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March 11, 1993

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DATE/TIME RECEIVED

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VIA TELECOPY

Peter Raack, Esq.
Assistant Regional Counsel
United States Environmental
Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Re: Carrier Air Conditioning Site
Collierville, Tennessee

Dear Mr. Raack:

This letter is further to our meeting in Atlanta on Friday, February 26, concerning implementation of the Unilateral Administrative Order (UAO) to Carrier Corporation for the remediation of the Collierville site. Please make this letter a part of the Administrative Record for the Collierville site.

The meeting was conducted pursuant to Section XXX of the UAO; it was, in our view, constructive and helped clarify a number of issues in ways which should make implementation more practical.

At this meeting we confirmed that En-Safe is an acceptable remedial action contractor under Section VIII.C. of the UAO; Ms. Beth Brown, the Remedial Project Manager (RPM) on this site advised us at the meeting of her February 24, 1993 letter, in which she stated EPA's approval of En-Safe as the remedial action contractor under section 119 of CERCLA and the UAO.

Pursuant to Section XVII.A. of the UAO, we also corrected the designation of the project coordinator for Carrier to show that it will be Mr. Nelson Wong's colleague, Douglas Bailey. Mr. Bailey's mailing address, phone, and fax numbers are:

10626304

Douglas A. Bailey
Environmental Engineer
Carrier Corporation
Post Office Box 4808
Carrier Parkway, TR-18
Syracuse, New York 13221
Telephone: (315) 433-4248
Receptionist: (315) 432-6002
Fax: (315) 432-3344

Beth

Carrier asks that copies of all communications sent to Mr. Bailey in his capacity as project coordinator also be sent to me as Carrier's counsel.

It is our understanding from discussions at the meeting that EPA regards Carrier's undertaking to comply with the lawful provisions of the UAO as satisfactory under Section XXIX of the UAO. As we also discussed at the meeting, Carrier disagrees with EPA's asserted legal positions on certain issues we identified. As our differences of opinion appear to have little current practical significance to the remedial work Carrier is undertaking, Carrier will be noting its legal position on these issues in this letter for the administrative record, leaving these legal disagreements between EPA and Carrier of academic, rather than practical significance, if EPA's current constructive approach to implementation of the UAO continues.

At our meeting, we complied with the financial assurance provisions of the UAO by presenting the 1991 UTC Annual Report, dated February 24, 1992, together with my February 26, 1993 letter setting forth the primary materials from the Report related to Carrier and Carrier's financial capacity to perform the remedial work specified in the ROD and UAO. Put simply, though Carrier disagrees with EPA's assertion of authority to require financial assurance, Carrier believes the information it has provided shows EPA should have no reasonable basis for concern about Carrier's financial capacity to perform. As we also discussed, if EPA should have questions about the information we have presented about Carrier's financial condition, please let me know.

At our meeting, we clarified the site definition as it pertains to portions of the order, section II.D, p. 4, about recording the UAO for property included in the Site. In Carrier's view, the site definition in the UAO must correspond to the 135 acre parcel used to define the site for the National

Priority List (NPL), a parcel delineated in Figure 1-2 of the Record of Decision (ROD). It is our understanding that this was the property description used in proposing and promulgating the site for the National Priority List (NPL).

Carrier believes that if EPA has any authority to require recording notice of the UAO in the title records, that authority extends to the NPL site definition and not beyond it. If EPA wants to expand the site definition now, the statutory procedure for defining NPL sites is quite clear: the Agency must resort to the notice and comment rulemaking procedure provided for in CERCLA, pursuant to sections 104 and 105.

Thus, Carrier has had notice of the UAO recorded with respect to the 135 acre parcel in Collierville at which Carrier's plant is located. Carrier will be looking into the issue of whether notice of the UAO can be recorded as to property Carrier does not own. Alternatively, Carrier will also look into whether the access agreements concerning sampling wells on nearby property can be recorded in lieu of recording the UAO or notice of the UAO. Carrier is uncertain whether the UAO and other documents created pursuant to it are in a form recordable in the title records.

At our meeting, we also discussed off-site access agreements and the need to obtain them. It is my understanding that Carrier currently has written permission to take samples from wells located at the adjacent Burch and Schilling properties, and that the final decision on the location of the additional off-site well down-gradient of the City wells has not yet been made. Carrier will provide you copies of the written permission to enter and sample these wells, which permission may consist of correspondence. When the final location of the additional off-site well is established, Carrier will notify EPA of the location and of Carrier's efforts to secure such access, if such efforts prove unsuccessful.

At our meeting, Carrier requested that it be given an additional 45 days in which to submit the Remedial Design (RD) work plan, sampling plan, and quality assurance project plan (QAPP). The basis for the request was the need to coordinate with the DQO process, and the inability of the DQO personnel to meet before March 5 to discuss these issues. I understand that the meeting took place on March 5 and that EPA agreed to extend the time for submission of these materials until May 3. I also understand that no technical consensus was reached on the

fulfillment of insurance reqmts? - what is basis of these reqmts?

groundwater monitoring issues there discussed. Carrier that these issues should be resolved on their technical In particular, Carrier believes that monitoring which wi little, if anything, to change the remedial design called for in the ROD is not appropriate.

At the meeting on the 26th, we also sought to clarify the insurance requirements EPA seeks to impose pursuant to the Order. As a result of this discussion, it is our understanding that submission of a certificate of insurance showing the appropriate policy limits will be satisfactory to EPA. I am informed that some of the policies carried by Carrier are in manuscript form, and thus not easily provided, if at all. Apparently these policies periodically change with respect to issues other than whether there is sufficient coverage under the policy limits set forth in the UAO.

Carrier is uncertain what authority EPA relies upon to impose this insurance requirement, as there is no exp authority of this kind provided in CERCLA to require suc insurance. Under RCRA, EPA has certain authorities of t but EPA specifically rejected addressing this clean-up u in 1989, despite Carrier's request that it do so. Havir rejected the use of specific statutory authority under R would have potentially allowed EPA to impose insurance financial assurance requirements as part of a clean-up, is puzzled that EPA now seeks to assert requirements fo has no express statutory basis under CERCLA.

two certificates of Completion 1. soil 2. GW

At our meeting on the 26th, we suggested that the certificate of completion be split into two parts: one providing for soils clean-up and one for groundwater clean-up. We understood that this suggestion was agreeable to EPA. This change is of considerable practical importance to Carrier, as any construction work at the plant is subject to elaborate procedures as a result of the site's NPL status. Once the soils work is completed, and a separate certificate issued for that ph the work, Carrier would be able to do construction work plant without the same restrictions, a change which may some cost savings, and greater operational flexibility.

We also raised the issue of the reporting date und for monthly reports, and the frequency of such reports phases of the work. At Carrier's request, EPA has agre change the due date for monthly reports to the 15th of month. This is done in order to accommodate unavoidabl

UAO mod?

mechanical and coordination problems in preparing and approving such reports where Carrier's project coordinator is located with Carrier's offices in Syracuse, but where En-Safe, the response action contractor, is located in Memphis. We agreed that the frequency of such reports might be revisited after the monitoring schedule has been set, as such monitoring in later phases of the work is less frequent.

These were the major issues we addressed in the course of our meeting. We also noted a number of areas where Carrier needed clarification of the order's provisions, or where Carrier disagrees with EPA's legal contentions. We verbally identified these areas which are discussed in the remainder of this letter, as well as other items we clarified at the meeting. In brief, the other items which we discussed were the following:

1. Page 3, ¶ II.B. We clarified that this provision, which requires the UAO to be provided to prospective owners, shareholders, and successors, is to be read to mean prospective controlling owners of the site, and not the shareholders of Carrier Corporation or United Technologies, or purchasers of assets (other than the site) unless the disclosure would be material within the meaning of the securities laws. Otherwise, the UAO would have to be read to require the UAO to be furnished every time United Technologies' stock is traded or assets other than the Collierville site sold. That construction is obviously not what EPA intended for a company listed on the New York Stock Exchange with over 100,000,000 shares of common stock.

2. Page 4, ¶ II.E. This provision purports to require Carrier to provide EPA land transfer documents affecting the Site 60 days in advance of such transfer. Obviously, EPA believes that the Site means only that property Carrier owns, or this requirement is absurd: Carrier will not have notice of transfers of land it does not own, any more than EPA will. Additionally, this requirement is impossible to comply with where the terms of the transaction are not finalized 60 days prior to the transfer. Indeed, it is frequently the case that negotiations in a transfer of real estate or corporate assets will frequently be conducted until the moment of the sale, and the documents changed accordingly.

This provision is redundant with other portions of section II of this order, especially with ¶ A, if EPA is concerned that Carrier might be relieved of its obligations by selling the property, and with ¶¶ B and D, if EPA is concerned with giving

notice to potential purchasers. Indeed, all of ¶¶ B, D, and E seems unwarranted when it is noted that the site is on the National Priority List (NPL). As you are aware, the NPL is published in the Federal Register and the Code of Federal Regulations and as such is legally notice to all the world of the site's status.

Carrier disagrees that EPA has the authority to impose these requirements under CERCLA section 106(a). There is no express authority to do so under CERCLA, unlike the case under RCRA, which EPA consciously decided not to use as its authority for this clean-up. In electing not to use express RCRA authority which provides for such requirements, EPA has effectively elected not to impose such requirements under CERCLA, which has no such express grant of authority.

3. Pp. 4-8, Section III, Definitions. Carrier objects to the UAO's definitions of Operation & Maintenance, Performance Monitoring, Performance Standards, Remedial Design, Remedial Action, and Work, to the extent these definitions purport to require the performance of additional work specified by EPA. The precondition for the exercise of EPA's authority under the statute is the presence of imminent and substantial endangerment to public health or the environment. To the extent the UAO is asserting that EPA may order later additional work, in the absence of later imminent and substantial endangerment, Carrier believes that there is no statutory support for that position.

4. Pp. 8-12, Sections IV, V, EPA's Findings of Fact and Conclusions of Law. Carrier reserves its right to contest EPA's findings of fact and conclusions of law if such becomes necessary later. In particular, Carrier disagrees that there is or may be an imminent and substantial endangerment of public health or the environment as asserted in ¶ V.H., pp. 11-12, where ingestion of groundwater is the primary exposure pathway of concern and where Carrier has already installed an operational water treatment system at the Collierville wells, a system which has assured that any hazardous substances in the drinking water are kept at levels which fully comply with Safe Drinking Water Act health standards.

Carrier also specifically objects to the statement on page 11 that the ROD includes institutional controls, to the extent EPA intends to seek such controls from Carrier. Only a governmental body can impose such controls, and EPA chose not to issue an order to the City of Collierville, the other potentially

responsible party here. Thus, Carrier cannot be held responsible for the imposition of such controls.

5. P. 16, third unnumbered paragraph. We clarified that Carrier and En-Safe need not publish solicitation documents for contractors whose participation is sought in the clean-up work. Neither Carrier nor En-Safe normally do publish such documents. Rather, Carrier and En-Safe are to provide to the EPA remedial project manager any specification documents provided to potential bidders on the work to be done. It is not EPA's intention to impose a formal bidding procedure on Carrier or En-Safe; instead, it is EPA's intention to obtain copies of the specifications to assure itself that these conform to the requirements of the UAO and the statute.

6. Pp. 19-20, Section IX, Failure to Obtain Performance Standards; Pp. 20-21, Section XI, Additional Response Actions. EPA's authority to order additional work depends on physical and chemical conditions at the Site at the time EPA seeks to order such work and whether such conditions pose an imminent and substantial endangerment, and not on the recitations in this UAO. Carrier objects to these provisions to the extent EPA is seeking to apply any other legal standard for additional work at the Site.

7. P. 23, ¶¶ XIII. D., E. Carrier objects to these provisions to the extent EPA seeks to make itself rather than the United States District Court the judge of whether certain facts exist, whether such facts would constitute a violation of the UAO or CERCLA, and of what procedures will be used to determine whether any such violation exists. Carrier has a right to a jury trial under the Seventh Amendment to the Constitution in any civil penalty action contending Carrier has violated section 106 and any UAO issued under it. In addition, Congress did not by enacting section 106 authorize EPA to repeal the rules of evidence or civil procedure governing such proceedings.

8. Pp. 29-30. Section XVIII, Site Access. We clarified that these site access provisions are not intended to, nor do they, limit Carrier's rights to claim that materials are subject to trade secrecy protection, or the attorney-client, attorney work product, or other evidentiary privileges available under the Federal Rules of Evidence. In particular Carrier is concerned that EPA understand that Carrier considers its assembly process at the Collierville plant a trade secret and will insist on protection of that trade secrecy, especially in connection with

any still or video photography of the interior of the manufacturing buildings. Carrier has had an extremely unfortunate experience with another EPA region, in which regional personnel turned over documents marked with confidentiality stamps to Carrier's opponents in litigation, without any advance notice or other effort to comply with appropriate procedures under 40 C.F.R. Part 2 or CERCLA, or even any apology after the fact. That experience has made Carrier very skeptical of EPA claims that it adequately protects trade secrets it receives.

9. Pp. 30-31. Section XIX. Off-site Access. Carrier objects to this provision insofar as EPA purports to require Carrier to pay for off-site access pursuant to section 106(a) or to reimburse EPA for such access. If EPA or anyone else has a cost claim under CERCLA against Carrier, then the person holding such a claim must seek to recover under section 107. EPA cannot, under the emergency powers provided in section 106(a), deprive Carrier of its right to have a court determine the recoverability of such claims by purporting to order payment to EPA or anyone else, or subject Carrier to penalties for refusing to make such a payment absent the judgment of a court. To read section 106 otherwise is to read section 107 out of the statute, contrary to Congress' intent, and the canons of statutory construction.

10. Pp. 31-34, Section XX, Access to Information and Data/Document Availability; Section XXI, Record Preservation. We clarified that these provisions are not intended to be waivers of existing evidentiary privileges such as attorney-client, attorney work product, and similar privileges provided under the Federal Rules of Evidence and case law under it. We also clarified that it is not a waiver of Carrier's trade secrecy protections.

As you may recall, we also clarified that the records of the ongoing operations at the Collierville manufacturing plant are not the subject of this order, nor are the records kept by Carrier's attorneys in this matter or in the ongoing insurance coverage litigation. Rather, it is the records of the clean-up kept in the ordinary course of business by the response action contractors and subcontractors which are intended to be covered by the access and record retention provisions.

Carrier specifically objects to the claim made by EPA in ¶ XX.D. that Carrier keep a log of privileged documents. There is no authority in section 106 or any other provision of CERCLA to impose such a requirement, which is normally something imposed by a court, pursuant to court rule, in a litigation context.

11. Pp. 34-35, ¶ XXII, Delay in Performance. Carrier objects to this provision insofar as it purports to make EPA the judge of whether certain circumstances constitute a delay in performance or justification for delay. That obviously is the court's decision, not EPA's. Likewise, EPA has no authority to require Carrier to state what its defenses are to a claim of unjustified delay; such claims and defenses are governed by the Federal Rules of Civil Procedure and Evidence, as applied by duly nominated and confirmed Article III judges, as the facts are found by sworn juries.

12. Pp. 38-41 ¶ XXVI, Enforcement and Reservations; Reimbursement of Response Costs. Carrier reserves all its rights and defenses to any EPA claims made under this order. In particular, Carrier objects to the recitation of supposedly recoverable response costs under the order, as such costs are to be determined by a court on the basis of the law and rules of evidence. Carrier also objects to EPA's contention that it can recover any response costs by issuing an order under section 106 rather than by filing a proper court action under section 107 and proving those costs to the court's satisfaction. Where Congress expressly provides a procedure in section 107 for such response costs, EPA cannot disregard that reimbursement procedure in favor emergency powers which make no mention of reimbursement.

Please call me if you should have questions about this letter, the discussions at our meeting, or about subsequent developments.

Sincerely,

Russell V. Randle

Russell V. Randle