

ATTN: Docket # FD 35952

June 5, 2016

Mr. Navecky
 Surface Transportation Board
 Docket No. FD 35952
 395 E Street, SW
 Washington, DC 20423-0001

Mr. Navecky,

After reviewing the available information about the proposed Great Lakes Basin (GLB) rail project, it is my opinion that the proposed GLB project has failed to sufficiently provide documentation that supports public convenience and necessity. Further more I believe that fast tracking this project and waiving the six month notification period was an error on the part of the STB. For the following reasons I respectfully request that the STB cease any further action on this project.

NEED

- **The Chicago Region Environmental and Transportation Efficiency (CREATE) program** - a collaboration between rail companies, local, state and federal government - is in the process of implementing physical and managerial improvements to make the rail system in Chicago more efficient in order to decrease delays. Letters from the Class I rail lines in response to the July 13, 2015 letter by the Chairman of the STB Daniel R. Elliot, II, indicate the **CREATE project, although not completed, is improving the delays in Chicago.**
- **The GLB proposed project undermines and subverts the CREATE program.**
- The GLB project is neither comprehensive, visionary, or collaborative. The proposed project is not part of any federal, state or local long-term freight plan. It is strictly a commercial venture by a for-profit company.
- There is no publicly available business plan for the proposed rail line to document public convenience, necessity or benefits.
- **GLB documentation does not describe a need for the 50 foot utility easement (beyond stating that it is a potential revenue source), or the need for the proposed 15,000 acre Kankakee rail terminal, which is five times larger than the largest rail yard in the world. The Surface Transportation Board's (STB) jurisdiction to approve a utility corridor is also in question.**
- **Union Pacific and Norfolk-Southern have publicly stated that they are not interested in the proposed GLB project. Instead they prefer to work with the CREATE program in Chicago.**
- **Canadian National invested heavily in their own Chicago bypass by purchasing the Elgin, Joliet and Eastern Railway line and are therefore less likely to use the proposed GLB toll rail.**
 - The letter from Norfolk Southern Corporation's legal department (filed as EI-22974 under FD-35952) states that **Norfolk-Southern does not have a non-disclosure agreement with GLB, nor is it interested in using the proposed rail.** It also states that no information about current rail movements or traffic volumes was provided for the GLB project. This raises the question whether there are any "non-disclosure agreements" at all. It also makes one wonder about the market research that was done, or not done, for this project.
- **Mr. John Yonan, P. E., Superintendent of the Cook County Department of Transportation and Highways writes the following in his letter to the STB; "The proposed Great Lakes Basin Rail Line will, at best, only address a very small part of the region's freight congestion. Cook County's Department of Transportation and Highways is proceeding with a long range transportation plan and an analysis to identify and prioritize freight pinch points and possible solutions. Those studies will yield a more comprehensive range of projects to address freight congestion and promote development."**

PUBLIC CONVENIENCE

- I find no evidence that the proposed GLB Chicago bypass has been identified as a solution to the Chicago bottleneck, a public convenience, or a national transportation priority (as Mr. Patton asserts). It is a business proposal by a for-profit company.
- Due to the fact that the route of the proposed rail will likely change (Mr. Patton's words) people in an area of over 32,220 square miles have lived in uncertainty about the future of their homes, farms and livelihood.
- **The potential for unwanted rail - and the use of eminent domain - has increased stress for land and property owners.**
- Farm fields divided by the proposed rail will be more difficult and dangerous (due to farm field crossings) to manage. Productivity of the land will decrease due to construction of the rail, odd shaped parcels and increased compaction. Costly irrigation and tiling infrastructure will be damaged and rendered useless.
- Government has spent millions of tax dollars preserving farmland, woodlands and promoting good agricultural practices. Farmers spend thousands of dollars on soil conservation practices. The proposed rail line is counter-productive to these efforts.
- Home and land owners near the proposed rail will see their home and land values reduced as local real estate appraisers confirm.
- GLB intends to be a toll railroad. Investors in this proposed project will have only their own financial interest in mind, not the public convenience.
- Opposition to the proposed project has been overwhelming, seven of eleven counties involved have passed resolutions opposing the GLB rail. Mr. Frank Patton has stated that he will take land by eminent domain if the proposed project is approved.
- The loss of thousands of acres of prime farmland cannot possibly be considered a public convenience. Taking highly productive land out of production for a speculative for-profit project is not in the public's best interest. US Farmers need to increase crop production (more acres) to feed the growing population worldwide.

The above provided information is what led me to the conclusion that the proposed GLB project is inconsistent with the public convenience and necessity. It was insufficiently vetted before starting the approval process. I respectfully request that the STB cease work on this project. Individually, or as part of a group, I will fight the GLB proposed plan using all options available, including Congress, my vote at the ballot box and the judicial system. My grandparents, parents and brother have worked very hard all our lives for these generational farms GLB RR wishes to destroy and I will have years of lost income in losing my inherited family generational farms. Farmers have practiced good environmental stewardship for decades long before it was a movement. A derailment will destroy surrounding farmland, homes, land values and water ways which in the country we depend on Well water, which a toxic spill in a derailment will permanently destroy and cause health issues and deaths for humans and livestock from toxins.

Signature for PAMELA R. ERICKSON

Name

Pamela Erickson

Address

1756 N. 43rd Road

City

LELAND

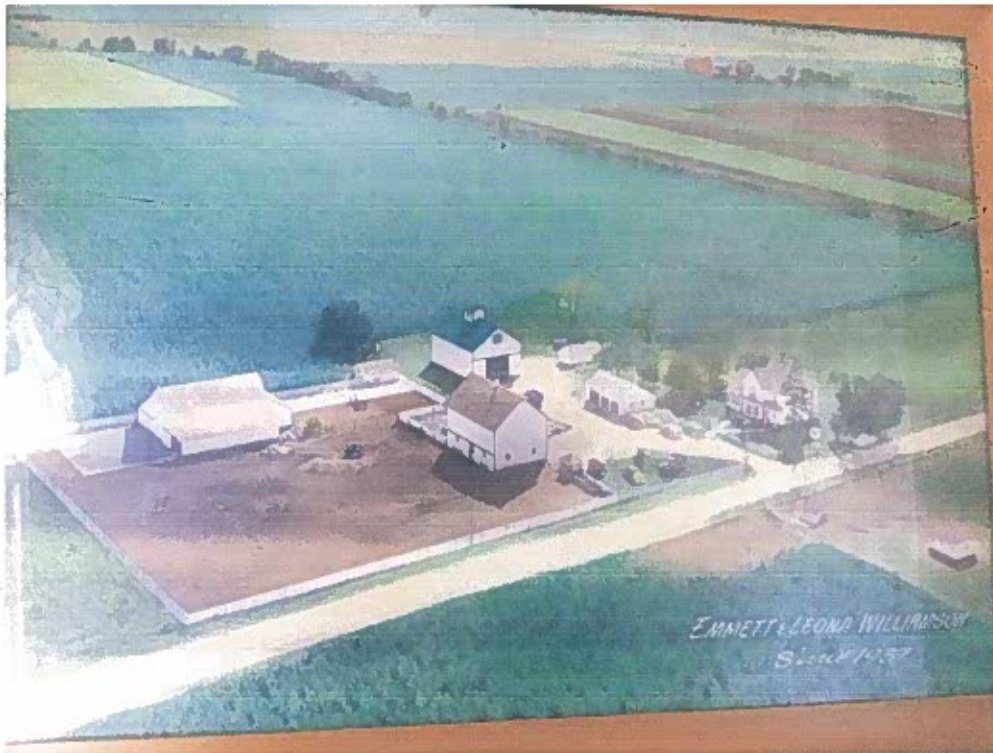
State and Zip

IL 60531

Phone

815-246-9005

~ FARMERS ARE AN EXAMPLE OF LIVING THE AMERICAN DREAM ~



Emmett & Leona Williamson (Grandparents Farm since 1937 but where already 3rd generation farmers in 1937) we inherited & live on this property and Elaine Williamson-Erickson & Harry Erickson, Sr purchased with blood, sweat & tears the farm next door with red buildings in photo, which has proposed GLB RR tracks running through it & dividing it.

My name is Pamela Erickson & my brother Harry Erickson (4th Gen) and I came in PROTEST of GLB Railroad Proposal that runs through our Generational Farm & also other cash rented farm land.

My grandparents (Williamson) survived the DEPRESSION and worked & SAVED to buy the farm we live on. My brother & I Witnessed the STRUGGLES to OPERATE a FARM in the bad years.

Farm Generational Farmers are the BACKBONE of America – We put blood, sweat, tears & SWEAT EQUITY into our generational farms for decades.

Did GLB RAILROAD stop think of how this proposed railroad destroys our farm land values and future income? Using Eminent Domain is unjust & unfair business practices. The Railroad will make Billions of dollars, but only want to pay the farmer a fraction of true value & LOSS to farmers. And so many landlocked parcels that can only be farmed by crossing the railroad? PLUS the Railroad will destroy the tiles that connect to the drainage ditches and/or other fields causing more flooding fields & financial losses.

Not only does this FINANCIALLY Hurt the FARM LANDOWNERS but also the Cash Renter's income. What about the farmers who cash rent the land which the GLB Railroad runs through and the Farmer's lost income & lost opportunities for future income.

FARMERS have been practicing GOOD ENVIRONMENTAL STEWARDSHIP for CENTURIES before it became a MOVEMENT.

Question: Why does the GLB Railroad believe they should use EMINENT DOMAIN to take farmland that is NOT for sale? Nor do these farmers want to sell their farmland at all. They want to keep it in the generational family - past, present and future as their own legacy and inheritance for their families.

In 1978, radio broadcaster Paul Harvey gave this famous speech honoring the FARMER:

This Paul Harvey Speech should be read by GLB RAILROAD to understand the honorable Farmer;

And on the 8th day, God looked down on his planned paradise and said, "I need a caretaker." So God made a farmer.

God said, "I need somebody willing to get up before dawn, milk cows, work all day in the fields, milk cows again, eat supper and then go to town and stay past midnight at a meeting of the school board." So God made a farmer.

"I need somebody with arms strong enough to rustle a calf and yet gentle enough to deliver his own grandchild. Somebody to call hogs, tame cantankerous machinery, come home hungry, have to wait lunch until his wife's done feeding visiting ladies and tell the ladies to be sure and come back real soon -- and mean it." So God made a farmer.

God said, "I need somebody willing to sit up all night with a newborn colt. And watch it die. Then dry his eyes and say, 'Maybe next year.' I need somebody who can shape an ax handle from a persimmon sprout, shoe a horse with a hunk of car tire, who can make harness out of haywire, feed sacks and shoe scraps. And who, planting time and harvest season, will finish his forty-hour week by Tuesday noon, then, pain'n from 'tractor back,' put in another seventy-two hours." **So God made a farmer.**

God had to have somebody willing to ride the ruts at double speed to get the hay in ahead of the rain clouds and yet stop in mid-field and race to help when he sees the first smoke from a neighbor's place. **So God made a farmer.**

God said, "I need somebody strong enough to clear trees and heave bails, yet gentle enough to tame lambs and wean pigs and tend the pink-combed pullets, who will stop his mower for an hour to splint the broken leg of a meadow lark. It had to be somebody who'd plow deep and straight and not cut corners. Somebody to seed, weed, feed, breed and rake and disc and plow and plant and tie the fleece and strain the milk and replenish the self-feeder and finish a hard week's work with a five-mile drive to church.

"Somebody who'd bale a family together with the soft strong bonds of sharing, who would laugh and then sigh, and then reply, with smiling eyes, *when his son says he wants to spend his life 'doing what dad does.'*" **So God made a farmer.**

GOD BLESS THE FARMER & GOD BLESS AMERICA (*In God We Trust*)

By 

Pamela Erickson (Minority Farmer whom just inherited the farm GLB RR plans to destroy)

Harry Erickson (5th Generational Farmer)

1756 N. 43rd Road, Leland, IL 60531 LaSalle County - IL

815-246-9005

FACTS FROM EXPERTS

Farm Journal Foundation is a 501(c)3 nonprofit corporation formed in 2010 by leaders of Farm Journal Media, who wanted to leverage the Farm Journal brand's unique position as the most trusted media brand in agriculture, to affect social change.

We leverage farmers and ranchers, industry, academia, government, consumers and NGO partnerships to:

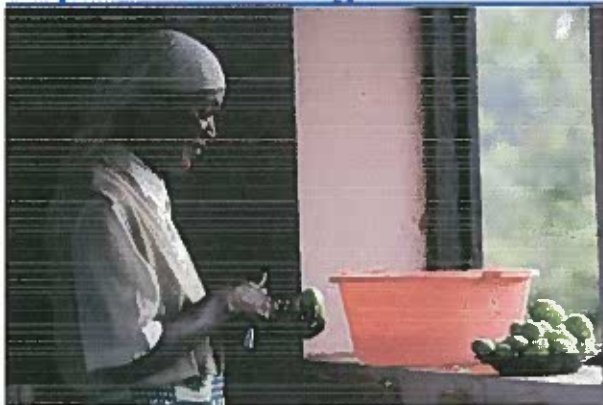
Elevate the next generation's understanding of the connection between expanding global nutritional needs and advanced agriculture's capacity to meet those needs.

Advocate for a policy environment that prioritizes hunger issues and empowers farmers and ranchers to meet the challenge.

Advance sustainable agricultural development and other proven hunger solutions. The Foundation is dedicated to sustaining agriculture's ability to meet the vital needs of a growing population through education and empowerment.

How to Feed the World in 2050

<http://www.fao.org/wsfs/forum2050/wsfs-forum/en/>



The prospects for agriculture

In the first half of this century, as the world's population grows to around 9 billion, global demand for food, feed and fibre will nearly double while, increasingly, crops may also be used for bioenergy and other industrial purposes. New and traditional demand for agricultural produce will thus put growing pressure on already scarce agricultural resources. And while agriculture will be forced to compete for land and water with sprawling urban settlements, it will also be required to serve on other major fronts: adapting to and contributing to the mitigation of climate change, helping preserve natural habitats, protecting endangered species and maintaining a high level of biodiversity. As though this were not challenging enough, in most regions fewer people will be living in rural areas and even fewer will be farmers. *They will need new technologies to grow more from less land, with fewer hands.*

The problems to be resolved

- Will we be able to produce enough food at affordable prices or will rising food prices drive more of the world's population into poverty and hunger?
- How much spare capacity in terms of land and water do we have to feed the world in 2050?
- What are the new technologies that can help us use scarce resources more efficiently, increase and stabilize crop and livestock yields?
- Are we investing enough in research and development for breakthroughs to be available in time?
- Will new technologies be available to the people who will need them most - the poor?
- How much do we need to invest in order to help agriculture adapt to climate change, and how much can agriculture contribute to mitigating extreme weather events?

2050: A third more mouths to feed

Food production will have to increase by 70 percent - FAO convenes high-level expert forum

23 September 2009, Rome - Producing 70 percent more food for an additional 2.3 billion people by 2050 while at the same time combating poverty and hunger, using scarce natural resources more efficiently and adapting to climate change are the main challenges world agriculture will face in the coming decades, according to an FAO

Global projections show that in addition to projected investments in agriculture, further significant investment will be needed to enhance access to food, otherwise some 370 million people could still be hungry in 2050, almost 5 percent of the developing countries' population.

According to the latest UN projections, world population will rise from 6.8 billion today to 9.1 billion in 2050 - a third more mouths to feed than there are today. Nearly all of the population growth will occur in developing countries. Sub-Saharan Africa's population is expected to grow the fastest (up 108 percent, 910 million people), and East and South East Asia's the slowest (up 11 percent, 228 million).

Around 70 percent of the world population will live in cities or urban areas by 2050, up from 49 percent today.

FAMILY FARMERS REPORT

<http://www.fao.org/docrep/019/mj760e/mj760e.pdf>

Family farming is linked to Global to National and Global Food Security

Family farming represents the opportunity to boost local economies

In the United States, the family farmers produce 84% of all produce – Totaling \$230 BILLION in SALES , working on 78% of all farmland.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III**

IN THE MATTER OF:

CSX Mount Carbon Train Derailment Site
Mount Carbon, West Virginia 25139

CSX Transportation, Inc.
500 Water Street
Jacksonville, Florida 32202,

Respondent.

DOCKET NO. CWA-03-2015-0104CW

Proceeding under Section 311 (c)
and (e) of the Clean Water Act, as
amended, 33 U.S.C. § 1321 (c) and (e)

ADMINISTRATIVE ORDER

Having determined the necessity for implementation of abatement activities at or relating to a train derailment that resulted in an oil spill into and upon the shoreline of the Armstrong Creek, which is a tributary to the Kanawha River, in the Town of Mount Carbon, in the County of Fayette, in the State of West Virginia, the United States Environmental Protection Agency ("EPA") orders as follows:

I. JURISDICTION AND GENERAL PROVISIONS

- 1.1 This Administrative Order ("Order") is issued pursuant to the authority vested in the President of the United States by Section 311(c) and (e) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), as amended, 33 U.S.C. § 1321(c) and (e), and the authority vested in the Administrator of EPA by Executive Order 12777 (56 Fed. Reg. 54757, October 22, 1991). These authorities were delegated to the Regional Administrator of EPA Region III on January 19, 1993, and May 11, 1994, by Delegation Nos. 2-85 and 2-89, respectively. These authorities were further delegated by the Regional Administrator to the Director of the Hazardous Site Cleanup Division on November 7, 2003, and September 1, 2005, by Regional Delegation Nos. 2-85 and 2-89, respectively.
- 1.2 EPA has conferred with and provided notice of the issuance of this Order to the State of West Virginia, in accordance with Section 311(e)(1)(B) of the Clean Water Act, 33 U.S.C. § 1321(e)(1)(B).

- 1.3 This Order requires the performance of actions as described herein to remediate contamination discharged from Facilities located at or near the CSX Mount Carbon Train Derailment Site (hereinafter "Derailment Site" or the "Site") in Fayette County, West Virginia.
- 1.4 The Work, as defined by Paragraph 3.22, shall be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R Part 300, the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq., and the CWA.

II. STATEMENT OF PURPOSE

- 2.1 In issuing this Order, EPA directs Respondent to study, abate, mitigate and eliminate such threats from oil, hazardous substances, and pollutants that may exist to the public health or welfare of the United States at and around the Derailment Site by undertaking response actions including:
 - (a) Continuing efforts to recover oil at or from the Derailment Site to the maximum extent practicable;
 - (b) Continuing oil control and stabilization efforts;
 - (c) Monitoring wetlands and surrounding navigable waters and their adjoining shorelines for effects of the spill;
 - (d) Restoring all areas, in accordance with natural resource damage assessment findings and conclusions, to pre-spill conditions, to the maximum extent practicable, or in the alternative, to a level that the Natural Resource Trustees, including the U.S. Fish and Wildlife Service ("FWS"), the U.S. National Oceanic and Atmospheric Administration ("NOAA"), and the West Virginia Division of Natural Resources ("WV DNR"), approve to prevent more significant damage; and
 - (e) Undertaking whatever other actions EPA determines to be necessary to protect the public health and welfare of the United States at the Site where there may be a substantial threat or an imminent and substantial threat due to the oil discharge.

III. DEFINITIONS

- 3.1 "Adjoining shorelines" shall mean the area of land from which, absent intervention, oil may reach a navigable water of the United States.
- 3.2 "Business Days" as used in this Order shall mean every day of the week except Saturdays, Sundays and federal holidays.
- 3.3 "Calendar Days" as used in this Order shall mean every day of the week, including Saturdays, Sundays and all federal holidays.

- 3.4 "CWA" shall mean the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act, 33 U.S.C. §§ 1251-1387.
- 3.5 "Days" or "days" as used in this Order, unless otherwise noted, shall mean Business Days.
- 3.6 "Derailment Site" or "Site" shall mean the location where CSX Transportation rail cars derailed in Mount Carbon, Fayette County, West Virginia, on February 16, 2015, and the area to which oil and hazardous substances have come to be located, including Armstrong Creek and the Kanawha River and their tributaries and their adjoining shorelines.
- 3.7 "Discharge" shall have the meaning set forth in Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), and 40 C.F.R. Part 110.3 for purposes of the Work to be performed under this Order.
- 3.8 "EPA" as used in this Order shall mean the United States Environmental Protection Agency and any successor departments or successor agencies of the United States.
- 3.9 "Facility" or "Facilities" shall, in accordance with the definition set forth in Section 1001(9) of the Oil Pollution Act ("OPA"), 33 U.S.C. § 2701(9), mean rolling stock that has been used for storing, handling, transferring, or transporting oil.
- 3.10 "Hazardous Substances" means any substance defined in Section 311(a)(14) of the CWA, 33 U.S.C. § 1321(a)(14).
- 3.11 "National Contingency Plan" or "NCP" as used in this Order shall mean the National Oil and Hazardous Substances Pollution Contingency Plan, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.
- 3.12 "Natural resources," shall have the meanings defined in Section 1001(20) of the OPA, 33 U.S.C. § 2701(20), and the NCP, 40 C.F.R. § 300.5.
- 3.13 "Navigable waters" shall have the meaning set forth in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and Section 1001(21) of OPA, 33 U.S.C. § 2701(21), and 40 C.F.R. Part 110.1.
- 3.14 "OPA" shall mean the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761.
- 3.15 "Oil" or "oil" as used in this Order shall have the meaning set forth in Section 311(a)(1) of CWA, 33 U.S.C. § 1321(a)(1).

- 3.16 "Order" shall mean this Unilateral Administrative Order and all appendices attached hereto. In the event of a conflict between this Order and any appendix, the text of the Order, other than that of the appendix, shall control.
- 3.17 "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.
- 3.18 "Respondent" shall mean CSX Transportation, Inc. and its agents, successors, or assigns.
- 3.19 "Section" shall mean a portion of this Order identified by a Roman numeral.
- 3.20 "United States" or "U.S." shall mean the United States of America.
- 3.21 The "public health or welfare" or the "public health or welfare of the United States" shall include, inter alia, the welfare of "fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States," as stated in CWA Section 311(e), 33 U.S.C. § 1321(e).
- 3.22 "Work" shall mean all activities Respondent is required to perform under this Order, except those required by Section XX ("Record Retention").
- 3.23 "WV DEP" as used in this Order shall mean the West Virginia Department of Environmental Protection and any successor departments or successor agencies of the State of West Virginia.
- 3.24 All terms not defined herein shall have the meanings set forth in OPA, CWA, and the NCP.

IV. PARTIES BOUND

- 4.1 This Order shall apply to and be binding upon Respondent and Respondent's directors, officers, employees, agents, receivers, trustees, successors, and assigns. Neither a change in ownership or corporate or partnership status of Respondent, nor a change in ownership or control of any Facility or the Derailment Site, shall in any way alter Respondent's responsibilities under this Order.
- 4.2 No change in ownership of any property covered by this Order shall in any way alter, diminish, or otherwise affect Respondent's obligations and responsibilities under this Order.
- 4.3 In the event that Respondent files for or is placed into bankruptcy, Respondent shall notify EPA and WV DEP within three (3) days of such event.

V. FINDINGS OF FACT

- 5.1 CSX Transportation, Inc. (hereinafter, "CSX Transportation" or "Respondent") is a wholly-owned subsidiary of CSX, Inc. (hereinafter, "CSX").
- 5.2 CSX Transportation, Inc. is a Virginia corporation, and its headquarters are located at 500 Water Street in Jacksonville, Florida.
- 5.3 According to CSX's public website, CSX Transportation operates a rail network that encompasses about 21,000 route miles of track in 23 states, including West Virginia, as well as the District of Columbia, and the Canadian provinces of Ontario and Quebec.
- 5.4 On February 16, 2015, a CSX Transportation train, which originated in North Dakota and was en route to Yorktown, Virginia, was traveling through Mount Carbon, West Virginia.
- 5.5 The train consisted of two locomotives, two buffer tank cars, and 107 tank cars containing crude oil.
- 5.6 At or around 1330 hours on February 16, 2015, approximately 28 rail cars of the train derailed from the tracks (hereinafter, "Derailment Incident").
- 5.7 The area at which the Derailment Incident occurred ("the Derailment Site") is adjacent to Armstrong Creek, which is a tributary of the Kanawha River.
- 5.8 Each of the derailed cars contained approximately 29,000 gallons of crude oil from North Dakota's Bakken Formation at the time of the Derailment Incident.
- 5.9 Upon derailment, approximately 28 rail cars collided, igniting the crude oil cargo, which escalated to boiling liquid expanding vapor explosion events in certain rail cars.
- 5.10 Approximately 19 of the derailed cars were involved in fires and/or explosions.
- 5.11 A residential house and garage were destroyed as a result of the fires and/or explosions and nearby residents were instructed to evacuate the area.
- 5.12 Multiple downstream water system intakes were closed by local water authorities as a precaution as a result of the Derailment Incident.
- 5.13 Due to the Derailment Incident and the ensuing fires and explosions, an unknown quantity of crude oil was discharged onto the adjoining shorelines of Armstrong Creek and the Kanawha River ("the Derailment Site").

- 5.14 On February 16, 2015, at approximately 1408 hours, CSX notified the National Response Center ("NRC") of the Derailment Incident and the discharge of an unknown amount of crude oil. The United States Coast Guard ("USCG") was the first federal responder at the scene and assumed Federal On-Scene Coordinator ("OSC") duties.
- 5.15 At all times relevant to this matter, the train was owned and operated by CSX Transportation.
- 5.16 Local, state and federal emergency responders determined that the safest course of action, because of the weather, was to let the fires burn out over time, which continued until or around February 21, 2015.
- 5.17 CSX removed all rail cars from the Derailment Site as of February 23, 2015. The damaged cars that were removed contained approximately 166,000 gallons of oil.
- 5.18 EPA OSCs observed oil in Armstrong Creek and the Kanawha River between February 16, 2015 and February 23, 2015 and continues to be observe oil in Armstrong Creek and the Kanawha River.
- 5.19 The discharge of oil from the Facilities has caused a film or sheen upon or discoloration of the surface of Armstrong Creek and the Kanawha River and upon their adjoining shorelines and has caused an emulsion to be deposited beneath the surface of the Armstrong Creek and the Kanawha River.
- 5.20 On or about February 16, 2015, in coordination with local, state, and federal emergency responders, CSX personnel, initiated mitigation efforts to address the discharge of oil, including the dispatching of boom in an effort to limit the spread of oil into the Armstrong Creek and the Kanawha River, the use of vacuum trucks and tanks to collect the discharged oil, the monitoring of water quality and air quality through sampling, the excavation of a receptor trench to prevent oil from entering Armstrong Creek and the Kanawha River, and the installation of a metal sheet pile wall as alternative containment due to the presence of ice on the water.
- 5.21 Oil recovery operations have been implemented 24 hours a day since the Derailment Incident.
- 5.22 As of February 19, 2015, approximately 21,319 gallons of oil water mixture had been recovered from the Derailment Site.
- 5.23 On February 19, 2015, primary federal cleanup authority was transferred from the USCG to EPA.

- 5.24 On or about February 19, 2015, personnel from FWS began an assessment of the damage to natural resources caused by the oil discharge from the Facilities.
- 5.25 Bakken Crude Oil, which also is known as Sweet Crude Oil, is a petroleum hydrocarbon mixture containing paraffinic, cycloparaffinic and aromatic hydrocarbons. It is amber to black in color and contains small amounts of sulfur, nitrogen, oxygen compounds and trace amounts of heavy metals. According to the Material Safety Data Sheet ("MSDS") provided by CSX Transportation to EPA, the oil in the train may contain benzene and n-hexane. Bakken Crude Oil contains a high concentration of the light carbon chains, which can make it extremely flammable.
- 5.26 Bakken Crude Oil, and its constituents, may pose a threat to human health and the environment. Benzene is a known human carcinogen. According to the MSDS, exposure to the oil discharged may cause cancer and eye and skin irritation. Inhalation may cause dizziness, nausea, or headache. More serious health effects can occur if Bakken Crude Oil is inhaled or swallowed.
- 5.27 Bakken Crude Oil is harmful to aquatic life and can have long lasting effects on aquatic life. The coating action of Bakken Crude Oil can kill birds, plankton, algae, and fish.
- 5.28 On February 27, 2015, EPA determined that a threat to public health or welfare of the United States exists due to the actual discharge and substantial threat of discharge of oil from the Facilities and that discharges from the Facilities may present an imminent and substantial endangerment to public health or welfare of the United States.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

- 6.1 The rail cars from which oil and hazardous substances discharged are each a Facility as defined in Section 1001(9) of OPA, 33 U.S.C. § 2701(9).
- 6.2 The Facilities are each an "onshore facility" as defined by Section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a)(10), and by Section 1001(24) of OPA, 33 U.S.C. § 2701(24).
- 6.3 Respondent is a "person" as defined by Section 311(a)(7) of the CWA, 33 U.S.C. § 1321(a)(7), and Section 1001(27) of the OPA, 33 U.S.C. § 2701(27).
- 6.4 Respondent is the "owner or operator" of each Facility as defined by Section 311(a)(6) of the CWA, 33 U.S.C. § 1321(a)(6).
- 6.5 A "removal," as defined in Section 311(a)(8) of the CWA, 33 U.S.C. § 1321(a)(8), and Section 1001(30) of OPA, 33 U.S.C. § 2701(30), is necessary to minimize and mitigate damage to the public health or welfare.

- 6.6 Bakken Crude Oil is an "oil" as defined in Section 311(a)(1) of CWA, 33 U.S.C. § 1321(a)(1).
- 6.7 Benzene is a "hazardous substance" as defined in Section 311(a)(14) of the CWA, 33 U.S.C. § 1321(a)(14), as implemented by 40 C.F.R. § 116.4.
- 6.8 "Oil," as defined in Section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), has been stored, handled, transferred, or transported within each Facility and is currently present at the Derailment Site.
- 6.9 A "discharge," as defined in Section 311(a)(2) of the CWA, 33 U.S.C. § 1321(a)(2), of oil has occurred at or from the Facilities.
- 6.10 Armstrong Creek and the Kanawha River and their tributaries are "navigable waters" of the United States as that term is defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7).
- 6.11 Armstrong Creek and the Kanawha River and their tributaries, as well as the adjoining shorelines of Armstrong Creek and the Kanawha River and their tributaries, are "natural resources" within the meaning of the NCP, 40 C.F.R. § 300.5, and Section 1001(20) of OPA, 33 U.S.C. § 2701(20), and have been affected by the discharge of oil from each Facility.
- 6.12 The discharge of oil from the Facilities has occurred "in such quantities as may be harmful" within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3(b) because the discharge of oil from the Facilities has caused a film or sheen or discoloration on Armstrong Creek and the Kanawha River or caused a sludge or emulsion to be deposited beneath the surface of Armstrong Creek and the Kanawha River.
- 6.13 The discharge of oil from the Facilities has occurred "in such quantities as may be harmful" within the meaning of Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), and 40 C.F.R. § 110.3(b) because it caused a film or sheen or discoloration on the adjoining shoreline of Armstrong Creek and the Kanawha River or a sludge or emulsion to be deposited beneath the surface of the adjoining shoreline of Armstrong Creek and the Kanawha River.
- 6.14 The discharge of oil from the Facilities is in violation of Section 311(b)(3) of CWA, 33 U.S.C. § 1321(b)(3).
- 6.15 The discharge or substantial threat of discharge from the Facilities is of such size and character as to be a substantial threat to public health or welfare within the meaning of Section 311(c)(2) of CWA, 33 U.S.C. § 1321(c)(2).

- 6.16 The actual and continued substantial threatened discharge of oil originating from the Facilities and remaining at the Derailment Site, within the meaning of Section 311(e) of the CWA, 33 U.S.C. § 1321(e), in violation of Section 311(b)(3) of CWA, 33 U.S.C. § 1321(b)(3), poses or may pose an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States and may be subject to action to protect public health and welfare pursuant to Section 311(e)(1) of the CWA, 33 U.S.C. § 1321(e)(1).
- 6.17 The Work required by this Order, pursuant to Section 311(e)(1) of the CWA, 33 U.S.C. § 1321(e)(1), is necessary to protect the public health and welfare of the United States of America, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States.
- 6.18 The Work required by this Order, pursuant to Section 311(c)(1) of the CWA, 33 U.S.C. § 1321(c)(1), is necessary to ensure effective and immediate removal of a discharge and mitigation or prevention of a substantial threat of a discharge of oil into or on the navigable waters, on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.
- 6.19 The Work required by this Order is consistent with the NCP and is authorized to be ordered by EPA pursuant to the authority granted in Section 311(c) and (e) of CWA, 33 U.S.C. § 1321(c) and (e), as delegated by the President by Executive Order 12777, Section 2(b)(1), 56 FR 54757 (October 22, 1991).

VII. RESPONSE ACTION PLAN DEVELOPMENT AND IMPLEMENTATION

- 7.1 Respondent shall commence and complete performance of the following Work within the time periods specified.
- 7.2 Within three (3) Business Days of the Effective Date of this Order, Respondent shall notify EPA and WV DEP in writing of the identity and qualifications of the contractor, subcontractor, supervisory personnel, and other persons who will be primarily responsible for developing the Response Action Plan ("RAP") required by this Section. Respondent shall further notify EPA in writing of the identity and qualifications of all contractors, subcontractors, supervisory personnel and other persons selected by Respondent who will conduct all or any portion of the response action. Respondent shall ensure that all contractors, subcontractors, supervisory personnel and/or other persons

retained to perform response actions shall meet the applicable Occupational Safety and Health Administration ("OSHA") requirements as defined in 29 C.F.R. §1910.120. Respondent's selection of all contractors, subcontractors, supervisory personnel and other persons who will perform response action; Respondent's Project Coordinator designated pursuant to Section VIII; and any replacements to any such persons are subject to disapproval by EPA at any time. In the event of any such disapproval by EPA, Respondent shall notify EPA and WV DEP within five (5) Business Days of receipt of such EPA disapproval of the person(s) who will replace the one(s) whose selection was disapproved by EPA. If a person's selection is disapproved by EPA, that person shall not perform such specified response action.

7.3 Beginning on the Effective Date and continuing thereafter, Respondent shall perform the following tasks.

- (a) Continue oil containment and recovery efforts on Armstrong Creek and the Kanawha River, their tributaries and their adjoining shorelines to contain and recover as much oil as practicable, until EPA determines that this action is no longer necessary or effective;
- (b) Dispose of and/or otherwise handle all oil and oil-contaminated materials recovered from the Site in accordance with applicable federal, state and local law and regulation;
- (c) Visually inspect all boom on a schedule approved by EPA and also after each rain event. Respondent shall repair or adjust each boom if damaged or if EPA otherwise determines that repair or adjustment is necessary to continue oil recovery. A schedule for visual inspections required by this subparagraph shall be submitted to EPA and WV DEP within two (2) Days of the Effective Date for EPA's approval; and
- (d) Visually inspect the metal sheet pile wall on a schedule approved by EPA. Respondent shall repair and maintain the metal sheet pile wall if EPA determines that repairs or maintenance are necessary to continue oil recovery. A schedule for visual inspections under this subsection shall be submitted in writing to EPA and WV DEP within two (2) Days of the Effective Date for EPA's approval.

7.4 Respondent shall also accomplish the following items:

- (a) Long-term monitoring of Armstrong Creek and the Kanawha River, and their adjoining shorelines, as well as any other water bodies and adjoining shorelines to such water bodies where contamination from the Facilities may come to be located, in order to detect, identify and characterize all oil discharged from the Facilities. Respondent shall coordinate this monitoring program with government agencies including, but not limited to WV DEP, WV DNR, FWS, NOAA, and the Counties of Fayette and Kanawha, and certain citizen representatives to be named by the Natural Resource Trustees. Respondent shall provide documentation supporting this coordination;

- (b) The restoration of all areas impacted by the Derailment Incident to their original, pre-spill condition to the maximum extent practicable, as determined by EPA in consultation with the Natural Resource Trustees, or in the alternative, to a level that the Natural Resource Trustees approve to prevent more significant environmental damage. In restoring such areas, Respondent shall account for any seasonal or historical use, as well as all critical, special, significant, or otherwise designated protected areas and to comply with the National Historic Preservation Act, as applicable, and the Native American Graves Protection and Repatriation Act, as applicable, and any such applicable local, state, or tribal law;
- (c) The evaluation of remediation technologies, including bioremediation, as options for effective and expedient removal of oil;
- (d) Coordination of the results of the remediation technology evaluation referenced in Paragraph 7.4(c), above, with government agencies, including but not limited to WV DEP, WV DNR, FWS, NOAA, and the Counties of Fayette and Kanawha;
- (e) Implementation of the technology recommended by the governmental agencies and as approved by EPA and/or the Regional Response Team, as appropriate;
- (f) Establishment of public availability centers in each of the counties affected by the spill that will provide a public education program, including a forum by which Respondent will meet with the public and address their questions and concerns, and will enable the distribution of timely information to affected residents and a method schedule for providing such information. This program shall consider such components as health threats and risk, protective measures, wildlife preservation, and claims and notification procedures;
- (g) Cooperation with the Shoreline Cleanup Assessment Team (a NOAA-led multi-agency team that surveys the shoreline, assesses the quantity of oil that has been deposited along the shoreline, assesses damages, and evaluates potential options for remediation), as it conducts assessments, as prescribed by EPA, until EPA determines and documents in writing that such assessments are unnecessary, in order to identify areas for further characterization of oil released from the Facilities;
- (h) Disposal of and/or handling of all recovered oil and oiled materials in an environmentally appropriate manner, in compliance with all applicable local, state, and federal laws and regulations;
- (i) Establishment of a sampling plan and quality assurance plan for regular sampling of the surface water and sediments and groundwater at locations to be determined by the Natural Resource Trustees, and as approved by EPA;

- (j) Development of and adherence to an expeditious schedule for implementation of the above items.
- 7.5 Within seven (7) Business Days of the Effective Date of this Order, Respondent shall submit to EPA and WV DEP for EPA's approval a RAP detailing the response actions to be implemented for the items specified in Paragraph 7.4, above. The RAP shall include, among other things, a schedule for expeditious performance of such response actions. To the extent that information concerning the details of a particular item does not yet exist so that it can be described in the RAP, the RAP shall set forth an expeditious schedule and plan for submittal of RAP supplement(s) to EPA and WV DEP for EPA's approval, which supplement(s) shall fully detail such items. All references to the review, approval and enforcement of the RAP shall also be applicable to any RAP supplement(s). The RAP shall be consistent with the NCP and shall be subject to approval by EPA according to the provisions of Paragraphs 7.6 and 7.12, below.
- 7.6 In consultation with WV DEP and the Natural Resource Trustees, EPA will review the RAP and notify Respondent of EPA's approval or disapproval of the RAP. In the event of disapproval, EPA will specify the deficiencies in writing. Respondent shall respond to and correct the deficiencies identified by EPA and resubmit the RAP to EPA within five (5) Business Days of receipt of EPA disapproval or such longer time as may be specified in writing by EPA in its discretion. Approval, disapproval and/or modification by EPA of the subsequent RAP submission shall be according to the provisions of Paragraph 7.12, below.
- 7.7 Within five (5) Business Days of receipt from EPA of written approval to proceed with implementation of any EPA-approved plan ("written approval to proceed"), Respondent shall commence implementation of such plan and complete it in accordance with the plan and the schedule therein. In the event EPA determines that any Work performed is deficient, and EPA requires Respondent to correct or re-perform such Work pursuant to this Order, Respondent shall correct or re-perform such Work in accordance with a schedule provided by EPA.
- 7.8 Beginning seven (7) Calendar Days after the Effective Date of this Order and every seven (7) Calendar Days thereafter, or such longer interval as may be determined in writing by EPA, and until EPA advises Respondent that the Work set forth in Paragraph 7.3 is complete, Respondent shall submit to EPA, WV DEP, and each Natural Resource Trustee a progress report describing the Work conducted pursuant to Paragraph 7.3 for each preceding seven (7) Day period or, if applicable, the alternate period specified in writing by EPA. Those progress reports shall include, at a minimum: (a) a description of the Work completed and the actions that have been taken toward achieving compliance with this Order; (b) a description of all data anticipated and activities scheduled for the next reporting period; (c) a description of any problems encountered or anticipated; (d) any

actions taken to prevent or mitigate such problems; (e) a schedule for when such actions will be completed; (f) copies of all analytical data received during the reporting period; and (g) all modifications to the Work and any plans thereunder, and schedule(s) made in accordance with Section XIII of this Order during the reporting period.

- 7.9 Beginning fifteen (15) Calendar Days after the Effective Date of this Order and every fifteen (15) Calendar Days thereafter, or such longer interval as may be determined in writing by EPA, and until EPA advises Respondent that all Work is complete, Respondent shall submit to EPA, WV DEP, and each Natural Resource Trustee a progress report describing the Work conducted pursuant to Paragraph 7.4 for each preceding fifteen (15) Day period or, if applicable, the alternate period specified in writing by EPA. Those progress reports shall include, at a minimum: (a) a description of the Work completed and the actions that have been taken toward achieving compliance with this Order; (b) a description of all data anticipated and activities scheduled for the next reporting period; (c) a description of any problems encountered or anticipated; (d) any actions taken to prevent or mitigate such problems; (e) a schedule for when such actions will be completed; (f) copies of all analytical data received during the reporting period; and (g) all modifications to the Work and any plans thereunder, and schedule(s) made in accordance with Section XIII of this Order during the reporting period.
- 7.10 Documents, including plans, reports, sampling results and other correspondence to be submitted pursuant to this Order shall be sent by certified or overnight mail or equivalent delivery or by electronic mail to the EPA Project Coordinator and WV DEP Project Coordinator designated pursuant to Section VIII of this Order.
- 7.11 To the extent Respondent submitted any plan, report, or schedule to EPA before the Effective Date to accomplish any of the tasks required by Paragraph 7.4, Respondent need not resubmit such plan, report, or schedule; however, Respondent must submit a certification for such plan, report, or schedule, pursuant to Section XVI of this Order. If EPA has approved any plan, report, or schedule before the Effective Date of this Order, such plan, report, or schedule is incorporated into this Order and failure to comply with such EPA-approved plan, report, or schedule shall be considered non-compliance with this Order.
- 7.12 All reports, plans, approval letters, specifications, schedules and attachments required by this Order are subject to EPA's approval and shall be deemed incorporated into this Order upon such approval by EPA. In the event that EPA approves a portion of any plan, report or other item required to be submitted under this Order, the approved portion shall be enforceable under this Order. In the event of conflict between this Order and any appendix attached hereto, incorporated in or enforceable hereunder, the provisions of this Order shall control. In the event that EPA disapproves any required submission, EPA will: (a) specify the deficiencies in writing, and/or (b) submit its own modifications to Respondent to accomplish the Work outlined in Paragraphs 7.3 and 7.4, above.

Respondent shall amend and submit to EPA a revised submission that responds to and corrects the specified deficiencies within five (5) Business Days of receipt of EPA disapproval or such longer time as may be specified in writing by EPA in its discretion. In the event that EPA submits its own modifications to Respondent, Respondent is hereby required to incorporate such modifications. Any non-compliance with EPA-approved reports, plans, specifications, schedules, attachments, or submission of deficient revisions following EPA disapproval or non-compliance with an EPA-required modification shall be considered a failure to comply with a requirement of this Order. Determination(s) of non-compliance will be made by EPA.

- 7.13 In addition to the information and documents required by this Order, Respondent shall provide to EPA, upon written request, any and all information and documents in its possession, custody or control resulting from and/or pertaining to Work performed by Respondent including, but not limited to, analytical data (including raw data), Site safety data, Site monitoring data, operational logs, copies of all manifests (including copies of all manifests signed upon receipt of any material by a licensed treatment, storage or disposal facility); the identity of treatment, storage and/or disposal facilities used; the identity of transporters used; the identity of any contractors, subcontractors and supervisory personnel used; any information and documents concerning Respondent's compliance with Quality Assurance and Quality Control requirements of this Order; information and documents relating to Respondent's efforts to secure access; and information and documents relating to any project delays. Nothing herein shall be interpreted as limiting the inspection and information-gathering authority of EPA under federal law.
- 7.14 Within thirty (30) Calendar Days of the date that Respondent concludes it has completed implementation of the plans and the items identified in Paragraphs 7.3 and 7.4, Respondent shall submit a written Final Report to EPA and WV DEP, subject to EPA's approval described in Paragraph 7.12, above. The Final Report shall detail the work undertaken to implement all plans and the items identified in Paragraphs 7.3 and 7.4 and shall be certified by Respondent in accordance with the terms of Section XVI of this Order. EPA will review the adequacy of Respondent's implementation of the plans and accomplishment of the work items specified in Paragraphs 7.3 and 7.4, above. EPA will notify Respondent, in writing, of any discrepancies in the Final Report or deficiencies in the execution of the plans and the items identified in Paragraphs 7.3 through 7.8 and the actions required to correct such discrepancies or deficiencies. Within five (5) Business Days of receipt of notification by EPA, or as otherwise specified by EPA, Respondent shall, as directed by EPA, amend the Final Report, develop an additional plan or amend any existing plan to address such discrepancies or deficiencies. Any additional plan or amendment to an existing plan will be subject to the approval procedures outlined in Paragraphs 7.6 and 7.12, above. Respondent shall perform all actions approved by EPA in a manner consistent with the NCP and all applicable federal laws and regulations, as required by the NCP.

- 7.15 Commencing on the Effective Date of this Order and continuing thereafter, Respondent shall not handle or remove oil or any hazardous substances from the Site pursuant to this Order except in conformance with the terms of this Order and all applicable federal, state and local laws and regulations.
- 7.16 Respondent shall not commence any Work except in conformance with the terms of this Order. Respondent shall not commence implementation of any plan developed hereunder until receiving EPA's written approval to proceed pursuant to Paragraph 7.7. To the extent that Respondent has commenced or undertaken any Work before receipt of this Order, it shall submit to WV DEP and EPA for EPA's approval the names of all contractors involved in any manner with such Work, all plans for such Work, and any records used in connection with such Work and any data, test results and/or reports developed as a result of such Work that are not privileged under law. This information shall be supplied to EPA and WV DEP within three (3) Business Days of Respondent's receipt of this Order.
- 7.17 Commencing on the Effective Date of this Order and continuing thereafter, Respondent shall immediately notify EPA's Project Coordinator and the National Response Center [(800) 424-8802] in the event of any action or occurrence during the pendency of this Order that causes or threatens to cause an additional release of oil, hazardous substances, pollutants or contaminants on, at, or from the Site, or which may create a danger to public health or welfare of the United States. If any incident, or change in Site conditions, during the actions conducted pursuant to this Order causes or may cause a substantial threat of a discharge or additional discharge of oil or hazardous substances from the Site or a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order to prevent, abate or minimize such discharge or imminent and substantial threat to the public health or welfare of the United States. Respondent shall also immediately notify the EPA Project Coordinator or, in the event of his/her unavailability, shall notify the Regional Duty Officer at (215) 814-9016 [or call (215) 814-3255 after hours] of the incident or Site conditions. Respondent shall submit a written report to EPA within seven (7) days after any such discharge, setting forth the events that occurred and the measures taken or to be taken to mitigate and prevent the recurrence of such a discharge. This reporting requirement is in addition to, not in lieu of, reporting under Section 311(b)(5) of the CWA, 33 U.S.C. §1321(b)(5), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, if applicable, or under any other applicable state, local or federal laws.

VIII. DESIGNATED PROJECT COORDINATORS AND SUBMISSIONS

8.1 Respondent shall designate a Project Coordinator and shall notify EPA and WV DEP of such designation no later than five (5) Calendar Days after the Effective Date of this Order. Designation of a Project Coordinator shall not relieve Respondent of its obligation to comply with all requirements of this Order. Respondent's Project Coordinator shall be a technical and/or managerial representative of Respondent and may be a contractor and/or consultant; provided, however, Respondent's Project Coordinator shall not be its legal representative in this matter. The Project Coordinator for EPA designated pursuant to this Section and the Project Coordinator for Respondent shall be responsible for overseeing the Work. To the maximum extent possible, communications between Respondent and EPA and all documents concerning the activities performed pursuant to the terms and conditions of this Order, including plans, reports, approvals, and other correspondence, shall be directed to the Project Coordinators.

8.2 The lead Project Coordinator for EPA is:

Dennis Matlock, OSC
U.S. Environmental Protection Agency
Removal Enforcement and Oil Section (3HS32)
1060 Chapline Street
Wheeling, WV 26003
(304) 234-0259
matlock.dennis@epa.gov

The secondary Project Coordinator for EPA in the event EPA's lead Project Coordinator is unavailable is:

Melissa Linden, OSC
U.S. Environmental Protection Agency
Removal Enforcement and Oil Section (3HS32)
1060 Chapline Street
Wheeling, WV 26003
(304) 234-0251
linden.melissa@epa.gov

The tertiary Project Coordinator for EPA in the event EPA's lead and secondary Project Coordinators are unavailable is:

Francisco J. Cruz, OSC
U.S. Environmental Protection Agency
Removal Enforcement and Oil Section (3HS32)
1650 Arch Street
Philadelphia, PA 19103
(215) 814-5528
cruz.franciscoj@epa.gov

- 8.3 Respondent may change its Project Coordinator. Such a change shall be accomplished by notifying the EPA Project Coordinator in writing at least five (5) Calendar Days prior to the change.
- 8.4 EPA shall have the right to change its Project Coordinator at any time without prior notice to Respondent. EPA's intent is to notify Respondent as soon as practicable following any such change of its Project Coordinator.
- 8.5 The absence of the EPA Project Coordinator from the Site shall not be cause for the stoppage or delay of Work except when such stoppage or delay is specifically required by EPA.
- 8.6 The EPA Project Coordinator is authorized to oversee the proper and complete implementation of this Order including the authority to: halt or modify Work or other activities performed by Respondent at the Site to eliminate a release or threat of release of oil or hazardous substances; remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time; direct or monitor all federal, state, and private actions to remove a discharge; and determine when the removal is complete. Such direction by the EPA Project Coordinator may be given verbally or in writing. If such direction is given verbally, the EPA Project Coordinator will later memorialize such direction in writing.
- 8.7 Documents required by this Order to be concurrently submitted to WV DEP shall be delivered to:

James K. Lilly
Environmental Inspector Supervisor
WVDEP – Environmental Enforcement
254 Industrial Drive
Oak Hill, WV 25901
(304) 465-3016
James.K.Lilly@wv.gov

and

Jeremy W. Bandy
Chief Inspector
WVDEP – Environmental Enforcement
601 57th Street, SE
Charleston, WV 25304
(304) 926-0470
Jeremy.W.Bandy@wv.gov

IX. ACCESS TO PROPERTY AND INFORMATION

- 9.1 On and after the Effective Date of this Order, Respondent shall secure and provide for EPA and its employees, agents, consultants, contractors, and other authorized and/or designated representatives, for the purposes of conducting and/or overseeing the Work, access to the Derailment Site property and all property owned or controlled by Respondent wherein Work must be undertaken. Such access shall permit EPA and its employees, agents, consultants, contractors, and other authorized and designated representatives to conduct all activities described in Paragraph 9.3 of this Order.
- 9.2 To the extent that property where Work must be undertaken is presently owned or controlled by parties other than Respondent, Respondent shall use its best efforts to obtain Site access agreements from the present owners. Such access agreements shall be finalized as soon as practicable but no later than five (5) Calendar Days after receiving EPA's written approval to proceed. Such agreements shall provide reasonable access for Respondent and its employees, agents, consultants, contractors and other authorized and designated representatives to conduct the Work, and for EPA and its designated representatives to conduct the activities outlined in Paragraph 9.3, below. In the event that any property owner refuses to provide such access or access agreements are not obtained within the time designated above, whichever occurs sooner, Respondent shall notify EPA at that time, in writing, of all efforts to obtain access and the circumstances of the failure to obtain such access. EPA may then take steps to provide such access. Respondent shall reimburse the United States for all costs incurred in obtaining access which are not inconsistent with the NCP.
- 9.3 EPA and its respective employees, agents, contractors, consultants and other authorized and designated representatives shall have the authority to enter and freely move about the location where the response actions and/or work is being performed at all reasonable times for the purpose of, inter alia, inspecting Work; inspecting records, operating logs, and contracts related to the Site; reviewing and assessing the progress of Respondent in carrying out the terms of this Order; conducting such tests as EPA deems necessary; using a camera, sound recording or other documentary type equipment; and verifying the data submitted to EPA by Respondent. Respondent shall permit such persons to inspect

and copy all records, files, photographs, documents, and other writings, including all sampling and monitoring data, in any way pertaining to the Work.

- 9.4 Respondent may make a claim of business confidentiality for information submitted to EPA pursuant to this Order in the manner described in 40 C.F.R. § 2.203(b), provided such claim is allowed by Section 308(b)(2) of the CWA, 33 U.S.C. § 1318(b)(2). Such an assertion shall be adequately substantiated in accordance with 40 C.F.R. § 2.204 at the time the assertion is made. Information subject to a confidentiality claim shall be made available to the public by EPA only in accordance with the procedures set forth in 40 C.F.R. Part 2, Subpart B. If no such claim of business confidentiality accompanies the information when it is submitted or made available to EPA, the submitted information may be made available to the public by EPA without further notice to Respondent.
- 9.5 Respondent may withhold those records and documents covered by any privilege or protection recognized under federal law and applied by federal courts in actions commenced by the United States. In the event that Respondent withholds a document as privileged, Respondent shall provide EPA with the title of the document, the date of the document, the name(s) of the author(s), and addressee(s)/recipient(s), a description of the nature of the document, and identification of the privilege asserted at the time such document is required to be provided to EPA.
- 9.6 No claim of confidentiality or privilege shall be made regarding any documents, reports or other information created or generated pursuant to this Order including, but not limited to, sampling, analytical, monitoring, hydrogeological, scientific, chemical or engineering data, or documents or information evidencing conditions at or around the Site. Nor shall such claims be made for analytical data; Site safety data; Site monitoring data; operational logs; manifests; identities of treatment, storage and/or disposal facilities used; identities of transporters used; identities of any contractors or subcontractors used in performing work required by this Order.
- 9.7 Notwithstanding any provision of this Order, EPA retains all of its access, information-gathering and inspection authorities and rights under the Resource Conservation and Recovery Act ("RCRA"), as amended, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, CWA, OPA and any other applicable statute and regulation.

X. RESERVATION OF RIGHTS

- 10.1 EPA reserves all rights, claims, interests and defenses that it may have.
- 10.2 Nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order.

- 10.3 Notwithstanding any provision of this Order, EPA reserves the right to assess an administrative penalty pursuant to Section 311(b)(6) of CWA, 33 U.S.C. § 1321(b)(6). If Respondent fails to comply with the terms of this Order, Respondent may be subject to civil penalties under Section 311(b)(7) of CWA, 33 U.S.C. § 1321(b)(7), and injunctive relief under Section 311(e)(1)(A) of the CWA, 33 U.S.C. § 1321(e)(1)(A).
- 10.4 As provided by this Order, EPA expressly reserves its right to disapprove Work performed by Respondent; to halt Work being performed by Respondent if Respondent has not complied with an approved RAP or this Order, or any time that EPA deems necessary to protect public health and welfare of the United States and to perform such Work; to request and require hereunder that Respondent corrects and/or re-performs any and all Work disapproved by EPA; and/or to request or require that Respondent perform response actions in addition to those required by this Order. Further, EPA reserves the right to undertake response action at any time EPA deems appropriate. In the event EPA requires Respondent, and Respondent declines, to correct and/or re-perform Work that has been disapproved by EPA and/or to perform response actions in addition to those required by this Order, EPA reserves the right to undertake such actions and seek reimbursement of the costs incurred and/or to seek any other appropriate relief. In addition, EPA reserves the right to perform its own studies and/or complete the response action or any portion of the response action at any time that such actions are appropriate under the NCP and/or take any other action authorized by law.
- 10.5 The United States reserves the right to bring an action against Respondent for recovery of all recoverable costs incurred by the United States related to this Order which are not reimbursed by Respondent, as well as any other costs incurred by the United States in connection with response actions conducted at the Site.
- 10.6 Nothing in this Order shall preclude EPA from taking any additional enforcement actions against Respondent, including modification of this Order or issuance of additional Orders, and/or additional response actions as EPA may deem necessary, or from requiring Respondent in the future to perform additional activities pursuant to RCRA, CERCLA, CWA, OPA, or any other applicable law.
- 10.7 Nothing in this Order shall limit the authority of the EPA OSC as outlined in the NCP, CWA and OPA.

XI. OTHER CLAIMS

- 11.1 Nothing in this Order shall constitute or be construed as a release from any claim, cause of action or demand in law or equity against any person, firm, partnership or corporation not bound by this Order for any liability it may have relating in any way to the generation, storage, treatment, handling, transportation, release or disposal of any oil or hazardous substances found at, taken to, or taken from the Site.

- 11.2 Neither EPA nor the United States by issuance of this Order assumes any liability for any acts or omissions by Respondent, or Respondent's employees, agents, contractors, or consultants engaged to carry out any action or activity pursuant to this Order, nor shall EPA nor the United States be held out as a party to any contract entered into by Respondent or by Respondent's employees, agents, contractors, or consultants engaged to carry out the requirements of this Order.
- 11.3 Nothing herein shall constitute or be construed as a satisfaction or release from liability of Respondent or any other person.

XII. COMPLIANCE WITH OTHER LAWS

- 12.1 All Work shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations. Where any portion of the Work requires a federal or state permit or approval, Respondent shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals. This Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XIII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

- 13.1 The effective date of this Order shall be three (3) Business Days after it is signed by EPA ("Effective Date").
- 13.2 This Order may be modified or amended by EPA. Such amendments shall be in writing and shall have as their effective date the date on which such amendments are signed by EPA. Modifications to the EPA-approved RAP and its implementation may be made by EPA including by the EPA Project Coordinator. Such modifications shall be memorialized in writing by the Project Coordinator.
- 13.3 Any reports, plans, specifications, schedules, or other submissions required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved reports, plans, specifications, schedules, or other submissions shall be considered non-compliance with the requirements of this Order. Determinations of non-compliance will be made by EPA.
- 13.4 No informal advice, guidance, suggestions or comments by EPA regarding reports, plans, specifications, schedules or other submissions by Respondent or the requirements of this Order will be construed as relieving Respondent of its obligation to obtain formal approval when required by this Order, and to comply with the requirements of this Order unless formally modified.

XIV. LIABILITY OF THE UNITED STATES AND WEST VIRGINIA

- 14.1 Neither the United States Government nor any agency thereof shall be liable for any injuries or damages to persons or property resulting from acts or omissions of Respondent; or of their employees, agents, servants, receivers, successors or assigns; or of any persons including, but not limited to, firms, corporations, subsidiaries, contractors or consultants in carrying out the Work, nor shall the United States Government or any agency thereof be held out as a party to any contract entered into by Respondent in carrying out the Work.

XV. FAILURE TO PERFORM/PERFORMANCE EVENTS

- 15.1 In the event of an inability or anticipated inability on the part of Respondent to perform any of the actions or Work required by this Order in the time and manner required herein, Respondent's Project Coordinator shall notify EPA and WV DEP orally as soon as possible but no later than within twenty-four (24) hours of the time Respondent becomes aware or should have become aware of such event (or, if the event occurs on a Friday or Saturday, no later than the following Monday) and in writing no later than seven (7) Calendar Days after Respondent becomes aware or should have become aware of such delay or anticipated delay. Such written notification shall be certified by a responsible official of Respondent in accordance with Section XVI of this Order and shall describe fully the nature of the delay, including how it may affect the Work, RAP and schedule; the actions that will be or have been taken to mitigate, prevent, and/or minimize further delay; and the timetable according to which future actions to mitigate, prevent and/or minimize the delay will be taken. Such notification shall not relieve Respondent of any obligation of this Order. Respondent shall adopt all reasonable measures to avoid and minimize such delay.
- 15.2 Failure by Respondent to carry out any requirement of this Order in accordance with the terms and conditions specified herein may result in the unilateral performance of the required actions by EPA pursuant to applicable authorities, an action to collect penalties in accordance with Section XIX, and/or the initiation of an enforcement action against Respondent to require Respondent to perform such actions, in addition to any other relief that may be available to EPA pursuant to applicable law.
- 15.3 Nothing in this Paragraph or any other provision of this Order shall be construed so as to limit any powers EPA may have under the CWA, OPA, NCP, or any other law or regulation.

~~XVI. CERTIFICATION OF COMPLIANCE~~

- 16.1 (a) Each notice, report, certification, data presentation or other document submitted by Respondent under or pursuant to this Order which discusses, describes, demonstrates or

supports any finding or makes any representation concerning Respondent's compliance or non-compliance with any requirement(s) of this Order shall be certified by Respondent, a responsible official of Respondent or by the Project Coordinator for Respondent. The term "responsible official" means: (I) a president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision-making functions for the corporation, or (ii) the manager of one or more manufacturing facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. The responsible official of a partnership or sole proprietorship is the general partner or the proprietor, respectively.

(b) The written Final Report required by Paragraph 7.14 of this Order and any written notification described in Paragraph 16.1(a) of this Order shall be certified by a responsible official of Respondent.

16.2 The certification required by Paragraph 16.1(b) of this Order shall be in the following form:

Except as provided below, I certify that the information contained in or accompanying this (type of submission) is true, accurate, and complete.

As to (the/those) portion(s) of this (type of submission), for which I cannot personally verify (its/their) accuracy, I certify under the penalty of law that this (type of submission) and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____

Name (print): _____

Title (print): _____

16.3 Submission of documents pursuant to this Order which are found by EPA to contain false information shall constitute a failure to comply with this Order and shall subject

Respondent to, among other things, possible enforcement action. In addition, providing false, fictitious, or fraudulent statements or representations may subject Respondent to criminal penalties under 18 U.S.C. § 1001.

XVII. NOTICE OF INTENT TO COMPLY

- 17.1 Respondent shall notify EPA's Project Coordinator within three (3) Business Days after the Effective Date of this Order of Respondent's intention to comply with the terms of this Order. Failure of Respondent to provide notification to EPA's Project Coordinator of its intent to comply within this time period shall be deemed a violation of this Order by Respondent.

XVIII. OPPORTUNITY TO CONFER WITH EPA

- 18.1 Not later than three (3) Business Days from the Effective Date of this Order, Respondent may confer with EPA to discuss this Order. Such conference is not an adversarial hearing or part of a proceeding to challenge this Order, and no official stenographic record of such conference shall be kept. In order to exercise its opportunity to confer with EPA, counsel for Respondent shall contact:

James Van Orden
Senior Assistant Regional Counsel
EPA Region III
1650 Arch Street (MC 3RC42)
Philadelphia, PA 19103
Phone: (215) 814-2693
Email: vanorden.james@epa.gov

XIX. PENALTIES FOR NONCOMPLIANCE

- 19.1 Violation of any provision of this Order may subject Respondent to civil penalties of up to \$37,500 per day of violation, or an amount up to three (3) times the cost incurred by the United States, as provided in Section 311(b)(7)(B) of CWA, 33 U.S.C. § 1321(b)(7)(B), as amended by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461.

XX. RECORD RETENTION

- 20.1 Respondent shall preserve all documents and information relating to the Work performed under this Order, or relating to the oil or hazardous substances found at or released from the Site, for ten (10) years following completion of the response action required by this Order. At the end of this ten (10) year period and thirty (30) days before any document or information is destroyed, Respondent shall notify EPA that such documents and information are available to EPA for inspection, and upon request, shall provide the originals or copies of such documents and information to EPA. In addition, Respondent shall provide documents and information retained under this Section at any time before expiration of the ten (10) year period at the written request of EPA.

XXI. ADMINISTRATIVE RECORD

- 21.1 The Administrative Record upon which this Order is issued is available for review by Respondent's representatives at its request. Requests to review the Administrative Record shall be submitted to the EPA Project Coordinator designated pursuant to Section VIII of this Order. The index of the Administrative Record is attached hereto as Appendix A.

XXII. NOTICE OF COMPLETION

- 22.1 When EPA determines, after EPA's review and approval of the Final Report required pursuant to Paragraph 7.14 of this Order, that the Work specified in Section VII of this Order has been fully performed, and upon receipt of penalties hereunder, with the exception of any continuing obligations required by this Order, including those requirements specified in Sections X ("Reservation of Rights"), XI ("Other Claims"), XIV ("Liability of the United States Government"), and XX ("Record Retention"), EPA will provide a notice of completion to Respondent regarding all aspects of the Work other than the continuing requirements of this Order.

IT IS SO ORDERED:

BY: 
Cecil Rodrigues, Director
Hazardous Site Cleanup Division
U.S. Environmental Protection Agency
Region III

DATE: 2/27/2015

Appendix A: Administrative Record Index

1. USCG POLREP, February 15, 2015
2. Memorandum of Transfer of FOSC Responsibilities from USCG to EPA – February 19, 2015
3. Initial POLREP #1 – February 18, 2015
4. POLREP #2 – February 19, 2015
5. POLREP #3 – February 19, 2015
6. POLREP #4 – February 21, 2015
7. POLREP #5 – February 22, 2015
8. POLREP #6 – February 22, 2015
9. POLREP #7 – February 24, 2015
10. POLREP #8 – February 25, 2015
11. Air Monitoring and Sampling Plan for Community – February 16, 2015
12. Air Monitoring and Sampling Plan for Community Adjustment 1 – February 23, 2015
13. Air Monitoring and Sampling Plan for Community Adjustment 2 – February 25, 2015
14. Air Monitoring and Air Sampling Plan for Workers plus Addendum – February 2015
15. Air Monitoring and Sampling Plan for Workers Addendum 2 – February 25, 2015
16. Aqua Blok Groundwater Contamination Plan – February 25, 2015
17. Barge Plan and Sheet Pile Installation Plan Addendum 1 – February 25, 2015
18. Barge Plan Addendum 1 – February 23, 2015
19. Boom Contingency Plan – February 23, 2015
20. Crude Oil Operations Transfer Plan – February 19, 2015
21. Crude Oil Operations Transfer Plan – Appendix B – February 25, 2015
22. Decontamination Site Plan – February 22, 2015
23. Interceptor Trench and Crude Oil Recovery – February 25, 2015
24. Kanawha River Bank Oil Investigation Plan – February 22, 2015
25. Post Excavation Soil Sampling Plan – February 23, 2015
26. Preliminary Waste Management and Handling Plan – February 19, 2015
27. Rail Bed Excavation Plan – February 25, 2015
28. EPA Endangerment Determination – February 27, 2015
29. EPA Notice to Suspected Discharger – February 22, 2015
30. CSX Response to EPA Notice to Suspected Discharger – February 23, 2015
31. EPA – CSX Email Correspondence – February 22, 2015
32. EPA Email Correspondence to WV DEP Regarding Action – February 25, 2015
33. Material Safety Data Sheet, Whiting Crude Oil (Sweet)

ERIC
1756 N. 43rd Road
Leland, IL 60531

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES



MR. NAVECKY
Surface Transportation Board
Docket No. FD 35952
395 E. Street, S.W.
Washington, DC.
20423-0001