

WEEKLY REPORT TO THE CITY COUNCIL

November 14, 2013

Members of the City Council
City of Tacoma, Washington

Dear Mayor and Council Members:

STUDY SESSION/WORK SESSION

1. The **City Council Study Session** of Tuesday, November 19, 2013, will be held in Room 16 of the Tacoma Municipal Building North, at Noon. Discussion items will be: (1) **Multi City Portal – Branding and Website**; (2) **Multi City Portal - Interlocal Agreement**; (3) **Other Items of Interest**; (4) **Agenda Review**; and **Closed Session – Labor Negotiations**.

Five Puget Sound cities (Tacoma, Seattle, Bellevue, Everett, and Bellingham) have been working together to create an online portal to make it easier for businesses to obtain business licenses and to pay their local business and occupation (B&O) taxes. Through the Multi-City Business License and Tax Portal, businesses will be able to create an online account and enter their sales information for all participating cities in one convenient place. The software will then calculate the tax due for each city and provide a way for the business to pay online.

Currently hundreds of Puget Sound companies conduct business in multiple cities and are required to be licensed in, to file B&O tax returns in, and to calculate and pay taxes for each city separately. The new portal will make getting a business license and paying local B&O taxes easier and quicker than ever before. At Tuesday's Study Session Finance staff will provide Council a briefing on the **Multi City Portal branding and website and the proposed Multi City Portal Interlocal Agreement, which is scheduled to be on the November 26th Council agenda** for your consideration.

2. The updated **Tentative City Council Forecast Calendar** is attached for your information.

COUNCIL REQUESTS/INQUIRIES

3. In the attached memorandum, Interim Planning and Development Services Director Peter Huffman provides information on the **procedures for processing Conditional Use Permit applications and information related to the Corban University – Blue Ribbon Conditional Use Permit**.
4. City Attorney Elizabeth Pauli provides the attached memorandum regarding the **two types of matters that trigger the Council's quasi-judicial appellate review**: (1) Hearing Examiner recommendations, and (2) contracts exceeding \$200,000.

5. At the request of Mayor Strickland and Deputy Mayor Campbell, Interim Public Works Director Kurtis Kingsolver provides the attached memorandum with an **update on the East 64th Street improvement project** (between Pacific Avenue and Portland Avenue). This project is listed in both the Six-Year Comprehensive Transportation Plan and the City's Integrated Transportation Plan.
6. Housing Division Manager Carey Jenkins provides responses to Council inquiries during the November 5th Study Session presentation on the **Community Development Block Grant, HOME Investment Partnership, and Emergency Solutions Grant Funding Priorities**.
7. City Attorney Elizabeth Pauli provides the attached memorandum related to the question of **whether or not the City of Tacoma can restrict the products that a railway can transport on its line or through its jurisdiction**. Although the City cannot, due to federal laws controlling the issue, reasonable regulation by the carrier may be allowed.

MARK YOUR CALENDARS

8. You have been invited to the following events:
 - **Lecture and Panel Discussion by Hedrick Smith of his book "Who Stole the American Dream" on Friday, November 15th, 11:30 a.m. to 1:00 p.m.**, University of Washington Tacoma, Tacoma Room, located at 1900 Commerce Street.
 - **STAR Communities Recognition Event at NLC's 2013 Congress of Cities on Saturday, November 16th, 12:30 p.m.**, located at the Washington State Convention Center, 800 Convention Place, Seattle.
 - **Street Name Dedication Ceremony in honor of Bob Dahl, on Monday, November 18th, 4:00 to 5:00 p.m.**, located at Lowell Elementary School, 810 Mr. Dahl Drive.
 - **Zoolights Program and Lighting Ceremony on Friday, November 29th, 4:35 p.m.**, at Point Defiance Zoo and Aquarium, located at 5400 North Pearl Street. Gates open at 4:00 p.m., with Zoolights from 5:00 to 9:00 p.m.

- **Tacoma-Pierce County Chambers Public Officials Holiday Reception on Thursday, December 11th, 5:00 – 8:00 p.m.**, at the Hotel Murano, located at 1320 Broadway Plaza.

Sincerely,



T.C. Broadnax
City Manager

TCB:crh
Attachments

**City of Tacoma 2013-2014
City Council Forecast**

Date	Meeting	Subject	Department
November 19, 2013	Study Session	Multi City Portal - Branding and Website	Finance
		Multi City Portal - Interlocal Agreement	Finance
		Closed Session - Labor Negotiations	HR
	Committee of the Whole	Other Items of Interest	
	City Council Meeting		
November 26, 2013	Study Session	2013/2014 Mid-Biennium Budget Modification	Finance
		2014 State and Federal Legislative Agenda	GRO
		Executive Session - City Manager Performance Review	Council
	City Council Meeting	Public Hearing Six-Year Transportation Program	Public Works
		Mid-Biennial Modification Presentation	Finance
December 3, 2013	Joint Utility Board Study Session	MyAccount – Website Upgraded for Customer Payments	TPU
		IRP and How Conservation Will Meet Future Load	TPU
		Mountain Rail Division Annual Review	PW/Tacoma Rail
	Study Session	South Downtown Subarea Plan & EIS	PDS
	Committee of the Whole	Executive Session - City Manager Performance Review	Council
	City Council Meeting	Mid-Biennial Modification Presentation	Finance
December 10, 2013	Study Session	MLK Subarea Plan & EIS	PDS
		Executive Session-City Manager Performance Review(tentative)	Council
	City Council Meeting		
December 17, 2013	Study Session	Tacoma Link Expansion	GRO/Sound Transit
	Committee of the Whole		
	City Council Meeting		
December 24, 2013		CANCELLED	
December 31, 2013		CANCELLED	
2014			
January 7, 2014	Study Session		
	Committee of the Whole		
	City Council Meeting		
January 14, 2014	Study Session		
	City Council Meeting		
January 21, 2014	Study Session	Overview of STAR Project	CMO/EPS
	Committee of the Whole		
	City Council Meeting		
January 28, 2014	Study Session		
	City Council Meeting		
February 4, 2014	Study Session		
	Committee of the Whole		
	City Council Meeting		
February 11, 2014	Study Session		
	City Council Meeting		
February 18, 2014	Study Session		
	Committee of the Whole		
	City Council Meeting		
February 25, 2014	Study Session		
	City Council Meeting		



TO: T.C. Broadnax, City Manager
FROM: Peter Huffman, Interim Director, Planning and Development Services
SUBJECT: Corban University-Blue Ribbon Conditional Use Permit
DATE: November 14, 2013

PH

It has been brought to my attention that several Council Members, the Mayor and yourself have received inquiries regarding the public meeting and decision making process for the review and issuance of conditional use permits in the City. Specifically, recent inquiries have related to a conditional use permit application submitted by Corban University and Blue Ribbon.

On October 16, 2013, Corban University filed a Conditional Use Permit on behalf of themselves and Blue Ribbon to address recent changes in the level of activity at the Weyerhaeuser Mansion (4301 North Stevens Street). The focus of the request is use of the site for weddings. Though weddings have been held at the site for decades, the number of weddings has escalated in recent years and Corban has allowed dancing and alcohol, which is different from years past. Also, Corban has the property on the market and desires to market the site as a combination school/event center.

Public Notice was mailed on October 24, 2013, to all property owners within 400 feet of the subject site, starting a 30-day comment period. Public comments will be accepted until November 25, 2013. Written comments should be directed to Philip Kao at 747 Market Street, Room 345, Tacoma, WA 98402 or by e-mail to pkao@cityoftacoma.org. A public meeting was held on November 7, 2013. Seventy-eight people attended and approximately 25 people spoke. The meeting was recorded and the recording is part of the administrative record.

Notice has also been transmitted to other City departments and agencies that may have oversight of activities held at the site. To date, we have been advised by Traffic Engineering that a traffic study and parking study is required. The applicant has been advised of this requirement.

Upon completion of the public comment period, all comments will be forwarded to the applicant and the applicant will be offered an opportunity to respond. A decision will be rendered after the applicant has responded to the comments and after submitting the required studies. The general public is only afforded, by code, the one comment period. The one exception would be if the applicant, in responding to comments, proposes a modification to the project that may have additional or different impacts. In that case, an additional comment period is allowed. We estimate that a decision will be issued 30-60 days after the end of the public comment period. The Director of Planning and Development Services is tasked with issuing the decision after reviewing all of the applicable information (applicant's submittal, comments, studies, applicable policies, etc.).

The decision is subject to a 14-day appeal period. Appeals must be filed with the City's Hearing Examiner. *Tacoma Municipal Code* 13.05.050 sets forth who may appeal and information that must be filed with the appeal. The appeal must include a \$311.30 filing fee. The appeal process often takes up to 60 or 90 days and includes an appeal hearing. The appeal hearing before the City's Hearing Examiner is limited to the issues identified in the appeal and only those parties appealing and listed witnesses may testify. The Hearing Examiner's decision is subject to a 21-day appeal period. Any appeal must be filed with the Superior Court for the State of Washington.

It is my understanding that specific inquiries have been brought to your attention regarding attendance of the decision maker for conditional use permits at public information meetings. Traditionally the decision maker, in this case the Director of Planning and Development Services, does not attend the public information meeting because the public meeting is administrative and like the rest of the public process, is conducted by staff assigned to the case. Unlike a public hearing, which is a quasi-judicial hearing run by the City's Hearing Examiner, the public meeting is meant to be more casual and is one avenue the City uses to collect information. Public meetings are only held when at least five neighbors request the meeting; when the neighborhood council requests the meeting; or, as in this case, when the Director requires the meeting because of broad interest. Staff met with the Director before and after the meeting and will meet with the Director again prior to preparation of staff report. All information relevant to the permit is forwarded to the Director along with a report.

In regards to the format and location of public information meetings for conditional use permits, the process was modified four years ago to create a more formal atmosphere. Land use public meetings are often emotionally charged because of the nature of the projects being discussed. After several contentious meetings (which sometimes were held in rooms that could not accommodate the crowd, were not recorded, and which were difficult for staff to facilitate), it was decided a more formal atmosphere would improve the effectiveness of the meetings. Having the attendees speak into a microphone, locating the facilitator at the front of the meeting room, and having the attendees direct their comments to the facilitator has resulted in meetings where everyone is afforded an opportunity to speak in an orderly fashion resulting in greater public input in the decision-making process. Although some members of the public have expressed concerns regarding this approach, the overall feedback is that a formal setting at City Hall or some other venue provides a meaningful experience in which citizens on both sides of an issue feel that their concerns have been heard. Staff continues to strive to improve our public input process so citizens have every opportunity to participate in the land use decision-making process.

Should you or the Council have additional questions, please contact Planning Manager Jana Magoon, Planning and Development Services, (253) 882-9713



TO: T.C. Broadnax, City Manager
FROM: Elizabeth Pauli, City Attorney *EP*
SUBJECT: Quasi-Judicial Appellate Review
DATE: November 13, 2013

QUESTION PRESENTED

What matters trigger the City Council's quasi-judicial appellate review?

BRIEF ANSWER

Quasi-judicial appellate review by the City Council is triggered by appeals of two types of matters: (1) Hearing Examiner recommendations, and (2) contracts exceeding \$200,000.

DISCUSSION

1. Hearing Examiner Appeals. The jurisdiction of the Hearing Examiner ("HEX") is divided into two categories: matters over which the HEX has the authority to make findings and recommendations, and matters over which the HEX has final decision-making authority. The appellate review authority is different for each of the categories of HEX jurisdiction, as discussed below.

A. Recommendation Jurisdiction. The HEX has jurisdiction over the following for purposes of making recommendations to the City Council:

1. Applications for rezoning of property (Chapter 13.05);
2. Formation of Local Improvement Districts (Chapter 10.04);
3. Approval of Local Improvement District assessments (Chapter 10.04);
4. Dangerous sidewalks proceedings (Chapter 10.18);
5. Petitions for street and alley vacations (Chapter 9.22);
6. Appeals of administrative determinations of the City Council (Section 1.06.820);

7. Appeals from the decision of the Landmarks Preservation Commission regarding certificates of approval (Section 1.42.080); and
8. Appeals of a decision of the City Council to remove a member of a City board, commission, committee, task force, or other multi-member body from office (Chapter 1.46).

B. Appeal Authority for HEX Recommendations. For matters over which the HEX has only the authority to make recommendations (1-8 above), appeals are made to the City Council. The appeal must be made within 14 calendar days of the entering of the HEX recommendations.

C. Decisional Jurisdiction. The HEX has jurisdiction over the following for purposes of making final decisions:

1. Applications for preliminary plat approval for subdivisions exceeding nine lots (Chapter 13.04);
2. Appeals from decisions of the Director of Planning and Development Services (Chapters 13.05 and 13.06);
3. Appeals from decisions of the City Engineer regarding removal of or pruning trees on City-owned property (Chapter 9.20);
4. Appeals from the decisions or order of the Health Officer regarding violations of the Infectious Waste Management Code (Section 5.04.170);
5. Appeals from the Health Officer's denial of a permit to operate a swimming pool under Chapter 5.50 (Section 5.50.030);
6. Appeals from denial or revocation of a permit for sidewalk vending (Section 6.81.120);
7. Appeals regarding determinations of unlawful discriminatory practice under the Human Rights Commission chapter (Chapter 1.29);
8. Appeals from determinations of the Chief of Police, or his or her designee, regarding Potentially Dangerous Dogs and Dangerous Dogs (Chapter 17.04);
9. Appeals arising out of the Tax and License Code (Title 6);
10. Appeals arising out of the City Environmental Code, Chapter 13.12 (Section 13.12.680);
11. Appeals arising under the City's commute trip reduction ordinance (Chapter 13.15);
12. Actions brought under the City's Whistle Blower Policy;
13. Appeals from the film production coordinator's decisions regarding productions of motion pictures within the City (Section 11.10.140);

14. Appeals from denial of special permits regarding solid waste recycling (Section 12.09.070);
15. Matters referred for adjudication by the Civil Service Board under its rules of procedure (Charter Section 6.11(c));
16. Appeals arising under the City's concurrency management ordinance (Chapter 13.16);
17. Hearing of violations of the City's Ethics Code (Chapter 1.46);
18. Appeals from the Public Works Director's determination of civil penalties or any other charge, order, requirement, decision, or determination issued by the Director, or his or her staff, pursuant to the sewage disposal and drainage regulations ordinance (Chapter 12.08);
19. Appeals from the Public Works Director's determination of civil penalties for violations of the solid waste ordinance and appeals arising out of the imposition by the Director, or his or her staff, of solid waste utility charges; provided, that the Hearing Examiner shall not adjudicate claims with respect to any rate set by the City Council in a rate ordinance nor hear any challenge to the rate-making process (Chapter 12.09);
20. Appeals from the decision of the Community and Economic Development Department Director denying or canceling a final Certificate of Tax Exemption under Tacoma's Mixed-Use Center Development ordinance (Chapter 13.17);
21. Appeals arising from the imposition of charges for service issued by the Department of Public Utilities, as well as those arising from disputes concerning utility service, use of watershed or other Department property, and termination of any use; provided, that the Hearing Examiner shall not adjudicate claims with respect to any rate set by the City Council in a rate ordinance nor hear any challenge to the rate-making process (Chapters 12.06 and 12.10);
22. Appeals arising out of the City's Minimum Building and Structures Code for Substandard or Derelict properties (Chapter 2.01);
23. Appeals from sign enforcement (Section 13.05.105);
24. Applications for projects that require land use permits from the City of Tacoma as well as from a neighboring jurisdiction transferred to the jurisdiction of the Hearing Examiner in accordance with Section 13.05.040.F;
25. Appeals from Chronic Nuisance Code enforcement (Section 8.30A.080);
26. Appeals arising from a decision to deny a special street use permit, pursuant to Subtitle 16B;

27. Appeals arising from a decision to deny a telecommunications system franchise, pursuant to Subtitle 16B;
28. Appeals arising from a decision to deny a telecommunications system license, pursuant to Subtitle 16B;
29. Appeals arising from the establishment of a reimbursement assessment area and levying of a reimbursement assessment upon benefited property owners, pursuant to Chapter 35.72 RCW and applicable City ordinances;
30. Appeals from the decision of the Landmarks Preservation Commission regarding certificates of approval and decisions on demolition applications (Section 13.07.160);
31. Applications for wetland and stream development permits, wetland and stream assessments, and wetland delineation verifications in conjunction with a preliminary plat approval or reclassification.
32. Appeals regarding overpayment of wages (Section 1.12.071);
33. Administrative hearings related to the breach or termination of cable television franchises granted, pursuant to Subtitle 16A;
34. Applications for Conditional Use Permits (Table "G" of Section 13.05.020.G, Chapter 13.06);
35. Appeals from Poultry and Pigeons enforcement (Section 5.30.040);
36. Appeals from determinations related to certification and enforcement of violations for Small Business Enterprise (Chapter 1.07).

D. Appeal Authority for HEX Final Decisions. For matters over which the HEX has decisional authority (1-36 above), appeals are made to the Superior Court, the Tacoma Municipal Court, or the Shoreline Hearings Board (for shoreline permit applications under RCW 90.58). The appeal must be made within 21 days of the entering of the HEX recommendations.

2. Contract Appeals.

A. Contracts over \$200,000. The City Council has jurisdiction to hear appeals relating to contracts over \$200,000.

B. Appeal Authority for Contracts over \$200,000. Protests of contracts over \$200,000 must first be made to the Contracts and Awards Board ("C&A Board"). If the C&A Board affirms the department/division recommendation, the protesting party has until 12:00 noon of the second business day after the C&A Board meeting to request a quasi-judicial hearing before the City Council/Public Utility Board.



TO: T.C. Broadnax, City Manager
FROM: Kurtis D. Kingsolver, P.E., Interim Public Works Director/City Engineer /*IKD*
SUBJECT: East 64th Street Improvements
DATE: November 8, 2013

The 64th Street Improvement project is listed in both the *Six-Year Comprehensive Transportation Improvement Plan* and the *City of Tacoma Integrated Transportation Plan*. The *Six-Year Comprehensive Transportation Improvement Plan* per RCW is updated annually, requires a public hearing, lists planned and budgeted transportation projects and is necessary in order to compete for both State and Federal Funding. The *City of Tacoma Integrated Transportation Plan*, completed in July of 2011, was developed solely to help define projects that could potentially be funded via a Levy Lid Lift. Each document lists a different scope of work and different project limits. The 64th Street project, as defined in the *Six-Year Comprehensive Transportation Improvement Plan*, is currently unfunded. Although Public Works over the years has applied for several different grants, all attempts to date have been unsuccessful.

The project to improve 64th Street between Pacific Avenue and Portland Avenue was added to the *Six-Year Comprehensive Transportation Improvement Plan* in 1998. The project scope consists of a new 42-foot wide roadway with three travel lanes, bike lanes, sidewalks, streetlights, and minor storm drainage improvements. This 1.1 mile long project is estimated to cost approximately \$9.25 million.

The project to improve 64th Street as contained within the *City of Tacoma Integrated Transportation Plan* is a much more extensive project. Unlike the project defined above, this project would improve 64th Street from South Sheridan Street to the eastern City limits. This project scope of work varies from the *Six-Year Comprehensive Transportation Improvement Plan's* scope of work and includes a new 40-foot wide roadway consisting of two travel lanes, parking lanes, sidewalks, four new traffic signals, streetlights, and major storm drainage improvements. This 2.75 mile long project is estimated to cost approximately \$31.8 million.

As stated earlier, several attempts have been made to try and fund a 64th Street project using grant dollars. Grants however are very competitive and use specific project criteria to score each application. One of the most important criterions is that a project connects "centers". 64th Street does not provide a connection between "centers". Implementing safety improvements to reduce accidents and to mitigate congestion are also important grant criteria, but 64th Street has relatively low traffic volumes and a low accident history.

Grant applications also require local matching funds. A Transportation Improvement Board grant requires a minimum match of 20%. A Puget Sound Region Council County Wide grant requires a minimum match of 13.5%. The funding sources listed in the current *Six-Year Comprehensive Transportation Improvement Plan* for the proposed project includes a 17.6% unidentified local match. Existing gas tax or other local funding is currently not available at the level required to construct this project.

Public Works has included water, storm and sewer utilities in project planning. Partnering with these utilities for their needed improvements is another method used to assist in funding a street improvement project. The various city utilities have indicated that there is limited need for

facility improvements on 64th Street. Public Works will continue to include the utilities in infrastructure planning to assist in developing and funding this project.

Another option for funding and constructing the street improvements is to phase the project. The current project in the *Six-Year Comprehensive Transportation Improvement Plan* improves 64th Street between Pacific Avenue and Portland Avenue. The ultimate project would also include the additional 0.5 miles between Portland Avenue and the eastern City limits. If a project from Pacific Avenue to the eastern City limits is phased, it is recommended that improvements be constructed in three phases approximately the same length. The three phases could include Pacific Avenue to McKinley Avenue, McKinley Avenue to Portland Avenue, and Portland Avenue to the eastern City limits. Using the current Portland Avenue to Pacific Avenue project estimate, it is estimated that each of the three phases would cost approximately \$5 million.

Community Development Block Grant, HOME Investment Partnership, Grant Funding - Responses to Inquiries from the 11/5/2013 Study Session

1. The number of 1st time homebuyers served over the past 5 years.

<u>Year</u>	<u>Number</u>
2009	148
2010	76
2011	78
2012	67
<u>2013 (YTD)</u>	<u>39</u>
Total	408

2. The number of houses acquired through the NSP and AG programs that have been rehabilitated and have homeowners

Between December of 2009 and October of 2013, a total of 23 foreclosed houses were acquired, rehabilitated and sold to first-time, low income homebuyers through the Neighborhood Stabilization Program (NSP).

Additionally, a blighted property was subdivided and redeveloped to provide 13 homeownership opportunities to very low-income (below 50% AMI) homebuyers under NSP.

To date a total of 36 home owners have been created through NSP activities.

Since January of 2013, a total of nine houses have been acquired through an award from the Washington State Attorney General's Office (AG). Of the nine, two have been resold to income eligible home buyers. The other seven are in various stages of rehabilitation.

3. Overall volume of vacant/foreclosed homes in the region and the plan to address them moving forward

For 2013 year to-date, Tacoma has seen approximately 1,040 total foreclosures, to include single family and multi-family properties.

This is an apparent increase of 19% from the last two years (872 foreclosures between January 2011–December 2012) and 18% from the last four years (882 foreclosures between January 2009–December 2012) (source: RealtyTrac).

To address the local foreclosure situation, a launch of the Single Family Residential Blight Abatement Program is anticipated to occur in the first quarter of calendar year 2014. This program is envisioned as a joint effort between various City departments, local real estate agents and construction professionals whose mission is to address blighted and abandoned single family homes that have been designated as "derelict" by the City's Code Compliance staff. Most of which are anticipated to be in some stage of the foreclosure process. Coordinated through the Housing Division of the Community and Economic Development Department, CDBG and HOME funds will be allocated to acquire, rehabilitate and subsequently resell these previously abandoned properties to eligible home buyers.



TO: T.C. Broadnax, City Manager
FROM: Elizabeth Pauli, City Attorney *ep*
SUBJECT: Railway Transport Restrictions in City of Tacoma
DATE: November 13, 2013

QUESTION PRESENTED

Can the City of Tacoma restrict the product that a railway can transport on its line or through its jurisdiction?

BRIEF ANSWER

No. However, reasonable regulation by the carrier may be allowed.

DISCUSSION

Federal law controls the issues relating to this question. While a number of federal laws are controlling, three are commonly found to preempt much, but not all, local regulation.¹

The Surface Transportation Board (“STB”) has exclusive regulatory authority over transportation conducted over the interstate rail network. Interstate Commerce Commission Termination Act of 1995 (“ICCTA”); 49 U.S.C. §§ 10101-10501(a). The ICCTA preempts local regulation that prevents or unreasonably interferes with railroad transportation.

Recent decisions by the STB and Court of Appeals make clear that “railroads have not only a right but a statutory common carrier obligation to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety

¹ For example, in regard to land use, the general principal arising from statutory and case law is that if a railroad is engaged in transportation-related activities, federal law (ICCTA) will preempt state and local attempts to regulate. In regard to railroad safety, the Federal Railroad Safety Laws, 49 U.S.C. 20106, allow local safety regulations not yet regulated at the federal level, provided the local regulation deals with an essentially local hazard, is not incompatible with any federal rule, and does not unreasonably burden interstate commerce. Issues related to noise are evaluated under the Noise Control Act of 1972 (“NSA”), which preempts any local regulation for transportation related noise within NSA limits.

regulations.” 49 U.S.C. § 11101; *Riffin v. Surface Transportation*, No. 11-1480 (Court of Appeals, D.C. Cir., 2013), citing *Eric Strohmeyer*, STB Docket No. 35527, 2011 WL 5006471, at 1 (Oct. 18, 2011). In light of the fact that a number of federal agencies, including the Department of Transportation, Federal Railroad Administration, Transportation Security Administration, and Nuclear Regulatory Commission, have promulgated extensive regulations governing the transportation of hazardous materials by rail, these decisional bodies have rejected and upheld the rejection of applications to operate that seek to limit or exclude the transportation of Toxic Inhalation Hazard (“TIH”) products. These decisions are expressly based on the goal of upholding the clear intent of Congress to establish an integrated national network, and telegraph preemption of any tariff or other regulation that would create a “gap” in the system in regard to what materials can be transported.

However, the STB has determined that dispersion of coal dust along the rail lines poses a serious problem for operational integrity (based on a finding that coal dust destabilizes rail bed ballast more than other contaminants).² *Surface Transportation Board Decision*, Docket No. FD 35305 (March 2, 2011). The STB has further determined that the railroad carriers may establish loading rules for shippers, requiring shippers to take actions to limit coal dust dispersion from the trains. The rules must constitute a “reasonable practice” as determined by the facts and circumstances of each case. The STB has rejected a tariff that included a provision requiring maintenance by the shippers of certain dust emission levels and load profile without directing the shippers to use a particular reduction technique or identifying consequences of non-compliance. The STB found that the uncertainty of such a tariff was unreasonable, particularly in light of the current status of the science and technologies relating to control options and emissions effects. The STB essentially left it to the carriers and suppliers to reach a reasonable solution that balances broad cost and benefit considerations.

Please let me know if you have questions or need any additional information.

EAP/bn

² The STB notes that the science regarding the effects of coal dust dispersion and its effective control is evolving.