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April 9, 2021

Via Email Only (sspu461@ecy.wa.gov)
Shannon Spurling
Washington State Department of Ecology
Financial Services/AR

Via Email Only (stee461@ecy.wa.gov)
Steve Teel, LHG
Cleanup Project Manager/Hydrogeologist
Washington State Department of Ecology
Toxics Cleanup Program, Southwest Regional Office
P.O. Box 47775
Olympia, Washington 98504-7775

Re: ***“Taylor Way & Alexander Avenue Fill Area” (“TWAAFA”)***
Ecology Facility Site #1403183; Ecology Cleanup Site #4692
Agreed Order No. DE 14260
Enforcement Order No. DE 19410
Ecology Past Costs Invoice #1T000539-002-AA (“Ecology Invoice #2”)
Payment of Ecology Invoice #2 by the AO Parties
“Informal Dispute Notice” Regarding Certain Invoiced Ecology Past Costs

Dear Ms. Spurling and Mr. Teel:

We write on behalf of the three parties who are signatories to Agreed Order No. DE 14260 for the “Taylor Way & Alexander Avenue Fill Area” (the “AO”) (General Metals of Tacoma, Inc., Occidental Chemical Corporation, and Burlington Environmental LLC) (collectively the “AO Parties”): (a) to confirm and to clarify the circumstances of the AO Parties’ payment of

Ecology's Past Costs Invoice #1T000539-002-AA in the amount of \$60,413.94 ("Invoice #2"); and (b) to invoke dispute resolution pursuant to AO Section VIII.A and VIII.H regarding certain Ecology costs invoiced to the AO Parties (total amount to be determined). As discussed in detail below (and as demonstrated in the two spreadsheets submitted with this letter), those costs should not have been attributed to the AO—those costs pertained solely to the Port of Tacoma (the "Port") and to Ecology's issuance of Enforcement Order No. DE 19410 to the Port (the "EO"). Accordingly, Ecology should seek all of those costs from the Port pursuant to the EO. This letter also requests some other related Ecology actions, as specified below.

BACKGROUND REGARDING ECOLOGY INVOICE #2 AND AO PARTIES' PAYMENTS.

Ecology's Issuance of Invoice #2 Pursuant to the AO and EO. We understand Ecology issued Invoice #2 (and Ecology's pertinent backup documentation) simultaneous to the AO Parties (pursuant to the AO) and to the Port (pursuant to the EO). Invoice #2 was due for payment under the AO and EO on or before March 31, 2021, as indicated in the invoice. On March 26, 2021, the AO Parties requested an extension to April 9, 2021, of the payment obligations and rights under the AO. The request was made because the Port had failed to respond to the AO Parties' repeated inquiries about the Port's payment of Ecology costs pursuant to the Port's EO obligations. Ecology granted the AO Parties' extension request. The Port finally responded to the AO Parties about Ecology's past costs on March 31 (on the EO payment due date), indicating (in part) the Port would not be making any timely payment on Invoice #2.

The AO Parties' Payment of the \$60,413.94 Invoice #2 in Full, Subject to Dispute Resolution. The AO Parties are paying Invoice #2 via three (3) separate checks payable to Ecology, each in the amount of \$20,137.98, comprising the total Invoice #2 amount of \$60,413.94. The three checks will be transmitted (separately by each of the three AO Parties) to Ecology. The checks will be identified as payments for Invoice #2 pursuant to the AO. The AO Parties are making payment to Ecology subject to the invocation of dispute resolution, and request Ecology waive a portion of the \$60,413.94 sought pursuant to the AO, and credit the AO Parties for that amount (to be determined) as requested in detail below.

Requested Ecology Action—Invoice #2 Payments: We request Ecology ensure the three checks are collectively credited to the AO. We also will appreciate Ecology's confirmation of receipt of the AO Parties' checks (and full payment of the Invoice), as well as confirmation of the Port's failure to make any payment, via email to Tasya Gray (ngray@dofnw.com).

Port of Tacoma's Obligation to Pay the \$60,413.94 Invoice #2 in Full. Pursuant to the EO, the Port is obligated to pay Ecology Invoice #2 in full. The terms of the EO (Section VIII.B) and Ecology's issuance of the Invoice to the Port confirm the Port's obligation. The circumstances described above and below have prompted the AO Parties to pay the entire Invoice #2 amount of \$60,413.94, while reserving all of their rights, claims, defenses, and positions pertaining to any and all parties, including the Port.

BACKGROUND REGARDING THE AO PARTIES' INVOCATION OF DISPUTE RESOLUTION.

The following facts and circumstances compel the AO Parties to invoke dispute resolution to address, in part, the Port's failure to comply with its EO obligations.

- **The Port failed to make any payment to Ecology on the Ecology past costs invoice of \$84,952.05 that was due for payment on March 6, 2021 (“Ecology Invoice #1”).** As of that due date, after repeated inquiries by the AO Parties, the Port's response was that the Port Commission would be consulted about the matter on March 18, 2021. Those circumstances prompted the AO Parties to pay the \$84,952.05 invoice in full.¹ The AO Parties also requested that the Port reveal the outcome of the March 18 Commission meeting to allow the AO Parties to make Invoice #2 payment arrangements before the then-applicable March 31 AO due date.
- **The Port failed to make any payment to Ecology on Invoice #2 of \$60,413.94 (due on March 31, 2021, per the EO).** Instead of making the payment due on March 31, the Port transmitted a March 31 letter to the AO Parties finally revealing the outcome of the March 18 Port Commission meeting—the Port's rejection of the AO Parties' very reasonable proposal to share costs on an interim basis, subject to eventual reallocation.
- **The Port has rejected the AO Parties' efforts to establish reasonable interim arrangements for sharing Ecology's past and oversight costs.** The Port's most recent rejection arrived in the March 31 letter in which the AO Parties were accused (in part) of being “a trifle disingenuous” when the AO Parties had repeatedly pointed to Ecology's invoice payment deadlines as meaningful dates necessitating the Port's timely responses. The Port has demonstrated, both in such correspondence and through its inaction, that the Port perceives no obligation to meet Ecology's EO deadlines.
- **The Port has rejected the AO Parties' request that the Port assume responsibility for the “PORT-ONLY PROPERTY ACQUISITION,” “PORT-ONLY,” and “PORT-EO” costs included in Ecology Invoice #1 and Invoice #2.** These costs are discussed in detail below, and are the costs now at issue in dispute resolution.
- **The AO Parties continue to make efforts to cooperate with the Port on AO/EO activities, despite the facts and circumstances described above.** One of many examples was the technical meeting on April 1, 2021, among the Ecology, AO Parties, and Port project coordinators to discuss anticipated site activities. The AO Parties will be addressing issues arising from that meeting via separate correspondence.

¹ See Letter dated March 5, 2021, from Counsel for the AO Parties (M. Myers, R. Bakemeier, and M. Palumbo) to Ecology (S. Spurling and S. Teel) explaining the circumstances and requesting certain Ecology actions.

DISPUTE RESOLUTION—ECOLOGY SHOULD: (A) WAIVE THE “PORT-ONLY PROPERTY ACQUISITION,” “PORT-ONLY,” AND “PORT-EO” PORTIONS OF INVOICES #1 AND #2 SOUGHT FROM THE AO PARTIES; (B) CREDIT THE AO PARTIES FOR THOSE AMOUNTS ALREADY PAID TO ECOLOGY; AND (C) RECOVER THOSE COSTS FROM THE PORT PURSUANT TO ENFORCEMENT OF THE EO.

The AO Parties previously requested (via the March 5 letter described above) that Ecology waive portions of the Invoice #1 costs identified as pertaining to “PORT-ONLY PROPERTY ACQUISITION,” “PORT-ONLY,” “PIERCE COUNTY-ONLY PROPERTY OWNERSHIP,” and “EMERALD SERVICES-ONLY PROPERTY ACQUISITION.” The AO Parties demonstrated that those costs involved Ecology efforts to address the respective individual property ownership agendas of the Port, Pierce County, and Emerald Services.² The AO Parties were not involved in any of the matters at issue. The past costs at issue had nothing to do with “work performed to issue [the AO] in draft form on October 31, 2016, as well as to finalize and implement [the AO]” as specified in AO Section VIII.A describing the basis for charging the \$84,952.05 total Invoice #1 amount to the AO Parties. The \$9,114.02 total amount at issue were not remedial action costs recoverable from the AO Parties under the Model Toxics Control Act and/or the Washington Administrative Code. Those property ownership matters had nothing to do with the investigation and remediation of the Site. Ecology could and should recover such costs directly from the three parties who caused Ecology to incur them.³

Ecology Invoice #2 contained additional “PORT-ONLY” costs attributed to “quarterly meetings” with the Port (that did not involve the AO Parties)--\$263.78. More significantly, Invoice #2 contained substantial Ecology costs incurred to address the Port’s recalcitrance in refusing to sign the AO. Ecology staff expended many hours meeting with the Port (again without the AO Parties), addressing the Port’s repeated requests for extensions of time to respond to Ecology’s 2020 deadlines, reviewing the Port’s various argumentative submissions to Ecology, addressing the Port’s requests to elevate the matter to Ecology supervisors and to Ecology’s Director (circumstances not even revealed to the AO Parties), and preparing the EO for issuance to the Port. The Ecology documentation for Invoice #2 reveals that Ecology staff incurred over \$7,588.42 in “PORT-EO” costs (this is a partial number in that it omits certain unspecific entries for August 2020 staff time likely spent on EO activities). A spreadsheet is transmitted with this letter identifying the identifiable Ecology staff time entries attributable to “PORT-ONLY” and “PORT-EO” activities resulting in Invoice #2 costs.

The Ecology documentation for Invoice #2 reveals the Washington State Attorney General’s Office (the “AGO”) incurred a total of \$21,739.14 for 2020 activities but lacks the information necessary to quantify the “PORT-EO” portions of time spent by AGO personnel. The AO Parties request that Ecology and the AGO quantify the amount at issue as part of the resolution of this matter.

² Those Invoice #1 costs were specifically identified in a spreadsheet transmitted with the March 5 letter.

³ Ecology has not yet responded to the March 5, 2021, letter. The AO Parties continue to request the Ecology actions delineated in that letter, including but not limited to waiver of the costs attributable to “PIERCE COUNTY-ONLY PROPERTY OWNERSHIP,” and “EMERALD SERVICES-ONLY PROPERTY ACQUISITION” activities.

The “PORT-EO” costs did not comprise “remedial action costs” recoverable from the AO Parties under the AO’s Section VIII.A. The costs at issue had nothing to do with “remedial actions and [Agreed] Order preparation, negotiation, oversight, and administration.” The AO Parties were not involved in the EO “negotiations” pursued unilaterally by the Port over several months between August and December of 2020. The AO Parties were never even informed about the various Port/Ecology meetings and were not copied on pertinent correspondence. The “PORT-EO” costs were incurred by Ecology solely due to the Port’s maneuvering and recalcitrance. It is fundamentally unfair to seek payment of such costs from the AO Parties who cooperatively signed the AO and have demonstrated their good faith by complying with all AO obligations. The AO Parties even have complied with inappropriately imposed AO obligations by fully paying Invoices #1 and #2.

Accordingly, the AO Parties dispute the following amounts: (a) \$7,935.10 in “PORT-ONLY PROPERTY ACQUISITION” and “PORT-ONLY” costs included in Invoice #1; (b) \$263.78 in “PORT-ONLY” costs included in Invoice #2; (c) \$7,588.42 in “PORT-EO” costs included in Invoice #2 for Ecology’s technical personnel; and (d) an amount to be determined by Ecology/AGO for “PORT-EO” costs included in Invoice #2 attributable to the EO-related work of the AGO’s personnel. To facilitate Ecology’s consideration of the matter, two spreadsheets are transmitted with this letter: (a) the March 5 spreadsheet for Invoice #1 costs at issue (previously provided to Ecology on March 5); and (b) a spreadsheet for Invoice #2 costs at issue.

Requested Ecology Action—Dispute Resolution: As indicated above, Ecology should waive its claims for the costs at issue from the AO Parties pursuant to the AO, and credit the AO Parties for those amounts against future Ecology oversight costs accrued under the AO. We request scheduling of the conference of project coordinators anticipated by AO Section VIII.H.1.b. Tasya Gray will contact Steve Teel to set that conference within the pertinent 14 calendar days (i.e., before April 23). When the conference is set, the Port’s project coordinator (Scott Hooton) will be informed. He will be invited to participate in the conference. The AO Parties hope the Port will commit to pay the costs at issue directly to Ecology and thereby render the dispute moot. We are alerting the Port to that opportunity by copying them on this letter. Depending upon the outcome of the conference, the AO Parties reserve all rights and positions.

Further Requested Ecology Action—Future Ecology Invoices: The AO Parties reiterate their previous (March 5) request that Ecology not include such costs in future AO oversight invoices. AO Section VIII.A obligates the AO Parties to “pay Ecology costs incurred by Ecology pursuant to this Order and consistent with WAC 173-340-550(2).” Thus the “oversight and administration” costs described by that section should be limited to oversight and administration of AO activities, and should not include any costs attributable to other parties’ property ownership agendas, costs attributable to the EO/Port, etc.

Reservations of the AO Parties’ Respective Rights, Claims, Defenses, and Positions. The AO Parties have in the past reserved all their individual rights, claims, defenses, and positions to be asserted about the Site. Such reservations also were included in the AO. Under no circumstances should any party (including but not limited to Ecology, the Port, and any other persons/entities liable for the Site’s environmental conditions) interpret any activities by the AO

Parties (individually or collectively) in executing the AO, in performing AO activities, in submitting payments to Ecology for Invoices #1 and #2, and/or otherwise to constitute a waiver(s) of any of the AO Parties' rights, claims, defenses, and/or positions.

Thank for your consideration of the matters addressed by this letter. As previously communicated by the AO Parties to Ecology, the AO Parties are committed to fulfilling their AO obligations, while attempting to engage cooperatively with the Port in doing so.

Sincerely,

/s/ Robert F. Bakemeier (transmitting letter)

Robert F. Bakemeier

Bakemeier, P.C.

Counsel for Occidental Chemical Corporation

/s/ Mark M. Myers (per email approval)

Mark M. Myers

Williams Kastner

Counsel for General Metals of Tacoma, Inc.

/s/ Marlys S. Palumbo (per email approval)

Marlys S. Palumbo

Van Ness Feldman LLP

Counsel for Burlington Environmental LLC

Enclosures—Spreadsheets—Costs at Issue in Invoices #1 (3/5/21) and #2 (4/9/21)

cc: (All Via Email Only)

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