AGREEMENT No. DTFH71-06-X-00013

Memorandum of Agreement

among the

State of West Virginia,
West Virginia Department of Transportation

and the

Commonwealth of Virginia,
Virginia Department of Transportation

and the

State of Ohio
Ohio Department of Transportation

and the

Department of Transportation,
Federal Highway Administration,
Eastern Federal Lands Highway Division

for the

The Heartland Corridor Project

PURPOSE OF THE AGREEMENT

The purpose of this Memorandum of Agreement (MOA) is to establish the roles and responsibilities of the Virginia Department of Transportation (VDOT), the West Virginia Department of Transportation (WVDOT), the Ohio Department of Transportation (ODOT), and the United States Department of Transportation, Federal Highway Administration, Eastern Federal Lands Highway Division (EFLHD); hereinafter known as the Parties. The Parties will jointly participate in the authorization and funding of the "Clearance Project" portion of the Heartland Corridor Project—a project to increase freight capacity on the vital Virginia to Ohio railway route.

The "Clearance Project" portion, hereinafter referred to as the Project, consists of all work to allow double-stacked freight trains to run between the Hampton Roads region in Virginia and Columbus, Ohio. A double-stacked freight train is a train configured to carry two layers of standard freight containers. The Project does not include work at rail facilities, nor at any stations or sidings along the route. The EFLHD is responsible for the coordination and facilitation of the overall schedule for the entire Project, as well as for the management of the Federal funding. Only certain portions of the work will be paid for in part with Federal funds, as noted below. The design and construction of the Project will be done by the Norfolk Southern Railway Company (the Railroad) under the terms of a separate agreement between the Railroad and the EFLHD.

BACKGROUND - LEGISLATIVE HISTORY

The Project is described twice in Public Law 109-59, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). At Section 1301(m)(2) it is described as: "Heartland Corridor Project including multiple intermodal facility improvements and improvements to facilitate the movement of intermodal freight from VA to OH." At Section 1702, Project No. 5072, it is described as: "Double stack clearance of tunnels on the Norfolk and Western Mainline in Virginia located on the Heartland Corridor."

In addition, Section 1301(a), Findings, at Subsection (a)(4) also states: "Projects of national and regional significance have national and regional benefits, including improving economic productivity by facilitating international trade, relieving congestion, and improving transportation safety by facilitating passenger and freight movement."

AUTHORITIES

WHEREAS, Congress has authorized $95 million for this Project in Public Law 109-59, SAFETEA-LU; $90 million under Sections 1301(m)(2) and $5 million under 1702, Project No. 5072;

WHEREAS, the States of Virginia, West Virginia, and Ohio have authority to participate in the Project by the legislative authority given to their respective Departments of Transportation by State law and Title 23 of the United States Code;

WHEREAS, the Commonwealth Transportation Board in the Commonwealth of Virginia has authorized the Virginia Secretary of Transportation to enter into this Agreement, and references to the Virginia Department of Transportation, or VDOT, shall mean the Virginia Secretary of Transportation, acting through VDOT;

WHEREAS, Title 23 United States Code, Section 308(a) authorizes the United States Secretary of Transportation to perform engineering or other services in connection with the survey, design, construction, and improvements of highways for other Federal or State cooperating agencies, and "highways" has been interpreted to include surface transportation projects such as this one; and whereas that authority has been delegated to the Federal Highway Administration by authority of Title 49, Code of Federal Regulations, Section 148; and whereas that authority has been delegated to the Federal Lands Highway Program and to the Eastern Federal Lands Highway Division by authority of EFLHD Order M1101.1A, Chapters 4 and 6.

NOW THEREFORE, the VDOT, the WVDOT, the ODOT (the State DOTs), and the EFLHD do hereby mutually agree as follows:

ARTICLE I: SCOPE OF WORK (Obligations, Responsibilities, and Funding)

A. The VDOT, WVDOT, and ODOT agree:

1. To request Federal funding for the Project to the extent required by Sections 1301 and 1702 of Public Law 109-59 (SAFETEA-LU).

2. To authorize that the funding be transferred directly to the EFLHD, as authorized by Title 23, United States Code, Section 104(k)(3), as amended by Public Law 109-59 (SAFETEA-LU).

3. That funds provided under Section1301 will be used for the work in West Virginia, and therefore that the available funds under Section 1301 will be allotted by the FHWA to West Virginia for direct transfer to the EFLHD.

4. That the funds provided under Section 1702 will be used for the work in Virginia, and therefore that the available funds under Section 1702 will be allotted by the FHWA to Virginia for direct transfer to the EFLHD.

B. The State DOTs, as relevant to the work within their State, agree to:

1. Cooperate with the EFLHD and the Railroad to the extent necessary where State involvement is required to advance the Project.

2. Request on an annual basis as funds for this Project become available for the new fiscal year that the funds be transferred to the EFLHD.

3. Participate in the environmental planning and preparation of environmental documents as a Cooperating Agency. Participate in public involvement activities led by the EFLHD, where applicable. Cooperate in the efforts of the EFLHD to obtain the required final environmental clearances and permits.

4. Act as a cooperating agency and be responsible for participating in any decisions associated with any improvements or modifications to roadways owned or maintained by the State, or otherwise where their interests are involved.

5. Partake in the design reviews at their option as coordinated by the EFLHD for the work within their State.

6. Participate in the final inspection of the constructed facility to the extent it impacts State-owned roadways. State DOT employees shall coordinate such inspection with the EFLHD, and agree to comply with any safety requirements imposed by the Railroad for review of its facilities.

7. Accept improvements or modifications to facilities owned and/or administered by the State for maintenance.

8. Provide to the EFLHD an anticipated budget of the costs of the State DOT to participate, as outlined above, in the Project. This budget shall be updated annually.

9. Provide annually a PR-2 to obligate funds.

10. Provide to the EFLHD an invoice for State DOT costs with a detailed summary of State DOT expenditures. Invoices will be submitted as they arise, but not more frequently than monthly.

C. <u>The EFLHD agrees to</u>:

1. Coordinate the overall schedule for the entire Project and facilitate cooperation among the Parties and the Railroad.

2. Accept and manage Federal funding for the Project.

3. Act as the lead agency for the coordination, preparation, and approval of the environmental documentation required pursuant to the National Environmental Policy Act (NEPA), 23 CFR §771, 49 U.S.C. §303, and Section 106 of the National Historic Preservation Act (including environmental documentation, 4(f) statement, and Section 106 statement) for the Project.

4. Select consulting services, as appropriate, for environmental planning assistance using procurement procedures in accordance with the Federal Acquisition Regulation (FAR), and the Transportation Acquisition Regulation (TAR).

5. Provide a quarterly status report to the State DOTs, both written and oral (face-to-face, videoconference, or teleconference), on the overall management of the Project. The report will detail, at a minimum, the financial status, schedule, and current and upcoming contracting activities of the Project, as well as any specific issues that have arisen.

6. Provide a Special Project Manager to coordinate day-to-day administration, including technical issues, of the Project. Technical issues will be discussed between the Parties as issues arise.

7. Review and approve the Financial Plan to be prepared by the Railroad for the Project.

8. Work jointly with the Railroad to determine appropriate action regarding a Project Management Plan.

9. Serve as the representative of the Parties to this Agreement on any consultant selection panel convened by the Railroad.

10. Ensure to the maximum extent possible that:
    a. design and construction work will be contracted out, except work that is normally done by the Railroad's internal staff. (It is recognized that decisions regarding whether to contract for construction engineering and inspection must be made by the Railroad.)
    b. contracting is done competitively and that the contracts contain no restrictions on local hiring.
    c. solicitations are posted on State DOT websites and linked to a Federal website as allowed;
    d. contractors meet State licensing requirements to the extent such requirements can be met after bid opening but prior to award of the contract;
    e. contracts contain disadvantaged business and small business subcontracting provisions in compliance with the requirements of the Federal Acquisition Regulations (FAR), including the submission for approval of a small business and disadvantaged business subcontracting plan, as required by Part 19 of the FAR.

11. Receive from the Railroad and provide to the State DOTs for review as appropriate the plans, specifications, and estimates, along with other necessary design documents for review and comment at the normally scheduled milestone completion percentages.

12. Approve the State DOTs' budget for their anticipated costs.

D. Responsibility of all Parties to Cooperate

All Parties to this Agreement shall agree to cooperate with each other and with the Railroad in an effort to not delay the completion of the Project.

ARTICLE II. FUNDING AND REIMBURSEMENT

The respective financial obligations of the parties under this Agreement shall be as follows:

A. The Heartland Corridor Project is subject to and contingent upon the approval for eligibility of Federal funds by the EFLHD. Eligibility requires State cooperation in the request for and the transfer of those funds to the EFLHD for administration.

B. Congress has authorized $95 million for this Project in Public Law 109-59, SAFETEA-LU. Under Section 1301(m)(2), Congress authorized $90 million for the work of the Project; and under Section 1702, Project No. 5072, Congress authorized $5 million for the work in Virginia. Both Sections authorize an annual distribution. For Section 1301, funds are distributed as follows: for fiscal year 2005 -- 10%, for fiscal year 2006 -- 20%, for fiscal year 2007 -- 25%, for fiscal year 2008 -- 25%, and for fiscal year 2009 - 20%. For Section 1702, funds are distributed at 20% per fiscal year. In addition, for fiscal years 2005 and 2006, Congress has imposed an obligation limitation in order to protect the funds in the Highway Trust Fund. This results in a reduction of the available funds that is set for each year. For fiscal year 2005, the obligation limitation was 85.5%. For fiscal year 2006, the obligation limitation was 87%. It can be assumed that Congress will impose an obligation limitation in future fiscal years as well. Finally, for funds available in fiscal year 2006, Congress imposed an additional 1% recission of funds to all Federal funding categories, in order to provide for emergency supplemental appropriations to address damages from the hurricanes in the Gulf in 2005 (Public Law 109-148).

C. Federal funding available for the Project requires a "State match" of 20%, which for Section 1301 funds will be provided by the Railroad and for Section 1702 by the Railroad or the State.

D. The EFLHD will provide Federal funding up to 80% of the total costs, up to the amount available under the law, as discussed above. The Railroad shall be responsible for the remaining total cost of the Project.

E. If the State DOTs incur costs in connection with this Project, the State DOT shall invoice the EFLHD for such costs. All such costs shall have been included in the approved budget, as

discussed above.

F. Work in Kentucky will be paid for in full by the Railroad.

G. Work in Ohio will be paid for in full by the Railroad and the Ohio Rail Development Commission.

ARTICLE III: TERM OF AGREEMENT

1. This Agreement and the authorizations granted in it shall be effective only after the full execution and approval by all Parties to this Agreement.

2. This Agreement shall be in force and effect and shall remain in effect until the work, including payment, has been completed to the mutual satisfaction of all Parties, plus the Railroad.

3. The Agreement may be modified by written consent of all of the Parties.

4. All Parties to the Agreement will be afforded the opportunity to inspect, review and comment on, at any time, work in progress, the financial records, and any other supporting documentation; and to participate in all meetings and field reviews.

ARTICLE IV: KEY OFFICIALS AND CONTACTS

Designated points of contact for the coordination of this project are as follows:

For the VDOT:

Mr. Malcolm T. Kerley, PE
Chief Engineer
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Phone: 804-786-4798
Fax: 804-786-2940
email: Mal.Kerley@VDOT.Virginia.gov

Mr. Richard L. Walton
Chief of Planning, Policy, and Environment
Virginia Department of Transportation
1401 E. Broad Street
Richmond, VA 23219
Phone: 804-786-2703
Fax: 804-786-2940
email:Richard.Walton@VDOT.Virginia.gov

For the WVDOT:

Mr. Paul Mattox
Commissioner
West Virginia Department
of Transportation
1900 Kanawha Boulevard, East
Capitol Complex, Building 5, Room 109
Charleston, WV 25305
Phone: 304-558-0444
Fax: 304-558-4076
email: pmattox@dot.state.wv.us

Mr. Patrick Donovan
Riverfront Development Coordinator
West Virginia Department
of Transportation
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Capitol Complex, Building 5, Room 503
Charleston, WV 25305
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Fax: 304-558-0333
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For the ODOT:

Mr. Gordon Proctor
Director
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For the EFLHD:

Ms. Melisa Ridenour
Division Engineer
Department of Transportation
Federal Highway Administration
Eastern Federal Lands Highway Division
21400 Ridgetop Circle
Sterling, Virginia 20166
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Mr. Kurt Dowden
Special Project Manager
Department of Transportation
Federal Highway Administration
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email: kurt.dowden@fhwa.dot.gov

ARTICLE V: TERMINATION

This Agreement will terminate when all transfers of funds are completed and all work associated with this Agreement has been approved by the Parties in writing. Approval by the State DOTs will be with regard to facilities that are owned and maintained by the respective State. Approval by the State DOTs will be by written notification to the EFLHD.

In case of the failure on the part of any Party to observe any of the conditions of the Agreement, any affected Party shall notify the other Party of the violation and allow a reasonable time to cure the violation. In the event that the violation is not cured within what the affected Party considers a reasonable time, the affected Party may terminate this Agreement by giving thirty (30) days written notice of termination to all Parties, effective at the end of the thirty (30) day period.

ARTICLE VI: ASSIGNMENT

No transfer or assignment of this Agreement, or any part thereof or interest therein, directly or indirectly, voluntarily or involuntarily, shall be made unless such transfer or assignment is first approved in writing by all Parties.

ARTICLE VII: LIABILITY

The Parties accept full responsibility for any property damage, injury, or death caused by the acts or omissions of their respective employees, acting within the scope of their employment, or their contractors' scope of work, to the fullest extent of the law. All claims shall be processed pursuant to applicable governing law.

Any claim that might be cognizable under the Federal Tort Claims Act (Title 28, United States Code, Section 2671, et seq.) or the tort claim provisions of State law, alleging an injury during the performance of this Agreement which may be traced to a Party, shall be received and processed by the Party having responsibility for the particular injury-causing condition according to the laws of that Party's State or, for the Federal Government, of the United States.

ARTICLE VIII: REQUIRED AND STANDARD CLAUSES

1. Nothing in this Agreement shall be construed as limiting or affecting the legal authorities of the Parties, or as requiring the Parties to perform beyond their respective authorities. Nothing in this Agreement shall be deemed to bind any party to expend funds in excess of available appropriations.

2. **NON-DISCRIMINATION**: The Parties shall not discriminate in the selection of employees or participants for any employment or other activities undertaken pursuant to

this Agreement on the grounds of race, creed, color, sex, or national origin, and shall observe all of the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. Section 2000(d), et seq.). The Parties shall take positive action to ensure that all applicants for employment or participation in any activities pursuant to this Agreement shall be employed or involved without regard to race, creed, color, sex, or national origin.

3. **ANTI-DEFICIENCY ACT**: Pursuant to the Anti-Deficiency Act, 31 U.S.C. Section 1341(a)(1) (1994), nothing contained in this Agreement shall be construed as binding the United States or any State to expend any sum in excess of appropriations made by Congress for the purposes of this Agreement, or as involving the United States or any State in any contract or other obligation for the further expenditure of money in excess of such appropriations.

4. **INTEREST OF MEMBERS OF CONGRESS**: No member of, or Delegate to, or Resident Commissioner in Congress shall be admitted to any share or part of this Agreement, or to any benefits that may arise therefrom, unless the share or part or benefit is for the general benefit of a corporation or company.

5. **LOBBY PROHIBITION:** The Parties will abide by the provisions of 18 U.S.C. Section 1913 (Lobbying with Appropriated Monies), which states:

   No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other devise, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or its departments or agencies from communicating to Members of Congress on the request of any Members of Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of public business.

   This Agreement is subject to all laws governing Federal and State procurement and to all regulations and rules promulgated thereunder, whether now in force or hereafter enacted or promulgated, except as specified in this Agreement. Nothing in this Agreement shall be construed as in any way impairing the general powers of the Parties for supervision, regulation, and control of its property under such applicable laws, regulations, and rules.

ARTICLE IX. ENTIRE AGREEMENT

This Agreement and its attachments constitute the entire Agreement and understanding of the Parties with respect to the Heartland Corridor Project. No oral or other written provisions shall have any force or effect except those contained in a written amendment to this Agreement

executed by the parties or as specifically provided for in this Agreement.

IN WITNESS THEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives.

DEPARTMENT OF TRANSPORTATION
STATE OF WEST VIRGINIA

Paul Mattox 6/22/06

Mr. Paul Mattox — Date
Commissioner

DEPARTMENT OF TRANSPORTATION
STATE OF OHIO

Gordon Proctor / 6-30-06

Mr. Gordon Proctor — Date
Director

DEPARTMENT OF TRANSPORTATION
COMMONWEALTH OF VIRGINIA

Pierce R. Homer 6/8/06

Pierce R. Homer — Date
Secretary of Transportation

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
EASTERN FEDERAL LANDS HIGHWAY DIVISION

Melisa L. Ridenour 11 Jul 06

Ms. Melisa Ridenour — Date
Division Engineer