



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2  
290 BROADWAY  
NEW YORK, NY 10007-1866

U.S. ENVIRONMENTAL  
PROTECTION AGENCY REGION 2  
NOV 21 2 11 PM '07  
REGIONAL HEARING  
CLERK

DEC 28 2007

**CERTIFIED MAIL- RETURN RECEIPT REQUESTED**

Mr. Terry A. Lundren, President  
Macy's Retail Holdings, Inc.  
7 West Seventh Street  
Cincinnati, Ohio 45202

Re: **In the Matter of Macy's Retail Holdings, Inc.**  
**Docket Number RCRA-02-2008-7103**

Dear Mr. Lundren:

Enclosed is the Complaint, Compliance Order and Opportunity for Hearing in the above-referenced proceeding. The Complaint alleges violations of the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.*

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint. If you wish to contest the allegations and/or the penalty proposed in the Complaint, you must file an Answer within **thirty (30)** days of your receipt of the enclosed Complaint with the Regional Hearing Clerk of the Environmental Protection Agency ("EPA"), Region 2, at the following address:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer of Region 2, a default order may be entered against you and the entire proposed penalty may be assessed.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issue relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of settlement and to have an informal conference with EPA. However, a request for an informal conference **does not** substitute for a written Answer, affect what you may choose to say in an

Answer, or extend the thirty (30) days by which you must file an Answer requesting a hearing.

You will find enclosed a copy of the "Consolidated Rules of Practice," which govern this proceeding. (A brief discussion of some of these rules appears in the later part of the Complaint.)


For your general information and use, I also enclose the "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" which may apply to you depending on the size of the proposed penalty and the nature of your company.

EPA encourages the use of Supplemental Environmental Projects, where appropriate, as part of any settlement. I am enclosing a brochure on "EPA's Supplemental Environmental Projects Policy." Please note that these are only available as part of a negotiated settlement and are not available if this case has to be resolved by a formal adjudication.

EPA appreciates the efforts you have made to expedite a settlement of this matter. Your good faith effort in this matter and Macy's beginning implementation of a spent lamp program has been duly noted in the penalty calculations. We look forward to negotiating a settlement of this matter and ensuring that Macy's has returned to compliance in terms of RCRA and the Universal Waste Programs in a cooperative, expedited manner.

If you have any questions or wish to schedule an informal conference, please contact the attorney whose name is listed in the Complaint.

Sincerely,



Dore LaPosta, Director  
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (without enclosures)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 2

U.S. ENVIRONMENTAL PROTECTION AGENCY-REG. II  
2103 JAN -2 PM 1:46  
REGIONAL HEARING CLERK

In The Matter of:

**COMPLAINT, COMPLIANCE ORDER  
AND NOTICE OF OPPORTUNITY  
FOR HEARING**

Macy's Retail Holdings, Inc.,

Respondent,

Docket No. RCRA-02-2008-7103

Proceeding Under Section 3008 of the  
Solid Waste Disposal Act, as amended.

**COMPLAINT**

This is a civil administrative proceeding instituted pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. § 6901 *et seq.* (referred to collectively as the "Act" or "RCRA").

This COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING ("Complaint") serves notice of EPA's preliminary determination that **Macy's Retail Holdings, Inc.** (hereinafter "Respondent"), has violated certain requirements of the authorized New York State hazardous waste program and the federal hazardous waste program.

Section 3006(b) of the Act, 42 U.S.C. § 6926(b), provides that EPA's Administrator may, if certain criteria are met, authorize a state to operate a hazardous waste program (within the meaning of Section 3006 of the Act, 42 U.S.C. § 6926) in lieu of the regulations comprising the federal hazardous waste program (the Federal Program). The State of New York received final authorization to administer its base hazardous waste program on May 29, 1986. Since 1986, New York State has been authorized for many other hazardous waste requirements promulgated by EPA pursuant to RCRA, See 67 Fed. Reg. 49864 (August 1, 2002), and 70 Fed. Reg. 1825 (January 11, 2005). This includes most EPA regulations issued as of July 1, 1999.

Section 3008(a)(1) of RCRA, 42 U.S.C. 6928(a)(1), provides, in part, that "whenever on the basis of any information the Administrator [of EPA] determines that any person has violated or is in violation of any requirement of this subchapter [Subtitle C of RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation." Section 3008(a)(2) of RCRA, 42 U.S.C. 6928(a)(2) provides, in part, that "[i]n the case of a violation of any requirement of [Subtitle C of RCRA] where such violation occurs in a State which is authorized to carry out a hazardous waste program under [Section 3006 of RCRA, 42 U.S.C. 6926], the

Administrator [of EPA] shall give notice to the State in which such violation has occurred prior to issuing an order.”

Section 3008(a)(2) of the Act, 42 U.S.C. 6928(a)(2), authorizes EPA to enforce the regulations constituting the authorized State program and EPA retains primary responsibility for the enforcement of certain requirements promulgated pursuant to HSWA for which the State has not yet been authorized.

Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), “any penalty assessed in the order [issued under authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a)] shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of [Subtitle C of RCRA].”

Under authority of the Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, Public Law 101-410 (codified at 28 U.S.C. § 2461 note), as amended by the Debt Collection Improvement Act of 1996, 110 Stat. 1321, Public Law 104-134 (codified at 31 U.S.C. § 3701 note), EPA has promulgated regulations, codified at 40 C.F.R. Part 19, that, *inter alia*, increase the maximum penalty EPA might obtain pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) to \$32,500 for any violation occurring after March 15, 2004.

Prior to the issuance of this Complaint, notice in accordance with the requirements of Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), has been given to the State of New York.

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, EPA, Region 2, who has been duly delegated the authority to institute this action, hereby alleges:

### Background Allegations

1. Respondent is Macy’s Retail Holdings, Inc. (hereinafter “Macy’s” and/or “Respondent”). Respondent is located at 7 West Seventh Street, Cincinnati, Ohio 45202.
2. Respondent owns and operates approximately 850 stores in forty-five (45) states (including Macy’s stores at Crossgates Mall, 120 Washington Avenue Extension, Colonie, N.Y. (hereinafter referred to as “Respondent’s Crossgates Mall Store”), and at the Roosevelt Field Mall, 630 Old Country Road, Garden City, NY 11530 (hereinafter referred to as “Respondent’s Roosevelt Field Mall Store”), both stores are hereinafter referred to collectively as “Respondent’s two New York Stores”), the District of Columbia, Guam, and Puerto Rico under the names of, *inter alia*, Macy’s and Bloomingdales. Respondent employs approximately 210,000 people.
3. Respondent, Macy’s Retail Holdings, Inc., owns and operates approximately seventy-eight (78) stores in New York, New Jersey and Puerto Rico.

4. Respondent is a "person," as defined at Section 1004(15) of the Act, 42 U.S.C. § 6903(15), and Title 6 of the New York Codes, Rules, and Regulations ("6 NYCRR") § 370.2(b).

#### Hazardous Waste Generation

5. In the course of normal operations, Respondent's two New York stores generate "solid waste," as that term is defined at 6 NYCRR § 371.1(c).
6. In the course of normal operations, Respondent's two New York stores generate "hazardous waste," as that term is defined at 6 NYCRR § 371.1(d).
7. Respondent generates spent lamps, a solid and potentially hazardous waste stream, at Respondent's two New York stores.
8. Except as provided in paragraph 64, Respondent's two New York Stores are each a conditionally exempt small quantity generator (CESQGs) of hazardous waste, provided each such store generates less than 100 kilograms ("kgs") of hazardous waste per month.
9. Many of the spent lamps generated by Respondent's two New York stores are likely to exhibit the toxicity characteristic under the toxicity characteristic leachate procedure (TCLP) for metals, in particular mercury or lead.
10. Spent lamps may be handled under the less stringent standards provided under the Universal Waste Rules, codified in federal regulations at 40 C.F.R. Part 273 and in New York State regulations at 6 NYCRR Part 374-3.
11. Respondent's two New York Stores each have been and remain a Small Quantity Handler of Universal Waste as that term is defined at 6 NYCRR § 374-3.1(i).
12. For purposes of this Complaint, where any of Respondent's stores handle and recycle the spent lamps they generate in accordance with the Universal Waste Rules and Regulations, such stores will be considered to have "a spent lamp program."

#### Hazardous Waste Notification

13. Pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, all persons conducting activities that generate or otherwise cause hazardous waste to be handled in other ways are required to notify EPA of their hazardous waste activities.
14. Respondent's Crossgates Mall Store notified EPA of its hazardous waste activity (involving ignitable (D001) hazardous waste) in February 2007. As a result of this

notification, EPA assigned the hazardous waste identification number NYR000145433 to this facility.

15. Respondent's Roosevelt Field Mall Store notified EPA of its hazardous waste activity (involving ignitable (D001) hazardous waste) in March 2003. As a result of this notification, EPA assigned the hazardous waste identification number NYR000113498 to this facility.

#### EPA Investigatory Activities

16. On or about March 15, 2007, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, an authorized representative of EPA conducted an inspection of Respondent's Crossgates Mall Store.
17. At the time of the inspection, Respondent's Crossgates Mall Store did not have a spent lamp program. It disposed of the spent lamps it generated in the trash and handled them as solid waste.
18. Respondent's Crossgates Mall Store Manager stated that at the time of the inspection there was no spent lamp program in place at this store. Spent lamps generated at Respondent's Crossgates Mall Store were being disposed with Respondent's solid waste in Respondent's trash compactor.
19. Between the years 2003 and 2007 the types of lamps used at Respondent's Crossgates Mall Store included (1) fluorescent and (2) incandescent lamps.
20. On or about March 29, 2007, pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927, an authorized representative of EPA conducted an inspection of Respondent's Roosevelt Field Mall Store.
21. At the time of the inspection, Respondent's Roosevelt Field Mall Store did not have a spent lamp program. Respondent's Roosevelt Field Mall Store disposed of the spent lamps it generated in the trash and handled them as solid waste.
22. During the inspection, Respondent's Roosevelt Field Mall Store Vice President for Operations stated that this store did not have a spent lamp program. Spent lamps generated at Respondent's Roosevelt Field Mall Store were being disposed with Respondent's solid waste. Respondent disposed of its solid wastes in its trash compactor.
23. Between the years 2003 and 2007, the types of lamps used at Respondent's Roosevelt Field Mall Store included (1) fluorescent, (2) incandescent, (3) mercury, (4) metal halide, and (5) high intensity sodium vapor lamps.

24. Prior to, and at the time of, EPA's inspection of Respondent's Crossgates Mall Store and Respondent's Roosevelt Field Mall Store, the spent lamps generated were handled as solid waste and as such would have been placed into Respondent's trash compactors.
25. The compactors are open containers into which Respondent's solid waste was placed and crushed to maximize space. The compactor, when turned on, crushed the trash and would have broken the spent lamps, thereby releasing the constituents contained in the lamps.
26. Once full, the compactors were transported to a landfill where their remaining contents would have been emptied.

Respondent's Response to NOV and Information Request Letter (IRL)

27. On or about May 14, 2007, EPA issued to Respondent a Notice of Violation (NOV) and RCRA Section 3007 Information Request Letter (IRL). EPA requested that Respondent provide a response to the NOV and answer the questions posed in the IRL within thirty (30) days after receiving it.
28. The NOV was based on observations made by EPA inspectors at Respondent's Crossgates Mall and Roosevelt Field Mall Stores. EPA determined that these two stores failed to make a hazardous waste determination for the spent lamps generated as required by 6 NYCRR § 372.2(a)(2). Respondent's two New York Stores handled the spent lamps as regular trash and disposed of them in the trash compactors which would have caused releases of hazardous waste constituents, particularly mercury and lead.
29. On May 29, 2007, a representative of Respondent informed EPA that, at the times of the inspections, Respondent was in the process of commencing a spent lamp program at its stores. Respondent had hired a third party consultant, Earth Protective Services, Inc (EPSI)(referred to as "Epsipak" in Respondent's May 30, 2007, letter), to develop the program, train the operators, and begin implementation of the program. According to Respondent, the program was fully implemented before Respondent received the NOV/IRL on May 21, 2007. This conversation was followed by a letter from Respondent, dated May 30, 2007, containing a summary of the information that was discussed during the May 29, 2007 phone call.
30. EPA reviewed the May 30, 2007 letter which explained that Respondent was in the process of addressing the violations but concluded that Respondent had not answered the questions posed in the IRL. On or about June 5, 2007, EPA informed Respondent's representative that a response to the IRL was required.
31. Respondent requested an extension of time because of the amount of information it had to obtain from approximately 78 stores in New York, New Jersey and Puerto Rico. EPA granted that request and required that the information be provided by July 23, 2007.

32. On July 23, 2007, Respondent provided to EPA a written response to the NOV and the questions posed in the IRL ("Response").
33. According to the IRL Response, between March 6 and April 25, 2007, Respondent began implementing a spent lamp program at all Macy's Stores in New York, New Jersey and Puerto Rico. This was done for the New York stores in April 2007. At the time of the inspections, no spent lamp program existed for Respondent's two New York Stores.
34. In its Response to the IRL, Respondent confirmed the information gathered during EPA's inspections. Respondent indicated its belief that the spent lamps from Respondent's two New York Stores historically were disposed in the trash with the solid waste that was generated at each of these facilities. The solid waste from Respondent's two New York Stores was placed in a trash compactor located at the Malls.
35. Since 1999, Macy's has increased its use of green lamps (lamps that probably would not fail a TCLP test) at all Macy's Stores in New York, New Jersey and Puerto Rico, from 26,000 to 96,000. However, a large number of non-green lamps have been and are still being used. (See paragraph 42, below)
36. According to Respondent's IRL Response, all lamps are currently being handled as if they were Universal Waste. Based on the Material Safety Data (MSD) Sheets presented in its IRL Response, many of the lamps still in use are not green lamps and probably would be hazardous waste when disposed.
37. The MSD Sheets submitted to EPA as part of the Response, in many instances, contain information suggesting that many of the spent lamps generated by Respondent's two New York Stores contain hazardous constituents and that many may likely qualify as hazardous waste. The sheets further state that it is the responsibility of the generator to ensure proper classification and disposal of waste and to conduct TCLP tests. The MSD Sheets specify the various hazardous constituents that may be released if a lamp is broken.
38. Respondent was not able to provide any records regarding the disposition of its spent lamps; however, Respondent's IRL Response indicates that Respondent believes that its two New York Stores may have discarded their spent lamps with other solid waste prior to the implementation of the spent lamp program.
39. The Universal Waste Rules were initially published in 60 Federal Register ("Fed. Reg.") 25542, on May 11, 1995, and were amended at 64 Fed. Reg. 36489, on July 6, 1999, to include spent lamps.



40. Over seven (7) years have passed from the time that the federal Universal Waste Rules and Regulations were issued, in 1999, to the time of the EPA inspections.
41. Prior to March 2007, according to the Respondent's IRL Response, Respondent's Macy's Stores in New York, New Jersey, and Puerto Rico probably disposed of the spent lamps generated in each of those stores with its solid waste even though many of the spent lamps were probably hazardous.
42. In its IRL Response, Respondent provided EPA with a complete inventory of its New York, New Jersey, and Puerto Rico stores and a store by store breakdown of lamp types and numbers of "green" (non-hazardous) versus non-green (probable hazardous) lamps used for the years 2003, 2004, 2005, 2006, and 4 months of 2007. The total number of lamps used, at Respondent's New York, New Jersey, and Puerto Rico stores over this period, amounted to approximately 1,241,537 of which approximately 321,510 were reported to be non-hazardous green lamps. The net number of lamps that most likely would have been hazardous over that 4.3 year period was approximately 736,725.
43. Respondent provided no documentation of how the spent lamps were managed and disposed during this period but suggested, because there are no records, that the spent lamps were disposed in the regular trash in trash compactors. Information gathered during EPA's inspections of Respondent's two New York Stores, and in follow-up discussions and correspondence, is consistent with this suggestion.

#### **COUNT 1 - Failure to Make Hazardous Waste Determinations**

44. Complainant realleges each allegation contained above in paragraphs 1 through 43, with the same force and effect as if fully set forth below.
45. Pursuant to 6 NYCRR § 372.2(a)(2), a person who generates a solid waste must determine whether that solid waste is a hazardous waste, using the procedures specified in that provision (hereinafter a "hazardous waste determination").
46. In accordance with 6 NYCRR § 371.1(c), subject to certain inapplicable exclusions, a solid waste is defined as any discarded, abandoned, recycled, or inherently waste-like material. In accordance with the same provision, materials are solid wastes if they are abandoned by being disposed of, burned or incinerated.
47. Prior to, on the date of, and subsequent to EPA's inspections, Respondent used incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps to illuminate the interior and exterior of Respondent's two New York Stores.

48. At various times prior to EPA's inspections, Respondent had taken out of service and disposed of spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps as non-hazardous solid waste.
49. Each of the spent lamps listed in paragraph 48 above is a "discarded material" and, as such, meets the definition of a "solid waste", as that term is defined at 6 NYCRR § 371.1(c).
50. The spent fluorescent, incandescent, high pressure sodium, mercury and metal halide lamps generated by Respondent at its Roosevelt Field Store were solid wastes.
51. The spent fluorescent and incandescent lamps generated by Respondent at its Crossgates Mall Store were solid wastes.
52. Prior to EPA's inspections at Respondent's two New York Stores, Respondent had not determined, and did not have a third-party determine on its behalf, whether its spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps were hazardous wastes.
53. In the IRL Response, Respondent stated that it relied on MSD Sheets and "did not conduct its own testing." (See page 2 of the July 23, 2007, IRL Response cover letter.) However, as noted in paragraph 37, above, the MSD Sheets, in many instances, contain information suggesting that many of the spent lamps generated by Respondent's stores contain hazardous constituents. The sheets further state that it is the responsibility of the generator to ensure proper classification and disposal of the waste.
54. Respondent's failures to have made, or to have a third-party make on its behalf, a hazardous waste determination for its spent incandescent, fluorescent, high pressure sodium vapor, and mercury and metal halide lamps constitute violations of 6 NYCRR § 372.2(a)(2).
55. Six NYCRR 372.2(a)(2) constitutes a requirement of Subtitle C of RCRA for purposes of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

## **Count 2 - Failure to Prevent and/or Minimize Releases**

56. Complainant realleges each allegation contained above in paragraphs 1 through 55, with the same force and effect as if fully set forth below.
57. Pursuant to 6 NYCRR § 371.1(f), a person who generates 100 kgs. or less of non-acute hazardous waste in a calendar month may accumulate hazardous waste on-site without being subject to full regulation under 6 NYCRR § 370 through 376, and the notification requirements of § 3010 of RCRA, 42 U.S.C. §6930, provided that it, inter alia, determines whether each solid waste generated at its facility is a hazardous waste as required by 6 NYCRR § 372.2(a)(2) in accordance with procedures set forth in 6 NYCRR § 371.1(f)(6)(i).
58. As of the time of EPA's inspections of Respondent's two New York Stores, Respondent had failed to make hazardous waste determinations on the spent fluorescent, incandescent, high pressure sodium vapor, mercury and metal halide lamps it generated before it disposed of them in the trash.
59. Because Respondent failed to make hazardous waste determinations on the spent lamps it generated at its two New York Stores and failed to manage the spent lamps it generated as universal waste, Respondent was subject to full regulation under 6 NYCRR §§ 370 through 376.
60. Pursuant to 6 NYCRR § 373-2.3(b) and 373-3.3(b), facilities must be maintained and operated to minimize the possibility of any unplanned sudden or non-sudden releases of hazardous waste or hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment.
61. As of the time of EPA's inspections of Respondent's two New York Stores, Respondent had disposed of spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps in trash compactors. The ordinary operation of the trash compactors would have broken the spent lamps and caused a release to the air and/or other media of some of the lamps' contents.
62. Pursuant to 6 NYCRR § 372.2(a)(2)(iv), a generator of hazardous waste may refer to 6 NYCRR § 374-3 for alternate waste management standards for universal wastes which include lamps as defined in 6 NYCRR § 374-3.1(i). A used lamp becomes a waste on the date it is discarded. An unused lamp becomes a waste on the date the handler decides to discard it. 6 NYCRR § 374-3.1(e)(3).
63. Six NYCRR § 374-3.2(d)(4) (applicable to a "Small Quantity Handler of Universal Waste") requires that lamps be managed in a way (specified in the regulations) that

prevents releases of any universal waste or component of universal waste to the environment.

64. Upon information and belief, Respondent was not containing its spent lamps in containers or packages that were (a) structurally sound, (b) adequate to prevent breakage, and (c) closed, as required by 6 NYCRR § 374-3.2(d)(4)(i).
65. Upon information and belief, Respondent did not immediately clean up and place in a closed and structurally sound container any lamp that was broken, as required by 6 NYCRR § 374-3.2(d)(4)(ii).
66. As of the times of EPA's inspections of Respondent's two New York Stores, and at times prior thereto, Respondent was not managing the spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps pursuant to 6 NYCRR § 374-3.2(d)(4).
67. Many of the spent incandescent, fluorescent, high pressure sodium vapor, mercury and metal halide lamps that Respondent generated at its two New York Stores were likely to have contained at least one contaminant in a concentration that would classify these spent lamps as hazardous waste under 6 NYCRR 371.3(e).
68. Respondent's failure to ensure that spent lamps were managed in a way (as specified in the regulation) that prevented releases to the environment constitutes a violation of 6 NYCRR § 374-3.2(d)(4).
69. In the alternative, Respondent's failure to maintain and operate its two New York Stores to minimize the possibility of any unplanned sudden or non-sudden releases of hazardous waste or hazardous waste constituents to the air, soil, surface water which could threaten human health or the environment constitutes a violation of 6 NYCRR § 373-2.3(b) and 6 § NYCRR 373-3.3(b).

## PROPOSED CIVIL PENALTY

The Complainant proposes, subject to the receipt and evaluation of further relevant information, that Respondent a civil penalty in the amount of **Fifty Five Thousand Two Hundred Fifty Dollars (\$ 55,250)** for the violations alleged herein.

The proposed civil penalty has been determined in accordance with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). For purposes of determining the amount of any penalty assessed, Section 3008(a)(3) requires EPA to “take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.”

The Federal Civil Penalties Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required EPA to adjust its penalties for inflation on a periodic basis. The penalty amounts were amended for violations occurring on or after January 31, 1997. The maximum civil penalty under Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3) \$32,500 for any violation occurring after March 15, 2004. 40 C.F.R. Part 19.

To develop the proposed penalty in this Complaint, Complainant has taken into account the particular facts and circumstances of this case and has used EPA’s 2003 RCRA Civil Penalty Policy. A copy of this penalty policy is available upon request or can be found on the Internet at “[www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf](http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf).” The penalty amounts in the 2003 RCRA Civil Penalty Policy were amended later to reflect inflation adjustments. These adjustments were made pursuant to a September 21, 2004 document entitled, “Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (pursuant to the Debt Collection Improvement Act of 1996, effective October 1, 2004)” and a January 11, 2005 document entitled “Revised Penalty Matrices for the RCRA Civil Penalty Policy.” This RCRA Penalty Policy provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors to particular cases.

A penalty calculation worksheet and narrative explanation to support the penalty figure for the RCRA violation cited in this Complaint is included in Attachment I, below. The matrix employed in the determination of the penalty is included as Attachment II, below. These Attachments are incorporated by reference herein.

## COMPLIANCE ORDER

Based upon the foregoing, and pursuant to the authority of Section 3008 of the Act, Complainant issues Respondent the following Compliance Order. To the extent it has not already done so, Respondent shall:

- i. commencing on the effective date of this Compliance Order, determine whether solid wastes generated at Respondent’s two New York Stores are hazardous wastes.

- ii. within thirty (30) calendar days of the effective date of this Compliance Order, comply with all applicable federal and state regulatory requirements for the management of hazardous waste by generators and universal waste by handlers at Respondent's two New York Stores.
- iii. within thirty (30) calendar days of the effective date of this Compliance Order, submit to EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein at Respondent's two New York Stores. If Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement.
- iv. submit the above required information and notices to:

Steven Petrucelli  
RCRA Compliance Branch  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 21<sup>st</sup> Floor  
New York, New York 10007-1866

This Compliance Order shall take effect thirty (30) days after service of this Order, unless by that date Respondent has requested a hearing pursuant to 40 C.F.R. § 22.15. *See* 42 U.S.C. §6928(b) and 40 C.F.R. §§ 22.37(b) and 22.7(c).

Compliance with the provisions of this Compliance Order does not waive, extinguish or otherwise release Respondent from liability for any violations occurring or existing at the New York Stores or other stores. Further, nothing herein waives, prejudices or otherwise affects the EPA's right (or the right of the United States on behalf of the EPA) to enforce any applicable provisions of law regarding Respondent.

#### **IV. NOTICE OF LIABILITY FOR ADDITIONAL CIVIL PENALTIES**

Pursuant to the terms of Section 3008(c) of RCRA and the Debt Collection Improvement Act of 1996, a violator failing to take corrective action within the time specified in a compliance order regarding hazardous waste violations is liable for a civil penalty of up to \$32,500 for each day of continued noncompliance. Such continued noncompliance may also result in suspension or revocation of any permits issued to the violator whether issued by the EPA or the State of New York.

## **V. PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION**

The rules of procedure governing this civil administrative litigation have been set forth in the “CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS.” These rules are codified at 40 C.F.R. Part 22. A copy of these rules accompanies this Complaint.

### **A. Answering The Complaint**

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent are entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer(s) to the Complaint, and such Answer(s) must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866**

Respondent shall also then serve one copy of the Answer(s) to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

Respondent’s Answer(s) to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer(s), the allegation is deemed denied. 40 C.F.R. § 22.15(b).

The Answer(s) shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent dispute (and thus intend to place at issue in the proceeding) and (3) whether Respondent request a hearing. 40 C.F.R. § 22.15(b).

Respondent’s failure affirmatively to raise in the Answer(s) facts that constitute or that might constitute the grounds of its defense may preclude Respondent at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

## **B. Opportunity To Request A Hearing**

If requested by Respondent(s), a hearing upon the issues raised by the Complaint and Answer(s) may be held. 40 C.F.R. § 22.15(c). If, however, Respondent requests a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer(s) raises issues appropriate for adjudication. 40 C.F.R. § 22.15(c). With regard to the Compliance Order in the Complaint, unless either Respondent requests a hearing pursuant to 40 C.F.R. § 22.15 within 30 days after the Compliance Order is served, the Compliance Order shall automatically become final. 40 C.F.R. § 22.37

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.21(d). A hearing of this matter will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

## **C. Failure To Answer**

If Respondent fails in their Answer(s) to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely (*i.e.* in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)) Answer(s) to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer(s) to the Complaint, any order issued therefor shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent(s) without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent(s), and to collect the assessed penalty amount, in federal court. Any default order requiring compliance action shall be effective and enforceable against Respondent(s) without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

## **D. Exhaustion Of Administrative Remedies**

Where Respondent fails to appeal an adverse initial decision to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30, and that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives the right to judicial review. 40 C.F.R. § 22.27(d).



To appeal an initial decision to the Agency's Environmental Appeals Board ("EAB"), Respondent must do so "[w]ithin 30 days after the initial decision is served upon the parties." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

### **INFORMAL SETTLEMENT CONFERENCE**

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that they believe is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the financial or economic impact the proposed penalty would have on Respondent and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Carl Howard, Esq.  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th floor  
New York, New York 10007-1866  
Phone: 212-637-3216

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing. 40 C.F.R. § 22.18(b)(1). Respondent's request for a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any

of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer(s) to the Complaint pursuant to 40 C.F.R. § 22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives the right to contest the allegations in the Complaint and waives the right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

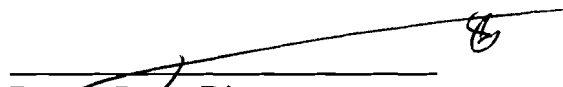
Respondent entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in the such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint. Respondent entering into a settlement does not extinguish, waive, satisfy or otherwise affect their obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

#### **RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE**

If, instead of filing an Answer(s), Respondent wishes not to contest the Compliance Order in the Complaint and wants to pay the total amount of the proposed penalty within 30 days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified on the previous page.

**Dated:** DECEMBER 23, 2007  
New York, New York

**COMPLAINANT:**

  
\_\_\_\_\_  
Dore LaPosta, Director  
Division of Enforcement and Compliance  
Assistance  
Environmental Protection Agency, Region 2  
290 Broadway, 21<sup>st</sup> floor  
New York, NY 10007-1866

**To:** Mr. Terry J. Lundren, President  
Macy's Retail Holdings, Inc.  
7 West Seventh Street  
Cincinnati, OH 45202

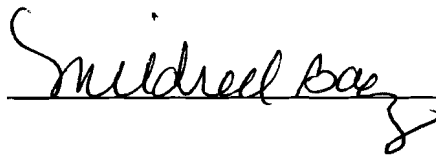
**cc:** Thomas Killeen, Chief  
Hazardous Waste Compliance Section  
Bureau of Hazardous Waste Management  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-7251

**In re: Macy's Retail Holdings, Inc.**  
**Docket Number RCRA-02-2008-7103**

**CERTIFICATE OF SERVICE**

This is to certify that on DEC 28, 2007, I served a true and correct copy of the foregoing "COMPLAINT, COMPLIANCE ORDER AND NOTICE OF OPPORTUNITY FOR HEARING," bearing Docket Number RCRA-02-2008-7103 hereinafter referred to as the "Complaint"), together with Attachments I and II and with a copy of the "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION COMPLIANCE ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS," 40 C.F.R. Part 22, by certified mail, return receipt requested, to the addressees listed below. On said day, I hand carried the original and a copy of the Complaint, with the accompanying attachments, to the Office of the Regional Hearing Clerk of the United States Environmental Protection Agency, Region 2, 290 Broadway, 16<sup>th</sup> floor, New York, New York 10007-1866.

Dated: DEC 28, 2007  
New York, New York

  
\_\_\_\_\_

**Attachment I - Penalty Calculation Worksheets**

**Penalty Calculation Worksheet - Count 1**

Requirement Violated:           Count 1: Failure to determine whether solid wastes (incandescent, fluorescent, mercury, high pressure sodium vapor, and metal halide lamps) are hazardous wastes, 6 NYCRR § 372.2(a)(2).

1. Gravity based penalty from matrix	\$ 32,500
(a) Potential for Harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	Not Applicable
3. Multiply line 2 by number of days of violation minus 1.	Not Applicable
4. Add line 1 and line 3	\$ 32,500
5. Percent increase/decrease for good faith.	-15%
6. Percent increase for willfulness/negligence.	Not Applicable
7. Percent increase for history of noncompliance.	Not Applicable
8. Total lines 5 through 7.	Not Applicable
9. Multiply line 4 by line 8.	- \$ 4,875
10. Calculate economic benefit.	Not Applicable
11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint.	\$ 27,625

## Narrative Explanation in Support of Penalty Figure - Count 1

### 1. Gravity Based Penalty

1. Potential for Harm - The potential for harm for Respondent's failures to make hazardous waste determinations was determined to be Major. Such failures pose a substantial adverse effect on the statutory purposes and regulatory procedures for implementing the RCRA program by substantially increasing the probability that Respondent will mismanage the solid waste that it has failed to determine is a hazardous waste. Macy's stores had in fact mismanaged and disposed the spent lamps in the trash.
2. Extent of Deviation - The extent of deviation present in these violations was determined to be Major. Respondent failed to determine whether or not the spent lamps it generated were hazardous wastes. Respondent discarded thousands of lamps without making a hazardous waste determination. This amounts to a significant deviation from both the RCRA and Universal Waste programs.
3. The applicable cell ranges from \$ 26,000 to \$ 32,500. The high point of the cell matrix was selected because of the quantity of spent lamps for which Respondent did not make a hazardous waste determination.
4. Multiple/Multi-day - EPA is exercising its enforcement discretion in proposing a single penalty for the two stores where EPA found violations.

### 2. Adjustment Factors

1. Good Faith - A reduction in the proposed penalty is being made based upon available information that Respondent had begun, although belatedly, to identify and take action to correct the violation prior to the inspection at all of its stores. It was in the process of acting at the New York stores as well but had not yet implemented the spent lamp program as of the time of EPA's inspections. As a result, the penalty was reduced by 15% for the good faith effort Macy's had shown prior to EPA's inspections.
2. Willfulness/Negligence Not Applicable
3. History of Compliance Not Applicable
4. Ability to Pay Not Applicable
5. Environmental Project Not Applicable
6. Other Unique Factors Not Applicable

3. **Economic Benefit** - No penalty is being sought to recoup economic benefit since Macy's staff may have been able to make such determinations at no additional cost to Respondent beyond salaries already paid.

### Penalty Calculation Worksheet - Count 2

Requirement Violated: Count 2: Failure to prevent and/or minimize releases, 6 NYCRR § 373-2.3(b), 6 NYCRR § 373-3.3(b), and 6 NYCRR § 374-3.2(d)(4).

1. Gravity based penalty from matrix	\$ 32,500
(a) Potential for Harm.	MAJOR
(b) Extent of Deviation.	MAJOR
2. Select an amount from the appropriate multi-day matrix cell.	Not Applicable
3. Multiply line 2 by number of days of violation minus 1.	Not Applicable
4. Add line 1 and line 3	\$ 32,500
5. Percent increase/decrease for good faith.	- 15%
6. Percent increase for willfulness/negligence.	Not Applicable
7. Percent increase for history of noncompliance.	Not Applicable
8. Total lines 5 through 7.	Not Applicable
9. Multiply line 4 by line 8.	- \$ 4,875
10. Calculate economic benefit.	Not Applicable
11. Add lines 4, 9 and 10 for penalty amount to be inserted into the complaint.	\$ 27,625



## Narrative Explanation in Support of Penalty Figure - Count 2

### 1. Gravity Based Penalty

1. Potential for Harm - The potential for harm to human health and the environment was determined to be Major. The potential for harm is substantially increased by the manner in which Respondent managed and disposed of the spent lamps it generated. Spent lamps were put into trash compactors where the lamps were broken and at least some of the lamps' contents was released.

With regard to the risk posed to human health and/or the environment, most current and past manufactured lamps, when taken out of service for disposal, are "toxic characteristic hazardous wastes" because of mercury content. The nervous system (human and non-human) is very sensitive to all forms of mercury, a neurotoxin. Exposure to high levels of metallic, inorganic, or organic mercury can potentially permanently damage the brain, kidneys, and a developing fetus. Improper handling (crushing in a trash compactor) of spent lamps in the regular trash likely led to release of hazardous constituents (such as mercury) into the environment.

2. Extent of Deviation - The extent of deviation present in these violations was determined to be Major. Prior to EPA's inspection, Respondent disposed of the spent lamps in the compactor and the compacted spent lamps would have been broken and then disposed of in a municipal landfill. The spent lamps constituted the largest potentially hazardous waste stream generated at Respondent's store, and considering the mismanagement of this waste stream, there likely were significant releases to the environment of hazardous waste and/or hazardous constituents. This represents a significant deviation from the RCRA Hazardous Waste and Universal Waste Programs.
3. The applicable cell ranges from \$ 26,000 to \$ 32,500. The high point of the cell range was selected because of the quantity of spent lamps being mismanaged.
4. Multiple/Multi-day - A multi day penalty is not being sought at this time.

### 2. Adjustment Factors

1. Good Faith - A reduction in the proposed penalty is being made based upon available information that Respondent had began, although belatedly, to identify and take action to correct the violation prior to the inspection of its stores. It was in the process of acting at the New York stores as well but had not yet implemented the spent lamp program prior to EPA's inspections. As a result, the

penalty was reduced by 15% for the good faith effort Macy's had shown prior to EPA's inspections.

- 2. Willfulness/Negligence Not Applicable
- 3. History of Compliance Not Applicable
- 4. Ability to Pay Not Applicable
- 5. Environmental Project Not Applicable
- 6. Other Unique Factors Not Applicable

3. **Economic Benefit** - At this time, EPA is not seeking to recover the economic benefit, because it is believed to be under the level considered to be insignificant under the 2003 RCRA Civil Penalty Policy. Although there is some economic benefit gained, the facility could have complied with the RCRA requirements without major expense.

**Attachment II**

**Gravity-Based Penalty Matrix**

		<b>EXTENT OF DEVIATION FROM REQUIREMENT</b>		
<b>P O T E N T I A L  F O R  H A R M</b>		<b>Major</b>	<b>Moderate</b>	<b>Minor</b>
	<b>Major</b>	<b>\$32,500 To 26,000</b>	<b>\$25,999 To 19,500</b>	<b>\$19,499 To 14,300</b>
	<b>Moderate</b>	<b>\$14,299 To 10,400</b>	<b>\$10,399 To 6,500</b>	<b>\$6,499 To 3,900</b>
	<b>Minor</b>	<b>\$3,899 To 1,950</b>	<b>\$1,949 To 650</b>	<b>\$649 To 130</b>