

AGREEMENT
BETWEEN
BNSF RAILWAY COMPANY
AND
THE DEPARTMENT OF THE ARMY

THIS AGREEMENT is entered into this 10 day of MARCH , 2021, by and between the DEPARTMENT OF THE ARMY (hereinafter the "Army"), represented by the U.S. Army Engineer, Seattle District, (hereinafter "District Engineer") and BNSF RAILWAY COMPANY (hereinafter "BNSF"), represented by its General Director, Construction Permitting.

WITNESSETH, THAT:

WHEREAS, Section 214 of the Water Resources Development Act (WRDA) of 2000, 33 U.S.C. § 2352, as amended, (hereinafter "Section 214") provides that the Secretary of the Army, after public notice, may accept and expend funds contributed by a non-Federal public entity or a public utility company, natural gas company, or railroad carrier to expedite the evaluation of a permit of that entity, company, or carrier related to a project or activity for a public purpose under the jurisdiction of the Department of the Army; and

WHEREAS, BNSF considers it to be in its own interest to contribute funds voluntarily to be used by the Army to expedite the evaluation of a permit (or permits) for BNSF's projects, activities or facilities regulated by the Federal Railroad Administration related to a public purpose; and

WHEREAS, BNSF is a "railroad carrier" as defined in 49 U.S.C. § 20102 falling under the regulatory jurisdiction of the Federal Railroad Administration and thus qualifies as a railroad carrier for purposes of being eligible to contribute funds under Section 214; and

WHEREAS, the Regulatory Branch, Seattle District, U.S. Army Corps of Engineers (hereinafter "Seattle District Regulatory") issued an initial Public Notice, dated May 1, 2019, indicating the Seattle District's intent, on behalf of the Army, to accept and expend funds contributed by BNSF under Section 214; and

WHEREAS, the District Engineer has determined that the acceptance and expenditure of funds contributed by BNSF will be in compliance with Section 214; and

NOW, THEREFORE, the Army and BNSF agree as follows:

ARTICLE I – PURPOSE

The purpose of this agreement is to establish a framework for governing the respective roles and responsibilities of the parties for the acceptance and expenditure of funds contributed by BNSF to expedite the evaluation of permits for projects having a public purpose and falling under the jurisdiction of the Army.

ARTICLE II – SCOPE AND IMPLEMENTATION

- A. Within 60 days of the execution of this Agreement, BNSF will provide Seattle District Regulatory funds, in an amount to be agreed upon by BNSF and Seattle District Regulatory, to expedite the permit review for BNSF projects, activities, and facilities regulated by the Federal Railroad Administration, having a public purpose, for which BNSF is both the applicant (or co-applicant) and permittee (or co-permittee), and falling under the jurisdiction and the area of responsibility of the U.S. Army Corps of Engineers, Seattle District. It is anticipated that this Agreement will fund at least half to one full-time employees for a minimum of two years. Additional funds will be provided to the Seattle District Regulatory Branch by BNSF as needed when fund balances reach a pre-determined and mutually agreed-upon level. Funds must be provided in advance and application of the expedited review process by Seattle District Regulatory will not continue unless funds are contributed by BNSF and a positive balance of contributed funds exists. If all funds provided by BNSF are expended and not replenished, any remaining permit evaluations will be processed like those of other applicant entities that have not contributed funds under Section 214. All fund transfers under this Agreement will be directly between BNSF and the Seattle District. No funds provided to BNSF by a Federal agency may be accepted unless BNSF provides to Seattle District Regulatory a written confirmation from the Federal agency that the use of those funds to expedite the permit review process is acceptable.
- B. It is understood by the parties that use of the funds accepted hereunder will not adversely affect the timeline, when considered collectively, for evaluation of other permits requested by applicants who have not contributed Section 214 funding.
- C. Seattle District Regulatory will establish a separate account to track receipt and expenditure of funds associated with its review of BNSF's permit applications. Seattle District Regulatory employees will charge their time against the account when working to expedite the review of any BNSF permit request.
- D. Funds contributed by BNSF will primarily be expended on salaries and overhead for Seattle District Regulatory Project Managers performing expedited processing activities for BNSF permits as described in the

Management Plan (hereinafter "Management Plan") to be agreed upon by the parties. Such activities may include, but are not limited to, the following: application intake review, correction of drawings, jurisdictional determinations, site visits, preparation of public notices, drafting of correspondence, conducting the public interest review, meetings with BNSF, and preparation of draft permit decision documents and environmental compliance documentation. Funds will also be expended for the administration and tracking of the contributed funds and work performed. Funds will not be expended for review of the work of Project Managers by their supervisors and other persons or elements in the U.S. Army Corps of Engineer, Seattle District or Northwestern Division chain of command. Funds will not be expended for enforcement activities, but may be used for any permit decision compliance inspections and reviews.

- E. Funds may be expended by other Corps elements supporting Seattle District Regulatory permit actions under this Agreement including, but not limited to, the Seattle District's Environmental and Cultural Resources Branch, Engineering Division, and Dredged Material Management Office. Funds may also be expended to hire contractors to perform select technical duties.
- F. All activities described in this article shall be performed in accordance with a Management Plan. The Management Plan, once agreed to by the parties, may be amended as needed by mutual consent of the Seattle District Regulatory and BNSF Principal Representatives identified in Article IV, below. The Management Plan shall be subject to this Agreement. In the event of a dispute, conflict or inconsistency between this Agreement and the Management Plan, as amended, this Agreement shall control.

ARTICLE III – IMPARTIAL DECISION MAKING

It is understood and agreed by the parties that in order to ensure that the funds contributed by BNSF will not impact impartial review and decision-making by the Army, the following procedures, mandated by statute and through implementation policy promulgated by Headquarters, U.S. Army Corps of Engineers, will apply to all activities using funds provided by BNSF under Section 214:

- A. All final Army permit decisions and associated decision documents for matters where BNSF funds are used must be reviewed and approved in writing by a responsible official that is at least one level above the decision-maker. If the decision-maker is the District Engineer, the permit will be reviewed by the Division Engineer.

- B. All final permit decisions for matters carried out using BNSF funds will be posted to a Corps Regulatory Program public website.
- C. Seattle District Regulatory will not use the process of expediting permit evaluation to eliminate any procedures or decisions that would otherwise be required for the type of project and permit application under consideration.
- D. Seattle District Regulatory shall comply with all applicable laws and regulations in conducting its evaluation of BNSF permit applications.
- E. Funds will only be expended to expedite the evaluation of BNSF permit applications or authorization requests. Funds will not be expended for the required review and approval of the decision-maker's decision, and that reviewer's position may not have been partially or fully funded through funds contributed by BNSF within the prior year. If contracts are used to develop decision documents or environmental compliance documentation, such documents shall be submitted to Seattle District Regulatory as drafts only and are subject to review and adoption by the Seattle District before a permit decision is made.

ARTICLE IV – COMMUNICATIONS

To provide for consistent and effective communication between the Army and BNSF, each party shall appoint a Principal Representative to serve as the central point of contact on matters relating to this Agreement.

As of the date of this Agreement, the Principal Representative of BNSF is:

Director Environmental Permitting & Sustainability
(Present incumbent: Nathan Joe Loftice)
BNSF Railway Company
P.O. Box 961039
Fort Worth, TX 76161-0039

As of the date of this Agreement, the Principal Representative of the Army is:

Administrator, Regulatory Branch Chief
(Present incumbent: Michelle Walker)
U.S. Army Corps of Engineers, Seattle District
P.O. Box 3755
Seattle, Washington 98124-3755

Any notice required by this Agreement shall be written and sent to the Principal Representative by registered or certified mail or overnight courier. Notices shall be

deemed given when (i) delivered by hand, (ii) on the third day after mailing when sent postage prepaid, by registered or certified mail, return receipt requested and the post mark affixed by the United States Postal Service shall be conclusive evidence of the date of mailing; or (iii) on the second business day after deposit with a nationwide overnight courier.

ARTICLE V – APPLICABLE LAWS AND EFFECT OF AGREEMENT

This Agreement and all documents and actions pursuant to it shall be governed by the applicable statutes, regulations, directives and procedures of the United States. This Agreement does not in any manner affect statutory authorities and responsibilities of the signatory parties. This Agreement is not intended, nor may it be relied upon, to create any rights in third parties enforceable in litigation with the United States or BNSF. Any disputes arising from or relating to this Agreement not resolved by the informal nonbinding procedures in Article VII shall be resolved in an appropriate federal court applying federal law. Nothing in the preceding sentence suggests that any particular disagreement or dispute is subject to judicial review under federal law.

ARTICLE VI – AVAILABILITY OF FUNDS

Implementation of this Agreement is subject to the requirements of the Anti-Deficiency Act, 31 U.S.C. § 1341, and the availability of Federal appropriated funds. With the exception of the receipt and expenditure of contributed funds as authorized by Section 214, as amended, nothing in this Agreement may be construed to require the obligation, appropriation, or expenditure of any money from the United States Treasury, in advance of an appropriation available for that purpose.

ARTICLE VII – DISPUTE RESOLUTION

In the event of a dispute between the parties regarding the receipt, expenditure, or administration of contributed funds pursuant to this Agreement (excluding any specific permit application/decision), BNSF and Seattle District Regulatory shall use their best efforts to resolve the dispute through informal consultation, communication, elevation of issue resolution to the designated Executive Team members as prescribed in the Management Plan, and other forms of non-binding alternative dispute resolution mutually acceptable to the parties.

ARTICLE VIII – AMENDMENT, MODIFICATION

This Agreement may be amended or modified only by written, mutual agreement of the parties, executed by the District Engineer and the General Director, Construction Permitting.

ARTICLE IX – TERMINATION

Either party may terminate this Agreement by providing written notice to the other party's Principal Representative at the listed address above. Such termination shall be effective on the sixtieth (60) calendar day following such notice. In the event of termination, BNSF shall be responsible for all costs incurred by the Army in execution of this Agreement.

This Agreement shall remain in force until the Agreement is terminated pursuant to this article, or the authority provided to the Corps to accept funds in accordance with Section 214 is terminated, whichever occurs first.

Within sixty (60) calendar days of the termination effective date, the Seattle District Regulatory shall perform an accounting to determine the actual costs of the performed work. Within thirty (30) days of the completion of this accounting, the Seattle District Regulatory shall return to BNSF any funds advanced in excess of the actual costs incurred. Funds may be returned to BNSF by check or electronic fund transfer. No credit or repayment is authorized, nor shall be provided, for any funds provided by BNSF and obligated by the Army for activities in execution of this Agreement.

ARTICLE X - EFFECTIVE DATE

This Agreement shall be effective when signed by authorized representatives of each of BNSF and the Army, as of the date of the latter of these signatures.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

DEPARTMENT OF THE ARMY

BY: 

Alexander "Xander" L. Bullock
District Engineer
Seattle District
U.S. Army Corps of Engineers

DATE: 10 Mar 2021

BNSF Railway Company

BY: 

Nathan Joe Loftice
Director
Environmental Permitting
& Sustainability
BNSF Railway Company

DATE: February 25, 2021