardous effects that such Respondent no longer qualifies as a *de minimis* party at the Site because such Respondent contributed 1.0% or more of the total amount of Tracked Waste contributed to the Site by individuals, corporations or other entities whom EPA has been able to locate, or because such Respondent contributed hazardous substances which are significantly more toxic or are of significantly greater hazardous effect than other hazardous substances at the Site.

## **XII. COVENANT NOT TO SUE BY RESPONDENTS**

26. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site or this Consent Order including, but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of response actions at or in connection with the Site,

including any claim under the United States Constitution, the Constitution of the State of New York, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 28 (Waiver of Claims) and Paragraph 30 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 24 (c) or (d) or Paragraph 25, but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

27. Nothing in this Consent Order shall be deemed to constitute preauthorization or approval of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

28. Respondents agree not to assert any claims or causes of action (including claims for contribution under CERCLA) that they may have for all matters relating to the Site against each other or any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against such Respondent.

### **XIII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

29. Except as provided in Paragraph 28 (Waiver of Claims), nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Order. Except as provided in Paragraph 28 (Waiver of Claims), the United States and Respondents each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

30. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 23.

31. The Parties agree that each Respondent is entitled, as of the effective date of this Consent Order, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for “matters addressed” in this Consent Order. The “matters addressed” in this Consent Order are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. As to each Respondent, the “matters addressed” in this Consent Order do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Order (except for claims for failure to comply with this Consent Order), in the event that the United States asserts rights against such Respondent coming within the scope of such reservations.

#### **XIV. PARTIES BOUND**

32. This Consent Order shall apply to and be binding upon EPA and upon Respondents and their heirs, successors and assigns. Any change in ownership or corporate or other legal status of a Respondent, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Respondent's responsibilities under this Consent Order. Each signatory to this Consent Order certifies that he or she is authorized to enter into the terms and conditions of this Consent Order and to execute and bind legally the party represented by him or her.

#### **XV. INTEGRATION/APPENDICES**

33. This Consent Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Order. The following appendices are attached to and incorporated into this Consent Order:

“Appendix A” is the list of Respondents and addresses.

“Appendix B” is the map of the Site.

“Appendix C” is the list of Respondents and payment amounts.

#### **XVI. PUBLIC COMMENT**

34. This Consent Order shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, 42 U.S.C. § 9622(i)(3), EPA may withdraw or withhold its consent to this Consent Order if comments received disclose facts or considerations which indicate that this Consent Order is inappropriate, improper, or inadequate.

**XVII. ATTORNEY GENERAL APPROVAL**

35. This Order is subject to the approval of the Attorney General or his designee in accordance with Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4).

**XVIII. EFFECTIVE DATE**

36. The effective date of this Consent Order shall be the date upon which EPA issues written notice to Respondents that the public comment period pursuant to Paragraph 34 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

IT IS SO AGREED AND ORDERED:

U.S. Environmental Protection Agency

By: \_\_\_\_\_

Walter Mugdan, Director  
Emergency and Remedial Response Division  
Region 2

\_\_\_\_\_

Date

THE UNDERSIGNED RESPONDENT enters into this Consent Order in the matter of EPA Docket # CERCLA-02-2009-2006, relating to the Mercury Refining Superfund Site, Towns of Guilderland and Colonie, Albany County, New York:

FOR RESPONDENT: \_\_\_\_\_  
Company Name

\_\_\_\_\_  
Company Address

By: \_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date