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January 31, 2017

Joan Tanaka, Chief
Remedial Response Branch 1
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: South Dayton Dump and Landfill Superfund Site, Moraine, Ohio - Dayton Power & Light Company, Request to Cooperate and Assist

Dear Ms. Tanaka:

On behalf of my client, The Dayton Power and Light Company ("DP&L"), I am writing in response to your November 3, 2016 letter to me regarding the South Dayton Dump and Landfill Site (the "Site"). As an initial matter, your letter is dated November 3, 2016 but was not received until November 16, 2016. As suggested in your letter, I also contacted James Morris, Associate Regional Counsel, on December 1, 2016 to discuss your letter. While Mr. Morris answered most of my questions regarding your letter, I believe that it is important that I respond in writing to you with a response to your letter.

In your letter you indicate that "[t]o date, DP&L has not indicated its willingness to perform or finance necessary response actions at the Site." This is false. Beginning in May 2015, at the behest of Tom Nash at U.S. EPA, DP&L and others were contacted by U.S. EPA "convening neutral" David Batson to explore a mediation process to explore the allocation of Site-related costs (see May 27, 2015 email attached as Exhibit A).

On August 11, 2015, DP&L and others met with the PRP Group, including Larry Silver, and Mr. Batson to discuss possible scenarios to fund Site-related costs, including the vapor intrusion study for the Site and the second Remedial Investigation/Feasibility Study (RI/FS) for the Site. All parties present, including DP&L, agreed to pursue settlement discussions and to seek a stay of pending litigation that had been initiated by the PRP Group in federal court against DP&L and others related to the 2013 ASAOC for vapor intrusion. The federal district court granted the stay, and the litigation was stayed until February 7, 2016, thereby providing the parties sufficient time to try to resolve the issue of allocation of Site-related costs.

At the day-long August 11, 2015 meeting in Dayton, Ohio, the PRP Group indicated that the estimated costs associated with the 2013 vapor intrusion

ASAOC and the second RI/FS, which the PRP Group at that time was negotiating with U.S. EPA, would cost approximately $X million, which was a reasonable number to achieve resolution and allocation. (The actual number is not being disclosed because of the confidential nature of the ADR discussions, but it was a number that appeared "doable.")

The PRP Group, Mr. Batson, and "other cooperating parties" (including DP&L) subsequently met on September 16, 2015 in our offices in Columbus, Ohio to discuss further a process to mediate the dispute over Site-related costs, which at that time were still estimated to be $X million. Information was exchanged, and dialogue continued among these parties related to resolving the pending litigation and dispute. DP&L led the efforts to schedule and organize this September 16, 2015 meeting in our offices.

Another meeting was held on November 12, 2015 at our offices in Columbus, Ohio to discuss further refinement of the process. The meeting was attended by the PRP Group, Mr. Batson, and "other cooperating parties" (including DP&L). At this meeting, the "other cooperating parties" decided that an experienced mediator should be retained among the parties to further the discussions to resolve this dispute. Needless to say, DP&L's commitment and active participation in this process were clear indications that DP&L was willing to contribute financially to the Site-related response costs being undertaken by the PRP Group. The amount of financial contribution from DP&L, the PRP Group and other defendants was the only variable that remained unresolved.

After the Batson-led convening neutral meetings, the parties embarked on a process to mediate the allocation of this $X million cost. This process included several conference calls, the identification and rejection of potential mediators and the negotiation of a "mediation agreement" among the parties. Again, DP&L led the efforts on behalf of the defendants to initiate the mediation of the dispute. The culmination of this process was the selection of a mediator and the execution of a mediation agreement among the parties, including sharing the costs for the mediation.

The mediation occurred on February 1, 2016 and February 2, 2016 at our offices in Columbus, Ohio. This was the third all-day meeting at our offices, ostensibly arranged and organized by DP&L's counsel, at DP&L's expense. Many of the party representatives flew into Columbus to attend this two-day mediation session. Prior to the mediation, the mediator interviewed the respective parties individually to discuss each party's position and anticipated outcome of the mediation. On January 27, 2016, just prior to the mediation session, the PRP Group provided the parties with cost estimates for Site-related work. Essentially, the estimated costs were unchanged and still in the $X million range. DP&L was ready, willing and able to enter into good faith negotiations to allocate these costs among the mediating parties and to contribute financially to resolve this issue.

On the morning of the start of the mediation, we were informed that the PRP Group would need almost triple $X million to resolve the case, which materially changed the paradigm for settlement without prior notice or justification. Moreover, the PRP Group refused to provide a proposed allocation or percentage of their share of the triple $X million. Therefore, despite DP&L's

best efforts, a comprehensive settlement could not be achieved at that time. As a result, the parties returned to litigation mode since the court-ordered stay expired on February 7, 2016.

DP&L's ability to contribute financially to the response costs (i.e., reach settlement with the PRP Group) has been adversely affected by the lack of information regarding the PRP Group's use of the Site. Notwithstanding DP&L's requests for such information through the litigation process, the PRP Group has not been forthcoming with this information. While the parties have gone back and forth for the past several months in attempts to resolve this discovery dispute, DP&L may have to bring in the court to resolve the discovery dispute. To the extent U.S. EPA has information and documents on the PRP Group's contributions and use of the Site (e.g., amount and type of waste the PRP Group disposed of at the Site), please provide me with such information, all of which should be subject to disclosure as a public record pursuant to the Freedom of Information Act (FOIA).

Turning back to your November 3, 2016 letter, it appears that U.S. EPA is encouraging and requesting DP&L to contribute financially to the response activities at the Site. This is the very activity that DP&L tried to accomplish in February 2016 during the mediation session. For U.S. EPA to maintain now that DP&L has been unwilling to contribute financially to Site-related response costs is absolutely false and unsupported by the lengthy and costly efforts contributed by DP&L to do just that. If the purpose of your November 3, 2016 letter is to encourage DP&L's financial contribution to the Site, U.S. EPA's disclosure of information regarding the PRP Group's contribution and use of the Site would go a long way in assisting DP&L to make that financial contribution at the appropriate level.

Finally, in your November 3, 2016 letter, you indicate that DP&L used the Site to dispose of "hazardous substances" generated by DP&L. As DP&L has indicated in numerous responses to U.S. EPA, DP&L has no knowledge or documentation suggesting that it disposed of "hazardous substances" at the Site. DP&L has admitted that it did dispose of "street sweepings, dirt, construction debris and fly ash" at the Site, none of which constitutes a "hazardous substance" under CERCLA. If U.S. EPA has additional information that otherwise suggests that DP&L disposed of "hazardous substances" at the Site, please provide that information to me as soon as possible.

In closing, DP&L continues to be amendable to contributing financially to the response costs of the Site in exchange for resolution and dismissal of the pending litigation initiated by the PRP Group. To date, DP&L has not been successful in these efforts because of disagreements with the PRP Group, most notably the PRP Group's position at the February 2016 mediation session for the resolution of Site-related response costs and the PRP Group's refusal to provide the necessary information on their use and contribution to the Site.

Nonetheless, as DP&L has stated to the PRG Group, it remains ready, willing and able to revisit mediation upon development of a more fulsome discovery record, the absence of which hindered the parties' ability to reach a comprehensive settlement in February 2016.

If you have any questions regarding the foregoing, please feel free to contact me.

Sincerely,

Frank L. Merrill

FLM/sb
cc: James Morris
Leslie Patterson
Steve Renninger
Joseph Strines (via email)
David Heger (via email)