

**IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO**

STATE OF OHIO, ex rel.	:	CASE NO. 2010CV0723
MICHAEL DEWINE,	:	
OHIO ATTORNEY GENERAL	:	JUDGE GARY L. YOST
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
NORFOLK SOUTHERN RAILWAY CO.	:	
	:	
Defendant	:	

CONSENT ORDER

Plaintiff, State of Ohio, by its Attorney General Michael DeWine ("Plaintiff") filed a Complaint in the above-captioned case on June 25, 2010, against Norfolk Southern Railway Company ("NSRC" or "Defendant") pursuant to Chapter 6111 of the Ohio Revised Code ("R.C."), and the rules promulgated thereunder. Plaintiff's Complaint seeks, among other things, injunctive relief and civil penalties for Defendant's violations of Water Pollution Control Laws at NSRC's Ashtabula Coal Dock ("Facility"), located near the mouth of the Ashtabula River.

This Court signed and journalized a Consent Order for Preliminary Injunction ("COPI") on October 26, 2010, that partially settled the claims raised in Plaintiff's Complaint.

NOW THEREFORE, without trial of any issue of fact or law, and upon consent of the parties hereto, it is hereby ORDERED as follows:

I. JURISDICTION AND VENUE

1. The Court has both personal and subject matter jurisdiction over the parties with respect to the State of Ohio's Complaint. The State of Ohio's Complaint states a claim upon which relief can be granted against Defendant under R.C. Chapter 6111 and the rules promulgated under those statutes, and venue is proper in this Court for the purposes and duration of this Consent Order.

II. PARTIES

2. The provisions of this Consent Order shall apply to and be binding upon Defendant, its agents, officers, employees, assigns, heirs, successors in interest and others bound by Rule 65(D) of the Ohio Rules of Civil Procedure. Defendant shall provide a copy of this Consent Order to each general contractor and/or consultant it employs to perform work itemized herein and each general contractor shall provide a copy of this Consent Order to each of its subcontractors for such work.

III. SATISFACTION OF LAWSUIT

3. Plaintiff alleges in its Complaint that Defendant has violated R.C. Chapter 6111 and R.C. Chapter 3767 at the Facility. Defendant denies these allegations. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendant for all claims alleged in the June 25, 2010, Complaint, including the claims for injunctive relief and civil penalties. Nothing in this Consent Order shall be construed to limit the authority of the State of Ohio to seek relief against other appropriate persons for claims or conditions alleged in the Complaint. Nothing in this Consent Order shall be construed to limit the authority of the State of Ohio to seek relief against Defendant or other appropriate persons for claims or conditions not alleged

in the Complaint, including violations that occur after the entry of this Consent Order. Similarly, nothing in this Consent Order shall be construed to limit the authority of the State of Ohio to undertake any action against any person, including Defendant, to eliminate or mitigate conditions that may present a threat to the public health, welfare or the environment.

IV. PERMANENT INJUNCTION

4. Defendant is hereby permanently enjoined and immediately ordered to comply with the applicable requirements of R.C. Chapter 6111 and the rules adopted under those statutes and with this Consent Order and the schedule set forth in the Consent Order.

5. Defendant is enjoined and ordered to comply with all terms and conditions of its National Pollutant Discharge Elimination System (“NPDES”) Permit No. 3IT00011*DD and any renewals and modifications thereof and with this Consent Order and any schedule set forth in the Consent Order.

V. COMPLIANCE SCHEDULE

6. Defendant is hereby enjoined and ordered to comply with the following schedule:

- a. In order to address discharges from the bridge, Defendant is ordered and enjoined to implement paragraphs 11 and 12 in the COPI and the schedule in the COPI, attached hereto as Attachment A. Paragraphs 11 and 12 of the COPI as set forth in Attachment A, are fully enforceable by the Ohio Environmental Protection Agency (“Ohio EPA”) in accordance with this Consent Order. Any schedule and all requirements set forth in the

approved General Plan pursuant to the COPI constitute the schedule of compliance for the purpose of this Consent Order.

b. Following the completion of implementation of paragraphs 11 and 12 of the COPI, the parties anticipate that the Facility's NPDES permit will be issued, renewed or modified in accordance with applicable laws and rules.

7. The provisions of the COPI not referenced by this Consent Order will terminate upon entry of this Consent Order.

8. Defendant is hereby ordered and enjoined to utilize best management practices in accordance with Ohio Revised Code Chapter 6111 and any rules or guidance thereunder in the operation and maintenance of the covered coal conveyor bridge at the Facility ("Bridge").

9. Defendant is hereby ordered and enjoined to update its Storm Water Pollution Prevention Plan (SWP3) as required by Part IV.C. of Defendant's NPDES permit for the Facility to reflect the current conditions at the Facility, including but not limited to all the improvements required by the COPI and this Consent Order. An evaluation of the effectiveness of the Bridge improvements in eliminating the discharge of wash water from the Bridge to waters of the state shall be included in the annual reports under Defendant's SWP3.

10. Any document, paper, writing or application that must be submitted to the Director or to the Ohio EPA pursuant to the terms of this Consent Order shall be sent to the following addresses:

Ohio Environmental Protection
Agency
Division of Surface Water
Attn: Manager, Stormwater and

Ohio Environmental Protection
Agency
Northeast District Office
Division of Surface Water

Enforcement Section
50 W. Town Street, Suite 700
Columbus, Ohio 43215

Attn: Enforcement Unit Supervisor
2110 East Aurora Road
Twinsburg, OH 44087

VI. CIVIL PENALTY

11. It is hereby ordered that Defendant shall pay the State of Ohio a civil penalty of one hundred fifteen thousand dollars (\$115,000.00). Defendant shall make the civil penalty payment within thirty (30) days of the effective date of this Consent Order by certified check, made payable to the order of "Treasurer, State of Ohio," for the appropriate amount and sent to:

Ohio Attorney General's Office
Environmental Enforcement Section
ATTN: Karen Pierson
30 East Broad Street, 25th Floor
Columbus, Ohio, 43215-3400

VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

12. In lieu of Defendant's paying an additional civil penalty of three hundred fifty thousand dollars (\$350,000.00), and in furtherance of the parties' objectives to improve the environment and the aquatic habitat in waters of the State of Ohio, specifically the Ashtabula River, as a supplemental environmental project ("SEP"):

- a. Defendant shall make available to the Ohio EPA approximately 2.2 acres along the shoreline on the southern portion of the Slip 5A property, as identified in Attachment B, on the Ashtabula River, plus an additional approximately 0.5 acres of shoreline to the immediate north of the 2.2 acres, for the purpose of Ohio EPA's constructing aquatic and shoreline restoration known as a Habitat Restoration and Enhancement Project. The project provides for construction of approximately 1,400 linear feet of submerged fish shelves, riverbank sloping, planting of upland vegetation

and related work as described in Attachment B, "Supplemental Environmental Project Slip 5A Property, Ashtabula Ohio" (hereinafter "Attachment B") and designated on the map in Attachment B. Attachment B is fully enforceable by Plaintiff in accordance with this Consent Order.

- b. Defendant shall allow placement of soil excavated during the habitat restoration project on approximately 3.3 acres of upland area of the Slip 5A property designated on the map in Attachment B. Placement of the soil shall be in accordance with Attachment B.
- c. Defendant shall provide access to Ohio EPA and its agents on the Slip 5A property in accordance with the "Consent for Access to Property and Authorization for Habitat Restoration and Enhancement Project," executed by Defendant and attached hereto as Attachment C. Attachment C is fully enforceable by Plaintiff in accordance with this Consent Order.
- d. Defendant shall take all necessary action to cause a valid and enforceable Environmental Covenant to be placed upon approximately 2.2 acres of property located along the shoreline on the southern portion of the Slip 5A property and recorded with the County Recorder for Ashtabula County in accordance with the following schedule. The Environmental Covenant shall comply with the applicable requirements of R.C. 5301.80 to 5301.92, shall preserve in perpetuity the approximately 2.2 acres designated on the map in Attachment B upon which fish shelves are to be installed, and shall be identical in substance to Attachment D, "Environmental Covenant."

Attachment D or the equivalent Environmental Covenant shall be fully enforceable by Plaintiff in accordance with this Consent Order.

(i) The property description for such Environmental Covenant will include an appropriate property description in accordance with Attachment B and applicable Ohio law.

(ii) Within one hundred and twenty (120) days of the entry of this Consent Order, Defendant shall provide to Ohio EPA the Environmental Covenant executed by Defendant.

(iii) Defendant shall file the Environmental Covenant with the County Recorder for Ashtabula County within thirty (30) days of receipt of the fully executed Environmental Covenant from Ohio EPA.

(iv) Defendant shall submit to Ohio EPA a certified copy of the Environmental Covenant as recorded with the Ashtabula County Recorder within thirty (30) days of its recording.

e. The Habitat Restoration and Enhancement Project activities will be conducted by Ohio EPA and/or its contractors and may utilize funding from other sources and is not part of this SEP or a requirement of this Consent Order. The parties acknowledge and agree that this Consent Order and completion of the SEP are not contingent upon receipt of such funding or completion of work by Ohio EPA and/or its contractors.

13. If Defendant fails to make available the property as provided in paragraphs 12(a) and 12(b), or if access as agreed to in paragraph 12(c) is denied by Defendant, the civil penalty amount in paragraph 12 of three hundred fifty thousand

dollars (\$350,000.00) shall be immediately due and payable by delivering a certified check to Karen Pierson, or her successor, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400, in the manner set forth in paragraph 17 below.

14. If Defendant fails to timely execute, record, or submit the Environmental Covenant as required by paragraph 12(d), Defendant shall be liable for and shall pay stipulated penalties as follows:

- (a) For each day of each failure to comply with a requirement or meet a deadline in paragraph 12(d), from one (1) day to fourteen (14) days – one thousand dollars (\$1,000.00) per day per requirement not met;
- (b) For each day of each failure to comply with a requirement or meet a deadline in paragraph 12(d) from fifteen (15) days to thirty (30) days – two thousand five hundred dollars (\$2,500.00) per day per requirement not met;
- (c) For each day of each failure to comply with a requirement or meet a deadline in paragraph 12(d) over thirty (30) days – five thousand dollars (\$5,000.00) per day per requirement not met.

The appropriate penalty amount shall be paid by delivering a certified check or checks to Karen Pierson, or her successor, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400, in the manner set forth in paragraph 17 below.

VIII. STIPULATED PENALTIES

15. In the event that Defendant fails to comply with any requirement of this Order, other than violations which are addressed separately in paragraphs 13, 14 and 16, Defendant is liable for and shall immediately pay stipulated penalties in accordance with the following schedule for each failure to comply:

- (a) For each day of each failure to comply with a requirement or meet a deadline from one (1) day to thirty (30) days – two hundred and fifty dollars (\$ 250.00) per day per requirement not met;
- (b) For each day of each failure to comply with a requirement or meet a deadline from thirty-one (31) days to sixty (60) days – five hundred dollars (\$500.00) per day per requirement not met;
- (c) For each day of each failure to comply with a requirement or meet a deadline from sixty-one (61) days to ninety (90) days – seven hundred and fifty dollars (\$ 750.00) per day per requirement not met.
- (d) For each day of each failure to comply with a requirement or meet a deadline over ninety (90) days – one thousand dollars (\$ 1000.00) per day per requirement not met.

16. Beginning thirty (30) days after Defendant has completed all improvements to the Bridge in accordance with the schedule in paragraph 6, Defendant shall immediately and automatically be liable for and shall pay a stipulated penalty of two thousand five hundred dollars (\$2,500.00) for each day Defendant fails to comply with best management practices in the operation and maintenance of the Bridge as set forth in the approved General Plan. This paragraph will terminate upon the occurrence of twelve (12) consecutive months after it takes effect during which no stipulated penalties were due pursuant to this paragraph and any stipulated penalties previously incurred under this paragraph have been paid.

17. Payments due under paragraphs 13, 14, 15, and 16 shall be made within forty-five (45) days from the date of the failure to meet the applicable deadline or the occurrence of the violation. Payments shall be accompanied by a written explanation of the deadline missed and/or the violation which occurred. Any payment required to be made under this paragraph shall be made by delivering to Karen Pierson, or her

successor, Environmental Enforcement Section, Ohio Attorney General's Office, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400, a certified check or checks for the appropriate amounts, made payable to "Treasurer, State of Ohio." The payment of stipulated penalties by Defendant and the acceptance of such stipulated penalties by Plaintiff for specific violations pursuant to Sections VII or VIII shall not be construed to limit Plaintiff's authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Order. Further, payment by Defendant shall not be considered an admission of liability on the part of Defendant.

18. The stipulated penalties imposed by paragraphs 13, 14, and 15 of this Consent Order may be terminated as to each specific paragraph of this Consent Order, for which stipulated penalties are imposed, only after Defendant has achieved and maintained compliance with all the requirements of those paragraphs for a period of twelve (12) consecutive months and has paid any stipulated penalties previously incurred related to those paragraphs. Termination of one paragraph subject to stipulated penalties under this Consent Order may occur, but it shall not terminate the accrual of or the liability for payment of stipulated penalties under any other paragraph. Termination of stipulated penalties under this Consent Order shall only be upon written application by any party and by order of the Court after the Court has made a determination that the requirements of this paragraph have been satisfied. The payment of stipulated penalties by Defendant and the acceptance of each stipulated penalty for specific violations pursuant to the section shall not be construed to limit Plaintiff's authority to seek additional relief or to otherwise seek judicial enforcement of this Consent Order.

XI. COMPLIANCE NOT DEPENDENT ON GRANTS OR LOANS

19. Performance of the terms of this Consent Order by Defendant is not conditioned on the receipt of any federal or state grant or loan funds. In addition, Defendant's performance is not excused by the failure to obtain any federal or state grant or loan funds, or by the processing of any applications for the same.

X. POTENTIAL FORCE MAJEURE

20. If any event occurs which causes or may cause a delay in Defendant's compliance with any requirement of this Consent Order, Defendant shall notify the Ohio EPA in writing within ten (10) days from when Defendant knew, or by the exercise of due diligence should have known, of the event. The notification to Ohio EPA shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Defendant to prevent or minimize the delay, and the timetable by which those measures will be implemented. Defendant shall adopt all reasonable measures to avoid or minimize any such delay.

21. In any action by Plaintiff to enforce any of the provisions of this Consent Order, Defendant may raise that it is entitled to a defense that its conduct was caused by reasons entirely beyond its control such as, by way of example and not limitation, acts of God, strikes, acts of war or civil disturbances. While Plaintiff does not agree that such a defense exists, it is, however, hereby agreed upon by Defendant and Plaintiff that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time, if ever, that a court proceeding to enforce this Consent Order is commenced by Plaintiff. At that time, Defendant will bear the burden of proving that any delay was or will be caused by circumstances entirely beyond the control of Defendant. Unanticipated or

increased costs associated with the implementation of any action required by this Consent Order, or a change in Defendant's financial circumstances, shall not constitute circumstances entirely beyond the control of Defendant or serve as a basis for an extension of time under this Consent Order. Failure by Defendant to timely comply with the notice requirements of this Section shall render this Section void and of no force and effect as to the particular incident involved and shall constitute a waiver of Defendant's right to request an extension of its obligations under this Consent Order based on such incident. An extension of one date based on a particular incident does not mean that Defendant qualifies for an extension of a subsequent date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought. Acceptance of this Consent Order without a Force Majeure Clause does not constitute a waiver by Defendant of any rights or defenses it may have under applicable law.

XI. EFFECT OF CONSENT ORDER

22. This Consent Order does not constitute authorization or approval for the construction or modification of any physical structure, facility, or wastewater collection or treatment system. Authorization or approval for any such construction or modification shall be by approval letter or permit issued by the Director or other such permits as may be required by applicable federal, state, or local laws, rules, or regulations.

XII. RESERVATION OF RIGHTS

23. Except as otherwise provided in Paragraph 3, Plaintiff reserves the right to seek further relief from this or any other Court including, but not limited to, further preliminary and/or permanent injunctive relief and civil penalties. Notwithstanding the

foregoing, Defendant reserves all rights, defenses, claims, and causes of action available under the law with respect to any such further relief, injunction, or penalty.

24. Plaintiff expressly reserves and this Consent Order shall be without prejudice to, any claims, demands, rights or causes of action, judicial or administrative, that Plaintiff may have or which may in the future accrue against Defendant or others, regardless of whether such claim, demand, right or cause of action was asserted in the Complaint.

25. Nothing herein shall limit the authority of Plaintiff to undertake any action against any entity, including Defendant, to eliminate or to control conditions which may present a threat to the public health, safety, welfare, or environment as provided in Paragraph 3 or to seek cost reimbursement for any such action. This Consent Order in no way waives any defenses which Defendant may have as to such claims, demands, rights or causes of action.

26. Nothing herein shall be construed to relieve Defendant of its obligations to comply with applicable federal or state statutes or regulations, including, but not limited to, permit requirements applicable to the Facility.

27. By signing and agreeing to this Consent Order, Defendant Norfolk Southern Railway Company does not waive any defenses it may have in any proceeding as to claims raised by a third party.

28. This Consent Order shall not be construed so as to provide any rights, duties, or responsibilities to any third parties.

XIII. MODIFICATION

29. No modification shall be made to this Consent Order without the written

agreement of the parties or an order of the Court.

XIV. RETENTION OF JURISDICTION

30. The Court will retain jurisdiction of this action for the purpose of administering and enforcing Defendant's compliance with this Consent Order.

XV. COSTS

31. Defendant is hereby ordered to pay the costs of this action.

XVI. SIGNATORIES

32. The undersigned is a representative of Defendant and understands the terms and conditions of this Consent Order and certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Order and to execute and legally bind Defendant to this document.

XVII. ENTRY OF CONSENT ORDER AND FINAL JUDGMENT BY CLERK

33. The Parties agree and acknowledge that final approval by the Plaintiff and Defendant, and entry of this Consent Order is subject to the requirement of 40 Code of Federal Regulations Section 123.27(d)(2)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and the consideration of any public comment. The Plaintiff and Defendant reserve the right to withdraw consent to this Consent Order based on comments received during the public comment period. Defendant shall pay the cost of publishing the public notice within 30 days of receipt of a bill or notice from the Director.

34. Upon the signing of this Consent Order by the Court, the Clerk is hereby directed to enter it upon the journal. Within three days of entering the judgment upon the journal, the Clerk is hereby directed to serve notice of the judgment upon all parties, and

its date of entry upon the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket, which date shall be the effective date as defined and used herein.

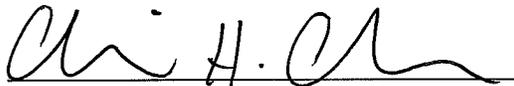
IT IS SO ORDERED:

JUDGE

Date

Approved:

MICHAEL DEWINE
OHIO ATTORNEY GENERAL



DAVID H. DOKKO (0080749)

Assistant Attorney General

Environmental Enforcement Section

30 East Broad Street, 25th Floor

Columbus, Ohio 43215

Telephone: (614) 466-5279

Facsimile: (614) 644-1926

Attorney for Plaintiff State of Ohio

Approved:



Norfolk Southern Railway Company
Norfolk, Virginia 23510
Representative for Norfolk
Southern Railway Company



MARTIN H. LEWIS (0010441)
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Ave.
Cleveland, OH 44115-1475
Telephone: (216) 696-5657



DAVID M. MOORE
Balch & Bingham LLP
30 Ivan Allen Plaza
Atlanta, Georgia 30308-30306
Attorneys for Defendant Norfolk Southern
Railway Co.

ATTACHMENT A

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

STATE OF OHIO, ex rel.
RICHARD CORDRAY,
OHIO ATTORNEY GENERAL

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY CO.

Defendant

CASE NO. 2010 CV 00723
JUDGE YOST

FILED
MAY 03 2011 A 10:56
CLERK OF COURTS
ASHTABULA COUNTY, OHIO

CONSENT ORDER FOR PRELIMINARY INJUNCTION

WHEREAS, the Plaintiff, State of Ohio, by its Attorney General Richard Cordray ("Plaintiff"), June 30, 2010, filed its Complaint in the above-captioned case against Norfolk Southern Railway Company ("Defendant") pursuant to Ohio Revised Code ("R.C.") Chapter 6111 and the rules promulgated thereunder (hereinafter "Ohio's Water Pollution Control Laws");

WHEREAS, Plaintiff's Complaint seeks, among other things, injunctive relief and civil penalties for Defendant's alleged violations of Ohio's Water Pollution Control Laws at Defendant's Ashtabula Coal Dock and Transloading Facility, located in the City of Ashtabula, Ashtabula County, Ohio;

WHEREAS, Defendant has agreed to enter into this Consent Order for Preliminary Injunction ("COPI") without the need for hearing;

Now therefore, upon consent of the parties hereto, it is hereby ORDERED as follows:

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I. JURISDICTION AND VENUE

1. The Court has both personal and subject matter jurisdiction over the parties. The Complaint states a claim for which relief can be granted against Defendant under R.C. Chapter 6111, and the rules promulgated thereunder, and venue is proper in this Court for the purposes and duration of this COPI.

II. PERSONS BOUND

2. The provisions of this COPI shall apply to and be binding upon Defendant, its agents, officers, employees, assigns, successors in interest and others bound by Rule 65(D) of the Ohio Rules of Civil Procedure. Defendant shall provide a copy of this COPI to each general contractor and/or consultant it employs to perform work itemized herein, and each general contractor and/or consultant shall provide a copy of this COPI to each of its subcontractors for such work.

III. RESERVATION OF RIGHTS

3. Plaintiff reserves the right to seek further relief from this or any other Court including, but not limited to, further preliminary and/or permanent injunctive relief and civil penalties.

4. Nothing herein shall be construed to be a final settlement of the claims raised in Plaintiff's Complaint. Plaintiff retains the right to seek permanent injunctive relief, civil penalties, costs of this action, attorneys' fees, and/or extraordinary litigation costs as demanded in the Complaint.

5. By signing and agreeing to this COPI, Defendant Norfolk Southern Railway Company does not waive any defenses in law or in fact it may have regarding the matters set forth herein including to contest its liability for the violations alleged in Plaintiff's Complaint in any subsequent hearing regarding permanent injunctive relief or

civil penalty for the violations alleged. By signing and agreeing to this COPI, Defendant does not admit any general or specific allegation, fact or finding set forth in this COPI or the Complaint regarding this matter.

IV. PRELIMINARY INJUNCTIVE RELIEF

6. Defendant Norfolk Southern Railway Company is hereby ordered and enjoined to comply with R.C. Chapter 6111 and rules adopted thereunder concerning the Ashtabula Coal Dock and Transloading Facility ("Facility"), and with this COPI and any schedule set forth herein.

7. Defendant is hereby ordered and enjoined to comply with the terms and conditions of NPDES Permit No. 3IT00011*DD and all modifications and renewals thereof in accordance with this COPI and any schedule set forth herein.

8. Defendant has submitted a complete and approvable permit to install (PTI) application and detailed plans for a containment tank and related piping to collect wastewater associated with the conveyor belt and storm water ("Containment Tank") on the east side of the Facility. EPA issued a PTI for the Containment Tank on June 9, 2009. Defendant issued a Notice to Proceed on February 24, 2010. Defendant is hereby ordered and enjoined to complete installation of the Containment Tank and related piping in accordance with the approved detailed plans and PTI, by no later than November 1, 2010.

9. Within fourteen (14) days of completing the requirements contained in Paragraph 8, Defendant is hereby ordered and enjoined to provide notice in writing to the Ohio EPA and the City of Ashtabula of their completion.

10. By July 1, 2010, Defendant is hereby ordered and enjoined to submit an Environmental Management System (EMS) for Defendant's Facility to Ohio EPA. The EMS will include the management practices to be undertaken regarding environmental

compliance with the Facility's air and water permits, as well as management practices associated with:

- i. the Containment Tank installed pursuant to Paragraph 8;
- ii. installation and implementation of the Pro Control System for coal piles at the Facility;
- iii. other water application systems for coal piles at the Facility as agreed between Defendant and Ohio EPA, which may include the use of watering trucks; and
- iv. cleaning and maintenance of the covered coal conveyor bridge at the Facility ("Bridge").

11. At the time of entry of this COPI, Defendant washes the bridge approximately every ten (10) days to prevent the buildup of coal dust for safety and fire suppression. The washing frequently results in the unpermitted discharge of wash water to waters of the state. In order to address discharges from the Bridge, Defendant is hereby ordered and enjoined, within ninety (90) days of the effective date of this COPI, to submit to Ohio EPA for approval a General Plan that identifies options for elimination of the discharge of wash water from the Bridge in accordance with (i) through (iv), below. Such options shall be evaluated, and the option(s) to be implemented shall be chosen, in accordance with R.C. Chapter 6111.

- i. The General Plan shall identify options and recommend improvements and/or options requiring further evaluation for achieving the purpose of eliminating the discharge of wash water from the Bridge, including structural modifications and/or improvements to the Bridge, changes in maintenance procedures and practices for operation and cleaning of the Bridge and implementation of any other best management practices ("BMP"). The

Plan shall include a schedule for implementing the recommended improvements. If the schedule is longer than set forth in Paragraph 12, Defendant shall provide justification for a longer schedule. The Plan shall include recommendations as to what BMP(s) should be included into future renewals and/or modifications of the NPDES permit for this facility concerning the operation and maintenance of the Bridge. In addition, the General Plan shall identify how the Bridge will be monitored for any discharges from the Bridge, including but not limited to wash water, during the implementation of the General Plan and subsequently during any Bridge operation and maintenance activities.

ii. After review of the General Plan, or any submission required under this paragraph of the COPI, Ohio EPA shall in writing (a) approve, in whole or in part, the General Plan and its recommendations or any submission; (b) approve the General Plan or submission with specified modifications and/or identifying any option requiring further evaluation; (c) disapprove, in whole or in part, the General Plan or submission, directing Defendant to modify the disapproved portion of the General Plan or submission; or (d) any combination of the above. Action of the Ohio EPA approving or disapproving the General Plan shall not constitute an action of the Director of Ohio EPA approving or disapproving an application for any NPDES permit or application for a permit-to-install.

(a) In the event of Ohio EPA approval of the General Plan and/or submissions required under this paragraph, Defendant shall proceed to take any action required by the approved General Plan or submission.

(b) In the event Ohio EPA disapproves of or modifies all or any portion of the General Plan or submission, Defendant shall have the opportunity to meet or confer with Ohio EPA within twenty (20)

days of receipt of such written notification of disapproval or modification, or such longer time as may be agreed to by the Ohio EPA and Defendant in writing, to discuss and reach agreement concerning the modifications, deficiencies or conditions identified by Ohio EPA. The City of Ashtabula may participate in any such meeting or conference. Based on this meeting or conference, Ohio EPA may, after reasonable opportunity for review and comment by the City of Ashtabula, either decide to revise any such modification, deficiency or condition or decide that its originally proposed modification, deficiency or condition is appropriate. Ohio EPA shall provide Defendant and City of Ashtabula with written notice of its decision.

(c) If Defendant does not exercise the opportunity to meet or confer with Ohio EPA or if Defendant accepts Ohio EPA's final decision, Defendant shall take any action required by the modifications, notice of deficiencies or conditions identified by Ohio EPA in its disapproval or its final decision, whichever is applicable.

iii. If the Director determines the General Plan or submission is incomplete, insufficient, or not approvable, then Defendant is hereby ordered and enjoined to submit to the Director a revised version of the document that addresses the deficiencies noted within fourteen (14) business days of receipt of a deficiency notification from the Ohio EPA.

iv. Defendant is hereby ordered and enjoined to implement the approved General Plan in accordance with the schedule set forth in Paragraph 12.

12. The General Plan shall be implemented as follows:

i. Within ninety (90) days of approval of the General Plan, or as otherwise provided in the approved schedule contained in the General Plan as submitted or modified pursuant to Paragraph 11, Defendant is hereby ordered and enjoined to submit complete and approvable PTI applications and detailed plans, as appropriate, for applicable improvements contained in the General Plan to both the Division of Surface Water and the Division of Air Pollution Control of Ohio EPA as appropriate. Such PTI shall include a proposed schedule for initiation of a bid process for such improvements, initiation of construction, and completion of construction. If the Director determines the PTI applications and detailed plans are incomplete, insufficient, or not approvable, then Defendant is hereby ordered and enjoined to submit to the Director a revised version of the documents that address the deficiencies noted within fourteen (14) business days of receipt of a deficiency notification from the Ohio EPA.

ii. Defendant shall complete construction of improvements to the Bridge in accordance with the approved PTIs and detailed plans.

iii. Three (3) months after completing construction of all Bridge improvements, Defendant is hereby ordered and enjoined to submit a report evaluating the effectiveness of the Bridge improvements in eliminating discharges of wash water from the Bridge into waters of the state.

iv. If the Bridge improvements have not resulted in the elimination of the discharge of wash water from the Bridge into waters of the state and compliance with all NPDES permits terms and conditions for this facility, Defendant is hereby ordered and enjoined to include in its report recommendations for additional improvements to the Bridge to eliminate discharges into waters of the state and to comply with the NPDES permit and

a schedule for implementation of the recommendations based on the study of additional items as identified in the General Plan. Defendant is hereby ordered and enjoined to implement the recommendations for improvements to the Bridge in accordance with the schedule as set forth in the General Plan upon approval by Ohio EPA.

13. Defendant is hereby ordered and enjoined to utilize best management practices in accordance with Ohio Revised Code Chapter 6111 in the operation and maintenance of the Bridge.

14. Within thirty (30) days of the effective date of these Orders, Defendant is hereby ordered and enjoined to install a high level alarm on the sewage pump station located on the east side of the Facility between Ferry Drive and Fourth Street.

15. Defendant is hereby ordered and enjoined to update its Storm Water Pollution Prevention Plan (SWP3) to reflect the current conditions at the Facility, including but not limited to all the improvements required by this Order, as required by Part IV.C. of Defendant's NPDES permit for the Facility. An evaluation of the effectiveness of the Bridge improvements in eliminating the discharge of wash water from the Bridge to waters of the state shall be included in the annual reports under Defendant's SWP3.

16. All documents submitted for approval, pursuant to this COPI, shall be submitted to the Ohio EPA. The City of Ashtabula shall also be provided a copy of documents submitted to Ohio EPA pursuant to this COPI.

V. SUBMISSION OF DOCUMENTS

17. Any document, paper, writing, general plan, or permit application that must be submitted to the Director or to the Ohio EPA pursuant to the terms of this COPI

shall be sent to the following address:

Ohio Environmental Protection Agency
Northeast District Office
Division of Surface Water
Attn: DSW Enforcement Unit Supervisor
2110 East Aurora Road
Twinsburg, Ohio 43402

and

Michael A. Mearini
City of Ashtabula
Waste Pollution Control
303 Woodland Avenue
Ashtabula, Ohio 44004-3500

VI. EFFECT OF COPI

18. This COPI does not constitute authorization or approval for the construction or modification of any physical structure, facility, wastewater system, or treatment works. Authorization or approval for any such construction or modification shall be by approval letter or permit issued by the Director or other such permits as may be required by applicable federal, state, or local laws and regulations.

VII. TERMINATION

19. This COPI shall terminate upon Order of this Court, upon Joint Motion of the parties to this action that all activities required or contemplated under this COPI have been completed, or upon entry of final judgment in this action. Nothing herein shall preclude Plaintiff from seeking further investigatory work in connection with implementation of this COPI or to address an imminent threat of harm to the public health or the environment. This Section, as well as the Section of this COPI on Reservation of Rights, shall survive this termination provision.

VIII. MODIFICATION

20. No modification shall be made to this COPI without the written agreement of the parties to this action and the Court.

IX. RIGHTS OF THIRD PARTIES

21. This COPI shall not be construed so as to provide any rights, duties, or responsibilities to any third parties.

X. RETENTION OF JURISDICTION

22. The Court will retain jurisdiction of this action for the purpose of administering and enforcing Defendant's compliance with this COPI.

XI. COSTS

23. Defendant is hereby ordered to pay the costs of this action incurred by the State.

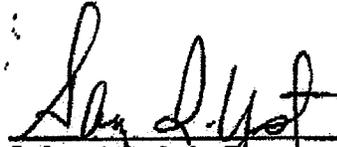
XII. ENTRY OF COPI

24. The Parties agree and acknowledge that final approval by the State and Defendant, and entry of this COPI is subject to the requirement of 40 C.F.R. § 123.27(d)(2)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and the consideration of any public comment. The State and Defendant reserve the right to withdraw this COPI based on comments received during the public comment period. Defendant shall pay the cost of publishing the public notice.

XIII. SIGNATORIES

25. The undersigned representative of each Party understands the terms and conditions of this COPI and certifies that he or she is fully authorized to enter into the terms and conditions of the COPI and to execute and legally bind the Party to this document.

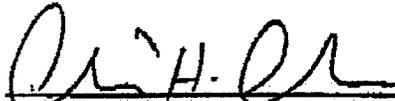
IT IS SO ORDERED.



Judge, Ashtabula County
Court of Common Pleas

Approved:

**RICHARD CORDRAY
OHIO ATTORNEY GENERAL**



MARGARET A. MALONE (0021770)
DAVID H. DOKKO (0080749)
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5279
Facsimile: (614) 644-1926
Attorneys for Plaintiff State of Ohio



Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510
Representative for Norfolk and
and Southern Railway Company

Approved:



MARTIN H. LEWIS (0010441)
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Ave.
Cleveland, OH 44115-1475
Telephone: (216) 696-5657



DAVID M. MOORE
Balch & Bingham LLP

30 Ivan Allen Plaza

Atlanta, Georgia 30308-30306

Attorneys for Defendant Norfolk Southern Railway Company

Approved:

MICHAEL FRANKLIN (0030737)

City Solicitor, City of Ashtabula

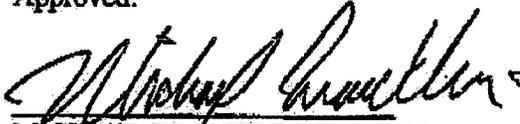
110 West 44th Street

Ashtabula, Ohio 44004

Representative for City of Ashtabula

DAVID M. MOORE
Balch & Bingham LLP
30 Ivan Allen Plaza
Atlanta, Georgia 30308-30306
Attorneys for Defendant Norfolk Southern Railway Company

Approved:



MICHAEL FRANKLIN (0030737)
City Solicitor, City of Ashtabula
110 West 44th Street
Ashtabula, Ohio 44004
Representative for City of Ashtabula

12 001641

ATTACHMENT B

Supplemental Environmental Project Slip 5A Property, Ashtabula, Ohio

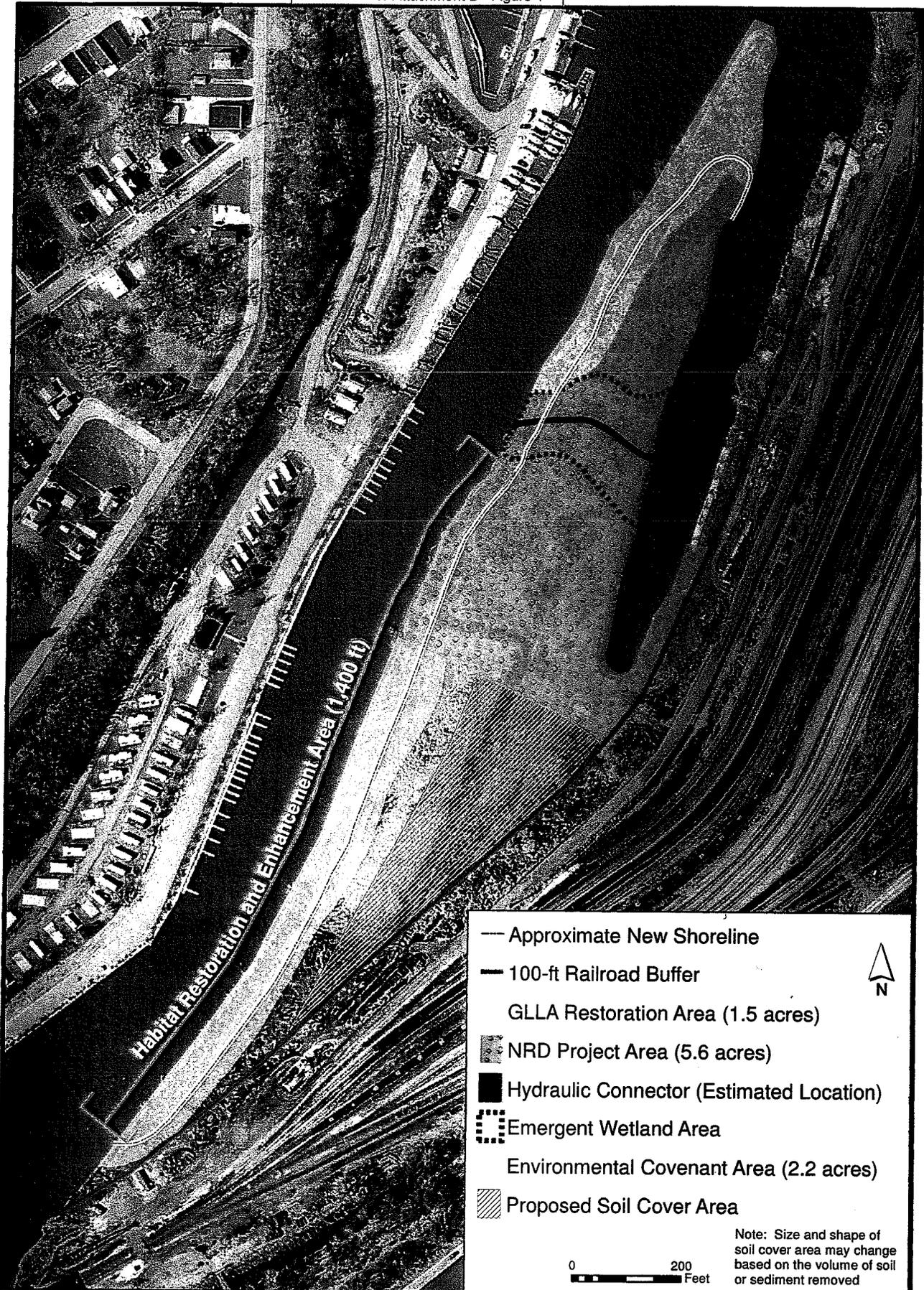
The supplemental environmental project (SEP) described herein will be conducted to provide additional natural resource restoration along the east bank of the Ashtabula River, in Ashtabula, Ohio. The SEP will be conducted on Norfolk Southern Railway Company (“NSRC”) property known as “Slip 5A” and depicted on the attached map (Figure 1). Restoration projects that have been implemented or are planned for the Slip 5A peninsula include: 1) Great Lakes Legacy Act (GLLA) fish shelves project; 2) the restoration activities (“NRD Project”) that are part of the natural resource damages (NRD) settlement with State and Federal Trustees; and 3) the proposed Great Lakes Restoration Initiative (GLRI) project (Figure 1) (“Habitat Restoration and Enhancement Project”). The Habitat Restoration and Enhancement Project is the subject of this SEP.

The GLLA restoration project was implemented in 2009 and 2010. This project included the construction of fish shelves and revegetation along the northern portion of the peninsula. The NRD restoration activities are summarized in a restoration work plan that was finalized in 2009 by NSRC, in consultation with the natural resource trustees (United States and the State of Ohio). This plan includes the creation of a hydraulic connector, emergent wetlands, and the restoration of connected riparian stream bank and connected shrub habitat. Since then, the Ohio Environmental Protection Agency (Ohio EPA) applied for GLRI funding for the Habitat Restoration and Enhancement Project to restore and enhance shoreline, including by installing fish shelves, on the southern portion of the Slip 5A property. The Habitat Restoration and Enhancement Project provides for the construction of approximately 1,400 linear feet of submerged fish shelves, riverbank sloping, planting of upland vegetation and related work along the southern portion of the Slip 5A property. As a SEP, NSRC will make the following contributions to the Habitat Restoration and Enhancement Project.

- 1) NSRC will make available and provide access to Ohio EPA to 1) approximately 2.2 acres along the shoreline on the southern portion of the Slip 5A property for the implementation of the Habitat Restoration and Enhancement Project as shown in Figure 1 as the “Environmental Covenant Area” and 2) an additional approximate 0.5 acres of shoreline to the immediate north of the Environmental Covenant Area. The foregoing property, some of which may be submerged following the completion of the Habitat Restoration and Enhancement Project, will be used by Ohio EPA for the installation of 1400 linear feet of submerged fish shelves as shown on Figure 1 by removing soil and

sediment along the banks, placing new substrate, and planting submerged, emergent, and riparian vegetation. Additionally, NSRC will provide access to OEPA to approximately 3.3 acres for the placement of excavated material as described below. NSRC will provide an access authorization agreement for activities related to the Habitat Restoration and Enhancement Project, and for operations and maintenance for up to three years following project completion. The access agreement referred to herein is ATTACHMENT C to the Consent Order between the State of Ohio and Norfolk Southern Railway Co. in Case No. 2010 CV 0723 in the Ashtabula County Court of Common Pleas (“Consent Order”), “CONSENT FOR ACCESS TO PROPERTY AND AUTHORIZATION FOR HABITAT RESTORATION AND ENHANCEMENT PROJECT.”

- 2) NSRC will allow Ohio EPA to place the excavated material associated with the Habitat Restoration and Enhancement Project on a 3.3 acre upland area of the Slip 5A parcel as shown in Figure 1 as the “Proposed Soil Cover Area”. Ohio EPA has conducted an initial assessment of the excavated material and determined that it can be placed (without additional sampling) as cover material with no run-off that may be potentially detrimental to sensitive areas such as surface water. Ohio EPA will place the excavated material to the grade specified by NSRC. The exact location and configuration of the placement of excavated material will be determined by NSRC, but will accommodate all of the excavated soil and sediment associated with the Habitat Restoration and Enhancement Project. The area will then be seeded to prevent erosion into surface water.
- 3) NSRC will provide an environmental covenant for the 2.2 acre Environmental Covenant Area on Figure 1 as may be more specifically identified by an appropriate property description provided for in the environmental covenant. The covenant will be held by NSRC. The environmental covenant referred to herein is ATTACHMENT D to the Consent Order, “ENVIRONMENTAL COVENANT.”
- 4) The Habitat Restoration and Enhancement Project will be conducted in accordance with the GLRI grant GL-00E00568-0.



- Approximate New Shoreline
- 100-ft Railroad Buffer
- GLLA Restoration Area (1.5 acres)
- NRD Project Area (5.6 acres)
- Hydraulic Connector (Estimated Location)
- Emergent Wetland Area
- Environmental Covenant Area (2.2 acres)
- Proposed Soil Cover Area



0 200
Feet

Note: Size and shape of soil cover area may change based on the volume of soil or sediment removed

ENVIRON

13801 West Center Street, Burton, Ohio 44021

**Restoration Project Locations
Ashtabula, Ohio**

**Figure
1**

RECEIVED

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OHIO EPA NEDO

**ATTACHMENT C
CONSENT FOR ACCESS TO PROPERTY AND AUTHORIZATION FOR HABITAT
RESTORATION AND ENHANCEMENT PROJECT
[Slip 5A Property, Ashtabula, Ohio]**

**Norfolk Southern Railway Company
1200 Peachtree Street NE, Box 13, Atlanta, Georgia 30309**

By authorized signature below on behalf of Norfolk Southern Railway Company, I hereby voluntarily consent to officers, employees, or authorized representatives and contractors and subcontractors of the Ohio Environmental Protection Agency (Ohio EPA) entering and having access to freely move about the southerly portion of the approximately 10 acre Slip 5A Property ("Property", as shown on the attached Attachment 1) located in Ashtabula, Ohio in order to implement and construct a Habitat Restoration and Enhancement Project involving the installation of approximately 1400 linear feet of submerged fish shelves as described in the attached document (Attachment 2). Specifically, construction by Ohio EPA of approximately 1,400 linear feet of submerged fish shelves, riverbank sloping, planting of upland vegetation and related work will be conducted on 1) the Environmental Covenant Area and 2) an additional approximate 0.5 acres of shoreline to the immediate north of the Environmental Covenant Area, as shown on Attachment 1 and excavated materials will be placed on the Proposed Soil Cover Area shown on Attachment 1.

The following activities as described in Attachment 1 and Attachment 2 (hereinafter collectively the "Work") are to be conducted on the Property by Ohio EPA and its contractors and representatives are covered by this authorization:

- Site reconnaissance and pre-bid site walk to evaluate accessibility of proposed construction locations;
- Construction and oversight activities required for implementation of activities described in Attachment 2, including, but not limited to:
 - Mobilization and demobilizations operations;
 - Construction of temporary haul roads;
 - Soil and sediment excavation;
 - Hauling of excavated materials to on-site locations;
 - Planting of vegetation and seeds;
 - Placement of excavated materials on on-site locations, and grading and planting vegetation and seeds in these areas;
 - Removal of temporary haul roads;
 - Site restoration; and
 - Evaluation and approval of final site activities, as-built drawings, and project closeout.
- Maintenance of the 1,400 linear feet of fish shelves and related plantings described in Attachment 1 and Attachment 2 for an approximately one year period following installation of the fish shelves and related plantings.

Such maintenance shall include invasive species control and replacement plantings, if needed.

I acknowledge that activities conducted by Ohio EPA are undertaken pursuant to its Great Lakes Restoration Initiative ("GLRI") grant awarded by the United States Environmental Protection Agency (U.S. EPA). All work will be performed meeting contemporaneous engineering and construction standards in compliance with all applicable laws and regulations.

This access authorization is contingent upon the following:

- The Work shall be coordinated in advance with Norfolk Southern Railway's environmental contractor, Environ, and all reasonable efforts shall be made in connection with the Work to facilitate and accommodate a restoration project planned by Norfolk Southern Railway Company for the Slip 5A property.
- Installation of temporary haul roads and limits of excavation on or to facilitate access to the Property shall be subject to the agreement of Environ.
- The Work shall be conducted in the areas shown in Attachments 1 and 2.
- Ohio EPA's contractors shall repair any erosion of the Property that is caused by the Work following the implementation of the Work.
- All material excavated during the Work shall be placed on-site in the area designated as the Proposed Soil Cover Area on Attachment 1. Ohio EPA has determined the material can be placed (without additional sampling) as cover material with no run-off that may be potentially detrimental. The excavated material will be placed to grade and in accordance with a location and configuration as determined by Environ.
- Access to the Property shall be over an existing roadway adjacent to Norfolk Southern Railway's Bridge Yard and care shall be taken to avoid disruptions to or effects upon rail operations and rail safety.
- Norfolk Southern Railway Company shall not be responsible for maintaining or supporting the changes imposed on the Property by the Work, except as required by the environmental covenant that will be placed on the Environmental Covenant Area.
- Ohio EPA shall provide Norfolk Southern Railway Company with a list of the agency's approved contractors before starting the Work.

- Ohio EPA's contractors shall provide the following insurance for the Work:

a. Certificates of Insurance, specifying that the policies are applicable to the particular work, have been furnished to and accepted by Norfolk Southern Railway Company as evidence that such contractors and subcontractors maintain the following insurance coverages:

- (i) Worker's Compensation Insurance in satisfaction of statutory requirements of the state where the property covered by this agreement is located. Also, Employers' Liability Insurance having limits of not less than \$500,000 each accident, \$500,000 per disease – policy limit, and \$500,000 per disease – each employee.
- (ii) Comprehensive General Liability Insurance having a combined single limit of not less than \$2,000,000 per occurrence for all loss, damage, cost and expense, including attorney's fees, arising out of bodily injury, liability and property damage liability during the policy period. Such policy shall be endorsed to name Norfolk Southern Railway Company as an additional insured and shall include a severability of interests provision. Any exclusion for construction or demolition activities (including installing wells or boring holes, but not for work done by means of a hand augur) conducted within 50 feet of railroad tracks shall be deleted from such policy.
- (iii) Automobile Liability Insurance having a combined single limit of not less than \$1 million per occurrence. Said policy shall name Norfolk Southern Railway Company as an additional insured and shall include a severability of interests provision.

b. Norfolk Southern Railway Company has advised the Ohio EPA that the limits, form, and substance of insurance policies and certificates of insurance are satisfactory. Said policies and certificates should be forwarded to Risk Manager, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia, 23510.

- Ohio EPA shall promptly provide copies of all reports pertaining to the Work to Norfolk Southern Railway Company by mailing them to Tim Barber at the following address:

Tim Barber
Environ
P.O. Box 405
13801 West Center Street, Suite 1
Burton, Ohio 44021

The written permission and Consent for Access to Property is also subject to (a) advance notice of accessing the Property, which shall be provided by calling the Terminal Superintendent at 484-992-2264 and Tim Barber at 440-834-1460 at least 24 hours in advance and (b) compliance with Norfolk Southern Railway Company's instructions pertaining to rail safety, which shall be provided in a safety briefing conducted with applicable Norfolk Southern Railway Company personnel before entering the Property or other appropriate means.

This written permission and Consent for Access to Property is given by me voluntarily, on behalf of the Norfolk Southern Railway Company, owner of the Slip 5A Peninsula Property, with knowledge of my right to refuse and without threats or promises of any kind.

By giving consent, the authorized signatory does not waive or otherwise compromise the property owner's rights under federal, state or local law, nor under common law, with the exception of those rights waived in giving this consent.

This written permission and Consent for Access shall expire 3 years from its effective date, unless earlier withdrawn, in which case notice of such withdrawal shall be made at least 24 hours in advance. The parties shall work in good faith to execute an authorization extending this expiration date, if needed.

Norfolk Southern Railway Company



Signature

4/14/11

Date

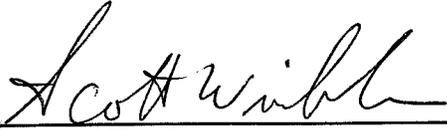
F. Blair Wimbusch

Printed or typed name

Vice President - Real Estate

Title

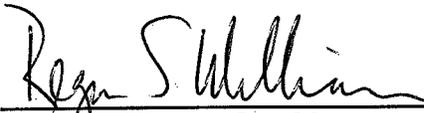
ACKNOWLEDGED:



Scott Winkler, Project Manager
Ohio Environmental Protection Agency
Northeast District Office
2110 E. Aurora Road
Twinsburg, Ohio 44087

5/5/2011

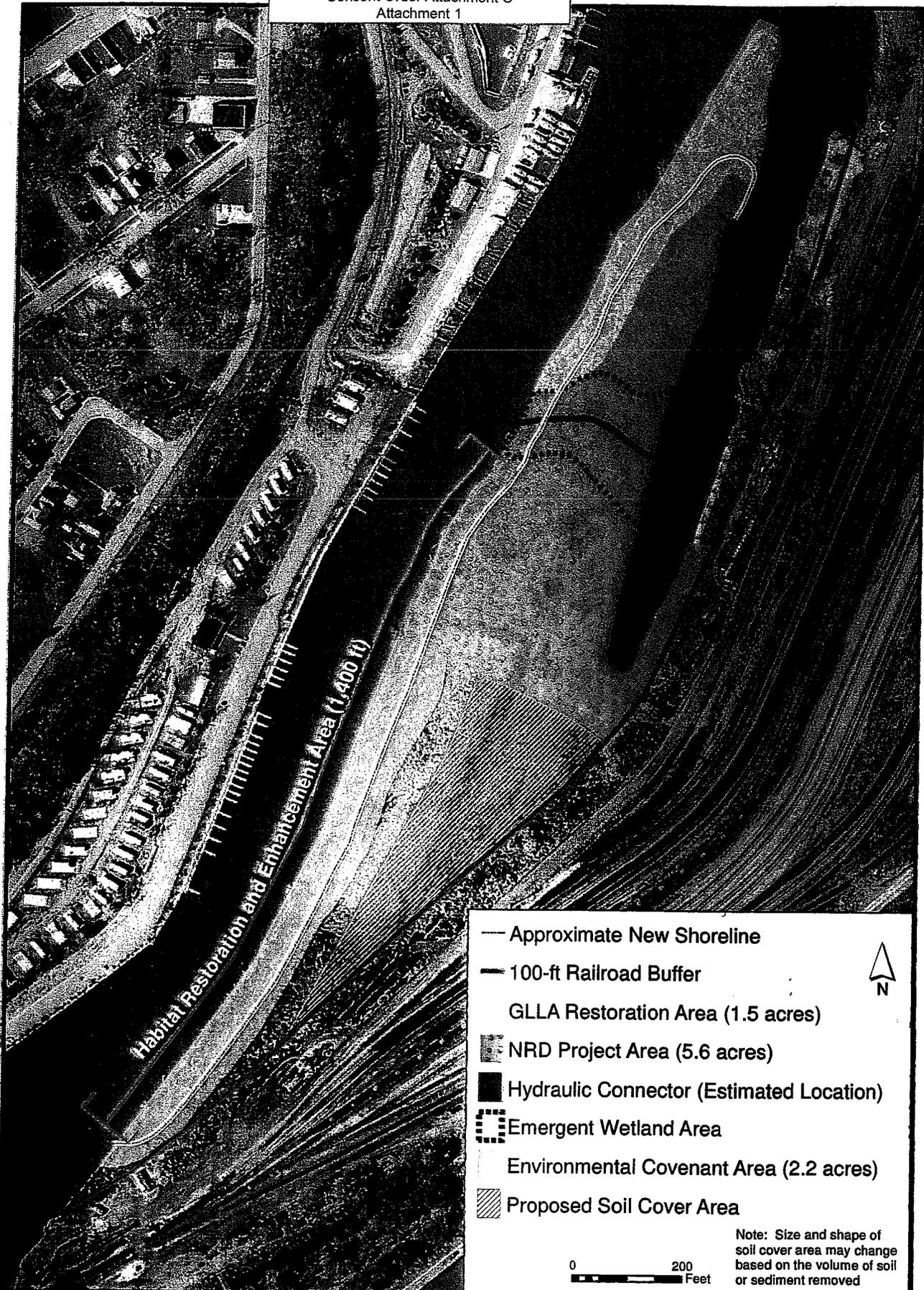
Date



Regan Williams, Site Manager
Ohio Environmental Protection Agency
Northeast District Office
2110 E. Aurora Road
Twinsburg, Ohio 44087

5/5/11

Date



ENVIRON

13801 West Center Street, Burton, Ohio 44021

**Restoration Project Locations
Ashtabula, Ohio**

**Figure
1**

Consent Order Attachment C
Attachment 2

Great Lakes Restoration Initiative Proposal

Funding Opportunity Number: EPA-R5-GL2010-1

Focus Area: Habitat and Wildlife Protection and Restoration

Program: Habitat Restoration in Great Lakes Areas of Concern

Project Title: Ashtabula River Area of Concern Habitat Restoration

Point of Contact: Julie Letterhos
614-644-2871 (phone)
614-644-2745 (fax)
julie.letterhos@epa.state.oh.us

Ohio Environmental Protection Agency
Division of Surface Water
Lazarus Government Center
50 West Town Street, Suite 700
Columbus, OH 43215-1049

DUNS Number: 809172372

Type of Organization: State Agency

Proposed Funding Request: \$1,578,458

Project Description:
Approximately 1400 ft. of fish habitat shelves will be installed along the east bank of the Ashtabula River Lake Erie Area of Concern. The Ashtabula River habitat restoration and enhancement plan identified this 0.5 mile area in the middle of the Area of Concern as the highest priority area for successful habitat restoration. Since contaminated sediment has been remediated, habitat restoration is now the focus to restore and delist the Area of Concern. Combined with several other complementary habitat projects in the same area, this effort will lead directly to delisting three beneficial use impairments: degraded fish populations; degraded benthos; and loss of fish habitat.

Key Terms: Area of Concern, habitat restoration, beneficial use impairment, delisting

Project Location

General Description: Lower Ashtabula River in Northeast Ohio, 1 mile upstream from Lake Erie
8-Digit HUC Code: 04110003
41.8956 (Lat): 80.7955 (Long)
Ohio, Ashtabula County
City of Ashtabula, 44004

Project Narrative

Strategic Approach

This project will restore habitat in a Great Lakes Area of Concern. The restoration and delisting of the Great Lakes Areas of Concern is one of the main goals of Annex 2 in the Great Lakes Water Quality Agreement. U.S. EPA's Strategic Plan lists restoration and delisting of Great Lakes Areas of Concern under sub-objective 4.3.3 to "Improve the Health of the Great Lakes". The restoration of the Areas of Concern is expected to have a significant impact on the ecosystem integrity of the Great Lakes. Both the Great Lakes Regional Collaboration and the Great Lakes Restoration Initiative have components that specifically address the efforts needed to restore the Areas of Concern. Sediment remediation and habitat restoration in particular are singled out as priorities. The draft Great Lakes Restoration Initiative Action Plan proposes an interim objective to delist 34 habitat-related beneficial use impairments across the Great Lakes Areas of Concern by 2014. At least three of those could come from Ashtabula with the implementation of this project.

The proposed project will excavate and install approximately 1,400 ft. of fish shelves along the east bank of the Ashtabula River, near the middle of the Area of Concern (AOC). It is ready to be implemented. It is part of a larger, comprehensive plan for habitat restoration and enhancement in the Ashtabula River AOC. No additional studies are needed and only minimal changes are required to scale down the design plans from a larger project to fit the funding limits of this RFP. In order to understand the causes of the beneficial use impairments and the steps that have already been taken to remediate and restore this area, a brief background on the long history follows. The project lies within one mile from Lake Erie and is in the lake effect/estuary zone.

Background

The lower Ashtabula River was transformed into a deep draft commercial harbor beginning in the early 1800s. Much of the river shoreline was altered to support various port-based industries and bulk-headed to accommodate shipping and shipbuilding. The land adjacent to the lower river was lined with rails to accommodate the railroads that handled the inland movement of coal and iron ore in and out of the port. Virtually no natural habitat remained. Most of the river shoreline remains bulk-headed today and now provides dockage for recreational marinas. Commercial shipping is restricted to the harbor area downstream of the 5th Street Bridge.

In addition to the port activities, around the 1940s a number of interdependent chemical companies began operation along Fields Brook, which is a tributary to the lower river. Over time, Fields Brook and the lower Ashtabula River became heavily contaminated with polychlorinated biphenyls (PCBs), chlorinated benzene compounds, chlorinated ethenes, hexachlorobutadiene, polycyclic aromatic hydrocarbons (PAHs), and heavy metals. Fields Brook was named a Superfund site in 1983. The lower two miles of the Ashtabula River were designated as a Great Lakes AOC in 1985. The 1987 Great Lakes Water Quality Agreement outlined the components of developing a remedial action plan to identify and restore all beneficial use impairments (BUI). Six BUIs were documented for Ashtabula including the three habitat related BUIs for loss of fish habitat, degraded fish populations and degraded benthos populations, as well as fish tumors and other deformities, dredging restrictions and fish consumption.

U.S. EPA began work on the cleanup of the Fields Brook Superfund site in the late 1980s, and Ohio EPA worked with the local community to establish the Ashtabula River Remedial Action Plan Advisory Council in 1988. This group became very active in identifying the problems and developing a remedial action plan (RAP) for the river. There was also concern that the pollutant sources from Fields Brook needed to be controlled or remediated before the river could be cleaned up. Many studies were done to determine where the pollutants were in the river and if there was any ongoing contamination. By then, the river had become a severe navigation hazard as well as a degraded ecosystem. Several intensive attempts to get the river dredged resulted in only a small interim sediment removal project that temporarily relieved the navigation hazard. Realizing that river habitat restoration efforts would be futile until the contaminated sediments were remediated, the Ashtabula River RAP Advisory Council temporarily set aside its efforts and merged with a new partnership to focus exclusively on dredging the river. This Ashtabula River Partnership included federal, state and local government agencies as well as local businesses, elected officials, citizens and the industries responsible for contributing to the pollution in the river.

With the intent of getting the river dredged under environmental authorities of the Corps of Engineers, the Ashtabula River Partnership worked with the Corps to complete an extensive Comprehensive Management Plan/Environmental Impact Statement that followed the federal NEPA guidelines. This report was completed in 2002 and included plans to rehabilitate habitat in the 5 ½ Slip area as well as to dredge the river. It essentially also served as the RAP Stage 2 implementation plan (http://www.epa.gov/glnpo/aoc/ashtabula/ARP_CMP_VOLUME_1.pdf). Unfortunately, repeated delays in approving federal funding for the Corps' budget continued to prevent the river from being dredged.

The passage of the Great Lakes Legacy Act (GLLA) in 2002 provided another opportunity for the Ashtabula River Partnership. After additional studies and further collaboration, and at a 50/50 cost share, approximately 500,000 yd³ of contaminated sediments were removed from the river in 2006 and 2007 under the GLLA. Another 140,000 yd³ were removed by the Corps of Engineers in 2008. The State of Ohio, Ashtabula River Cooperating Group, and the Ashtabula Port Authority also contributed funding to the remediation. Total cost was approximately \$75 million. The project utilized some innovative methods by which sediments were dredged hydraulically (to minimize release of contaminants), pumped several miles upland to the landfill built specifically for this remediation, and disposed in geotubes. The effluent from the geotubes as the sediments dewatered was collected and treated prior to discharge.

It is expected that the Superfund actions along Fields Brook and the removal of contaminated sediments from the river have eliminated the sources of contaminants and the degradation due to toxicity and poor water quality. Habitat restoration and enhancement can now move forward to complete the restoration of the Ashtabula River AOC. This section of the river does not meet the physical or biological criteria for warm water habitat aquatic life use in the Ohio Water Quality Standards nor the delisting targets established for the AOC. Upstream of the AOC the Ashtabula River is considered unimpaired, and was designated as an Ohio Scenic River in 2008 (<http://ohiodnr.com/tabid/21442/Default.aspx>). Ohio Scenic Rivers are recognized as high quality streams that should be protected for future generations. Since the watershed upstream of

the AOC is already attaining and in many areas exceeding Ohio water quality standards, this proposed project will play a significant role in the goal of bringing the entire watershed into attainment. The habitat improvements in this project will lie within a mile of Lake Erie.

A Natural Resource Damage Assessment for the lower river was begun in 2001 by the Natural Resource Trustees (Ohio EPA, NOAA and USFWS) under the authority of the Superfund (CERCLA) program. Studies in the early 2000s documented injuries to surface water, fisheries, and avian resources. The associated studies, including the 2009 final plan and assessment, can be found at www.fws.gov/midwest/AshtabulaNRDA. Final settlements are still being negotiated to compensate for the natural resource injury.

In 2007, Ohio EPA commissioned the development of a habitat restoration and enhancement plan for the Ashtabula River Area of Concern (Midwest Biodiversity Institute, 2008 http://www.epa.state.oh.us/dsw/rap/MBIAShtabulaReport_mar08.pdf). The purpose of the plan was to prioritize habitat restoration and enhancement options in the AOC that could then be implemented under the direction of the Natural Resource Damage program, the RAP, the GLLA or other programs. It was determined that a location known as the 5 ½ Slip and Peninsula had the highest priority for habitat improvement. This site is an approximately 11 acre peninsular property on the eastern bank of the Ashtabula River. It is centrally located in the two mile long AOC and has approximately 0.5 miles of shoreline along the river and an additional 1700 ft of shoreline in a backwater area that was once the mouth of Fields Brook (Figure 1 in attachments). The property had been used for material transfer and storage by the railroad (most recently Norfolk and Southern). The associated slip or backwater area had been used for ship to rail transfer, and for dismantling Great Lakes ships for scrap (Figure 2 in attachment). All rail lines on the peninsula were removed decades ago and the property is unused at this time. The 5 ½ Slip area is one of the few locations left in the AOC that is not hard armored with sheet piling and/or lined with boat docks. A series of interconnected projects for this area were proposed under the habitat restoration and enhancement report. Implementation of the projects as a whole would have more impact than implementation of each project separately. However, the limits of funding sources dictated that each project be pursued individually.

For the first of these projects, in January 2010, U.S. EPA/GLNPO completed excavation and construction of approximately 800 linear feet of fish habitat shelf along the northern part of the 5 ½ Slip Peninsula as habitat mitigation under the GLLA sediment remediation project. The project will be finalized in the spring of 2010 by top soil placement and planting of aquatic and upland vegetation.

Also in 2010 it is expected that a Natural Resource Damage Restoration project will be constructed by Norfolk and Southern Railroad to improve the shoreline slopes and create natural vegetated shoreline around much of the slip on the eastern side of the peninsula. That project will create 3.62 acres of upland shrub habitat over much of the peninsula, and construct a channel with one acre of connected wetland that will provide hydrologic flow and oxygenated water to the slip. The fish shelf proposed in this GLRI application will connect to these previous projects and create improvements above and beyond the effects of each individual habitat project (Attachment Figure 3).

Project Description (Technical and Scientific Merit)

The habitat shelf will be constructed by excavating approximately 1,400 ft of currently steep slopes (< 1:1) adjacent to the existing river navigation channel. The adjacent river channel was dredged for removal of contaminated sediment under the GLLA and now averages about 20 feet in depth. It is comprised of solid clay that does not provide quality habitat and does not promote the growth of aquatic vegetation. The shelf will be excavated to a maximum depth of approximately five feet and taper to the existing grade to ensure that habitat features will continue to function with water level fluctuations. The steep slope adjacent to the shipping channel will be enhanced by adding large rock to provide varied habitat for fish and benthic organisms. The existing hard clay surface exposed during construction of the fish shelf will be covered with sand to allow for vegetative growth and habitat for benthic invertebrates. Native aquatic vegetation will be planted in keeping with the desired final condition and stabilization of the site.

Diversity will also be accomplished by placing boulders, boulder piles, cobble piles, and gravel spawning areas along the shelf. These areas of hard structure will create holes, pockets, travel lanes, and increased edge areas in the vegetation. Trees and other wood have been incorporated in the plan for instant habitat although the river is expected to transport woody debris to this area naturally.

The water levels of Lake Erie commonly fluctuate through the seasons and from year to year. In order to maintain functional wetlands under these conditions, the banks were designed with a 6:1 slope and the entire zone of fluctuation will be planted in wetland plants to provide a seed bank that will flourish with the changing water levels. The banks and riparian zones will be planted with trees and shrubs to naturalize and prevent erosion. In time the trees and shrubs will create overhanging limbs and root mats for additional aquatic habitat. (Attachment Figure 4).

Construction activities will include surveying, land clearing (woody material will be retained for reuse), excavation, soil removal, substrate placement, bank stabilization, riparian planting, and aquatic vegetation planting. Of these activities, some land clearing has already been accomplished and it is anticipated that actual construction can begin as soon as the contracts can be awarded. All of the construction work will be contracted. Contractors will be required to meet all State of Ohio contract requirements, as well as any applicable federal assurances and requirements. This will include the need for safety plans for all activities and activities necessary to address GLRI's reporting needs to track the progress of the project. Ohio EPA staff will be on site to monitor and oversee the implementation of the project.

As the area for the fish shelf was once under industrial use, soil contamination was a realistic possibility. Soil samples were taken in the 38 locations shown in the Supplementary Information Attachment Figure 4. Field sampling was completed on January 30, 2009 under a joint effort of Ohio EPA and U.S. EPA-GLNPO contractor, CH2MHill. Two separate samples were obtained from each of these 38 sampling locations. The uppermost soil was sampled to determine the feasibility to reuse the soil on or off site or to determine the appropriate disposal method in the event contamination was found above regulatory levels. A sample was obtained of the soil below the depth of the proposed construction to determine if contamination would be exposed to the environment during and after construction. The results show that the soil is acceptable for

reuse upland. However, Norfolk and Southern Railroad, the owner of the property, has stipulated that all excavated soil must be transported to a licensed sanitary landfill. Pre-project sampling of the fish community and habitat in the area has been completed in accordance with Ohio EPA protocols to establish baseline conditions to compare with post construction results and delisting targets. Benthos sampling was not conducted as the lack of substrate and the recently dredged deep ship channel are not conducive to invertebrate colonization.

Permits and Other Information

U.S. EPA-GLNPO has obtained a Section 404 Nationwide 27 permit from the US Army Corps of Engineers that includes the area proposed in this application. In the event that Ohio EPA is awarded this grant, the NW 27 permit will be transferred to Ohio EPA. The Ohio Coastal Management Program has determined that this project is consistent with Ohio coastal policies and did not object to the construction of this project. This project is included in the US Army Corp of Engineers Great Lakes Habitat Initiative data base as developed under the Great Lakes Regional Collaboration. The purpose of the data base is to identify habitat restoration and funding needs and to assist in setting priorities for funding habitat projects in the Great Lakes.

Project Timelines

Dates are approximate and will be revised based on the date a grant is awarded. Activities are also subject to weather conditions that may shut down construction (i.e. subfreezing temperatures, deep snow cover). Plantings must be done at the appropriate time of year to ensure they grow. These issues may change or prolong the project period.

Activity	Date
Receive award	May 2010
Prepare and release bid for construction contract	June 2010
Select contractor and finalize contract	August 2010
Submit First Quarterly Report	August 2010
Host Public Event with RAP to Explain the Project	August 2010
Excavation and construction of fish shelf	August – November 2010
Submit Second Quarterly Report	November 2010
Submit Third Quarterly Report	March 2011
Plantings	April – June 2011
Initial Post Construction Monitoring	August 2011
Final project report	October 2011

Cost Effective Manner for Facilitation

This project will implement a project that is shovel ready. Project plans and designs have been developed with the input of U.S. EPA as well as U.S. FWS and NOAA. No further review is needed. Once a grant is awarded, most of the work performed under this proposal will be done via contract. Ohio EPA staff will prepare all bid packages and ensure that all state and federal requirements are considered. Criteria will be developed to guide the selection of a contractor.

U.S. EPA/GLNPO staff involved in the 2010 fish shelf project will be consulted to ensure a smooth transition from that project to this project. Contracts will be prepared and overseen by Ohio EPA. Ohio EPA staff will be on site monitoring the progress of the excavation and installation, and document progress via photos and required contractor reports. We also intend to use any leftover materials from U.S. EPA's project that are left on site, whenever possible, to avoid costs associated with hauling them out and having to haul new materials back in.

This project is one of a series of projects developed by State of Ohio agencies to address the Great Lakes Restoration Initiative. This project has been designed by Ohio EPA to reduce the amount of oversight and the number of grants that U.S. EPA is required to administer in Ohio. Ohio EPA is willing to bundle this project with other projects selected for funding to result in a single formal application and grant for the Ohio EPA projects that are funded.

The idea and design of the fish shelf will certainly be transferable to other locations. In fact, fish shelves have already been used previously with great success in the Black River AOC. The design will be a bit different from site to site, but the basic concepts are the same.

Outcomes, Outputs and Expected Results (Measurement of Progress)

The outcomes of this project will be: imminent delisting of the Ashtabula River Area of Concern; improvement of habitat directly connected to Lake Erie; an increase in the recreational potential of the Ashtabula River which could then lead to an increase in the economic potential of the area; and the opportunity to bring the entire watershed into attainment.

The expected outputs and results of this project are: habitat restoration of 0.5 miles of riverbank and aquatic habitat; delisting of three habitat-related beneficial use impairments (fish habitat, fish populations and benthos) in the Ashtabula River Great Lakes Area of Concern.

Measuring Progress

The fish shelf was designed with the goal of producing the highest reasonable habitat score based on the Lake Erie Qualitative Habitat Evaluation Index (LQHEI). This methodology was developed by Ohio EPA for the Lake Erie shoreline and estuary areas under a grant from NOAA's Ohio Coastal Management Program (Thoma 2004). The Ohio EPA *Delisting Targets for Ohio Areas of Concern* document (<http://www.epa.ohio.gov/dsw/lakeerie/index.aspx>) identifies a LQHEI average greater than 55 as an acceptable target for the Lake Erie shoreline and lacustrine areas. Currently no site in the AOC scores higher than a LQHEI of 45. The LQHEI off the 5 ½ Slip Peninsula scored a 29. This project is designed to yield a LQHEI value exceeding 74 and raise the AOC average to the LQHEI delisting target of 55 allowing for delisting of the fish habitat beneficial use impairment. This fish shelf design is similar to a project that was completed in the Black River AOC in 2002. Sampling of the Black River shelf resulted in an increase of the Modified Index of Well-being score from 7.3 to 9.4 (delisting requirement 8.2) and the fish IBI increased from 39 to 46 (delisting target of 36). The turbid water of the Black River does not allow for the growth of submerged aquatic vegetation which is a major habitat component of the Ashtabula River project. Due to the addition of the aquatic plants, the Ashtabula River project is expected to far exceed the results observed in the Black River.

This project is designed to yield MIwb and IBI fish community indices values exceeding delisting target values and raise the AOC average to the delisting targets and allow the delisting of the fish population use impairment. By providing shallow water habitat along a federal navigation channel, this project is expected to raise the benthic macroinvertebrate values to an average range to allow benthos use impairment to be delisted.

The area of the fish shelf and connecting channel will be sampled for fish, macroinvertebrates, and habitat scores in 2011 and compared to the 2009 pre-construction sampling results and to delisting targets. This sampling will be included as part of another effort to measure the success of the sediment remediation dredging projects. The entire Ashtabula AOC will be sampled for fish populations, fish habitat, benthos, fish tumors and other deformities and fish tissue in 2011 and 2013.

Several rare or endangered species such as pugnose minnow, pugnose shiner, blackchin shiner, blacknose shiner, lake chubsucker, and spotted sucker are expected to colonize the area. The Ashtabula River is one of the few streams left in Ohio that has a strong population of bigeye chub which is a declining species in the state. This project will also increase mammal, bird, and macroinvertebrate populations. The Ashtabula River also has seasonal runs of steelhead trout and other lake fish migrating from Lake Erie to spawn in the river. This project will provide a needed staging area for the trout and other lake species in a zone where there is little other natural shoreline. It is expected that top level predators including northern pike, walleye, large and smallmouth bass, steelhead trout, and muskellunge will use this area and increase the interest of recreational fishermen.

Collaboration, Partnerships and Overarching Plans

The goals of habitat restoration in the Ashtabula AOC are included in a number of overarching plans. At the state level, the Ohio Lake Erie Protection and Restoration Plan ranks the restoration of Ohio's four Lake Erie Areas of Concern as a high priority. Implementation of at least one state led habitat restoration project in Ashtabula is included as an action to be implemented by 2011 (<http://www.lakeerie.ohio.gov/Portals/0/Reports/2008LEPRplan.pdf>). The Lake Erie LaMP identifies habitat loss and degradation as one of the top three stressors that must be addressed to restore Lake Erie. The alteration of natural lands throughout the Lake Erie watershed has greatly impacted the current state of the lake. One of the goals of the Lake Erie LaMP Habitat Strategy is to "restore, rehabilitate, enhance and reclaim degraded habitats and impaired hydrological function in the Lake Erie basin, with an emphasis on the lake-effect zone of the tributaries influencing the lake" (<http://epa.gov/greatlakes/erie.html>).

The success of the restoration progress in the Ashtabula River AOC has always been based on partnerships. A number of plans have been developed specifically for the Ashtabula River AOC over the years. The Ashtabula Stage 1 RAP (www.epa.gov/glnpo/aoc/ashtabula/Ashtabula-River-RAP.pdf) defined the beneficial use impairments and the sources/causes. The Ashtabula River and Harbor Comprehensive Management Plan laid out the sediment remediation plan and proposed habitat restoration (www.epa.gov/glnpo/aoc/ashtabula/ARP_CMP_VOLUME_1.pdf). The Post-Dredging Habitat Enhancement Plan Report for the Lower Ashtabula River (www.epa.state.oh.us/dsw/rap/MBIAshtabulaReport_mar08.pdf) identified the highest priority

areas for habitat restoration and enhancement in the AOC. It is the basis for the projects that are now being implemented in the AOC.

Work in the Ashtabula River AOC has always been highly visible and coordinated with a number of local, state, and federal organizations as well as with the interested public. The local community has actively participated in the numerous meetings and activities over the years. The plans for habitat restoration have been shared widely and this project is highly supported by the local community. They will be kept apprised of the actions and progress under this project. The Ashtabula River RAP Advisory Council plans to develop outreach materials for the local community. Information on the progress of this effort will be posted periodically in local news media and several information sessions will be planned. Highlights will also be included in the Ashtabula River RAP annual report. Since this project is located on private property, there will not be site visits for the general public. However, there will be regular updates on the progress and results of the project presented at Ashtabula River RAP Advisory Council meetings, which are open to all interested parties. The RAP Advisory Council plans to host several information sessions.

The habitat plans and implementation efforts to date have been a collaborative effort among U.S. EPA/GLNPO, U.S. Fish and Wildlife Service, NOAA, the U.S. Army Corps of Engineers, the Ashtabula River RAP Advisory Council, Ohio EPA, Ohio DNR, Ohio Sea Grant and Norfolk and Southern Railroad. All of these partners are continuing to seek additional sources of funding to complete the projects described under the Ashtabula River Habitat Enhancement Plan until habitat is restored (http://www.epa.ohio.gov/portals/35/rap/MBIAshTabulaReport_mar08.pdf).

Programmatic Capability

Ohio EPA Division of Surface Water is currently managing 24 active grant awards and more than 60 subgrants. It has managed grants to support Ohio's Area of Concern program since its inception in 1987. Our current Lake Erie program grant (GL00E56601) covers the period October 1, 2008 to November 15, 2011 with an award of \$1.45 million. The award is in the form of a cooperative agreement as we work extensively in partnership with U.S. EPA/GLNPO on the AOC and Lake Erie LaMP efforts. The previous cooperative agreement (GL00E05901) project period was from October 1, 2006 to September 30, 2008. Grant progress is tracked via the submittal of biannual reports and deliverables as specified in the grant work plan. The Agency has a national reputation as a leader in the development and use of biological criteria and habitat evaluation indices and has been involved in the remediation of a number of Superfund sites as well as brownfields. As a Natural Resource Trustee, Ohio EPA participates in Natural Resource Damage Assessments and the associated settlements, including those done for Fields Brook and the Ashtabula River AOC. Ohio EPA has a number of long-time, experienced staff who will be providing technical assistance at various points during this grant program. We expect to continue to work closely with U.S. EPA/GLNPO, USFWS, the Corps of Engineers and NOAA as we move toward restoring the Ashtabula River AOC.

Principal Program Staff and Qualifications

Name: Regan S. Williams (Sig)

Title: Environmental Specialist, Division of Emergency and Remedial Response.

Sig holds an M.S. in aquatic ecology and a B.S. in biology, both from Penn State University. His environmental work experience has been in academia, private industry and government. For the past 20 years he has been at Ohio EPA working on contaminated site remediation (Superfund and state-lead), natural resource damage assessments and habitat restoration (NRDA). Since 1992 he has been the state project manager for the contaminated sediment remediation projects, NRD assessments and habitat restoration projects on the Ashtabula River and Fields Brook Superfund Sites. This work routinely involves review and approval of all site related documents, field sampling, developing and implementing restoration plans and oversight of contractors. He is a member of the Ashtabula River Remedial Action Plan (RAP), the Ashtabula River Partnership from its inception in 1994 and also serves on the Ashtabula River Watershed Steering Committee. Coordination with federal agencies (USEPA, GLNPO, USACE, NOAA, USFWS), state agencies (Ohio DNR), local government and the general public is an integral part of his role as a project manager. Sig will be the onsite manager for this project.

Name: Ted Conlin

Title: Environmental Specialist, Division of Surface Water, Remedial Action Plan Coordinator
Ted holds a B.S. in biology, from Allegheny College. His environmental work experience has been in environmental laboratory analysis/management and government. He worked as both an analyst and laboratory manager for various environmental labs for approximately 13 years. For the past 15 years he has been at Ohio EPA, first for the Division of Drinking and Ground Waters and for the last 10 years as State Coordinator for the Black River Remedial Action Plan. Since 2008, he has also the Ashtabula River Remedial Action Plan Coordinator. The coordinator work routinely involves writing and review of documents relating to the RAP organizations, field sampling and review of sample data, the implementation of restoration plans and public outreach. Coordination with federal agencies (U.S.EPA/GLNPO, USACE), state agencies (Ohio Dept. of Health, Ohio DNR, Sea Grant), local government (health departments, soil and water conservation districts) and the general public is an integral part of his coordinator duties.

Name: Scott Winkler

Title: Environmental Specialist, Ohio EPA, Division of Surface Water
Scott has a BS in biology from Bowling Green State University and has employed by the Ohio EPA for 19 years. He spent 17 years in the Division of Solid and Infectious Waste Management where he reviewed designs and provided regulatory oversight during the construction and closure of landfills, transfer stations, composting sites, scrap tire recycling operations, liquid waste bulking facilities, waste relocation projects and other projects that involve large excavations and materials handling. He was involved in the contracting and oversight of scrap tire cleanups and other waste removals. For the last two years he has worked in the Division of Surface Water where his responsibilities include biological and chemical field sampling, and habitat evaluations using the Qualitative Habitat Evaluation Index (QHEI), Lake Erie Qualitative Habitat Evaluation Index (LQHEI), and the Headwater Habitat Evaluation Index (HHEI). He is also involved in TMDLs and reviewing 401 plans to evaluate the potential impacts on aquatic systems and the need for habitat mitigation. He will be setting up field operations, monitoring contractor efforts, and providing technical support in design, implementation and monitoring.

Name: Julie Letterhos

Title: Environmental Specialist 3, Ohio EPA, Division of Surface Water

Julie has a B.S. in biology from Bowling Green State University with a minor in chemistry. She has been the Lake Erie Program Coordinator in the Division of Surface Water since 1994 and has oversight of the State's RAP program for the Ashtabula, Maumee, Black and Cuyahoga River Areas of Concern. She is the Agency's representative on the Lake Erie Lakewide Management Plan Work Group and authored the LaMP 2000 Report and co-edited the LaMP 2002, 2004, 2006 and 2008 reports, and co-authored the LaMP Habitat Strategy. She has prepared and managed all of Ohio EPA's Lake Erie Program grants from U.S. EPA and the Great Lakes National program Office since 1988, as well as a number of sub-grants and contracts. She was the Ashtabula River RAP Coordinator from 1987 to 1993 and wrote the Stage 1 RAP for Ashtabula. She will assist in managing subgrants, contracts, and tracking progress of the grant.

Budget

Budget Category	Federal
Personnel	\$49,504
Fringe	14,737
Travel	
Equipment	
Supplies	
Contractual	1,500,000
Other	4,150
Indirect	10,067
Total	\$1,578,458

Acorn Statement: The State of Ohio is not subject to this prohibition. We are not an affiliate, subsidiary, or allied organization with ACORN and none of our projects will subcontract with ACORN or its affiliates, subsidiaries, or allied organizations.

Add Pictures, maps and Letters of Collaboration.

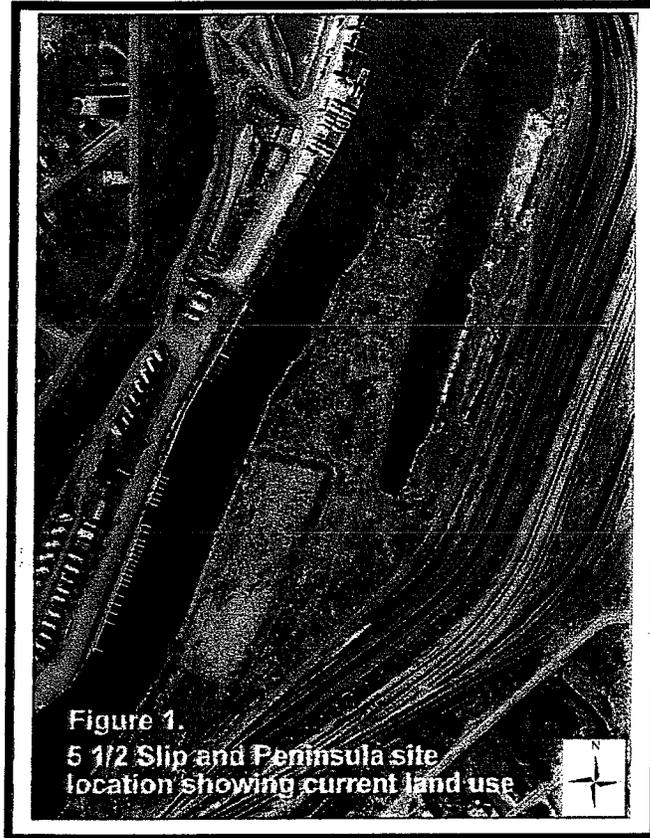


Figure 1.
5 1/2 Slip and Peninsula site
location showing current land use

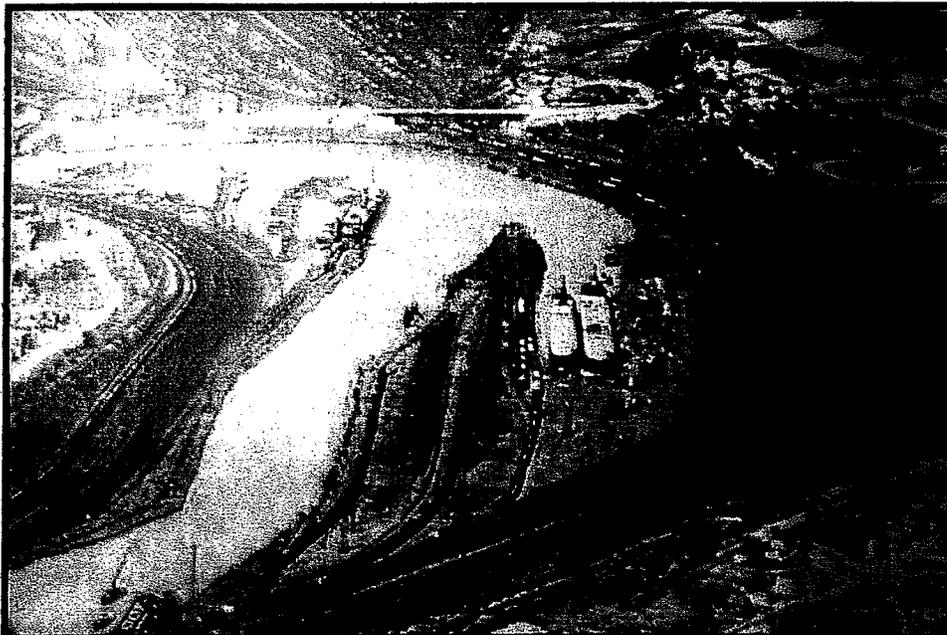
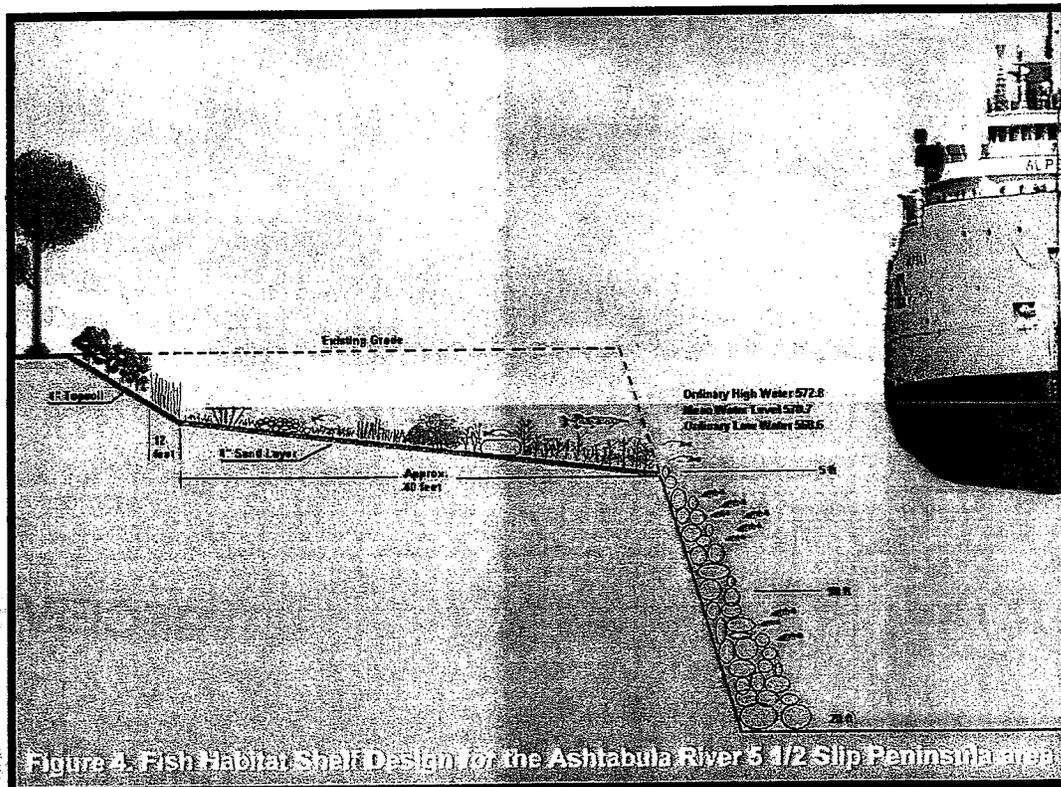
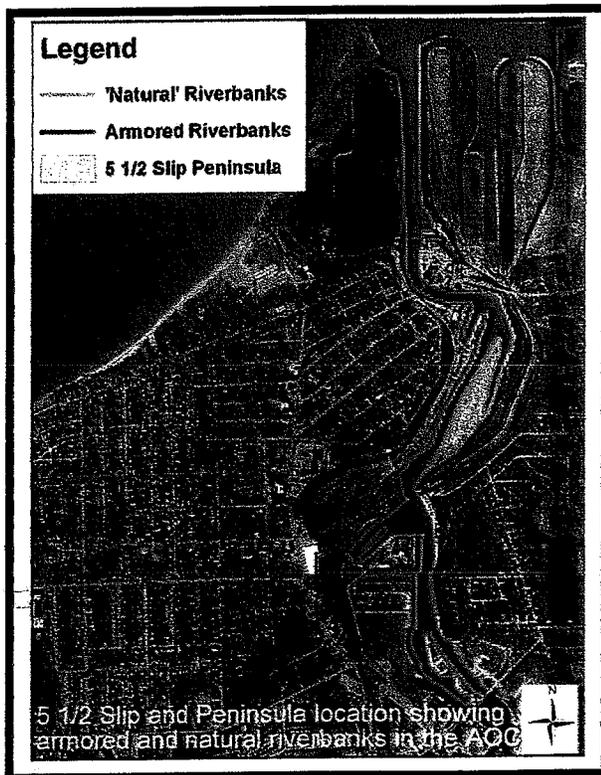
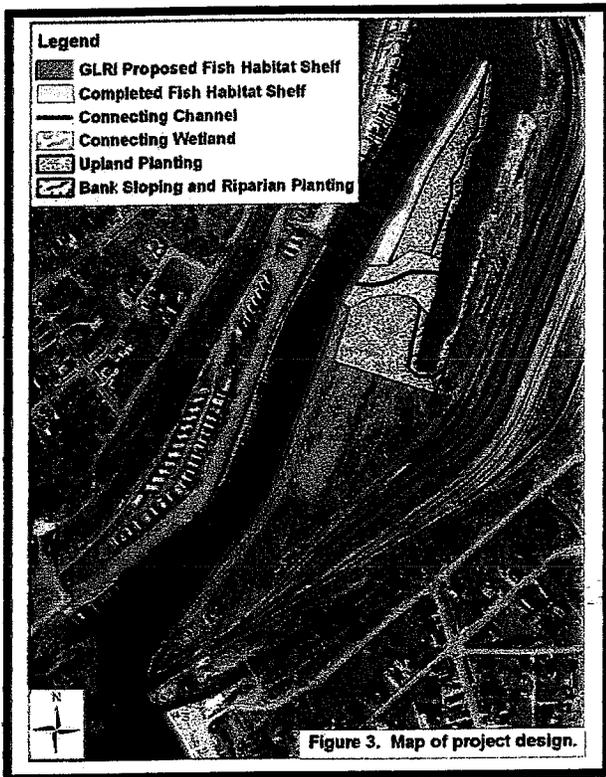


Figure 2. Historical photograph of the 5 1/2 Slip area showing past industrial use.



ATTACHMENT D

To be recorded with Deed
Records – O.R.C. § 317.08

ENVIRONMENTAL COVENANT

This Environmental Covenant is entered into pursuant to Ohio Revised Code ("O.R.C.") §§ 5301.80 to 5301.92 by Norfolk Southern Railway Company, a Virginia corporation (the "Owner" and "Holder"), having an address of 1200 Peachtree Street, Atlanta, Georgia 30309 and the Ohio Environmental Protection Agency ("Ohio EPA"), as a non-holder agency, for the purpose of subjecting certain property ("the Covenant Area", defined below) to the activity and use limitations set forth herein.

WHEREAS, the Owner is the owner in fee of certain real property, which contains the Covenant Area and is situated in Ashtabula County, Ohio, in the Ashtabula River watershed;

WHEREAS, Ohio EPA intends to construct a project under the Great Lakes Restoration Initiative ("GLRI") located along the shoreline on the southern portion of the Slip 5A property ("the Project Site"), to improve aquatic habitat in the Ashtabula River by installation of approximately 1,400 linear feet of submerged fish shelves, riverbank sloping and planting of upland vegetation ("Habitat Restoration and Enhancement Project");

WHEREAS, as part of the settlement between the State of Ohio and Norfolk Southern Railway Company in the case of *State of Ohio, ex rel. Cordray v. Norfolk Southern Railway Co.*, Case No. 2010 CV 0723 in the Ashtabula County Court of Common Pleas, Owner agreed as a Supplemental Environmental Project to protect the Covenant Area, which is a portion of the Project Site, in perpetuity with an environmental covenant;

WHEREAS, this agreement is documented in a Consent Order entered into by the State of Ohio and Norfolk Southern Railway Company, effective _____, 2011; and

WHEREAS, Owner proposes to fulfill its obligation to ensure the Covenant Area is protected in perpetuity by this Environmental Covenant.

Now therefore, Owner and Holder and Ohio EPA agree to the following:

1. Environmental Covenant. This instrument is an environmental covenant developed and executed pursuant to O.R.C. §§ 5301.80 to 5301.92.

2. Covenant Area. The Covenant Area is an approximately 2.2 acre tract of real property located along the shoreline on the southern portion of the Slip 5A property, some of which may be submerged following the completion of the Habitat Restoration and Enhancement Project, in Ashtabula County, Ohio, and more particularly described in Exhibit A [Exhibit A should be a meets and bounds description] and Exhibit B [Exhibit B

should be a map that depicts the covenant area] attached hereto and hereby incorporated by reference herein ("the Covenant Area").

3. Owner is the fee simple owner of the Covenant Area.
4. The Owner is the Holder of this Environmental Covenant.

5. Activity and Use Limitations. As part of the Consent Order entered into by the State of Ohio and Norfolk Southern Railway Company, effective _____, 2011, Owner hereby imposes the following activity and use limitations on the Covenant Area and agrees to comply with such limitations:

- a. Any division or subdivision of the Covenant Area is prohibited;
- b. Commercial development or industrial activity on the Covenant Area is prohibited;
- c. The placement or construction of any man-made modifications such as buildings, billboards, structures, fences, roads and parking lots, either temporary or permanent, on the Covenant Area is prohibited, other than construction activities that are authorized by GLRI grant GL-00E00568-0 or by the Ohio EPA;
- d. There shall be no filling, excavating, or removal of top soil, sand, gravel, or rock, minerals or other materials on or at the Covenant Area, nor any building of roads or change in topography of the Covenant Area in any manner, other than that caused by the forces of nature, except in accordance with GLRI grant GL-00E00568-0;
- e. The control, management and eradication of animal or plant species on the Covenant Area must comply with State and Federal requirements and manufacturer guidelines;
- f. No power or petroleum transmission lines may be constructed, nor may any other interests in the Covenant Area be granted for this purpose. However, the Owner reserves the right to maintain and repair telephone, electric, water, wells, or other utility lines or mains on existing easements needed to provide for the needs of the Owner, successors or assigns. In addition, the Owner reserves the right to undertake activities necessary to service and maintain nearby rail structures in accordance with applicable laws and standards. The area affected by the repair work shall be the minimum necessary to accomplish the task. Upon completion of all construction for such utilities or rail structures, the area shall be restored to its previous state, except in the case where rail safety laws or standards require otherwise, in

which case the area shall be restored to its previous state to the greatest extent possible;

- g. No towers for communication or otherwise shall be constructed on the Covenant Area;
- h. Any cutting of trees, ground cover or vegetation, or destroying by means of herbicides or pesticides on the Covenant Area is prohibited, other than the removal or control of invasive and noxious species and control activities that are authorized by the Ohio EPA or except as may be required in connection with activities covered by paragraph 5(f);
- i. Owner shall not store or place garbage, trash, machinery and other unsightly material on the Covenant Area;
- j. Use of vehicles for recreation, including snowmobiles, all terrain vehicles or other motorized vehicles, shall not be permitted on the Covenant Area;
- k. Natural water courses and streams and adjacent riparian buffers may not be dredged, straightened, filled, channelized, impeded, diverted or otherwise altered on the Covenant Area, other than as part of activities that are authorized by the Ohio EPA.

6. Breach. If any event or action by or on behalf of a person who owns an interest in or holds an encumbrance on the Covenant Area, or any other person constitutes a breach of the activity and use limitations, Owner or Transferee shall notify the Ohio EPA within thirty (30) days of becoming aware of the event or action, and shall remedy the breach of the activity and use limitations within sixty (60) days of becoming aware of the event or action.

7. Running with the Land. This Environmental Covenant, including the activity and use limitations set forth in paragraph 5 herein, shall be binding upon the Owner and all assigns and successors in interest, including any Transferee, and shall run with the land, pursuant to ORC § 5301.85, subject to amendment or termination as set forth herein. The term "Transferee," as used in this Environmental Covenant, shall mean any future owner of any interest in the Covenant Area including, but not limited to, owners of an interest in fee simple, mortgagees, easement holders, and/or lessees.

8. Compliance Enforcement. Compliance with this Environmental Covenant may be enforced pursuant to O.R.C. § 5301.91 or other applicable law. Failure to timely enforce compliance with this Environmental Covenant or the activity and use limitations contained herein by any party shall not bar subsequent enforcement by such party and shall not be deemed a waiver of the party's right to take action to enforce any provision of this Covenant. Nothing in this Environmental Covenant shall restrict the Director of Ohio

EPA from exercising any authority under applicable law in order to protect public health or safety or the environment.

9. Rights of Access. Owner hereby grants to Ohio EPA, its agents, contractors, and employees and the Holder or its agents the right of access to the Covenant Area in connection with the implementation or enforcement of this Environmental Covenant. Ohio EPA shall provide at least 24 hours advance notice to Owner before accessing the property, shall present proper credentials when seeking access, shall participate in a site safety briefing to be conducted by Owner and shall further make reasonable efforts to comply with appropriate safety instructions provided by Owner and to avoid disruption of rail operations.

10. Compliance Reporting. Upon the request of Ohio EPA, Owner and any Transferee shall submit to Ohio EPA written documentation verifying compliance with this Environmental Covenant. Such a request shall be made no more frequently than once a year.

11. Notice upon Conveyance. Each instrument hereafter conveying any interest in the Covenant Area or any portion of the Covenant Area shall contain a notice of the activity and use limitations set forth in this Environmental Covenant, and provide the recorded location of this Environmental Covenant. The notice shall be substantially in the following form:

THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL COVENANT, DATED _____, 20___, RECORDED IN THE DEED OR OFFICIAL RECORDS OF THE ASHTABULA COUNTY RECORDER ON _____, 20___, IN [DOCUMENT ____, or BOOK ____, PAGE ____]. THE ENVIRONMENTAL COVENANT CONTAINS THE FOLLOWING ACTIVITY AND USE LIMITATIONS.

[In the instrument conveying the property interest, the above text shall be followed by a restatement of the restrictions from Paragraph 5 of this Covenant.]

Owner shall use its best efforts to notify Ohio EPA within ninety (90) days after each conveyance of an interest in any portion of the Covenant Area. Owner's notice shall include the name, address and telephone number of the Transferee, a copy of the deed or other documentation evidencing the conveyance, a survey map that shows the boundaries of the property being transferred, and a copy of the original document that imposed restrictions on the Covenant Area.

12. Representations and Warranties. Owner hereby represents and warrants to the other signatories hereto:

- a. that the Owner is the sole owner of the Covenant Area;
- b. that the Owner holds fee simple title to the Covenant Area that is free, clear and unencumbered OR the Owner holds fee simple title to the Covenant Area that is free, clear and unencumbered with the exception of preexisting interests of record as set forth in Exhibit C¹;
- c. that the Owner has the power and authority to enter into this Environmental Covenant, to grant the rights and interests herein provided and to carry out all obligations hereunder;
- d. that the Owner has identified all other persons that own an interest in or hold an encumbrance on the Property and notified such persons of the Owner's intention to enter into this Environmental Covenant; and
- e. that this Environmental Covenant will not materially violate or contravene or constitute a material default under any other agreement, document or instrument to which Owner is a party or by which Owner may be bound or affected.

13. Amendment. This Environmental Covenant may be amended only by consent of all of the following: the Owner or a Transferee; the Holder; and the Ohio EPA, pursuant to ORC § 5301.90 and other applicable law. The term "Amendment" as used in this Environmental Covenant, shall mean any changes to the Environmental Covenant, including the activity and use limitations set forth herein, or the elimination of one or more activity and use limitation when there is at least one activity and use limitation remaining.

This Environmental Covenant may be amended only by a written instrument duly executed by the Director of Ohio EPA and the Owner or Transferee of the Property and the Holder, as applicable. Within thirty (30) days of signature by all requisite parties on any amendment of this Environmental Covenant, the Owner or Transferee shall file such instrument for recording with the Ashtabula County Recorder's Office, and shall provide a file and date-stamped copy of the recorded instrument to the Ohio EPA.

14. Severability. If any provision of this Environmental Covenant is found to be unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

15. Governing Law. This Environmental Covenant shall be governed by and interpreted in accordance with the laws of the State of Ohio.

16. Recordation. Within thirty (30) days after the date of the final required

¹ For interests such as preexisting mortgages, Ohio EPA will likely seek to require the owner to obtain an agreement of the mortgage holder to subordinate the mortgage to the covenant because if the property is foreclosed upon, the covenant will not prevail against a preexisting mortgage.

signature upon this Environmental Covenant, the Owner shall file this Environmental Covenant for recording, in the same manner as a deed to the property, with the Ashtabula County Recorder's Office.

17. Effective Date. The effective date of this Environmental Covenant shall be the date upon which the fully executed Environmental Covenant has been recorded as a deed record for the Covenant Area with the Ashtabula County Recorder. This Environmental Covenant shall remain in effect in perpetuity as provided in R.C. § 5301.89.

18. Distribution of Environmental Covenant. The Owner shall distribute a file-and date-stamped copy of the recorded Environmental Covenant to: Ohio EPA, the City of Ashtabula, the Holder, each person holding a recorded interest in the Property, and any other person designated by Ohio EPA.

19. Notice. Unless otherwise notified in writing by or on behalf of the current owner or Ohio EPA, any document or communication required by this Environmental Covenant shall be submitted to:

Manager, Storm Water and Enforcement Section
Division of Surface Water
Ohio EPA
P.O. Box 1049
Columbus, Ohio 43216-1049

Environmental Manager
Division of Surface Water
Ohio EPA
Northeast District Office
2110 East Aurora road
Twinsburg, Ohio 44087

General Counsel – Operations
Law Department
Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-9241

Vice President – Safety and Environmental
Environmental Protection Department
Norfolk Southern Corporation
1200 Peachtree Street
Atlanta, Georgia 30309

20. Counterparts. This Covenant may be executed in several counterparts, each of which may be deemed an original, and all of such counterparts together shall constitute one and the same Covenant.

The undersigned representative of the Owner/Holder represents and certifies that he or she is authorized to execute this Environmental Covenant.

IT IS SO AGREED:

OWNER/HOLDER:

By: _____

Its: _____

Date: _____

State of _____)
County of _____) ss:

Before me, a notary public, in and for said county and state, personally appeared _____, a duly authorized representative of _____, who acknowledged to me that *[he/she]* did execute the foregoing instrument on behalf of _____.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this ____ day of _____, 20__.

Notary Public

OHIO ENVIRONMENTAL PROTECTION AGENCY

By: _____
Director

Date: _____

State of Ohio)
)
County of Franklin)

ss:

Before me, a notary public, in and for said county and state, personally appeared _____, the Director of Ohio EPA, who acknowledged to me that *[he/she]* did execute the foregoing instrument on behalf of Ohio EPA.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this ____ day of _____, 20__.

Notary Public