



- 1.3 EPA has conferred with and provided notice of the issuance of this Consent 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).
- 1.4 EPA and Respondent acknowledge that the Work required by this Consent Order is intended to address contamination of the Site. This Consent Order requires the performance of actions as described herein to remediate contamination discharged from Facilities located at or near the CSX Transportation Mount Carbon Train Derailment Site (hereinafter "Derailment Site" or the "Site") in Fayette County, West Virginia.
- 1.5 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.
- 1.6 All terms and conditions of this Consent Order, including any modifications hereto, are required by this Consent Order. The Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order and to comply with all such terms and conditions as set forth herein.
- 1.7 Respondent consents to and will not contest EPA's authority or jurisdiction to issue or to enforce this Consent Order. In executing this Consent Order, Respondent neither admits nor denies liability, and neither admits nor denies EPA's Findings of Fact, EPA's Conclusions of Law and EPA's Determinations set forth in Sections IV through VI of this Consent Order. Respondent acknowledges EPA's authority to issue this Consent Order and consents to its terms. Respondent further agrees that in any proceeding to enforce this Consent Order, it will not contest EPA's Findings of Fact, EPA's Conclusions of Law, and EPA's Determinations set forth in Sections IV through VI of this Consent Order respectively, the basis or validity of this Consent Order, or its terms.

## **II. STATEMENT OF PURPOSE**

- 2.1 In entering into this Consent Order, the mutual objective of EPA and Respondent is for Respondent to conduct an action to study, abate, mitigate and eliminate threats from oil, and/or hazardous substances, and/or 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 affected 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 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 Consent Order shall mean every day of the week except Saturdays, Sundays and federal holidays.
- 3.3 “Calendar Days” as used in this Consent Order shall mean every day of the week, including Saturdays, Sundays and all federal holidays.
- 3.4 “Consent Order” shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of a conflict between this Consent Order and any appendix, the text of the Consent Order, other than that of the appendix, shall control.
- 3.5 “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.
- 3.6 “Days” or “days” as used in this Consent Order, unless otherwise noted, shall mean Business Days.
- 3.7 “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 any constituents thereof have come to be located, including Armstrong Creek and the Kanawha River and their tributaries and their adjoining shorelines.
- 3.8 “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. § 110.3 for purposes of the Work to be performed under this Consent Order.

- 3.9 “EPA” as used in this Consent Order shall mean the United States Environmental Protection Agency and any successor departments or successor agencies of the United States.
- 3.10 “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.
- 3.11 “Hazardous Substances” means any substance defined in Section 311(a)(14) of the CWA, 33 U.S.C. § 1321(a)(14).
- 3.12 “National Contingency Plan” or “NCP” as used in this Consent 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.
- 3.13 “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.
- 3.14 “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. § 110.1.
- 3.15 “OPA” shall mean the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761.
- 3.16 “Oil” or “oil” as used in this Consent Order shall have the meaning set forth in Section 311(a)(1) of CWA, 33 U.S.C. § 1321(a)(1).
- 3.17 “Paragraph” shall mean a portion of this Consent 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 Consent 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 Consent Order, except those required by Section XXI (“Record Retention”).

- 3.23 “WV DEP” as used in this Consent 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. EPA’S FINDINGS OF FACT**

- 4.1 CSX Transportation is a wholly-owned subsidiary of CSX, Inc.
- 4.2 CSX Transportation is a Virginia corporation, and its headquarters are located at 500 Water Street in Jacksonville, Florida.
- 4.3 According to CSX, Inc.’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.
- 4.4 On February 16, 2015, a CSX Transportation train en route to Yorktown, Virginia, was traveling through Mount Carbon, West Virginia.
- 4.5 The train consisted of two locomotives, two buffer cars, and 107 tank cars containing crude oil.
- 4.6 At or around 1330 hours on February 16, 2015, approximately 27 rail cars of the train derailed from the tracks (hereinafter, “Derailment Incident”).
- 4.7 The area at which the Derailment Incident occurred (“the Derailment Site”) is adjacent to Armstrong Creek, which is a tributary of the Kanawha River.
- 4.8 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.
- 4.9 Upon derailment, approximately 27 rail cars collided, igniting the crude oil cargo, which escalated to, based upon representations of the Respondent, sudden heat induced tear events causing explosions and/or fires in approximately 20 rail cars.
- 4.10 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.
- 4.11 One downstream water system intake was closed by local water authorities as a precaution as a result of the Derailment Incident.

- 4.12 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”).
- 4.13 On February 16, 2015, at approximately 1408 hours, CSX Transportation 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. USCG initiated the Unified Command with representatives from EPA, WV DEP, local emergency responders and CSX Transportation.
- 4.14 At all times relevant to this matter, the train was operated by CSX Transportation.
- 4.15 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.
- 4.16 CSX Transportation removed all rail cars from the Derailment Site as of February 23, 2015. The damaged cars that were removed contained approximately 181,000 gallons of oil.
- 4.17 EPA OSCs observed oil in Armstrong Creek and the Kanawha River between February 16, 2015 and February 23, 2015.
- 4.18 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/or has caused an emulsion to be deposited beneath the surface of the Armstrong Creek and the Kanawha River.
- 4.19 On or about February 16, 2015, in coordination with local, state, and federal emergency responders, CSX Transportation 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.
- 4.20 Oil recovery operations have been implemented 24 hours a day since the Derailment Incident.

- 4.21 Respondent has represented to EPA that, as of February 28, 2015, approximately 110,287 gallons of oil water mixture had been recovered from the Derailment Site.
- 4.22 On February 19, 2015, primary federal cleanup authority was transferred from the USCG to EPA.
- 4.23 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.
- 4.24 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.
- 4.25 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.
- 4.26 Bakken Crude Oil is harmful to aquatic life and wildlife and may have long lasting effects on aquatic life. The coating action of Bakken Crude Oil can kill birds, plankton, algae, and fish.
- 4.27 On February 23, 2015, CSX Transportation in response to a February 22, 2015 legal notice from EPA, confirmed in writing that it intends to assume the responsibility of Responsible Party for the Derailment Incident and that it intends to voluntarily continue the clean up.
- 4.28 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.
- 4.29 As set forth in Paragraphs 1.2 and 24.1, upon execution of this Consent Order, the Work at the Site will be conducted pursuant to this Consent Order.

**V. EPA'S CONCLUSIONS OF LAW**

- 5.1 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).
- 5.2 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).
- 5.3 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 OPA, 33 U.S.C. § 2701(27).
- 5.4 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).
- 5.5 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.
- 5.6 Bakken Crude Oil is an “oil” as defined in Section 311(a)(1) of CWA, 33 U.S.C. § 1321(a)(1).
- 5.7 “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.
- 5.8 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.
- 5.9 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).
- 5.10 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.
- 5.11 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.

- 5.12 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 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.

## **VI. EPA’S DETERMINATIONS**

Based on the EPA’s Findings of Fact and EPA’s Conclusions of Law set forth above, and the Administrative Record supporting the issuance of this Consent Order, EPA has determined that:

- 6.1 The discharge of oil from the Facilities is in violation of Section 311(b)(3) of CWA, 33 U.S.C. § 1321(b)(3).
- 6.2 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).
- 6.3 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).
- 6.4 The Work required by this Consent 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.
- 6.5 The Work required by this Consent 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.

- 6.6 The Work required by this Consent 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. PARTIES BOUND**

- 7.1 This Consent Order shall apply to and be binding upon EPA and its agents and 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 Consent Order.
- 7.2 No change in ownership of any property covered by this Consent Order shall in any way alter, diminish, or otherwise affect Respondent's obligations and responsibilities under this Consent Order.
- 7.3 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.
- 7.4 The Respondent shall provide a copy of this Consent Order to all contractors, subcontractors, supervisory personnel, laboratories and consultants retained by Respondent to conduct any portion of the Work to be performed by Respondent pursuant to this Consent Order. Respondent shall require in any and all contracts related to this Site that the Work that is the subject of such contract be performed within the time and in the manner set forth in this Consent Order.
- 7.5 The undersigned representative of the Respondent certifies that he or she is fully authorized to enter into the terms of this Consent Order and to execute and legally bind Respondent to this Consent Order.

## **VIII. RESPONSE ACTION PLAN DEVELOPMENT AND IMPLEMENTATION**

- 8.1 Respondent shall continue, commence and complete performance of the following Work as set forth herein within the time periods specified, and all Work must be in conformance with the terms of this Consent Order.
- 8.2 Within three (3) Business Days of the Effective Date of this Consent Order, Respondent shall notify EPA and WV DEP in writing of the identity and qualifications of the

contractor, subcontractor, and supervisory personnel who will be primarily responsible for developing the Response Action Plan (“RAP”) required by this Section. Respondent shall simultaneously notify EPA and WV DEP in writing of the identity and qualifications of all contractors, subcontractors, and supervisory personnel selected by Respondent who will conduct all or any portion of the response action. Respondent shall ensure that all contractors, subcontractors, and supervisory personnel 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 IX 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 and Respondent shall expeditiously notify EPA and WV DEP of an alternative or alternatives.

- 8.3 Respondent shall not commence implementation of any plan developed hereunder until receiving EPA’s written approval to proceed pursuant to Paragraph 8.7. 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 8.4, Respondent need not resubmit such plan, report, or schedule; however, Respondent must submit a certification for such plan, report, or schedule, pursuant to Section XX of this Consent Order. If EPA has approved any plan, report, or schedule before the Effective Date of this Consent Order, such plan, report, or schedule is incorporated into this Consent Order upon the certification for such plan, report or schedule, and failure to comply with such EPA-approved plan, report, or schedule shall be considered non-compliance with this Consent Order.
- 8.4 Respondent has performed and, upon the Effective Date, will continue to 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.

8.5 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. The long-term monitoring of Armstrong Creek and the Kanawha River as required by this subparagraph shall continue until EPA notifies Respondent in writing of its determination that such monitoring is no longer required.

(b) The restoration of 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 8.5(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 a public availability center in Fayette County 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 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.

8.6 Within twenty-one (21) Calendar Days of the Effective Date of this Consent 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 8.5, 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 8.7 and 8.12, below.

8.7 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 8.12, below.

- 8.8 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 Consent Order, Respondent shall correct or re-perform such Work in accordance with a schedule provided by EPA.
- 8.9 Beginning seven (7) Calendar Days after the Effective Date of this Consent Order and then on the seventh, fourteenth, twenty-first, and twenty-eighth day of each month thereafter, or at such longer interval as may be determined in writing by EPA, and until EPA advises Respondent that the Work set forth in Paragraph 9.4 is complete, Respondent shall submit to EPA, WV DEP, and each Natural Resource Trustee a progress report describing the Work conducted pursuant to Paragraph 9.4 for each preceding seven (7) Calendar 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 Consent 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 XVII of this Consent Order during the reporting period.
- 8.10 Beginning fifteen (15) Calendar Days after the Effective Date of this Consent Order and then on the seventh and twenty-first day of each month thereafter, or at 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 9.5 for each preceding fifteen (15) Calendar 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 Consent 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 XVII of this Consent Order during the reporting period.

- 8.11 Documents, including plans, reports, sampling results and other correspondence to be submitted pursuant to this Consent 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 IX of this Consent Order.
- 8.12 All reports, plans, approval letters, specifications, schedules and attachments required by this Consent Order are subject to EPA's approval and shall be deemed incorporated into this Consent 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 Consent Order, the approved portion shall be enforceable under this Consent Order. In the event of conflict between this Consent Order and any appendix attached hereto, incorporated in or enforceable hereunder, the provisions of this Consent 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 8.4 and 8.5, 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 Consent Order. Determination(s) of non-compliance will be made by EPA.
- 8.13 In addition to the information and documents required by this Consent 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 Consent 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.
- 8.14 Within thirty (30) Calendar Days of the date that Respondent concludes it has completed implementation of the plans and the items identified in Paragraphs 8.4 and 8.5, Respondent shall submit a written Final Report to EPA and WV DEP, subject to EPA's

approval described in Paragraph 8.12, above. The Final Report shall detail the work undertaken to implement all plans and the items identified in Paragraphs 8.4 and 8.5 and shall be certified by Respondent in accordance with the terms of Section XX of this Consent Order. EPA will review the adequacy of Respondent's implementation of the plans and accomplishment of the work items specified in Paragraphs 8.4 and 8.5, 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 8.4 through 8.9 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 8.7 and 8.12, 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.

- 8.15 Commencing on the Effective Date of this Consent Order and continuing thereafter, Respondent shall not handle or remove oil or any constituents thereof from the Site except in conformance with the terms of this Consent Order and all applicable federal, state and local laws and regulations.
- 8.16 Respondent shall not commence any Work except in conformance with the terms of this Consent Order. Respondent shall not commence implementation of any plan developed hereunder until receiving EPA's written approval to proceed pursuant to Paragraph 8.7. To the extent that Respondent has commenced or undertaken any Work before receipt of this Consent 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 Consent Order.
- 8.17 Commencing on the Effective Date of this Consent 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 Consent 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 Consent 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 Consent 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.

**IX. DESIGNATED PROJECT COORDINATORS AND SUBMISSIONS**

9.1 The Project Coordinator for Respondent is:

Matt Adkins  
351 Thornton Road  
Suite 125  
Lithia Springs, Ga 30122  
(770) 819-2849 (office)  
(904) 245-2273 (fax)  
Matt\_adkins@csx.com

The secondary Project Coordinator for Respondent is

Rick Helmadollar, PE  
Associate Vice President/Principal Engineer  
ARCADIS U.S., Inc.  
1000 Cobb Place Blvd, Bldg. 500-A  
Kennesaw, GA 30144  
(404) 952-1608 (office)  
(276) 730-5300 (mobile)  
(770) 428-4004 (fax)  
rick.helmadollar@arcadis-us.com

9.2 Designation of a Project Coordinator shall not relieve Respondent of its obligation to comply with all requirements of this Consent 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 Consent Order, including plans, reports, approvals, and other correspondence, shall be directed to the Project Coordinators.

9.3 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

- 9.4 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.
- 9.5 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.
- 9.6 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.
- 9.7 The EPA Project Coordinator is authorized to oversee the proper and complete implementation of this Consent 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.
- 9.8 Documents required by this Consent 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 57<sup>th</sup> Street, SE  
Charleston, WV 25304  
(304) 926-0470  
Jeremy.W.Bandy@wv.gov

## **X. ACCESS TO PROPERTY AND INFORMATION**

- 10.1 On and after the Effective Date of this Consent Order, Respondent shall 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 10.3 of this Consent Order.
- 10.2 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 10.3, 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.
- 10.3 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 Consent 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.
- 10.4 Respondent may make a claim of business confidentiality for information submitted to EPA pursuant to this Consent 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.

- 10.5 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.
- 10.6 No claim of confidentiality or privilege shall be made regarding any documents, reports or other information created or generated pursuant to this Consent 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 Consent Order.
- 10.7 Notwithstanding any provision of this Consent 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.

## **XI. DISPUTE RESOLUTION**

- 11.1 If Respondent disagrees, in whole or in part, with any EPA disapproval, modification or other decision, determination, or directive made by EPA pursuant to this Consent Order, Respondent shall notify EPA in writing of its objections, and the basis therefor, within fourteen (14) Calendar Days of receipt of EPA's disapproval, decision, determination or directive. Such notice shall set forth the specific points of the dispute, the position which Respondent asserts should be adopted as consistent with the requirements of this Consent Order, the basis for Respondent's position, and any matters which it considers necessary for EPA's decision on the dispute. EPA and Respondent shall have an additional fourteen (14) Calendar Days from the receipt by EPA of the notification of objection, during which time representatives of EPA and Respondent may confer in person or by telephone to resolve any disagreement. If an agreement is reached, the resolution shall be written and signed by an authorized representative of each party. In the event that

resolution is not reached within this fourteen (14) Calendar Day period, EPA will furnish to Respondent, in writing, its decision on the pending dispute.

- 11.2 The invocation of dispute resolution procedures under this Section XI shall not extend, postpone or affect in any way any obligation of Respondent under this Consent Order unless EPA determines otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Order. In the event that Respondent does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (“Delay in Performance and Stipulated Penalties”).
- 11.3 Notwithstanding any other provisions of this Consent Order, no action or decision by EPA, including, without limitation, decisions of the Director of the Hazardous Site Cleanup Division, Region III, pursuant to this Consent Order, shall constitute final agency action giving rise to any right to judicial review prior to EPA’s initiation of judicial action to compel Respondent’s compliance with this Consent Order.

**XII. DELAY IN PERFORMANCE AND STIPULATED PENALTIES**

- 12.1 For each day, or portion thereof, that Respondent fails to comply with any requirement of this Consent Order at the time and in the manner set forth herein, Respondent shall be liable upon demand to EPA for the sums set forth below as stipulated penalties. All payments to EPA under this Section XII shall be paid in accordance with payment instructions to be provided by EPA at the time of the demand for payment of stipulated penalties. All payments shall indicate that the payment is for stipulated penalties, and shall reference EPA Region III and EPA Docket No. CWA-03-2015-0105CW. Copies of the transmittal letters and the checks or electronic funds transfer receipt shall simultaneously be sent to EPA’s Project Coordinator and to the following:

Docket Clerk (3RC00)  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

- 12.2 Stipulated penalties shall accrue in the amount of \$1,000.00 per calendar day per violation. Neither the accrual of nor demand for stipulated penalties set forth in this Section XII shall preclude EPA from pursuing other penalties or sanctions available to EPA for Respondent’s failure to comply with the requirements of this Consent Order.

**XIII. FORCE MAJEURE AND NOTIFICATION OF DELAY**

- 13.1 Respondent, through its Project Coordinator, shall notify EPA of any delay or anticipated delay in achieving compliance with any requirement of this Consent Order. Such notification shall be made verbally as soon as possible but not later than two (2) Calendar Days after Respondent becomes aware or should have become aware of any such delay or anticipated delay, 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 fully describe 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 the future actions to mitigate, prevent and/or minimize the delay will be taken. The Respondent shall ensure that its Project Coordinator provides Respondent with immediate notification of any project delays. The Respondent shall adopt all reasonable measures to avoid and minimize such delay.
- 13.2 To the extent Respondent intends to claim that any delay or anticipated delay described by Respondent in accordance with Paragraph 13.1 was or will be caused by circumstances beyond its control, Respondent shall, within fourteen (14) Calendar Days after Respondent becomes aware, or should have become aware, of such delay or anticipated delay, submit to EPA a "Notice of Force Majeure" in which Respondent fully explains that the delay was caused by circumstances beyond its control which could not have been overcome by due diligence, the necessity of the proposed length of the delay, and that the Respondent took and is taking all reasonable measures to avoid and minimize delay. The Respondent shall have the burden of proving these facts to EPA.
- 13.3 Any such delay that EPA determines (1) has resulted or will result from circumstances beyond the control of the Respondent and (2) could not and cannot be overcome by due diligence on the Respondent's part, shall not be deemed to be a violation of Respondent's obligation(s) under this Consent Order, and shall not subject Respondent to stipulated penalties under this Consent Order for that particular delay. In such event, the schedule affected by the delay shall be extended for a period EPA deems necessary to complete the Work on an expedited basis, but no greater than a period equal to the delay directly resulting from such circumstances. Increased costs of performance of the requirements of this Consent Order or changed economic circumstances shall not be considered circumstances beyond the control of the Respondent. Delay in one item or component of Work or the RAP does not justify delay in timely achievement of other items or components. Each delay must be separately addressed and substantiated according to the provisions of Paragraphs 13.1 and 13.2 above.
- 13.4 Failure of the Respondent to comply with the notice requirements of Paragraphs 13.1 and 13.2, above, shall constitute a waiver of the Respondent's right to invoke the benefits of this Section with respect to that event.

- 13.5 In the event that EPA and the Respondent cannot agree that any delay in compliance with the requirements of this Consent Order has been or will be caused by circumstances beyond the control of the Respondent that cannot be overcome by due diligence, the dispute shall be resolved in accordance with the provisions of Section XII (“Dispute Resolution”) of this Consent Order.

#### **XIV. RESERVATION OF RIGHTS**

- 14.1 The United States reserves all rights, claims, interests and defenses that it may have.
- 14.2 Nothing herein shall prevent the United States from seeking legal or equitable relief to enforce the terms of this Consent Order.
- 14.3 Notwithstanding any provision of this Consent 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 Consent 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).
- 14.4 As provided by this Consent 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 Consent 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 Consent 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 Consent 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. Respondent expressly reserves whatever rights it may have to defend against any such action by EPA.
- 14.5 Nothing herein shall preclude or otherwise limit the authority of the United States to bring an action against Respondent for recovery of all recoverable costs incurred by the United States related to this Consent 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.

- 14.6 Nothing in this Consent Order shall preclude EPA from taking any additional enforcement actions against Respondent, including modification of this Consent 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.
- 14.7 Nothing in this Consent Order shall limit the authority of the EPA OSC as outlined in the NCP, CWA and OPA.
- 14.8 Nothing in this Consent Order shall constitute or be construed to be an admission of liability or wrongdoing or an admission of law or fact by Respondent. By entering into this Consent Decree, the Respondent does not admit or deny any factual, legal or liability determinations express or implied. Respondent reserves all rights and defenses available regarding liability or responsibility in any proceeding regarding the Respondent other than proceedings, including administrative or civil, to enforce this Consent Order.

#### **XV. OTHER CLAIMS**

- 15.1 Nothing in this Consent 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 Consent 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.
- 15.2 Neither EPA nor the United States by issuance of this Consent 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 Consent 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 Consent Order.
- 15.3 Nothing herein shall constitute or be construed as a satisfaction or release from liability of Respondent or any other person.

#### **XVI. COMPLIANCE WITH OTHER LAWS**

- 16.1 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 Consent Order is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

**XVII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

- 17.1 The effective date of this Consent Order shall be the date upon which it is signed by EPA (“Effective Date”).
- 17.2 This Consent Order may be amended by mutual agreement of EPA and the Respondent. 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 mutual agreement of the Project Coordinators. Such modifications shall be memorialized in writing by the Project Coordinators.
- 17.3 Any reports, plans, specifications, schedules, or other submissions required by this Consent Order are, upon approval by EPA, incorporated into this Consent 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 Consent Order and will subject the Respondent to the requirements of Section XII (“Delay in Performance and Stipulated Penalties”), above. Determinations of non-compliance will be made by EPA.
- 17.4 No informal advice, guidance, suggestions or comments by EPA regarding reports, plans, specifications, schedules or other submissions by Respondent or the requirements of this Consent Order will be construed as relieving Respondent of its obligation to obtain formal approval when required by this Consent Order, and to comply with the requirements of this Consent Order unless formally modified.

**XVIII. LIABILITY OF THE UNITED STATES**

- 18.1 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.

**XIX. INDEMNIFICATION AND HOLD HARMLESS**

- 19.1 Respondent agrees to indemnify and hold harmless the United States, its agencies, departments, agents, officers, employees and representatives from any and all causes of action arising from or on account of acts or omissions of Respondent or its contractors in carrying out the work required by this Consent Order.

**XX. CERTIFICATION OF COMPLIANCE**

20.1 (a) Each notice, report, certification, data presentation or other document submitted by Respondent under or pursuant to this Consent 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 Consent 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) Project Coordinator of Respondent if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Any such delegation pursuant to subsection (ii) above shall in no way relieve the Respondent of its obligations under this Consent Order.

(b) The written Final Report required by Paragraph 8.14 of this Consent Order and any written notification described in Paragraph 20.1(a) of this Consent Order shall be certified by a responsible official of Respondent.

20.2 The certification required by Paragraph 20.1 of this Consent 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): \_\_\_\_\_

- 20.3 Submission of documents pursuant to this Consent Order which are found by EPA to contain false information shall constitute a failure to comply with this Consent 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.

#### **XXI. RECORD RETENTION**

- 21.1 Respondent shall preserve all documents and information relating to the Work performed under this Consent Order, or relating to the oil or constituents thereof found at or released from the Site, for ten (10) years following completion of the response action required by this Consent 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.

#### **XXII. ADMINISTRATIVE RECORD**

- 22.1 The Administrative Record upon which this Consent 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 IX of this Consent Order. The index of the Administrative Record is attached hereto as Appendix A.

#### **XXIII. NOTICE OF COMPLETION**

- 23.1 When EPA determines, after EPA's review and approval of the Final Report required pursuant to Paragraph 8.13 of this Consent Order, that the Work specified in Section VIII ("Response Action Plan and Implementation") of this Consent Order has been fully performed, and upon receipt of penalties hereunder, with the exception of any continuing obligations required by this Consent Order, including those requirements specified in Sections XIV ("Reservation of Rights"), XV ("Other Claims"), XVIII ("Liability of the United States Government"), and XXI ("Record Retention"), EPA will provide a notice of completion to Respondent regarding all aspects of the Work other than the continuing requirements of this Consent Order.

#### **XXIV. TERMINATION OF FEBRUARY 27, 2015 ORDER**

- 24.1 Upon the Effective Date of this Consent Order, the February 27, 2015 Order is hereby terminated.

FOR RESPONDENT CSX TRANSPORTATION, INC.:

BY:



DATE:



Mr. Carl Gerhardstein  
Assistant Vice-President Public Safety, Health & Environment  
CSX Transportation, Inc.  
500 Water Street, J -275  
Jacksonville, FL 32202

FOR EPA:

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

DATE: 3/3/2015

### **Appendix A: Administrative Record Index**

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5. POLREP #3 – February 19, 2015
6. POLREP #4 – February 21, 2015
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32. EPA Email Correspondence to WV DEP Regarding Action – February 25, 2015
33. EPA Email Correspondence to WV DEP Regarding Action – March 2, 2015
34. Material Safety Data Sheet, Whiting Crude Oil (Sweet)
35. Material Safety Data Sheet, Bakken Crude Oil