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

August 20, 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 (Site)

Dear Mr. Nash:

I am writing on behalf of Hobart Corporation, NCR Corporation and Kelsey-Hayes Company (collectively Respondents) regarding certain response activities EPA has requested that the Respondents perform purportedly under the Administrative Settlement Agreement and Order on Consent for RI/FS, Docket Number V-W '06-C-852 (ASAOC for RI/FS or ASAOC).

EPA has requested that the Respondents install, develop and sample permanent groundwater wells around the perimeter of the Site. As outlined below, the performance of these activities in conjunction with investigation of the presumptive remedy area is contrary to the agreed and expressly-stated purpose of the ASAOC, as confirmed in a 2010 Dispute Resolution Agreement between the Respondents and Region 5 (signed by Richard C. Karl, Director Superfund Division, December 15, 2010) and as acknowledged repeatedly by Region 5 since its "change of direction" in investigation strategy for the Site beginning in June 2012.

Because these activities would be outside the scope of the ASAOC if performed by Respondents in conjunction with investigation of the presumptive remedy area, any Record of Decision based upon the resulting RI/FS that relies upon these activities will be potentially subject to challenge by other PRPs or the public as inconsistent with the National Contingency Plan. While Respondents desire to fully cooperate with EPA in the performance of these activities, it is requisite that Respondents and EPA enter into an appropriate and defensible agreement which includes statements of work and purpose that clearly identify their performance.

Accordingly, Respondents hereby request that Region 5 and Respondents forthwith enter into a new ASAOC for RI/FS, the purpose and scope of which addresses the activities requested as well as other work included in Region 5's "change of direction". Additionally, Respondents request that the new ASAOC for RI/FS clarify the scope of the imprecise terms "Operable Unit One" and "Operable Unit Two", terminology that Region 5 began using at the Site in 2008, but which does not appear anywhere in the current ASAOC or attached Statement of Work.

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Respondents are committed to expediting entry of a new ASAOC.

The Parties' Agreement Regarding the ASAOC Work

Respondents entered into the ASAOC in 2006 based on an agreement with EPA that the initial investigation and remediation of the Site would proceed in accordance with EPA's "Presumptive Remedy" guidance and that the presumptive remedy for this Site would be limited to capping to address the potential risk of direct contact with the landfill contents in the central portion of the Site. This agreement was memorialized in the Statement of Work attached as Appendix A to the ASAOC: "Consistent with the guidance, the Respondents and U.S. EPA agree that the presumptive remedy to address the direct contact risks in this area shall be containment (i.e., a landfill cap)." *ASAOC, Appendix A, Purpose Section.* The ASAOC makes it clear that the Statement of Work defines the purpose and scope of the RI/FS and is enforceable. ("The Statement of Work is incorporated into this Settlement Agreement and is an enforceable part of this Settlement Agreement. ..." *ASAOC, ¶11.v*; "The Respondents shall conduct the RI/FS in accordance with this Settlement Agreement [and] the SOW." *ASAOC ¶ 35.a; see also ASAOC ¶ 9*).

The Statement of Work also provides that, following the completion of the Presumptive Remedy investigation (but not before), Respondents were also to perform a "conventional" RI/FS "for all Site areas and/or media not addressed by the Presumptive Remedy approach", including "Groundwater within and outside the Presumptive Remedy Area". In accordance with the Statement of Work and with the approval of EPA, the Respondents proceeded in 2006 to prepare a RI/FS for the Presumptive Remedy.

Subsequent to the issuance of the ASAOC, but nowhere included in the document or the Statement of Work appendix, EPA began to refer to the Presumptive Remedy RI/FS work as Operable Unit One (OU 1) and the "conventional" RI/FS work as Operable Unit Two (OU 2). *Letter dated January 9, 2008 from Karen Cibulskis, Remedial Project Manager, to Steve Quigley, Conestoga-Rovers & Associates.*

The Dispute Resolution Agreement

Although the Presumptive Remedy was expressly limited in the ASAOC to the landfill cap work, after several years of work by Respondents on the RI/FS, Region 5, in October 2010 informed the Respondents of EPA's unilateral decision to expand the application of the Presumptive Remedy to encompass groundwater work. *Letter of October 5, 2010 from Karen Cibulskis, Remedial Project Manager, to Steve Quigley, Conestoga-Rovers & Associates (Cibulskis Letter)*. Subsequently, the Respondents invoked the "Dispute Resolution" process of the ASAOC, challenging the inclusion of groundwater work in the RI/FS then underway. *Letter of October 15, 2010 from Robin Lunn to Thomas C. Nash, Office of Regional Counsel.*

The Respondents and EPA reached a settlement on December 15, 2010, memorialized in a "Dispute Resolution Agreement", in which EPA agreed to withdraw its comments contained in the Cibulskis Letter "which required presentation of an alternative for OU 1 to address containment of shallow groundwater as part of the Presumptive Remedy for OU 1." *Dispute*

Resolution Agreement ¶6 (at p.4). The Dispute Resolution Agreement, by its terms and the terms of the ASAOC, was "incorporated into and became an enforceable part of the ASAOC." *DRA ¶1 (at p.1), citing ASAOC ¶ 64.*

EPA's "Change of Direction" in June 2012

Beginning in or about June 2012, Region 5 changed its thinking on investigation strategy at the Site and decided it would abandon the Presumptive Remedy approach in favor of a more traditional approach that includes groundwater monitoring (including perimeter deep wells) as part of the investigation of appropriate potential soil and groundwater remedial alternatives. Remedial Project Manager Leslie Patterson informed Respondents about the "change of direction" during summer 2012. Respondents met with EPA personnel (including Joan Tanaka, Kevin Adler, Leslie Patterson, Larry Kyte and you) at Region 5 on September 20, 2012 to further discuss the change of direction. At the meeting, Ms. Tanaka expressed her desire that Respondents perform the groundwater monitoring under the current ASAOC and SOW. At the meeting, you and I discussed the inconsistencies between the Presumptive Remedy approach incorporated in to the ASAOC and EPA's change of direction.

A New ASAOC for RI/FS is needed

It is evident from the series of events described above that the current ASAOC, which incorporates a Presumptive Remedy approach to the Site, is not the right vehicle for the specific work contemplated within the new approach to the Site as requested by EPA. The Respondents request that EPA and Respondents enter into a new ASAOC for RI/FS that (i) formally identifies and incorporates the new approach at the Site and (ii) expressly identifies and clearly delineates work encompassed by the two operable units; as noted above, neither the work nor these titles are found or referenced in the current ASAOC. So as not to delay the requested field work, Respondents are committed to expedite entry of the new ASAOC.

Respondents are concerned that proceeding to perform the perimeter groundwater activities at the present time under the current ASAOC could leave any Record of Decision based upon the resulting RI/FS subject to challenge by other PRPs or the public as inconsistent with the National Contingency Plan. While Respondents certainly do not concede that is the case, we believe that a new ASAOC will readily remedy this potential problem and, indeed, prevent it from ever arising. As you are aware, the presumption of consistency with the NCP lies where a "response action [is] carried out *in compliance with the terms of an order* issued by EPA pursuant to section 106 of CERCLA. ..." 40 CFR 300.700(c)(3)(ii). (Emphasis supplied). Respondents will not and EPA should not take this risk.

Other PRPs

Finally, Respondents, as the only participating PRPs, respectfully suggest that it is time to address in a serious fashion the inclusion of other PRPs in this work effort. As you are aware, evidence developed by EPA itself and in the private cost recovery action shows that the Dayton Power & Light Company is far and away the largest contributor of waste to the Site, dwarfing involvement of the Respondents. Yet Dayton Power & Light has evaded any semblance of

responsibility, a result that is completely inconsistent with public policy. With the Valley Asphalt unilateral order, Region 5 demonstrated that it has the power, authority and will to compel recalcitrant parties to participate in response actions. The new ASAOC for RI/FS should provide an eminent opportunity to compel Dayton Power & Light and other liable "arranger" PRPs to perform and pay their fair shares of the work.

I look forward to your response.

Best regards,
LANGSAM STEVENS SILVER & HOLLAENDER LLP

Larry Silver

cc: Leslie Patterson, EPA Region 5 (SR-6J)