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ENVIRONMENTAL, REAL ESTATE, BUSINESS AND INSURANCE LAW

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via email and regular mail

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Mr. Lawrence Kyte
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RE: South Dayton Dump & Landfill Superfund Site

Dear Ms. Tanaka and Mr. Kyte,

I represent Hobart Corporation, Kelsey-Hayes Company and NCR Corporation, Respondents to ASAOC No. V-W-13-C-010 (EPA Region 5, 2013) ("2013 ASAOC") and ASAOC No. V-W-16-C-011 (EPA Region 5, 2016) ("2016 ASAOC"). I am writing to follow up on our request to James Morris, Esq. that EPA consider issuing a "participate and cooperate" unilateral administrative order to the Dayton Power and Light Company (DPL) to perform the RI/FS for OU1 and OU2 at the South Dayton Dump & Landfill (SDD) Superfund Site (the "Site") in conjunction with the 2016 ASAOC. We request that EPA Region 5 issue such an order.

For most of the Site's operational existence, DPL had a Service Building at 1900 Dryden Road, directly across the street from SDD. SDD was the preferred and practically sole disposal site for DPL's Service Building. Commensurate with its status as the primary service building for a large utility, the Service Building produced wastes in large volume and high toxicity, as explained below. SDD also accepted waste from other DPL locations, notably coal-burning steam generating electrical stations, which produced coal ash and fly ash daily. In addition, DPL had remote repair and maintenance operations that generated broken utility poles, spent transformers and other industrial waste sent to SDD. Based on the information and evidence

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outlined below, we believe DPL is responsible for at least 40% of the Site waste volume, and at least twice as much volume as the next largest PRP.

Respondents have agreed to perform an RI/FS for OU1 and OU 2 at the Site in the 2016 ASAOC, are already performing work relating to vapor intrusion at the Site pursuant to the 2013 ASAOC, and have conducted investigations and testing at the Site pursuant to an earlier ASAOC entered into in 2006. When Respondents' obligations under the ASAOCs are completed, their allocable share of response work at the Site will be complete, no matter how the volumetric data is applied. Other than General Motors, which has since gone through bankruptcy, no other PRP has contributed any work at all, or any dollar of financing, to any of these projects. DPL in particular has refused any participation of any kind, and is instead focused solely on litigation defense, which as noted below is misguided at best.

As set forth below, issuing a unilateral participate and cooperate order to DPL is appropriate because:

- DPL is by far the most liable PRP at the Site, both in terms of the enormous volume of waste it has arranged for disposal at the Site (much from its facility directly across the street) and the hazardous substances in its waste stream;
- DPL has not cooperated with EPA with regard to responding to General and Special Notice Letters;
- DPL has refused access to EPA and Respondents to its property across the street from the Site, leading to EPA issuing an access order in 2009;
- DPL has misrepresented its involvement in sending hazardous substances to the Site to EPA in 104(e) responses and communications with EPA;
- DPL falsified an affidavit of one of its former employees in an effort to avoid liability at the Site, as brought out in a deposition of that employee in the contribution litigation;
- DPL declined an invitation from Respondents to join a PRP Group, and refused to constructively participate in mediation efforts; and,
- There is precedent for "participate and cooperate" orders in support of RI/FS work.

The circumstances here fully justify issuing such an order to DPL. Below, we expand on the above points. Of course we can provide full transcripts of any of the deposition material cited, and copies of any documents referenced.

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1. DPL is by far the most liable PRP at the Site

Both in terms of volume and toxicity, DPL is by far the most liable PRP at the Site.

a. DPL's considerable volume

No other PRP comes close to DPL's volume in terms of amount and consistency of dumping at the Site. DPL had a key to the SDD gate that allowed it to dump loads off-hours at SDD without supervision.[1] Documents produced by DPL include check registers (copies attached hereto) showing that DPL paid for dumping privileges at the Site every month from at least 1952 through 1977, in increasing amounts. Moreover, DPL's heavy and regular use of the Site predates the 1952 check register.[2]

Several witnesses testified to the large volume of DPL's waste disposed of at the Site. Horace Boesch testified that DPL was the dump's largest customer.[3] Mr. Michael Wendling, who worked at the Site, testified that he saw DPL dump trucks "on a daily basis. If I was there, I would see 'em all the time."[4] Mr. David Grillot, who also worked at the dump, made a similar observation:

> Q. So the dump trucks would come from DP&L at night?
>
> ***
>
> A. They would leave in the mornings. They'd come back, they would empty out at the dump, and then they would go across the street into their entrance. It's plain as day.

D. Grillot dep. 32:20-33:7, 34:6-11. It is not surprising that many loads of waste per day from the Service Building went to SDD, given SDD's proximity to the Service Building.

Similar testimony comes from DPL employees. Mr. John Davis, a DPL driver, testified that he dumped coal ash at the Site every day for twenty years from two DPL power generating

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[1] H. Boesch 12/1/11 dep., 63:13-15; D. Grillot dep. 97:22-98:3; J. Davis dep., 23:18-24:7. These and all other deposition transcripts and documents not attached to this letter are available upon request.
[2] H. Boesch 12/1/11 dep., 35:21-25.
[3] H. Boesch 12/1/11 dep., 69:18-70:1, 70:20-71:2.
[4] M. Wendling 7/17/2012 dep., 39:15-21.

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stations. An average day would be six loads, some days as many as fifteen loads.[5] Mr. Davis's testimony is corroborated by Mr. Charles Fields, another DPL driver, who testified that he dumped waste at the Site "four to five times a day."[6]

In addition to waste from the power generating stations, DPL's waste came to the Site from its Service Building, which was directly across the street from the Site, and from operations around the area that DPL serviced "every day."[7]

b. DPL's waste was toxic

DPL's waste disposed of at the Site was particularly toxic. Three particular categories of recognized toxic wastes have been readily identified. DPL produced documents regarding its divisions located at the Service Building, including "Electric Maintenance," "Construction Management" and "Gas Operations Regulator Shop" (copies attached). The Electric Maintenance division cleaned up spilled transformer oil containing PCBs with "Floor Dry," which was then disposed of in "Landfill via Dumpster," according to DPL's documents, and also generated waste degreasing solvents.[8] The Construction Management division generated waste Fuller's Earth, used as a filtering sand for transformer and capacitor oils in the "Oil House" at the Service Building. The waste Fuller's Earth, contaminated with used oil, and oil filters were disposed of in "Landfill" and "Stores Dumpsters," which, according to Mr. Fleckenstein and Mr. South, were taken to the Site. The Gas Operations Regulator Shop was involved in "Degreasing of Equipment" and "Painting"; the waste solvent[9] went to "Dumpsters or Transportation Department." Waste in the dumpsters ended up at the Site. Transformer oil of course often contains PCBs, one of the documented contaminants at the Site; the Fuller's Earth was used to filter oil and PCBs, and industrial solvents are very commonly the basis for site cleanups.

The testimony of former DPL employees confirms that DPL's hazardous waste, including PCB- and solvent-contaminated materials, went to the Site. They testified that used Fuller's Earth contaminated with used oil and PCBs, mineral spirits,[10] metal shavings,[11] broken poles,

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[5] J. Davis dep., 16:1-17:16, 17:22-18:5.
[6] Charles Fields dep., 18:21-19:11, 28:6-29:2. Mr. Fields drove a truck for DPL from about 1965-67. C. Fields dep., 22:6-7:11, 51:22-24.
[7] J. South dep., 35:1-9; W. Fleckenstein dep., 28:20-29:3; J. Davis dep., 31:5-24.
[8] Although the documents are undated, similar and apparently contemporaneous documents produced by DPL are dated 1980.
[9] The solvent identified is "Chlorothene NU," a synonym for 1-1-1 trichloroethane.
[10] J. Tharpe 12/11/14 dep., 54:2-25.
[11] J. Tharpe 1/17/12 dep., 126:2-16.

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transformers,[12] insulators,[13] and rags used to degrease metal parts[14] were disposed of at the Site. The broken poles were usually coated with creosote.[15] Other documents produced by DPL show that operations within the Service Building, whose waste was disposed of at the Site, generated waste oils, painting residuals, degreasing solvent residuals, oily wastes and PCB wastes;[16] 1-1-1 trichloroethane;[17] and construction debris, dirt, ash, cinders, broken concrete and blacktop.[18] Mineral spirits are a class of petroleum solvents that typically include hazardous substances such as xylene, toluene and ethylbenzene.[19] Metal shavings may be hazardous by themselves,[20] or may be disposed of along with hazardous materials because of the process by which they were generated.[21] Poles coated with creosote are hazardous waste because creosote is a listed hazardous substance, as are degreasers such as trichloroethylene and 1,1,1 trichloroethane.[22]

As noted above, transformers and insulators from that era typically contained PCBs. Waste oil is often hazardous because it is typically mixed with other hazardous materials,[23] as are waste paint[24] and painting residuals.[25] Lead paint was still in common use at the time DPL used the Site for disposal. Construction and demolitions debris generated by DPL likely included hazardous substances, such as "Waste paints, varnish, solvents, … Treated wood, including lumber, posts, ties, or decks, <u>and utility poles</u>;"[26] blacktop is typically hazardous because it contains tar.[27]

Not only did DPL dispose hazardous substances at the Site, hazardous substances are also present in the groundwater beneath the DPL Service Center itself, potentially migrating to the adjacent Site.[28]

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[12] Clarence Wall dep., 40:11-25, 43:23-44:2, 44:25-45:6, 48:19-49:9.
[13] J. South dep., 45:11-47:15.
[14] J. Tharpe 12/11/14 dep., 28:13-23, 31:18-34:14, 76:3-10, 76:14-25, 78:1-79:4.
[15] E. Grillot 4/24/12 dep. 90:12-24; C. Wall dep. 66:25-67:12.
[16] DPLIII2HC000173-74.
[17] DPLIII2HC000058-59.
[18] DPL 9/11/02 104(e) response (SDD_00410-421).
[19] See, e.g., 40 CFR Part 63 Table 6 to Subpart VVVV.
[20] E.g., chromium, lead, mercury.
[21] E.g., plating, etching, degreasing.
[22] 40 CFR § 302.4 Table.
[23] 40 CFR § 261.3(a)(2)(v).
[24] "RCRA in Focus – Construction, Demolition and Renovation," EPA Solid Waste and Emergency Response (5305W), Sept. 2004.
[25] <u>See</u> <u>Gen. Motors Corp. v. EPA</u>, 363 F.3d 442 (D.C. Cir. 2004).
[26] "RCRA in Focus," p. 6 (emphasis added).
[27] <u>See</u> 40 CFR § 261.31; 40 CFR Part 261 Appendix VII.
[28] "Streamlined Remedial Investigation and Feasibility Study Report," Conestoga-Rovers

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2. DPL Has Done Nothing to Help the Response and Everything to Stop It

DPL received General Notice Letters regarding the Site in 2002, 2005 and 2012, and Special Notice Letters in 2005 and 2015. DPL has never offered to participate in any response actions, declined an invitation from Respondents to join a PRP Group, and terminated a recent mediation, despite admitting as early as 2002, in its response to EPA's request for information under § 104(e) of CERCLA, that it arranged for the disposal of waste at the Site. Despite overwhelming evidence of the hazardous nature of a significant part of that waste, DPL continues to deny it. This strains all credulity.

DPL's answer to this evidence has been to try to stop EPA and any PRPs who cooperate with EPA from performing any appropriate response at the Site. In 2009, Ms. Karen Cibulskis, Region 5's RPM for the Site, called DPL to request access to DPL's property across the street from the Site for the RI. In response, "DPL stated they would not allow EPA access to DPL property to collect data to complete a RI/FS" because "DPL has evidence they never took waste to the SDDL site." DPL has never explained how this statement can be juxtaposed with its own documentary evidence establishing that it indeed "took waste to the SDDL site," nor with the abundant deposition testimony referenced in this letter.

Moreover, instead of allowing EPA and the cooperating PRPs access to its property, "DPL also said EPA could re-drill and sample DPL's existing well MW-104 in the parkway of their property adjacent to Dryden Road" (copy of Ms. Cibulskis's memo attached). Not surprisingly, in response to DPL's obstinacy, EPA was forced to issue an "Administrative Order Directing Compliance with Request for Access" to DPL to allow the investigators to do their job (copy also attached).

3. DPL's § 104(e) Response Is False

For reasons best known to itself, DPL's March 27, 2015 § 104(e) response to Region 5 baldly states that "DP&L has not discovered any evidence or indication of any hazardous substances generated by DP&L having been sent to the Site."[29] This statement is false, and it is demonstrably false. By March 27, 2015, the date of this statement on which DPL knew EPA would rely, DPL had in its own hands the depositions of its former employees Tharpe, Wall and South, and of Mr. Edward Grillot, that DPL disposed of hazardous substances at the Site. DPL also had the surveys from its divisions, such as the "Electric Maintenance," "Construction

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& Associates, June 2011, Figs. 1.28, 1.30 (vinyl chloride, trichloroethene, arsenic, lead).

[29] "The Dayton Power and Light Company's Response to U.S. EPA's Information Request for the South Dayton Dump Site," March 27, 2015, pp. 3, 4, 8, 9, 10, 11, 12, 13, 14, 15 (emphasis added).

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Management" and "Gas Operations Regulator Shop" surveys, indicating that DPL generated hazardous waste, and DPL knew that some of that hazardous waste must have been disposed of at the Site. It knew it had written checks every month for more than 25 years for the use of this dump.

The only deposition transcripts DPL attached to its response to Region 5 were those of Mr. Fields and Mr. Davis, who testified that they hauled fly ash (from coal burning) to the Site.[30] The transcripts were attached in response to the question, "If not already provided, specify the dates and circumstances when Respondent's waste was taken to the SDDL Site, and identify the companies or individuals who brought Respondent's waste to the Site. Provide all documents which support or memorialize your response."[31] The transcripts of Messrs. Tharpe, Wall, South and Grillot are just as responsive as the transcripts of Messrs. Fields and Davis. The only reason for DPL to include those of Messrs. Fields and Davis but omit those of Messrs. Tharpe, Wall, South and Grillot, is to conceal from EPA the evidence of DPL's arranging for the disposal of hazardous substances at the Site.

DPL's disingenuous and misleading behavior is thoroughgoing and consistent. Another former DPL employee, Henry Luther, testified that an affidavit under his signature submitted by DPL to Ohio EPA to the effect that DPL sold, rather than disposed of, used electrical equipment, had been altered after he signed it:

> Q. Mr. Henry, I'm placing in front of you an exhibit we marked as Henry 1. Please review it.
>
> A. You want me to read this?
>
> Q. Yeah. Glance through it at least.
>
> A. Some of this isn't true.
>
> ***
>
> Q. Do you know who wrote this letter, this document?
>
> A. No, I don't know.

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[30] DPL knows or should know that fly ash contains hazardous substances. See Eagle-Picher Indus., Inc. v. United States EPA, 759 F.2d 922 (D.C. Cir. 1985) (EPA had authority to list sites contaminated with fly ash on NPL because fly ash includes hazardous substances).
[31] 104(e) Response, pp. 17-18.

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* * *

Q. Keep reading.

A. Oh. I see my name here. My name looks -- I must have signed this before all of that stuff was printed.

* * *

Q. You're saying you signed it before you saw the rest of the document?

A. Oh, yeah, because some of this stuff ain't true.

L. Henry dep., 25:25-28:9.[32] To Respondents' knowledge, DPL has never corrected this affidavit that it filed as an official part of its own record with EPA, nor has it advised EPA of this lack of the affidavit's fundamental integrity.

4. <u>There Is Precedent for Unilateral Orders in Support of RI/FS Work</u>

Section 106(a) of CERCLA authorizes the President to "issu[e] such orders as may be necessary to protect public health and welfare and the environment." EPA does not typically issue unilateral orders for PRPs to perform RI/FS because of (Respondents assume) concerns the PRP may not be able to "carry out the activities in accordance with CERCLA requirements and EPA procedures."[33]

In this case, issuing a unilateral order to DPL requiring it to participate in performing or funding the RI/FS is appropriate. First, Respondents have agreed to perform the RI/FS for OU1 and OU2 in the 2016 ASAOC. Issuing a unilateral order to DPL puts no additional burden on Region 5 to ensure that DPL is "carry[ing] out the activities in accordance with CERCLA requirements and EPA procedures." Region 7 issued unilateral orders for an RI/FS under similar circumstances, i.e., where an ASAOC for RI/FS was already in place. <u>See</u> "Unilateral Orders for Remedial Investigation/Feasibility Study," Docket Nos. CERCLA-07-2009-0016/17 (EPA Region 7, 2009) (copies attached).

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[32] A copy of the Exhibit is attached.
[33] Interim Guidance on PRP Participation in the RI/FS Process, OSWER Directive #9835.2A (1989).

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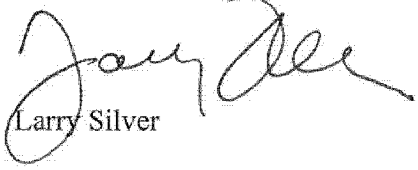
Second, this is a textbook case where a PRP should be issued a unilateral order to participate and cooperate. DPL's volume at the Site dwarfs that of other PRPs, and its waste was hazardous and toxic. Instead of acknowledging its role at the Site, DPL has consistently obfuscated and downplayed that role. It is time for DPL to take the same steps that PRPs with vastly lesser responsibility for the Site, i.e., Respondents, have taken for years. DPL can participate in the way most suitable to it, whether as an active work party or as a funding party, joining with Respondents in either case.

Not issuing a unilateral order will suggest to the public that the United States tolerates DPL's and other parties' recalcitrance, that stonewalling, inaction and sharp practices will be rewarded, and that respondents will effectively be punished for volunteering to do work.

5. Request for In-Person Meeting

Respondents request an in-person meeting to discuss the issuance by EPA Region 5 of a unilateral order to DPL to perform an RI/FS at the Site, or otherwise to discuss DPL's very substantial liability and its record of recalcitrance. I will contact Mr. Kyte to offer possible dates.

Sincerely,
Langsam Stevens Silver & Hollaender LLP



Larry Silver

cc: Ms. Leslie Patterson
James Morris, Esq.

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