FOR SETTLEMENT PURPOSES ONLY/SUBJECT TO FED. R. EVID. 408

January 6, 2017

Eric Schaaf, Esq.
Regional Counsel
US Environmental Protection Agency, Region 2
290 Broadway
New York, NY 10007-1866

Sarah P. Flanagan, Esq.
Branch Chief, NJ Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, NY 10007-1866

Dear Mr. Schaaf and Ms. Flanagan:

We write on behalf of six companies that have been identified by the United States Environmental Protection Agency, Region 2 ("EPA") as potentially responsible parties ("PRPs") with respect to the Lower Passaic River Study Area ("LPRSA"), an operable unit of the Diamond Alkali Superfund Site in Essex and Hudson Counties, New Jersey. These companies are: Pfizer Inc. ("Pfizer"), Wyeth LLC, on behalf of Shulton, Inc. ("Wyeth"), Teva Pharmaceuticals USA, Inc. (f/k/a Biocraft Laboratories, Inc.) ("Teva"), Tate & Lyle Ingredients America LLC ("Tate & Lyle"), Goody Products, Inc. ("Goody") and Berol Corporation ("Berol") (Goody and Berol are subsidiaries of Newell Brands Inc., f/k/a Newell Rubbermaid Inc.). These companies are collectively referred to as the Remote Entities Group ("REG").

The REG parties' facilities are either so remote from the Lower Passaic River ("LPR") that it is unlikely they contributed any hazardous substances that persist today, or they are not otherwise responsible for any adverse impact to the LPR. Unlike the numerous PRPs with facilities that are or were located along the LPR and discharged to the river directly, the REG parties' facilities are located far from the LPR. Several of the REG facilities are situated along tributaries (some along several tributaries) that contain lakes, ponds, dams, marshes, a waterfall and other attributes that would have prevented contaminants from reaching the LPR or remaining in the LPR sediments. Moreover, none of the REG facilities discharged dioxins/furans or PCBs—the drivers of the remedy.

Accordingly, it is important for EPA to prioritize settlement with parties like the REG parties. Indeed, EPA has acknowledged that "some of the parties that have been identified as PRPs may be eligible for a cash out settlement with EPA"[1] and we understand that the agency is currently considering the scope and structure of such potential settlement criteria.

CERCLA Section 122 gives EPA broad authority to enter into settlements and is particularly appropriate at sites, such as the LPR, with large numbers of PRPs. In addition, Section 107(o) of CERCLA makes clear the Congressional intent that a party that contributed extremely small, or de micromis, quantities of hazardous substances to a Superfund site shall not be liable for response costs if all or some of the party's contribution occurred (as was the case for the REG parties) before April 1, 2001. 42 U.S.C. § 9607(o)(1).

EPA's Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties, dated November 6, 2002 (the "De Micromis Settlement Policy") makes clear that even parties that fall outside the strict terms of CERCLA Section 107(o) but which may be deserving of similar treatment based on case-specific factors are considered "non-exempt de micromis parties" and are similarly deserving of zero dollar settlements. This is because "EPA believes such non-exempt de micromis parties should not be pursued or otherwise compelled to expend transaction costs to resolve potential CERCLA liability."[2] As such, "as a matter of national policy," EPA is to "use its enforcement discretion, as necessary, to achieve settlements that provide appropriate relief for those non-exempt de micromis parties that are being sued in contribution or threatened with a suit by responsible parties."[3] It is EPA's longstanding policy to enter into a settlement with non-exempt de micromis parties if they contributed very small amounts of hazardous substances to a site and, based on case-specific factors, may be deserving of treatment similar to that given to exempt de micromis parties.[4] EPA's policy serves to

[1] *See* EPA's March 31, 2016 Notice of Potential Liability under 42 U.S.C. § 9607(a) regarding the Superfund Site, Lower 8.3 Miles of Lower Passaic River, Essex and Hudson Counties, New Jersey, Commencement of Negotiations for Remedial Design from Nicoletta Di Forte, Deputy Director for Enforcement, Emergency and Remedial Response Division.
[2] De Micromis Settlement Policy at 2.
[3] *Id.*
[4] De Micromis Settlement Policy at 5-6.

ensure "that the transaction costs imposed" on non-exempt de micromis parties "are not in gross distortion to the amount of their potential liability."[5]

Consistent with EPA's De Micromis Settlement Policy, even if the REG parties are considered non-exempt de micromis parties, EPA "should generally not require any monetary payment as part of a non-exempt de micromis settlement" because "it would be inequitable to require parties sending such small volumes of waste to participate in financing or performing cleanup at the site" and "the administrative costs of executing a settlement will likely equal or exceed the non-exempt de micromis party's proportional share of response costs at the site, if any."[6] As EPA has said in longstanding guidance, '[g]iven this inequity, it is fair, and thus, in the public interest, for Regions to offer a zero dollar settlement to non-exempt de micromis parties."[7] Notably, notwithstanding the statute and EPA's policies, all of the REG parties have already paid considerable costs toward the performance of the remedial investigation/feasibility study for the LPRSA and the River Mile 10.9 removal action and thereby incurred transaction costs and expenses grossly disproportionate to their respective potential liability, if any, for the LPRSA.

As discussed below, to the extent that hazardous substances from some of the REG facilities reached the LPR, the quantities released were likely below de micromis thresholds. And for those facilities whose total discharges may not be quantifiable, EPA's De Micromis Settlement Policy dictates that those REG parties should nonetheless be considered non-exempt de micromis parties and offered zero dollar settlements because of the limited total volume, and limited hazardous or toxic effects, of hazardous substances that conceivably could have made it to the LPR and remain there today.

Contaminant toxicity is the largest factor driving the selection of the remedy and allocation of response costs at the LPR. The March 3, 2016 Record of Decision for the Lower 8.3 Miles of the LPR (the "ROD") makes clear that, while numerous substances have been identified as contaminants of concern, dioxins/furans

[5] U.S. v. Keystone Sanitation Co., Inc., No. 1:CV-93-1482, 1996 U.S. Dist. LEXIS 22573, at *15 (M.D. Pa. Apr. 29, 1996).
[6] De Micromis Settlement Policy at 7.
[7] Id.

and PCBs are the "main risk drivers."[8] Those contaminants alone are responsible for 97-98% of the human health risk and the majority of the ecological risk in the LPR, and drove the selection of the ROD Remedy.[9] The REG parties did not contribute to the sediments of the LPR the contaminants identified in the ROD as driving the remedy.

Moreover, any consideration of contaminant mass or volume in the LPR should be measured in terms of PRP contributions to current LPR sediment contamination and not in the context of historic discharges to the water column. Past discharges that are not present today in the LPR sediment did not cause response costs and have no bearing upon the selection or cost of the remedy. With respect to the REG parties, there is no evidence that any hazardous substances from their facilities are present in the LPR sediments. But even if the sediments were to contain such substances, the selected remedy is the lodestar for both allocation and settlement discussions under CERCLA, with each PRP's share determined based upon its "relative responsibility for (1) the need for remediation at the Site, (2) the selection of the particular remedy, and (3) the cost of the selected remedy."[10]

Hereafter are brief descriptions of each of the REG facilities that have been alleged to be associated with the LPR and the reasons the REG parties deserve de micromis treatment.

The REG Facilities

Pfizer – Former Distribution Center, 230 Brighton Road, Clifton, N.J.

The former Pfizer Distribution Center is located more than two miles from the LPR along MacDonald's Brook. Hughes Lake is located approximately one mile downstream from the facility and contains a dam that would prevent stream sediments from migrating downstream toward the LPR, which is another mile away. The facility itself was an office and warehouse facility with no manufacturing operations and which did not generate any process waste streams or waste waters. EPA's September 15, 2003 General Notice Letter to Pfizer alleged a

[8] EPA, ROD, Attachment E: Updated Mechanistic Model at 11-23 (2016).
[9] EPA, ROD at 29 and Tables 21-23b.
[10] United States v. Atlas Min. & Chems., Inc. 1995 WL 510304, at *94 (E.D. Pa. 1995).

release of hazardous substances from the facility, but the only known report or document that could form the basis for any such liability is a one paragraph report from 1969 stating that hexavalent chromium was detected in cooling water discharged into MacDonald's Brook. First, chromium (in any form) is not a contaminant of concern and was not a substance with respect to which EPA made any remediation decisions. Second, if hexavalent chromium had been discharged from the Pfizer facility, it would have precipitated out of solution after mixing with stream and/or lake water and been contained in stream/lake sediments upstream of or within Hughes Lake. It is highly implausible that any significant quantities of chromium would have migrated to the LPR from the Pfizer facility. Pfizer is prepared to provide scientific and technical evidence that any chromium that could have reached the LPR would have been far below the de micromis threshold in 42 U.S.C. § 9607(o)(1)(A) and, in light of the fact that Pfizer's operations at the distribution facility ceased in August 1999, any such releases occurred before April 1, 2001. *See* 42 U.S.C. § 9607(o)(1)(B).

Wyeth – Former Shulton, Inc. Facility, 697 Route 46, Clifton NJ

The former Shulton, Inc. facility is located more than two miles from the LPR along Weasel Brook and there is a dam in Weasel Brook approximately a mile downstream from the facility and over a mile upstream from the LPR. There is no allegation that the former Shulton facility ever released any contaminants that caused response costs or drove the selection of any remedy. While concentrations of PAHs were discovered along the banks of Weasel Brook near the former Shulton facility, NJDEP determined that such PAHs originated from the deposition of PAH-containing sediments from off-site and upstream sources and *not* from the former Shulton facility.[11] Soil samples analyzed in connection with the 1991-92 closure of the Shulton facility had hazardous substances below New Jersey's residential direct contact soil cleanup criteria with the exception of a single sample of lead, which was still well below the non-residential criterion. Even if some of these soils had gotten into Weasel Brook, however, they would have settled upstream of the dam and would not have reached the LPR. Neither EPA nor any other party has taken, or even planned, any response action with respect to

[11] NJDEP similarly concluded that low levels of VOCs in groundwater beneath the former Shulton facility originated from sources upgradient of the site and did not require any further investigation.

sediments upstream of the dam in Weasel Brook in recognition of the fact that neither Weasel Brook nor facilities located along it are sources of contamination of the LPR or have caused any response costs. To the extent any hazardous substances might have gotten past the dam in Weasel Brook, Wyeth is prepared to demonstrate that such amounts are well below the de micromis thresholds in 42 U.S.C. § 9607(o)(1)(A) and, in light of the fact the facility was closed in 1991, any releases from the former Shulton facility would have occurred before April 1, 2001. *See* 42 U.S.C. § 9607(o)(1)(B).

Teva – Former Waldwick, NJ Facility, 12 Industrial Way, Waldwick, NJ

Teva's (f/k/a Biocraft Laboratories, Inc.) former facility in Waldwick, NJ manufactured semi-synthetic penicillin products in bulk form from 1972 to 1997. In 1975 a leak was discovered in an underground transfer pipe transporting dilute wastewater containing acetone, methylene chloride, n-butyl alcohol, dimethyl aniline and water, which was believed to have released via an adjacent storm sewer line to the Allendale Brook (located on an indirect remote tributary some 14 or so miles from the LPR). The source of the discharge was removed, groundwater was extensively investigated and remediated (via a sophisticated biostimulation/bioremediation system over a period of time) and hydraulic control of the groundwater was maintained on-site to prevent off-site migration, all under the oversight of the New Jersey Department of Environmental Protection (NJDEP), culminating in the issuance of an NJDEP no further action determination in 2004. Surface water and sediment sampling (in 1975 and 1999, respectively) confirmed no elevated impacts to the Allendale Brook.[12] The travel path from the facility's storm water outfall would have been through several brooks, ponds and water control structures--the Allendale Brook, the Ho-Ho-Kus Brook, dams at White's Pond and Cole's Pond, and a water fall (at the confluence of the Ho-Ho-Kus Brook and the Saddle River), before meandering several miles along the Saddle River, a total distance of approximately 14.4 miles from the facility's storm water drain to the confluence of the Saddle River and the LPR. Teva is prepared to demonstrate that insofar as all of the constituents of concern from the leak were volatile organic compounds which do not adsorb strongly to soil, if any of those

[12] There were also two minor releases of hydrochloric acid at Teva's Waldwick facility in 1993 and 1994, both of which were addressed promptly and received no further action determinations from NJDEP.

constituents ever made it to the LPR (which is unlikely), they were dilute and would have significantly degraded during the 14.4 mile journey and with the passage of approximately 40 years from the discovery of the release so as not to have impacted the LPR at all. Certainly, they could never have impacted the LPR sediments which are the subject of the remedy.

Tate & Lyle – Former Staley Chemical Company facility at 100 Third Avenue, Kearny, NJ

Tate & Lyle Ingredients Americas LLC, then known as A. E. Staley Manufacturing Company (A. E. Staley), moved its Staley Chemical Company division (Staley Chemical) to Kearny, New Jersey in late 1968. In October 1978 A. E. Staley sold the Staley Chemical business, including the manufacturing plant on Third Avenue in Kearny, to Union Oil Company and has had no operation in New Jersey since then.

Information in the PRP Data Extraction Form that formed the basis of the EPA's general notice letter to Tate & Lyle notes that Staley Chemical discharged some water to the Third Avenue storm sewer that then went into Frank's Creek, a 1.7 mile meandering tributary of the Passaic River at about river mile 3.

Documents from that Form reflect tests of wastewater effluent. They noted trace amounts of metals in it. A 1975 cover letter explains "a fully quantitative analysis [was done] for lead and chromium since those are the ions that could possible [*sic*] be added to the water as a result of any washing of equipment". Lead is the only hazardous substance that the EPA considered in the ecological risk assessment and that was possibly discharged by Staley Chemical. However, there is no evidence in the documents that Staley Chemical in fact "added" lead to the wastewater or, if so, what trace amounts that would have been, or that it ever was able to reach the Passaic River.

A 1974 document refers to the discharge of boiler blow down to the storm sewer as "polluting" but says nothing about its constituents. Other documents refer to "some of the vapors [of acrylates] released to the outside air" and to an acrylate odor possibly originating at Staley Chemical but with no indication of discharges to any water body. The documents also refer to the prior practice of washing equipment that may have contained such monomers, but they would have evaporated long before reaching the Passaic

River.

The materials that were used at the Staley Chemical plant to produce synthetic polymers, adhesives and leather finishes did not include, and the Staley Chemical plant would not have generated dioxins/furans or PCBs. There is no evidence that Staley Chemical discharged dioxins/furans or PCBs.

Goody – Former Goody Products, Inc. Facility, 969 Newark Turnpike, Kearny, NJ

Goody manufactured hair care accessories at a facility located at 969 Newark Turnpike, Kearny, NJ[13] from approximately 1969 – 1994. NJDEP issued a Conditional No Further Action Letter for the site in 2012. Goody did not use or discharge any dioxins/furans or PCBs at or from this facility, and its analysis demonstrates that it is unlikely that any hazardous substances released from its operations ever reached the Passaic River.

As Goody understands it, the alleged nexus to the Passaic is that hazardous substances were released from the facility to the Dead Horse Creek, which flows to Franks Creek, which in turn flows to the Passaic.[14] But that is grounded on a simple error: There are two creeks in Kearny with the name "Dead Horse Creek," and the one that discharges to Franks Creek is over one mile from the former Goody facility.

The creek at the facility was in essence a stagnant, vegetated ditch running along the property's western boundary. To reach the Passaic River, water leaving the property would have to travel uphill through a 12-inch pipe culvert with a nearly five-foot inversion, which would be possible, even theoretically, only under very specific hydraulic conditions. Any water completing that unlikely journey would then have to flow over one mile through expansive wetlands and marshes, creeks and culverts, to a pumping station (or during certain conditions, a gravity outlet) to reach the Passaic River. The culverts

[13] EPA issued a September 15, 2003 General Notice Letter to Goody's parent, Newell Brands Inc. (f/k/a Newell Rubbermaid Inc.), but not to Goody, based upon alleged discharges from Goody's operations at this facility.
[14] Both the 1973 PVSC Annual Report (which Goody understands may have informed USEPA's nexus assessment) and Tierra and Maxus's allegations in the now-resolved state litigation describe the "Dead Horse Creek" as a tributary of Franks Creek.

(including the inverted culvert) were frequently clogged, and the pumping station had chronic operational issues. Moreover, Goody's analysis has revealed substantial attenuation of contaminants on-site, and enormous potential for additional attenuation of contaminants from any water that may have ever flowed off-site.

Consequently, Goody is prepared to demonstrate it is unlikely that any hazardous substances allegedly released through its operations ever reached the Passaic River.

Berol – Former Faber-Castell Corporation Facility, 41 Dickerson St., Newark, NJ

Berol is the successor by merger to Faber-Castell Corporation ("Faber"), which operated a manufacturing facility at 41 Dickerson St., Newark, NJ between 1919 and 1996. In the early decades, Faber manufactured rubber bands and erasers at the facility. Over the years, Faber's manufacturing included other rubber and vinyl products, inks, and paint. NJDEP issued a No Further Action letter for the site in 2000.

Faber did not use or discharge any dioxins/furans or PCBs at or from this facility. In fact, based on Berol's investigation, it believes that it discharged no contaminants of concern to the Passaic River. Its industrial wastewater discharges were limited to steam condensation, boiler blowdown, and contact and non-contact cooling water. Other than sanitary waste, no solids were discharged with Faber's wastewater. The alleged nexus to the Passaic River is via the sewer system. Berol has seen no evidence confirming any connection between its facility and the Passaic River prior to the completion of the Passaic Valley Sewerage Commission ("PVSC") interceptor pipe in 1924. Since then, any discharges from the facility to the PVSC sewer system would have been treated at the PVSC treatment plant or, during certain conditions, allegedly discharged to the Passaic River via the Clay Street Combined Sewer Overflow ("CSO"). Notably, wastewater discharges from the facility were so low that, at the most, Berol believes they contributed only a fraction of 1% of the flow through the Clay Street CSO to the Passaic River.

Conclusion

Each of the REG parties is eligible for de micromis or non-exempt de micromis settlements based on the case-specific factors summarized above, on CERCLA, and on EPA's long-standing settlement policies and guidance. The REG parties' facilities were remote from the LPR and it is unlikely they contributed any hazardous substances that persist today, or are otherwise responsible for any adverse impact to the LPR. Accordingly, "it would be inequitable" to require the REG parties to participate in financing or performing cleanup of the Passaic River. It is in the public interest to afford the REG parties zero-dollar settlements because they have already incurred costs and expenses far in excess of their potential liabilities. For all these reasons, the REG parties should be among the first parties offered an opportunity for de micromis settlement. The REG parties are available to make more detailed site-specific presentations to show that they are entitled to de micromis settlements with EPA. Each of the REG parties has fully cooperated with EPA with respect to the LPRSA. The REG parties respectfully request that EPA engage with the REG parties on settlement promptly.

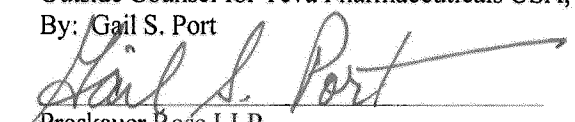
Thank you for your consideration and we look forward to hearing from you soon.

WHITE & CASE LLP
Outside Counsel for Pfizer Inc. and Wyeth LLC,
on behalf of Shulton, Inc.
By:

WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
Evan M. Goldenberg
(305) 925-4764
egoldenberg@whitecase.com

Seth Kerschner
(212) 819-8630
seth.kerschner@whitecase.com

PROSKAUER ROSE LLP
Outside Counsel for Teva Pharmaceuticals USA, Inc.
By: Gail S. Port



Proskauer Rose LLP
Gail S. Port
Eleven Times Square
New York, NY 10036
(212) 969-3243
gport@proskauer.com

Aliza R. Cinamon
Eleven Times Square
New York, NY 10036
(212) 969-3417
acinamon@proskauer.com

JOHN R. HOLSINGER, LLC
Outside Counsel for Tate & Lyle Ingredients America LLC
By: John R. Holsinger

John R. Holsinger, LLC
Two University Plaza, Suite 300
Hackensack, NJ 07601
(201) 487-9000
johnh@jrholsinger.com

SCHIFF HARDIN LLP
Outside Counsel for Berol Corporation and Goody Products, Inc.
By: Andrew N. Sawula

Schiff Hardin LLP
Andrew N. Sawula
One Westminster Place, Suite 200
Lake Forest, IL 60045
(847) 295-4336
asawula@schiffhardin.com

Bina R. Joshi
233 S. Wacker Drive, Suite 6600
Chicago, IL 60606
(312) 258-5605
bjoshi@schiffhardin.com