

THE MARYLAND AND DELAWARE RAILROAD COMPANY SIDETRACK AGREEMENT OFF RAILROAD PROPERTY

THIS AGREEMENT, made and executed in duplicate this ___ day of _____, 2017, between THE MARYLAND AND DELAWARE RAILROAD COMPANY, hereinafter called "Railroad Company" and _____ hereinafter called "Industry".

WITNESSETH:

WHEREAS, the Industry desires to ship and/or receive products, materials, or goods by rail at its facility adjacent to the Railroad Company, for itself or on behalf of its tenants and/or assigns; and

WHEREAS, the Railroad Company provides common carrier rail service; and

WHEREAS, Industry has requested common carrier rail service in _____ County, Maryland, described as follows:

An existing sidetrack consisting of approximately _____ feet of track with a point of switch located at Milepost _____, as more fully set forth in **Exhibit A**, such track facilities and underlying right of way being collectively referred to as the "Sidetrack"; and

WHEREAS, the Railroad Company has the exclusive operating rights on the railroad right of way owned by the State of Maryland _____ as more fully described herein upon; and

NOW, THEREFORE, in consideration of the promises and the mutual covenants and agreements herein, the parties hereby agree as follows:

1. DEFINITIONS:

- 1.1 "Sidetrack" shall mean the existing track structure consisting of approximately _____ feet of track on industry's property, located at Milepost _____ as more fully set forth in **Exhibit A**.
- 1.2 "Switch Connection" shall mean shall mean the existing track structure consisting of approximately _____ feet of track on property owned by the State of Maryland and operated by Railroad Company, located at Milepost _____ as more fully set forth in **Exhibit A**.
- 1.3 "Right of Way" [owned by State...] The Railroad Company right of way shall be assumed to extend a width of sixty-six feet (66') from the center line of track.
- 1.4 "Environmental law" or "environmental laws" shall mean and encompass all Federal, State, and local environmental laws including but not limited to, the

following statutes, as amended, and all regulations promulgated thereunder; the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) 42 U.S.C. sec. 96__ et seq.); the Clean Water Act (33 U.S.C. sec. 1251, et seq.). The Resource Conservation and Recovery Act (42 U.S.C. sec. 6901, et seq.); The Clean Air Act (42 U.S.C. sec. 1857, et seq.); the Safe Drinking Water Act (21 U.S.C. sec. 349; 42 U.S.C. sec 201 and 300_ through 300j-9); the Noise Control Act (42 U.S.C. sec. 4901, et seq.); the Emergency Planning and Community Right to Know Act (42 U.S.C. 11001, et seq.); the Hazardous Materials Transportation Act (49 U. S. C. sec. 1801, et seq.); the Occupational Safety and Health Act (29 U.S.C.A. sec 651, et seq.); the Toxic Substances Control Act.

1.5 "Release" shall have the meaning given such term or any similar term in the environmental laws, including, without limitation, Section 101(22) of CERCLA.

1.6 "Hazardous materials" shall mean any hazardous or toxic substance, material or waste or any pollutant that is labeled or regulated as such by any governmental authority and includes, without limitation, asbestos and asbestos-containing materials. PCB and PCB-containing materials and any material or substance that is: (A) designated as a "hazardous substance" pursuant to Section 307 of the Federal Water Pollution Control Act 33 U.S.C. sec. 1241, et seq. (33 U.S.C. sec 1317); (B) defined as "solid waste" or "hazardous waste" pursuant to sec. 1004 of the Federal Solid Waste Disposal Act, 42 U.S.C. sec. 6901, et seq. (42 U.S.C. sec. 6903); (C) defined as a "hazardous substance" pursuant to sec. 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. sec. 9601, et seq. (42 U.S.C. sec. 9601); (D) petroleum, including crude oil or any fraction thereof, gasoline, aviation fuel, diesel fuel and any additives thereto; (E) any "hazardous substance" pursuant to sec. 101 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. sec. 9601, et seq. (42 U.S.C. sec. 9601); (D) petroleum, including crude oil or any fraction thereof, gasoline, aviation fuel, diesel fuel and any additives thereto; (E) any "hazardous material" regulated under the Hazardous Materials Transportation Act (49 U.S.C. sec. 1801, et seq.); or (F) is so designated or defined under any other applicable laws.

2. COMMENCEMENT AND TERMINATION:

2.1 This Agreement shall commence on the date of the final signature by either Party hereto, and shall continue in force until terminated by either party.

2.2 This Agreement shall terminate in whole upon the happening of any of the following events:

- a. By either party hereto giving at least thirty (30) days written notice to the other party of termination hereof at any time. In the event Railroad Company is unable to locate Industry, such notice may be posted on or near the Sidetrack and this Agreement shall terminate thirty (30) days after such posting.

- b. If Railroad Company, in accordance with applicable law, abandons or otherwise discontinues service over the rail line that connects with the involved Sidetrack, this Agreement shall terminate automatically on the effective date of any such abandonment or discontinuance.
 - c. Subsequent written mutual agreement of the parties hereto.
 - 2.3 Railroad Company shall have the right to terminate this Agreement at any time with no prior written notice for Industry's failure to abide by the terms of this Agreement.
 - 2.4 Upon termination of this Agreement, Railroad Company shall have the right, but not the obligation, to remove the Switch Connection and any portion or all of the Sidetrack on Right of Way.
 - 2.5 Until terminated, this Agreement shall inure to the benefit of and be binding upon the parties and their respective successors and assigns, but Industry shall not assign or otherwise transfer this Agreement without the written consent of Railroad Company, which consent shall not be unreasonably withheld.
 - 2.6 Any obligation assumed and any liability which may have arisen or been incurred by either party shall survive termination of this Agreement.
3. MAINTENANCE:
- 3.1 The Railroad Company shall be responsible for and shall maintain the Switch Connection.
 - 3.2 Industry shall be responsible for and shall maintain the Sidetrack. Industry shall maintain the Sidetrack to meet Federal Railroad Administration (FRA) standards for Class III track, currently contained in 49 CFR Part 213.
4. RESPONSIBILITIES:
- 4.1 Industry hereby guarantees to Railroad Company the right and authority to operate over any portion of the Sidetrack, and the tracks of any third party necessary to provide service to the Sidetrack, located beyond the Right of Way or upon any public roadway.
 - 4.2 Industry, at its sole cost and expense, shall secure and maintain in effect all federal, state and local permits and licenses required for the occupation of the Sidetrack and shall be solely liable for fines or penalties that may be levied for failure to procure or to cure violations thereof.

- 4.3 Industry shall be solely responsible for any rail lading transferred from rail cars.
- 4.4 Industry, at its sole cost and expense, shall keep the Sidetrack clear of debris and obstructions and shall not place or allow any temporary or permanent structure, material, parked vehicles, or other obstruction of any kind within Railroad Company Right of Way. Industry shall not plow snow or divert water onto the Sidetrack.
- 4.5 Industry shall, at its sole cost and expense, maintain the Sidetrack in a safe condition, clear of obstructions and/or temporary or permanent structures in order to provide safe clearance for movement of locomotives and railcars with or without man on the side, and shall maintain a level and safe ground area for Railroad Company's employee(s) to work cars from either side.
- 4.6 Industry shall bear full responsibility for any of Industry's lading stored on the Sidetrack, and shall be solely responsible for any loss, cost, damage or expense associated with any such stored lading.
- 4.7 With regard to rail cars and/or lading, Railroad Company shall be responsible for any damages and/or repairs while moving when connected to Railroad Company's locomotive or moving under the direction of Railroad Company's employees, and Industry shall be responsible for said rail cars and/or lading during loading or unloading or while being moved or repositioned by Industry's equipment.
- 4.8 Railroad Company shall provide rail service to the Industry on a frequency which meets the volume of traffic moving to/from the Industry.
- 4.9 Railroad Company shall not store rail cars on Sidetrack.
- 4.10 Railroad Company shall have the right, but not the obligation, to inspect Sidetrack before use by its locomotives and trains.
- 4.11 Railroad Company shall not operate its locomotives or trains over Sidetrack at a speed greater than 10 MPH.
- 4.12 Railroad Company shall have the right

5. LIABILITY AND INDEMNITY:

- 5.1 Industry agrees to protect, indemnify, defend and hold harmless, and shall require in its agreements with contractors and subcontractors that they shall protect, indemnify, defend and hold harmless, Railroad Company, its officers, agents, employees, successors and assigns, from and against any and all loss, cost, damage, expense, injury or death to any person, as well as expenses and claims under the Federal Employers' Liability Act (FELA) (45 U.S.C. 51 et seq.), or any applicable

safety act, arising from any act or omission of Industry, its employees, officers, invitees, agents, contractors or any third persons, to persons or property of Railroad Company or any other person or corporation while on or about the Sidetrack, regardless of whether such loss, cost, damage, expense, injury or death is caused or contributed to by the negligence or alleged negligence of Railroad Company, except to the extent any such loss, cost, damage, expense, injury or death to any person, is proximately caused by Railroad Company's gross negligence or intentional misconduct.

- 5.2 Industry agrees that if a claim is made or suit instituted against Railroad Company or any of its affiliates for any injury, death, loss or damage resulting from any act or omission of Industry, its employees, officers, invitees, agents, contractors or any third persons, Industry shall upon notice from Railroad Company, settle, adjust and defend the claim or suit at Industry's sole cost and expense, and pay any resulting judgments and court costs.
- 5.3 Industry hereby waives any claim (including any claim based on strict or absolute liability in tort) it might have against Railroad Company for any loss, cost, damage (including incidental or consequential damage) or expense caused by Industry's use of the Sidetrack and/or use of the Sidetrack by any of Industry's employees, agents, invitees or contractors.
- 5.4 Industry assumes all responsibility for and agrees to indemnify Railroad Company or any of its affiliates against loss or damage to property of Industry or to property upon Railroad Company's Sidetrack arising from fire caused by locomotives operated by Railroad Company on the Sidetrack or in its vicinity for the purpose of serving Industry.
- 5.5 In connection with this Agreement, either directly, or indirectly, Industry shall defend, indemnify and save Railroad Company and any of its affiliates harmless from any fines, suits, claims, demands, losses, actions and/or costs (including attorney's fees and other professional fees) that allege or are based upon any violation by Industry or any federal, state or local environmental laws, rules or ordinances for environmental protection, including but not limited to those itemized in this Agreement, or upon the release of hazardous materials in the possession or control of Agreement, or upon any other threatened or actual damage to the environment by Industry which occurs whether on the Sidetrack or off the Sidetrack.
- 5.6 Industry hereby certifies that is has obtained and will at all times continue to obtain and/or maintain all licenses, permits and/or other governmental or regulatory actions necessary to comply with all applicable environmental laws, and Industry is and will continue to be and at all times remain in full compliance with the terms and provisions of all applicable licenses or permits.

6. INSURANCE:

6.1 Prior to the effective date of this Agreement, and at all times during its term, Industry, at its sole cost and expense, shall procure and shall maintain, and shall require its contractors and subcontractors (of any tier) performing activities hereunder to procure and maintain, insurance which shall protect Railroad Company, its officers, agents, employees, invitees, successors, and assigns, from claims which may arise out of or as a result of Industry's activities under this Agreement, whether such activities be by Industry, by any contractor or subcontractor, by anyone directly or indirectly employed by any of them or by anyone for whose acts any of them may be liable. In furtherance of this obligation, Industry shall procure and maintain at least the minimum levels of insurance coverage as set forth below:

(1) Industry shall maintain Commercial General Liability insurance (or in the case of a municipality, Municipal General Liability Insurance) and, if necessary commercial or municipal umbrella insurance ("CGL") with a limit of not less than \$2 Million each occurrence and \$6 Million aggregate. If such CGL insurance contains a general aggregate limit, it shall apply separately.

i. CGL insurance shall be written on ISO occurrence form CG 00 01 10 93 (or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and liability assumed under an insured contract, including the tort liability of another assumed in a business contract.

ii. CGL insurance shall be amended by attachment of ISO form CF 20 26 (or a substitute form providing coverage acceptable to Owner and Railroad Company) to include Railroad Company as an Additional Insured.

iii. There shall be no endorsement or modification of the CGL limiting the scope of coverage for liability arising from pollution, explosion, collapse, underground property damage or employment-related practices. **There shall be no endorsement of the CGL limiting the scope of coverage for activities within fifty (50) feet of the Railroad Company right of way. Industry shall obtain certification from its Liability Insurer that any "50-Foot Railroad Exclusion" contained in its CGL policy does not apply to the any activities on the Sidetrack.**

(2) If at any time Industry engages in activities constituting construction, demolition, or maintenance work within fifty (50) feet of the Railroad tracks, Industry, at its sole cost and expense, shall also procure and shall maintain, and shall require its contractors and subcontractors (of any tier) performing activities hereunder to procure and maintain, Railroad Protective Liability (RPL) insurance with a limit of not less than \$2 Million each occurrence and \$6

Million aggregate, which shall name Railroad Company as Certificate Holder, and which shall protect Railroad Company, its officers, agents, employees, successors and assigns, from claims which may arise out of or as a result of Industry's construction, demolition or maintenance activities. If equivalent, or better, wording is not contained in the policy form, the following endorsement shall be included: "It is agreed that in this policy of insurance 'Physical Damage to Property' means direct and accidental loss of or damage to rolling stock and their contents, mechanical construction equipment or motive power equipment, railroad tracks, roadbed, signals, bridges or buildings."

- 6.2 If at any time the above required insurance policies should be canceled, terminated or modified such that the insurance is not in full force and effect as required herein, Railroad Company may terminate this agreement for default or, at its sole option, obtain insurance coverage equal to that required herein, the full cost of which shall be charged to and paid by Industry.
- 6.3 Each policy referenced hereinabove, by endorsement, shall include the following required clauses:
 - (1) "This insurance coverage shall not be canceled by this Insurance Company, nor shall any changes be made which alter, restrict or reduce the insurance coverage so provided or change the name of the Insured(s), without first having given forty-five (45) days written notice to (1) Industry at their last known address, and (2) Railroad Company: The Maryland and Delaware Railroad Company, 106 Railroad Avenue, Federalsburg, Maryland 21632, all evidenced by receipt of registered letter.
 - (2) Such insurance as afforded by this policy for the benefit of Railroad Company shall be primary and any insurance carried by Railroad Company shall be excess and noncontributing with insurance afforded by this policy.
 - (3) This Insurance Company releases Railroad Company from any liability arising from or through the operation of any subrogation clause in this policy of insurance, and in the event of any occurrence, accident or claim made under this policy, this Insurance Company shall not claim or contend that any of those entities is liable as the result of subrogation."
- 6.4 As evidence of the above insurance, Industry shall, prior to the effective date of this Agreement, file with Railroad Company, and require any contractors and subcontractors performing activities under this Agreement to so file, duly executed Certificates of Insurance issued by the insurer(s) of all insurance required herein, including special endorsements. Each such Certificate shall be in a form satisfactory to Railroad Company; shall list the various coverage types and limits; shall name both Railroad Company as an Additional Insured; and shall

indicate that the Commercial General Liability policy has been endorsed as described above. All insurance shall be placed and maintained with insurers licensed and authorized to do business in the State of Maryland and who have an A.M. Best rating of "IIA" or better, unless otherwise approved by Railroad Company. Railroad Company's approval or failure to disapprove insurance furnished by Industry shall not diminish or release Industry from full responsibility for liability as set forth herein. Upon Railroad Company's request, Industry shall furnish Railroad Company with a certified copy of each insurance policy.

- 6.5 Whenever either party becomes aware of any claim, injury, death, damage, or loss of any kind to persons or property arising out of or connected with this Agreement, that party shall have the right to fully investigate the claim. Each party shall cooperate with the other in any such investigation. All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit under this Agreement, including pro-rated salaries or wages of full-time agent or employees of either party, including full-time attorneys, engaged directly or indirectly in such work, shall be included as costs and expenses in applying the liability provisions set forth in this Agreement.

7. BREACH AND REMEDIES:

- 7.1 The Industry and the Railroad Company each agree that neither shall proceed against the other by litigation before the offending party has had written notice of and reasonable time to respond and cure such breach or defect; provided, however, neither party shall be required to give the other time to respond and cure if any such delay will cause irreparable harm.
- 7.2 Remedies available to each party include but are not limited to: (1) litigation for specific performance; (2) litigation for injunction relief; (3) litigation for damages and costs. Railroad Company will not be responsible for consequential damages.
- 7.3 Any waiver by either party at any time of any of its rights as to anything herein contained shall not be deemed to be a waiver of any right or covenant herein or of any other matter subsequently occurring.

8. COVENANTS AND WARRANTIES:

- 8.1 Industry and Railroad Company covenants and warrants each has full right and authority to enter into this Agreement in accordance with the terms hereof, and that by entering into and performing this Agreement, it is not in violation of its charter or by-laws, or any law, regulation or agreement by which it is bound or to which it is subject.

8.2 Industry and Railroad Company covenants and warrants that each, to the best of its knowledge, has no litigation or proceeding pending or threatened against it or its facilities that would threaten this Agreement, nor has it violated, to its knowledge, any rule, order or regulation issued by any applicable governmental authority which might adversely affect the other party's interest thereunder or right to make the agreements hereunder, or execute or perform this Agreement, and that the execution, delivery and performance of this Agreement has been duly authorized by all requisite corporate action, that the signatories hereto are authorized to sign this Agreement.

9. INDEPENDENT CONTRACTOR STATUS:

9.1 The Railroad Company exercises no control whatsoever over the employment, discharge, compensation of or services rendered by the Industry's employees or contractors, and it is the intention of the parties that the Industry shall be and shall remain an independent contractor, and nothing herein shall be construed as inconsistent with that status or as creating or implying any partnership or joint venture between the Industry and the Railroad Company.

10. SUCCESSION/ASSIGNABILITY:

10.1 This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors or assigns. This Agreement is assignable by Railroad Company without the consent of Industry. Industry shall not assign this Agreement to any other entity or individual without the prior written consent of Railroad Company, which approval shall not be unreasonably withheld.

11. NOTICES:

11.1 Unless otherwise provided herein, all notices and communications concerning this Agreement shall be addressed to:

Industry at: (one copy to each)

Railroad Company at: (one copy to each)

Cathrin O'Donnell, Esq.
Vice President and General Counsel
The Maryland and Delaware Railroad Company
106 Railroad Avenue
Federalsburg, Maryland 21632

- 11.2 Unless otherwise provided herein, notices shall be sent by registered or certified U.S. mail, postage prepaid, and shall be deemed served or delivered to addressee, or its office, upon the date of return receipt acknowledgment or, if postal claim notice is given, on the date of its return marked "unclaimed", provided, however, that upon receipt of a returned notice marked "unclaimed", the sending party shall make reasonable effort to contact and notify the other party by telephone.

12. MISCELLANEOUS:

- 12.1 The Railroad Company and the Industry represent and warrant to each other that neither has dealt with any broker or agent in connection with the transaction contemplated by this Agreement and each indemnifies and agrees to hold harmless the other from and against any commission or fee claimed by any broker or agent in connection with this transaction.
- 12.2 Each party shall be responsible for its own costs, including legal fees, incurred in negotiating or finalizing this Agreement.
- 12.3 Industry's use of the Sidetrack shall be subject to any applicable railroad tariffs, available from Railroad Company upon request.
- 12.4 This Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of Maryland.
- 12.5 This Agreement shall not be interpreted against either party for the reason that the final Agreement was prepared by them.

(Remainder of page left intentionally blank)

IN WITNESS WHEREOF, the parties hereto have duly executed this Sidetrack Agreement Off Railroad Property the day and the year first written above.

RAILROAD COMPANY

ATTEST:

THE MARYLAND AND DELAWARE
RAILROAD COMPANY

By: _____
Cathrin B. O'Donnell
Vice President and General Counsel

ATTEST:

INDUSTRY

.

By: _____

Name: _____

Title: _____

EXHIBIT A

