Langsam Stevens Silver & Hollaender LLP
ENVIRONMENTAL, REAL ESTATE, BUSINESS AND INSURANCE LAW

May 10, 2013

Via email and regular mail
Thomas Nash, ORC (C-14J)
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Re: South Dayton Dump and Landfill Site, Moraine, Ohio
Cost Bill dated December 11, 2012

Dear Mr. Nash:

I am writing on behalf of Hobart Corporation, NCR Corporation and Kelsey-Hayes Company (collectively Respondents) in response to your letter dated May 2, 2013 regarding EPA's request for payment dated December 11, 2012 of $1,057,336.66 (the Bill) purportedly under the Administrative Settlement Agreement and Order on Consent for RI/FS, Docket Number V-W '06-C-852 (ASAOC). The Bill purports to include EPA costs incurred between August 15, 2011 and August 14, 2012.

EPA's interpretation of the ASAOC, as outlined in your May 2 letter, is incorrect in several respects material to the Respondents' obligations to pay and escrow costs requested in the Bill. I will respond to the issues in the order you address them in your letter.

With regard to your letter's reference to Paragraph 81 of the ASAOC, that section provides: "Respondents may contest payment of any Future Response Costs under Paragraph 79 if they determine that the U.S. EPA has made an accounting error or if they believe U.S. EPA incurred excess costs as a direct result of an U.S. EPA action that was inconsistent with the NCP." With respect to the Bill, the Respondents are not merely contesting whether billed costs include a simple "accounting error" or whether "EPA incurred excess costs as a direct result of an U.S. EPA action that was inconsistent with the NCP." Respondents are contesting whether large amounts of costs are billable <u>at all</u> by EPA under the ASAOC.

To illustrate the point, our review of the EPA documentation provided to us so far indicates that large amounts of billed costs were incurred by EPA and its contractors addressing "active landfill gas collection". The Dispute Resolution Agreement signed by Richard Karl for EPA on December 15, 2010, states:

"The Parties … agree that EPA withdraws its OU 1 FS Report comments requiring Respondents to evaluate alternatives for active landfill gas collection systems as part of the Presumptive

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Remedy for OU 1." (p. 4 ¶B.6), and

"The Parties agree that the evaluation of alternatives for active landfill gas collection systems will be deferred to a decision point based on the monitoring conducted pursuant to the operation and maintenance plan for OU1. If required based on monitoring results, active landfill gas collection systems would be evaluated via the Explanation of Significant Difference (ESD) process for OU 1 or, if timing is appropriate, during preparation of the OU2 FS Report." (p. 4 ¶B.7.1).

Thus, EPA expressly agreed in the Dispute Resolution Agreement in December 2010 that "active landfill gas collection" work would not be required by Respondents under the ASAOC, yet EPA billed large amounts of costs related to such work during the 8/15/11 to 8/14/12 billing period. These costs and related indirect costs are outside the scope of what EPA may bill under the ASAOC and should not have been included in the Bill. EPA should remove these costs and reissue the Bill.

With regard to your letter's reference to the definition of "Future Response Costs" in the ASAOC, EPA's very expansive interpretation of the language of the definition is inconsistent with the notion of "oversight" in these agreements and contradicts later language in the ASAOC. You will recall that by letter dated September 12, 2011 (Cibulskis Letter), EPA states that it made a "decision to modify" the RI/FS purportedly under Paragraph 42 of the ASAOC in order to correct what EPA perceived as "deficiencies" in the submission. As noted in the Cibulskis Letter, Paragraph 42 allows EPA to "modify the submission to cure deficiencies". Letter from Karen Cibulskis to Robin Lunn, dated 9/12/11.

From our review of the draft RI/FS issued by EPA's contractor CH2MHill in July 2012, it is quite clear that EPA went far beyond correcting "deficiencies" in the submission. For example, while the Respondents' contractor was working on the RI/FS prior to the Cibulskis Letter, EPA requested that it insert an EPA-drafted 3-page "Streamlined Risk Assessment" (SRA) into the document in various places. The Respondents' contractor fully complied. Yet, after EPA took over the RI/FS following the Cibulskis Letter, EPA's contractor created a 500-page SRA at a cost of hundreds of thousands of dollars. EPA had never requested that the Respondents prepare such a massive document. The cost of the 500-page SRA, along with associated indirect costs, are included in the Bill.

The SRA- related costs are not properly in the Bill. Even where EPA truly "modifies" a submission to correct "deficiencies" under paragraph 42 of the ASAOC, including, as here, "complet[ing] the RI/FS (or any portion of the RI/FS)", EPA's only recourse is to "seek reimbursement from Respondents for its costs." See ASAOC ¶43.

EPA's Model RI/FS language makes it clear that EPA's power to "seek reimbursement" is quite different from the Respondent's obligation to "pay costs" under the ASAOC. For example, in the "Work Takeover" section of the 2004 Model RI/FS, EPA includes the following model language: "Costs incurred by EPA in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XVIII (Payment of Response Costs)." However, this language was <u>omitted</u> in the Respondents'

ASAOC from both the "Work Takeover" paragraph (¶85) and from Paragraphs 42 and 43 (regarding correcting "deficiencies").

EPA had available to it Model language that obligates Respondents to pay EPA's costs as "Future Response Costs" in situations where EPA completes an RI/FS. EPA did not include that language in the ASAOC.

EPA should re-issue the Bill after excluding EPA's and its contractors' costs of completing the RI/FS (including at minimum the "active landfill gas collection" and the SRA work) and related indirect costs, consistent with the ASAOC language.

Please also note that EPA has not yet responded to the request in my March 19, 2013 letter to you for documents previously requested but omitted from Leslie Patterson's transmittal of February 19, 2013. These include the following monthly CH2MHill documents: voucher, technical status reports and work assignment detail task level reports as follows: (i) Voucher B91 dated 7/22/11; (ii) Voucher B93 dated 8/23/11; (iii) Voucher B97 dated 11/3/11; and (iv) Voucher B113Z dated 7/10/12. We also note that Statement of Work Revision No. 3 dated 9/27/11 for CH2M Hill has redactions at pages 1 and 16. Please explain the reason for the redactions or provide the text.

In addition, the following categories of documents were requested by my March 19 letter but not provided: (a) a full set of EPA employee time sheets and travel vouchers, or, as an alternative to the time sheets, a Verification Report from EPA's accounting system which shows the activity codes that were charged by the employees; (b) Delivery Order 19 for Primus Solutions; (c) Delivery Order 15 for E2 Inc; and (d) Progress Reports for Ohio EPA from 8/2011 through 7/2012.

We would like to resolve this dispute prior to your June 3 deadline if that is possible. However, in light of the outstanding document requests we have presented to EPA, that deadline appears to be unrealistic. Accordingly, we respectfully suggest that EPA allow 30 days following receipt of the requested documents for Respondents to evaluate the materials and further respond to EPA's request for payment.

Sincerely,
LANGSAM STEVENS SILVER & HOLLAENDER LLP

Larry Silver

Cc: Richard D. Hackley, EPA Region 5
Leslie Patterson, EPA Region 5 (SR-6J)