

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

In the Matter of Remedial Action)
)
Avista Corporation, a Washington Corporation,)
PO Box 3727, Spokane, WA 99220-3727)
)
Burlington Northern and Santa Fe Railway Co.,)
a Delaware Corporation)
Suite 1A)
2454 Occidental Avenue, South)
Seattle, WA 98134-1451)
_____)

AGREED ORDER
NO. DE 00TCPER-754

To: Mr. Rob Fukai
Avista Corporation

Mr. Bruce Sheppard
Burlington Northern Santa Fe

I.

Jurisdiction

This Agreed Order ("Order") is issued pursuant to the authority of RCW 70.105D.050(1).

II.

Findings of Fact

The Washington Department of Ecology (the Department) makes the following Findings of Fact, without admission of such facts by the following named companies:

1. Avista Corporation (Avista) (formerly known as the Washington Water Power Company) is a past owner or operator of a manufactured gas plant at property located at North 111 Erie Street, Spokane, Washington on which the facility is located (Exhibit A).
2. Brown Building Materials or Spokane River Properties LP, is the current owner of property located at North 111 Erie Street, Spokane, Washington on which the facility is located (Exhibit A).
3. Burlington Northern and Santa Fe Railway Company (BNSF) is the owner of property at North 111 Erie Street, Spokane, Washington on which the facility is located (Exhibit A).
4. The manufactured gas plant (sometimes referred to as Spokane Gas Plant) operation manufactured coal gas and carbureted water gas from approximately 1905 to 1948.
5. A coal-tar processing operation, known as American Tar Company (American Tar), previously operated on the land owned by BNSF. The operation is believed to have started concurrently with the Spokane Gas Plant in approximately 1905, and continued to formulate or distribute products until 1967. The operation produced a variety of hydrocarbon-based products and intermediates including roofing tar, boat pitch, post paint, and naphthalene, among others.
6. An environmental investigation of the Spokane Gas Plant and American Tar properties was directed by the Washington Department of Transportation (WDOT) in the fall of 1997. The results of this work are presented in the report: *Focused Remedial Investigation and Feasibility Study Report – SR290 Southriver Drive Alignment* report. The report was prepared by EMCON for Washington State Department of Transportation, August 28, 1998. The study documented contamination of soil by various hydrocarbons, particularly polycyclic aromatic hydrocarbons (PAHs).
7. The Department provided a letter to WDOT, dated December 18, 1998, under the Voluntary Cleanup Program. The letter summarizes previous investigations, hazardous substance releases, and recommendations for additional investigation. Based on this letter and

other site information the volume of contaminated soils on the properties was estimated to be over 50,000 cubic yards

8. Ground water beneath the site occurs in the Spokane Valley-Rathdrum Prairie Aquifer. In 1978 the United States Environmental Protection Agency (EPA) designated this aquifer as a "Sole Source" Aquifer. The aquifer serves as the main drinking water supply for at least 400,000 people in the City and County of Spokane.

9. Avista Corp. has performed both historical and field investigative studies of the Spokane Gas Plant. These studies are presented in the following documents:

Supplemental Investigation – Former Spokane Manufactured Gas Plant report. Prepared by Landau Associates, Inc. for the Washington Water Power Company, January 7, 1999

Historical Information Study – Vicinity of Former Spokane Manufactured Gas Plant Property report. Prepared by Landau Associates, Inc. for Washington Water Power Company, October 23, 1998.

Preliminary Site Investigation – Former Spokane Manufactured Gas Plant report. Prepared by Landau Associates, Inc. for the Washington Water Power Company, February 9, 1998.

10. BNSF performed a field investigation at American Tar, which is presented in the following document:

Focused Site Assessment, Former American Tar Company Site, Spokane, Washington. Prepared by GeoEngineers for BNSF, April 30, 1999.

11. Avista currently has in progress a remedial investigative effort designed to obtain additional information about groundwater and site soil contamination. The field work was completed by September 1999.

12. In certified correspondences dated January 15, 1999, the Department notified Avista and BNSF of the preliminary finding of potential liability and requested comment on those findings.

In a certified correspondence dated June 11, 1999, the Department notified Brown Building Materials (Spokane River Properties LP) of the preliminary finding of potential liability and requested comment on those findings

13. Collectively the signing PLPs, hereafter referred to as the "Companies", have formed a work group and have designated a project coordinator to implement the Work to be Performed. By execution of this agreed order, the Companies agree to be bound by the terms thereof and not to contest the same

III.

Department Determinations

1. Avista is a past "owner or operator" as defined at RCW 70.105D 020(12) of a "facility" as defined in RCW 70.105D 020(4)
2. BNSF is an "owner" as defined at RCW 70.105D 020(12) of a "facility" as defined in RCW 70.105D.020(4)
3. Brown Building Materials or Spokane River Properties is an "owner" as defined in RCW 70.105D.020(12) of a "facility" as defined in RCW 70.105D.020(4).
4. The Site is located at North 111 Erie Street, Spokane, Washington and will be referred to herein as the "Hamilton Street Bridge Site". The Hamilton Street Bridge Site includes the former Spokane Gas Plant property, and portions of BNSF and former Chicago Milwaukee & Saint Paul Railroad properties located within the facility/site boundaries shown in Exhibit A.
5. The presence of PAHs, volatile organic compounds, coal tar and other facility waste materials in soils, and the detection of PAHs and other hydrocarbon compounds in groundwater constitutes a "release" of a "hazardous substance" as defined in RCW 70.105D.020 (5) and (10)

6. The substances found at the facility as described above are "hazardous substances" as defined in RCW 70.105D.020(7) (a) and (e)

7. Based on the presence of these hazardous substances at the facility and all factors known to the Department, there is a release or threatened release of hazardous substances at the facility, as defined in RCW 70.105D.020(20).

8. In certified correspondences dated June 11, 1999, the Department notified both Avista and BNSF of status as a "potentially liable person" under RCW 70.105D.040 for the release of hazardous substances at the Hamilton Street Bridge Site, after notice and opportunity for comment.

9. In another certified correspondence, dated September 10, 1999, the Department notified Spokane River Properties of its status as a "potentially liable person" under RCW 70.105D.040 for the release of hazardous substances at the Hamilton Street Bridge Site (i.e., Spokane Gas Plant) after notice and opportunity for comment.

10. Pursuant to RCW 70.105D.030(1) and 70.105D.050, the Department may require potentially liable persons to investigate or conduct other remedial actions with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.

11. Based on the foregoing facts, the Department believes the remedial action required by this Order is in the public interest.

IV.

Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby ordered that the Companies take the following remedial actions and that these actions be conducted in accordance with Chapter 173-340 WAC unless otherwise specifically provided for herein.

1. The Companies shall furnish all personnel, materials and services necessary for, or incidental to, the planning, initiation, completion, and reporting upon the Scope of Work, attached as Exhibits B, C and D. The work to be performed includes the completion of the Remedial Investigation (RI) and a focused Feasibility Study (FS). Exhibits B, C and D are incorporated by reference as integral and enforceable parts of the Order.

2. The following documents are, by this reference, made a part hereof as though set out in full:

Exhibit A - Map showing location of the Hamilton Street Bridge Site;

Exhibit B – Work plan for the completion of the Remedial Investigation (RI);

Exhibit C – Work plan for focused Feasibility Study (FS);

Exhibit D – Interim Groundwater Sampling and Analysis Plan for sampling and analysis pending the implementation of a Cleanup Action Plan approved by Ecology;

Exhibit E – Health and Safety Planning

Exhibit F – Public Participation Plan; and

Exhibit G – Schedule for Completing Work.

The work plans and each element thereof are designed and shall be implemented and completed in accordance with the Model Toxics Control Act (Chapter 70.105D RCW) and its implementing regulation (Chapter 173-340 WAC) as amended, and all applicable federal, state, and local laws and regulations.

3. As provided in the agreed upon schedule, the Companies shall commence work and thereafter complete all tasks in the time frames indicated.

4 Written progress reports shall be completed every second month and shall be submitted by the tenth day of the month following the effective date of this Order. The reports shall address and describe the previous full two months' progress toward completion of the Order including work in progress, problem areas, key activities, deliverables submitted, field work and data generated, subcontracting, analytical services performed, and key staff changes.

5 In accordance with WAC 173-340-840(5), groundwater sampling data shall be submitted. These submittals shall be provided to the Department as required under the schedule.

6 In the interest of human health, the environment, or efficiency it may be desirable for the Companies to propose, or become appropriate and necessary for the Department to require, the implementation of interim action, as defined under WAC 173-340-430. The Companies may propose, plan, implement, and report on an action, in the event that an interim action is appropriate or necessary. All components of such actions shall be subject to Ecology approval and be conducted in accordance with Chapter 173-340 WAC.

V.

Terms and Conditions of Order

1. Definitions

Unless otherwise specified, the definitions set forth in Chapter 70.105D RCW and Chapter 173-340 WAC shall control the meanings of the terms used in this Order.

2. Public Notice

RCW 70.105D 030(2)(a) requires that, at a minimum, this Order be subject to concurrent public notice. The Department shall be responsible for providing such public notice and reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations that indicate to the Department that the Order is inadequate or improper in any respect. However, unilateral changes to this Order shall not be binding as part of an "Agreed Order" unless the Companies expressly agree by signing the modified Agreed Order.

3. Remedial Action Costs.

The Companies shall pay to the Department costs incurred by the Department pursuant to this Order. These costs shall include work performed by the Department or its contractors for investigations, remedial actions, Order preparation, oversight, and administration. The Department costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). The Companies shall pay the required amount within 90 days of receiving from the Department an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general description of work performed will be provided upon request. Itemized statements shall be prepared quarterly. Failure to pay the Department's costs within 90 days of receipt of the itemized statement of costs will result in interest charges.

4. Designated Project Coordinators.

The project coordinator for the Department is:

Mr. John L. Roland
WA Department of Ecology
Eastern Regional Office
4601 N. Monroe
Spokane, WA 99205-1295

The project coordinator for the Companies is:

Mr. Hank Nelson
Avista Corporation
1411 East Mission
P. O. Box 3727
Spokane, WA 99220-3727

The project coordinator(s) shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between the Department and the Companies, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinator(s). Should the Department or the Companies change

project coordinator(s), written notification shall be provided to the Department or the Companies at least ten (10) calendar days prior to the change

5. Performance.

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer, hydrogeologist, or similar expert, with appropriate training, experience, and expertise in hazardous waste site investigation and cleanup. The Companies shall notify the Department as to the identity of such engineer(s) or hydrogeologist(s), and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the site. The Companies shall provide a copy of this Order to all agents, contractors, and subcontractors retained to perform work required by this Order and shall ensure that all work undertaken by such agents, contractors, and subcontractors will be in compliance with this Order.

Except where necessary to abate an emergency situation, the Companies shall not perform any remedial actions at the site outside that required by this Order unless the Department concurs, in writing, with such additional remedial actions.

6. Access.

The Department or any Department authorized representative shall have the authority to enter and freely move about the site at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as the Department or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to the Department by the Companies. By signing this Agreed Order, Companies agree that this Order constitutes reasonable notice of access, and agree to allow access to the site at all reasonable times for purposes of overseeing work performed under this Order.

The Department will make best efforts to provide the Companies at least seven (7) working days advanced notice of any sampling event conducted by the Department. The

Department shall allow split or replicate samples to be taken by the Companies during an inspection unless doing so interferes with the Department's sampling. The Companies shall allow split or replicate samples to be taken by the Department and shall provide at least ten (10) working days notice before any sampling activity. Should the Department desire to split samples during the Companies' sampling activity, the Department will make best effort to provide at least five (5) working days advanced notice.

The Department and the Companies acknowledge that Avista does not own any of the properties in the Hamilton Street Bridge Site and that BNSF owns a portion of the property in the Site. The Companies will use reasonable efforts to obtain access to the Site. If necessary, the Department will exercise its authority under Chapter 70.105D RCW to ensure access to the Site or to facilitate remedial action at the Site.

7 Public Participation.

The Companies have prepared a public participation plan for the site (Exhibit G). The Department shall maintain the responsibility for public participation for the site. The Companies shall help coordinate and implement public participation for the site.

8 Retention of Records.

The Companies shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data in its possession relevant to this Order. Should any portion of the work performed hereunder be undertaken through contractors or agents of the Companies, then the Companies agree to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9 Dispute Resolution.

The Companies may request the Department to resolve disputes that may arise during the implementation of this Order. In the event the Companies dispute an approval, disapproval, proposed modification, or other decision or action by the Department's project coordinator, the Companies shall utilize the following dispute resolution process:

A. Upon receipt in writing of the Department project coordinator's decision, the Companies have ten (10) working days to notify the Department's project coordinator in writing of their objection to the decision.

B. The Department's project coordinator and the Companies' project coordinator and/or representative of the Companies shall then confer in an effort to resolve the dispute. If the Department's project coordinator and the Companies' project coordinator and/or representative of the Companies cannot resolve the dispute within ten (10) working days, the Department's project coordinator shall issue a written decision.

C. The Companies may then request that the Department management review the decision made by the Department's project coordinator. Such request shall be in writing and directed to the signatory or his/her successor(s) to this Order.

D. The Department's signatory or his/her successor(s) to this Order shall conduct a review of the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the Companies' request for review. Resolution by the Department's signatory, or his/her successor(s), to this Order shall be binding and final. The project coordinators will make all reasonable efforts to comply with the project schedule in the event of a dispute. However, if requested and necessary, the Department will agree to reasonable adjustments to the project schedule.

E. The Department and the Companies agree to utilize the dispute resolution process in good faith and agree to expedite, to the extent possible, the dispute resolution process whenever it is used. The Companies are not relieved of any requirement of this Order during the pendency of the dispute and remain responsible for timely compliance with the terms of this Order unless otherwise notified by the Department in writing.

10. Reservation of Rights/No Settlement.

This Agreed Order is not a settlement under Chapter 70 105D RCW. The Department's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Department rights or authority. The Department will not, however, bring an action against the Companies to recover remedial action costs paid to and received by the Department under this Agreed Order. In addition, the Department will not take additional enforcement actions against

the Companies to require those remedial actions required by this Agreed Order, provided the Companies comply with this Agreed Order.

The Department reserves its authority, however, to require additional remedial actions at the Site should it deem such actions necessary. The Department also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances from the Site.

In the event the Department determines that conditions at the site are creating or have the potential to create a danger to the health or welfare of the people on the site or in the surrounding area or to the environment, the Department may order the Companies to stop further implementation of this Order for such period of time as needed to abate the danger.

Except as expressly provided herein, Companies reserve all claims and defenses with respect to the Site.

11 Transference of Property.

A. No voluntary conveyance or relinquishment of title, easement, leasehold, or other interest held by the Companies in any portion of the site shall be consummated without provision for continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

B. Prior to transfer or involuntary conveyance or relinquishment of any legal or equitable interest in all or any portion of the property, the Companies shall deliver a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest.

C. At least thirty (30) days prior to finalization of any transfer, the Companies shall notify the Department of the contemplated transfer or conveyance or relinquishment.

12 Compliance with Other Applicable Laws.

A. All actions carried out by the Companies pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph B of this section.

B Pursuant to RCW 70 105D.090(1), the substantive requirements of Chapters 70.94, 70 95, 70 105, 75 20, 90 48, and 90 58 RCW and of any laws requiring or authorizing local government permits or approvals for the remedial action under this Order are binding and enforceable requirements of the Order.

The Companies have a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D 090(1) would otherwise be required for the remedial action under this Order. In the event the Companies determine that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, they shall promptly notify the Department of this determination. The Department shall determine whether the Department or the Companies shall be responsible to contact the appropriate state and/or local agencies. If the Department so requires, the Companies shall promptly consult with the appropriate state and/or local agencies and provide the Department with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. The Department shall make the final determination on the additional substantive requirements that must be met by the Companies and on how the Companies must meet those requirements. The Department shall inform the Companies in writing of these requirements. Once established by the Department, the additional requirements shall be enforceable requirements of this Order. The Companies shall not begin or continue the remedial action potentially subject to the additional requirements until the Department makes its final determination.

The Department shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.

C Pursuant to RCW 70 105D 090(2), in the event the Department determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the State of Washington to administer any federal law, the exemption shall not apply and the Companies shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70 105D.090(1), including any requirements to obtain permits.

VI

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon the Companies' receipt of written notification from the Department that the Companies have completed the remedial activity required by this Order, as amended by any modifications, and that all other provisions of this Order have been complied with.

VII

Enforcement

1. Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

A. The Attorney General may bring an action to enforce this Order in a state or federal court.

B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by the Department for investigative and remedial actions and orders related to the site.

C. In the event the Companies refuse, without sufficient cause, to comply with any term of this Order, each will be liable for:

(1) up to three (3) times the amount of any costs incurred by the state of Washington as a result of its refusal to comply; and

(2) civil penalties of up to \$25,000 per day for each day it refuses to comply.

D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.

The Order may be signed in counterpart. This Order shall be binding when all parties have signed a copy of the Order.

AVISTA CORPORATION

By R. D. Fukai
Its Vice President

DATE 3/7/2000

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By _____
Its _____

DATE _____

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

By Joseph Goldstein
Its Section Manager TCP

DATE 3.13.00

AVISTA CORPORATION

By _____

Its _____

DATE _____

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By B. Sheppard

Its Manager Environmental Remediation

DATE March 9, 2000

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

By _____

Its _____

DATE _____