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Confidential Settlement Communication: Subject to Rule 408 or its State Equivalent

January 29, 2013

Via Email dguevara@taftlaw.com

Mr. David Guevara, Esq.
One Indiana Square, Suite 3500
Indianapolis, IN 46204-2023

Policyholder: City of Kokomo ("Kokomo")
Site: 1130 S. Dixon Road, Kokomo, Indiana
Re: United States Environmental Protection Agency's ("USEPA") April 5, 2012 General Notice of Potential Liability

Dear Mr. Guevara:

Thank you for your e-mail of January 15, 2013, which included an Itemized Cost Summary which reflects the USEPA's costs through September 30, 2012, and a proposed budget for environmental investigative costs from Kokomo's environmental consultant (SESCO) for the preliminary investigation of the contamination at or near the above-captioned Site.

As an initial matter, it appears that SESCO's proposed budget for an "initial investigation into buried drums," is limited to *on-Site* contamination and does not include any investigation into whether there is actually any third party *property damage* (defined in the policies as "physical damage to tangible property *of others*"), as required under the insuring agreements of the policies under which we are defending the captioned matter.

Our offer to participate in the defense of this matter was based on the limited information from the August 19, 2011 Site Assessment, which stated that "hazardous substances, such as lead and arsenic, are present at the Site in surface soil, subsurface soil, and *leaking from drums into a small creek, which drains into Wildcat Creek* approximately 500 feet north of the Site" (*emphasis added*) as well as the February 17, 2012 Otie Site Assessment Report, which included a map potentially placing the drums at issue slightly outside Kokomo's property lines. However, SESCO's proposal seems to be limited to an investigation and clean-up of *on-Site* contamination only.

As to Task 1, Site Survey, SESCO indicates that "[a] complete Site boundary survey is needed to establish the legal boundaries of the Site. This is an important task…to ensure that investigation and/or removal actions are not encroaching on off-Site properties. If investigation activities are expected to encroach onto neighboring properties, access to those neighboring properties will be needed." This Task description alone suggests that off-Site investigation or remediation may never be required. We also question the necessity of a 15% markup on subcontractor invoices. Notwithstanding the foregoing, and reserving our right to raise these issues in the future, we are willing to include this Task item (without the markup) in the Investigative Costs Agreement ("ICA") that is under discussion.

As to Task 2, Historic Site Research, SESCO indicates that "[p]rior to conducting any additional investigation or sampling activities *on-Site*, it is important to conduct a complete and thorough historical Site research." (emphasis added). While SESCO's own description of this Task again suggests that this proposal only includes investigation of *on-Site* contamination, we are willing to include this Task item in the ICA that is under discussion. However, we believe the Phase I by a subcontractor (which again includes a 15% markup) appears duplicative of the "additional site research" by SESCO; please advise in detail how the work between the subcontractor and SESCO differs.

As to Task 3, Brush Removal and Disposal, SESCO advises that "[r]emoval of brush and other yard waste along the east side *of the Site* is necessary to expose the drums and debris…It is estimated that approximately one (1) acre of land surface *on the Site* contains brush that will require removal prior to the removal of the two drums…" (*emphasis added*). The proposed costs for brush removal appear to be in connection with *on-Site* investigation only, and the removal of yard waste is limited to *on-Site* waste and is further remedial in nature. Travelers will not reimburse clean-up and other remedial costs *at this time*, but will consider paying such clean-up costs as indemnity if 1) it is determined that *off-site* contamination exists, 2) the removal of the brush and debris is necessary to mitigate such *off-site* contamination, and 3) it is determined that Travelers has an indemnity obligation. We also question why an entire acre of land needs to have all of the brush removed to complete the removal of the two drums identified by the USEPA. In that regard, please advise whether the other 3.5 acres of the Site are already free of vegetation. Even assuming one acre of land did require brush removal, it is unclear why SESCO would do this work when a local subcontractor who is in the business of brush removal could likely do the work for less than half the proposed costs.

As to Task 4, Geophysical Survey & Reporting, SESCO indicates that "a geophysical survey will be conducted *on the entire 4.5 acre Site*…" for the purpose of "identify[ing] buried drums, ferrous and non-ferrous metals, and other anomalies…" (emphasis added). It is our understanding that this survey is again limited to *on-Site* contamination only. Until Kokomo shows that this survey assists in the investigation of *off-Site* contamination, Travelers will not contribute to the cost of this Task.

As to Task 5, Test Pits, SESCO advises that "a number of test pits will be installed to determine the nature and extent of buried drums and debris" based on the results of the *on-Site* Geophysical Survey. Further, Task 1 also indicates that these test pits will be installed *on-Site* to identify the contents of the former landfill on the Site. Again, because this does not appear to assist in the

investigation of *off-Site* contamination, Travelers will not contribute to the costs of this Task at this time.

As to Task 6, Drum Disposal, SESCO proposes to "remove the two (2) drums that were identified by IDEM…" We view this removal as a remedial cost. Travelers will not reimburse these costs at this time, but will consider paying such removal costs as indemnity if 1) it is determined that *off-Site* contamination exists, 2) the removal of the drums is necessary to clean-up or mitigate *off-Site* contamination, and 3) it is determined that Travelers has an indemnity obligation.

As to Task 7, Surface Soil Sampling & Summary Report, SESCO proposes "to sample surface soil to assist in the determination of contamination in soil that currently poses direct exposure risk." Again, because the soil sampling is limited to *on-Site* soil and not damage to property of others, Travelers will not contribute to the costs of this Task at this time.

And finally, as to Task 8, SESCO advises that "[p]rior to conducting investigative work on the Site, a number of USEPA-required plans are necessary." Travelers is willing to consider these costs once we have a better idea of what the Work Plan includes or what other requirements the USEPA is demanding that Kokomo fulfill. In that regard, if the USEPA is not specifically requiring any *off-Site* investigation and is limiting Kokomo's investigation and clean-up of its own property only, Travelers would not contribute to these costs.

Please note that our in-house engineers also noted additional critiques and concerns of certain of SESCO's budget items, however, given our current position on most of the Tasks, I have not included them here. We reserve the right to raise those concerns at a future date.

As indicated above, we are willing to reconsider any of the currently denied Tasks at any point that their connection to "property damage" as defined in the policies (i.e., "physical damage to tangible property of others") is established. Similarly, if you think our understanding of SESCO's proposal is incomplete or incorrect, please let us know and we would be happy to discuss or review any information that you believe is helpful in that regard.

Additionally, please note that we still need the back-up documentation to the USEPA's costs for which your client is seeking reimbursement to determine whether any such costs are the result of third party property damage as required by the insuring agreement of the policies under which Travelers is defending the captioned matter.

I look forward to hearing from you.

Very truly yours,

Sybille C. Macke

cc: Amanda Macsata, Travelers SLCU