COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
North Carolina & Virginia Railroad Company, LLC
Incident Report No. IR 2010-T-2653

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.34:20, between the State Water Control Board and North Carolina & Virginia Railroad Company, LLC, for the purpose of resolving certain violations of the State Water Control Law and the applicable regulations.

SECTION B: Definitions

Unless the context indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

2. "CA Railroad" means Chesapeake & Albemarle Railroad, a short-line railroad that operates between Edenton, North Carolina, and Chesapeake, Virginia. CA Railroad is a division of the North Carolina & Virginia Railroad Company, LLC.

3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

4. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

5. "Discharge" means the release of oil into or upon state waters that (i) violates applicable water quality standards or a permit or certificate of the Board or (ii) causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

6. "Location" means the state water(s) where the oil discharge occurred: the Intracoastal Waterway (Albemarle Canal) in Chesapeake, Virginia, approximately one mile west of Centerville Turnpike.

7. "NCVA Railroad" means North Carolina & Virginia Railroad Company, LLC, a limited liability company authorized to do business in Virginia and its affiliates, partners, subsidiaries, and parents. NCVA Railroad is a "person" within the meaning of Va. Code § 62.1-44.3.

8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

9. "Oil" means oil of any kind and in any form, including, but not limited to, petroleum and petroleum by-products, fuel oil, lubricating oils, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity. *See* Va. Code §62.1-44.34:14. Diesel fuel is a petroleum product, and is included in the definition of "oil" under Va. Code § 62.1-44.34:14.

10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.

11. "State Water Control Law" means Chapter 3.1(§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 11 (Va. Code §§ 62.1-44.34:14 through 62.1-44.34:23) of the State Water Control Law addresses Discharge of Oil Into Waters.

12. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.

13. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia

14. "Va. Code" means the Code of Virginia (1950), as amended.

15. "VAC" means the Virginia Administrative Code.

SECTION C: Findings of Fact and Conclusions of Law

1. CA Railroad provides transportation services by rail for ready-mix concrete plants along its route.

2. On March 26, 2010, a representative of NCVA Railroad reported to DEQ by telephone that a CA Railroad train had derailed in Chesapeake, Virginia, causing the discharge of approximately 2,000 gallons of diesel fuel into the Intracoastal Waterway (Albemarle Canal).

3. The Albemarle Canal ("Canal"), a state water, is located in the Chowan River and Dismal Swamp Basins and is listed in DEQ's 305(b) report as impaired due to dissolved oxygen and chloride, the sources of which are unknown.

4. DEQ staff ("staff") responded to the call by site inspection also on March 26, 2010, and observed that a train comprised of two locomotives and thirty empty rail cars had collided with a raised drawbridge intended to span the Canal. The collision had caused the rupture of the diesel fuel tank of the lead locomotive, which was hanging partially off the bridge suspended above the Canal. Cleanup efforts by an oil-response contractor were underway and the Canal had been closed to vessel traffic. Oil-containment booms had been placed across the Canal both upstream and downstream of the bridge and the oil floating on the surface of the Canal, which had caused a film or sheen, had been surrounded by booms and was being removed from the containment area with oil skimmers and vacuums. Staff observed no oil on the shoreline and there were no reports of dead fish or other wildlife. Oil trapped within the bridge structure was emulsified and removed manually. Staff also observed that, when the damaged locomotive was removed from the bridge on March 27, 2010, no additional oil was discharged.

5. A representative of NCVA Railroad reported by electronic mail on March 30, 2010, within five days of the discharge as required by State Water Control Law stating that a detailed report was forthcoming.

6. Va. Code § 62.1-44.34:18 prohibits the discharge of oil into or upon state waters, lands, or storm drain systems.

7. On April 20, 2010, the Department issued Notice of Violation No. 2010-T-2653 to CA Railroad for a discharge of oil into state waters.

8. An environmental consultant responded to the NOV on behalf of CA Railroad by letter dated May 19, 2010. The environmental consultant attributed the collision of the train with the drawbridge to "human error alone" on the part of the train's engineer who had reportedly been disciplined by a sixty-day suspension; no further information about the engineer's error was provided. By examining fueling records and fuel-consumption data, the consultant estimated that approximately 1,000 gallons of diesel fuel had been discharged to state waters. The letter summarized the abatement actions taken by CA

Railroad and its contractors in response to the discharge and included manifests reflecting that 8,300 gallons of oil-contaminated water and 41 drums of oily absorbent material had been collected and disposed of properly. The environmental consultant noted further that abatement activities had been completed by March 30, 2010, and the Canal reopened to vessel traffic within thirty hours of the discharge.

9. Based on the results of March 26, 2010, site inspection and the documentation submitted on May 19, 2010, the State Water Control Board concludes that NCVA Railroad has violated Va. Code § 62.1-44.34:18, which prohibits the discharge of oil into or upon state waters, lands, or storm drain systems, as described in paragraphs C(2) through C(8), above.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it pursuant to Va. Code § 62.1-44.34:20, the Board orders NCVA Railroad, and NCVA Railroad agree to pay a civil charge of $15,099 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

NCVA Railroad shall include its Federal Employer Identification Number (FEIN) (62-1344570) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Petroleum Storage Tank Fund (VPSTF).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of NCVA Railroad for good cause shown by NCVA Railroad, or on its own motion pursuant to the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2)

seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, NCVA Railroad admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. NCVA Railroad consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. NCVA Railroad declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.

6. Failure by NCVA Railroad to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. NCVA Railroad shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. NCVA Railroad shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. NCVA Railroad shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;

   b. the projected duration of any such delay or noncompliance;

   c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

   d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which NCVA Railroad intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and NCVA Railroad.

11. This Order shall continue in effect until:

    a. NCVA Railroad petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

    b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to NCVA Railroad.

    Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve NCVA Railroad from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by NCVA Railroad and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of NCVA Railroad certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind NCVA Railroad to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of NCVA Railroad.

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signatures below, NCVA Railroad voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 27th day of September, 2010.

Francis L. Daniel
Francis L. Daniel, Regional Director
Department of Environmental Quality

North Carolina & Virginia Railroad Company, LLC, voluntarily agrees to the issuance of this Order.

Date: 7/22/10 By: _____, General Manager
(Person) (Title)
North Carolina & Virginia Railroad Company, LLC

State/Commonwealth of South Carolina
City/County of Darlington

The foregoing document was signed and acknowledged before me this 22 day of July, 2010, by Todd Gruenemeier who is General Manager of North Carolina & Virginia Railroad Company, LLC, on behalf of the company.

Brent Freeman
Notary Public

_____
Registration No.

My commission expires: September 16, 2018

Notary seal: Seal not required in South Carolina