

THE MARYLAND AND DELAWARE RAILROAD COMPANY SIDETRACK AGREEMENT ON RAILROAD PROPERTY

THIS AGREEMENT, made and executed in duplicate this ___ day of _____, 2016, between THE MARYLAND AND DELAWARE RAILROAD COMPANY, hereinafter called "Railroad Company" and _____ hereinafter called "Licensee".

WITNESSETH:

WHEREAS, the Railroad Company has the right of exclusive use and possession of its railroad right of way as more fully described herein upon; and

WHEREAS, the Licensee wishes to acquire the license or privilege, as hereinafter described, defined and limited, in, on, upon, over, across, along and through said right of way (hereinafter sometimes referred to as "Sidetrack") to permit the Licensee to unload rail lading to such extent as Railroad Company has the right and authority to do so.

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

1. DEFINITIONS:

- 1.1 "License" shall mean a license for the right to use provided to Licensee by Railroad Company pursuant to this agreement.
- 1.2 "Railroad Company" shall mean The Maryland and Delaware Railroad Company, operator of the railroad right-of-way owned by the State of Maryland Department of Transportation within the counties of Caroline, Dorchester and Queen Anne, Maryland.
- 1.3 "Sidetrack" shall mean the track owned, operated, leased or controlled by the Railroad Company as more fully described in **Exhibit A**.
- 1.4 "Owner" shall mean the Maryland Department of Transportation and Maryland Transit Administration (MTA) a modal agency of the Maryland Department of Transportation, acting for, and on behalf of, the State of Maryland (which has entered into an agreement with Railroad Company for the use of its right of way and certain other property adjacent thereto).
- 1.5 "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 ~); 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.

- 1.6 "Release" shall have the meaning given such term or any similar term in the environmental laws, including, without limitation, Section 101(22) of CERCLA.
- 1.7 "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. LICENSE DESCRIPTION:

- 2.1 LOCATION OF LICENSE: Subject to the terms hereinafter described, Railroad Company does hereby permit the Licensee to enter upon and occupy the Sidetrack as more fully described in **Exhibit A** for the sole purpose of unloading rail cars into its facility.
- 2.2 NATURE OF LICENSE: Licensee's rights as granted herein are for the sole purpose of entering upon the Sidetrack and unloading rail lading from rail cars in possession of Railroad Company into its facility. The Sidetrack is provided in an "as is" condition and neither Railroad Company nor Owner make any representations or warranties of any kind with respect to the Sidetrack Property.
- 2.3 LICENSE FEE: The License Fee associated with this License is One Thousand Dollars (\$1,000.00) per year.
- 2.4 EFFECTIVE DATE/TERMINATION DATE: This License shall take effect on _____, 2016 and unless earlier terminated pursuant to the provisions of this

License, shall have a term of one (1) year and thereafter from year to year unless otherwise terminated as provided for in paragraph 3 hereof.

2.5 Railroad shall maintain the Sidetrack to FRA Class I standards.

3. TERMINATION:

3.1 This License shall terminate in whole upon the happening of any of the following events:

(1) By either party hereto giving at least thirty (30) days written notice to the other party of termination hereof at any time.

(2) Subsequent written mutual agreement of the parties hereto.

3.2 Railroad Company shall have the right to terminate this Agreement at any time with no prior written notice for Licensee's failure to abide by the terms of this Agreement.

4. NON-EXCLUSIVITY OF LICENSE:

4.1 The license granted to Licensee by Railroad Company pursuant to this agreement shall be non-exclusive and occupations of the Sidetrack by Railroad Company or any other Licensee of Railroad Company are permitted at the sole discretion of Railroad Company.

5. RAILROAD COMPANY APPROVAL PROCESS / REQUIRED TRAINING:

5.1 Prior to any work of any kind being performed on the Sidetrack, Licensee shall designate those individuals and equipment that shall occupy the Sidetrack, all of which shall submit to inspection and/or training at Railroad Company's option.

6. RESPONSIBILITIES OF LICENSEE:

6.1 Licensee shall notify Railroad Company before entry upon any portion of the Sidetrack.

6.2 Licensee, 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. Licensee shall further be solely responsible for any rail lading transferred from rail cars in possession of Railroad Company into its facility.

6.3 The Licensee, 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 or other obstruction of any kind within Railroad Company right of way without the prior written approval of Railroad Company.

- (1) In the event Railroad Company grants permission to Licensee to place a temporary or permanent structure, materials or equipment owned by Licensee onto the Sidetrack, Licensee shall bear full responsibility for said structure, materials or equipment and shall be solely responsible for any loss, cost, damage or expense associated with any such structure, material or equipment.
- (2) Railroad Company shall have the right to direct Licensee to remove any structure, materials or equipment placed on the Sidetrack at any time. Upon removal of any structure, materials or equipment, Licensee shall return the Sidetrack to its original condition.

6.4 Licensee shall bear full responsibility for any lading stored on the Sidetrack, and shall be solely responsible for any loss, cost, damage or expense associated with any such stored lading.

7. LIABILITY/INDEMNITY:

- 7.1 Licensee 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, Owner and Railroad Company, their 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 Licensee, its employees, officers, invitees, agents, contractors or any third persons, to persons or property of Railroad Company and Owner 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 or Owner's gross negligence or intentional misconduct.
- 7.2 Licensee agrees that if a claim is made or suit instituted against Owner or Railroad Company or any of its affiliates for any injury, death, loss or damage resulting from any act or omission of Licensee, its employees, officers, invitees, agents, contractors or any third persons, Licensee shall upon notice from Owner or Railroad Company, settle, adjust and defend the claim or suit at Licensee's sole cost and expense, and pay any resulting judgments and court costs.
- 7.3 Licensee hereby waives any claim (including any claim based on strict or absolute liability in tort) it might have against Railroad Company and/or Owner for any loss,

cost, damage (including incidental or consequential damage) or expense caused by Licensee's use of the Sidetrack.

- 7.4 Licensee assumes all responsibility for and agrees to indemnify Owner and Railroad Company and its affiliates against loss or damage to property of Licensee 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 Licensee.
- 7.5 In connection with this License, either directly, or indirectly, Licensee shall defend, indemnify and save Owner and Railroad Company and its affiliates harmless from any fines, suits, claims, demands, losses, actions and/or costs (including attorney's fees and other professional fees) that (1) arise from any violation by Licensee of the License's provisions, or (ii) allege or are based upon any violation by Licensee or any federal, state or local environmental laws, rules or ordinances for environmental protection, including but not limited to those itemized in this License, or upon the release of hazardous materials in the possession or control of Licensee, or upon any other threatened or actual damage to the environment by Licensee which occurs whether on the Sidetrack or off the Sidetrack.
- 7.6 Licensee 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 Licensee 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.
- 7.7 In the event that there is any release, spillage or leakage of any hazardous materials, occurring as a direct or indirect result of this License, on the Sidetrack, or in the event that Licensee receives any notice from any governmental agency, entity or any other party with regard to hazardous materials on, from or affecting the Sidetrack as a direct, or indirect, result of this License.
 - (1) Within 24 hours or when Licensee becomes aware or reasonably should have been aware of the release, spillage or leakage of any hazardous materials, Licensee shall immediately notify: (a) the appropriate Government Response Center; (b) Railroad Company, through Eric H. Callaway, President, by phone at 410-754-5735 ext. 104, or at its main office at 106 Railroad Avenue, Federalsburg, Maryland 21632; (c) Owner, through Mr. George E. Fabula, Jr., Manager, Real Estate Division, by email at gfabula@mta.maryland.gov or by phone at 410-767-3908.
 - (2) Licensee shall conduct and complete at its own expense all investigations, studies, sampling and testing, and all remedial, removal, or other actions necessary to clean up and remove all hazardous materials on, from or affecting the Sidetrack in accordance with all

applicable environmental laws. Licensee will defend, indemnify and hold Owner and Railroad Company and its affiliates harmless from any liability, fines, damages, expenses, or costs associated with the inspection, testing or remediation of hazardous materials on the Sidetrack.

7.8 Licensee covenants and agrees, at its sole cost and expense, to defend, indemnify, protect, and hold Owner and Railroad Company and its affiliates harmless against and from any and all liens, damages, losses, liabilities, obligations, penalties, claims, litigation, demands, defenses, judgments, suits, proceedings, costs, disbursements or expenses of any kind or of any nature whatsoever (including without limitation, reasonable attorneys' and experts fees and disbursements actually incurred) which may at any time be imposed upon, incurred by or asserted or awarded against Owner and Railroad Company and its affiliates or the Sidetrack and arising directly or indirectly from or out of: (i) any hazardous materials on, in, under or affecting all or any portion of the Sidetrack regardless of whether or not caused by or within the control of Licensee, (ii) the violation of any environmental laws relating to or affecting the Sidetrack or the Licensee, whether or not caused by the Licensee, (iii) the failure of Licensee to comply fully with the terms and conditions of the License, (iv) the violation of any environmental laws in connection with other property of Licensee which gives or may give rise to any rights whatsoever in any party with respect to the Sidetrack by virtue of any environmental laws, or (v) the enforcement of this License, including without limitation, (A) the costs of removal of any and all hazardous materials from all or any portion of the Sidetrack or any surrounding areas, (B) additional costs required to take necessary precautions to protect against the discharge, spillage, emission, leakage, seepage or release of hazardous materials on, in, under or affecting the Sidetrack, or into the air, any body of water, any other public domain or any surrounding areas, and (C) costs incurred to comply with the environmental laws in connection with all or any portion of the Sidetrack or any surrounding areas. Owner and Railroad Company's rights under this License shall be in addition to all rights of Owner and Railroad Company and its affiliates under other applicable laws.

7.9 The Licensee further agrees that in case a claim is made or suit instituted against Owner or Railroad Company and its affiliates for any injury, death, loss or damage, as set forth above, that the Licensee will, upon notice from Owner or Railroad Company, settle, adjust and defend the same at its sole cost and expense and pay any resulting judgments and court costs.

8. INSURANCE:

8.1 Prior to the effective date of this agreement, and at all times during its term, Licensee, 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 any Licensor, Owner, Railroad Company, its officers, agents, employees, invitees, successors, and

assigns, from claims which may arise out of or as a result of Licensee's activities under this License, whether such activities be by Licensee, 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, Licensee shall procure and maintain at least the minimum levels of insurance coverage as set forth below:

- (1) Licensee 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 Owner and Railroad Company each 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. Licensee 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.** Licensee waives all rights against Owner and Railroad Company and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the required CGL.
- (2) Workers' Compensation Insurance meeting the statutory requirements of the jurisdiction where the work will be performed, including Employer's Liability coverage with minimum limits of \$1,000,000 each occurrence or disease.
- (3) If at any time Licensee engages in activities constituting construction, demolition, or maintenance work within fifty (50) feet of the Railroad tracks, Licensee, 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 Owner and Railroad Company as Certificate Holder, and which shall protect Owner and Railroad Company, their officers, agents, employees, successors and assigns, from claims which may arise out of or as a result of Licensee's construction, demolition or maintenance activities under this License. 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."

- 8.2 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 Licensee.
- 8.3 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) Licensee 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 Owner and Railroad Company shall be primary and any insurance carried by Owner or Railroad Company shall be excess and noncontributing with insurance afforded by this policy.
 - (3) This Insurance Company releases Owner and 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."
- 8.4 As evidence of the above insurance, Licensee shall, prior to the effective date of this License, file with Railroad Company, and require any contractors and subcontractors performing activities under this License 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 Owner and Railroad Company; shall list the various coverage types and limits;

shall name both Owner and Railroad Company as Additional Insureds; 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 "A" or better, unless otherwise approved by Owner and Railroad Company. Owner or Railroad Company's approval or failure to disapprove insurance furnished by Licensees shall not diminish or release Licensee from full responsibility for liability as set forth herein. Upon Railroad Company's request, Licensee shall furnish Railroad Company with a certified copy of each insurance policy.

- 8.5 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 License, 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 License, 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 License.

9. BREACH/REMEDIES:

- 9.1 The Licensee 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.
- 9.2 Remedies available to each party shall include: (1) litigation for specific performance; (2) litigation for injunction relief; (3) litigation for damages and costs (Railroad Company and/or Owner will not be responsible for consequential damages).
- 9.3 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.

10. COVENANTS AND WARRANTIES:

- 10.1 Licensee and Railroad Company covenants and warrants each has full right and authority to enter into this License in accordance with the terms hereof, and that by entering into and performing this License, 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.

10.2 Licensee 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 License, 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 License, and that the execution, delivery and performance of this License has been duly authorized by all requisite corporate action, that the signatories hereto are authorized to sign this License.

11. INDEPENDENT CONTRACTOR STATUS:

11.1 The Railroad Company and/or Owner exercise no control whatsoever over the employment, discharge, compensation of or services rendered by the Licensee's employees or contractors, and it is the intention of the parties that the Licensee shall be and 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 Licensee and the Railroad Company and/or Owner.

12. SUCCESSION/ASSIGNABILITY:

12.1 This License shall be binding upon and inure to the benefit of the parties hereto and their respective successors or assigns. This license is assignable by Railroad Company without the consent of Licensee. Licensee shall not assign this License to any other entity or individual without the prior written consent of Railroad Company.

13. NOTICES:

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

Licensee at: (one copy to each)

Railroad Company at: (one copy to each)

Eric H. Callaway
President
The Maryland and Delaware Railroad Company
106 Railroad Avenue

Federalsburg, Maryland 21632

- 13.2 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.

14. MISCELLANEOUS:

- 14.1 The Railroad Company and the Licensee represent and warrant to each other that neither has dealt with any broker or agent in connection with the transaction contemplated by this License 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.
- 14.2 Each party shall be responsible for its own costs, including legal fees, incurred in negotiating or finalizing this License.
- 14.3 Licensee's use of the Sidetrack shall be subject to any applicable railroad tariffs, available from Railroad Company upon request.

15. LEGAL FORUM:

- 15.1 This License shall be interpreted, construed and enforced in accordance with the laws of the State of Maryland.
- 15.2 This License shall not be interpreted against either party for the reason that the final License was prepared by them.

(Remainder of page left intentionally blank)

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

RAILROAD COMPANY

ATTEST:

THE MARYLAND AND DELAWARE
RAILROAD COMPANY

By: _____
Eric H. Callaway
President

ATTEST:

LICENSEE

.

By: _____

Name: _____

Title: _____

EXHIBIT A

