



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

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August 26, 2021

Ref: 8SEM-RB-C

Mr. Casey Tippens  
Scout DAC, LLC  
5148 US-89  
Livingston, Montana 59047

RE: County Tax Assessor Parcels 000RGH2763, 0000RGH1511, 0000RGH3577, 000RGH3578, Idaho Pole Superfund Site, located near the northern limits of Bozeman, Montana, in the east half of Section 6 and the west half of Section 5, Township 28, Range 6E of Gallatin County.

Dear Mr. Tippens:

The U.S. Environmental Protection Agency (EPA) is issuing this comfort letter to Scout DAC, LLC (Prospective Purchaser) regarding the property referenced below (Property). The Property, which the Prospective Purchaser is proposing to redevelop, is located within the Idaho Pole Superfund Site (Site). The Property consists of 41.40 acres of the Site south of Interstate 90, and more particularly described as:

The Property is bound by Montana Rail Link (MRL) tracks to the South; an old MRL rail spur and the Montana Ready Mix and Crane Service Company to the East; Interstate 90 to the north; residential property, "L" Street and commercial property (Empire Building Materials) to the west. The Property is bisected by Cedar Street that runs East to West across the Property. Significant remaining features of the Property include offices, ground water extraction and injection galleries, monitoring wells, the water treatment building, and areas where waste above levels that allow for unlimited use/unrestricted exposure has been left in place pursuant to a 1992 Record of Decision (ROD) and 1996 Explanation of Significant Differences (ESD).

(Attachment 1 (Legal Description)). The purpose of this letter is to provide the Prospective Purchaser with information the EPA has about the Property; present concerns that the community has raised with the EPA about the Property; and identify potentially applicable federal statutory and regulatory provisions and policies under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et. seq.*, as of the date of this letter. This letter also describes the activities the Prospective Purchaser proposes to perform at the Property, which would render care or assistance under CERCLA Section 107(d)(1) in accordance with the National Contingency Plan (NCP), 40 C.F.R. Part 300, as well as outline some reasonable steps the EPA would anticipate that the Prospective Purchaser would take as required by Section 101(40)(B)(iv) of CERCLA in preparation for acquiring the Property. The information provided in this letter should enable the Prospective Purchaser to make informed decisions as it prepares to further characterize the Property in anticipation of purchasing and redeveloping the Property.

Under CERCLA, the EPA's mission is to protect human health and the environment from the risks posed by contaminated or potentially contaminated land, water, and other media. A Superfund cleanup can help return properties to productive reuse. As a step towards returning the Property to productive reuse, the EPA is issuing this letter consistent with its current guidance.

## **Property Status**

Interested parties can find information on sites that are or may be contaminated with hazardous substances and may warrant action under Superfund, including site-specific documents and fact sheets, in the Superfund Enterprise Management System (SEMS).<sup>1</sup> Additional information about the Site is also available on the EPA's site profile page at <https://www.epa.gov/superfund/idaho-pole> or can be obtained at the EPA Region 8 Montana Office, Federal Building, Suite 3200, 10 West 15<sup>th</sup> Street, Helena, Montana 59626, Hours: Mon-Fri 8 a.m. to 5 p.m., 1-866-457-2690 (toll free).

The Property is located in Bozeman, Gallatin County, Montana. For the reasons stated below, the EPA is addressing the Site under Superfund authority.

## **History and Status of the Site and Property**

Between the late 1800s and early 1940s, the Northern Pacific Railroad Company, a predecessor of Burlington Northern Santa Fe Railway Company (BNSF), operated a five-stall roundhouse south of Cedar Street and east of L Street and adjacent to the Idaho Pole Company (IPC) facility. The roundhouse was used for servicing and storing locomotives. The roundhouse was considered obsolete with the development of larger diesel locomotives in the 1930s and was abandoned in the early 1940s.

In 1945, wood treating operations began and initially used creosote, a tarry liquid derived from coal. In 1952, pentachlorophenol (PCP) replaced creosote. PCP was brought to the Site in a granular form and dissolved in a heated carrier fuel similar in consistency to a diesel range organic. While the diesel range organic is not a contaminant of concern (COC) identified in the ROD, there are sixteen polycyclic aromatic hydrocarbons (PAHs) that are indicators of the use of heated carrier fuel and creosote in wood treating operations. Dioxins/Furans which form during the manufacturing of PCP are also identified as a COC in the ROD.

In addition to the wood treating operations and the roundhouse, the Property also contained storage areas where untreated and treated poles were stored prior to shipment. Bark was peeled off the untreated wood prior to treatment and placed in piles or used as fill material in a low-lying area north of Cedar Street. The filled area (referred to as the bark fill area) is located between I-90 and Cedar Street in the vicinity of the log office building.

The EPA proposed the facility for listing on the National Priorities List (NPL) in 1984, 29 FR 40320 (Oct. 15, 1984). The listing was final in 1986, 51 FR 21054 (June 10, 1986). In 1989, the Montana Department of Health and Environmental Services (MDHES), acting as the lead agency, initiated a Remedial Investigation/Feasibility Study (RI/FS). In 1992, MDHES finalized the RI Report and summarized the site characterization information collected and evaluated during the investigation including the Human Health and Ecological Risk Assessments.

The RI data showed that spills and leaks of IPC wood treating fluids are the sources of Site contamination. The primary media contaminated are subsurface soils, wood treating fluids, and, to a lesser extent, surface soils. The secondary contaminated media are ditch sediments and aquifer materials. The primary pathways identified in the risk assessments are groundwater, surface and subsurface soils, sediment, and air; secondary pathways are surface water and vegetation. Potentially affected receptors include humans as well as terrestrial and aquatic biota. The exposure routes evaluated were ingestion, inhalation, and direct contact with contaminated media. In 1992, the EPA signed the ROD and selected a remedial alternative for soil, sediment and groundwater.

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<sup>1</sup> SEMS is available at: <https://cumulis.epa.gov/supercpad/cursites/srchsites.cfm>

Potentially responsible party, IPC, began the soil excavation portion of the cleanup in 1995. IPC excavated soils and constructed an on-site land treatment unit (LTU). Contaminated soils were excavated from six areas at the Site: the Pressure Plant Area, beneath Cedar Street, the Barkfill Area, the Roundhouse Area, the Cedar Street Ditch and the Pasture Area. The ESD removed the requirement for a RCRA Subtitle C closure of the LTU, which was identified in the ROD. The ESD also states that once the treatment goals were reached for PCP and PAHs, these treated soils would be removed from the LTU and could be used for fill material on the plant site. It also states that if the soil contains other contaminants that exceed the ROD levels, the soil will be isolated from groundwater, covered at the surface to prevent direct contact, and institutional controls on future land use will be required. In 1999, IPC demolished and disposed of structures and excavated contaminated soil from underneath the demolished structures. Approximately 24,000 cubic yards of contaminated soil were excavated and placed in the LTU for treatment. LTU operations continued through October 2000.

In 2002, the LTU was dismantled. Treated soil with PAH and PCP concentrations below the ROD soil cleanup standards, along with the filter sand from the LTU, were placed in the excavated areas (Barkfill and Pressure Plant Areas) and the two pits constructed south of Cedar Street in what is referred to as the "Treated Soils Area" (TSA). However, these soils also contain dioxins and furans above the soil cleanup standards identified in the ROD. Therefore, the treated soil was placed above historic high groundwater levels and covered with a minimum of 12 inches of clean soil to prevent direct human contact with treated soils.

On September 16, 2010, the EPA issued a Ready for Reuse and Redevelopment Determination. Also, in 2010, a Notice of Institutional Controls (ICs) was filed with the Gallatin County Clerk and Recorder on the 4.5-acre TSA that applies restrictions on new construction and excavation. In August 2016, a Restated and Amended Declaration of ICs on Real Property was recorded with the Gallatin County Clerk and Recorder for the IPC property. In August 2017, a second Amendment to Restated and Amended Declaration of ICs on Real Property was recorded with the Gallatin County Clerk and Recorder. The recorded land-use restrictions include the following covenants, conditions, and restrictions that run with the Property:

- No residential development or use of the Property that is zoned M-1 and M-2 (city of Bozeman zoning designations light manufacturing district and manufacturing and industrial district, respectively) unless approved by the EPA and Montana Department of Environmental Quality (DEQ);
- No excavation on the Property within the controlled groundwater use area (CGA) that will reach the saturated soils or groundwater, except where the Owner receives prior written approval from the EPA and DEQ and meets the requirements of the CGA and Agency-approved Soil Management Plan; and
- No use of groundwater within the CGA for any purpose except as provided in the Remedial Action or authorized in writing by the EPA and DEQ.

Additional restrictions for the TSA include:

- No construction, other than surface paving, landscaping, curbs, light standards, traffic signs, foundations (and related above-ground structures), utilities and greenways and/or as otherwise authorized in writing by the EPA and DEQ; and
- No excavation deeper than 12 inches unless authorized in writing by the EPA and DEQ and in accordance with an Agency-approved Soil Management Plan or other soils and groundwater management plan approved by the EPA and DEQ. Owner shall maintain a 12-inch protective cover of soil. A 12-inch gravel layer, asphalt overlay, or other cover that prevents erosion and which maintains the integrity of the remedy can be substituted for clean soil.

The EPA has determined that the appropriate soil response actions under CERCLA have been completed, other than operation and maintenance, monitoring, and five-year reviews. As a result, the EPA deleted surface and unsaturated subsurface soils outside of the 4.5-acre TSA from the NPL, effective January 31, 2020. The TSA remains on the NPL. The groundwater, sediments and saturated subsurface soils also remain on the NPL and are being addressed as part of the groundwater remedy component. As such, the EPA refers to this as a partial NPL deletion.

The EPA's partial deletion resulted in interest in redeveloping the Property. Based on the analysis of current zoning and land uses, the portion of the Property that presents the greatest potential for site redevelopment is a 35.5-acre area consisting of County Tax Assessor Parcels 000RGH2763, 0000RGH1511, 0000RGH3577, 000RGH3578 owned by IPC. These parcels are located within the Bozeman city limits and are zoned manufacturing and industrial (M-2).

### **CERCLA Liability Protections**

The EPA is providing you with information regarding the bona fide prospective purchaser (BFPP) provision of CERCLA. Congress amended CERCLA in 2002 to exempt certain parties who buy contaminated or potentially contaminated properties from CERCLA liability if they qualify as BFPPs. The BFPP provision provides that a person who meets the criteria of CERCLA Sections 101(40) and 107(r)(1) and who purchases after January 11, 2002, will not be liable as an owner or operator under CERCLA.

A key advantage of the BFPP provision is that it is self-implementing; therefore, the Agency is not involved in determining whether a party qualifies for BFPP status. A party, on its own, can achieve and maintain status as a BFPP, which provides statutory protection from CERCLA liability, without entering into an agreement with the EPA, so long as that party meets the threshold criteria and continuing obligations identified in the statute.<sup>2</sup> However, the EPA provides guidance on the actions that the EPA believes may qualify a party as a BFPP.

In addition, CERCLA Section 107(d)(1), provides that no person shall be liable under CERCLA as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the NCP or at the direction of an on-scene coordinator with respect to an incident creating a danger to public health or welfare or the environment as a result of any releases or threat of release of a hazardous substance.

### **Proposed Work at the Property**

Among other criteria outlined in CERCLA, a BFPP must take "reasonable steps" to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resources exposure to any previously released hazardous substances as required by CERCLA § 101(40)(B)(iv). This requirement is explored further in the Common Elements Guidance.<sup>3</sup>

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<sup>2</sup> See EPA *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* ("Common Elements") ("Common Elements Guidance") (Office of Enforcement and Compliance Assurance, July 29, 2019) available on the Agency's website at <https://www.epa.gov/enforcement/common-elements-guidance>.

<sup>3</sup> See EPA *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* ("Common Elements") ("Common Elements Guidance") (Office of Enforcement and Compliance Assurance, July 29, 2019), available on the Agency's website at <https://www.epa.gov/enforcement/common-elements-guidance>.

Concerns were raised during the public comment period associated with the partial deletion about the need to conduct further characterization of the Property soils to ensure that any residual waste encountered during construction is properly handled to ensure protection of construction workers and nearby residents as well as future on-site workers. These concerns continued to be raised when the EPA held a series of public meetings between December 2020 and February 2021 to discuss various possible redevelopment scenarios.

The EPA understands that the Prospective Purchaser proposes to conduct an additional investigation of the Property to determine the nature and extent of the residual wood treating impacted soils on the Property at the surface as well as at depth. The purpose of this investigation is to collect surface soil samples from the 26 acres of the Site south of Cedar Street, but excluding the TSA; to collect unsaturated subsurface soils from the footprint of the proposed building; and to collect unsaturated subsurface soils from the proposed utility corridor to further characterize current contamination levels of PCP, PAHs, and dioxins/furans at the Property to inform the proposed redevelopment use and ensure protection of human health and the environment.

This investigation, if conducted as approved, will also assist the EPA in selecting the appropriate personal protective equipment and construction best management practices to require during construction. The Prospective Purchaser will be responsible for ensuring that the investigation is performed in accordance with applicable local, state and federal law.

To assist the Prospective Purchaser in performing the investigation consistent with the NCP for purposes of section 107(d)(1), as well as continuing to take reasonable steps for purposes of section 101(40)(B)(iv) and 107(r), based upon the information the EPA has evaluated to date, the EPA believes that the following would be appropriate activities by the Prospective Purchaser related to the residual wood treating impacted soils that may be encountered at the Property:

- Conduct the investigation pursuant to an EPA-approved Sampling Analysis Plan/Quality Assurance Project Plan and Health and Safety Plan;
- Use EPA-certified laboratories for sample analyses;
- Obtain an access agreement from the current property owner prior to commencing the investigation;
- Complete work in compliance with the approved Plans and in accordance with all applicable local, state and federal laws and regulations;
- Document any deviations from the approved Plans;
- Coordinate with EPA personnel so that samples obtained during the investigation can be provided to the EPA for analysis upon request;
- Comply with the recorded land-use restrictions that run with the Property;
- Present analytical results to the EPA as soon as the final data package has been validated; and
- Help prepare informational packages (e.g., fact sheets, posters, presentations, etc.) for the EPA upon request to disseminate sample results to the public.

The activities suggested above by the EPA are based on the nature and extent of contamination known to the EPA at this time and the need to be transparent with the community that continues to raise concerns about any proposed redevelopment on the Property. With respect to taking reasonable steps at the Property, there could be other activities necessary to meet this criterion. If additional information regarding the nature and extent of hazardous substance contamination at the Property becomes available, additional actions may be necessary to satisfy the reasonable steps criterion. You should ensure that you are aware of the condition of the Property so that you are able to take reasonable steps with respect to any hazardous substance contamination at or on the Property. In particular, if new areas of contamination are identified, you should ensure that reasonable steps are undertaken.

As you proceed with the approved work, you should inform the EPA, as appropriate, of issues that arise and your progress, as well as when the work has been completed.

### **State Actions**

We can only provide you with information about federal Superfund actions at the Site, federal law, and EPA guidance. For information about potential state actions and liability issues, please contact Keith Large, DEQ Project Officer, [klarge@mt.gov](mailto:klarge@mt.gov) or (406) 444-6569.

The EPA has conferred with DEQ on the issuance of this reasonable steps letter, and DEQ concurs with the issuance of the letter.

### **Conclusion**

The EPA remains dedicated to facilitating the cleanup and beneficial reuse of contaminated properties and hopes the information contained in this letter is useful to you. You may find it helpful to consult with your own environmental professional, legal counsel, and your state, tribal, or local environmental protection agency before taking any action to acquire, clean up, or redevelop the Property. These consultations may help you obtain a greater level of comfort about the compatibility of the proposed use and ensure compliance with any applicable federal, state, local, and/or tribal laws or requirements.

This letter only pertains to the reasonable steps listed above. The EPA and the DEQ are separately working with the Prospective Purchaser to enter into a Prospective Purchaser Agreement which may involve additional work on the Property beyond the scope of the reasonable steps. If you have any questions or wish to discuss activities described in this letter, please feel free to contact me at (406) 422-9725 or [hoogerheide.roger@epa.gov](mailto:hoogerheide.roger@epa.gov). Legal questions should be directed to Mark Chalfant of our Office of Regional Counsel at (303) 312-6177 or [chalfant.mark@epa.gov](mailto:chalfant.mark@epa.gov).

Sincerely,

Roger Hoogerheide  
Remedial Project Manager

### **Attachment 1 (Legal Description)**

cc: Mark Chalfant, EPA-Region 8  
Joe Vranka, EPA-Region 8  
Julie Nicholson, EPA-Region 8  
Hollis Luzecky, EPA-HQ (OSRE)  
Jacquie Huynh-Linenberg, EPA-HQ (OSRE)  
Elisabeth Freed, EPA-HQ (OSRE)  
Erik Hanselman, EPA-HQ (OSRE)

**Attachment 1**  
**Legal Description**

The Property is located near the northern limits of Bozeman, Montana and occupies approximately 41.40 acres in the east half of Section 6 and the west half of Section 5, Township 25, Range 6E of Gallatin County.

Individual legal lot descriptions for the Property are:

Northern Pacific ADD, 305, T02 S, R06 E, All BLK 70PT of Blocks 73 & 83, Plus VAC St & Alleys.

NP-BOZ PT BLK 87 S of Highway SEC 6 25, 6E, COS 21

Northern Pacific ADD, SOS, T02 S, R06 E, Lots 1-9 BLK 86 APP 142' X 225'

S06, T02 S, R06 E, PT Tract A SE4 & SW4, 22,1 AC COS 1876