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October 13, 2016

Mike Gribner
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Darrel McCallum
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2714 N. Mayfair Street
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Re: North Spokane Corridor – Environmental Conditions and Design Considerations

Dear Mr. Gribner and Mr. McCallum:

As you know, BNSF Railway Company (BNSF) is the current owner of the commercial industrial property commonly known as 3202 East Wellesley Avenue in Spokane, Washington (the Property). In 2006, the Washington State Department of Ecology (Ecology) conducted an assessment of the Property and ranked the site as a three on its Hazardous Sites List. According to Ecology, "[t]he Hazardous Sites List is a record of contaminated sites throughout the state that are ranked on a scale of one to five. One represents the greatest potential threat to human health and the environment; five represents the least potential threat."[1]

As part of an independent action at the Property, BNSF removed a retired above-ground storage tank and petroleum-impacted soil under and around the tank in 2006. This facility is referred to as the Black Tank Site. In 2012, Ecology entered into an Agreed Order with BNSF and Marathon Oil Company (Marathon) for the completion of a remedial investigation and feasibility study at the Black Tank Site.

BNSF and the Washington Department of Transportation (WSDOT) have long been in discussions about WSDOT plans for the North Spokane Corridor as they relate to rail operations in the area, including the Property. Original design documents for the alignment of the route through Hillyard proposed crossing the Property on the surface. BNSF approved the WSDOT proposed schematic showing an alignment through the Property in July 2011. In June 2015, WSDOT began indicating to BNSF that it planned to change the North Spokane Corridor design to avoid the Property and the neighborhood by a raised freeway. Although BNSF has not seen design documents associated with the alternative WSDOT design, we understand that it will still cross over operating railroad property. WSDOT's concerns about environmental conditions on the

[1]July 2012 Fact Sheet by Ecology (available at https://fortress.wa.gov/ecy/publications/documents/1209031.pdf. Last visited September 29, 2016).

Property affecting design considerations for the North Spokane Corridor are summarized in its webpage titled "Rail Area Contamination" within the larger WSDOT US 395 – North Spokane Corridor website.[2]

Although WSDOT claims that environmental investigations and remediation efforts at the Black Tank Site are an impediment to the original alignment through the Property that is simply not the case. While WSDOT is correct that Ecology formally established the Black Tank Site after the 1999 Final EIS, it fails to acknowledge that the Final EIS identified both soil and groundwater impacts as affected media. *See* Final EIS, Chap. 4, p. 4-203, Table 4-43. Accordingly, the same subsurface conditions recently identified by WSDOT as a basis for altering the original plan for accommodating highway and rail operations on the Property were known and available for consideration as part of WSDOT's planning process for over 17 years.

Furthermore, to the extent any of the various remedial alternatives that Ecology is evaluating for the hydrocarbons at depth at the Black Tank Site are selected as additional cleanup measures, they can be implemented without adversely affecting surface features such as the North Spokane Corridor or BNSF rail operations. Indeed, we believe that in coordinating the remediation and construction efforts the parties could realize cost, equipment and personnel efficiencies while minimizing disruption of the surrounding Hillyard neighborhood.

To summarize, we believe rerouting the North Spokane Corridor based on environmental conditions would be a solution looking for a problem. The issues associated with crossing the Property and addressing soil and groundwater conditions were identified in the 1999 Final EIS and are routinely managed as part of highway projects around the State of Washington and the rest of the country.

We also understand that WSDOT has expressed concern that it could become a potentially liable party for remediation at the site should it proceed with the original alignment. BNSF and Marathon are already cooperating with Ecology on the Remedial Investigation and Feasibility Study (RI/FS) for the Black Tank Site. The RI/FS will be followed by a Corrective Action Plan (CAP) that BNSF and Marathon anticipate implementing through a Consent Decree with Ecology. There is no reason for Ecology to pursue WSDOT for cleanup work that BNSF and Marathon are already performing at the Black Tank Site.

Nonetheless, to the extent WSDOT is still considering the original at-surface alignment through the Property, BNSF and Marathon are willing to either indemnify or seek to provide other agreeable assurances to address WSDOT stated concerns about potential claims from Ecology under the Washington Model Toxics Control Act (MTCA). Further, BNSF and Marathon are amenable to coordinating with Ecology on an Interim Action that would involve excavating impacted soils at depths of up to 15 feet, if needed, in the proposed corridor in preparation for highway construction.

Regarding the operational and engineering criteria for highway projects intersecting with rail operations, BNSF has not been provided detailed design documents for an overpass alignment. Any freeway design that crosses BNSF property requires BNSF engineering approval. From WSDOT's public statements, BNSF understands that it is working on an alternative design and again caution WSDOT that incurring design costs before discussing feasibility and compliance with BNSF engineering requirements may result in significant costs and delays to the WSDOT

[2] *See* http://www.wsdot.wa.gov/Projects/US395/NorthSpokaneCorridor/NscBlackTank.htm

project. The better practice would be to discuss potential alternative designs and any associated BNSF engineering limitations before proceeding with developing and presenting an alternative WSDOT proposal.

Despite BNSF's stated concerns, we understand that WSDOT is proceeding with an alternative design and that it will not share the details of that design with BNSF until it has been completed and presented to the public. In an effort to guide that process, BNSF reiterates some general design limitations that BNSF engineering has previously shared with WSDOT to the extent that the final design is on, over or across BNSF property.

First, BNSF requires vertical clearance at a minimum of 23.5 feet above the top of any rail for any structure proposed to cross above BNSF's right of way. Second, any structure crossing over BNSF tracks should clear-span the right of way with abutments placed off the right of way. Third, the minimum clear horizontal opening should be equivalent to or greater than the clear opening provided by the recently completed Francis Street overpass. Finally, the design must comply with BNSF construction standards. Designs that depart from these fundamental engineering requirements cannot be approved by BNSF. The draft preliminary plan and profile WSDOT has provided to date do not demonstrate compliance with these requirements.

BNSF and Marathon have heard and recognize the community interest in maintaining the original alignment of the North Spokane Corridor through the Hillyard neighborhood. By working together we can jointly resolve WSDOT's environmental concerns relating to the Property.

Sincerely,

Johan Hellman,
Regional Assistant Vice President, State Government Affairs

Courtney Wallace

Courtney Wallace,
Regional Director, Public Affairs

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cc: Jeremy Schmidt, Washington Department of Ecology
Bill Fees, Washington Department of Ecology
Andrew A. Fitz, Washington State Office of the Attorney General

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October 20, 2016

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Ms. Courtney Wallace
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RE: BNSF Railway Black Tank Property Site: Factual Inaccuracies in October 13 Letter to the Washington State Department of Transportation

Dear Mr. Hellman and Ms. Wallace:

The Washington State Department of Ecology (Ecology) received your October 13, 2016, letter addressed to Mike Gribner and Darrel McCallum of the Washington State Department of Transportation (WSDOT) and copied to Ecology. Ecology is providing this letter to correct several factual inaccuracies regarding the BNSF Railway Black Tank Property Site (the Site).

The first paragraph of the letter indicates Ecology conducted a Site Hazard Assessment (SHA) and ranked the Site in 2006. We understand the source of this inaccuracy was Ecology's July 2012 Fact Sheet, which was incorrect. As stated in Section V Part C of Agreed Order number 9188 between Ecology, BNSF Railway Company (BNSF), and Marathon Oil Company (Marathon), the SHA for this Site was completed in February 2001. Contamination data that was used for the SHA to rank the Site came from a WSDOT document titled *Detailed Site Investigation and Evaluation of Construction Impacts-North Spokane Limited Access Corridor Market/Greene Segment*, by EMCON dated January 21, 2000. During the SHA in 2001, the presence of any groundwater contamination at the Site was unknown.

Next, the second paragraph on page 2 of the letter states that groundwater impacts were known in 1999. In doing so, you reference Table 4-43 in the North Spokane Corridor (NSC) Final Environmental Impact Statement (FEIS). However, the scope of groundwater contamination at the Site was *far* from clear in 1999. In fact, the FEIS contains only one reference to the Black Tank Site on page 4-210 in the Koch Material Site description, which does not address groundwater contamination:

> "Northwest of Koch is a single tank and a vacant metal building. Adjacent and to the west of this building, along the railroad tracks, are globules of solidified asphalt, dark stained soils, and railroad tie debris. The entire area along the railroad cut extending to

> the southern boundary of the Koch site appears to have similar characteristics. Discussion with BNR personnel indicated the Railroad had additional concerns at this facility and plans to pursue these with the leasee (sic) as funding becomes available."

Other sites referenced in Table 4-43 (Koch Materials Site, Aluminum Recycling Corporation Site, and Burlington Norther/SF Hillyard Property Sequence 911) similarly do not support the assertion that groundwater impacts were understood in 1999. At the time it was known that some impacts to groundwater were associated with the Aluminum Recycling Corporation Site, but not from petroleum products. At the Koch Materials Site (also known as Sem Materials), it was known that soil had been contaminated by petroleum products, but groundwater contamination was only suspected (*see* page 4-208 of the FEIS). With regard to the Burlington Northern/SF Hillyard Property Sequence 991, this area is too geographically remote from the Site to be of value in assessing Black Tank Site impacts, as is made clear on page 4-215 of the FEIS (and the accompanying figures):

> "Property Sequence No. 991, the BNR property, is loosely defined as beginning at the intersection of Wellesley Avenue and the present day Burlington Northern railroad tracks, east to Ferrall Street, north to Francis Avenue, west to the current BNR/GNRR lines and south to Wellesley Avenue in Section 34, Township 26 North, Range 43 East (W.M.)."

The description defines this Site as being north of Wellesley and south of Francis. Because the Black Tank Site is located south of Wellesley, it is not included in the Site referenced in Table 4-43. Therefore, after thorough review the NSC FEIS, it clearly does not indicate knowledge of groundwater contamination at the Black Tank Site, because such knowledge did not exist.

The earliest evidence in Ecology's record that confirms groundwater contamination at the Site came in 2008, after the installation of the first groundwater monitoring wells. Following the Black Tank demolition in late 2005/early 2006, BNSF independently completed a "subsurface assessment." During this assessment, on February 23, 2007, BNSF placed a boring known as B-12 approximately 120 feet north of the historical Black Tank (near the feature at the Site known as the "sump"). This boring was completed to 148 feet below ground surface and did not encounter groundwater. However, high concentrations of petroleum hydrocarbons we present for the entire 148 feet of this boring.

Subsequently, BNSF constructed groundwater monitoring wells MW-1 through MW-5 from January 17 to 31, 2008. Unlike B-12, these borings did encounter groundwater (for the first time at the Site). At the time of completion in 2008, four of these monitoring wells (MW-1 and MW-3 to 5) contained free petroleum product. Combined with the petroleum contamination at boring B-12, Ecology reached the obvious conclusion that groundwater at the Black Tank Site had been impacted by Site operations. This provided the first confirmation that groundwater at the Black Tank Site had been impacted.

As a result, it is incorrect and misleading to imply that the SHA accounted for groundwater contamination. The SHA was completed nearly seven years before it was known that Site groundwater was impacted. Had the SHA been completed with knowledge of a seven-acre, free-product petroleum plume in Spokane's sole-source aquifer, the ranking unquestionably would have been higher.

In the second paragraph on page 2 of the letter, you indicate the remedial alternatives that Ecology is evaluating for the hydrocarbons at depth can be implemented without adversely affecting surface features. This is not entirely accurate. To begin with, it is critical to note that the remedial investigation and feasibility study (RI/FS) has not yet been completed. In addition, the revised draft RI/FS submitted by ERM on behalf of BNSF and Marathon on September 12, 2016, contains numerous references indicating incompatibility between remedial alternative infrastructure and constructing and operating the NSC. For example, in the Executive Summary on page ES-13, the text clearly highlights the "impracticability of servicing the critical infrastructure" required for steam enhanced light non-aqueous phase liquid (LNAPL) removal if the highway is constructed over the Site. In addition, based on review of the RI/FS figures, the surface infrastructure required for steam-enhanced LNAPL removal that would be co-located with the 2014 NSC alignment is very similar to other remedial alternatives, including bioventing and heated bioventing.

In the fifth paragraph on page 2 of your letter, you indicate that BNSF and Marathon are amenable to completing an interim action that would excavate impacted soils within 15 feet of the ground surface to allow NSC construction to move forward. Ecology has indicated several times that an interim action could happen. However, while the first draft of the RI/FS identified excavation as the preferred alternative for remediating near-surface contaminated soil, the revised RI/FS submitted by the Potentially Liable Persons no longer proposes to excavate the near-surface contaminated soil at the Site. We believe you should be clear to WSDOT that your proposal in the revised RI/FS is *not* to excavate near-surface contaminated soil.

Finally, on page 2 of your letter, BNSF offers to indemnify WSDOT from liability at the Site. It should be noted that private indemnification agreements do not negate Ecology's duty to designate, when necessary, Potentially Liable Persons at contaminated sites.

With respect to discussions between BNSF and WSDOT regarding the ultimate location of the NSC and the railroad, we want to be very clear: Ecology is not involved in the design and construction of highways. Our responsibility is to ensure that the Black Tank Site is characterized and a remedial alternative that is protective of human health and the environment is implemented in compliance with the Model Toxics Control Act. It is unfortunate that Ecology's efforts in that regard have been diverted to correcting the factual misstatements contained in your letter. We request that BNSF consider reissuing the letter to WSDOT in light of the factual corrections. Also, Ecology is aware that you shared your October 13 letter to more entities than those listed as carbon copied. To ensure the record is corrected completely, please provide Ecology with a full list of recipients so we can forward this response accordingly.

Please contact me at 509-329-3484 or via email at Jeremy.Schmidt@ecy.wa.gov if you have any questions regarding this letter.

Sincerely,

Jeremy Schmidt, P.E.
Site Manager
Toxics Cleanup Program
Eastern Regional Office - Spokane

JS:cka

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October 21, 2016

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Re: North Spokane Corridor – Environmental Conditions and Design Considerations

Dear Mr. Hellman:

Thank you for your letter dated October 13, 2016. I appreciate your offer to consider alternatives to address impacts related to the black tank site associated with the North Spokane Corridor project (NSC Project). The Washington State Department of Transportation (WSDOT) has responsibility to protect the public at large from assuming unnecessary or inappropriate risks associated with the construction of the NSC Project, and we need to consider BNSF's offer in light of that responsibility.

In addition, WSDOT has clear direction from the legislature to deliver the NSC Project under the conditions set forth in the Connecting Washington transportation package passed in 2015. The Connecting Washington program fully funds the remainder of the NSC Project completion, provides appropriations in successive biennia, and sets legislative expectations for meeting construction milestones. This schedule must take into account the time needed for final design, preparation of plans and specifications, permitting, and advertisement for bids.

Our decision to begin the design work for the realignment option stems from our need to satisfy both of these responsibilities to avoid unnecessary risks and to comply with the direction in the transportation budget. As we view the effects of the proposed cleanup effort on both cost and schedule, we see considerable uncertainty that is in conflict with our responsibilities. WSDOT has experience with different types and degrees of environmental cleanup, and is familiar with the cost and schedule risks that it poses. In particular, we know that there is always a risk that the extent of contamination will be greater than what was anticipated in pre-cleanup studies. In addition, it is not uncommon for the Department of Ecology to require a period of post-cleanup monitoring before cleanup is deemed complete. These potential factors make it difficult to predict when cleanup will be complete and when the property will be available to the NSC Project. Given our commitments to the legislature to deliver this project on schedule and on budget, we see no practical alternative but to start the process of vetting the realignment option.

However, we are interested in continuing to pursue a resolution on our risk associated with the black tank cleanup that would accommodate BNSF's interest in the original alignment as it was set out in the Final Environmental Impact Statement (FEIS). If BNSF could agree to the following, WSDOT could agree to construct the FEIS alignment as originally planned. An

agreement must include the following provisions:

- Full indemnification of WSDOT from any responsibility or costs associated with the cleanup effort related to the black tank, including all costs incurred by BNSF, any claims by third parties related to the presence of the contamination or the cleanup, and costs of complying with any regulatory orders directed to WSDOT or BNSF related to the black tank site.

- A firm completion date by which the site will be available for WSDOT to construct the NSC Project. This agreement date must align with our commitments to the legislature for project delivery and must contain appropriate liquidated damages to be awarded to WSDOT if the date is not met, regardless of whether the failure to meet the date is the fault of BNSF.

If BNSF finds that these concepts present opportunities for an agreement, we can convene to discuss the details.

As we work together to reach an accord on how to handle the black tank area, WSDOT wants to reiterate to BNSF that it clearly understands that any structures crossing BNSF tracks will be designed to meet applicable standards for lateral and vertical clearances. We understand from past practices that placing abutments on BNSF property is allowable with appropriate design considerations.

WSDOT has enjoyed a positive working relationship with BNSF to date on the design and construction of the NSC. WSDOT would expect this collaborative environment to continue as we work through the design and construction considerations of the NSC.

I look forward to working with you to find a feasible solution.

Sincerely,

Mike Gribner
Acting Regional Administrator

MG:mg

cc: Senator Michael Baumgartner
Senator Andy Billig
Representative Marcus Riccelli
Representative Timm Ormsby
Mayor David Condon
Richard Burris
Courtney Wallace, BNSF
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