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July 26, 2019

Via Email and First Class U.S. Mail

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Re: Haystack Mines Site
EPA Comment Letter of July 24, 2019

Dear Maddy:

Thank you for sending your comments on behalf of the United States Environmental Protection Agency (USEPA) and the comments of Harrison Karr on behalf of the Navajo Nation Department of Justice (NNDOJ). We wanted to respond quickly to correct what appears to be a fundamental misunderstanding of what BNSF Railway Company (BNSF) was trying to accomplish with its offer. In short, BNSF was making an offer for permanent relocation of the Ex. 6 Personal Privacy (PP) which the company understood was also the goal of the agencies, and which went above-and-beyond the temporary alternative housing requirement of the AOC. The package also contemplated an advance payment for temporary relocation in the event that the permanent homesite was not ready when the TCRA was performed. We provide additional detail below and also clarify how we arrived at the proposed offer that, in retrospect, was prematurely transmitted to Ex. 6 Personal Privacy (PP)

As you know, BNSF has been engaged at the Haystack Mines Site since the spring of 2015, when USEPA sent BNSF its Removal Assessment Report and a general notice letter. BNSF and USEPA entered into the Administrative Settlement Agreement and Order on Consent (AOC) on May 10, 2017.

The AOC requires BNSF to carry out a time-critical removal action (TCRA), and most of the TCRA work is outlined in Paragraph 32 of the AOC. BNSF and USEPA spent some months negotiating the appropriate scope of work to be performed as part of the TCRA. The AOC requires work in six discrete locations, including the area surrounding the existing residence. We

understand that the ground beneath the existing residence was remediated by USEPA in the context of the Haystack Navajo Radioactive Structures Site removal action, conducted under the lead of USEPA OSC Randy Nattis in or around 2013. The work required by the AOC can be carried out without damaging the residential structures.

Paragraph 32(e) of the AOC requires BNSF to "Provide temporary alternative housing to impacted residents as necessary during removal activities, as determined by USEPA, and pay for all associated costs."

BNSF acknowledges that USEPA has guidance that provides direction to the agency in carrying out temporary relocations. As we discussed on our call, some of the core "guiding principles" of this guidance are:

- The Agency should ensure fair and equitable treatment of people who are being temporarily relocated.

- Residents should be compensated for actual, reasonable, and necessary out-of-pocket expenses. In most cases, residents must first incur expenses to be entitled to reimbursement. Residents are not entitled to compensation for expenses that are never incurred.[1]

In the course of planning our work to date at the site, BNSF has convened numerous meetings with several interested parties, including Dr. Donald Benn, then-director of the Navajo Nation Environmental Protection Agency (NNEPA), other members of the NNEPA, as well as with USEPA, the United States Bureau of Indian Affairs (BIA), and other relevant parties. During these meetings, BNSF understood that the NNEPA and BIA shared a common understanding that residents should not be living at abandoned uranium mine sites, given the potential impact to their health from any residual mine waste and, more specifically for this mine site, potential exposure to naturally-occurring radiation in the surficial Todilto limestone. Additionally, BNSF understood that all interested parties believed that moving Ex. 6 Personal Privacy (PP)

[1] Superfund Response Actions: Temporary Relocations Implementation Guidance, OSWER Directive 9230.0-97, USEPA (April 2002) at 4. The guidance further states "To ensure that relocations conducted by PRPs meet the same or similar standards [as the URA and regulations impose on USEPA], the relevant URA requirements and this guidance should be incorporated into the Record of Decision (ROD) or Action Memorandum and other enforceable decision documents." *Id.* at 3-4. The guidance was not referenced by USEPA in the 2017 AOC, and was not discussed in any detail until after BNSF provided the proposed relocation package. BNSF agrees with the core principle of treating people temporarily relocated in a fair and equitable manner as set forth in the guidance and has considered portions of the guidance to the extent applicable to its development of a temporary relocation package, but does not concede that the guidance and URA law and regulations are legally binding upon BNSF.

Ex. 6 Personal Privacy (PP) multiple times was not the most ideal situation or in their best interest. We also understood that that USEPA, NNEPA, and BIA wanted BNSF to provide a permanent relocation offer for the residents living at the Haystack Mines Site, as further evidenced by NNEPA and USEPA meeting with Ex. 6 Personal Privacy (PP) to determine a preferred new homesite location, which was communicated to BNSF and that would relocate them away from any potential harm from the mine site and/or naturally occurring radiation. Given the number of meetings that BNSF has had with the various stakeholders regarding preparation for this permanent relocation, we were surprised to see the comments from USEPA and NNDOJ characterizing the BNSF offer as a temporary relocation offer.

Following these numerous meetings, BNSF prepared a permanent relocation package that went well above-and-beyond the requirements of the AOC and, if required to meet agency expectation on the expedited completion of the TCRA, also included a temporary relocation cash payment. Since the offer went beyond what was required by the AOC, and in keeping with the parties' interest of keeping residents off the mine site, BNSF believed that seeking a commitment not to return to the mine site and other releases was justified in its initial offer.

After sending our proposed offer in July 2019 to USEPA, USEPA provided BNSF example relocation agreements along with comments. Now that we have received the relocation agreements used at Northeast Church Rock by USEPA, USEPA's comment letter, and NNDOJ's comments, it appears clear that our offer for permanent relocation was misconstrued to be the "temporary alternative housing" that is required by the AOC. That was not BNSF's intent as noted above.

Consistent with the AOC and after considering USEPA's guidance and the comments provided from USEPA and NNEPA, BNSF is now developing an offer for temporary alternative housing during the TCRA more akin to the cash payment contemplated in the existing settlement package. Our initial thinking is that, although USEPA's guidance states that costs should first be incurred before any claim for reimbursement, an upfront, lump-sum payment is most appropriate given the financial constraints of the families. Further, based on a prior suggestion from Vivian Craig (NNEPA), we understand that an upfront, lump-sum payment to Ex. 6 Personal Privacy (PP) would be most appropriate for a temporary hotel-based relocation. Therefore, BNSF anticipates providing an upfront offer for payment to cover Ex. 6 Personal Privacy (PP) costs to obtain temporary alternative housing during the TCRA work, along with daily allotments for food and incidentals. Other reasonable costs would be reimbursed if over the amount of the lump-sum payment.

Initial research suggests that there are numerous hotels in the vicinity and in Grants, New Mexico that can provide temporary alternative housing. USEPA's guidance goes into significant detail regarding the categories of expenses compensable for a temporary relocation. The guidance also suggests some fairly invasive information be provided by Ex. 6 Personal Privacy (PP) to be located, *id.* at 67, to aid in development of a reasonable offer. At this point, BNSF is willing to prepare its offer without the information typically available to USEPA. BNSF will protect the

Ex. 6 Personal Privacy (PP) homes to ensure that the TCRA does not result in any damage to the Ex. 6 Personal Privacy (PP) personal property. BNSF intends to prepare and submit the temporary relocation offer by August 23, as requested in your letter.

We regret that the relocation package to Ex. 6 Personal Privacy (PP) was received and interpreted to be made not in good faith, to be unconscionably overbroad, and to otherwise be unacceptable. However, as discussed above, we believe there has been a fundamental misunderstanding of the BNSF offer. Please be assured BNSF strives to manage its environmental projects in good faith. In the future, if there are questions or concerns about BNSF's intentions, we welcome a phone call to avoid misunderstandings and the delays that have resulted here. We look forward to agreeing with USEPA, NNEPA, and Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) on an acceptable temporary accommodation that fulfills BNSF's requirements under the AOC.

We will be in further contact in the coming days to set up an in-person meeting to discuss the proposed temporary alternative housing offer.

Very truly yours,

John F. Barg

cc: Harrison Karr, NNDOJ
Vivian Craig, NNEPA

JFB/jf

4813-6307-4205.v2