

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

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IN THE MATTER OF THE LEHIGH VALLEY :
RAILROAD DERAILMENT :
SUPERFUND SITE :
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LEHIGH VALLEY RAILROAD COMPANY, : Index Number:
 : CERCLA-02-2014-2010
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 Respondent. :
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 Proceeding under Section 106(a) of the Comprehensive :
 Environmental Response, Compensation, and Liability :
 Act of 1980, as amended, 42 U.S.C. § 9606(a). :
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ADMINISTRATIVE ORDER FOR
REMEDIAL ACTION

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order (“Order”) is issued to the Lehigh Valley Railroad Company (hereinafter, the “Respondent”) by the United States Environmental Protection Agency, Region 2 (“EPA”) and requires Respondent to perform remedial action activities associated with the soil vapor extraction system (“SVE”) component of the remedy for the Lehigh Valley Railroad Derailment Superfund Site (hereinafter, the “Site”) located in Genesee, Monroe and Livingston Counties, near the Town of LeRoy, New York.
2. This Order is issued to Respondent by EPA pursuant to the authority vested in the President of the United States under Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9606(a), and delegated to the Administrator of EPA on January 23, 1987, by Executive Order No. 12580 (52 Federal Register 2926, January 29, 1987). This authority was further delegated to the EPA Regional Administrators by EPA Delegation Nos. 14-14-A and 14-14-B and to the Director of the Emergency and Remedial Response Division in Region 2 by Regional Delegation R-1200, dated November 23, 2004.
3. EPA has notified the New York State Department of Environmental Conservation (“NYSDEC”) of this Order pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

II. PARTIES BOUND

4. This Order shall apply to and be binding upon Respondent and its directors, officials, employees, agents, successors and assigns. No change in the status or control of Respondent shall alter Respondent's responsibilities under this Order. Respondent is responsible for carrying out all activities required by this Order.

5. Until EPA notifies Respondent under Paragraph 86 that the Work has been completed, Respondent shall provide a copy of this Order to any prospective purchaser or successor before a controlling interest in Respondent's assets or property rights are transferred to any successor.

III. DEFINITIONS

6. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this Order or in an attachment to this Order, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.
- b. "Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- c. "Effective Date" shall be the effective date of this Order as provided in subsection VI.T (Opportunity to Confer, Effective Date).
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
- e. "NAPL/Spill Zone" shall mean the nonaqueous phase liquid ("NAPL") zone, which was estimated by NYSDEC in 1997 to be approximately 10 acres in size, and which is located in the general area of the 1970 train derailment that led to the contamination at the Site. The NAPL/Spill Zone was further defined during remedial design activities to generally include the area of soil contamination that exceeds the Remedial Action Objectives in the Record of Decision for the Site.
- f. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300, including any amendments thereto.
- g. "NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State.

- h. "Order" shall mean this Administrative Order and all appendices attached hereto. In the event of conflict between this Order and any appendix, this Order shall control.
- i. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.
- j. "Performance Standards" shall mean the cleanup standards and Remedial Action Objectives and other measures of achievement of the goals for of the Remedial Action set forth in the Record of Decision attached hereto as Appendix A and the Remedial Action Statement of Work for SVE (defined below) attached hereto as Appendix B.
- k. "Record of Decision" or "ROD" shall mean the Record of Decision relating to the Site signed by NYSDEC on March 28, 1997, partially adopted and as supplemented by EPA's memorandum of May 15, 2002.
- l. "Remedial Action for SVE" or "RA for SVE" shall mean the remedy component related to soil vapor extraction ("SVE") as authorized by the ROD, and further delineated in this Order and in the various EPA-approved plans referred to in the RA SOW.
- m. "Remedial Action Statement of Work for SVE" or "RA SOW for SVE" shall mean the Statement of Work attached hereto as Appendix A.
- n. "Remedial Action Work Plan for SVE" or "RA Work Plan for SVE" shall mean the document developed pursuant to the RA SOW and approved by EPA, and any amendments thereto.
- o. "Remedial Design" or "RD" shall mean those activities undertaken by Respondent pursuant to the EPA-approved Remedial Design Work Plan and includes the final plans and specifications for the SVE system selected in the ROD.
- p. "Remedial Design Report" or "RD Report" shall mean the document entitled, "Soil Remedial Design Report," as well as any amendments thereto. The RD Report is attached hereto as Appendix C.
- q. "Respondent" shall mean the Lehigh Valley Railroad Company.
- r. "Section" shall mean a portion of this Order identified by an upper-case Roman numeral and includes one or more Paragraphs. Sections may also include subsections identified by upper-case letters.
- s. "Settlement Agreement" shall mean the Administrative Settlement Agreement and Order on Consent, Index No. CERCLA 02-2006-2006, between EPA and Respondent for certain pre-RD investigations, remedial design of the SVE system, and a remedial investigation and feasibility study ("RI/FS") for groundwater at the Site.
- t. "Site" shall mean the Lehigh Valley Railroad Derailment Superfund Site, located in Genesee, Monroe, and Livingston Counties, near the Town of LeRoy, New York.

The Site includes the location of a chemical spill caused by a 1970 train derailment and the resulting contaminated groundwater plume. The Site is depicted generally on the map attached as Appendix D.

- u. "State" shall mean the State of New York.
- v. "Statement of Work" or "SOW" shall mean the Statement of Work attached to the Settlement Agreement.
- w. "United States" shall mean the United States of America.
- x. "Waste Material" shall mean (i) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any "pollutant or contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (iii) any "solid waste" under Section 1004(27) of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6903(27).
- y. "Work" means all activities Respondent is required to perform pursuant to this Order, except those required by Paragraph 61, below.

IV. EPA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

7. The Site is located in Genesee, Monroe and Livingston Counties, near the Town of LeRoy, New York and includes the location of a chemical spill caused by a 1970 train derailment, and the resulting contaminated groundwater plume. The Site is in a rural setting, and the surrounding area is used for residential, recreational, and commercial purposes.

8. On December 6, 1970 a train operated by the Lehigh Valley Railroad Company derailed at the Site, spilling approximately one ton of cyanide crystals and approximately 30,000 gallons of trichloroethene ("TCE"). An initial cleanup removed the cyanide crystals and the ruptured tank cars. TCE odors were noticed eight days after the derailment in the basement of the Knickerbocker Hotel, which is located 200 feet north of the spill area. The Lehigh Valley Railroad Company attempted to alleviate the odors by flushing the TCE out of the soil. The Railroad dug trenches near the spill area, pumped approximately one million gallons of water into the trenches and allowed it to percolate into the ground. Owners of private wells located along Gulf Road east of the spill area noticed TCE in their water supplies about a week after the spill.

9. By November 1971, seven wells had become contaminated with TCE concentrations of up to 171 parts per million. The Lehigh Valley Railroad Company provided drinking water to local residents with contaminated wells beginning in June 1971, and later installed and maintained charcoal-filtering systems at the affected wells.

10. In September 1989, TCE was detected during routine sampling of the Genesee County Campground well located more than 1.5 miles east of the spill area. Further sampling of private wells by the New York State Department of Health, EPA, and NYSDEC between 1990 and 1994 detected TCE in approximately 50 wells located east or southeast of the spill area. In December 1991, EPA began installing granular-activated carbon water-treatment systems at 37 locations.

11. In September 1992, the State commenced an RI/FS for the Site pursuant to State law.

12. The State completed a Remedial Investigation Report in October of 1996, and two Feasibility Study Reports in January and February of 1997. The State's investigation found high concentrations of TCE in the soil at the NAPL/Spill Zone and in the bedrock, particularly in the vadose zone of the bedrock beneath the NAPL/Spill Zone. The State also detected TCE in monitoring wells situated approximately about three and a half miles downgradient from the NAPL/Spill Zone. The State published notice of the completion of the FS and of a proposed plan for a remedial action on February 14, 1997.

13. The decision by the State on a remedial action to be implemented at the Site is embodied in a ROD, executed on March 28, 1997. The State selected ex-situ SVE and in-situ bedrock vapor extraction ("BVE") as source-control measures, and a water-line extension to provide a safe potable water supply to all affected residents and businesses. The State's ROD also provided for monitoring of the groundwater.

14. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA proposed the Site for inclusion on the National Priorities List ("NPL"), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on July 28, 1998, 63 Fed. Reg. 40247. EPA placed the Site on the NPL by publication in the Federal Register on January 19, 1999, 64 Fed. Reg. 2941.

15. On August 7, 1998, the State submitted to EPA the RI/FS Reports and the 1997 ROD and requested that EPA approve the 1997 ROD and assume responsibility for the source-control components of the remedy. The State agreed to continue its work on the waterline component of the remedy.

16. On July 27, 1999, EPA concurred with the waterline component of the remedy selected in the 1997 ROD. However, EPA withheld concurrence on the source-control components of the ROD pending the results of a pilot study that the State was conducting. EPA also indicated that it would assume the lead role for future groundwater studies at the Site.

17. The State's pilot study indicated that ex-situ SVE should be effective in achieving the soil cleanup objectives in the ROD.

18. The State began construction of the waterline in December 2001. Construction was completed in July of 2003 and the waterline is currently providing potable water to about 70 affected residences and businesses in the area.

19. On May 21, 2002, EPA approved the source-control measures contained in the ROD, as supplemented by an EPA memorandum dated May 15, 2002.

20. On September 22, 2006, EPA Region 2 signed an Administrative Settlement Agreement and Order on Consent (“Settlement Agreement”) with Respondent, whereby Respondent agreed to perform certain pre-RD investigations, remedial design of the SVE system and an RI/FS for groundwater at the Site.
21. Pursuant to the Settlement Agreement, on or about December 14, 2010, Respondent submitted to EPA a Soil Data Summary Report and an addendum to that Report on January 27, 2011 which confirmed the continued presence of TCE at elevated levels at the Site. On September 27, 2013, EPA approved the final Soil RD Report that provides for the design of the SVE system.
22. TCE, which is a suspected carcinogen, has been detected in private drinking water wells at the Site at levels which exceed the New York State drinking water standards for public water supplies since 1982. Human exposure to TCE by ingestion, inhalation or direct contact can cause a variety of adverse health effects.
23. There is a threat of migration of TCE present at the Site which might further impact groundwater and the surrounding environment through, for example, surface run-off and/or percolation through contaminated soil of rain and melting snow.
24. There is a continuing threat of migration of TCE through groundwater that could contaminate additional residential wells resulting in further risks to human health and the environment.
25. TCE is a hazardous substance listed at 40 C.F.R. § 302.4 and is thus a hazardous substance as defined in Section 101(14) of CERCLA, 42 U.S.C. 9601(14).
26. The discharge of TCE from the Lehigh Valley Railroad Company train onto the ground at the Site is a “release” within the meaning of CERCLA Section 101(22). The continuing migration of hazardous substances in soils and groundwater at the Site also constitutes a “release” or a threat of “release” into the environment.
27. The Site constitutes a “facility” within the meaning of CERCLA Section 101(9), 42 U.S.C. § 9601(9).
28. Respondent is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Respondent is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
29. Respondent was the owner of the railroad right-of-way at the time that the TCE was released there. Respondent is thus a responsible party within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).
30. On September 5, 2013, Respondent informed EPA that it did not intend to negotiate a consent decree to implement the RA for the SVE component of the remedy.

V. DETERMINATIONS

31. Based on EPA's Findings of Fact and Conclusions of Law set forth above and the entirety of the administrative record, EPA has determined that the release or threatened release of hazardous substances at and from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

32. The actions required by this Order are necessary to protect the public health or welfare or the environment, are in the public interest, and are consistent with CERCLA and the NCP.

VI. ORDER

33. Based upon the foregoing Findings of Fact, Conclusions of Law, and Determinations, and upon the administrative record supporting the Record of Decision for this Site, EPA has determined that the actual or threatened release of hazardous substances at and from the Site may present an imminent and substantial endangerment to the public health, welfare, or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and it is hereby ordered that Respondent comply with all requirements of this Order including performance of the RA for SVE, as set forth in subsection VI.A. (Description of Work) and the RA SOW for SVE.

A. Description of Work

34. Respondent shall conduct the Work required hereunder in accordance with CERCLA, the NCP, the ROD, and this Order, including the RA SOW for SVE, as well as applicable provisions of the following guidance documents, and of other guidance documents referenced in the following guidance documents: *Uniform Federal Policy for Implementing Quality Systems* (UFP-QS), EPA-505-F-03-001, March 2005, *Uniform Federal Policy for Quality Assurance Project Plans* (UFP-QAPP), Parts 1, 2 and 3, EPA-505-B-04-900A, B and C, March 2005, *EPA Region 2's "Clean and Green Policy"* which may be found at http://www.epa.gov/region02/superfund/green_remediation/policy.html, *Guidance for Scoping the Remedial Design* (EPA 540/R-95/025, March 1995), and *Guide to Management of Investigation-Derived Wastes* (OSWER Publication 9345.3-03FS, January 1992), as they may be amended or modified by EPA. The tasks that Respondent must perform (including future deliverables) and the scope of such Work are identified in this Order, including the RA SOW for SVE which is incorporated into and is an enforceable part of this Order. Respondent shall perform the Work in accordance with the RA SOW for SVE and the attached RA Work Plan for SVE and all other deliverables approved, modified or issued by EPA under this Order, as they may be modified or amended pursuant to subsection IV.D., below, and Respondent shall also comply with all other requirements of this Order.

35. Respondent shall assure that field personnel used by Respondent are properly trained in the use of field equipment and in chain-of-custody procedures.

B. Designation of Contractor and Designated
Project Coordinator

36. Within ten (10) days after the Effective Date, Respondent shall select a coordinator to be known as the Project Coordinator and shall submit the name, address, qualifications, and telephone number of the Project Coordinator to EPA. The Project Coordinator shall be responsible on behalf of Respondent for oversight of the implementation of this Order. The Project Coordinator shall not be an attorney engaged in the practice of law. He or she shall have the technical expertise sufficient to adequately oversee all aspects of the Work contemplated by this Order. The Project Coordinator shall be knowledgeable at all times about all matters relating to the Work being performed under this Order.

37. Selection of the Project Coordinator shall be subject to approval by EPA in writing. If EPA disapproves a proposed Project Coordinator, Respondent shall propose a different person and notify EPA of that person's name, address, telephone number and qualifications within seven (7) days following EPA's disapproval. Respondent may change its Project Coordinator provided that EPA has received written notice at least seven (7) days prior to the desired change. All changes of the Project Coordinator shall be subject to EPA approval.

38. EPA correspondence related to this Order will be sent to the Project Coordinator. Notice by EPA in writing to the Project Coordinator shall be deemed notice to Respondent for all matters relating to the Work under this Order and shall be effective upon receipt. To the extent possible, the Project Coordinator shall be present on-Site or readily available for EPA to contact during all working days and be retained by Respondent at all times until EPA issues a notice of termination of this Order upon the completion of the Work in accordance with Paragraph 86.

39. Within ten (10) days after the Effective Date, Respondent shall notify EPA in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor to be used in carrying out work under the Order. With respect to any proposed Supervising Contractor, Respondent shall demonstrate that the proposed Supervising Contractor has a quality system that complies with the *Uniform Federal Policy for Implementing Quality Systems* ("UFP-QS"), EPA-505-F-03-001 (March 2005) or equivalent documentation as determined by EPA by submitting a copy of the proposed Supervising Contractor's Quality Management Plan. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Respondent proposes to change the Supervising Contractor, Respondent shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under the Order.

40. All activities required of Respondent under the terms of this Order shall be performed only by well-qualified persons possessing all necessary permits, licenses, and other authorizations required by Federal, State, and/or local governments consistent with Section 121 of CERCLA, 42 U.S.C. § 9621, and all Work conducted pursuant to this Order shall be performed in accordance with prevailing professional standards. All plans and specifications shall be prepared under the supervision of, and signed/certified by, a licensed New York professional engineer.

41. EPA retains the right to disapprove of any, or all, of the contractors and/or subcontractors proposed by Respondent to conduct the Work. If EPA disapproves of any contractor, EPA will notify Respondent in writing. Respondent shall submit to EPA another proposed contractor or list of contractors that would be acceptable to Respondent, including the qualifications of each contractor, within 30 days after receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Respondent may select any contractor that is not disapproved from that list and shall notify EPA of the name of the selected contractor within 21 days after EPA's authorization to proceed.

42. Respondent shall provide a copy of this Order to each contractor and subcontractor approved and retained to perform the Work required by this Order. Respondent shall include in all contracts or subcontracts entered into for Work required under this Order provisions stating that such contractors or subcontractors, including their agents and employees, shall perform activities required by such contracts or subcontracts in compliance with this Order and all applicable laws and regulations. Respondent shall be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Order.

C. Remedial Project Manager, Other Personnel and Modification to EPA-Approved Work Plan

43. EPA has designated Michael Infurna of the New York Remediation Branch, Emergency and Remedial Response Division, EPA Region 2, 290 Broadway, 20th Floor, New York, NY 10007-1866, (212) 637-4177, as its Remedial Project Manager (“RPM”) for the Site. Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to the RPM via e-mail at infurna.michael@epa.gov.

44. EPA, including the RPM, or his authorized representative, will conduct oversight of the implementation of this Order. The RPM shall have the authority vested in an RPM by the NCP, including the authority to halt, conduct, or direct any Work required by this Order, or to direct any other response action undertaken by EPA or Respondent at the Site consistent with this Order. Absence of the RPM from the Site shall not be cause for stoppage of Work unless specifically directed by the RPM.

45. As appropriate during the course of implementation of the actions required of Respondent pursuant to this Order, Respondent or its consultants or contractors, acting through the designated Project Coordinator, may confer with EPA concerning the required actions. Based upon new circumstances or new information not in the possession of EPA on the Effective Date of this Order, the Designated Project Coordinator may request, in writing, EPA approval of modification(s) to the EPA-approved RA Work Plan for SVE. In addition, Respondent may propose other additional investigations, studies, and response actions and, upon EPA approval of the same, Respondent shall conduct such actions pursuant to this Order. Only modifications approved by EPA in writing shall be deemed effective. Upon approval by EPA, such modifications shall be deemed incorporated in this Order and shall be implemented by Respondent.

D. EPA Review of Submissions

46. After review of any deliverable, plan, report or other item which is required to be submitted for review and approval pursuant to this Order, EPA may: (a) approve the submission; (b) approve the submission with modifications; (c) disapprove the submission and direct Respondent to re-submit the document after incorporating EPA's comments; and/or (d) disapprove the submission and assume responsibility for performing all or any part of the response action. As used in this Order, the terms "approval by EPA," "EPA approval," or a similar term means the action described in subparagraphs (a) or (b) of this Paragraph.

47. In the event of approval or approval with modifications by EPA, Respondent shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

48. Upon receipt of a notice of disapproval or a request for a modification, Respondent shall correct the deficiencies and resubmit the plan, report, or other item for approval within thirty (30) days or such other time as may be specified by EPA in its notice of disapproval or request for modification. Notwithstanding the notice of disapproval, or approval with modifications, Respondent shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission.

49. If any plan, report, or other item required to be submitted to EPA for approval pursuant to this Order is disapproved by EPA, even after being resubmitted following Respondent's receipt of EPA's comments on the initial submittal, Respondent shall be deemed to be out of compliance with this Order. If any resubmitted plan, report, or other item, or portion thereof, is disapproved by EPA, EPA may again direct Respondent to make the necessary modifications thereto, and/or EPA may amend or develop the item(s) and recover the costs of doing so from Respondent. Respondent shall implement any such item(s) as amended or developed by EPA.

50. EPA shall be the final arbiter regarding the sufficiency or acceptability of all documents submitted and all activities performed pursuant to this Order. EPA may modify those documents and/or perform or require the performance of additional work unilaterally.

51. All plans, reports, and other submittals required to be submitted to EPA under this Order shall, upon approval by EPA, be deemed to be incorporated in and an enforceable part of this Order. In the event EPA approves a portion of a plan, report, or other item required to be submitted to EPA under this Order, the approved portion shall be deemed to be incorporated in and an enforceable part of this Order.

E. Reporting Requirements

52. Reporting

- a. On the 15th day of every month after Respondent's receipt of EPA's approval of the RA Work Plan for SVE, Respondent shall submit written progress reports to EPA concerning actions undertaken pursuant to this Order. Respondent shall submit such written progress reports until termination of this Order or unless otherwise directed in

writing by EPA. These reports shall describe all significant developments since the time period covered by the preceding progress report, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

- b. Respondent shall submit copies of all plans, reports, or other submissions required by this Order, the RA SOW for SVE, or any approved work plan as set forth below. Any electronic submissions must be in a format that is compatible with EPA software and in database files and sizes to be specified by EPA. Reports should be submitted to the following:

4 copies: Michael Infurna, Remedial Project Manager, Lehigh Valley
Railroad Derailment Superfund Site
(1 bound final; Emergency and Remedial Response Division
2 unbound; United States Environmental Protection Agency, Region 2
2 electronic) 290 Broadway, 20th Floor
New York, New York 10007-1866
Infurna.michael@epa.gov

1 electronic copy: Chief, New York/Caribbean Superfund Branch
Office of Regional Counsel
United States Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
Attn: Lehigh Valley Railroad Derailment Superfund Site
Attorney
Wieder.marla@epa.gov

2 copies: Director, Division of Environmental Remediation
(1 unbound; New York State Department of Environmental
1 electronic) Conservation
625 Broadway, 12th Floor
Albany, New York 12233-7011
Attn: Lehigh Valley Railroad Derailment Site Project Manager
mddunham@gw.dec.state.ny.us

F. Oversight

53. During the implementation of the requirements of this Order, Respondent and its contractor(s) and subcontractors shall be available for such conferences with EPA and inspections by EPA or its authorized representatives as EPA may determine are necessary to adequately oversee the Work being carried out or to be carried out by Respondent, including inspections at the Site and at laboratories where analytical work is being done hereunder.

54. Respondent and its employees, agents, contractor(s) and consultant(s) shall cooperate with EPA in its efforts to oversee Respondent's implementation of this Order.

G. Community Relations

55. Respondent shall cooperate with EPA in providing information relating to the Work required hereunder to the public. As requested by EPA, Respondent shall participate in the preparation of all appropriate information disseminated to the public; participate in public meetings which may be held or sponsored by EPA to explain activities at or concerning the Site; and provide a suitable location for public meetings, as needed.

H. Access to Property and Information

56. EPA, NYSDEC and their designated representatives, including, but not limited to, employees, agents, contractor(s) and consultant(s) thereof, shall be permitted to observe the Work carried out pursuant to this Order. Respondent shall at all times permit EPA, NYSDEC, and their designated representatives full access to and freedom of movement at the Site and any other premises where Work under this Order is to be performed for purposes of inspecting or observing Respondent's progress in implementing the requirements of this Order, verifying the information submitted to EPA by Respondent, conducting investigations relating to contamination at the Site, or for any other purpose EPA determines to be reasonably related to EPA oversight of the implementation of this Order.

57. In the event that action under this Order is to be performed in areas owned by or in possession of a person other than Respondent, Respondent shall use its best efforts to obtain access agreements from such persons within forty-five (45) days of the Effective Date of this Order for purposes of implementing the requirements of this Order. Such agreements shall provide access not only for Respondent, but also for EPA and its designated representatives and agents, as well as NYSDEC and its designated representatives and agents. Such agreements shall specify that Respondent is not EPA's representative or agent with respect to liability associated with Site activities. If such access agreements are not obtained by Respondent within the time period specified herein, Respondent shall immediately notify EPA of its failure to obtain access and shall include in that notification a summary of the steps Respondent has taken to attempt to obtain access. Subject to the United States' non-reviewable discretion, EPA may use its legal authorities to obtain access for Respondent, may perform those response actions with EPA contractors at the property in question, or may terminate the Order if Respondent cannot obtain access agreements. If EPA performs those tasks or activities with EPA contractors and does not terminate the Order, Respondent shall perform all other activities not requiring access to that property. Respondent shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables.

58. Upon request, Respondent shall provide EPA with access to all records and documentation related to the conditions at the Site, hazardous substances found at or released from the Site, and the actions conducted pursuant to this Order except for those items, if any, subject to the attorney-client or work product privileges. Nothing herein shall preclude

Respondent from asserting a business confidentiality claim pursuant to 40 CFR Part 2, Subpart B. All data, information and records created, maintained, or received by Respondent or its contractor(s) or consultant(s) in connection with implementation of the Work under this Order, including, but not limited to, contractual documents, invoices, receipts, work orders and disposal records shall, without delay, be made available to EPA upon request, subject to the same privileges specified above in this Paragraph. EPA shall be permitted to copy all such documents. Respondent shall submit to EPA upon receipt the results of all sampling or tests and all other technical data generated by Respondent or its contractor(s), or on Respondent's behalf, in connection with the implementation of this Order.

59. Upon request by EPA, Respondent shall provide to EPA or its designated representatives duplicate and/or split samples of any material sampled in connection with the implementation of this Order.

60. Notwithstanding any other provision of this Order, EPA hereby retains all of its information gathering, access, and inspection authority under CERCLA, the Resource Conservation and Recovery Act, 42 U.S.C §§ 6901-6992k ("RCRA"), and any other applicable statutes or regulations.

I. Record Retention, Documentation, Availability of Information

61. Respondent shall preserve all documents and information relating to Work performed under this Order, or relating to Waste materials found on or released from the Site, for ten years after completion of the Work required by this Order. At the end of the ten year period, Respondent shall notify EPA, at least thirty (30) days before any such document or information is destroyed, that such documents and information are available for inspection. Upon request, Respondent shall provide EPA with the originals or copies of such documents and information.

62. All documents submitted to EPA by Respondent in the course of implementing this Order shall be available to the public unless identified as confidential by Respondent pursuant to 40 CFR Part 2, Subpart B, and determined by EPA to merit treatment as confidential business information in accordance with applicable law. In addition, EPA may release all such documents to NYSDEC, and NYSDEC may make those documents available to the public unless Respondent conforms with applicable New York State law and regulations regarding confidentiality. Respondent shall not assert a claim of confidentiality regarding any monitoring or hydrogeologic data, any information specified under Section 104(e)(7)(F) of CERCLA, or any other chemical, scientific or engineering data relating to the Work performed hereunder.

J. Off-Site Shipments

63. All hazardous substances, pollutants, or contaminants removed from the Site pursuant to this Order for off-Site treatment, storage, or disposal shall be treated, stored, or disposed of in

compliance with (a) Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), (b) Section 300.440 of the NCP, (c) RCRA, (d) the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §§ 2601-2697, and (e) all other applicable federal and New York State requirements.

64. If Waste Material from the Site is to be shipped outside of the State of New York, Respondent shall provide prior notification of such shipments of Waste Material to the RPM at the address set forth in Paragraph 52.b. and in accordance with the EPA Memorandum entitled “Notification of Out-of-State Shipments of Superfund Site Wastes” (OSWER Directive 9330.2-07, September 14, 1989). At least five (5) working days prior to such shipments of Waste Material, Respondent shall notify the environmental agency of the accepting state of the following: (a) the name and location of the facility to which the Waste Material is to be shipped; (b) the type and quantity of Waste Material to be shipped; (c) the expected schedule for the Waste Material shipments; (d) the method of transportation and name of transporter; and (e) the treatment and/or disposal method of the Waste Material streams.

65. Respondent shall provide EPA with copies of all certificates of destruction of Waste Material upon Respondent’s receipt of such certificates. These certificates must be included in the monthly progress reports pursuant to Paragraph 52.a. and in the Remedial Action Report for SVE to be submitted by Respondent pursuant to Section II of the RA SOW for SVE.

K. Compliance With Other Laws

66. Respondent shall undertake all action that this Order requires in accordance with the requirements of all applicable local, state, and federal laws and regulations, unless an exemption from such requirements is specifically provided by law or in this Order.

67. Except as provided in Section 121(e)(1) of CERCLA, 42 U.S.C. § 9621(e)(1), and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work required hereunder that is conducted entirely on-Site. Where any portion of the Work requires a federal or New York State permit or approval, Respondent shall submit timely applications and shall take all other actions necessary to obtain and to comply with all such permits or approvals. This Order is not, nor shall it be construed to be, a permit issued pursuant to any federal or New York State statute or regulation.

L. Emergency Response and Notification of Releases

68. Upon the occurrence of any event during performance of the Work required hereunder which, pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, requires reporting to the National Response Center (800) 424-8802), Respondent shall immediately orally notify the Chief of the Removal Action Branch of the Emergency and Remedial Response Division of EPA Region 2, at (732) 321-6658, of the incident or Site conditions. Respondent shall also submit a written report to EPA within seven (7) days after the onset of such an event, setting forth the events that occurred and the measures taken or to be taken, if any, to mitigate any release or endangerment

caused or threatened by the release and to prevent the reoccurrence of such a release. The reporting requirements of this Paragraph are in addition to, not in lieu of, reporting under CERCLA Section 103, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.

69. In the event of any action or occurrence during Respondent's performance of the requirements of this Order which causes or threatens to cause a release of a hazardous substance or which may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize the threat and shall immediately notify EPA as provided in the preceding Paragraph. Respondent shall take such action in accordance with applicable provisions of this Order including, but not limited to, the updated Health and Safety Contingency Plan required to be submitted pursuant to Section III.A.3 of the RA SOW for SVE. In the event that EPA determines that (a) the activities performed pursuant to this Order, (b) significant changes in conditions at the Site, or (c) emergency circumstances occurring at the Site pose a threat to human health or the environment, EPA may direct Respondent to stop further implementation of any actions pursuant to this Order or to take other and further actions reasonably necessary to abate the threat.

70. Nothing in the preceding Paragraph shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action to protect human health and the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances on, at, or from the Site.

M. Modifications

71. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain such formal approval as may be required by this Order and to comply with all requirements of this Order.

N. Delay in Performance

72. Any delay in performance of the Work under this Order that, in EPA's judgment, is not properly justified by Respondent under the terms of Paragraph 73 below, shall be considered a violation of this Order. Any delay in performance of this Order shall not affect Respondent's obligations to perform all obligations fully under the terms and conditions of this Order.

73. Respondent shall notify EPA of any delay or anticipated delay in performing any requirement of this Order. Such notification shall be made by telephone to EPA's RPM at the telephone number in Paragraph 43, above, as soon as Respondent knows or should have known that a delay might occur. Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Within two (2) days after notifying EPA by telephone, Respondent shall provide EPA with written notification fully describing the nature of the delay, any justification for the delay, any reason why Respondent should not be held strictly accountable for failing to comply

with any relevant requirements of this Order, the measures planned and taken to minimize the delay, and a schedule for implementing the measures that have been or will be taken to mitigate the effect of the delay. Increased cost or expense associated with the implementation of the activities called for in this Order is not a justification for any delay in performance.

O. Enforcement and Reservation of Rights

74. Notwithstanding any other provision of this Order, failure of Respondent to comply with any provision of this Order may subject such Respondent to civil penalties of up to thirty-seven thousand five hundred dollars (\$37,500) per violation per day, as provided in Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1), the Debt Collection and Improvement Act of 1996 (see Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66643 (November 6, 2013), and 40 CFR Part 19. Respondent also may be subject to punitive damages in an amount at least equal to but not more than three times the amount of any costs incurred by the United States as a result of such failure to comply with this Order, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Should Respondent violate this Order or any portion thereof, EPA may carry out the required actions unilaterally, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and/or may seek judicial enforcement of this Order pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606.

75. Nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law. EPA reserves the right to bring an action against Respondent under Section 107 of CERCLA, 42 U.S.C. § 9607, for recovery of any response costs incurred by the United States related to this Order or the Site.

P. Other Claims

76. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent or Respondent's employees, agents, contractors, or consultants in carrying out any action or activity pursuant to this Order. The United States or EPA shall not be held out as or deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

77. Nothing in this Order constitutes or shall be construed as a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order for any liability that Respondent or other persons may have under CERCLA, other statutes, or the

common law, including but not limited to any claims of the United States for injunctive relief, costs, damages, and interest under Sections 106(a) and 107 of CERCLA, 42 U.S.C. §§ 9606(a) and 9607. Nothing herein shall constitute a finding that Respondent is the only responsible party with respect to the release and threatened release of hazardous substances at and from the Site.

78. Nothing in this Order shall affect any right, claim, interest, defense, or cause of action of any party hereto with respect to third parties.

79. Nothing in this Order shall be construed to constitute preauthorization under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2), and 40 CFR § 300.700(d).

Q. Insurance

80. At least five (5) days prior to commencing any on-Site Work under this Order, Respondent shall secure and shall maintain for the duration of this Order comprehensive general liability insurance and automobile insurance with limits of \$4 million dollars, combined single limit, naming the EPA as an additional insured. Within the same period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondent shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Order, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Order. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent needs to provide only that portion of the insurance described above that is not maintained by such contractor or subcontractor.

R. Financial Assurance

81. In order to ensure the full and final completion of the Work, Respondent shall establish and maintain a performance guarantee, initially in the amount of \$4 million for the benefit of EPA (hereinafter "Estimated Cost of the Work"). The performance guarantee, which must be satisfactory in form and substance to EPA, shall be in the form of one or more of the following mechanisms (provided that, if Respondent intends to use multiple mechanisms, such multiple mechanisms shall be limited to surety bonds guaranteeing payment, letters of credit, trust funds, and insurance policies):

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) that (i) has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that (i) has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;

d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a State agency;

e. A demonstration by Respondent that it meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied; and

f. A written guarantee to fund or perform the Work executed in favor of EPA by one or both of the following: (i) a direct or indirect parent company of Respondent, or (ii) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with Respondent; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder.

82. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA’s sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondent shall, within 30 days of receipt of notice of EPA’s determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 81, above. In addition, if at any time EPA notifies Respondent that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondent shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondent’s inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

83. If Respondent seeks to ensure completion of the Work through a guarantee pursuant to Subparagraph 81(e) or 81(f) of this Settlement Agreement, Respondent shall: (i) demonstrate to EPA’s satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f)

annually, on the anniversary of the Effective Date, to EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references “sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates,” the current cost estimate of \$4 million for the Work at the Site shall be used in relevant financial test calculations.

84. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 81 of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA.

85. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section.

S. Termination and Satisfaction

86. Upon a determination by EPA that the Work required pursuant to this Order has been fully carried out in accordance with this Order, EPA will so notify Respondent in writing.

T. Opportunity to Confer, Effective Date

87. This Order shall be effective seven (7) days after receipt by Respondent, unless a conference is timely requested pursuant to Paragraph 88, below. If such a conference is timely requested, this Order shall become effective three (3) days following the date the conference is held, unless the effective date is modified by EPA. All times for performance of ordered activities shall be calculated from the Effective Date.

88. Respondent may, within five (5) days after receipt of this Order, request a conference with EPA to discuss this Order. If requested, the conference shall occur within seven (7) days of Respondent’s request for a conference.

89. The purpose and scope of the conference is to discuss issues involving the implementation of the Work required by this Order and the extent to which Respondent intends to comply with this Order. The conference is not intended to be a forum for discussing liability issues or whether the Order should have been issued. This conference is not an evidentiary hearing, and does not constitute a proceeding to challenge this Order. It does not give Respondent a right to seek review of this Order or to seek resolution of potential liability, and no official stenographic record of the conference will be made. At any conference held pursuant to

Respondent's request, Respondent may appear in person or by an attorney or other representative.

90. A request for a conference must be made by telephone to Marla E. Wieder, Assistant Regional Counsel, Office of Regional Counsel, EPA Region 2, telephone (212) 637-3184, followed by written confirmation emailed to Ms. Wieder at wieder.marla@epa.gov.

U. Notice of Intent to Comply

91. Respondent shall provide, not later than five (5) business days after the Effective Date, written notice to EPA stating whether it will comply with the terms of this Order. The notice shall state the manner in which Respondent intends to comply. If Respondent does not unequivocally commit to perform the Work required by this Order, it shall be deemed to have violated this Order and to have failed or refused to comply with this Order. Respondent's written notice shall describe, using facts that exist on or prior to the Effective Date of this Order, any "sufficient cause" defenses asserted by Respondent under Sections 106(b) and 107(c)(3) of CERCLA. Respondent's written notice shall be sent to the EPA addressees listed in Paragraph 52.b., above. The absence of a response by EPA to the notice required by this Paragraph shall not be deemed to be an acceptance of Respondent's assertions.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Walter E. Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
Region 2

Date of Issuance

Appendices
(On computer disk)

Appendix A - The March 28, 1997 ROD and EPA's May 15, 2002 Memoranda which partially adopted and supplemented the ROD

Appendix B - Remedial Action Statement of Work for SVE

Appendix C - Remedial Design Report

Appendix D - Site Map