

108-71450 29
75 588

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

In the Matter of Remedial Action by:)

)
Burlington Northern Railroad Company)
9401 Indian Creek Parkway)
Overland Park, KS 66210)
_____)

AGREED ORDER
No. DE 92TC-E101

TO: Mr. Melvin L. Burda
Burlington Northern Railroad Company

I.

Jurisdiction

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

II.

Findings of Fact

The Washington State Department of Ecology (Ecology) makes the following Findings of Fact, without admission of such facts by Burlington Northern Railroad Company (BN).

1. The North Market Street site, hereinafter known as the facility, as defined in RCW 70.105D.020(3), is located in portions of Sections 15, 16, 21, 22, 27 and 28, T. 26 N., R. 43 E.W.M. in Spokane County, approximately 1.5 miles north of the City of Spokane corporate limit in an area referred to as Hillyard.

2. BN presently owns property located within the facility.

3. Portions of the facility have been used in the past, or are currently being used, as an oil refinery, petroleum pipeline terminus, petroleum products storage and distribution center, railroad line and railcar maintenance facility.

4. Historic refinery operations resulted in discharges of petroleum and other refinery-related wastes and waste waters which were released to the environment through a series of ponds and ditches, once located immediately west to northwest of the current Tosco Spokane Terminal (Tosco tank farm) complex.

5. Current operations at the Tosco tank farm have resulted in the spill or release of petroleum substances to the environment. Release of an estimated 709 barrels of jet fuel from overfilling of Tank No. 158 occurred in October, 1979. An estimated forty thousand (40,000) gallons of gasoline were spilled in April 1989, from Tank No. T302. Two hundred barrels of trans mix was reported spilled in December 1990.

6. The BN operation historically located a tank car on the facility which contained petroleum-based products used for the maintenance of rail cars.

7. Data from studies directed by Ecology and the U. S. Environmental Protection Agency (EPA), and follow up ground-water sampling and site study by Ecology have confirmed that "releases" of "hazardous substances", as defined in RCW 70.105D.020(10) and (5) respectively, to soil and ground water have occurred on the facility. Historic aerial photographs also show evidence of releases.

These data and studies are found in the following references:

Ecology and Environment, Inc., 1989, Technical Assistance Team Site Assessment, Final Report for: Tosco Corporation Spokane Terminal, Spokane, Washington.

Golder Associates, 1985, Phase I Remedial Investigation of the North Market Street Site. Volumes I, II, and III.

-----, 1988, Data Compilation Report for the North Market Street Site Phases I, II And III Remedial Investigations.

U. S. Environmental Protection Agency, 1990, Aerial Photographic Analysis of Tosco, Incorporated, Spokane, Washington, Prepared by: Environmental Systems Laboratory, TS-PIC-90752.

Washington State Department of Ecology, 1990, October 1990 ground water sample results data report.

-----, 1990, Environmental Report Tracking System, Spill Report - Tosco Refining Company, E. 3225 Lincoln Road, Spokane, Washington.

7. The EPA proposed the facility for inclusion on the National Priority List (NPL) on June 24, 1988 (53 FR 23978). The facility was named to the NPL on August 30, 1990 (55 FR 35502).

8. The facility overlies the Hillyard Trough portion of the Spokane Valley-Rathdrum Prairie Aquifer, designated by the EPA in 1978 as a sole source aquifer. Ground water in the vicinity of the facility is used for residential, commercial, industrial, and irrigation purposes.

9. On February 25, 1991, Ecology issued proposed findings of potentially liable person (PLP) status to BN as an owner or operator of the facility under RCW 70.105D.040. BN requested, and was granted, an extension to the thirty (30) day comment period. Responses were received prior to final determinations.

10. On May 15, 1991, Ecology issued final determinations of PLP status to BN as an owner or operator of the facility.

11. In addition to BN, Ecology has issued agreed orders to three other potentially liable persons (PLPs) to perform Phase 1 of the remedial investigation and feasibility study (RI/FS) at the facility. Each of the orders are identical in work scope, but are independant of this Order. The following four PLPs have signed Agreed Orders to perform the Phase 1 work at the facility:

Burlington Northern Railroad Company (BN) - Agreed Order
No. DE 92TC-E101

Chevron Corporation (Chevron) - Agreed Order No. DE 92TC-E102

Phillips Petroleum Co. (Phillips) - Agreed Order
No. DE 92TC-E103

Tosco Refining Co. (Tosco) - Agreed Order No. DE 92TC-E104

Collectively these four PLPs, hereafter referred to as the "Companies", have formed a work group and have designated a project coordinator (see Section V - Terms and Conditions of Order) to implement the Phase 1 RI/FS Scope of Work (SOW) defined in Section IV. - 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, but they do not admit any act, responsibility, fault or liability, or waive any other right, claim, privilege or defense.

III.

Ecology Determinations

1. BN is an "owner(s) or operator(s)" as defined in RCW 70.105D.020(6).

2. The North Market Street site is a "facility" as defined in RCW 70.105D.020(3).

3. The North Market Street site is located within portions of Sections 15, 16, 21, 22, 27 and 28, T. 26 N., R. 43 E.W.M. in Spokane County, approximately 1.5 miles north of the City of Spokane corporate limit in an area referred to as Hillyard. At this point in the remedial action the facility includes, but is not limited to, properties currently owned by Tosco, Chevron and BN located east of North Market Street, north of Lincoln Road, west of Freya Street, and south of Regal Street.

The limits of the facility are actually defined by the extent of soil and ground water contamination created by releases of hazardous substances from past or present operations. Presently, ground water contamination is known to exist north of Lincoln Road and extend at least 0.5 mile to north-northwest of the current tank farm. The currently documented northern extent of ground water contamination is marked by a drinking water well known as the "R. A. Hanson Well".

4. The substances found at the facility as described above are "hazardous substances", as defined in RCW 70.105D.020(5).

5. Based on the presence of these hazardous substances at the facility and all factors known to Ecology, it has been determined that there has been a release or threatened release of hazardous substances from the facility, as defined in RCW 70.105D.020(10).

6. By letters dated May 5, 1991, Ecology notified BN and five other persons of their status as "potentially liable persons" (PLPs) under RCW 70.105D.040 after notice and opportunity for comment.

7. Pursuant to RCW 70.105D.030(1) and .050, Ecology may require PLPs 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.

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

9. Ecology and BN contemplate that, following the Phase 1 RI/FS work to be performed under this Order, a Phase 2 RI/FS remedial action, consistent with the Scope of Work (SOW) and preliminary schedule presented in Section IV. - Work to be Performed, will be conducted by one or more of the Companies. Ecology and the Companies anticipate that, through consensus, this Order may be amended to perform Phase 2 of the RI/FS. The Phase 2 SOW will be comprehensive and will complete the requirements of an RI/FS, as defined under Chapter 173-340 WAC.

IV.

Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby ordered that BN 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. BN shall furnish all personnel, materials and services necessary for, or incidental to, the planning, initiation, completion, and reporting upon a Phase 1 remedial investigation/feasibility study (RI/FS) of the facility. The Scope of Work (SOW), attached as Exhibit A, specifically describes the work to be conducted under Phase 1 and is hereby incorporated by reference as an integral and an enforceable part of this Order. As such, the following tasks will be completed:

Phase 1

- TASK 1: Develop Current Understanding of Site Conditions
- TASK 2: Prepare Planning Documents
- TASK 3: Conduct Phase 1 Field Sampling

Ecology and BN contemplate the following additional tasks (4 through 8) will be completed under a Phase 2 agreed order ammendment. The remaining requirements for the RI/FS will be completed under a subsequent Phase 2 agreed order ammendment and schedule, to be issued by Ecology, immediately following completion of Phase 1 to one or more of the Companies participating in this Order.

Phase 2

- TASK 4: Develop Baseline Risk Assessment/Cleanup Levels Analysis Document, Identify Remedial Action Requirements and Objectives, and Prepare Phase 2 Planning Documents
- TASK 5: Conduct Phase 2 Field Investigative Activities
- TASK 6: Prepare Remedial Investigation Report
- TASK 7: Conduct Feasibility Study
- TASK 8: Prepare Feasibility Study Report

The planning documents and each element of the tasks shall be consistent with the provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), and Chapter 173-340 WAC. Performance of the SOW also will be in accordance with applicable EPA guidance documents, or revisions, and companion documents, including, but not limited to:

U. S. Environmental Protection Agency, 1989, Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA, Interim Final, EPA/540/G-89/002.

-----, 1980, Interim Guidelines and Specifications for Preparing Quality Assurance Project Plans, QAMS-005/80.

-----, 1989, Risk Assessment Guidance for Superfund, Volumes I and II, EPA/540/1-89/001.

-----, 1987, Data Quality Objectives for Remedial Response Activities, EPA 540/G-87/003 and 004.

All planning documents, proposals, reports, and other documents shall be subject to Ecology approval.

2. A performance schedule of activities and deliverables to complete Tasks 1 through 3 listed above, and defined in Exhibit A, is shown as Table 1. The schedule lists the number of calendar days from the effective date of the Order by which the tasks will be completed. The schedule includes time for Ecology review and approval of task deliverables.

Table 2 shows a preliminary implementation schedule for performance of the Phase 2 SOW which Ecology and BN anticipate will be implemented by one or more of the Companies under an amendment to this Order, following completion of the Phase 1 tasks.

Ecology shall be given up to forty-five (45) days after receipt of draft deliverable documents to review, comment and approve each document. Ecology will notify the Project Coordinator for the Companies in writing, along with comments, of the approvals or disapprovals. Within fifteen (15) days of the final approvals for the planning and reporting documents, BN shall commence work on the next task scheduled. If the Companies request adjustments to the schedule, because of (1) insufficient or unreasonable schedule periods to complete the tasks; (2) unpredictable complexities or difficulties in the hydrologic investigations or other field tasks; or, (3) other justifiable reasons, then Ecology may reconsider the time frames established herein, through Section V (12) of this Order, Amendment.

3. Progress reports shall be completed by the Project Coordinator for BN on a bimonthly basis. The reports shall include an estimate of percent complete for each task or subtask, address progress made during the period, work in progress, problem areas, key activities and scheduling, deliverables submitted, field work and data generated, subcontracting, and analytical services performed.

Table 1

SCHEDULE OF PHASE 1 TASK COMPLETION AND DELIVERABLE ITEMS

<u>TASK AND DELIVERABLE</u>		<u>SCHEDULE</u> ⁽¹⁾
<u>Phase 1:</u>		
Effective Date of Phase 1 Agreed Order		start
TASK 1	- Task Completion and Report Delivery	75 days
TASK 2	- Delivery and Approval of Planning Documents	
	RI/FS Work Plan	140 days
	Sampling and Analysis, Quality Assurance Project, and Health and Safety Plans	205 days
TASK 3	- Completion of Phase 1 Field Activities, and Approval and Delivery of Phase 1 RI Report	440 days

- (1) Schedule represents days allowed to complete each task relative to the Phase 1 start date. The days given for each task having deliverable documents includes time for Ecology review, comment and approval prior to final delivery of each document.

Table 2

PRELIMINARY SCHEDULE OF PHASE 2 TASK COMPLETION AND DELIVERABLE ITEMS

Phase 2:⁽¹⁾

Effective Date of Phase 2 Agreed Order		start
TASK 4	- Approval and Delivery of Baseline Risk, Refined Remedial Action, and Phase 2 Planning Documents	113 days
TASK 5	- Completion of Phase 2 Field Activities	212 days
TASKS 6 - 8	- Approval and Delivery of Draft-Final RI and FS Reports	532 days

- (1) The Phase 2 schedule is preliminary. Schedule adjustments may be considered at the time of the agreed order ammendment, following completion of the Phase 1 tasks.

4. All ground water and sampling data shall be submitted in accordance with WAC 173-340-840(5). The ground water data also shall be delivered in the form of computer storage disk files in a format such as ASCII, or another easily convertible and mutually agreed upon format for application in dBASE IV or PARADOX personal computer software relational database products. The specific structure of the fields and parameters to be delivered will be detailed in the remedial planning documents defined in Section IV and approved by Ecology. The format will conform to the submittal requirements of Ecology's Ground-Water Management System (GWMS). The data submittals will be loaded by Ecology into the GWMS. To support the GWMS, all ground-water wells used in the study shall be professionally located relative to the Washington Coordinate System (Chapter 58.20 WAC).

5. It may be desirable for BN to propose, or become appropriate and necessary for Ecology to order, the implementation of interim action(s), as defined under WAC 173-340-430. In the event that interim action is technically necessary, BN may propose, plan, initiate, operate, and report on the action. The task schedule (see Table 1) of this Order shall be adjusted, if necessary, to complete such action(s). All components of such actions shall be subject to Ecology approval. If BN fails to undertake technically necessary interim action in a proper and timely manner, Ecology reserves the right to perform the action(s) and recover, from BN, costs incurred in doing so pursuant to RCW 70.105D.050.

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 Notices

WAC 173-340-600(10)(c) requires a 30-day public comment period before this Order on a RI/FS becomes effective. Ecology 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 which indicate to Ecology that the Order is inadequate or improper in any respect.

3. Remedial Action Costs.

BN shall pay to Ecology costs incurred by Ecology pursuant to this Order. These costs shall include work performed by Ecology or its contractors for investigations, remedial actions, Order preparation, and oversight and administration. Ecology costs shall include costs of direct activities (e.g. employee salary, laboratory costs, travel costs, contractor fees, employee benefit packages, and agency indirect costs of direct activities). BN shall pay the required amount within ninety (90) days of receiving from Ecology 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 Ecology's costs within ninety (90) days of receipt of an itemized statement of costs may result in interest charges.

4. Designated Project Coordinators.

The project coordinator for Ecology is:

John L. Roland
State of Washington
Department of Ecology
N. 4601 Monroe, Suite 100
Spokane, WA 99205-1295

The project coordinator for BN is:

Matthew G. Dalton
Dalton, Olmsted & Fuglevand Inc.
19017 120th Avenue NE, Suite 107
Bothell, WA 98011-2571

The project coordinator shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and BN, 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. Should Ecology or BN change project coordinator(s), written notification shall be provided to Ecology or BN 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 or hydrogeologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. BN shall notify Ecology 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.

Except where necessary to abate an emergency situation, BN shall not perform any remedial actions at the facility outside that required by this Order unless Ecology concurs, in writing, with such additional remedial actions. WAC 173-340-400(7)(b)(i) requires that "construction" performed on the facility must be under the supervision of a professional engineer registered in Washington.

6. Access.

Ecology or any Ecology authorized representative shall have the authority to enter and freely move about the facility 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 Ecology 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 Ecology by BN. Ecology shall provide reasonable notice before entering property unless an emergency prevents notice. Ecology shall allow split or replicate samples to be taken by BN during an inspection unless doing so would interfere with Ecology's sampling. BN shall allow split or replicate samples to be taken by Ecology and shall provide seven (7) days notice before any sampling activity.

7. Public Participation

BN shall prepare and/or update a public participation plan for the RI/FS. Ecology shall maintain the responsibility for public participation at the site. BN shall help coordinate and implement public participation for the RI/FS.

8. Retention of Records.

BN 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 BN, then BN agrees to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Reservation of Rights/No Settlement.

This Order is not a settlement under Chapter 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against BN to recover remedial action costs paid to and received by Ecology under this Order. In addition, Ecology will not take additional enforcement actions against BN to require those remedial actions required by this Order, provided BN complies with this Order.

Ecology reserves the right, however, to require additional remedial actions at the facility should it deem such actions necessary.

Ecology 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 facility.

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

10. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the facility shall be consummated by BN 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.

Prior to transfer of any legal or equitable interest BN may have in the facility or any portions thereof, BN shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, be shall notify Ecology of the contemplated transfer.

11. Compliance with Other Applicable Laws.

All actions carried out by BN pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements.

12. Amendment.

Ecology and BN may amend this Order and its SOW by mutual written agreement.

VI.

Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon BN's receipt of written notification from Ecology that BN has 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 Ecology for investigative and remedial actions and orders related to the facility.
- C. In the event BN refuses, without sufficient cause, to comply with any term of this Order, BN will be liable for:
 - (1) Up to three 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. Effective date of this Order:

July 13, 1992.

BURLINGTON NORTHERN RAILROAD

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

By

John L. Burda

By

Leah J. Goldstein