

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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<b>IN THE MATTER OF:</b>	)	<b>DIVISION OF WATER RESOURCES</b>
	)	
	)	
<b>NORFOLK SOUTHERN RAILWAY COMPANY</b>	)	
	)	
	)	
<b>RESPONDENT.</b>	)	<b>CASE NUMBER WPC18-0026</b>

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**CONSENT ORDER AND ASSESSMENT**

This CONSENT ORDER AND ASSESSMENT is entered into between the Tennessee Department of Environment and Conservation (the “Department”) and the Norfolk Southern Railway Company (the “Respondent”) for the purpose of resolving the issues set forth herein. The parties hereby stipulate and agree as follows:

**PARTIES**

**I.**

Jennifer Dodd is the duly appointed Director of the Tennessee Division of Water Resources (the “Division”) by the Commissioner of the Department.

**II.**

The Respondent is a foreign limited liability company created in the State of Virginia and is properly registered to conduct business in the State of Tennessee. The Respondent operates the DeButts Yard in Hamilton County, Tennessee (the “site” or “facility”). Service of process may be made on the Respondent through its Registered Agent, CT Corporation System, 300 Montvue Road, Knoxville, Tennessee 37919.

## JURISDICTION

### III.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated (“Tenn. Code Ann.”) § 69-3-101 *et seq.*, the Water Quality Control Act (the “Act”), has occurred, is occurring, or is about to occur, the Commissioner may issue a complaint to the violator and the Commissioner may order corrective action be taken pursuant to Tenn. Code Ann. § 69-3-109(a). Further, the Commissioner has authority to assess civil penalties against any violator of the Act, pursuant to Tenn. Code Ann. § 69-3-115 and has authority to assess damages incurred by the state resulting from the violation, pursuant to Tenn. Code Ann. § 69-3-116. Pursuant to Tenn. Code Ann. § 69-3-107(13), the Commissioner may delegate to the Director any of the powers, duties, and responsibilities of the Commissioner under the Act. Shari Meghreblian, PhD, Commissioner of the Department of Environment and Conservation, has delegated such authority to Jennifer Dodd, Director of the Tennessee Division of Water Resources (“Director”).

### IV.

The Respondent is a “person” as defined by Tenn. Code Ann. § 69-3-103(26) and, as herein described, has violated the Act.

### V.

Citico Creek and the Tennessee River constitute “waters” of the state as defined by Tenn. Code Ann. § 69-3-103(44). Pursuant to Tenn. Code Ann. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses, as outlined in Tenn. Comp. R. & Regs. Chapter 0400-40-04. Accordingly, all waters of the state have been classified for the following uses: to support fish and aquatic life, recreation, irrigation, and livestock watering and wildlife, and may additionally be classified for use as industrial water supply, domestic water supply, and navigation. Citico Creek is an impaired waterbody for low

dissolved oxygen, nutrients, pathogens, and habitat alteration and is listed on the State of Tennessee 2018 303d list.

## **VI.**

Pursuant to Tenn. Code Ann. § 69-3-108, any person engaged in or planning to engage in the discharge of sewage, industrial wastes or other wastes into waters, or to a location from which it is likely that the discharged substance will move into waters must obtain a permit from the Department. Tenn. Comp. R. & Regs. 0400-40-05-.08 states, in part, that a set of effluent limitations will be required in each permit that will indicate adequate operation or performance of treatment units used, and that appropriately limit those harmful parameters present in the wastewater. Tenn. Comp. R. & Regs. 0400-40-05-.07 and the permit each state, in part, that the permittee shall at all times properly operate and maintain all facilities and systems for collection and treatment which are installed or used by the permittee to achieve compliance with the conditions of the permit. Furthermore, it is unlawful for any person to increase the volume or strength of any wastes in excess of the permissive discharges specified under any existing permit pursuant to Tenn. Code Ann. § 69-3-108(b)(3). It is unlawful for any person to violate the conditions of a discharge permit issued by the Department pursuant to Tenn. Code Ann. §§ 69-3-108(b) and -114(b).

## **FACTS**

## **VII.**

On July 1, 2014, the Division reissued National Pollutant Discharge Elimination System (“NPDES”) permit TN0073491 (the “permit”) to the Respondent for stormwater discharges associated with industrial activity at the site. The permit has an effective date of August 1, 2014,

and an expiration date of July 31, 2019. The permit authorizes the Respondent to discharge stormwater runoff to Citico Creek and unnamed tributaries to Citico Creek.

### VIII.

On January 8, 2018, the Division received a complaint forwarded by the City of Chattanooga stating that a significant spill of what appeared to be a petroleum product had occurred in Citico Creek and had entered the Tennessee River. The Division was informed that the Chattanooga Fire Department had responded to the report and was the first on the scene. The spill was reported to the United States Environmental Protection Agency (“EPA”) National Response Center (“NRC”), and the EPA requested that Division personnel be onsite to aid in the investigation. Division personnel arrived at the site of the spill in Citico Creek at approximately 9:30 p.m. that same day and met with Captain David Tallent of the Chattanooga Fire Department, Mr. Bill Payne with the City of Chattanooga’s Municipal Separate Storm Sewer System (“MS4”) program, and Mr. David Patten, Regional Manager of Environmental Operations for the Respondent. By the time Division personnel arrived on site, the Chattanooga Fire Department had installed an oil containment boom at the mouth of Citico Creek and relinquished the clean-up of the spill to HEPACO, the City’s environmental response contractor.

During the incident investigation, Division personnel observed brown colored oil accumulating behind the containment boom at the mouth of Citico Creek. A sample of the oil provided by Captain Tallent was described by personnel onsite as emulsified or heavily degraded, and Division personnel observed that the oil had an intense odor of solvents. Mr. Patten stated that he had investigated the Respondent’s permitted outfalls and did not believe the Respondent was the source of the spill. Due to the darkness and rainy weather conditions, Division personnel were unable to adequately gauge the size of the spill or determine its origin.

Division personnel spoke by phone with Mr. Carter Williamson, the EPA on scene coordinator (“OSC”), and arranged to meet with him the next morning to hike up the creek to identify the origin of the spill.

## **IX.**

On the morning of January 9, 2018, Division personnel met with Mr. Williamson at the mouth of Citico Creek and observed a long trail of black oil being pulled into an oil skimmer. Division personnel learned that Dr. Mounir Minkara, Water Quality Manager with the City of Chattanooga’s MS4 program, had discovered evidence indicating that the oil discharge may have originated at the top of the slope near the equalization basin at the site. Division personnel and Mr. Williamson then met with Dr. Minkara and Mr. Patten at the site and observed sheen within Citico Creek near a process water aerial crossing, where process water is gravity drained from the locomotive facility and passes over the creek and into the adjacent equalization basin. Oil was not observed within the creek upstream from the process water aerial crossing. A pump was observed inside the equalization basin, which was empty and under construction at the time. The basin’s liner had been removed from the southern portion and concrete walls had been installed. The basin had been divided into two portions; the southern portion of the basin was under construction while the northern portion of the basin was still operational. Division personnel also observed that the side of the basin contained marks that suggested a hose had been located within the basin and observed stained vegetation with an acrid odor on the outside slope of the basin leading toward Citico Creek. At the time, representatives for the Respondent could not explain how the oil had been discharged into the creek but agreed to take responsibility for the clean-up until the responsible party could be determined. Mr. Patten stated that an oil/water mix had been leaking from a grout seal around the temporary pipe in the valve structure inside the

equalization basin, and this pipe had been installed to route process water from the valve structure to the northern part of the basin which still had a liner.

That same day, Division personnel met with Mr. Steve Pitzen, a foreman with Anderzack-Pitzen Construction, Inc. (“APC”), a construction company hired by the Respondent who was onsite at the time of the spill modifying the existing equalization basin at the site to better capture and control oil. APC had received permit coverage with tracking number TNR113061 under the NPDES General Permit for Discharges of Stormwater Associated with Construction Activities (the “CGP”) on November 6, 2017, which authorized the company to discharge stormwater associated with construction activity to Citico Creek. Mr. Pitzen was unable to explain the cause of the oil spill into Citico Creek. At all times relevant, Mr. Pitzen was the foreman on duty for APC overseeing the construction activities being conducted by APC on Respondent’s property in January of 2018.

Also on January 9, 2018, the Hamilton County Emergency Management Authority deployed a drone to capture aerial footage of the Tennessee River and determine the extent of the spill. Oil sheens were visible on the Tennessee River up to five miles downstream from the mouth of Citico Creek.

## X.

On January 11, 2018, Division personnel met with Mr. Williamson at the mouth of Citico Creek and used a boat to travel downstream in the Tennessee River to evaluate the progress of the cleanup. Booms had been deployed within the Tennessee River, and some areas were observed with remaining oil sheens. After returning to the site, Division personnel met to discuss the spill and cleanup operation with Mr. Steven Smith, Mr. Nathan Stopper, Ms. Kerisa

Coleman, and Mr. Chris Aiello with the EPA, and Dr. Minkara and Mr. Payne with the City of Chattanooga.

## **XI.**

On January 12, 2018, Division personnel spoke by phone with Mr. Williamson to discuss progress at the site. Mr. Williamson stated that he was pleased with the progress and that he would no longer need to stay at the site as the OSC for the EPA.

That same day, the Division received an Incident Action Plan (“IAP”) from the Respondent for the period of time between January 12 and January 13, 2018. The plan outlined objectives of the cleanup, including continued safety measures for responders to the incident and continued maintenance of hard and soft booms. Included within the IAP were aerial maps depicting the location of remaining oil for recovery within Citico Creek and oil sheen on the Tennessee River. The IAP also indicated the area of vegetation along Citico Creek that had already been cleaned as part of the recovery process. Cleanup efforts effectively ended on January 12, 2018 when all recoverable oil was removed and the cleanup area was properly contained and secured, although the Respondent continued to monitor conditions at the site and in the impacted waters.

## **XII.**

On January 18, 2018, the Division received a written report of non-compliance from Mr. David Patten on behalf of the Respondent as required by Part II, Section C of permit TN0073491. In the letter, Mr. Patten described the series of events from the discovery of the oil spill by the Chattanooga Fire Department on January 8, 2018, to the ongoing recovery efforts undertaken by the Respondent at the site.

That same day, the Division received a Situation Report from the Respondent. The Report stated that local personnel for the Respondent were managing ongoing activities. The report described future activities to be completed, including continued dewatering and maintenance of booms, a drone fly-over of Citico Creek and the Tennessee River to assess the effectiveness of containment, an attempt to live trap beavers in the affected area to assess animal health and relocate as needed, and future liquids disposal to be performed by Aqua Treat, Inc.

### **XIII.**

On January 24, 2018, the Division received an update report email from Mr. Patten on behalf of the Respondent. In the email, Mr. Patten stated that conditions in Citico Creek and the Tennessee River had remained fairly static and that no sheen or oil had been recently seen or captured within the Tennessee River. He stated that a drone flight had been performed on January 19, 2018, which indicated no oil sheen on the Tennessee River. Some intermittent sheen had been observed within Citico Creek but was being effectively captured by layers of sorbent and hard booms along the length of the creek. Since no oil sheens had been witnessed in the Tennessee River since January 12, 2018, Mr. Patten indicated that they planned to remove the booms within the Tennessee River on January 25, 2018.

### **XIV.**

On February 13, 2018, the Division received an update report email from Mr. Patten on behalf of the Respondent providing a summary of liquids recovered. Mr. Patten stated that, according to Aqua Treat, a total of 2,734 gallons of oil with an estimated 10% water content had been recovered from the spill and 8,834 gallons of impacted water had been recovered and transported to Aqua Treat's wastewater plant for disposal. Mr. Patten also stated that sporadic



sheen had been observed infrequently in a few places within Citico Creek, but that the creek was effectively free of sheen.

**XV.**

On February 23, 2018, the Division issued a Notice of Violation (“NOV”) to the Respondent for violations observed during the week of January 8, 2018. The NOV required the Respondent to provide a detailed report to the Division within fifteen days describing the timeline of events and the clean-up efforts taken to address the spill.

**XVI.**

On March 22, 2018, Tetra Tech, Inc. submitted a report to Mr. Williamson, the OSC for the EPA, summarizing the results of samples of the discharged petroleum that had been collected on January 9, 2018. Two samples were taken from the source material in the equalization basin, a soil sample was taken from the bank leading to Citico Creek, and two surface water samples were taken from Citico Creek; all samples were analyzed for target analytes to determine if they contained the same constituents. According to the report, the senior chemist for Tetra Tech reviewed the data and concluded that the samples represented varying concentrations of the same constituent. Tetra Tech concluded that the product was most likely a diesel fuel oil.

**XVII.**

On April 4, 2018, Mr. Williamson submitted a Pollution/Situation Report on the Norfolk Southern Chattanooga Oil Release to the EPA and the Department’s Office of Emergency Services. In the report, Mr. Williamson described the timeline of events and stated that the release affected approximately 0.67 miles of Citico Creek and 1.28 miles of the Tennessee River. Norfolk Southern was identified in the report as the Potentially Responsible Party.

## XVIII.

On April 5, 2018, the Division received a reply from Mr. Patten on behalf of the Respondent as required by the February 23, 2018 NOV. In the letter, the Respondent provided a detailed report of daily activities during the week of January 8, 2018, and a summary of activities between January 13, 2018 and March 23, 2018. Mr. Patten stated that an investigation conducted on January 9, 2018, by himself and representatives of the EPA, Division, and City of Chattanooga, revealed that leaves stained with oil led from an equalization basin on the Respondent's property down to the bank of Citico Creek, leading them to believe that the equalization basin was the source of the oil spill. As a result, the Respondent secured Marion Environmental, Inc., HEPACO, LLC., Environmental Management Solutions, SWS Environmental, Hulls Environmental, and GHD ("Response Contractors") to assist in cleanup of the spill and to perform air monitoring, environmental assessments, wildlife assessments, shoreline cleanup assessments, and to assist with the cleanup command system.

In the NOV response, Mr. Patten detailed cleanup efforts with Citico Creek and the Tennessee River and stated that the Respondent had deployed a total of approximately 120 Response Contractor personnel to assist in the removal of oil and cleanup of debris and vegetation. During the course of the cleanup, Mr. Patten reported that three dead fish measuring less than six inches were discovered within the debris of Citico Creek. A decomposing raccoon and a dead cat were also found in the debris, but Mr. Bobby Brown with the Tennessee Wildlife Resources Agency advised the Respondent that they were likely unrelated to the release or the cleanup efforts. By Friday, January 12, 2018, Mr. Patten reported that all recoverable oil had been removed from the creek, but the Respondent left ten boom stations in place within the Citico Creek and Tennessee River to control sheen and capture any residual oil that may be

released in rain events. Between January 13 and March 23, 2018, Mr. Patten reported that the Respondent performed boom maintenance and inspections, revised its dewatering and boom maintenance plan, and removed the boom stations within the Tennessee River. During this period, oil sheen was observed with decreasing frequency.

Mr. Patten summarized in the report that as a result of cleanup operations, the Respondent had contained, recovered, and disposed of approximately 14 tons of petroleum impacted debris and absorbent media, 11,500 gallons of impacted water, and approximately 2,700 gallons of recovered free petroleum product. Additionally, Mr. Patten stated that the Respondent had conducted an investigation into the cause of the release. Mr. Patten stated that there was no evidence that the Respondent or any of its employees caused or contributed to the release of pollutants into Citico Creek, and that there was no evidence to suggest that any of the Respondent's industrial activities caused or contributed to the release. The Respondent's letter stated that APC failed to comply with the Respondent's written instructions or CGP TNR113061 and believed APC discharged water from the construction area down the embankment of the EQ basin resulting in a release to Citico Creek. At all times relevant, APC, had control of the construction area and was responsible for the construction activities occurring at the location of the release.

## **XX.**

During the course of the investigation, the Division incurred DAMAGES in the amount of ONE THOUSAND SIXTY-THREE DOLLARS AND TWENTY CENTS (\$1,063.20).

## VIOLATIONS

### XXI.

By allowing an unpermitted discharge of petroleum products, as described herein, the Respondent has violated Tenn. Code Ann. §§ 69-3-108(b) and 69-3-114(a) which state, in relevant part:

Tenn. Code Ann. § 69-3-108(b):

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
  
- (6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters.

Tenn. Code Ann. § 69-3-114(a):

It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103, unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

### XXII.

By discharging petroleum products to Citico Creek and the Tennessee River, the Respondent has caused a condition of pollution and has violated Tenn. Code Ann. § 69-3-114, which states in relevant part:

Tenn. Code Ann. § 69-3-114:

- (a) It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in § 69-3-103, unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.
- (b) In addition, it is unlawful for any person to act in a manner or degree that is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to this part....

### ORDER AND ASSESSMENT

#### XXIII.

WHEREFORE, pursuant to the authority vested by Tenn. Code Ann. §§ 69-3-109, 69-3-115, and 69-3-116, I, Jennifer Dodd, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall pay a CIVIL PENALTY of FIFTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY DOLLARS (\$58,870.00) to the Division, hereby ASSESSED to be paid as follows:
  - a. On or before the 31st day after receipt of this Order and Assessment, the Respondent shall pay FIFTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY DOLLARS (\$58,870.00). The Respondent may propose a Supplemental Environmental Project (“SEP”) to offset up to 75% of the up-front penalty. All SEP project(s) must have a 2:1 value of the offset portion of the penalty. While the final SEP value may exceed 75% of the penalty, it shall not decrease the amount owed beyond the agreed upon 75%. Therefore, the remaining FOURTEEN THOUSAND, SEVEN HUNDRED SEVENTEEN DOLLARS AND

FIFTY CENTS (\$14,717.50) shall be due on or before the 31<sup>st</sup> day from receipt of this Order and Assessment. If the Respondent wishes to provide supplemental work in lieu of 75% of the up-front penalty, then the value must be at least EIGHTY-EIGHT THOUSAND, THREE HUNDRED FIVE DOLLARS (\$88,305.00). Any proposed SEP(s) must be submitted, in writing, to the Department's Director of Water Resources within 31 days of the Order becoming final. The written proposal must include an estimate of the anticipated cost of the project(s), a timetable for completion, and detailed plans, including but not limited to maps, schematics, listing of plant species used for vegetative cover, and any on-going monitoring plans needed. Before implementing the SEP(s), the SEP(s) must be approved, in writing, by the Director. Once approved, the SEP project(s), including the timetable for completion, shall become an enforceable portion of this Order. If one or more of the proposed SEP(s) is/are not approved, the Director may extend the time in which to submit an alternative SEP(s) proposal.

- b. If no extension of time is requested or granted, the Respondent shall pay the above-assessed FIFTY-EIGHT THOUSAND, EIGHT HUNDRED SEVENTY DOLLAR (\$58,870.00) CIVIL PENALTY within 31 days of receipt of the Director's letter denying the SEP(s). To receive credit against the CIVIL PENALTY for any approved SEP(s), the Respondent must provide documentation to the Director of the actual costs expended on each SEP(s). The value credited against the civil penalty for any approved SEP(s) will be determined by the Director. In the event that the Respondent fails to propose SEP(s) within 31 days of this ORDER becoming final, the FIFTY-EIGHT

THOUSAND, EIGHT HUNDRED SEVENTY DOLLAR (\$58,870.00) CIVIL PENALTY will become due and payable immediately.

2. On or before the thirty-first day after receipt of this ORDER and ASSESSMENT, the Respondent shall pay DAMAGES to the Division in the amount of ONE THOUSAND SIXTY-THREE DOLLARS AND TWENTY CENTS (\$1,063.20).

The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

The Director of the Division may, for good cause shown, extend the compliance dates contained within this Consent Order and Assessment. In order to be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondent fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondent is advised that the foregoing Consent Order and Assessment is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Consent Order and Assessment will be one factor considered in any decision whether to take enforcement action against the Respondent in the future. Failure to comply with any of the requirements of this Consent Order and Assessment could lead to further enforcement actions, which may include additional civil penalties, assessment of damages, and/or recovery of costs. Payments of the civil penalty and/or damages shall be made payable to the "Treasurer, State of Tennessee" and sent to the Division of Fiscal

Services - Consolidated Fees Section, Tennessee Department of Environment and Conservation, William R. Snodgrass Tennessee Tower, 312 Rosa Parks Avenue, 10<sup>th</sup> Floor, Nashville, Tennessee 37243. **The case number, WPC18-0026, should be written on all correspondence regarding this matter.**

#### **WAIVER OF APPEAL**

The Respondent understands that it has the right to appeal this Consent Order and Assessment pursuant to Tenn. Code Ann. §§ 69-3-109, 69-3-115, and 69-3-116. By signing below, the Respondent knowingly and voluntarily waives any right it may have to appeal this Consent Order and Assessment.

#### **RESERVATION OF RIGHTS**


The Respondent does not admit or deny the factual allegations or the alleged violations of law contained in this Consent Order and Assessment. The Respondent denies any wrongdoing but wishes to settle this matter to avoid protracted litigation. The Respondent reserves its rights to contest the factual allegations and alleged violations contained in this Consent Order and Assessment in any proceeding other than a proceeding brought by the Department to enforce the Order and Assessment terms of this Consent Order and Assessment.

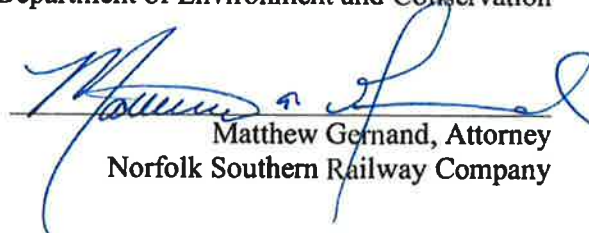
#### **AUTHORITY TO SIGN**

The undersigned representatives of the Department and the Respondent hereby represent and warrant that they are fully authorized and competent to execute this CONSENT ORDER and AGREEMENT on behalf of the entity for which they are signing.

Issued by the Director of the Division of Water Resources of the Tennessee Department of Environment and Conservation and agreed to by the Norfolk Southern Railway Company on this 10<sup>th</sup> day of October, 2018.




  
Jennifer Dodd, Director  
Division of Water Resources  
Department of Environment and Conservation

  
Matthew Gernand, Attorney  
Norfolk Southern Railway Company

Reviewed by: 

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