

PICKLE POND REMEDIATION AND RESTORATION CONTRACT

This Pickle Pond Remediation And Restoration Contract ("the Contract") is made this 10th day of January 2019, by and between BNSF Railway Company, a Delaware Corporation (the "Company"), the City of Superior, Wisconsin (the "City"), and the State of Wisconsin, Department of Natural Resources (the "Department")(collectively the "Parties" and each individually a "Party"), pursuant to the authority and provisions of Wis. Stat. § 292.31(1)(b).

WHEREAS, the Pickle Pond is a navigable body of water located in the city of Superior, Wisconsin, within the St. Louis River Area of Concern (AOC) in the Great Lakes Basin, as designated in the U.S.-Canada Great Lakes Water Quality Agreement and as is depicted on Exhibit A, Figure 1; and

WHEREAS, the owners of land adjacent to the Pickle Pond are the City and the Company, as depicted on Exhibit A, Figure 2; and

WHEREAS, Pickle Pond has been studied and evaluated by the Department dating back to 2007 when the first sediment samples were collected. Pickle Pond was identified as a potential Great Lakes Basin Remediation and Restoration site in a 2013 Remedial Action Plan for the St. Louis River AOC. The United States Fish and Wildlife Service, in partnership with the Department, subsequently conducted a baseline (Phase I) environmental evaluation of Pickle Pond in 2013, and developed conceptual remediation and restoration alternatives, as documented in the "Pickle Pond – Phase I: Baseline Characterization and Restoration Alternatives" dated April 30, 2014. Additional data collection and further evaluation of the alternatives was completed from 2014 through 2016, as documented in the "Pickle Pond Restoration – Phase II: Feasibility Study" dated September 14, 2016; and

WHEREAS, on June 29, 2015 the Department listed the Pickle Pond in its database of sites where environmental contamination has been reported (otherwise known as the Bureau of Remediation and Redevelopment Tracking System "BRRTS") under BRRTS Case # 02-16-563948 and identified the Company as the sole Responsible Party, which the Company has contested. The Department subsequently issued a second, linked BRRTS number for Pickle Pond (BRRTS Case #07-16-581043) for administrative purposes pursuant to the endeavors contemplated under this Contract; and

WHEREAS, on February 23, 2018, the Company submitted a technical assistance application to the Department, with fee paid, requesting a Contract in accordance with § 292.31 and § 281.83, Wis. Stats. that describes in detail the agreements and commitments of the Department, the City and the Company with respect to the Project; and

WHEREAS, the Parties' desire to cooperate to implement the Pickle Pond Remediation and Restoration Project (the "Project) in accordance with Wis. Stat. ch. 292, the Great Lakes 2013 RAP, Wis. Stat. § 281.83 and Wis. Admin. Code chs. NR 700-754, as described herein, to allow for the elimination of beneficial use impairments (BUI) and contribute to delisting the St. Louis River AOC tracked and administered under BRRTS Case # 07-16-581043, with the secondary consequence of the Company utilizing Department reports as the basis for applying for closure of Pickle Pond BRRTS Case # 02-16-563948;

NOW, THEREFORE, in consideration of the foregoing recitals, the covenants, promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed, the Parties agree to enter into this Contract under Wis. Stats. § 292.31 to effectuate the undertaking of actions set forth herein to address BRRTS Case # 07-16-581043, the Parties hereby agree as follows:

1. GENERAL

1.1. Definitions.

- (a) All terms used in this Contract shall have the same meaning as is provided in Wisc. Stats. Chapter 292 and Wis. Admin. Code chs. NR 700 - 754.
- (b) Unless explicitly provided for in this Contract herein, all terms shall have their ordinary meaning.
 - i) "City Property" means real property adjacent to the Pickle Pond that is owned by the City, as shown in Figure 2 of this Contract.
 - ii) "Company Property" means real property adjacent to the Pickle Pond that is owned by the Company, as shown in Figure 2 of this Contract.
 - iii) "Habitat" means the type of natural environment (often characterized by both specific physical and biological features) in which a particular species of organism can find food, shelter, protection, or otherwise live.
 - iv) The "Restoration Long-Term Maintenance Plan" or "RLTM Plan" means the plan developed by the Department, pursuant to the terms of this Contract, for the long-term care of components of the Project requiring long-term care.
 - v) "Design Report" means the work product defined by ch. NR 724, Wis. Adm. Code to be developed by the Department's Contractor.
 - vi) "Scope of Work" means the Remedial & Habitat Design Services Scope of Work for the Pickle Pond Remediation and Restoration (SLRAOC RAP Project 9.14), St. Louis Area of Concern, Superior, Wisconsin dated March 9, 2018, including any amendments thereof.

2. DEPARTMENT PROJECT GOALS AND ACTIVITIES

2.1. Project Goals. The Project has five goals which are based, in part, on addressing BUIs in Pickle Pond. These goals are:

- (a) Goal 1: Contribute work towards the removal of the Fish and Wildlife Habitat BUIs.
- (b) Goal 2: Improve plant communities through reducing invasive and non-native plants and improving native vegetation by planting seed and plugs.

- (c) Goal 3: Reduce storm water loading.
- (d) Goal 4: Improve sediment quality.
- (e) Goal 5: Improve habitat conditions of water quality, shoreline and bottom diversity, fish spawning and nursery areas, fish sticks, tree drops, turtle basking areas, bird nest boxes or platforms, brush piles, and wildlife openings.

2.2. Project Activities. As set forth in the Scope of Work, the Project may include the following activities ("Project Activities"):

- (a) Removal of contaminated sediment;
- (b) Control of invasive plants;
- (c) Improved circulation and connectivity of the waters of Pickle Pond to Barkers Bay and the St. Louis River estuary;
- (d) Enhanced Habitat;
- (e) Installation and maintenance of vegetated filter strips and a low-height vegetated buffer; and
- (f) Storm water best management practices.

3. DEPARTMENT RESPONSIBILITIES AND COMMITMENTS

3.1. Project Lead. The Department will have the responsibility for overall leadership of the Project which will include the following:

- (a) hiring the necessary environmental consultant and contractors to carry out the Project Activities,
- (b) securing funding from the U.S. Environmental Protection Agency's (EPA) Great Lakes Restoration Initiative (GLRI) to pay for Project activities,
- (c) covering all costs for the Project, as set forth in and consistent with the Scope of Work, including any costs associated with the preparation of local, state, and federal permit applications and applicable permit fees necessary to complete the project, and
- (d) coordinating all applications for local, state, and federal permits.

3.2. Financial Responsibility Where Federal Funding Not Obtained or Available. If federal funding from the GLRI or other non-Department sources is not obtained or available for the Project, to the extent the Department elects to proceed with the implementation of the specific Scope of Work, as set forth herein, the Department shall cover any remaining Project costs. In such a circumstance, if the Department is not able to cover any remaining Project costs contemplated in this Contract, the Project will immediately cease. In no circumstance will the Department seek to compel the Company to perform or pay for the implementation of the specific Scope of Work, as

set forth herein, even where the Department establishes the responsibility of the Company under the provisions of Section 7.7 of this Contract.

3.3. Department Access to Property

- (a) The Department shall coordinate access to City Property pursuant to terms of access negotiated with the City.
- (b) The Department and the Department's contractors shall access Company Property for a total of seven (7) years, including at least five (5) years from the completion of construction, pursuant to (i) as to the Department, the Company's Access Agreement, a copy of which is attached hereto as Exhibit B, with all enumerated fees in the Access Agreement waived by the Company, except for any payments to participate in Railroad Protective Liability Insurance, if required for the project activities under the Scope of Work, and (ii) as to the Department's contractors, pursuant to the Company's Access Agreement, a copy of which is attached hereto as Exhibit C, with all enumerated fees in the Access Agreement waived by the Company, except for any payments to participate in Railroad Protective Liability Insurance, if required for the project activities under the Scope of Work.

3.4. Project Documents and Progress Reports.

- (a) The Department shall provide documents to and, wherever applicable, obtain the reasonable approval for such documents from the Company pursuant to the terms of Section 6 of this Contract.
- (b) The Department will prepare the Design Plan in accordance with the Scope of Work and will provide the Parties with opportunity to comment on the Design Plan and proposed Project in accordance with the provisions of Section 6. The City and Company will have the opportunity to participate in a design charrette and provide comment on the resulting technical memorandum, and the 75%, and 90% Design Reports in accordance with the provisions of Section 6.
- (c) The Department shall provide periodic progress reports consistent with the terms of the SOW.

3.5. Property Demarcation. Utilizing updated survey information, the Department, following consultation with Company and receipt of Company's written approval, will demarcate and physically (i.e. with temporary fencing) install and maintain, during implementation of the work, temporary fencing to separate the Project area from the active Company rail yard for the safety of contractors on the Company Property.

3.6. Opening in the Embankment. The Department will not enlarge or deepen openings, create new openings, or remove the bridges or rails on the raised railroad track embankment on Company Property without seeking the consent of the Company. The Company shall grant or deny permission within ninety (90) days of the Company's receipt of investigation, analysis, and design

documents prepared by the Department pertaining to the proposed action on Company Property affecting bridges, rails or the opening of an embankment.

- 3.7. Vegetated Filter Strip. The Department will construct a vegetated filter strip on Company Property as provided for in the Final Design Report. The purpose of the vegetated filter strip will be to mitigate future potential impacts to the Pickle Pond.
- 3.8. Performance of Remediation. The Department intends to perform remedial activities in accordance with Wis. Stat. ch. 292 and Wis. Admin. Code chs. NR 700-754 and in a manner satisfactory to address BRRTS Case # 07-16-581043 and BRRTS Case # 02-16-563948.
- 3.9. Notice of Completion; Presumption of Department Closure of BRRTS Matters. The Department agrees to inform the Company and City when all Project Activities, except for the RLTM, are complete. Project Activities include completion of the construction contract, installation of habitat foundations, completion of sediment remediation and plans in place for RLTM. Following such notice to the Company, the Department will provide to the Company the narrative information and data related to the remedial activities necessary for the Company to apply for regulatory case closure under Wis. Admin. Chs. NR 725 and 726 for BRRTS Case # 02-16-563948 and for the Department, upon receipt of the same and with the necessary form and applicable fee, to grant closure under Wis. Admin. Code Chs. NR 725 and 726, as applicable, to BRRTS Case # 02-16-563948.
- 3.10. Non-Interference. The Department and its contractors will not unreasonably interfere with City operations in the Project area and affecting City Property; the Department and its contractors will not unreasonably interfere with Company operations in the Project area and affecting Company Property. The City and the Company will not unreasonably interfere with the operations of the Project.
- 3.11. Continuing Obligations – Restoration Long-Term Maintenance.
 - (a) The Department will establish, in accordance with Wis. Stat. §§ 292.31(3) and 292.12, as a prerequisite to funding for this Project, a Restoration Long-Term Maintenance Plan for the Project, including on City Property and Company Property. The RLTM Plan will identify all activities necessary for long-term care of components of the project by the Department and the City. The Department and the City will agree to responsibility for conducting RLTM Plan activities.
 - (b) As a prerequisite to funding for this Project, the Department or its contractors will conduct invasive plant monitoring and control under the Project for the portions of land adjacent to the Pickle Pond owned by the City or the Company, for at least five (5) years. In no event shall the Company be obligated to conduct invasive plant monitoring and control under this Project.
 - (c) As a prerequisite to funding for this Project, at the request of the EPA, if this Contract does not suffice, the Department shall obtain letters of commitment from the City and Company

for the direct maintenance or access agreements for RLTM by another party to fulfill the RLTM Plan for this Project. The Company shall waive access fees for any aforementioned RLTM activities per Section 5.1 of this Contract.

3.12. Volunteer Efforts. The Department may, in cooperation with the City, coordinate the use of citizen volunteers to maintain installed Habitat features under the Project, excluding any access to Company Property by such volunteers. No volunteers may access Company Property without a written agreement between the Company and an entity or organization which assumes responsibility for the health and safety of such volunteers and which indemnifies the Company and provides insurance reasonably acceptable to the Company related to access by such volunteers. Additionally, the City shall utilize feedback from these citizen volunteers regarding the efficacy of City efforts to educate the public on the benefits of the Project. In no event shall the use of citizen volunteers impact, change, negate, or affect any of the limitations, terms, or conditions present in other sections of this Contract under the Project.

4. CITY RESPONSIBILITIES AND COMMITMENTS

4.1. Access to City Property. The City authorizes the Department and its Project contractors and representatives access to City-owned real property adjacent to the Pickle Pond, including access for any vehicles or equipment for the following purposes:

- (a) To the extent required for the Department to complete all Project Activities, including Habitat development and maintenance activities and invasive plant monitoring and control work for five (5) years from the completion of Project Activities.
- (b) To the extent required for the Department to conduct RLTM activities assigned to the Department.

4.2. Storm Water Management.

- (a) The City is responsible for submitting to the Department a plan for management of storm water draining to the Pickle Pond (the "City's Pickle Pond Storm Water Management Plan") for Department review which will be incorporated into the RLTM Plan.
- (b) The City's Pickle Pond Storm Water Management Plan will include activities for long-term care which will:
 - i) Minimize to the extent practicable the migration of contaminants, including lead, zinc, copper, mercury and polynuclear aromatic hydrocarbons (PAHs), to the Pickle Pond;
 - ii) Provide for adequate sampling of storm water discharges into the Pickle Pond to monitor surface and sediment quality;
 - iii) Provide for maintenance and repair of a native plant buffer established on City-property as part of the Project; and

- iv) Maintenance of new storm water infrastructure constructed on the City's Property as part of the Project.
 - (c) The City is responsible for implementing all activities provided for in the City's Pickle Pond Storm Water Management Plan.
- 4.3. Design Review. The City shall review the Department's design recommendations and provide input to the Department on the type, number, and location(s) of new storm water infrastructure, devices and the location(s), seed/plant mix, planting layout, and other design aspects of the native plant buffer. The City agrees to allow construction of storm water infrastructure, native plant buffer, and habitat improvements provided for in the Design Report.
- 4.4. Bridge and Track Removal. The City shall cooperate with the Department to determine if railroad track or bridge removal that may be proposed and carried out on City-owned Property may be conducted with federal funds to enhance habitat restoration and water quality in Pickle Pond.
- 4.5. Applications for Permits. The City shall sign, when appropriate, applications for local, state, and federal permits prepared by the Project or allow an authorized representative to sign on their behalf where allowed.
- 4.6. The City's Park Plan. The City shall update the maintenance section of its Park Plan to include monitoring and maintenance of habitat improvements on City Property as provided for in the RLTM Plan.
- 4.7. Special Events. The City retains authority to suspend access to the Department and its contractors upon reasonable notice to administer special public events. The Department and its contractors shall, upon request, make reasonable accommodations to allow for special public events to continue on property affected by the Project.
- 4.8. Restoration to Pre-Project Conditions. The City's upland property altered by the Project shall be returned to pre-project conditions unless specified in the work plan and agreed to by the City.

5. COMPANY RESPONSIBILITIES AND COMMITMENTS

5.1. Access to Company Property.

The Company agrees to provide access to the Company Property to the Department and the Department's contractors for a total of seven (7) years, including at least five (5) years from the completion of construction, (i) as to the Department, pursuant to the Company's Access Agreement, a copy of which is attached hereto as Exhibit B, with all enumerated fees in the Access Agreement waived by the Company, except for any payments to participate in Railroad Protective Liability Insurance, if required for the project activities under the Scope of Work, and (ii) as to the Department's contractors, pursuant to the Company's Access Agreement, a copy of which is attached hereto as Exhibit C, with all with all enumerated fees in the Access Agreement waived by the Company, except for any payments to participate in Railroad Protective Liability Insurance, if required for the project activities under the Scope of Work.

- 5.2. Vegetated Filter Strip. The Company agrees to allow the Department to construct a vegetated filter strip on Company Property as provided for in the Final Design Report.
- (a) The Company shall review the Department's design recommendations and provide comment to the Department on the location(s), seed and plant mix, planting layout, and other design aspects of the vegetated filter strip and Habitat improvements on its property. If the Company objects to any aspect of the design for the vegetated filter strip, the Company shall offer reasonable alternatives that achieve the same or greater water quality and remedial functions.
 - (b) The case closure determination issued by the Department for BRRTS Case # 02-16-563948 shall identify "continuing obligations" reasonably acceptable to the Company requiring any owner of the Company Property to refrain from taking any actions on the Company Property that might reasonably be anticipated to damage or impair the viability of the vegetated filter strip constructed on Company Property. This responsibility shall not preclude the Company from contracting with a third party, including the City, to assume and fulfill such continuing obligations. No such continuing obligations shall unreasonably require the Company to alter or modify railroad operations on Company Property.
- 5.3. Bridge and Track Removal. The Company shall work cooperatively with the Department to determine if railroad track or bridge removal that may be proposed and carried out by the Project on Company Property may be conducted with federal funds, subject to the provisions of Section 3.6 of this Contract.
- 5.4. Case Closure Request. As set forth in Section 3.9 of this Contract, the Department agrees to inform the Company and City when all Project Activities, except for the RLTM, are complete. Following such notice to the Company, the Department will provide to the Company the narrative information and data related to the remedial activities necessary for the Company to apply for regulatory case closure under Wis. Admin. Chs. NR 725 and 726 for BRRTS Case # 02-16-563948 and for the Department, upon receipt of the same and with the necessary form and applicable fee, to grant closure under Wis. Admin. Code Chs. NR 725 and 726, as applicable, to BRRTS Case # 02-16-563948. Absent further information not presently available to the Department, the Department agrees that it will not require additional investigation and remediation by the Company related to consideration of case closure for BRRTS Case # 02-16-563948.
- 5.5. Applications for Permits. The Department shall prepare all necessary applications for local, state, and federal permits prepared for the purposes of the Project, with the Department, as performing party under such permit(s), retaining all responsibility for performance of the same in compliance with law and holding Company harmless for same, except for circumstances of Company's negligence or willful misconduct, but the Company may need to sign applications for local, state, and federal permits prepared for the purposes of the Project as property owners. No such permits may relate to or impose restrictions on BNSF rail operations or yard activities.

6. PROJECT DOCUMENT REVIEW AND COMMENT

6.1. General.

- (a) Unless otherwise specified in this Contract, the Department will prepare documents arising from this Project including, without limitation, the Technical Memorandum from Design Charette (15% Design Submittal), 75% Design Submittal, 90% Design Submittal, 100% Design Submittal (Final Design) and the Monitoring and Maintenance Plan (RLTM Plan). In any circumstance specifically addressed or otherwise contemplated in this Contract where the Company or the City have the opportunity to review or comment on an action or document prepared by the Department including the specific documents identified above, the Department will provide the City and the Company with a review period to provide comment on any document prepared by the Department. The review period shall be twenty-eight (28) calendar days unless a different period is agreed to by all Parties. The City and Company should each use good faith efforts to provide a single set of written comments directly to the Department Project Managers listed in the SOW. The Department shall reasonably consider the City's and the Company's comments arising from any document review and provide its responses to the comments to the City and the Company within twenty-eight (28) days of receiving the same. Any Project activities affecting the City Property, including any documents or design implemented by the Department under this Section, shall be subject to approval by the City, which approval shall not be unreasonably withheld. Any Project activities affecting the Company Property, including any documents or design implemented by the Department under this Section, shall be subject to approval by the Company, which approval shall not be unreasonably withheld. The Parties agree to employ good faith efforts to resolve such matters. The Company and City reserve any rights and claims available to challenge any decision of the Department under this Contract under applicable local, state, and federal laws.
- (b) The Department shall conduct public participation and notification activities for the Project to the extent required by Wis. Admin. Code ch. NR 714.

7. ADDITIONAL TERMS AND CONDITIONS

7.1. Health and Safety. The Parties shall comply with any Health and Safety plans developed by contractors conducting Project activities to the extent applicable. Any Health and Safety Plans developed by contractors for activities under this Project on or affecting Company Property shall be subject to review and approval by the Company and shall, at a minimum, for access to the Company's property, comply with the applicable health and safety protocols set forth in the controlling access agreement between the Department and the Company (Exhibit B).

7.2. Dispute Resolution.

- (a) Any dispute regarding this Contract shall be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed forty-five (45) days from the time the dispute arises, unless it is extended by written agreement of the parties to the dispute. No lawsuit or proceeding arising under this Contract may be filed until the 45-day period has elapsed except to the extent such lawsuit or proceeding seeks

injunctive relief or the parties agree to waive the 45-day period. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute. Any informal resolution of a dispute shall be documented in writing by the parties and provided to the project coordinators.

- (b) In the event that the parties cannot resolve a dispute by informal negotiations after the forty-five (45) day period under the preceding paragraph, then either of the parties to the dispute may initiate a civil proceeding in a court of appropriate jurisdiction to resolve such matter.
- (c) The invocation of dispute resolution procedures under this section shall not extend, postpone or affect in any way any obligation of the any party under this Contract, not directly in dispute, unless the other party that is subject to the dispute agrees otherwise.

7.3. Public Records. The following provisions apply:

- (a) “Confidential Information” shall collectively refer to all information or material disclosed or provided, whether orally, in writing, electronically or otherwise, by any Party to this Contract to another Party to this Contract before or after the Effective Date, that is not publicly known or otherwise publicly available, including without limitation, any settlement communications (including any drafts of this Contract), including any noted as such by the Parties, any information or material pertaining to designs, products, plans, specifications, drawings, methods, data, environmental and/or geotechnical assessments and/or testing, processes, relationships with third parties, financial information, and information received by a Party to this Contract from third parties which another Party to this Contract has an obligation to keep confidential. Confidential Information shall also include all notes, estimates, data, compilations, analyses, documents and other materials prepared by one Party that reveal, reference or are based on the information or material the Party receives from another Party to this Contract or other third parties in connection with the activities to be performed under this Project. Disclosure of any records labeled as confidential must be subject to Wisconsin’s Open Records Law and such records shall be managed and destroyed in accordance with the Department’s Records Disposal Authorization protocols.
- (b) Pursuant to Wis. Stat. §§ 19.31 to 19.37 (Wisconsin’s Open Records Laws), unless specifically exempt from disclosure under applicable state law, e.g., Wis. Admin. Code § NR 700.05, all Records, as that term is defined in Wisc. Stat. §§ 19.32(2), generated by the Parties and submitted to the Department under the terms of this Contract, disclosure of any records labeled as confidential must be subject to Wisconsin’s Open Records Law and such records shall be managed and destroyed in accordance with the Department’s Records Disposal Authorization protocols.

7.4. Submittals, Correspondence, Contacts. All documents submitted by the Parties, or any communications between the Parties, under the terms of this Contract shall be addressed as follows:

(a) To the Company:

i) For Company:

Brooke Gaede, Environmental Department, 2500 Lou Menk Drive, Fort Worth, TX 76131-2830, (817) 352-2369 or Brooke.Gaede@BNSF.com; and

Sandra Moore 80 44th Avenue NE, Minneapolis, MN 55421, (763) 782-3483 or Sandra.Moore@BNSF.com; and with copies to

David Bessingpas, Arcadis U.S., Inc., 430 First Avenue North, Suite 720, Minneapolis, MN 55401, (218) 208-3427 or david.bessingpas@arcadis.com; and,

Edward B. Witte, Godfrey & Kahn, sc, 833 East Michigan Street, Milwaukee, WI, 53202, 414-287-9518 or nwitte@gklaw.com.

(b) To the City:

i) Environmental Regulatory Manager: Darienne McNamara, City of Superior, 1316 North 14th Street #200, Superior WI 54880, (715) 395-7506 or mcnamarad@ci.superior.wi.us

(c) To the Department:

i) DNR RR Program Project Manager: John Hunt, Hydrogeologist; Wisconsin Department of Natural Resources; 1701 North 4th Street; Superior, WI 54880; (715) 392-3126 or JohnT.Hunt@Wisconsin.Gov; and

ii) DNR Office of Great Waters Project Manager: Joe Graham; Wisconsin Department of Natural Resources; 810 W. Maple Street; Spooner, WI 54801; (715) 635-4075 or Joseph.Graham@Wisconsin.Gov

(d) Replacement of Named Contacts. In the event a contact named in this Section is no longer associated with the Project, the Party shall memorialize this change by submitting an updated contact list for the Party to all Parties in writing. This named contact amendment does not require the procedure as specified in Section 7.13 of this Contract.

- 7.5. Effective Date. This Contract shall be executed by the City and the Company before being executed by Department. When the Department executes this Contract, the Department shall enter an effective date immediately below the Department's signature which shall be a minimum of five (5), but not greater than ten (10) business days after the date of mailing of a fully executed copy of the Contract (first class postage prepaid), by the DNR to the City and the Company.
- 7.6. No Admission of Liability of Parties. Entry into this Contract by the City and the Company does not constitute an admission of any liability by either the City or the Company. Furthermore, as provided in Wis. Stat. §292.31(10)(b), if either Party undertakes any remedial action at the Pickle Pond, whether subject to this Contract or any other agreement with the Department under Wis. Stat. 292.31(8)(h), the action taken shall not constitute any evidence of liability or an admission of

liability for any potential or actual environmental pollution. Any assumption related to an RLTM Plan under this Contract shall be subject to the terms of this Contract and shall not constitute evidence of liability or admission of liability for any potential or actual environmental pollution, nor any obligation of the Company, unless expressly provided for under this Contract.

7.7. Conditions under which this Contract is voided. This Contract will be null and void in the event any of the following occurs:

- (a) The Department is unable to secure funding from the EPA Great Lakes Restoration Initiative to pay for Project activities.
- (b) A Party or a third party takes an action (e.g., causes environmental damage to the Pickle Pond) which makes it impossible to complete the Project.
- (c) An event of Force Majeure makes it impossible to complete the Project.

7.8. Additional Actions after Closure. In the event that after case closure environmental pollution or a discharge of a hazardous substance is discovered in the Pickle Pond that requires the Department to take action, the Department will evaluate the potential or known sources of the environmental pollution or hazardous substances discovered. The Department will take the steps available to it through state law to compel the person that the Department determines to have caused the discharge on the Property to take the response action necessary to address any threat to the environment. The Department would only require the person in current possession or control of the Property to address that threat if the Department were unable to compel the person who caused the discharge to take the appropriate response action. In no circumstance will the Department seek to compel the Company to perform or pay for the implementation of the specific Scope of Work, as set forth herein, even where the Department establishes the responsibility of the Company under the provisions of this Section 7.7.

7.9. Indemnity, Duty to Defend, Attorney's Fees. Nothing in this Contract, whether express or implied, shall be understood to give rise to any requirement or right for the Department or the State to indemnify or hold harmless any Party. Further, nothing in this Contract shall give rise to any duty to defend or responsibility for payment of attorney's fees by the Department or the State with respect to any Party.

7.10. Insurance. The Department and the Department's contractors shall comply with the terms of the access agreement between the Department and the Company (Exhibit B) and the Department's contractors and the Company (Exhibit C), respectively, relating to minimum insurance requirements

7.11. Limit of Liability. In regard to the Company Property, and in relation to property damage and personal injury, and for Project Activities on or affecting the Company Property, the terms of the access agreement between the Department and the Company shall control in regard to any limits of liability of the Department. Subject to the foregoing, in no event shall any party be liable to the other or any third party in Contract, tort or otherwise for incidental or consequential damages of

any kind, including, without limitation, punitive or economic damages or lost profits, regardless of whether either party shall be advised, shall have other reason to know in fact shall know of the possibility. The Department shall be responsible for the consequences of its own acts, errors, or omissions and those of its employees, agents, contractors, officers, and representatives and shall be responsible for any losses, claims, and liabilities which are attributable to such acts, errors, or omissions. The Company and the City each recognizes and understands that it may be responsible for the consequences of its own acts, errors, or omissions and those of its employees, agents, boards, commissions, agencies, officers and representatives, including providing its own defense. In situations including joint liability, each party shall be responsible for the consequences of its own acts, errors, or omissions and those of its employees, agents, boards, commissions, agencies, officers and representatives. It is not the intent of the parties to impose liability beyond that imposed by state statutes. This clause applies only to the actions of each party pursuant to this Contract and does not apply to actions or events that occur outside the scope of this Contract. The provisions of this section are subject to any Access Agreement agreed upon between the Parties to this Contract.


- 7.12. Severability. If any provision of this Contract shall be declared by any court of competent jurisdiction to be illegal, void, or unenforceable, the other provisions shall not be affected but shall remain in full force and effect.
- 7.13. Amendments. This Contract may be amended by mutual written agreement of the Company, City, and the Department. Any amendment of this Contract shall be in writing, signed by all parties and shall have as the effective date that date on which the last party signed such amendment.
- 7.14. Assignment. Except as provided herein, neither Party shall have the right to assign any part of its obligations under this Contract without the consent of each Party.
- 7.15. Termination.
- (a) On Completion. The provisions of this Contract shall be deemed terminated following the Department completing project activities addressing BRRTS Case #07-16-581043 and issuance by the Department of case closure for BRRTS Case # 02-16-563948 pursuant to Wis. Admin. Code ch. NR 726. Continuing obligations, if any, identified in the RLTM Plan, shall survive the termination of this Contract.
 - (b) For Convenience. This Contract may be terminated in good faith by any Party to this Contract following thirty (30) days advance written notice effective as of the expiration of the notice period.
- 7.16. Entire Agreement. This Contract constitutes the entire partnership between the parties hereto with respect to the Project and, upon its effectiveness, shall supersede all prior agreements, understandings and arrangements, both oral and written, between the Company, the City and the Department with respect to the Project.

- 7.17. Conflicts. The terms of this Contract shall control over any conflicting terms in any agreement or document referenced herein.
- 7.18. Department's Authority Preserved. Subject to the provisions of this Contract, nothing in this Contract shall be construed to limit the Departments' authority in any way to require the Parties to implement response actions pursuant to, and ensure compliance with, ch. 292 Wisc. Stats and chs. NR 700 to 754 Wisc. Admin Code. The Parties do not waive and retain all rights and claims available under applicable local, state, and federal laws.
- 7.19. Waiver. Failure of either party to insist on strict compliance with any of the terms and conditions of this Contract shall not be deemed a waiver of such terms and conditions, or of any similar right or power hereunder at any subsequent time.
- 7.20. Choice of Law. This Contract shall be governed by and construed in accordance with the laws of the State of Wisconsin, without reference to any conflicts of law provisions.
- 7.21. Compliance with Applicable Law. The Department will conduct all work on the Project as provided in the Scope of Work in accordance with all applicable local, state and federal laws.

The Parties, whose signatures appear below, hereby agree to the terms of this Contract.

Each person signing this Contract represents and warrants that he or she has been duly authorized by the Company, City, or the Department to execute and legally bind the respective Party to the terms of this Contract. This Contract may be signed in counterparts which, when taken together, shall constitute one in the same document.

BNSF Railway Company

By: 
(Allen Stegman, General Director Environmental)

12/21/18
(date)

APPROVAL BY THE CITY

Pursuant to action taken by the Common Council on _____, approval is given to the City of Superior to enter into this Contract.

THE CITY OF SUPERIOR, WISCONSIN,
A Municipal Corporation

By: _____
(James Paine, Mayor)

(date)

By: _____
(Frog Prell, Attorney)

(date)

By: _____
(Jean Vito, Finance Director)

(date)

By: _____
(Terri Kalan, Clerk)

(date)

The Parties, whose signatures appear below, hereby agree to the terms of this Contract.

Each person signing this Contract represents and warrants that he or she has been duly authorized by the Company, City, or the Department to execute and legally bind the respective Party to the terms of this Contract. This Contract may be signed in counterparts which, when taken together, shall constitute one in the same document.

BNSF Railway Company


By: _____ (name, title) _____ (date)


APPROVAL BY THE CITY


Pursuant to action taken by the Common Council on December 18, 2018, approval is given to the City of Superior to enter into this Contract.


THE CITY OF SUPERIOR, WISCONSIN,

A Municipal Corporation

By:  _____ (James Paine, Mayor) 1/4/19 (date)

By:  _____ (Frog Prell, Attorney) 1-8-2019 (date)

By:  _____ (Jean Vito, Finance Director) 12/21/18 (date)

By:  _____ (Terri Kalan, Clerk) 12/21/18 (date)

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

By: Darsi Foss

Darsi Foss, Director

Remediation and Redevelopment Program

January 10, 2019

(date)

(Signature Date) January 10, 2019

(Contract Effective Date) January 15, 2019