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March 5, 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 #1T000539-001-AA
Payment of Ecology Past Costs Invoice by the AO Parties and Related Matters

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”) to confirm and to clarify the circumstances of the AO Parties’ payment of Ecology’s

Past Costs Invoice #1T000539-001-AA in the amount of \$84,952.05 (the “Invoice”). This letter also requests some Ecology actions, as specified below.¹

Ecology’s Issuance of the Invoice Pursuant to the AO and EO. Ecology has confirmed the Invoice (and Ecology’s pertinent backup documentation) was simultaneously issued to the AO Parties (pursuant to the AO) and to the Port of Tacoma (the “Port”) (pursuant to Enforcement Order No. DE 19410) (the “EO”).² The AO Parties received the Invoice and backup documentation on February 3, 2021, via email from Ecology (Ms. Spurling) to the AO Parties’ Project Coordinator (Tasya Gray of Dalton, Olmsted & Fuglevand). Ecology subsequently confirmed the AO Parties’ Invoice payment is due on or before March 6, 2021.³

The AO Parties’ Payment of the \$84,952.05 Invoice in Full, Subject to Credit Request. The AO Parties are paying the Invoice via three (3) separate checks payable to Ecology, each in the amount of \$28,317.35, comprising the total Invoice amount of \$84,952.05. The three checks will be transmitted (separately by each of the three AO Parties) to Ecology. The checks will be identified as payments for the Invoice pursuant to the AO. The AO Parties also are making payment to Ecology subject to the request that Ecology waive a portion of the \$84,952.05 sought pursuant to the AO, and credit the AO Parties for that amount (\$9,114.02) as requested in detail below.

Requested Ecology Action: We request Ecology ensure the three checks are collectively credited to the AO. We also will appreciate Ecology’s confirmation of receipt of the checks (and full payment of the Invoice) via email to Tasya Gray (ngray@dofnw.com).

Port of Tacoma’s Obligation to Pay the \$84,952.05 Invoice in Full. Pursuant to the EO, the Port is obligated to pay the Invoice 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 AO Parties have attempted repeatedly to ascertain whether the Port intends to fulfill its EO obligations. However, the AO Parties have been unable to obtain from the Port a commitment to pay the Invoice (or any particular amount by any specific date). After inquiries on February 4 and 10, 2021, the AO Parties’ counsel transmitted a letter to the Port’s counsel on February 16th requesting, *inter alia*, the Port pay 25% of the Invoice (\$21,238.02) and requesting a Port response regarding the matter by February 26th (or sooner). That request was not a settlement offer and was made reserving all rights of all parties. On March 3rd, the Port’s counsel informed the AO Parties there will be no decision on the matter by the Port Commission until its March 18 meeting. The uncertainty of the circumstances has prompted the AO Parties to pay the entire Invoice amount of \$84,952.05 prior to the March 6 due date, while reserving all of their rights, claims, defenses, and positions pertaining to any and all parties, including the Port.

¹ The AO Parties received a second Ecology Past Costs Invoice #1T539-002-AA on February 27, 2021. That invoice will be addressed by the AO Parties separately in due course.

² Email on February 9, 2021, from S. Spurling to T. Gray (“[Port of Tacoma] have been invoiced identically. I know they are working on getting a payment out today.”).

³ Email on February 8, 2021, from S. Spurling to T. Gray (“I have updated our records to indicate emailed invoices. I have updated the ‘mailed date’ to 2/4/2021 which will push out the due date to 3/6/2021 since you just received the invoice.”).

Requested Ecology Action: We request Ecology confirm to the AO Parties that the Port did not make any payment on the Invoice on or before the Invoice due date. In the event the Port makes a payment on the Invoice, the AO Parties request Ecology inform Tasya Gray of any pertinent developments, and copy her on pertinent correspondence exchanged by Ecology and the Port. In the event the Port makes a payment on the Invoice, the AO Parties request Ecology credit any such payment to accrual of Ecology's oversight costs for the AO.

AO Parties' Request that Ecology Waive \$9,114.02 in Ecology Past Costs Inappropriately Included in the Invoice, and Credit the AO Parties for that Amount. The Ecology backup documentation provided with the Invoice reveal that the \$84,952.05 amount contains past costs incurred by Ecology that should NOT be billed to the AO Parties pursuant to the AO. The AO Parties object to those past costs, and are paying them "under protest," but are NOT invoking dispute resolution under the AO. Instead, the AO Parties request that Ecology consider the matter and do the right thing—waive recovery of the pertinent costs under the AO and credit the amount to cover future AO oversight costs.

The \$9,114.02 in Ecology past costs at issue are summarized in a spreadsheet transmitted with this letter which details the time entries, descriptions, hours, and costs. According to Ecology's backup documentation descriptions, those costs involved activities pertinent to the following: (a) the Port's 2008-2009 interactions with Ecology for the purpose of the Port's property acquisition plans (designated as "PORT-ONLY PROPERTY ACQUISITION" in the spreadsheet); (b) Ecology's 2009-2010, 2013, 2016, and 2018 communications with Pierce County about the County's property ownership, access, and site security matters, as well as the County's apparent plans to auction its property (designated as "PIERCE COUNTY-ONLY PROPERTY OWNERSHIP"); (c) Ecology's additional numerous communications with the Port (only) from 2012 through 2019 (including "quarterly Port of Tacoma meetings") (designated as "PORT-ONLY"); and (d) Ecology's communications with Emerald Services (and its attorneys) in 2013-2014-2015 regarding a possible prospective purchaser agreement for the CleanCare property owned by the County (designated as "EMERALD SERVICES-ONLY PROPERTY ACQUISITION"). Please note the \$9,114.02 is an incomplete total—some pertinent time entries indicated on the spreadsheet did not provide related cost information (those entries are not included in the dollar total). The \$9,114.02 also is incomplete in that some pertinent time entries were aggregated with other site activities in the Ecology documentation—those time entries have been omitted from the spreadsheet and not included in the dollar total.

All past costs at issue involved Ecology efforts to address the respective individual property ownership agendas of the Port, Pierce County, and Emerald Services. 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 amount to the AO Parties. The \$9,114.02 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.

Requested Ecology Action: As indicated above, Ecology should waive its claim for the \$9,114.02 from the AO Parties pursuant to the AO, and credit the AO Parties for that amount against future Ecology oversight costs accrued under the AO. The AO Parties also 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 payment to Ecology for the Invoice, 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 3/4/21 email approval)
Mark M. Myers
Williams Kastner
Counsel for General Metals of Tacoma, Inc.

/s/ Marlys S. Palumbo (per 3/4/21 email approval)
Marlys S. Palumbo
Van Ness Feldman LLP
Counsel for Burlington Environmental LLC

Enclosure—Spreadsheet—Ecology Past Costs Invoice Review (3/5/21)

cc: (All Via Email Only)

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