

November 10, 2023



City of Merced  
Attention: Ms. Jamie Formico  
110 Blue Ravine  
Suite 200  
Folsom, CA 95630

Tracking No. 23W-17402

Dear Ms. Formico:

Attached please the requested contract for execution by an official authorized to execute contract agreements on behalf of City of Merced. Please execute and **return with digital or original signatures** for completion on part of BNSF Railway Company ("BNSF") to this office, along with the following requirements:

1. A Certificate of Insurance as required in the agreement.
2. A **separate policy** for Railroad Protective Liability Insurance as required in the agreement (**ORIGINAL POLICY MUST BE PROVIDED**). BNSF Railway Company will be the only insured party; OR;

**In lieu of providing a separate policy for Railroad Protective Liability Insurance**, you may participate in the BNSF's Railroad Protective Policy by checking the appropriate box in the contract and including an additional \$633.00 through BNSF.RailPermitting.com. If work within the right-of-way is over \$35,000, please advise and I will update the cost to enter into the RPLI Policy accordingly.

Acceptance and deposit of any check by BNSF does not constitute an agreement between BNSF and Licensee for the requested license. BNSF shall not be obligated to hold the check in a separate fund, but may commingle the funds with other funds of BNSF, and in no event shall BNSF be responsible for interest on said funds.

The enclosed permit is not a binding agreement and shall become binding only when, and if, it is executed by you and fully approved and executed by BNSF Railway Company. Upon completion on behalf of BNSF, one fully executed counterpart will be returned for your records.

Please be informed that if contracts, fees, and insurance are not returned within sixty (60) days, a \$800.00 processing fee will be assessed.

Sincerely,

Blake Jung  
Manager - Permits  
2650 Lou Menk Dr., MOB1  
Fort Worth, TX 76131

November 10, 2023

Ms. Jamie Formico  
110 Blue Ravine  
Suite 200

**LICENSE FOR ENVIRONMENTAL ACCESS**

~~2023~~ <sup>2024</sup> THIS LICENSE FOR ENVIRONMENTAL ACCESS ("**License**"), is made to be effective \_\_\_\_\_, 2023 (the "**Effective Date**") by and between **BNSF RAILWAY COMPANY**, a Delaware corporation ("**Licensor**") and **CITY OF MERCED**, a California municipal corporation ("**Licensee**").

In consideration of the mutual covenants contained herein, the parties agree to the following:

**GENERAL**

1. **Grant of License.** Licensor hereby grants Licensee a non-exclusive license, subject to all rights, interests, and estates of third parties, including, without limitation, any leases, use rights, easements, liens, or other encumbrances, and upon the terms and conditions set forth below, to access and use the Premises in strict accordance with the Use(s) specified in Section 4 below, across or along Licensor's rail corridor at or near the station of Merced, County of Merced, State of California, Line Segment 7200, Mile Post 1057.70 as shown on the attached Drawing No. 87672, dated August 4, 2023, attached hereto as **Exhibit "A"** and incorporated herein by reference (the "**Premises**").
2. **Term.** This License shall commence on the Effective Date and shall continue for a period of one (1) year, subject to prior termination as hereinafter described.
3. **Existing Improvements.** Licensee shall not disturb any improvements of Licensor or Licensor's existing lessees, licensees, easement beneficiaries or lien holders, if any, or interfere with the use, repair, maintenance or replacement of such improvements.
4. **Use of the Premises.** Licensee's use of the Premises shall be strictly limited to the work specified in the "Highway 59 Bridge Widening over Black Rascal Creek – Request for BNSF Access" letter work plan, dated July 28, 2023 and associated drawings submitted by Dokken Engineering on behalf of the City of Merced attached hereto as **Exhibit "B,"** (the "**Environmental Work**"). Performance of the Environmental Work shall be conducted in strict conformance with Exhibit B.
  - 4.1 No access, use, or work other than as expressly provided in Exhibit B or this Section 4 is permitted without the prior written consent and approval of Licensor.
  - 4.2 Licensee shall not deviate from the Exhibit B work plan without prior written consent, including but not limited to deviations from the (i) means and method of performing the Environmental Work; (ii) sampling methods, frequency, sample media, and analysis; (iii) points of access; (iv) health and safety measures; (v) waste characterization, handling, management, transportation, and disposal; (vi) pollution prevention; (vii) plugging or abandonment of physical features; and (viii) all other requirements and specifications presented in Exhibit B. Any such deviations may result in Licensee's immediate removal from the Premises, termination of this License, and/or additional legal action against Licensee, including but not limited to actions for breach of contract and trespass. If any such deviation causes Licensor to incur costs or expenses, Licensee agrees to reimburse Licensor for such costs and expenses and to indemnify Licensor for any and all claims related to such deviation.
  - 4.3 Future work that is contingent on the findings of the Environmental Work as presented in Exhibit B is not permitted without further authorization from Licensor. In the event the results of the Environmental Work show further investigation or remedial activity will be required pursuant to applicable state and/or federal regulations, Licensee must submit a work plan for such activity to Licensor for approval prior to any such work, and must obtain a new or amended license from Licensor to access the Premises and to perform any such work.
  - 4.4 Licensee warrants that it is conducting the Environmental Work solely to perform soil sampling and testing associated with future at-grade crossing improvements.
5. **Alterations.** Except as set forth in this License, Licensee may not make any alterations to the Premises or permanently affix anything to the Premises or any buildings or other structures adjacent to the Premises without Licensor's prior written consent.

**COMPENSATION**

6. License Fee. Licensee shall pay Licensor, prior to the Effective Date, the sum of Two Thousand Five Hundred and No/100 Dollars (\$2,500) as compensation for the use of the Premises.
7. Costs and Expenses.
- 7.1 For the purpose of this License, "cost" or "costs" and "expense" or "expenses" includes, but is not limited to, actual labor and material costs including all assignable additives, and material and supply costs at current value where used.
- 7.2 Licensee agrees to reimburse Licensor (pursuant to the terms of **Section 8** below) for all costs and expenses incurred by Licensor in connection with Licensee's use of the Premises, including but not limited to the furnishing of Licensor's flaggers and any vehicle rental costs incurred. Licensee shall bear the cost of flagger services and other safety measures provided by Licensor, when deemed necessary by Licensor's representative. Flagging costs shall include, but not be limited to, the following: pay for at least an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays (as applicable); vacation allowance; paid holidays (as applicable); railway and unemployment insurance; public liability and property damage insurance; health and welfare benefits; transportation; meals; lodging and supervision. Negotiations for railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase flagging rates. Flagging rates in effect at the time of performance by the flaggers will be used to calculate the flagging costs pursuant to this Section 7.
8. Payment Terms. All invoices are due thirty (30) days after the date of invoice. If Licensee fails to pay any monies due to Licensor within thirty (30) days after the invoice date, then Licensee shall pay interest on such unpaid sum from the due date until paid at an annual rate equal to the lesser of (i) the prime rate last published in *The Wall Street Journal* in the preceding December plus two and one-half percent (2½%), or (ii) the maximum rate permitted by law.

**LICENSOR'S RESERVED RIGHTS**

9. Reserved Rights of Use. Licensor excepts and reserves the right, to be exercised by Licensor and any other parties who may obtain written permission or authority from Licensor:
- 9.1 to maintain, use, operate, repair, replace, modify and relocate any utility, power or communication pipe/lines/cables and appurtenances and other facilities or structures of like character upon, over, under or across the Premises existing as of the Effective Date;
- 9.2 to construct, maintain, renew, use, operate, change, modify and relocate any tracks or additional facilities, structures and related appurtenances upon, over, under or across the Premises; or
- 9.3 to use the Premises in any manner as Licensor in its sole discretion deems appropriate, provided Licensor uses all commercially reasonable efforts to avoid material interference with the use of the Premises by Licensee for the purpose specified in Section 4 above.

**LICENSEE'S WORK**

10. Construction and Maintenance.
- 10.1 Licensee shall notify Licensor's Roadmaster, Myron Dickerson at 40 Eastt Vine Street, Bldg. B, Fresno, CA 93725, telephone (559) 593-2453 (cell) or Myron.Dickerson@BNSF.com, and Licensor's Remediation Manager, Thomas Jones, telephone (913) 551-4591 (office) or (816) 605-3495 (cell), at least five (5) business days prior to entering the Premises. In the event of emergency, Licensee shall notify Licensor of Licensee's entry onto the Premises at the telephone number above as soon as practicable and shall promptly thereafter follow up with written notice of such entry.
- 10.2 Licensee's on-site supervisors shall retain/maintain a fully executed copy of this License at all times while on the Premises.
- 10.3 While on the Premises, Licensee shall use only public roadways to cross from one side of Licensor's tracks to the other.



- 10.4 Any contractors or subcontractors performing Environmental Work on the Premises, or entering the Premises on behalf of Licensee shall be deemed servants and agents of Licensee for purposes of this License.
- 10.5 No work, as set forth in **Section 4**, may be conducted by Licensee without Licensors' written consent of said workplan for the purpose specified in **Section 4**. Such review and consent by Licensors shall not constitute an endorsement of the sufficiency or effectiveness of any workplan.
- 10.6 No monitoring wells may be installed on the property prior to written approval of Licensee's workplan for the installation of such monitoring wells. Upon obtaining such consent, Licensee shall provide Licensors the location of said well(s) relative to Licensors' nearest trackage, identifying Licensors' nearest Mile Post sign number.
- 10.7 Under no conditions shall Licensee be permitted to conduct any tests, investigations or any other activity using mechanized equipment and/or machinery, or place or store any mechanized equipment, tools or other materials, within twenty-five (25) feet of the centerline of any railroad track on the Premises unless Licensee has obtained prior written approval from Licensors. Licensee shall, at its sole cost and expense, perform all activities on and about the Premises in such a manner as not at any time to endanger or interfere with (i) the existence or use of present or future tracks, roadbeds, or property of Licensors, (ii) the safe operation and activities of Licensors or existing third parties, or (iii) the rights or interests of third parties. If ordered to cease using the Premises at any time by Licensors' personnel due to any hazardous condition, Licensee shall immediately do so. Notwithstanding the foregoing right of Licensors, the parties agree that Licensors has no duty or obligation to monitor Licensee's use of the Premises to determine the safe nature thereof, it being solely Licensee's responsibility to ensure that Licensee's use of the Premises is safe. Neither the exercise nor the failure by Licensors to exercise any rights granted in this Section will alter the liability allocation provided by this License.

# 11. Boring and Excavation.

- 11.1 Prior to Licensee conducting any boring, excavation, or similar work on or about the Premises, Licensee shall explore the proposed location for such work with hand tools to a depth of at least three (3) feet below the surface of the ground to determine whether pipelines or other structures exist below the surface, provided, however, that in lieu of the foregoing, Licensee shall have the right to use suitable detection equipment or other generally accepted industry practice (e.g., consulting with the Underground Services Association) to determine the existence or location of pipelines and other subsurface structures prior to drilling or excavating with mechanized equipment. Licensee may request information from Licensors concerning the existence and approximate location of Licensors' underground lines, utilities and pipelines at or near the vicinity of the proposed Environmental Work by contacting Licensors' Telecommunications Helpdesk at (817) 593-5900 at least thirty (30) business days prior to performance of the Environmental Work. Upon receiving Licensee's timely request, Licensors will provide Licensee with the information Licensors has in its possession regarding any existing underground lines, utilities, and pipelines at or near the vicinity of the proposed Environmental Work, and if applicable, identify the location of such lines on the Premises pursuant to Licensors' standard procedures. Licensors does not warrant the accuracy or completeness of information relating to subsurface conditions of the Premises and Licensee's operations will be subject at all times to the liability provisions herein.
- 11.2 For all bores greater than twenty-six inch (26") diameter and at a depth less than ten feet (10') below bottom of rail, a soil investigation must be performed by Licensee and reviewed by Licensors prior to the performance of the Environmental Work. This study is to determine if granular material is present, and to prevent subsidence during the installation process. If the investigation determines in Licensors' reasonable opinion that granular material is present, Licensors may select a new location for Licensee's use, or may require Licensee to furnish for Licensors' review and approval, in Licensors' sole discretion a remedial plan to deal with the granular material. Once Licensors has approved any such remedial plan in writing, Licensee shall, at Licensee's sole cost and expense, carry out the approved plan in accordance with all terms thereof and hereof.
- 11.3 Any open hole, boring or well constructed on the Premises by Licensee shall be safely covered and secured at all times when Licensee is not working in the actual vicinity thereof. Following completion of that portion of the work, all holes or borings constructed on the Premises by Licensee shall be restored in accordance with **Section 21** below.



**LIABILITY AND INSURANCE****12. Liability and Indemnification.**

- 12.1 For purposes of this License: (a) "**Indemnitees**" means Licensor and Licensor's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees, and agents; (b) "**Liabilities**" means all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments, and expenses (including, without limitation, court costs, reasonable attorneys' fees, costs of investigation, removal and remediation, and governmental oversight costs) environmental or otherwise; and (c) "**Licensee Parties**" means Licensee or Licensee's officers, agents, invitees, licensees, employees, or contractors, or any party directly or indirectly employed by any of them, or any party they control or exercise control over.
- 12.2 **TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE SHALL, AND SHALL CAUSE ITS CONTRACTOR TO, RELEASE, INDEMNIFY, DEFEND AND HOLD HARMLESS INDEMNITEES FOR, FROM AND AGAINST ANY AND ALL LIABILITIES OF ANY NATURE, KIND OR DESCRIPTION DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART):**
- 12.2.1 **THIS LICENSE, INCLUDING, WITHOUT LIMITATION, ITS ENVIRONMENTAL PROVISIONS,**
- 12.2.2 **ANY RIGHTS OR INTERESTS GRANTED PURSUANT TO THIS LICENSE,**
- 12.2.3 **LICENSEE'S OCCUPATION AND USE OF THE PREMISES,**
- 12.2.4 **THE ENVIRONMENTAL CONDITION AND STATUS OF THE PREMISES CAUSED BY OR CONTRIBUTED TO BY LICENSEE, OR**
- 12.2.5 **ANY ACT OR OMISSION OF ANY LICENSEE PARTY.**
- 12.3 **TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE NOW AND FOREVER WAIVES AND WILL INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FROM ANY AND ALL CLAIMS THAT BY VIRTUE OF ENTERING INTO THIS LICENSE, LICENSOR IS A GENERATOR, OWNER, OPERATOR, ARRANGER, OR TRANSPORTER FOR THE PURPOSES OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION, AND LIABILITY ACT, AS AMENDED ("CERCLA") OR OTHER ENVIRONMENTAL LAWS (DEFINED BELOW). NOTHING IN THIS LICENSE IS MEANT BY EITHER PARTY TO CONSTITUTE A WAIVER OF ANY INDEMNITEE'S COMMON CARRIER DEFENSES AND THIS LICENSE SHOULD NOT BE SO CONSTRUED. IF ANY AGENCY OR COURT CONSTRUES THIS LICENSE TO BE A WAIVER OF ANY INDEMNITEE'S COMMON CARRIER DEFENSES, LICENSEE AGREES TO INDEMNIFY, HOLD HARMLESS, AND DEFEND INDEMNITEES FOR ANY LIABILITIES RELATED TO THAT CONSTRUCTION OF THIS LICENSE. IN NO EVENT AS BETWEEN LICENSOR AND LICENSEE AS TO USE OF THE PREMISES AS CONTEMPLATED BY THIS LICENSE SHALL LICENSOR BE RESPONSIBLE TO LICENSEE FOR THE ENVIRONMENTAL CONDITION OF THE PREMISES.**
- 12.4 **IF ANY EMPLOYEE OF ANY LICENSEE PARTY ASSERTS THAT HE OR SHE IS AN EMPLOYEE OF ANY INDEMNITEE, TO THE FULLEST EXTENT PERMITTED BY LAW, LICENSEE SHALL, AND SHALL CAUSE ITS CONTRACTOR TO, RELEASE, INDEMNIFY, DEFEND, AND HOLD THE INDEMNITEES HARMLESS FROM AND AGAINST ANY LIABILITIES ARISING OUT OF OR RELATED TO (IN WHOLE OR IN PART) ANY SUCH ASSERTION INCLUDING, BUT NOT LIMITED TO, ASSERTIONS OF EMPLOYMENT BY AN INDEMNITEE RELATED TO THE FOLLOWING OR ANY PROCEEDINGS THEREUNDER: THE FEDERAL EMPLOYERS' LIABILITY ACT, THE SAFETY APPLIANCE ACT, THE LOCOMOTIVE INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE RESOURCE CONSERVATION AND RECOVERY ACT, AND ANY SIMILAR STATE OR FEDERAL STATUTE.**
- 12.5 **THE FOREGOING OBLIGATIONS OF LICENSEE SHALL NOT APPLY TO THE EXTENT LIABILITIES ARE PROXIMATELY CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY INDEMNITEE, BUT SHALL APPLY TO ALL OTHER LIABILITIES, INCLUDING THOSE ARISING FROM OR ATTRIBUTED TO ANY OTHER ALLEGED OR ACTUAL NEGLIGENCE, INTENTIONAL ACTS, OR STRICT LIABILITY OF ANY INDEMNITEE.**

12.6 Upon written notice from Licensor, Licensee agrees to assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any entity, relating to any matter covered by this License for which Licensee has an obligation to assume liability for and/or save and hold harmless any Indemnitee. Licensee shall pay all costs and expenses incident to such defense, including, but not limited to, reasonable attorneys' fees, investigators' fees, litigation and appeal expenses, settlement payments, and amounts paid in satisfaction of judgments.

13. **Personal Property Risk of Loss. ALL PERSONAL PROPERTY, INCLUDING, BUT NOT LIMITED TO, FIXTURES, EQUIPMENT, OR RELATED MATERIALS UPON THE PREMISES WILL BE AT THE RISK OF LICENSEE ONLY, AND NO INDEMNITEE WILL BE LIABLE FOR ANY DAMAGE THERETO OR THEFT THEREOF, WHETHER OR NOT DUE IN WHOLE OR IN PART TO THE NEGLIGENCE OF ANY INDEMNITEE.**

14. **Insurance.** Licensee shall, at its sole cost and expense, procure and maintain during the life of this License the following insurance coverage:

14.1 **Commercial General Liability Insurance.** This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$2,000,000 each occurrence and an aggregate limit of at least \$4,000,000 but in no event less than the amount otherwise carried by Licensee. Coverage must be purchased on a post 2004 ISO occurrence or equivalent and include coverage for, but not limited to, the following:

- Bodily Injury and Property Damage
- Personal Injury and Advertising Injury
- Fire legal liability
- Products and completed operations

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- The definition of insured contract shall be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.
- Waiver of subrogation in favor of and acceptable to Licensor.
- Additional insured endorsement in favor of and acceptable to Licensor and Jones Lang LaSalle Brokerage, Inc.
- Separation of insureds.
- The policy shall be primary and non-contributing with respect to any insurance carried by Licensor.

It is agreed that the workers' compensation and employers' liability related exclusions in the Commercial General Liability Insurance policy(s) required herein are intended to apply to employees of the policy holder and shall not apply to Licensor's employees.

No other endorsements limiting coverage may be included on the policy.

14.2 **Business Automobile Insurance.** This insurance shall contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

- Bodily injury and property damage
- Any and all vehicles owned, used or hired

This policy shall also contain the following endorsements, which shall be indicated on the certificate of insurance:

- Waiver of subrogation in favor of and acceptable to Licensor.
- Additional insured endorsement in favor of and acceptable to Licensor.
- Separation of insureds.
- The policy shall be primary and non-contributing with respect to any insurance carried by Licensor.

14.3. **Workers Compensation and Employers Liability Insurance.** This insurance shall include coverage for, but not limited to:

- Licensee's statutory liability under the workers' compensation laws of the state(s) in which services are to be performed. If optional under state laws, the insurance must cover all employees anyway.
- Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

- Waiver of subrogation in favor of and acceptable to Licensor.

- 14.4 Railroad Protective Liability Insurance. This insurance shall name only Licensor as the Insured with coverage of at least \$2,000,000 per occurrence and \$6,000,000 in the aggregate. The coverage obtained under this policy shall only be effective during the initial environmental testing and/or exploration. If further exploration and testing is needed at a later date, an additional Railroad Protective Liability Insurance Policy shall be required. The policy shall be issued on a standard ISO form CG 00 35 12 03 and include the following:

- ◆ Endorsed to include the Pollution Exclusion Amendment
- ◆ Endorsed to include the Limited Seepage and Pollution Endorsement.
- ◆ Endorsed to include Evacuation Expense Coverage Endorsement.
- ◆ No other endorsements restricting coverage may be added.
- ◆ The original policy must be provided to Licensor prior to performing any work or services under this License.
- ◆ Definition of "Physical Damage to Property" shall be endorsed to read: "means direct and accidental loss of or damage to all property owned by any named insured and all property in any named insured's care, custody and control arising out of the acts or omissions of the contractor named on the Declarations."

In lieu of providing a Railroad Protective Liability Policy, for a period of one (1) year from the Effective Date, Licensee may participate in Licensor's Blanket Railroad Protective Liability Insurance Policy available to Licensee or its contractor. The limits of coverage are the same as above. The cost is \$633.

- ☐ I **elect** to participate in Licensor's Blanket Policy;
- ☐ I **elect not** to participate in Licensor's Blanket Policy.

14.5 Intentionally deleted.

14.6 Other Requirements.

- 14.6.1 Where allowable by law all policies (applying to coverage listed above) shall contain no exclusion for punitive damages.
- 14.6.2 Licensee agrees to waive its right of recovery against Licensor for all claims and suits against Licensor. In addition, Licensee's insurers, through the terms of the policy or a policy endorsement, must waive their right of subrogation against Licensor for all claims and suits, the certificate of insurance must reflect the waiver of subrogation endorsement. Licensee further waives its right of recovery, and its insurers must also waive their right of subrogation against Licensor for loss of Licensee's owned or leased property or property under Licensee's care, custody, or control.
- 14.6.3 Licensee is not allowed to self-insure without the prior written consent of Licensor. If granted by Licensor, any self-insured retention or other financial responsibility for claims shall be covered directly by Licensee in lieu of insurance. Any and all Licensor liabilities that would otherwise, in accordance with the provisions of this License, be covered by Licensee's insurance will be covered as if Licensee elected not to include a self-insured retention or other financial responsibility for claims.
- 14.6.4 Prior to entering the Premises, Licensee shall furnish to Licensor an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments. Licensee shall notify Licensor in writing at least thirty (30) days prior to any cancellation, non-renewal, substitution, or material alteration. In the event of a claim or lawsuit involving Licensor arising out of this License, Licensee will make available any required policy covering such claim or lawsuit.
- 14.6.5 Any insurance policy shall be written by a reputable insurance company acceptable to Licensor or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provided.
- 14.6.6 If coverage is purchased on a "claims made" basis, Licensee hereby agrees to maintain coverage in force for a minimum of three years after expiration, or termination of this License. Annually, Licensee agrees to provide evidence of such coverage as required hereunder.



- 14.6.7 Licensee represents that this License has been thoroughly reviewed by Licensee's insurance agent(s)/broker(s), who have been instructed by Licensee to procure the insurance coverage required by this License. Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.
- 14.6.8 Not more frequently than once every five years, Licensor may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.
- 14.6.9 If any portion of the operation is to be subcontracted by Licensee, Licensee shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein, naming Licensor as an additional insured, and shall require that the subcontractor shall release, defend and indemnify Licensor to the same extent and under the same terms and conditions as Licensee is required to release, defend and indemnify Licensor herein.
- 14.6.10 Failure to provide evidence as required by this **Section 14** shall entitle, but not require, Licensor to terminate this License immediately. Acceptance of a certificate that does not comply with this Section shall not operate as a waiver of Licensee's obligations hereunder.
- 14.6.11 The fact that insurance (including, without limitation, self-insurance) is obtained by Licensee shall not be deemed to release or diminish the liability of Licensee, including, without limitation, liability under the indemnity provisions of this License. Damages recoverable by Licensor shall not be limited by the amount of the required insurance coverage.
- 14.6.12 These insurance provisions are intended to be a separate and distinct obligation on the part of the Licensee. Therefore, these provisions shall be enforceable and Licensee shall be bound thereby regardless of whether or not indemnity provisions are determined to be enforceable.
- 14.6.13 For purposes of this **Section 14**, Licensor shall mean "Burlington Northern Santa Fe, LLC", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

## **COMPLIANCE WITH LAWS, REGULATIONS, AND ENVIRONMENTAL MATTERS**

### **15. Compliance with Laws, Rules, and Regulations.**

- 15.1 Licensee shall observe and comply with any and all laws, statutes, regulations, ordinances, orders, covenants, restrictions, or decisions of any court of competent jurisdiction ("**Legal Requirements**") relating to the Environmental Work and use of the Premises.
- 15.2 Prior to entering the Premises, Licensee shall and shall cause its contractor(s) to comply with all of Licensor's applicable safety rules and regulations. Licensee must ensure that each of its employees, contractors, agents or invitees entering upon the Premises completes the safety orientation program at the website "www.BNSFcontractor.com" (the "**Safety Orientation**") within one year prior to entering upon the Premises. Additionally, Licensee must ensure that each and every employee of Licensee, its contractors, agents and invitees possess a card certifying completion of the Safety Orientation prior to entering upon the Premises. Licensee must renew the Safety Orientation annually.
- 15.3 Licensee shall obtain on or before the date it or its contractor enters the Premises, any and all additional rights-of way, easements, licenses and other agreements relating to the grant of rights and interests in and/or access to the Premises (collectively, the "**Rights**") and such other rights, licenses, permits, authorizations, and approvals (including without limitation, any necessary local, state, federal or tribal authorizations and environmental permits) that are necessary in order to permit Licensee to conduct the Environmental Work and otherwise to perform its obligations hereunder in accordance with the terms and conditions hereof.
- 15.4 Licensee shall either require that the initial stated term of each such Rights be for a period that does not expire, in accordance with its ordinary terms, prior to the last day of the term of this License or, if the initial stated term of any such Right expires in accordance with its ordinary terms on a date earlier than the last day of the term of this License, Licensee shall, at its cost, exercise any renewal rights thereunder, or otherwise acquire such extensions, additions and/or replacements as may be necessary, in order to cause the stated term thereof to be continued until a date that is not earlier than the last day of the term of this License.

- 15.5 Upon the expiration or termination of any Right that is necessary in order for Licensee to conduct the Environmental Work in accordance with the terms and conditions of this License, this License thereby shall automatically expire upon such expiration or termination of the Right.

16. Environmental.

- 16.1 Licensee shall strictly comply with **Environmental Laws** (as defined below). Licensee shall not maintain a treatment, storage, transfer or disposal facility, or underground storage tank, as defined by Environmental Laws, on the Premises. Licensee shall not release or suffer the release of oil or Hazardous Materials (as defined below) on or about the Premises.
- 16.2 Licensee covenants that it will not store, handle, manage, or transport Hazardous Materials across or along Licensors property, except to the extent required and approved as part of the Environmental Work. Upon request by Licensors, Licensee agrees to furnish Licensors with proof, satisfactory to Licensors that Licensee is in compliance with the provisions of this **Section 16.2**.
- 16.3 Investigation-derived waste ("IDW") and development water will be handled in accordance with all applicable Environmental Laws. IDW and development water shall be removed from the Premises at the end of each work day.
- 16.4 To the extent the Environmental Work includes removal of soils or other such material as wastes, Licensee shall be deemed the generator of that waste. All waste shall be appropriately managed and properly disposed of at an appropriately-licensed facility in accordance with all applicable Legal Requirements, including manifesting requirements.
- 16.5 Licensee shall give Licensors immediate notice to Licensors Resource Operations Center at (800) 832-5452 of any known (i) release of Hazardous Materials on, from, or affecting the Premises, (ii) violation of Environmental Laws, or (iii) inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Licensees use of the Premises. Licensee shall use its best efforts to immediately respond to any release on, from, or affecting the Premises. Licensee also shall give Licensors prompt notice of all measures undertaken on behalf of Licensee to investigate, remediate, respond to or otherwise cure such release or violation.
- 16.6 Licensee recognizes and agrees to assume all responsibility for all present and future environmental obligations imposed under applicable Environmental Laws, regulations or other such requirements relating to contamination of the Premises, groundwater, or other contaminated media arising from, caused by, contributed to, or in any way growing out of Licensees entry, occupation, or use of the Premises, or in any way related to Licensees Environmental Work. Licensee further agrees to undertake at its sole cost and expense any cleanup of any contamination of the Premises, groundwater, or other contaminated media arising from, caused by, contributed to, or in any way growing out of Licensees entry, occupation, or use of the Premises, or in any way related to Licensees Environmental Work as required by applicable laws and regulations.
- 16.7 Licensee agrees to waive any and all statutes of limitations applicable to any controversy or dispute arising out of **Section 16.4**, and Licensee further agrees that it will not raise or plead a statute of limitations defense against Licensors in any action arising out of Licensees failure to comply with the preceding subsection.
- 16.8 If Licensors has notice from Licensee or otherwise of a release or violation of Environmental Laws arising in any way with respect to the Environmental Work which occurred or may occur during the term of this License, Licensors may require Licensee, at Licensees sole risk and expense, to take timely measures to investigate, remediate, respond to or otherwise cure such release or violation affecting the Premises or Licensors right-of-way.
- 16.9 Licensee shall immediately report to Licensors Resource Operations Center at (800) 832-5452 any conditions or activities upon the Premises known to Licensee which create a risk of harm to persons, property or the environment and shall take all reasonable actions necessary to prevent injury to persons, property or the environment arising out of such conditions or activities; provided, however, that Licensees reporting to Licensors shall not relieve Licensee of any obligation whatsoever imposed on it by this License. Licensee shall promptly respond to Licensors request for information regarding said conditions or activities.

- 16.10 Licensors shall have the option to obtain split samples of any media sampled and otherwise have reasonable access to the groundwater monitoring well(s) subject to this License for the purpose of obtaining samples or other information from the monitoring well(s). Licensee shall also advise Licensors of any applicable health and safety plans or other similar programs in effect with respect to the Environmental Work on the Premises or Licensee's entry, occupation, or use of the Premises.
- 16.11 To the extent the Environmental Work includes performance of any remedial activities, such remedial activities shall be completed to the satisfaction of the state or federal authority having jurisdiction over such remedial activity. Licensee shall obtain a No Further Action Letter, Release, or other such equivalent closure document from the state or federal agency having jurisdiction over the remediation of the Premises. Such No Further Action Letter, Release, or other such equivalent closure document shall not be contingent upon or specify the performance of any further work or conditions with respect to the Premises.
- 16.12 Licensee agrees to waive any and all statutes of limitations applicable to any controversy or dispute arising out of Sections 4 and 16.11, and Licensee further agrees that it will not raise or plead a statute of limitations defense against Licensors in any action arising out of Licensee's failure to comply with Sections 4 or 16.11.
- 16.13 Until the Restoration Obligations (defined below) have been completed by Licensors pursuant to Section 21, Licensors may, at Licensors's option, require Licensee to conduct an environmental audit, including but not limited to sampling, of the Premises through an environmental consulting engineer acceptable to Licensors, at Licensee's sole cost and expense, to determine if any noncompliance or environmental damage to the Premises has occurred during occupancy and use thereof by Licensee. The audit shall be conducted to Licensors's satisfaction and a copy of the audit report shall promptly be provided to Licensors for its review. Licensee shall pay all expenses for any remedial or corrective action that may be required as a result of said audit to correct any noncompliance or environmental damage, and Licensee shall diligently pursue all necessary work to completion.
- 16.14 Notwithstanding anything in this Section 16, the parties agree that Licensors has no duty or obligation to monitor Licensee's use of the Premises to determine Licensee's compliance with Environmental Laws, it being solely Licensee's responsibility to ensure that Licensee's use of the Premises is compliant. Neither the exercise nor the failure by Licensors to exercise any rights granted in this Section will alter the liability allocation provided by this License.
- 16.15 "Environmental Law(s)" shall mean any federal, state, local, or tribal law, statute, ordinance, code, rule, regulation, policy, common law, license, authorization, decision, order, or injunction which pertains to health, safety, any Hazardous Material, or the environment (including but not limited to ground, air, water, or noise pollution or contamination, and underground or above-ground tanks) and shall include, without limitation, CERCLA 42 U.S.C. §9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. §5101 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq.; the Clean Air Act, 42 U.S.C. §7401 et seq.; the Toxic Substances Control Act, 15 U.S.C. §2601 et seq.; the Safe Drinking Water Act, 42 U.S.C. §300f et seq.; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. 11001 et seq.; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 to 136y; the Oil Pollution Act, 33 U.S.C. 2701 et seq.; and the Occupational Safety and Health Act, 29 U.S.C. 651 et seq.; all as have been amended from time to time, and any other federal, state, local, or tribal environmental requirements, together with all rules, regulations, orders, and decrees now or hereafter promulgated under any of the foregoing, as any of the foregoing now exist or may be changed or amended or come into effect in the future.
- 16.16 "Hazardous Material(s)" shall include but shall not be limited to any substance, material, or waste that is regulated by any Environmental Law or otherwise regulated by any federal, state, local, or tribal governmental authority because of toxic, flammable, explosive, corrosive, reactive, radioactive or other properties that may be hazardous to human health or the environment, including without limitation asbestos and asbestos-containing materials, radon, petroleum and petroleum products, urea formaldehyde foam insulation, methane, lead-based paint, polychlorinated biphenyl compounds, hydrocarbons or like substances and their additives or constituents, pesticides, agricultural chemicals, and any other special, toxic, or hazardous (i) substances, (ii) materials, or (iii) wastes of any kind, including without limitation those now or hereafter defined, determined, or identified as "hazardous chemicals", "hazardous substances", "hazardous materials", "toxic substances", or "hazardous wastes" in any Environmental Law.



- 16.17 Licensee shall promptly transmit to Licensor copies of all documents, records, reports, data boring logs, well completion and other information generated during any Environmental Work performed on the Premises ("**Environmental Reports**") to Licensor's Remediation Manager and email copies of the same to **EnvironmentalAccess@bnsf.com**.
- 16.18 At least once every six months for the duration of this License and upon completion of the Environmental Work or upon termination, whichever occurs first, Licensee shall prepare and submit to Licensor a **Status Report** summarizing (i) all work and activities completed to date; (ii) remaining work; (iii) Environmental Reports generated during the reporting period; (iv) and any issues noted on or with the Premises. Photo logs documenting relevant activities and/or site conditions shall accompany each Status Report.
- 16.19 Unless otherwise required by applicable law, Licensee shall keep confidential and shall not disclose any Environmental Reports, Status Report, other such documents, records, reports, data boring logs, well completion and any other information obtained in connection with this License, to third parties without the prior written consent of Licensor.
- 16.20 Licensee agrees to provide Licensor with copies of any and all information and reports that concern this License, the Environmental Work, or any condition on the Premises before such information and/or reports are submitted to a regulatory agency.
- 16.21 The agreements and obligations of this Section 16 shall survive the expiration or earlier termination of this License.

#### **DISCLAIMER OF WARRANTIES**

##### **17. No Warranties.**

- 17.1 **LICENSOR'S DUTIES AND WARRANTIES ARE LIMITED TO THOSE EXPRESSLY STATED IN THIS LICENSE AND SHALL NOT INCLUDE ANY IMPLIED DUTIES OR IMPLIED WARRANTIES, NOW OR IN THE FUTURE. NO REPRESENTATIONS OR WARRANTIES HAVE BEEN MADE BY LICENSOR OTHER THAN THOSE CONTAINED IN THIS LICENSE. LICENSEE HEREBY WAIVES ANY AND ALL WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO THE PREMISES OR WHICH MAY EXIST BY OPERATION OF LAW OR IN EQUITY, INCLUDING, WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, HABITABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**
- 17.2 **LICENSOR MAKES NO WARRANTY, REPRESENTATION OR CONDITION OF ANY KIND, EXPRESS OR IMPLIED, CONCERNING (A) THE SCOPE OF THE LICENSE OR OTHER RIGHTS GRANTED HEREUNDER TO LICENSEE OR (B) WHETHER OR NOT LICENSEE'S CONSTRUCTION, MAINTENANCE, OWNERSHIP, USE OR PERFORMANCE OF THE ENVIRONMENTAL WORK WILL VIOLATE OR INFRINGE UPON THE RIGHTS, INTERESTS AND ESTATES OF THIRD PARTIES, INCLUDING, WITHOUT LIMITATION, ANY LEASES, USE RIGHTS, EASEMENTS AND LIENS OF ANY THIRD PARTY.**

##### **18. Disclaimer of Warranty for Quiet Enjoyment. **LICENSOR DOES NOT WARRANT ITS TITLE TO THE PREMISES NOR UNDERTAKE TO DEFEND LICENSEE IN THE PEACEABLE POSSESSION OR USE THEREOF. NO COVENANT OF QUIET ENJOYMENT IS MADE.****

19. **Eviction at Risk of Licensee. In case of the eviction of Licensee by anyone owning, claiming title to, or claiming any interest in the Premises, or by the abandonment by Licensor of the affected rail corridor, Licensor shall not be liable (i) to refund Licensee any compensation paid hereunder, except for the pro rata part of any recurring charge paid in advance, or (ii) for any damage Licensee sustains in connection with the eviction.**

#### **DEFAULT, TERMINATION, AND SURRENDER**

20. **Default and Termination. In addition to and not in limitation of Licensor's right to terminate for failure to provide evidence of insurance as required pursuant to the terms of **Section 15**, the following events are also deemed to be events of default pursuant to which Licensor has the right to terminate as set forth below:**

- 20.1 If default shall be made in any of Licensee's covenants, agreements, or obligations contained in this License and Licensee fails to cure said default within thirty (30) days after written notice is provided to Licensee by Licensor, or in case of any assignment or transfer of this License in violation of **Section 23** below, Licensor may, at its option, terminate this License by serving five (5) days' notice in writing upon Licensee. Notwithstanding the foregoing, Licensor shall have the right to terminate this License immediately if Licensee fails to provide evidence of insurance as required in **Section 14**.

- 20.2 Should Licensee not comply fully with the obligations of **Section 16** regarding the handling or transporting of hazardous waste or hazardous material, notwithstanding anything contained in any other provision of this License, Licensors may, at its option, terminate this License by serving five (5) days' notice of termination upon Licensee.
- 20.3 Any waiver by Licensors of any default or defaults shall not constitute a waiver of the right to terminate this License for any subsequent default or defaults, nor shall any such waiver in any way affect Licensors' ability to enforce any Section of this License. The remedy set forth in this **Section 20** shall be in addition to, and not in limitation of, any other remedies that Licensors may have at law or in equity.
- 20.4 In addition to and not in limitation of Licensors' rights to terminate this License for failure to provide evidence of insurance or occurrence of defaults as described above, this License may be terminated by Licensors, at any time, by Licensors serving ten (10) days' written notice of termination upon Licensee. This License may be terminated by Licensee upon execution of Licensors' Mutual Termination Letter Agreement then in effect. Upon expiration of the time specified in such notice, this License and all rights of Licensee shall absolutely cease. Such termination shall not release either party hereto from any liability or obligation under the License, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or thereafter in case by the terms of the License it is provided that anything shall or may be done after termination hereof.

21. Surrender of the Premises.

- 21.1 Upon termination, should Licensee have installed its monitoring well(s) on the Premises, once Licensee's well(s) are retired, Licensee shall provide Licensors a copy of the closure documents, submitted directly to Licensors' Environmental Remediation Manager at the applicable address listed in **Section 24** below with copies of the same to **EnvironmentalAccess@bnsf.com**.
- 21.2 Upon completion of Licensee's work on the Premises or upon termination of this License for any reason, whichever shall occur first, Licensee shall, at its sole cost and expense:
- 21.2.1 remove all of its equipment from the Premises;
- 21.2.2 report and restore any damage to the Premises arising from, growing out of, or connected with Licensee's use of the Premises;
- 21.2.3 remedy any unsafe conditions on the Premises created or aggravated by Licensee; and
- 21.2.4 properly fill all holes, borings, or temporary wells installed on the Premises by Licensee with compacted bentonite, or other media approved by Licensors, to match the surrounding ground level;
- 21.2.5 properly fill and compact all excavations to match the surrounding ground level with material that meets the specifications and approval of Licensors;
- 21.2.6 properly close, seal, abandon, or remove any and all permanent and temporary groundwater monitoring wells in accordance with all applicable Legal Requirements and Environmental Laws and to Licensors' sole satisfaction; and
- 21.2.7 perform any other work to restore the Premises substantially the condition which existed as of the Effective Date.
- 21.3 Upon any expiration or termination of this License, if Licensee fails to surrender the Premises to Licensors or if Licensee fails to complete its obligations under this **Section 21.1** above (the "**Restoration Obligations**"), Licensee shall have a limited license to enter upon the Premises solely to the extent necessary for Licensee to complete the Restoration Obligations, and all liabilities and obligations of Licensee hereunder shall continue in effect until the Premises are surrendered and the Restoration Obligations are completed. Neither termination nor expiration shall release Licensee from any liability or obligation under this License, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination, or, if later, the date when Licensee surrenders the Premises and all of the Restoration Obligations are completed.

- 21.4 If Licensee fails to complete the Restoration Obligations within thirty (30) days after the date of such termination of its tenancy, then Licenser may, at its election, either: (i) remove any equipment and the other Improvements or otherwise restore the Premises, and in such event Licensee shall, within thirty (30) days after receipt of bill therefor, reimburse Licenser for cost incurred, (ii) upon written notice to Licensee, take and hold the equipment and the other Improvements and personal property as its sole property, without payment or obligation to Licensee therefor, or (iii) specifically enforce Licensee's obligation to restore and/or pursue any remedy at law or in equity against Licensee for failure to so restore. Further, if Licenser has consented to the equipment and the other Improvements remaining on the Premises following termination, Licensee shall, upon request by Licenser, provide a bill of sale in a form acceptable to Licenser conveying the equipment and the other Improvements to Licenser.

## **MISCELLANEOUS**

22. **Successors and Assigns.** All provisions contained in this License shall be binding upon, inure to the benefit of, and be enforceable by the respective successors and assigns of Licenser and Licensee to the same extent as if each such successor and assign was named a party to this License.
23. **Assignment.**
- 23.1 Licensee may not sell, assign, transfer, or hypothecate this License or any right, obligation, or interest herein (either voluntarily or by operation of law, merger, or otherwise) without the prior written consent of Licenser, which consent may not be unreasonably withheld or delayed by Licenser. Any attempted assignment by Licensee in violation of this **Section 23** shall be a breach of this License and, in addition, shall be voidable by Licenser in its sole and absolute discretion.
- 23.2 For purposes of this **Section 23**, the word "assign" shall include without limitation (a) any sale of the equity interests of Licensee following which the equity interest holders of Licensee immediately prior to such sale own, directly or indirectly, less than 50% of the combined voting power of the outstanding voting equity interests of Licensee, (b) any sale of all or substantially all of the assets of (i) Licensee and (ii) to the extent such entities exist, Licensee's parent and subsidiaries, taken as a whole, or (c) any reorganization, recapitalization, merger or consolidation involving Licensee. Notwithstanding the foregoing, any reorganization, recapitalization, merger or consolidation following which the equity interest holders of Licensee immediately prior to such reorganization, recapitalization, merger or consolidation own, directly or indirectly, at least 50% of the combined voting power of the outstanding voting equity interests of Licensee or any successor thereto or the entity resulting from such reorganization, recapitalization, merger or consolidation shall not be deemed an assignment. THIS LICENSE SHALL NOT RUN WITH THE LAND WITHOUT THE EXPRESS WRITTEN CONSENT OF LICENSOR, SUCH CONSENT TO BE IN LICENSOR'S SOLE DISCRETION.
- 23.3 Notwithstanding the provisions of **Section 23.1** above or anything contained in this License to the contrary, if Licensee sells, assigns, transfers, or hypothecates this License or any interest herein in contravention of the provisions of this License (a "**Purported Assignment**") to another party (a "**Purported Transferee**"), the Purported Transferee's enjoyment of the rights and privileges granted under this License shall be deemed to be the Purported Transferee's agreement to be bound by all of the terms and provisions of this License, including but not limited to the obligation to comply with the provisions of **Section 15** above concerning insurance requirements. In addition to and not in limitation of the foregoing, Licensee, for itself, its successors and assigns, shall indemnify, defend and hold harmless Licenser for all Liabilities of any nature, kind or description of any person or entity directly or indirectly arising out of, resulting from or related to (in whole or in part) a Purported Assignment.
- 23.4 The provisions of this **Section 23** shall survive the expiration or earlier termination of this License.
24. **Notices.** Any notice, invoice, or other writing required or permitted to be given hereunder by one party to the other shall be in writing and the same shall be given and shall be deemed to have been served and given if (i) placed in the United States mail, certified, return receipt requested, or (ii) deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than thirty (30) days' advance written notice of such change in address.



If to Licensors: Jones Lang LaSalle Brokerage, Inc.  
2650 Lou Menk Dr., MOB1  
Fort Worth, TX 76131  
Attn: Permits/Licenses

with a copy to: BNSF Railway Company  
2650 Lou Menk Dr.  
Fort Worth, TX 76131

with a copy to: [EnvironmentalAccess@bnsf.com](mailto:EnvironmentalAccess@bnsf.com)

with a copy to: BNSF Remediation Manager  
[Thomas.Jones@bnsf.com](mailto:Thomas.Jones@bnsf.com)

If to Licensee: City of Merced  
~~140 Blue Ravine, Suite 200~~ **678 W. 18th Street**  
~~Folsom, CA 95630~~ **Merced, CA 95340**

25. Survival. Neither termination nor expiration will release either party from any liability or obligation under this License, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration, or, if later, the date when the Premises are restored to its condition as of the Effective Date.
26. Recordation. It is understood and agreed that this License shall not be placed or allowed to be placed on public record.
27. Applicable Law. All questions concerning the interpretation or application of provisions of this License shall be decided according to the substantive laws of the State of Texas without regard to conflicts of law provisions.
28. Severability. To the maximum extent possible, each provision of this License shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this License shall be prohibited by, or held to be invalid under, applicable law, such provision shall be ineffective solely to the extent of such prohibition or invalidity, and this shall not invalidate the remainder of such provision or any other provision of this License.
29. Integration. This License is the full and complete agreement between Licensors and Licensee with respect to all matters relating to Licensee's use of the Premises, and supersedes any and all other agreements between the parties hereto relating to Licensee's use of the Premises as described herein. However, nothing herein is intended to terminate any surviving obligation of Licensee or Licensee's obligation to defend and hold Licensors harmless in any prior written agreement between the parties.
30. Joint and Several Liability. If Licensee consists of two or more parties, all the covenants and agreements of Licensee herein contained shall be the joint and several covenants and agreements of such parties.
31. Waiver. The waiver by Licensors of the breach of any provision herein by Licensee shall in no way impair the right of Licensors to enforce that provision for any subsequent breach thereof.
32. Interpretation.
  - 32.1 This License shall be interpreted in a neutral manner, and not more strongly for or against any party based upon the source of the draftsmanship; both parties hereby agree that this License shall not be subject to the principle that a contract would be construed against the party which drafted the same. Article titles, headings to sections and paragraphs and the table of contents (if any) are inserted for convenience of reference only and are not intended to be a part or to affect the meaning or interpretation hereof. The exhibit or exhibits referred to herein shall be construed with and as an integral part of this License to the same extent as if they were set forth verbatim herein.

- 32.2 As used herein, "include", "includes" and "including" are deemed to be followed by "without limitation" whether or not they are in fact followed by such words or words of like import; "writing", "written" and comparable terms refer to printing, typing, lithography and other means of reproducing words in a visible form; references to any person are also to that person's successors and permitted assigns; "hereof", "herein", "hereunder" and comparable terms refer to the entirety hereof and not to any particular article, section, or other subdivision hereof or attachment hereto; references to any gender include references to the masculine or feminine as the context requires; references to the plural include the singular and vice versa; and references to this License or other documents are as amended, modified or supplemented from time to time.
33. Counterparts. This License may be executed in multiple counterparts, each of which shall, for all purposes, be deemed an original but which together shall constitute one and the same instrument, and the signature pages from any counterpart may be appended to any other counterpart to assemble fully executed documents, and counterparts of this License may also be exchanged via email or electronic facsimile machines and any email or electronic facsimile of any party's signature shall be deemed to be an original signature for all purposes.
34. Licensors' Representative. Jones Lang LaSalle Brokerage, Inc. is acting as representative for BNSF Railway Company.

This License has been duly executed by the parties hereto as of the below each party's signature' to be effective, however, as of the Effective Date

**BNSF RAILWAY COMPANY**, a Delaware corporation

By: Jones Lang LaSalle Brokerage, Inc.  
2650 Lou Menk Dr., MOB1  
Fort Worth, TX 76131

By: \_\_\_\_\_

Patricia Villegas  
Vice President – Permits

**CITY OF MERCED**

~~110 Blue Ravine, Suite 200~~  
~~Folsom, CA 95630~~

678 W. 18<sup>th</sup> Street  
Merced CA, 95340

By: \_\_\_\_\_

Title: \_\_\_\_\_

APPROVED AS TO FORM:

*Quig Cornwell*  
City Attorney





July 28, 2023

RE: Highway 59 Bridge Widening over Black Rascal Creek – Request for BNSF Access

The City of Merced proposes to widen and improve Highway 59 (Hwy 59) from a two-lane roadway to four-lanes from the 16th Street intersection to approximately 600 feet south of Buena Vista Drive. The Project also proposes to replace the Black Rascal and South Fork Black Rascal Creek bridges. Additional Project features include standard shoulders, intersection improvements, class II bicycle lanes, striped two-way left turn lane and median, and sidewalks.

As part of the project, widening of the existing at-grade crossing of the BNSF railroad tracks is included. Access is requested within the BNSF right of way to perform soil sampling and testing associated with the at-grade crossing improvements. The below information includes details of the work that will be performed within the BNSF right of way as part of this access request:

- Soil samples will be collected using hand augers – no heavy equipment will be used within the railroad right of way.
- Soil samples will be collected at two depths of 0-1 feet and 1-2 feet.
- Samples will be collected from two locations within the right of way, as shown on the attached figure. It will take approximately 15 minutes at each location to collect the samples.
- There will be no need to cross the tracks to perform the sampling.
- The purpose of the sampling is to determine if there is any potentially hazardous material within the limits of the project improvements to make the roadway contractor aware of the materials as part of the construction contract documents.
- The samples will be analyzed for heavy metals, organochlorine pesticides, diesel-range and motor oil-range organics, semi-volatile organic compounds, and polychlorinated biphenyls.
- The cost of labor, supplies and testing associated with the two sampling locations within the BNSF right of way is \$2,000.

Please let me know if you have any questions regarding the requested access and work within the BNSF right of way.

Sincerely,

Jacqueline Lockhart, PE  
Project Engineer

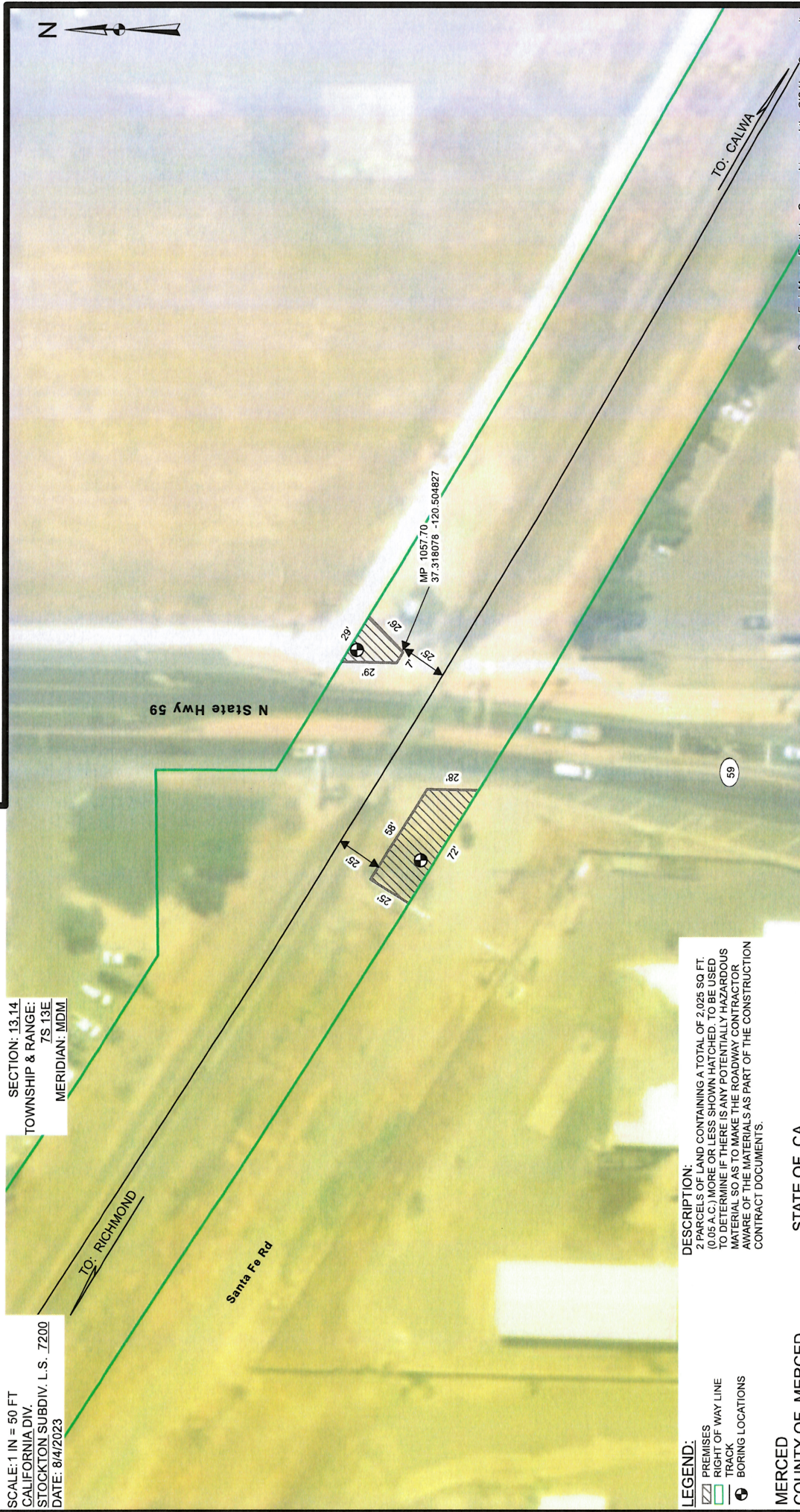


# EXHIBIT "A"

SCALE: 1 IN = 50 FT  
CALIFORNIA DIV.  
STOCKTON SUBDIV. L.S. 7200  
DATE: 8/4/2023

SECTION: 13, 14  
TOWNSHIP & RANGE:  
7S 13E  
MERIDIAN: MDM

TRIM LINE



DESCRIPTION:  
2 PARCELS OF LAND CONTAINING A TOTAL OF 2.025 SQ. FT.  
(0.05 A.C.) MORE OR LESS SHOWN HATCHED. TO BE USED  
TO DETERMINE IF THERE IS ANY POTENTIALLY HAZARDOUS  
MATERIAL SO AS TO MAKE THE ROADWAY CONTRACTOR  
AWARE OF THE MATERIALS AS PART OF THE CONSTRUCTION  
CONTRACT DOCUMENTS.

LEGEND:  
[Hatched Box] PREMISES  
[Green Line] RIGHT OF WAY LINE  
[Black Line] TRACK  
[Circle with Dot] BORING LOCATIONS

MERCED  
COUNTY OF MERCED  
STATE OF CA

REVISION 2

Source: Esri, Maxar, Earthstar Geographics, and the GIS User Community

DRAWN BY: JNC DRAWING NO. 87672



