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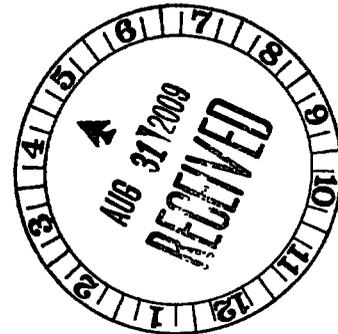
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**FILED**

AUG 31 2009

**SURFACE  
TRANSPORTATION BOARD**

August 31, 2009



Hon. Anne K. Quinlan  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: Chesapeake Railroad Company – Modified Rail Certificate  
Finance Docket No. 32609**

Dear Ms. Quinlan:

I am enclosing an original and ten (10) copies of the Appeal of Maryland Transit Administration in the above referenced proceeding. An additional copy is enclosed for date stamp and return to our messenger. Please note that a 3.5 inch diskette is enclosed with this document.

Sincerely,

Charles A. Splazinik

cc: All Parties of Record

Enclosure

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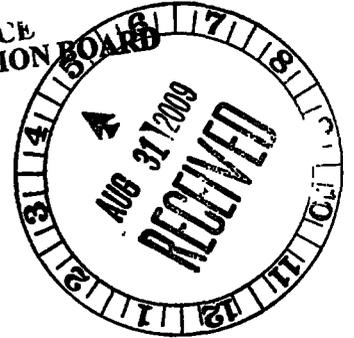
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**SURFACE  
TRANSPORTATION BOARD**



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 32609**

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**CHESAPEAKE RAILROAD COMPANY – MODIFIED RAIL CERTIFICATE**

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**APPEAL OF MARYLAND TRANSIT ADMINISTRATION**

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**ENTERED  
Office of Proceedings**

**AUG 31 2009**

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**SURFACE  
TRANSPORTATION BOARD**

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Counsel for the Maryland Transit Administration

Dated: August 31, 2009

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**Finance Docket No. 32609**



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**CHESAPEAKE RAILROAD COMPANY – MODIFIED RAIL CERTIFICATE**

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**APPEAL OF MARYLAND TRANSIT ADMINISTRATION**

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Pursuant to 49 C.F.R. §1152.25(e)(1)(iii), the Maryland Transit Administration, a modal agency of the Maryland Department of Transportation (“MTA”), hereby appeals the Decision of the Surface Transportation Board (“STB” or “Board”) Office of Proceedings issued in this proceeding on August 21, 2009 (“Decision”), a copy of which is attached hereto as **Exhibit A**. The Decision denied MTA’s request to allow the Maryland Department of Natural Resources (“MDNR”) and Delaware Department of Natural Resources and Environmental Control (“DNREC”) to assume responsibility as trail sponsors along the railbanked<sup>1</sup> Clayton-Easton railroad line (the “Line”). *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609 (Service Date Aug. 21, 2009).

The Decision should be reversed for the following reasons: (a) the Decision is contrary to previous decisions in which the Board authorized trail use based on SWAFRs containing similar qualifications arising from state law limitations; (b) the limitations of liability in the SWAFRs conform to the requirements of the Trails Act and the Board’s regulations; and (c) the Decision is contrary to the public interest and to the intent of the Trails Act, 16 U.S.C. § 1247(d), under which railroad lines may be preserved as recreational trails. By requiring that public entities

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<sup>1</sup> 16 U.S.C. § 1247(d); 49 C.F.R. § 1150, Subpart C; *Preseault v. I.C.C.*, 494 U.S. 1, 19 (1990).

provide unlimited liability or indemnification in cases where applicable state law prohibits them from so doing, the Decision defeats the stated purpose of the Trails Act to promote the preservation of rail lines under the stewardship of state and local agencies.

The Board denied MTA's request on the ground that the required statements of willingness to assume financial responsibility (each a "SWAFR") submitted by MDNR and DNREC contained impermissible limitations of liability because each SWAFR referred to state law requirements governing the latitude of MDNR and DNREC to incur financial obligations on behalf of the states of Maryland and Delaware, respectively. The Office of Proceedings concluded that DNREC's SWAFR "contained a caveat that could negate the required indemnification" because DNREC had indicated in its SWAFR that its indemnity "shall not constitute or be deemed to constitute an obligation of future appropriations by the Delaware General Assembly," and because DNREC's license agreement with MTA provides that its assumption of liability and indemnification are "subject to the requirements of Delaware law." *Id.* at 3. Similarly, the Office of Proceedings found that the MDNR SWAFR "appears to contain a limitation on liability by reference to the Maryland Tort Claims Act".<sup>2</sup> *Id.*

The assumptions of liability contained in the SWAFRs accompanying MTA's request are fully compliant with the Trails Act and the Board's implementing regulations at 49 C.F.R. §1152.29(a). MTA now seeks review by the full Board of the initial decision of the Office of Proceedings concerning the applicability and administration of the Trails Act.

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<sup>2</sup> The Decision also noted that the MDNR SWAFR does not indicate whether MDNR will be responsible for the payment of all taxes assessed on the Maryland segment. As a state administrative agency, MDNR has no tax liability to the State of Maryland. MD. CODE. ANN., Transportation § 7-704. If necessary, MTA can provide a sworn statement to this effect.

## BACKGROUND

### I. Railbanking

#### A. The Trails Act

The Trails Act explicitly provides that railbanking is intended to “encourage State and local agencies and private interests to establish appropriate trails . . . in furtherance of the national policy to preserve established rights-of-way for future reactivation of rail service”. 16 U.S.C.A. § 1247(d). When a railroad requests the Board’s authority to abandon a line of railroad, another party may assert its interest in becoming the sponsor of a trail under the Trails Act. The Trails Act provides that “interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” 16 U.S.C.A. § 1247(d). Toward these ends, The Trails Act requires that

[i]f a State, political subdivision or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use.

16 U.S.C.A. § 1247(d).

The Trails Act was enacted in 1983 in response to the Railroad Revitalization and Regulatory Reform Act of 1976 (“4R Act”). The 4R Act contained the first authorization of use of rail corridors as interim trails as a means of preserving rights-of-way. *See* Pub. L. 94-210, 90 Stat. 31 (1976) (codified as amended at 45 U.S.C. § 801 *et seq.*), Sec. 809. However, Congress determined in 1983 that rail corridors were not being converted to trail at the pace anticipated when the 4R Act was passed. *See* H.R. Rep. 98-28, 1983 U.S.C.C.A.N. 112, 119-120. As a result, Congress enacted the Trails Act provision codified at 16 U.S.C. § 1247(d) to “encourage the development of additional trails.” *Id.* at 120.

**B. The Board's Trail Use Regulations**

The Board's regulations provide that a state, political subdivision or qualified private organization may submit a petition requesting trail use authority accompanied by:

- (1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;
- (2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way; and
- (3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in [the form provided in the regulations at 49 C.F.R. § 1152.29(a)(3)].

49 C.F.R. § 1152.29(a).<sup>3</sup>

The Board must issue a Certificate of Interim Trail Use ("CITU") or, in the case of exemption proceedings, a Notice of Interim Trail Use ("NITU"), when it receives a properly-supported request for interim trail use and the abandoning railroad is willing to negotiate an

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<sup>3</sup> Section § 1152.29(a)(3) of 49 C.F.R. provides that the SWAFR must be provided "in the following form":

**Statement of Willingness To Assume Financial Responsibility**

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by (Railroad) and operated by (Railroad). The property, known as (Name of Branch Line), extends from railroad milepost ----- near (Station Name), to railroad milepost -----, near (Station name), a distance of ----- miles in [County(ies), (State(s))]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB----- (Sub-No. -----).

A map of the property depicting the right-of-way is attached. (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

interim trail use agreement with the proposed trail sponsor. The Board views itself as taking a “limited” role under the Trails Act, and considers its duties in issuing a CITU or NITU upon the satisfaction of the relevant statutory requirements as largely ministerial. *See Kansas Eastern RR, Inc. – Abandonment Exemption – In Butler and Greenwood Counties, KS*, 2006 WL 1516602 (S.T.B. ), slip op. at \*2 (Jun. 2, 2006). The Board has repeatedly held that an expression of financial responsibility and the ability to restore the right-of-way to railroad use are the only requirements for establishing a railbanked corridor. *See T and P Ry. – Abandonment Exemption – in Shawnee, Jefferson and Atchison Counties, KS*, 2 S.T.B. 36, 1997 WL 68211 (S.T.B.), slip op. at \*6 (Service Date Feb. 20, 1997).

Once the Board has issued a CITU or NITU, the entity requesting railbanking authority must negotiate an interim trail use agreement within 180 days with the abandoning railroad. 49 C.F.R. § 1152.29(c). The negotiation is strictly voluntary; a railroad that does not wish to negotiate cannot be compelled to do so. *See, e.g., Preseault*, 494 U.S. at 7 n.5, 16 n.10. This negotiating period may be extended upon request and at the discretion of the Board. *See Chesapeake R.R. Co. – Cert. of Interim Trail Use and Termination of Modified Rail Cert.*, STB Finance Docket No. 32609, slip op. at \*2 (Service Date Mar. 25, 2008) (granting MTA’s fifth request to extend the time to negotiate a trail use agreement, but urging the parties to conclude negotiations). There is no express requirement that the Board be notified when an interim trail use agreement is reached, but the trail sponsor typically submits a notice to the Board that the agreement has been consummated. The use of a rail corridor as a trail is denoted as “interim” in recognition of the purpose of railbanking as a place-holder until such time as rail service is reinstated.

In order to substitute or otherwise change the trail sponsor or sponsors, the existing and new trail sponsors must submit to the STB a copy of the existing CITU or NITU, a SWAFR for any new trail sponsor, and an indication of the date on which such change in trail sponsor is to become effective. 49 C.F.R. § 1152.29(f). The Board’s regulations provide that “[t]he Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.” 49 C.F.R. § 1152.29(f)(2).

## II. The Line

MTA owns the Line, which runs a distance of approximately 54.1 miles between milepost 0.0 at Clayton, DE, and milepost 45.3 at Easton, MD, including a connecting branch line, the Denton Spur, extending from milepost 0.0 at Queen Anne, MD, to milepost 8.8 at Denton, MD.

MTA obtained authority from the STB in 2006 to institute interim trail use on the Line under the Trails Act. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609 (Service Date Jan. 9, 2006) (the “*Jan. 9, 2006 Decision*”). The Chesapeake Railroad Company (“CHRR”) had operated freight service on the line from 1994 to 1998 pursuant to a modified certificate of public convenience and necessity (“modified certificate”) from the STB and an operating agreement with MTA.<sup>4</sup> In 2005, when no service had been provided on the line for at least seven years, and

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<sup>4</sup> A modified certificate allows a rail carrier to operate freight service over a previously abandoned rail line. The Line had been owned by the Trustees of the former Penn Central Transportation Company and abandoned in 1976 before being purchased by MTA in 1982. *Chesapeake R.R. Co. – Modified Rail Cert.*, STB Finance Docket No. 32609, slip op. at \*1 (Service Date Nov. 16, 1994). Pursuant to special provisions at 49 C.F.R. § 1150 Subpart C, an instrumentality of a state may acquire an abandoned rail line and enter into a contract with a rail carrier under which the carrier provides service and assumes all common carrier obligations upon obtaining a modified certificate from the Board. The Board has jurisdiction to authorize interim trail use in a proceeding, as here, involving the termination of operations under a modified certificate. See, e.g. *Sammamish Transp. Co. – Notice of Interim Trail Use and Termination of Modified Cert.*, Finance Docket No. 33398 (Sub-No. 1) (Service Date Feb. 26, 1998);

CHRR's operating agreement with MTA had expired. MTA filed a notice of intent to terminate service on the Line. MTA submitted the notice rather than CHRR because CHRR was no longer in existence in Maryland. Simultaneously, MTA submitted a SWAFR and requested that the Board issue a CITU to allow MTA to negotiate an interim trail use/railbanking agreement for the Line with a party or parties who would be willing to be responsible for trail use. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609, Notice of Maryland Transit Administration (Filed July 28, 2005). The termination of the modified certificate became effective 60 days after MTA's notice, and the Board issued a decision on January 6, 2006, granting the initial CITU requested by MTA and authorizing MTA to negotiate an interim trail use agreement. *Jan. 9, 2006 Decision*.

Here, because MTA had acted on behalf of the defunct CHRR to obtain the discontinuance of service and because MTA owns the Clayton-Easton Line, MTA is effectively considered the "abandoning railroad" (or, more precisely in this case, the discontinuing railroad) for the purposes of the Trails Act. Accordingly, MTA must execute an interim trail use agreement with an entity willing to assume responsibility for maintaining the trail according to the criteria at 49 C.F.R. § 1152.29(a).

Once MTA received authorization to railbank the Clayton-Easton Line, it then had 180 days to negotiate a trail use/railbanking agreement with a prospective trail sponsor or sponsors. 49 C.F.R. § 1152.29(c)(1). MTA requested and received several extensions of the negotiation period. Over the years, MTA negotiated with the Maryland Department of Transportation ("MDOT") in addition to DNREC and MDNR. In 2006, MDOT provided a SWAFR for the Line. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of*

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*Wisconsin and Calumet R.R. Co., Inc. – Notice of Interim Trail Use and Termination of Modified Cert.*, Finance Docket No. 30724 (Sub-No. 1) (Service Date Aug. 8, 1989).

*Modified Certificate*, STB Finance Docket No. 32609 (Service Date July 10, 2006). This SWAFR is currently in effect in support of the existing CITU.

In 2007, MTA requested that the CITU be partially vacated in order to remove a segment known as the Easton Spur from the CITU to permit MTA to consummate full abandonment of that segment. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609, Notice of the Maryland Transit Administration of Intent to Remove Property From Certificate of Interim Trail Use (Filed Jun. 13, 2007). The Easton Spur extended from approximately milepost 45.3 at Easton, Maryland to U.S. Route 50, a distance of approximately 1,645 feet. The Board granted this request. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609 (Service Date July 5, 2007). A map of the Line currently subject to the CITU is attached hereto as **Exhibit B**. Copies of the Board's Decisions (1) issuing the CITU to MTA as the original trail sponsor (Service Date January 10, 2006), (2) substituting MDOT as the trail sponsor (Service Date July 5, 2007), and (3) partially vacating the CITU (Service Date March 25, 2008), are attached hereto as **Exhibit C**.

In order to railbank the portions of the Line that remained subject to the CITU, MTA negotiated an interim trail use agreement in the form of a license agreement with DNREC, dated September 25, 2008, for management of the Delaware segment of the Line (the "DNREC License Agreement"). The Delaware segment consists of the line of railroad from milepost 0.0 in Clayton, DE, to milepost 13.5 in Marydel, DE, on the state line. A copy of the DNREC License Agreement for the Delaware Segment, is attached hereto as **Exhibit D**. MTA also entered into a lease with MDNR, dated June 20, 2007, to permit MDNR to assume responsibility for the Maryland segment of the Line (the "MDNR Lease"). The Maryland segment consists of

the Oxford Branch from milepost 13.6 in Marydel, MD, to milepost 45.3 in Easton, MD, and the Denton Spur from milepost 0.0 in Queen Anne, MD to milepost 8.8 in Denton, MD. A copy of the Lease Agreement is attached hereto as **Exhibit E**.

On September 26, 2008, MTA submitted a Notice to the Board (“MTA Notice”) indicating it had entered into interim trail use agreements with DNREC and MDNR. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609, Notice of Consummation of Trail Agreements (Filed September 26, 2008). MTA attached copies of DNREC’s SWAFR and MDNR’s lease with MTA to the MTA Notice. MTA subsequently conducted further discussions with DNREC and obtained DNREC’s consent to submit into the record a copy of the DNREC License Agreement in place of the DNREC SWAFR.

On May 22, 2009, MTA filed a request to modify its September 26, 2008, submission by substituting a copy of the DNREC License Agreement for the DNREC SWAFR. *Chesapeake Railroad Company – Certificate of Interim Trail Use and Termination of Modified Certificate*, STB Finance Docket No. 32609, Request to Amend Notice of Consummation of Trail Agreements (Filed May 22, 2009). MTA reiterated its request that the Board vacate the existing CITU for the Clayton-Easton Line and issue CITUs substituting DNREC and MDNR as the trail sponsors, respectively, of the Delaware and Maryland portions of the line. The Office of Proceedings denied this request in the Decision.

## **ARGUMENT**

### **I. The Decision is inconsistent with other recent Board decisions.**

A SWAFR may permissibly be subject to the proposed trail sponsor’s own immunity, because the Trails Act and Board’s regulations contemplate that a trail sponsor may be immune.

Hence, the Board has accommodated such qualified SWAFRs in prior cases. On at least two occasions involving instrumentalities of state government seeking authority to be trail sponsors, the Board granted trail use requests where the state entity submitted a SWAFR containing a limitation similar to those appearing in the SWAFRs provided by DNREC and MDNR.<sup>5</sup>

In *Nebkota Ry., Inc. – Abandonment Exemption – In Dawes and Sheridan Counties, NE*, STB Docket No. AB-988X (Service Date Oct. 1, 2007), the Nebraska Game and Parks Commission (“NGPC”) submitted a SWAFR in which it represented that it “is willing, *to the extent permitted by law*, to assume full responsibility for management of, for any legal liability arising out of the transfer or use of, and for the payment of any and all taxes that may be levied or assessed against the right-of-way in the above-captioned proceeding, owned and operated by Nebkota Railway, Inc.” SWAFR of NGPC, *Nebkota Ry., Inc.*, STB Docket No. AB-988X (Filed Aug. 28, 2007) (emphasis added). Like MDNR and DNREC, NGPC is subject to state law limitations on its authority to assume liability or to indemnify. Under Nebraska’s Tort Claims Act, a political subdivision of the state retains immunity from liability for, among other circumstances, (a) a claim arising out of snow or ice conditions caused by nature in any public place and (b) a claim relating to recreational activity for which no fee is charged. NEB. REV. STAT. § 13-910(10) and (13). A “recreational activity” is defined to include, among others, hiking, walking, running, horseback riding, use of trails, nature study, winter sports, biking, roller blading and skateboarding (NEB. REV. STAT. § 13-910(13)(b)(1)), all activities that a recreational trail may reasonably expected to accommodate. Furthermore, NGPC may only

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<sup>5</sup> The Board has also issued at least one decision denying a trail use request supported by a SWAFR containing a reference to Florida’s sovereign immunity laws. In that case, however, the SWAFR offered by the Florida Department of Environmental Protection varied from the language provided at 49 C.F.R. § 1152.29(a)(3) to a greater extent than in any of the cases where the Board approved the SWAFR. *Florida West Coast R.R. Co., Inc. – Abandonment Exemption – In Alachua and Gilchrist Counties, FL*, STB Docket No. AB-347 (Sub-No. 3X) (Service Date August 15, 2007). More recently, the Board has granted requests involving qualified SWAFRs, as discussed above.

expend funds after prior authorization by the Commission and state treasurer. NEB. REV. STAT. § 37-325. As a result, NGPC cannot lawfully commit the State of Nebraska to an unlimited indemnity. Accordingly, NGPC's SWAFR was appropriately qualified to assume liability "to the extent provided by law," and the Board accepted it. Similarly, here, DNREC identified its lack of authority to bind the State of Delaware in the absence of a legislative appropriation and made its SWAFR "subject to the requirements of Delaware law". The MDNR SWAFR referred to the Maryland Tort Claims Act, presenting the same conceptual framework that NGPC had presented in *Nebkota Ry., Inc.*

In an even more recent case, *Union Pac. R.R. Co. - Abandonment and Discontinuance of the Elm Industrial Lead in Fulton and Peoria Counties, IL*, STB Docket No. AB-33 (Sub-No. 262X) (Service Date Aug. 21, 2008), the Board granted the trail use request of the Illinois Department of Natural Resources ("IL-DNR") even though IL-DNR's SWAFR provided that "the Illinois Department of Natural Resources should be immune from liability and in which case will only indemnify the railroad for potential liability *under current statutory authority.*" SWAFR of IL-DNR, *Union Pac. R.R. Co.*, STB Docket No. AB-33 (Sub-No. 262X) (Filed Jul. 21, 2008) (emphasis added). Again, IL-DNR's limitation of its SWAFR was consistent with Illinois law: public employees in Illinois are immune from suit arising out of the condition of public property used for recreational purposes unless such condition is the result of an employee's willful and wanton misconduct (745 ILL. COMP. STAT. 10/3-106) or arising out of the maintenance or condition of a "hiking, riding, fishing or hunting trail." 745 ILL. COMP. STAT. 10/3-107. Under its enabling statute, IL-DNR must expend funds only in accordance with prior appropriations and therefore does not have the authority to obligate the State to future expenditures of unknown magnitude. 20 ILL. COMP. STAT. 801/1-15.

Given the similarities among the narrow qualifications contained in the SWAFRS provided by NGPC and IL-DNR, in which state agencies analogous to DNREC and MDNR permissibly identified state law limitations on their assumption of liability and scope of indemnification, the Board should reverse the Decision of the Office of Proceedings and grant MTA's request.

**II. The limitations of liability in the SWAFRS submitted by DNREC and MDNR conform to the requirements of the Trails Act and the Board's regulations.**

The Office of Proceedings characterized the DNREC License and MDNR Lease Agreement as lacking "the required statements of willingness from the prospective trail users" because the statements of DNREC and MDNR referred to applicable state law limitations. The Office of Proceedings' position that a SWAFR must bind a state instrumentality to provide unlimited liability and indemnification is contrary to the Trails Act and the Board's regulations.

The Trails Act does not require an assumption of unlimited liability by the prospective trail sponsor. The only material difference between the language of 16 U.S.C. § 1247(d) and the form of SWAFR appearing at 49 C.F.R. § 1152.29(a)(3) is the addition, in the regulations, of the requirement that a prospective trail sponsor indemnify the abandoning railroad against any potential liability if the trail use applicant is immune from liability:

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, [Interim Trail User] is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (*unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability*) . . . the right of way . . .

49 C.F.R. § 1152.29(a)(3) (emphasis added).

In contrast, the language of the Board's regulations at 49 C.F.R. § 1152.29(a)(2) is different. It states:

A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-

way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way . . . .

49 C.F.R. § 1152.29(a)(2).

This listing of the required contents of a request for a trail use condition appears to deviate from the specific requirements of the Trails Act to require that the prospective trail sponsor assume “full responsibility” for *all of* management, legal liability (except to the extent it is immune, in which case it must indemnify the railroad for any potential liability) and payment of taxes. However, the assumption of liability as an all-or-nothing proposition is contrary to the plain language of the Trails Act, which requires “full responsibility” for management, including the assumption of “any liability.” Thus, as long as the profferor of a SWAFR is willing and able to accept any liability that the railroad may incur, the SWAFR is proper. Here, the extent of the liability that MTA (the “abandoning railroad”) might incur is limited by the same fiscal limitations as MDNR, that is, to the extent of appropriations by the legislature. As a result, both MDNR and DNREC (which is subject to similar limitations under Delaware law) are agreeing to assume “any liability” that MTA might incur.

The insertion of the indemnification in the regulations signals the Board’s recognition that the proposed trail sponsor may be entirely immune from liability, but that it may still qualify as a trail user. This is because nowhere in the Trails Act is the prospective trail user required to assume full liability or provide a full indemnity.

Accordingly, when a prospective trail sponsor agrees to assume such obligations “subject to the requirements of state law” (DNREC License Agreement, Sec. 12), “to the extent permitted by law” (SWAFR of NGPC, *Nebkota Ry., Inc.*, STB Docket No. AB-988X), “under current statutory authority” (SWAFR of IL-DNR, *Union Pac. R.R. Co.*), or with reference to specific state law provisions, such as a Tort Claims Act (MDNR Lease Agreement Sec. 15), it does so to

the fullest extent of its ability, which is all the plain language of the Trails Act and 49 C.F.R. § 1152.29(a)(3) requires.

Here, DNREC and MDNR have fully complied with the essential protections contained in the Trails Act: they have assumed liability and the obligation to indemnify MTA to the fullest extent allowable under state law, and have entered into voluntary agreements with MTA for their assumption of “full responsibility” to manage the trail, including an assumption of liability and duty to indemnify. As a result, the Board should, as it has previously, permit DNREC and MDNR to become trail sponsors on the basis of their respective SWAFRs.

**III. State law limitations will apply whether or not a state so indicates in its SWAFR.**

By operation of law, a state agency’s ability to conform to the representations it makes in a SWAFR will be subject to applicable state law limitations. A review of the Board’s approval of trail use requests by state administrative agencies within the past five years confirms that this Board regularly approved trail use where a state agency submitted an unqualified SWAFR, but was nevertheless bound by state requirements limiting its ability to obligate the state. Most recently, for example, in *Beaufort R.R. Co. – Modified Rail Certificate*, STB Finance Docket No. 34943, slip op. at \*8 (Service Date May 20, 2009), the Board granted the trail use request of the Beaufort-Jasper Water & Sewer Authority (“BJWSA”), a special purpose district of the State of South Carolina. BJWSA had submitted a SWAFR without amendment to the language appearing at 49 C.F.R. § 1152.29(a)(3). However, as an instrumentality of the state, BJWSA is immune from liability arising out of naturally-occurring snow or ice conditions on a public place or relating to the “maintenance, security or supervision of any public property, intended or permitted to be used as an . . . open area for recreational purposes.” S.C. Code 1976 §§ 15-87-60(8) and (16). Furthermore, if BJWSA were liable for any loss, limitations of liability apply.

S.C. Code 1976 § 15-78-120. A special purpose district in South Carolina does not have authority to unconditionally bind the state. S.C. Code 1976 § 6-11-10 et seq.

Because state law will govern the latitude of a state agency seeking trail use authority to obligate itself, the Board cannot assume that the submission of a SWAFR without qualification indicates that the trail use applicant has assumed unlimited liability or obligated itself to an unlimited indemnity. Indeed, under the plain language of the Trails Act and accompanying regulations, such unlimited obligations are not required. As the example of BJWSA illustrates, a state agency may elect not to alter the language of its SWAFR because it is subject to state law in all events. The Office of Proceedings' policy of presuming that trail use applicants assume unlimited liability or take on an unlimited indemnity by submitting an unqualified SWAFR therefore penalizes state agencies that submit SWAFRs clearly setting out the legal parameters of their authority. Such an approach goes well beyond the requirements of the Trails Act and Board regulations, and, given the wide adoption of state tort claims acts and limitations on future obligations, is quite likely frequently observed in the breach.

#### **IV. The Decision is contrary to the Trails Act.**

In addition to extending beyond the plain language of the Trails Act and Board regulations, the Decision is erroneously based on a narrow interpretation of the Trails Act that is contrary to the aims of the legislation. The 4R Act clearly intended that preservation of abandoned or discontinued rail corridors "to recreational and conservational uses" would maintain such corridors "for public purposes" primarily under the stewardship of public bodies. Pub. L. 94-210, 90 Stat. 31, Sec. 809(b). The 4R Act directed the Secretary of the Interior, after consultation with the Secretary of Transportation, to "provide financial, educational, and

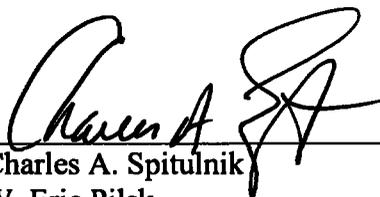
technical assistance to local, and State, and Federal governmental entities for programs involving the conversion of abandoned railroad rights-of-way to recreational and conservational uses.” *Id.*

When the 4R Act proved not to be the expected spur to the creation of railbanked trails, Congress enacted the Trails Act, “to encourage the development of additional trails in conjunction with the provisions of the [4R Act].” H.R. Rep. 98-28, 1983 U.S.C.C.A.N. 112, 119. The goal here is clearly to create the means for creating trails, not blocking them and forcing an abandonment, and the Trails Act made clear that railbanking a rail corridor through interim trail use would not effect an abandonment. Pub. L. 98-11, 97 Stat. 42 (1983) (codified at 16 U.S.C. 1247(d)), Sec. 208(d). The legislative history and plain language of the Trails Act emphasize the public purpose underlying the railbanking program and the essential role public agencies are to play in achieving the goals of the legislation. The Decision, by imposing requirements on DNREC and MDNR that they cannot lawfully meet, runs contrary to this stated public purpose and hinders the exercise of the Trails Act. As a result, the Board should reverse the Decision of the Office of Proceedings and return a result consistent with the Board’s own precedent, regulations, plain language and stated intent of the Trails Act because the SWAFRs provided by DNREC and MDNR conform to the requirements of the statute and applicable regulations.

## CONCLUSION

For the reasons set forth above, MTA respectfully requests that the Board accept MTA's appeal of the Decision and reverse the Office of Proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik  
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(202) 955-5600

Counsel for the Maryland Transit Administration

Dated: August 31, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused to be served a copy of the foregoing APPEAL OF THE MARYLAND TRANSIT ADMINISTRATION upon the following parties of record in this proceeding by first class mail with postage prepaid and properly addressed:

General Counsel  
American Short Line and Regional Railroad Association  
50 F Street, N.W., Suite 7020  
Washington, DC 20001

Edward G. Banks, Jr.  
Maryland Delaware Railroad  
106 Railroad Avenue  
Federalsburg, MD 21632-1499

Linda C. Janey, J.D.,  
Maryland Department of Planning  
301 West Preston Street, Suite 1101  
Baltimore, MD 21201-2365

  
\_\_\_\_\_  
Charles A. Spitulnik

Dated this 31st day of August, 2009

A

**Exhibit A**

**Decision – Finance Docket No. 32609, August 21, 2009**

**[attached hereto]**

39426  
DO

SERVICE DATE – LATE RELEASE AUGUST 21, 2009

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32609

CHESAPEAKE RAILROAD COMPANY—CERTIFICATE OF INTERIM TRAIL USE AND  
TERMINATION OF MODIFIED RAIL CERTIFICATE

Decided: August 21, 2009

This decision denies the request of the Maryland Transit Administration (MTA) to vacate the current certificate of interim trail use (CITU) in this proceeding and issue new CITUs.

BACKGROUND

In Chesapeake Railroad Company—Modified Rail Certificate, Finance Docket No. 32609 (ICC served Nov. 23, 1994), Chesapeake Railroad Company (CHRR) was issued a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150, subpart C, to operate approximately 54.1 miles of rail line owned by the State of Maryland between milepost 00.0 at Clayton, DE, and milepost 45.3 at Easton, MD, and a connecting branch line between milepost 00.0 at Queen Anne, MD, and milepost 8.8 at Denton, MD (collectively, Clayton-Easton line).

On July 28, 2005, MTA, on behalf of the State of Maryland, filed notice on behalf of CHRR of its intent to terminate service under the modified certificate over the Clayton-Easton line.<sup>1</sup> On that same date, MTA simultaneously filed a request for issuance of a certificate of interim trail use (CITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the Clayton-Easton line. MTA submitted a statement indicating its willingness to assume financial responsibility for management of the right-of-way (ROW) as required at 49 CFR 1152.29, and acknowledged that the use of the ROW for trail purposes would be subject to future reconstruction and reactivation for rail service. On January 9, 2006, a decision and CITU was served authorizing a 180-day period for MTA to negotiate an interim trail use/rail banking agreement for the Clayton-Easton line.

On June 7, 2006, MTA filed a motion to extend the negotiating period for an additional 180 days. MTA's motion stated that it was in the process of negotiating an agreement with the

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<sup>1</sup> Under 49 CFR 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate. CHRR, however, no longer had an operating agreement with MTA, and CHRR was determined to have ceased existence as a corporate entity in Maryland. Therefore, the Board allowed MTA to file on CHRR's behalf.

AUG 26 2009

Maryland Department of Natural Resources (MDNR) to become the interim trail user for the Clayton-Easton line. However, the Board had received no statement of willingness to assume financial responsibility from MDNR, and MTA was asked to supplement its motion. On June 28, 2006, MTA filed a supplemental motion, stating that MTA was negotiating with the Maryland Department of Transportation (MDOT) to become the interim trail user for the Clayton-Easton line. MDOT executed the necessary statement of willingness to assume financial responsibility as an attachment to MTA's supplemental motion. By decision served on July 10, 2006, the Board granted MTA's motion to extend the CITU negotiating period an additional 180 days, until January 6, 2007. The Board granted another negotiating period extension by decision served on January 5, 2007 (until July 5, 2007).

On June 13, 2007, MTA filed a notice of intent pursuant to 49 CFR 1152.29(c), to "remove property known as the "Easton Spur" from the CITU." The Easton Spur consists of a parcel of approximately 5.514 acres on which is situated a spur track extending between the main ROW at approximately milepost 45.3, at Easton, and U.S. Route 50, a distance of approximately 1,645 feet. By pleading filed on June 14, 2007, MTA also requested an extension of the CITU negotiating period. By decision served on July 5, 2007, the Board reopened the proceeding, partially vacated the CITU with respect to the "Easton Spur," and extended the negotiating period for the remaining ROW. By decisions served on December 26, 2007, and March 25, 2008, the CITU negotiating period for the remaining ROW was extended to September 27, 2008.

On September 26, 2008, MTA filed a notice indicating that it had entered into interim trail use agreements on the remaining ROW. MTA stated that it has entered into an agreement with MDNR for the portion of the ROW located in Maryland (Maryland segment).<sup>2</sup> In addition, MTA stated that it has entered into an interim trail use agreement with the Delaware Department of Natural Resources and Environmental Control (DNREC) for the portion of the ROW located in Delaware (Delaware segment).<sup>3</sup> On May 22, 2009, MTA filed a request to amend its notice of consummation of trail use agreements. MTA requests that the CITU be vacated and that new CITUs be issued to address MDNR's trail-use responsibilities for the Maryland segment and DNREC's trail-use responsibilities for the Delaware segment.

## DISCUSSION AND CONCLUSION

Under the Trails Act and the Board's regulations at 49 CFR 1152.29(a)(2), a prospective trail user is required to include "a statement indicating the user's willingness to assume full responsibility: for managing the [ROW]; for any legal liability arising out of the use of the

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<sup>2</sup> The Maryland segment includes the "Oxford Branch" from milepost 13.6 in Marydel, Caroline County, MD, to milepost 45.3 in Easton, Talbot County and the "Denton Spur" from milepost 0.0 in Queen Anne, to milepost 8.8 in Denton.

<sup>3</sup> The Delaware segment includes the line of railroad from milepost 0.0 in Clayton, Kent County, DE, to milepost 13.5 in Marydel, Kent County.

[ROW] (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the [ROW].”

Although MTA’s notice and amended notice contained statements purporting to address DNREC’s obligation to “assume full responsibility... for any legal liability arising out of the use of the [ROW] (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability),” DNREC’s representations do not comply with the requirements of 49 CFR 1152.29(a)(2). DNREC’s “Statement of Willingness to Assume Financial Responsibility” (Exhibit B in MTA’s September 26, 2008 notice) contains a caveat that could negate the required indemnification. It states that DNREC “will indemnify MTA against any potential liability provided that such indemnification shall not constitute or be deemed to constitute an obligation of future appropriations by the Delaware General Assembly” (emphasis added). Likewise, MTA’s May 22, 2009 amended notice included as Exhibit A a copy of the license agreement between MTA and DNREC. The agreement includes a similar caveat under the provisions covering indemnity and liability.

In addition, MDNR’s statement of willingness to assume financial responsibility in the lease agreement with MTA (Exhibit C in MTA’s September 26, 2008 notice) (1) does not indicate whether MDNR will be responsible for the payment of all taxes assessed on the Maryland segment and (2) appears to contain a limitation on liability by reference to the Maryland Tort Claims Act. The Board cannot issue a CITU without the required statements of willingness from the prospective interim trail users. Accordingly, MTA’s requests to vacate the current CITU and to issue new CITUs will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. MTA’s request to vacate the CITU is denied.
2. MTA’s request for issuance of CITUs under 16 U.S.C. 1247(d) is denied.
3. This decision is effective on the date of service.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary

**B**

**Exhibit B**

**Map of the Clayton-Easton Line**



C

**Exhibit C**

**Existing CITU:**

- 1. January 9, 2006 – Issuance of CITU**
- 2. July 10, 2006 – Board decision granting substitution of MDOT as trail user**
- 3. July 5, 2007 – Board decision partially vacating CITU with respect to the Easton Spur**

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SERVICE DATE – LATE RELEASE JANUARY 9, 2006

SURFACE TRANSPORTATION BOARD

DECISION AND CERTIFICATE OF INTERIM TRAIL USE OR ABANDONMENT

Finance Docket No. 32609

CHESAPEAKE RAILROAD COMPANY—CERTIFICATE OF INTERIM TRAIL USE AND  
TERMINATION OF MODIFIED RAIL CERTIFICATE

Finance Docket No. 29830<sup>1</sup>

MARYLAND AND DELAWARE RAILROAD COMPANY—  
TERMINATION OF MODIFIED RAIL CERTIFICATE

Decided: January 9, 2006

In Chesapeake Railroad Company—Modified Rail Certificate, Finance Docket No. 32609 (ICC served Nov. 23, 1994), Chesapeake Railroad Company (CHRR) was issued a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150, subpart C, to operate approximately 54.1 miles of rail line owned by the State of Maryland between milepost 00.0 at Clayton, DE, and milepost 45.3 at Easton, MD, and a connecting branch line between milepost 00.0 at Queen Anne, MD, and milepost 8.8 at Denton, MD (collectively, Clayton-Easton line).

On July 28, 2005, the Maryland Transit Administration (MTA), on behalf of the State of Maryland, filed notice on behalf of CHRR of its intent to terminate service under the modified certificate over the Clayton-Easton line.<sup>2</sup> On that same date, MTA filed a request for issuance of a certificate of interim trail use (CITU) under the National Trails System Act, 16 U.S.C. 1247(d), for the Clayton-Easton line. MTA submitted a statement indicating its willingness to assume financial responsibility for management of the right-of-way (ROW) as required at 49 CFR 1152.29, and acknowledged that the use of the ROW for trail purposes is subject to future reconstruction and reactivation for rail service.

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<sup>1</sup> These proceedings are not consolidated but are being considered in the same decision for administrative convenience.

<sup>2</sup> Under 49 CFR 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate. However, according to MTA, CHRR, the operator, has ceased operating over the Clayton-Easton line, the operating agreement between CHRR and MTA was terminated on October 31, 1998, and CHRR has subsequently forfeited its status as a corporate entity in Maryland.

In Maryland and Delaware Railroad Company–Modified Rail Certificate, Finance Docket No. 29830 (ICC served Feb. 9, 1982), Maryland and Delaware Railroad Company (M&D) was issued a modified certificate under then 49 CFR 1120A to provide service in Maryland and Delaware, including service over the Clayton-Easton line. On August 17, 2005, M&D filed notice of its intent to terminate service under a modified certificate over the Clayton-Easton line.

Because MTA's request complies with the requirements of 49 CFR 1152.29, a CITU will be issued for the above-described line. MTA is free to negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, then no further Board action is necessary. If no agreement is reached within 180 days, the line may be fully abandoned. See 49 CFR 1152.29(c)(1). Use of the ROW for trail purposes is subject to restoration for railroad purposes. See 49 CFR 1152.29(c)(2).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for a CITU under 16 U.S.C. 1247(d) is accepted.
2. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the owner against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the ROW.
3. Interim trail use/rail banking is subject to the future restoration of rail service and the user's continuing to meet the financial obligations for the ROW.
4. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and certificate and request that it be vacated on a specified date.
5. If an agreement for interim trail use/rail banking has been reached by the 180th day after service of this decision and certificate, interim trail use may be implemented. If no agreement is reached by that time, the line may be fully abandoned.

Finance Docket No. 32609 et al.

6. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary

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SERVICE DATE – JULY 10, 2006

SURFACE TRANSPORTATION BOARD

DECISION

Finance Docket No. 32609

CHESAPEAKE RAILROAD COMPANY–CERTIFICATE OF INTERIM TRAIL USE AND  
TERMINATION OF MODIFIED RAIL CERTIFICATE

Decided: July 7, 2006

In Chesapeake Railroad Company–Modified Rail Certificate, Finance Docket No. 32609 (ICC served Nov. 23, 1994), Chesapeake Railroad Company (CHRR) was issued a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150, subpart C, to operate approximately 54.1 miles of rail line owned by the State of Maryland between milepost 00.0 at Clayton, DE, and milepost 45.3 at Easton, MD, and a connecting branch line between milepost 00.0 at Queen Anne, MD, and milepost 8.8 at Denton, MD (collectively, Clayton-Easton line).

On July 28, 2005, the Maryland Transit Administration (MTA), on behalf of the State of Maryland, filed notice on behalf of CHRR of its intent to terminate service under the modified certificate over the Clayton-Easton line.<sup>1</sup> On that same date, MTA filed a request for issuance of a certificate of interim trail use (CITU) under the National Trails System Act, 16 U.S.C. 1247(d), for the Clayton-Easton line. MTA submitted a statement indicating its willingness to assume financial responsibility for management of the right-of-way (ROW) as required at 49 CFR 1152.29, and acknowledged that the use of the ROW for trail purposes is subject to future reconstruction and reactivation for rail service.

On January 9, 2006, a decision and CITU was served authorizing a 180-day period for MTA to negotiate an interim trail use/rail banking agreement for the Clayton-Easton line.

On June 7, 2006, MTA filed a motion to extend the negotiating period for an additional 180 days.<sup>2</sup>

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<sup>1</sup> Under 49 CFR 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate. CHRR, however, no longer had an operating agreement with MTA, and CHRR was determined to have ceased existence as a corporate entity in Maryland. Therefore, the Board allowed MTA to file on CHRR's behalf.

<sup>2</sup> MTA's motion stated that it was in the process of negotiating an agreement with the Maryland Department of Natural Resources (DNR) to assume the responsibility of trail user for the Clayton-Easton line. However, the Board had received no statement of willingness to assume financial responsibility from DNR, and MTA was asked to supplement its motion.

On June 28, 2006, MTA filed a supplemental motion for an extension of the 180-day negotiating period. MTA states that it is currently negotiating an agreement with the Maryland Department of Transportation (MDOT) to assume the responsibility of trail user for the Clayton-Easton line.<sup>3</sup> The parties request an additional 180 days to complete the required agreement so that MDOT may complete an inspection of the line prior to assuming its trail user responsibilities.

Where, as here, the parties are willing to continue trail use negotiations, the negotiating period may be extended. An extension of the negotiating period will promote the establishment of trails and rail banking consistent with the National Trails System Act.<sup>4</sup> Accordingly, the CITU negotiating period will be extended for an additional 180 days from July 10, 2006 (until January 6, 2007).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion of MTA to extend the CITU negotiating period is granted.
2. The negotiating period under the CITU is extended for 180 days until January 6, 2007.
3. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary

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<sup>3</sup> MDOT executed the necessary statement of willingness to assume financial responsibility as an attachment to MTA's supplemental motion.

<sup>4</sup> See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

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SERVICE DATE – LATE RELEASE JULY 5, 2007

**SURFACE TRANSPORTATION BOARD**

**DECISION**

Finance Docket No. 32609

**CHESAPEAKE RAILROAD COMPANY—CERTIFICATE OF INTERIM TRAIL USE AND  
TERMINATION OF MODIFIED RAIL CERTIFICATE**

Decided: July 5, 2007

In Chesapeake Railroad Company—Modified Rail Certificate, Finance Docket No. 32609 (ICC served Nov. 23, 1994), Chesapeake Railroad Company (CHRR) was issued a modified certificate of public convenience and necessity (modified certificate) under 49 CFR 1150, subpart C, to operate approximately 54.1 miles of rail line owned by the State of Maryland between milepost 00.0 at Clayton, DE, and milepost 45.3 at Easton, MD, and a connecting branch line between milepost 00.0 at Queen Anne, MD, and milepost 8.8 at Denton, MD (collectively, Clayton-Easton line).

On July 28, 2005, the Maryland Transit Administration (MTA), on behalf of the State of Maryland, filed notice on behalf of CHRR of its intent to terminate service under the modified certificate over the Clayton-Easton line.<sup>1</sup> On that same date, MTA filed a request for issuance of a certificate of interim trail use (CITU) under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), for the Clayton-Easton line. MTA submitted a statement indicating its willingness to assume financial responsibility for management of the right-of-way (ROW) as required at 49 CFR 1152.29, and acknowledged that the use of the ROW for trail purposes is subject to future reconstruction and reactivation for rail service.

On January 9, 2006, a decision and CITU was served authorizing a 180-day period for MTA to negotiate an interim trail use/rail banking agreement for the Clayton-Easton line.

On June 7, 2006, MTA filed a motion to extend the negotiating period for an additional 180 days. MTA's motion stated that it was in the process of negotiating an agreement with the Maryland Department of Natural Resources (DNR) to assume the responsibility of trail user for the Clayton-Easton line. However, the Board had received no statement of willingness to assume financial responsibility from DNR, and MTA was asked to supplement its motion. On June 28, 2006, MTA filed a supplemental motion, stating that MTA was negotiating with the

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<sup>1</sup> Under 49 CFR 1150.24, an operator must provide 60 days' notice of its intent to terminate service over a line covered by a modified certificate. CHRR, however, no longer had an operating agreement with MTA, and CHRR was determined to have ceased existence as a corporate entity in Maryland. Therefore, the Board allowed MTA to file on CHRR's behalf.

Maryland Department of Transportation (MDOT) to assume the responsibility of trail user for the Clayton-Easton line. MDOT executed the necessary statement of willingness to assume financial responsibility as an attachment to MTA's supplemental motion. By decision served on July 10, 2006, the Board granted MTA's motion to extend the CITU negotiating period an additional 180 days, until January 6, 2007. On December 18, 2006, MTA filed a motion to further extend the negotiating period an additional 180 days (until July 5, 2007). By decision served on January 5, 2007, the Board granted MTA's motion to extend the CITU negotiating period.

On June 13, 2007, MTA filed a notice of intent pursuant to 49 CFR 1152.29(c), to remove property known as the "Easton Spur" from the CITU. The Easton Spur consists of a parcel of approximately 5.514 acres on which is situated a spur track extending between the main ROW at approximately milepost 45.3, at Easton, and U.S. Route 50, a distance of approximately 1,645 feet.

MTA has complied with the requirements of 49 CFR 1152.29(c)(2) regarding a request to partially vacate the CITU. Whenever a trail user intends to terminate trail use over a portion of the ROW and sends the Board a request that a CITU be vacated in part, the Board will reopen the proceeding and partially vacate the CITU. Therefore, MTA's request to partially vacate the CITU will be granted with respect to 5.514 acres of the ROW.

On June 14, 2007, MTA filed a motion to extend the negotiating period for the remaining ROW an additional 180 days (until January 1, 2008). MTA states that its negotiations with MDOT are continuing, and that MDOT has asked for additional time to complete its inspection of the line prior to assuming the responsibilities as the trail user. MTA also states that MDOT has authorized MTA to state that it concurs with the request for an extension.

Where, as here, the parties are willing to continue trail use negotiations, the negotiating period may be extended. An extension of the negotiating period will promote the establishment of trails and rail banking consistent with the Trails Act.<sup>2</sup> Accordingly, the CITU negotiating period will be extended for an additional 180 days from July 5, 2007 (until January 1, 2008).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.

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<sup>2</sup> See Rail Abandonments—Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987).

2. MTA's request to vacate the CITU for the 5.514 acres of the ROW described above is granted.

3. The CITU, served on January 9, 2006, is vacated with respect to 5.514 acres of the ROW known as the Easton Spur. The CITU will remain in effect for the remainder of the ROW described in the January 2006 decision.

4. The motion of MTA to extend the CITU negotiating period is granted.

5. The negotiating period for the remaining ROW under the CITU is extended for 180 days until January 1, 2008.

6. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary

**D**

**Exhibit D**

**DNREC License Agreement**

**LICENSE AGREEMENT**  
Between  
**MARYLAND TRANSIT ADMINISTRATION**  
a modal agency of the  
**MARYLAND DEPARTMENT OF TRANSPORTATION**  
acting for and on behalf of  
**THE STATE OF MARYLAND**  
and  
**DELAWARE DEPARTMENT OF NATURAL RESOURCES**  
& **ENVIRONMENTAL CONTROL**

**THIS LICENSE AGREEMENT** ("Agreement") is entered into this 25<sup>th</sup> day of SEPTEMBER 2008 by and between **MARYLAND TRANSIT ADMINISTRATION** a modal agency of the **MARYLAND DEPARTMENT OF TRANSPORTATION** acting for and on behalf of **THE STATE OF MARYLAND** ("Licensor" or "MTA") located at 6 Saint Paul Street, Baltimore, MD 21202, and **DELAWARE DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL** located at 89 Kings Highway, Dover, Delaware 19901 ("Licensee" or "DNREC" or "Interim Trail User").

**RECITALS**

1. By Deeds dated January 8, 1982 and recorded among the land records of Kent County, Delaware, on November 22, 1982 at Record Q, Volume 37, Page 1, and dated January 8, 1982 and recorded among the land records of Caroline County, Maryland in Book 214, Page 676, MTA acquired certain railroad rights-of-way from the Penn Central Corporation and others, in Kent County, Delaware and Caroline County, Maryland ("Rail Corridor").

2. The Rail Corridor is now subject to a Certificate of Interim Trail Use (CITU) issued by the Surface Transportation Board (STB) in Washington, D.C. on January 9, 2006 in STB Docket No. 32609, *Chesapeake R. Co.- Certificate of Interim Trail Use and Termination of Modified Rail Certificate* and STB Docket No. 29830, *Maryland and Delaware R. Co. - Termination of Modified Certificate*).

3. The State of Maryland recognizes that interim use of railroad rights-of-way for public recreation produces transportation benefits such as maintenance of the right-of-way, prevention of vandalism, or other deterioration. As such, MDOT filed a Statement of Willingness To Assume Financial Responsibility pursuant to 16 USC § 1247 (d) and 45 CFR §1152.29.

4. The STB has recognized the right of the State of Maryland to utilize interim use provisions under the Federal Rail to Trails Act, committing to a restoration for freight use should such a need develop.

5. Pursuant to Chapter 658, Acts of 1990, the General Assembly of Maryland provided for the interim use for public recreation of that portion of the Railroad Corridor located in the State of Maryland known as the Easton to Clayton Rail Trail through an MOU dated August 23, 1993 from the

State Railroad Administration (now part of the Maryland Transit Administration) to the Maryland Department of Natural Resources.

6. MTA and DNREC have agreed that the portion of the Rail Corridor located solely within Delaware that runs from the Town of Clayton, Kent County, Delaware proceeding in a southwesterly direction and ending in Delaware at the Maryland/Delaware State Line in the Town of Marydel, Kent County, Delaware is currently inactive and would be appropriately used on an interim basis for public recreation as a rail trail.

7. MTA and DNREC believe that it is in the best interest of their respective States that the portion of the Rail Corridor located solely within Delaware should be transferred to DNREC.

8. MTA intends to recommend to the State Board of Public Works that the transfer to DNREC be for no consideration.

9. In anticipation of a transfer of the Delaware portion of the Rail Corridor to DNREC which must first be approved by the Maryland Board of Public Works, MTA and DNREC have agreed to enter into this Agreement which is intended to be of a limited duration.

10. For the duration of this Agreement, DNREC intends and expects to make payments to MTA in lieu of providing insurance as set forth in paragraph 6(f) herein.

11. It is therefore the intent of MTA and DNREC that this Agreement and a subsequent conveyance from MTA to DNREC:

a. encompass that portion of the Railroad Corridor within the State of Delaware, that is part of the railroad line known as the Oxford Secondary Track, extending from the Town of Clayton, Kent County, Delaware beginning at Mile Post 0.0 to the Town of Marydel, Kent County, Delaware at Mile Post 13.5, as shown on the valuation maps for the Oxford Branch, which valuation maps are filed among the record of MTA, that is within the general 66 foot wide corridor and adjacent outparcels adjoining the Rail Corridor (the "Area") and is part of the property described in Recital No. 1 of this Agreement; and

b. be for an interim use only for public recreation as a rail trail, be subject to termination for restoration of the railroad right-of-way for railroad purposes by MTA, and does not constitute an abandonment of use of the right-of-way for railroad purposes.

12. MTA and DNREC mutually commit themselves to certain terms for the interim use of the Area for public recreation.

NOW, THEREFORE, the Parties, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, agree as follows, intending to be legally bound:

1. **Incorporation of Recitals.** The foregoing Recitals are incorporated herein by reference and made a part of this Agreement.

2. **Grant and Term of License.** Subject to the terms and conditions of this Agreement, for a term of two (2) years, beginning on the date this Agreement is executed by MTA, MTA grants DNREC a license to use and maintain the Area for public recreational and park uses, in accordance with and in furtherance of the CITU issued by the STB, and for no other purpose. This Agreement shall be automatically renewed for three (3) additional one-year terms, unless notice of termination is given

by one party to the other at least thirty (30) days prior to the end of a term. This License conveys to Licensee no title or real property interest of any kind respecting the Area licensed. This Agreement shall terminate immediately at the end of the term of this Agreement or conveyance of the Area by MTA to DNREC, whichever is sooner.

3. **License Fee.** In consideration of the grant by Licensor of this License, Licensee agrees to pay Licensor One Dollar (\$1.00), payable in advance.

4. **Licensee's Responsibilities.**

(a) Licensee shall keep the Area free and clear of debris.

(b) Licensee shall be responsible for reasonable maintenance of the Area.

(c) All work of whatever kind done by Licensee, its agents and contractors, while upon the Area shall be done in a workmanlike manner and in compliance with all applicable laws, rules, regulations and orders. Licensee shall comply with all requirements with respect to protection of the environment and shall not place, cause to be placed, or knowingly allow any third party to place upon or under the Licensor's property any hazardous substance or other substance, which may be the cause of environmental degradation.

(d) Licensee shall be responsible for any inspections, renovations or repairs to any bridge structures that are located along or within the Area in connection with its use of the Area for a rail trail.

(e) Licensee shall be solely responsible for any act, commission, or omission of any vendor, agent, contractor, or any person operating or acting by or through it.

(f) At the termination of this License for any reason, Licensee shall vacate the Area and leave it in as good or better a condition as existed upon Licensee's original entry.

5. **Indemnity and Liability.**

(a) Licensee shall 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 MTA, its officers, agents, employees, customers, successors and assigns, against and with respect to any and all liabilities arising out of or in any way connected with: (i) the exercise or performance by Licensee (or its agents, volunteers, officers, employees, successors or assigns or contractors) of any of its rights or obligations hereunder; (ii) the use or operation by Licensee (or its agents, volunteers, officers, employees, successors or assigns or contractors) of the Area, or (iii) work performed by or on behalf of Licensee upon the Area. As used herein, "Liabilities" shall include any and all losses, claims, damages, suits, liabilities or costs whatsoever, (including without limitation reasonable attorney's fees and cost of suit) which arise: (i) out of injury to any person (including without limitation loss of limb or death); (ii) out of damage to or destruction of any property of any person whomsoever; (iii) out of damage to or destruction of the environment, including without limitation land, air, water, wildlife, or vegetation (including, but not limited to, costs and expenses incident to monitoring, remedial actions, proceedings or investigations or the defense of any claim); or (v) out of or occasioned by any breach or default by Licensee (or its agents, volunteers, officers, employ-

ees, customers, successors or assigns or contractors) in performing any of its obligations hereunder or under any applicable law. The foregoing obligations shall survive termination of this Agreement with respect to Liabilities arising during its term.

(b) Notwithstanding the requirements of subsection (a) of this section, nothing contained in this Agreement shall constitute or be deemed to constitute an obligation of future appropriations by the Delaware General Assembly. MTA acknowledges that Licensee must obtain appropriations prior to payment of any damages. A lack of funds to perform any aspect of this Agreement due to insufficient appropriation by the Delaware General Assembly shall not constitute a breach of this Agreement.

(c) Licensee intends to satisfy all of its obligations under this Agreement. Licensee reasonably believes that funds in amounts sufficient to discharge these obligations can and will lawfully be appropriated and made available for this purpose. In the event the Delaware General Assembly does not provide funds in sufficient amounts to discharge these obligations, Licensee shall use its reasonable best efforts to satisfy any requirements for payments under this Agreement from any other source of funds legally available for this purpose, subject to such priorities as may be determined by the Governor of the State of Delaware. In the event the Delaware General Assembly does not provide funds in sufficient amounts to discharge any of its obligations under this Agreement, and despite the reasonable best efforts of Licensee, and no other source of funds is available for this Agreement, then MTA may suspend or terminate this Agreement in its sole discretion. Such termination shall not affect any liability of Licensee for obligations incurred prior to the date of termination. Further, if Licensee is unable to satisfy its obligations under this Agreement, MTA may exercise any legal rights it has to protect its interest in any way related to this Agreement.

## 6. Insurance.

(a) 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 maintain and require its contractors and subcontractors (of any tier) performing activities hereunder to procure and maintain, insurance which shall protect Maryland Transit Administration, Maryland Department of Transportation, and the State of Maryland, their officers, agents, employees, invitees, successors, and assigns, from claims which may arise out of or as a result of Licensee's activities under this Agreement, 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:

(i) Commercial General Liability and Umbrella Insurance. Licensee shall maintain Commercial General Liability ("CGL") insurance and, if necessary, commercial umbrella insurance with a limit of not less than \$5,000,000 each occurrence. If such CGL insurance contains a general aggregate limit, it shall apply separately to this Utility. 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 advertising injury, and liability assumed under an insured contract, including the tort liability of another assumed in a business contract. CGL insurance shall be amended by attachment of ISO form CG 20 26 (or a substitute form providing coverage acceptable to MTA) to include the Maryland Transit Administration; Maryland Department of Transportation, and State of Maryland as Additional Insureds. 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. Licensee waives all rights against Licensor and its agents, officers, directors and employees for recovery of damages to the extent these damages are covered by the required commercial general liability or commercial umbrella insurance.

(b) If at any time the above required insurance policy should be canceled, terminated or modified so that the insurance is not in full force and effect as required herein, MTA 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.

(c) The insurance policy referenced hereinabove, by endorsement, shall include the following required clauses:

(i) 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 written notice, at least 30 days prior to (1) Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, Dover, Delaware 19901, and (2) Maryland Transit Administration, 6 St. Paul Street, Baltimore, Maryland 21202, Attention: Office of Real Estate, as evidenced by receipt of registered letter.

(ii) Such insurance as afforded by this policy for the benefit of Maryland Transit Administration, Maryland Department of Transportation, and the State of Maryland (collectively, "State") shall be primary and any insurance carried by State shall be excess and noncontributing with insurance afforded by this policy.

(iii) In the event of any occurrence, accident or claim made under this policy, this Insurance Company shall not contend that Maryland Transit Administration, Maryland Department of Transportation, and/or the State of Maryland is (are) not liable in tort by virtue of being a governmental instrumentality or public or quasi-public body.

(iv) This Insurance Company releases Maryland Transit Administration, Maryland Department of Transportation, and the State of Maryland 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.

(d) As evidence of the above insurance, Licensee shall, prior to the effective date of this Agreement, file with MTA, 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 Licensor; shall list the various coverage types and limits; shall name Maryland Department of Transportation, the State of Maryland and Maryland Transit Administration, as additional insureds; and shall indicate that the policy has been endorsed as described above. All insurance shall be placed and maintained with insurers licensed and authorized to do business in the States of Maryland and Delaware and who have an A.M. Best rating of "A" or better, unless otherwise approved by Licensor. Licensor's approval or failure to disapprove insurance furnished by Licensee shall not di-

minish or release Licensee from full responsibility for liability as set forth herein. Upon MTA's request, Licensee shall furnish MTA with a certified copy of each insurance policy.

(e) 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 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 agents 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.

(f) Notwithstanding any other requirement of this Section 6 that requires Licensee to provide insurance for the benefit of MTA, in lieu of providing such insurance, at Licensee's request, MTA will acquire such insurance and Licensee shall, within no more than thirty (30) days after MTA sends Licensee notice of the cost of such insurance, reimburse MTA for the cost of such insurance. Licensee further agrees that none of its employees, agents, servants, or any other person or party acting with either its express or implied permission shall enter onto the Area without the express permission of MTA until full reimbursement is made in accordance with this subparagraph (f). At such time as the Area is conveyed to Licensee or this Agreement is terminated, MTA shall immediately cancel the insurance and rebate to DNREC any insurance proceeds that are refunded by the insurance carrier to MTA.

7. **Notices.** Unless otherwise agreed, all notices or other communications to either party is given when made in writing and either personally delivered or deposited in the United States mail, postage prepaid, return receipt requested, to the following addresses:

For Licensor: Maryland Transit Administration  
Office of Real Estate  
6 St. Paul Street, 3<sup>rd</sup> Floor  
Baltimore, Maryland 21202  
Attention: Manager

With a copy to: Office of the Attorney-General  
6 St. Paul Street, 12<sup>th</sup> Floor  
Baltimore, Maryland 21202

For Licensee: Delaware Department of Natural Resources &  
Environmental Control  
89 Kings Highway  
Dover, Delaware 19901

A party may change the address to which notices to it are directed by such notice.

8. **Termination.**

(a) This Agreement may be terminated at any time by either Party hereto upon thirty (30) days prior notice in writing to the other Party. Upon such termination, Licensee shall remove any

signage from the Area. The Area shall then be restored to a condition reasonably satisfactory to MTA, either by MTA or Licensee in the sole discretion of MTA, all at Licensee's sole cost.

(b) Notwithstanding the foregoing, this Agreement may be terminated by MTA in accordance with this clause in whole, or from time to time in part, wherever MTA shall determine that such termination is in the best interest of the State of Maryland.

9. **Assignment, Sublicense, and Non-Waiver.**

(a) Licensee shall not assign any of its rights or delegate any of its duties hereunder nor sublicense all or part of the Area without the express prior written consent of MTA. Any attempted assignment, delegation, or sublicense without MTA's consent is void ab initio.

(b) The failure of MTA at any time to insist upon strict performance of any provision of this Agreement, or to exercise any right of remedy under this Agreement, shall not impair any such right or remedy or be deemed a waiver or relinquishment thereof.

10. **Rails.** Notwithstanding any rights Licensee receives under this Agreement, all rails and ties shall remain the property of MTA. At such time as Licensee may remove the rails and ties, Licensee shall deliver the rails and ties to a facility designated by MTA. All costs and expense related to the removal and relocation of the rails and ties shall be borne solely by Licensee.

11. **Crossing Agreements and Conveyances.**

For the term of this Agreement, MTA shall reserve the following rights:

a. MTA reserves and shall have the right to grant crossing agreements by license, lease, or deed of easement that will allow for utility service to cross under or over the surface of the Area. Any crossing agreement entered into by MTA shall insure that any activities undertaken to cross under the Area do not unnecessarily impact or cause any damage to Licensee's use of the Area for a rail trail.

b. MTA shall, in its reasonable discretion, have the right to convey or transfer by deed any of the land that is referenced in Recital 11a. as "adjacent outparcels" to a third party. However, before it transfers any such land, MTA shall first consult with DNREC to determine if DNREC has existing plans for use of the subject outparcel. If DNREC has existing plans at the time MTA makes its request, MTA will not transfer or convey the subject outparcel.

12. **Licensee's Responsibilities.**

a. In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, subject to the requirements of Delaware law, DNREC is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify MTA against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned and operated by MTA. The Area is part of a railroad line previously acquired by the State of Maryland known as the Oxford Secondary Tract and which extends from railroad milepost 0.0 near the Town of Clayton, Kent County Delaware, to railroad milepost 13.5, near the Town of Marydel, Kent County, Delaware. The right-of-way is part of a railroad line subject to a Certificate

of Interim Trail Use issued by the Surface Transportation Board in Washington, D.C. on January 9, 2006 in STB Docket No. 32609, *Chesapeake R. Co.-Certificate of Interim Trail Use and Termination of Modified Rail Certificate* and STB Docket No. 29830, *Maryland and Delaware R. Co. - Termination of Modified Certificate*).

b. Interim Trail User acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

c. DNREC shall provide a separate statement signed by DNREC that makes the statements recited in paragraphs a. and b. of this Section 12, for submission by MTA to the Surface Transportation Board.

13. Headings, Etc. The within headings are for convenience and shall not affect any construction or interpretation of this Agreement. The singular shall be read to include the plural, and vice versa, unless the context clearly requires otherwise.

14. Severability. If any provision is determined to be void by any court of competent jurisdiction, such determination shall not affect any other provisions of this Agreement, which shall remain in full force and effect.

15. Miscellaneous. This License Agreement:

(a) shall inure to the benefit of and bind the Parties and their respective successors or assigns;

(b) constitutes the entire agreement between the Parties;

(c) may be amended or supplemented only by a writing signed by the Parties;

(d) may be executed in several counterparts, each of which shall constitute an original;

(e) is not for the benefit of or enforceable by any third party, and shall not be deemed to create any rights or benefits in any third party; and

(f) is a contract under seal, notwithstanding anything to the contrary contained herein.

16. Relationship Between the Parties. The relationship between the Parties is that of Licensor and Licensee. Nothing in this License shall be construed as creating any other relationship between the Parties.

17. Signee. The individual who is signing on behalf of each of the parties warrants and declares that he/she is authorized and empowered to enter to this Agreement on behalf of that party and to bind it to its terms and conditions.

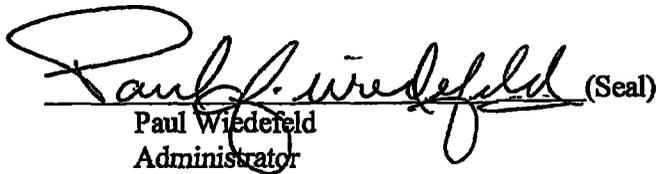
[SIGNATURES ON THE NEXT PAGE]

IN WITNESS WHEREOF the Parties have executed this License Agreement.

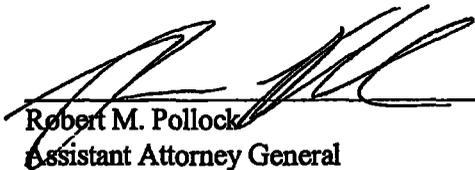
ATTEST:

MARYLAND TRANSIT ADMINISTRATION

  
Madonna J. Copper

 (Seal)  
Paul Wiedefeld  
Administrator

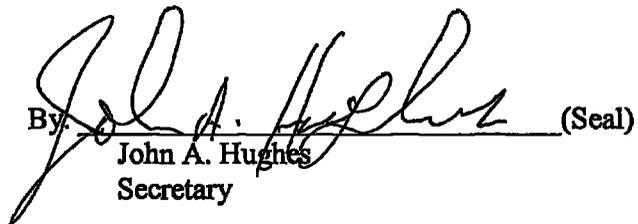
Approved as to Form and Legal Sufficiency for MTA

  
Robert M. Pollock  
Assistant Attorney General

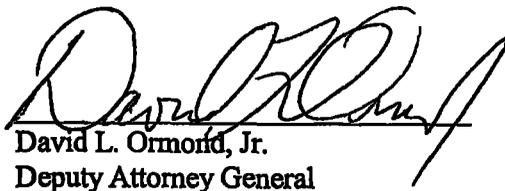
ATTEST:

DELAWARE DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL CONTROL

  
Charles A. Salkin  
Director

By:  (Seal)  
John A. Hughes  
Secretary

Approved as to Form and Legal Sufficiency for DNREC

  
David L. Ormond, Jr.  
Deputy Attorney General

Page 9 of a 9 page License Agreement between the Delaware Department of Natural Resources and Environmental Control and the Maryland Transit Administration

**E**

**Exhibit E**

**Lease Agreement between MTA and MDNR**

LEASE AGREEMENT BETWEEN  
MARYLAND TRANSIT ADMINISTRATION ("MTA")  
AND  
MARYLAND DEPARTMENT OF NATURAL RESOURCES ("MDNR")

THIS LEASE AGREEMENT ("Agreement") is entered into this 20<sup>th</sup> day of June, 2007, by and between the Maryland Transit Administration ("MTA" or "Lessor") located at 6 Saint Paul Street, Baltimore, MD 21202, a modal agency of the Maryland Department of Transportation ("MDOT"), acting by and on behalf of the State of Maryland, and the State of Maryland to the use of the Department of Natural Resources ("MDNR" or "Lessee")

WHEREAS, by Deed dated January 8, 1982, Lessor acquired certain railroad rights-of-way from the Penn Central Corporation and others, in Kent County, Delaware, which Deed is recorded among the land records of Kent County, Delaware, on November 22, 1982 at Record Q, Volume 37, Page 1; and in Talbot County, Maryland, which Deed is recorded among the land records of Talbot County on May 10, 1982 at Liber J.T.B No. 564, Folio 182; and in Caroline County, Maryland, which Deed is recorded among the land records of Carolina County on May 11, 1982 at Liber M.C.B. No. 214, Folio 676 ("Rail Corridor"); and

WHEREAS, a certain railroad right-of-way located from the Town of Clayton, Kent County, Delaware proceeding in a southwesterly direction to the end of the line in the Town of Easton, Talbot County, Maryland (hereinafter referred to as the "Land") is currently inactive and is now subject to a Certificate of Interim Trail Use ("CITU") issued by the Surface Transportation Board ("STB") in Washington, D.C on January 9, 2006 in STB Docket No. 32609, *Chesapeake R. Co - Certificate of Interim Trail use and Termination of Modified Rail Certificate* and STB Docket No. 29830, *Maryland and Delaware R Co - Termination of Modified Certificate*; and

WHEREAS, by Chapter 658, Acts of 1990, the General Assembly of Maryland provided for the interim use of another portion of railroad corridor for public recreation by a MOU dated August 23, 1993 from the State Railroad Administration, now known as the Maryland Transit Administration to the MDNR and known as the Easton to Clayton Rail Trail; and

WHEREAS, the STB has recognized the right of the State of Maryland to utilize interim use provisions under the Federal Rail to Trails Act, committing to a restoration for freight use should such a need develop and be economically warranted; and

WHEREAS, the State of Maryland recognizes that interim use of railroad rights-of-way for public recreation produces transportation benefits such as maintenance of the right-of-way, prevention of vandalism, or other deterioration; and

WHEREAS, MTA and MDNR have agreed that the portion of the Rail Corridor located within Maryland and not including the portion located in Delaware would be appropriately used on an interim basis for public recreation as a rail trail; and

WHEREAS, it is the intent of the Lessor and Lessee that this lease encompass that portion of the Railroad Corridor within the State of Maryland from Mile Post 13.6 in Maryland, Caroline County, MD to Mile Post 45.3 in Easton, Talbot County, MD, as shown on valuation maps V3/1 to V3/32 for the Oxford Branch, and from Mile Post 0.0 in Queen Anne, MD to Mile Post 8.8 in Denton, MD, as shown on valuation maps V1.02-25 to V.1.02-34 for Denton Spur, which valuation maps are filed among the records of Lessor that is within the general 66 foot wide trail corridor (the "Area"); and

WHEREAS, MDOT having filed a Statement of Willingness To Assume Financial Responsibility pursuant to 16 USC § 1247 (d) and 45 CFR §1152.29; and

WHEREAS, it is the intent of Lessor and Lessee this Lease be for an interim use only for public recreation as a rail trail, that the Lease be subject to termination for restoration of the railroad right-of-way by MDOT and or MTA for railroad purposes, and that this Lease does not constitute an abandonment of use of the right-of-way for railroad purposes; and

WHEREAS, MTA, MDOT and MDNR mutually desire to commit themselves to certain terms for the interim use of the Area for public recreation;

NOW, THEREFORE, the parties, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, agree as follows:

1. Incorporation of Recitals. The above recitals are incorporated by reference and made a part of this Agreement.
2. Grant of Lease. Lessor hereby grants to Lessee a lease of the Area, subject to the terms and conditions of this Agreement
3. Lessee's Responsibilities:
  - (a) The Area shall be used exclusively for a recreational rail trail for public recreation.
  - (b) During the term of the Lease, Lessee shall pay or cause to be paid all charges levied against the right-of-way as incurred by Lessee as part of Lessee's use of the Area.
  - (c) Lessee shall be responsible for all costs and expenses to inspect, improve, maintain and repair the right-of-way, including bridges, for use as a rail trail only.
  - (d) Lessee shall not be responsible for any cost or expense to maintain, repair, inspect, renovate, or replace any bridge or any portion of the Area for railroad or train uses even upon expiration or termination of this Agreement.
  - (e) Lessee may make those alterations and improvements to the Area, consistent with a rail trail. However, Lessee will submit proposed alterations and improvements to any bridges to Lessor for its written prior approval.
  - (f) Lessee acknowledges that the Area is subject to possible future restoration for rail use by the Lessor.
4. Term: Subject to the terms and conditions of the CITU, the term of this Agreement shall be fifty (50) years, commencing on the date this Agreement is signed by both parties and approved by the Maryland Board of Public Works and terminating fifty (50) years from that date.
5. Sublease: Lessor acknowledges that Lessee has the right to assign or sublease rights to portions of the Area to a local government subject to all the terms and conditions of this Agreement. Any sublease with a local government shall be subject to the prior approval of MTA and the Maryland Board of Public Works. Any sublease or assignment shall specifically acknowledge the potential that the Area is subject to restoration to rail service and shall subscribe specifically to the language set forth in Paragraph 15 of this Lease.
6. MTA's Rights:
  - (a) MTA shall at all times have the exclusive right to grant easements and licenses within the Area and sell excess parcels outside the generally sixty-six foot (66') wide rail corridor that are not used by Lessee in conjunction with the rail trail, so long as such uses are consistent and in no way interfere with Lessee's use of the Area as a rail trail. Such easements and licenses that may be granted by MTA may be for purposes, including but not limited to utilities, telecommunications, fiber optic communications and right-of-way

crossings. MTA reserves the right to all revenues from such easements and licenses as MTA may grant. For any action associated with such easements and licenses that may temporarily disrupt the operation of a rail trail on the Area, Lessor shall notify Lessee and/or sublessee thirty (30) days prior to the undertaking of any such action. For any action associated with such easements and licenses that may temporarily disturb or damage any rail trail improvements to the Area undertaken by Lessee or sublessee, MTA shall be required to return the Area to its immediately preceding condition.

(b) MTA shall remove all rails, joint bars, tie plates and ties from the Area. MTA shall be the sole owner of the rails, joint bars, tie plates and ties, and, accordingly, shall receive all revenues associated with the sale or other disposition of the rails, joint bars, tie plates and ties.

7. Notices. Unless otherwise agreed, all notices or other communications to either party is given when made in writing and either personally delivered or deposited in the United States mail, postage prepaid, return receipt requested, to the following addresses:

For Lessor: Maryland Transit Administration  
Office of Real Estate  
6 St. Paul Street  
Baltimore, Maryland 21202  
Attention: Manager

For Lessee: Maryland Department of Natural Resources  
Land & Property Management  
580 Taylor Avenue, E-4  
Annapolis, Maryland 21401  
Attention: Director

A party may change the address to which notices to it are directed by such notice.

8. Termination.

This Agreement may be terminated at any time by either party hereto upon minimum six (6) months prior notice in writing to the other party. If Lessee intends to terminate rail trail use and has not transferred its rights and obligations hereunder to an approved sublessee, Lessee via Lessor shall send the STB a copy of the CITU and ask that the CITU be vacated on the specific date on which it intends to terminate trail use. Upon termination by Lessee, all improvements or alterations made by Lessee or any sublessee shall be removed, or with the consent of Lessor abandoned for the sole use and benefit of Lessor without compensation.

9. Non-Assignment and Non-Waiver.

(a) Lessee shall not assign any of its rights or delegate any of its duties hereunder without the express prior written consent of MTA and the Maryland Board of Public Works; except as set forth in Section 5 for uses by local government. Any attempted assignment or delegation without MTA's or Maryland Board of Public Works consent is void ab initio.

(b) The failure of MTA at any time to insist upon strict performance of any provision of this Agreement, or to exercise any right or remedy under this Agreement, shall not impair any such right or remedy or be deemed a waiver or relinquishment thereof.

10. Headings. The within headings are for convenience and shall not effect any construction or interpretation of this Agreement. The singular shall be read to include the plural, and vice versa, unless the context clearly requires otherwise.

11. Severability. If any provision is determined to be void by any court of competent jurisdiction, such determination shall not affect any other provisions of this Agreement, which shall remain in full force and effect.

12. Miscellaneous. This Agreement:

(a) shall inure to the benefit of and bind the parties and their respective successors or assigns;

(b) constitutes the entire agreement between the parties;

(c) may be amended or supplemented only by a writing signed by the parties;

(d) may be executed in several counterparts, each of which shall constitute an original;

(e) is not for the benefit of or enforceable by any third party, and shall not be deemed to create any rights or benefits in any third party;

(f) and the obligations of the parties hereto are subject to appropriations of the Maryland General Assembly; and

(g) shall be governed by the laws of the State of Maryland.

13. Breach; Default.

(a) There shall be an "Event of Default by Lessee" if Lessee shall breach or fail to perform any of its covenants or duties, and Lessee does not cure the breach or failure within seven (7) days after notification by Lessor, verbally or in writing of such breach or failure.

(b) Upon the occurrence of an Event of Default by Lessee, Lessor has the following rights, in addition to any other rights it may have: to terminate this Lease and all of Lessee's rights and interest, whereupon Lessee shall immediately quit and surrender the Area to Lessor, and Lessor shall have no further obligation to Lessee.

14. Relationship Between the Parties. The relationship between the parties is that of Lessor and Lessee. Nothing in this Lease shall be construed as creating any other relationship between the parties.

15. Statement of Willingness to Assume Financial Responsibility. In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, Lessee is willing to assume, under the provisions of the Maryland Torts Claims Act, responsibility for management of, and for any legal liability arising out of, the Lessee's use of the Area as a public recreation rail trail. The Area is part of a line of railroad previously acquired by the State of Maryland, and for which the Modified Certificates of Public Convenience and Necessity have been terminated in STB Finance Docket No 32609 and STB Finance Docket No. 29830. Lessee acknowledges that use of the Area is subject to the Lessee's continuing to meet its responsibilities described above and subject to possible future reconstruction at Lessor's cost and reactivation of the right-of-way for rail service.

16. Indemnity and Liability. Subject to appropriations by the Maryland General Assembly and to the extent permitted by law (if at all), Lessee shall 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 Lessor, its officers, agents, employees, successors and assigns or contractors, against and with respect to any and all liabilities arising out of or in any way connected with: (a) the exercise or performance by Lessee (or its agents, officers, employees, successors or assigns or contractors) of any of its rights or obligations hereunder; (b) the use or operation by Lessee (or its officers, agents, employees, successors and assigns or contractors) of the Trail; or (c) work performed by or on behalf of Lessee upon the Trail. As used herein,

"Liabilities" shall include any and all losses, claims, damages, suits, liabilities or costs whatsoever (including without limitation reasonable attorney's fees and cost of suit), which arise: (a) out of injury to any person (including without limitation loss of limb or death); (b) out of damage to or destruction of any property of any person whomsoever; (c) out of interruption of rail or transit services including without limitation loss of revenue income; (d) out of damage to or destruction of the environment, including without limitation land, air, water, wildlife, or vegetation (including, but not limited to, costs and expenses incident to monitoring, remedial actions, proceedings or investigations or the defense of any claim); or (e) out of, or occasioned by, any breach or default by Lessee (or its agents, officers, employees, successors, or assigns or contractors) in performing any of its obligations hereunder or under any applicable law. The foregoing does not waive or limit the rights of the parties under the Maryland Tort Claims Act and other Maryland law. The foregoing obligations shall survive termination of this Agreement with respect to liabilities arising during its term.

17. This Agreement is contingent upon approval of the Maryland Board of Public Works.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective Administrator and Secretary, as of the day and year first written above

MARYLAND TRANSIT ADMINISTRATION

Witness:

Kim G. Kim

By: Paul Wiedefeld (SEAL)  
Paul Wiedefeld, Administrator

Approved for form and legal sufficiency:

T. Byron Smith  
T. Byron Smith, AAB  
MTA, Office of General Counsel

MARYLAND DEPARTMENT OF TRANSPORTATION

Witness: Robert P. ...

By: John Porcari (SEAL)  
John Porcari  
Secretary

Approved for form and legal sufficiency:

Thomas G. Peter  
MDOT, Assistant Attorney General

MARYLAND DEPARTMENT OF NATURAL RESOURCES

Witness:

Jean Lipphard

By: Kristin M. Saunders (SEAL)  
for Kristin M. Saunders  
Assistant Secretary

Approved for form and legal sufficiency:

Shaun P.K. Fenlon  
Shaun P.K. Fenlon  
DNR, Assistant Attorney General

STATE OF MARYLAND  
BOARD OF PUBLIC WORKS

By: *Martin O'Malley* (SEAL)  
Martin O'Malley  
Governor

By: *Nancy K Kopp* (SEAL)  
Nancy K Kopp  
Treasurer

By: *Peter Franchot* (SEAL)  
Peter Franchot  
Comptroller

WITNESS  
*Sheila McDonald*  
Sheila McDonald  
Secretary, Board of  
Public Works

This Lease Agreement was approved by the Maryland Board of Public Works on June 20, 2007 as Item 18-LL.

State of Maryland  
County of Baltimore City

On this the 25<sup>th</sup> day of July, 2007, before me, the undersigned officer, personally appeared Paul J. Wiedefeld, Administrator of the Maryland Transit Administration, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.



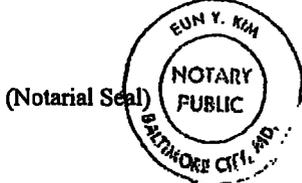
*Eun Y. Kim*  
Notary Public

Commission expires July 1, 2009

State of Maryland  
County of Baltimore City

On this the 25<sup>th</sup> day of July, 2007, before me, the undersigned officer, personally appeared John Forcari, Secretary, of the Maryland Department of Transportation, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.



*Eun Y. Kim*  
Notary Public

Commission expires July 1, 2009

State of Maryland  
County of Anne Arundel

On this the 12th day of April, 2007, before me, the undersigned officer, personally appeared Kristin M. Saunders, Assistant Secretary, Department of Natural Resources of the State of Maryland, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that, being authorized so to do, executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Jean M. Lippard  
Notary Public

(Notarial Seal)

Commission expires 4/1/09

State of Maryland  
County of Anne Arundel

On this the 11th day of July, 2007, before me, the undersigned officer, personally appeared Martin O'Malley Governor, a member of the Board of Public Works of the State of Maryland, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

William Boschen  
Notary Public

(Notarial Seal)

Commission expires 12/1/07

State of Maryland  
County of Anne Arundel

On this the 11 day of July, 2007, before me, the undersigned officer, personally appeared Peter Franchot, Comptroller, a member of the Board of Public Works of the State of Maryland, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

William Boschen  
Notary Public

(Notarial Seal)

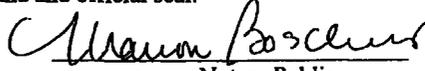
Commission expires 12/1/07

Blw  
6/20/07  
DOT 18-11

State of Maryland  
County of Anne Arundel

On this the 11 day of July, 2007, before me, the undersigned officer, personally appeared Nancy K. Kopp, Treasurer, a member of the Board of Public Works of the State of Maryland, known to me (or satisfactorily proven) to be the person described in the foregoing instrument, and acknowledged that she executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.



Notary Public

(Notarial Seal)

Commission expires

12/1/07

Approved by the Board of Public Works of the State of Maryland at a meeting held on the 20 day of June, 2007, as Item No: DOT, 18-LL