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August 3, 2020

Via Electronic Mail

Gabrielle Gurian
Assistant Attorney General
Ecology Division
Gabrielle.gurian@atg.wa.gov

RE: Taylor Way & Alexander Avenue Site ("TWAAFA")

Dear Ms. Gurian:

We are writing on behalf of Burlington Environmental, LLC, an indirect wholly-owned subsidiary of CleanEarth Environmental Solutions, Inc. ("Burlington/CES" or "company"), the owner and operator of the Tacoma Resource Conservation and Recovery state dangerous waste facility located at 1701 Alexander Avenue, Tacoma Washington, operating under WAD 020257945. The Washington Department of Ecology ("Ecology") has named Burlington/CES a potentially liable person ("PLP") by Ecology at the TWAAFA site which includes the abandoned CleanCare site. The company and three other named PLPs, Occidental Chemical, General Metals, and the Port of Tacoma have been directed by Ecology to sign onto an Agreed Order (AO) requiring these named parties to investigate and conduct remedial activities on properties including the CleanCare dangerous waste management facility, abandoned in 1999. Ecology has threatened any named PLP who refuses to sign onto the order with issuance of an enforcement order. Although Burlington/CES has given serious consideration to the AO, particularly in light of the threat of enforcement, it cannot accept the obligations attendant to signing onto the AO for the reasons set forth herein.

Nearly twenty years after abandonment, the CleanCare site has deteriorated significantly in its abandoned state despite Ecology's oversight. Ecology is now ordering the company and the other named PLPs to investigate and conduct remedial activities at the CleanCare property¹ and

¹ CleanCare operated a 4.25-acre treatment, storage, disposal and recycling facility in Tacoma, Washington from the 1960s to the 1990s with four tank farms, two hazardous waste container storage areas, and a waste processing area. During its history of operations, the CleanCare (operating under several names and owners) facility was the site of numerous releases to the environment, including a large oily waste spill into on-site storm drains. Site soils and groundwater are contaminated with arsenic, PAHs, benzene, toluene and other semi-volatile and volatile organic compounds and metals. In approximately 1999, the CleanCare facility was abandoned and became the subject of an

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adjacent contiguous properties owned and operated by the company and the Port, in the guise of a larger “landfill” site involving historical industrial fill and disposal that occurred nearly six-decades ago. Rather than assume responsibility for a site long ignored by the state, despite obvious and gross non-compliance, Ecology created a Model Toxics Control Act (MTCA) site. This MTCA site included several properties contiguous to the CleanCare properties, in an effort to transfer liability for site investigation and cleanup to owners and operators of contiguous land, whose properties have no nexus to the CleanCare operations other than historical Oline landfill activity.

Burlington/CES has previously advised Ecology that it does not intend to sign onto the Agreed Order although it has cooperated fully to date with Ecology in preparation of work plans for the TWAAFA. The company also intends to continue to address environmental concerns on company-owned parcels that are part of the TWAAFA site to the extent necessary to investigate landfill conditions on its properties.²

As Ecology is fully aware, Burlington/CES has and continues to conduct extensive corrective actions, soil and groundwater sampling and monitoring at its facility-owned properties, which comprise a substantial portion of the TWAAFA site. These are current obligations under the company’s existing state dangerous waste operating permit for the Tacoma facility and MTCA order requirements for corrective action incorporated into the permit to meet federal RCRA requirements. The facility permit and MTCA order provide sufficient Ecology enforcement authority for any environmental concerns related to the company-owned properties within the TWAAFA-defined MTCA site.³

extensive removal action by U.S. Environmental Protection Agency Region 10. Following the removal action, EPA returned responsibility for the site to Ecology in 2000. Rather than assume responsibility for a site long ignored by the state, despite obvious and gross non-compliance, Ecology decided to create a Model Toxics Control Act (MTCA) site. This MTCA site included significant properties contiguous to the CleanCare properties, in an effort to transfer liability for site investigation and cleanup to owners and operators of contiguous land, with no other nexus to the CleanCare operations other than the former Oline landfill activity. The four PLPs named at the TWAAFA site include the adjacent property owners, Port of Tacoma and Burlington/CES, and former generators of wastes allegedly disposed of by Oline throughout the TWAAFA site, Occidental Chemical and General Metals of Tacoma

² Burlington/CES is currently subject to both the requirements of its RCRA/Dangerous Waste Permit No. WAD 020257945 in effect until March 22, 2022, and a MTCA Order under which Ecology dictates the requirements for corrective actions at the company’s Tacoma Facility under WAC 173-340-360. The facility cleanup action plan is issued by Ecology and selects facility-specific corrective measures and specific cleanup standards (cleanup levels, points of compliance and other corrective measures). The definition of “Site” in the facility permit and the incorporated Order, means the “TWAAFA” site. The company believes that these enforcement vehicles are more than adequate basis for Ecology to require Burlington/CES to address contamination at its facility as well as any known migration of contaminants beyond the boundaries of its facility. Moreover, the company has been engaged in extensive corrective action at this facility since 1988 and has provided considerable environmental data from its investigations, remedial measures, and several decades of soil and groundwater monitoring to characterize conditions at the company’s property as well as assist Ecology in defining conditions within a broader area.

³ Burlington/CES facility permitted operations occur on approximately 3.5 acres of the company’s 17-acre site in Tacoma. However, all 17 acres are subject to corrective action. Based upon periodic reviews required under WAC 173-340-420(2), Ecology may require further corrective actions to comply with Chapter 173-303 WAC. Additional approved corrective actions plans are to be incorporated into the facility Permit in accordance with permit modification procedures.

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As the Port of Tacoma has stated in its letter to you dated July 31, 2020, “MTCA requires that PLPs for the CleanCare property are jointly and severally liable for the remediation of hazardous substances released at that property” as well as any releases from that property to adjacent properties within the TWAAFA site. As an adjacent current property owner subject to a dangerous waste facility permit and corrective action order, Burlington/CES is already responsible for contamination on and sourced from its facility property. However, because the company owns property within the TWAAFA site, the company is *not a priori* a PLP for the CleanCare parcels under RCW 70.105D.040(1). The MTCA states who is strictly liable for the release or threatened release of hazardous substances at a contaminated site. Among those parties strictly liable under MTCA (i) owners and operators (ii) persons who generated hazardous wastes disposed of or treated at a facility, and (iii) persons who arranged for the treatment, storage and/or disposal of hazardous substances at a facility. Burlington/CES is not a current or former owner or operator of the CleanCare property, or a generator, transporter, or arranger for disposal or treatment of hazardous waste at the CleanCare (or its predecessor) TSD operations conducted on its property. It is more likely that the company has addressed groundwater contamination migrating onto the company’s property from the CleanCare facility and its predecessor operations given known releases and poor operating practices at that facility.

Thus, it would be improper for Ecology to hold Burlington/CES jointly and severally liable as a PLP for cleanup of the CleanCare Property solely by reason of its adjacent property ownership. The Burlington/CES permit corrective action requirements provide Ecology sufficient enforcement authority to require cleanup on CleanCare properties to the extent any contamination is sourced from or caused by Burlington/CES facility operations on adjacent property. However, credible evidence of such source or cause has not been determined.

Burlington/CES has expended millions of dollars in the past 32 years performing soil and groundwater investigations, regulatory compliance and remedial measures at the Tacoma facility, including removal actions to eliminate large buried pockets of autofluff, wood and lime wastes necessary to construct the current tank farm structures and other areas of the facility. In the mid-1980s, the company conducted a removal action under Ecology supervision that involved excavation and disposal of several tons of oily waste- contaminated soils and subsequent placement of an engineered cap on “Parcel A,” after acquiring this contaminated property from Northwest Processing. Continued monitoring and interim corrective measures on all company facility property, as well as permit-required facility compliance upgrades, are integral to operations at the Burlington/CES facility and will continue for the life of the permit. The company must finance these facility activities in accordance with its operating permit and corrective action order.

It is apparent that Ecology created an expansive definition of “facility” for the TWAAFA site, based in large part upon historical land-filling⁴ activities that occurred during early industrial development in Commencement Bay, and that clearly pre-date and are unrelated to later abandoned TSD operations at the CleanCare facility. This approach fails to take into reasonable consideration extensive environmental work completed on adjacent properties by

⁴ The land-filling operations either conducted or permitted by Don Oline on properties he owned in the 1500 block of Taylor Way included disposal of various industrial waste, used oil, lime solvent sludges, autofluff, wood waste and other industrial waste materials.

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owners and operators under Ecology-issued permits and/or MTCA orders to address contamination associated with the former Oline landfill operations. The majority of the TWAAFA site properties are currently subject to *existing* MTCA orders. Burlington/CES has been actively investigating, monitoring, and cleaning up historical contamination (including former landfill impacts) on its properties within the TWAAFA under former and current permits and MTCA orders. Imposing another layer of MTCA enforcement to address the *entire* TWAAFA site, on Burlington/CES's current regulatory obligations, is neither necessary or, in this case, legally enforceable under the requirements of RCW 70.105D.040(1), .020(26) and WAC 173-340-500.

Because Burlington/CES is not a PLP for the CleanCare site, it is also not responsible for Ecology past costs related to the waste removal actions at the CleanCare site or monitoring and maintaining the CleanCare property as a result of owner/operator abandonment. Rather, Burlington/CES is subject to an independent obligation in its permit to pay all reasonable Ecology costs associated with corrective actions at the Tacoma facility.⁵ In any case, the majority of past costs sought by Ecology under the Draft Agreed Order and proposed Enforcement Order are unrelated to the Oline-related landfill of hazardous wastes on or within the CleanCare property parcels. These past costs are further unrelated to current and past Ecology oversight work associated with properties, adjacent to CleanCare properties, currently owned and operated by Burlington/CES and the Port of Tacoma.

Based upon the foregoing, Burlington/CES disagrees with Ecology's legal position with respect to the company's PLP status at the CleanCare properties, but will continue to cooperate with Ecology in meeting its current obligations under its Tacoma facility permit and corrective action MTCA order. Burlington/CES is already required to provide Ecology all data derived from contaminant-related investigations and monitoring activity on Burlington/CES property as required by its permit and related corrective action order. Burlington/CES is unwilling, however, to sign onto a new clean up order that requires participation in the MTCA investigation and cleanup of CleanCare properties.

Sincerely,
VAN NESS FELDMAN LLP
/s/
Marlys Palumbo

Via email

cc: Averil Rance, CleanEarth Environmental Solutions, Inc.
Greg Fink, CleanEarth Environmental Solutions, Inc.
Laura DellOlio, Corrective Action Manager, Burlington/CES
Frank Boenning, Counsel to HARSCO

⁵ The company's Tacoma Facility permit incorporates an independent Payment Agreement #8R22, between Ecology and the company permittee, dated January 4, 2000 for recovery of Ecology costs reasonably attributable to corrective action activities the facility per WAC 173-340-550 and WAC 173-303-64630. The Permit also requires the company to estimate the cost of all future corrective action work to be performed at the facility and maintain financial assurance to fully fund these costs.