

**AGENDA ITEM 8-A**  
**ACTION ITEM**

**TO: CHAIRMAN KAUFFMAN AND THE VRE OPERATIONS BOARD**

**FROM: DALE ZEHNER**

**DATE: NOVEMBER 16, 2007**

**RE: AUTHORIZATION TO AMEND INSURANCE FUND AGREEMENT  
AND THE LIABILITY INSURANCE PLAN**

---

**RECOMMENDATION:**

The VRE Operations Board is being asked to recommend that the Commissions authorize the Chief Executive Officer to amend the Insurance Fund Agreement for Commuter Rail Operation Liability Insurance Plan and the Liability Insurance Plan.

**BACKGROUND:**

NVTC and PRTC established the Commuter Rail Liability Insurance Plan ("Insurance Plan") in 1989. The Insurance Plan, which is administered by the Commonwealth of Virginia Division of Risk Management (DRM), provides for the indemnification obligations accepted by the Commissions in each of their agreements with the railroads as a condition of gaining access to the railroads' rights of way.

At the time the Insurance Plan was established, the Commissions entered into an Insurance Fund Agreement and a Management Agreement with DRM. The agreements, as well as the Plan, have not been modified since their original execution and it is appropriate to update them. In discussions with DRM, amendments were identified to the Insurance Fund Agreement for Commuter Rail Operation Liability Insurance Plan and the Liability Insurance Plan. The changes

to the Plan are in addition to those identified and approved by the Commissions at their September 6<sup>th</sup> and October 4<sup>th</sup> meetings.

The proposed changes to the Insurance Fund Agreement for Commuter Rail Operation Liability Insurance Plan and the Liability Insurance Plan include updating the names of the freight railroads with which VRE now has contracts, ensuring that successors and assigns of the railroads are automatically covered under the Plan, clarifying the scope of certain exclusions from coverage under the Plan, correcting citations to the Code of Virginia, clarifying administrative procedures and addresses, and adding a signature line to the Plan for the Commissions. All changes are reflected in the attached drafts.

Changes to Agreement for the Management of the Liability Insurance Plan are still being reviewed with DRM and will be brought to the Operations Board and Commissions at a later date.

**FISCAL IMPACT:**

There is no fiscal impact associated with this action.

**TO: CHAIRMAN KAUFFMAN AND THE VRE OPERATIONS BOARD**  
**FROM: DALE ZEHNER**  
**DATE: OCTOBER 19, 2007**  
**RE: AUTHORIZATION TO AMEND INSURANCE FUND AGREEMENT**  
**AND THE LIABILITY INSURANCE PLAN**

**RESOLUTION**  
**8A-11-2007**  
**OF THE**  
**VIRGINIA RAILWAY EXPRESS**  
**OPERATIONS BOARD**

**WHEREAS**, NVTC and PRTC established the Commuter Rail Liability Insurance Plan (“Insurance Plan”) in 1989; and,

**WHEREAS**, the Insurance Plan is administered by the Commonwealth of Virginia Division of Risk Management (DRM) and provides for the indemnification obligations accepted by the Commissions in agreements with railroads; and,

**WHEREAS**, the Insurance Fund Agreement and Liability Insurance Plan have not been modified or updated since their original execution; and,

**WHEREAS**, it is appropriate to update them.

**NOW, THEREFORE, BE IT RESOLVED THAT**, the VRE Operations Board recommends that the Commissions approve amendments to the Insurance Fund Agreement for Commuter Rail Operation Liability Insurance Plan and the Liability Insurance Plan, in accordance with the attached amended documents; and,

**BE IT FURTHER RESOLVED THAT**, the VRE Operations Board recommends that the Commissions authorize the VRE Chief Executive Officer to execute each document on behalf of the Commissions.

Nov. 8, 2007

Deleted: 11/27/89

NORTHERN VIRGINIA AND POTOMAC AND RAPPAHANNOCK  
TRANSPORTATION COMMISSIONS  
COMMUTER RAIL OPERATIONS LIABILITY INSURANCE PLAN

As requested by the Northern Virginia and Potomac and Rappahannock Transportation Commissions (hereinafter the "Commissions"), the Department of Treasury, Division of Risk Management, in accordance with §2.2-1839 of the Code of Virginia, as amended, with the approval of the Governor, hereby establishes the terms and conditions of the Commissions' Commuter Rail Operations Liability Insurance Plan (hereinafter the "Plan"), a "liability policy" within the meaning of §15.2-4526.C of the Code of Virginia, as amended, to fulfill the liabilities created by the indemnification portions of the various Operating and/or Access Agreements entered into between the Commissions and the several Rail Entities as well as direct liabilities of the Commissions arising out of the operation of the Commuter Services.

Deleted: T

Deleted: General Services

Deleted: Section 2.1-526.8:1 of the Code of Virginia (1950), as amended

Deleted: Northern Virginia and Potomac and Rappahannock Transportation Commissions (hereinafter the "

Deleted: ")

Deleted: established

The Plan and all INSUREDS/INDEMNITEES, as defined herein, agree as follows:

PART A. INSURING AGREEMENT

The Plan will pay on behalf of the INSURED/INDEMNITEE as defined hereafter all sums which the INSURED/INDEMNITEE shall become legally obligated to pay as DAMAGES as a result of OCCURRENCES. Such coverage provided hereunder shall be applicable despite the fact that such liability may have been caused, in whole or in part, by the negligence, regardless of its character or degree, of any employee, agent, or officer of any Rail Entity which has entered into an Agreement with the Commissions for the provision of COMMUTER RAIL SERVICE.

PART B. DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS

- 1) The Plan shall have the right and duty to defend any suit against the INSURED/INDEMNITEE seeking DAMAGES on account of such OCCURRENCE for which the Commissions are responsible pursuant to the respective Agreements, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and settlement, subject to the provisions of B(2)(b), of any claim or suit as it deems expedient: provided, however, the Plan shall not be obligated to pay any claim or judgment or defend any suit, after the applicable limit of the Plan's liability has been exhausted by payment of judgments, settlements, or supplementary expense payments, except as provided in Part B(4) below.

With respect to claims for which the Commissions are responsible and which involve litigation against the INSURED/INDEMNITEE, the Commissions will provide, at the Plan's expense, legal representation. Selection of counsel to represent any

INSURED/INDEMNITEE in such litigation shall be determined by the Plan. The INSUREDS/INDEMNITEES may, at their own expense, provide for legal representation with respect to claims which involve litigation against them.

- 2) a) An INSURED/INDEMNITEE shall not, except at his own cost and for his own account, make any payment, admit any liability, settle any claim, assume any obligation, or incur any expense for which the Plan would be liable without the written consent of the Plan except as provided below.
- b) Each INSURED/INDEMNITEE, as the case may be, will promptly advise the Plan of claims. The Plan, however, agrees that AMTRAK will handle, subject to the Division of Risk Management's oversight, the investigation and settlement of all claims arising out of the COMMUTER RAIL SERVICE. The Division of Risk Management and AMTRAK will coordinate the investigation of all claims. Specifically, AMTRAK will evaluate each claim it receives upon receipt and provide the Commissions and the Division of Risk Management with an initial report. AMTRAK will also submit, at least semi-annually, a report on all claims of which it is aware indicating status. Under the Plan, AMTRAK has the authority to settle and pay individual claims up to \$10,000.00 for any one claim. Any proposed settlement or payment of a single claim which is in excess of \$10,000 will be submitted to the Division of Risk Management for prior approval.

Deleted: of

Deleted: The Division of Risk Management specifically agrees that

3) The Plan will pay, as supplementary expenses:

- a) expenses for reasonable attorneys fees incurred in the defense of claims;
- b) expenses incurred by the INSUREDS/INDEMNITEES for outside manpower and for other extraordinary expenses of handling individual claims, as set out in the Operating and/or Access Agreements, provided prompt and advance notice of such expenses is provided the Plan;
- c) costs assessed against the INSURED/INDEMNITEE in any suit covered by the Plan and all interest on the amount of any judgment therein which accrues after entry of the judgment and before the Plan has paid or tendered or deposited in court that part of the judgment;
- d) premium on appeal bonds required in any suit covered by the Plan and costs of attachment or similar bonds.

4) a) The expenses referred to in subparagraph 3(a) through 3(d) above shall be in addition to the \$100,000 per claimant limit set out in Part C(1), but shall be included within the limits set out in Part C(2).

Deleted: 75,000

b) If suit is brought against an INSURED/INDEMNITEE alleging claims not arising out of an OCCURRENCE and for which the Commissions are not responsible together with claims arising out of an Occurrence for which the Commissions are

responsible, the INSURED/INDEMNITEE and the Commissions, with the Plan's approval, will agree on a method of allocating equitably the costs of defense described in subparagraphs 3(a) through 3(d) above.

PART C. LIMITS OF LIABILITY

Regardless of the number of (1) INSUREDS/INDEMNITEES under this Plan, (2) persons or organizations who sustain DAMAGES payable under this PLAN, or (3) suits brought on account of insurance afforded by this Plan, the Plan's liability is limited as follows:

- 1) The Plan's liability with respect to any Insured defined in Part E(4)(a) shall not exceed \$100,000 per claimant; Deleted: 75,000.00
  
- 2) With regard to the liability of any Insured/Indemnified Rail Entity or Liability Assumed by the Commissions by specific contractual indemnity:
  - a) The limit of liability under this Plan, regardless of the number of claims or the number of Insureds/Indemnitees, shall not exceed \$250,000,000 as a result of, or arising from, OCCURRENCES in any one ANNUAL TERM. Deleted: 200,000,000
  
  - b) This limit of liability required by 2(a) above may be fulfilled by self-insurance, purchased commercial insurance or participation in any alternative insurance mechanism, provided1 however, that the extent of liability covered under this Plan shall not be reduced by, or limited to, the coverage provided by any such insurance. The reinstatement of all or any portion of any insurance coverage purchased by the Plan shall not operate to increase the annual aggregate liability of the Commissions under the Plan's self-insurance provisions to a sum in excess of \$250,000,000. Deleted: 200,000,000
  
  - c) The Plan shall consist of a \$5 million self-insured retention and the balance of the coverage up to \$250 million shall consist of commercial insurance or participation in any financially sound alternative insurance mechanism. Except for the initial \$5 million self-insurance retention, self-insurance shall be used only to the extent that commercial insurance or alternative Insurance mechanisms are not available. Deleted: 200
  
- 3) In the event that the Commuter Rail Operations Liability Insurance Trust Fund created and maintained for the purpose of implementing this Plan is rendered or becomes insolvent, neither the Commonwealth of Virginia, the General Assembly of Virginia nor any department, agency, institution, board, commission or officer, agent or employee, or any of the constituent jurisdictions of either Commission or any officer, agent or employee thereof, shall be liable for any claim that would have been covered under this Plan but for such insolvency. The establishment of this Plan does not, and shall not be deemed or construed to, pledge or obligate the full faith and credit of the Commonwealth of Virginia or any political subdivision thereof.

The determination of such insolvency rests solely with the Department of Treasury, Division of Risk Management, and will be communicated promptly to all INSUREDS/INDEMNITEES. The financial status of the Plan shall be reported to the INSUREDS/INDEMNITEES at least semi-annually.

Deleted: General Services

#### PART D. EXCLUSIONS

1) The Plan shall not be obligated to make any payment or defend any lawsuit in connection with any claim made against the INSURED/INDEMNITEE:

- a) Based upon or attributed to their gaining in fact any profit, advantage or remuneration to which they were not legally entitled;
- b) Brought about or contributed to by fraud or dishonesty of an INSURED/INDEMNITEE: provided, however, such exclusion shall not be effective unless a judgment or other final adjudication thereof adverse to such INSURED/INDEMNITEE shall establish that acts of active or deliberate dishonesty or fraud committed by such INSURED/INDEMNITEE were material to the cause of action so adjudicated; and further provided that this exclusion shall not apply to any INSURED/INDEMNITEE other than the entity, including its officers and employees, who committed such fraud or dishonesty.

c) Based on liability arising out of the ownership, maintenance and operation, loading or unloading of vehicles of any kind licensed for use on public highways, except that this exclusion shall not apply to the Commissions in instances where Commission owned vehicles, provide transportation for commuters, on account of an interruption of service due to malfunction of the train, accident or other conditions which require commuters to be transported by means other than trains, and shall not apply to hyrail vehicles when not covered by automobile insurance. Any insurance or self-insurance provided by this Plan shall be excess over any other valid and collectable insurance maintained with respect to those vehicles.

Deleted: hired by AMTRAK to

Deleted: due to the necessity which arises

Deleted: passengers

Deleted: or

Deleted: hired

Notwithstanding this exclusion, the Plan shall cover liability arising from a collision between a train and vehicle licensed for use on public highways, which occurs at a grade crossing, or anywhere else on the tracks, and which collision arises out of an Occurrence.

Deleted: In no event will any coverage by the Plan accrue to owners or operators of such hired vehicles.¶

Deleted: over which a commuter rail train is being operated

d) Based on any injury or death to employees of Amtrak arising out of the COMMUTER RAIL SERVICE, except this exclusion shall not apply to any claim for injury or death to Amtrak employees brought against the Commissions, CSXT, or Norfolk Southern.

Deleted: any INSURED/INDEMNITEE

Deleted: of Conrail, RF&P

e) Based on property damage to property owned or leased by the Northern Virginia Transportation Commission or the Potomac and Rappahannock Transportation

Commission unless such claim is asserted against one or more of the rail entities named in Part E (4) (b2), (b3) and (b4V) and (5) of this Plan.

This exclusion shall not apply to property of any other INSURED/INDEMNITEE or to property of other persons. Further, this exclusion shall not apply to the deductible amount of any property insurance for property owned or leased by the Northern Virginia Transportation Commission and the Potomac and Rappahannock Transportation Commission.

- f) Based on any claims arising from any contract dispute, provided however that this exclusion shall in no way apply to liability assumed by the Commissions by contract with Rail Entities, namely the National Railroad Passenger Corporation (AMTRAK), Norfolk Southern Railway Company (Southern), and CSX Transportation (CSXT).

Deleted: Richmond, Fredericksburg & Potomac Railroad Company (RF&P),

Deleted: Consolidated Rail Corporation (Conrail)

Deleted: A

Deleted: , or arising out of,

Deleted: /

- g) Based on any claim for normal wear or deterioration of roadbed and track, routine personnel requirements, delays, or any other loss or damage attributable to or exacerbated by the normal operations of the COMMUTER RAIL SERVICE, the costs of which claim, loss or damage are taken into account under the compensation provisions of any OPERATING AND/OR ACCESS AGREEMENTS.

#### PART E. DEFINITIONS

Whenever used in this Plan, the following words have these meanings:

- 1) ANNUAL TERM - means:

Any twelve month period beginning July 1. If the Commuter Rail Service begins operation, which may or may not be the date that passengers are first transported, other than on 1 July. That period between the date operations begin and the July 1 next ensuing shall constitute an annual term.

- 2) COMMUTER RAIL SERVICE (also known as Contract Service) - means all activities relating to the provision of rail passenger service along two lines between a point at or near Fredericksburg, Virginia and the Washington, D.C. Union Station, and between a point at or near Manassas Airport, Virginia and Washington, D.C. Union Station over the railroad tracks of the Norfolk Southern Railway Company, AMTRAK and CSXT with various intermediate stops. This term includes switching, maintenance, train storage and other services related to the provision of Commuter Rail Service as set forth in the Operating and/or Access Agreements.

Deleted: Richmond, Fredericksburg and Potomac Railroad Company,

Deleted: Conrail

- 3) DAMAGES - includes compensatory, liabilities assumed under the Operating and/or Access Agreements - Risk of Liability Article, punitive and equitable damages.

- 4) INSURED - means:

- a) The Northern Virginia Transportation Commission, the Potomac and Rappahannock Transportation Commission, and any other Transportation Commission subject to the Virginia Tort Claims Act that may become a participant in the Commuter Rail Service operated by or for the Commissions.
- b)
  - 1) the officers and employees of the Northern Virginia Transportation Commission and the Potomac and Rappahannock Transportation Commission;
  - 2) the National Railroad Passenger Corporation (AMTRAK), its officers, directors, agents and employees, including the Washington Terminal Company, its officers, directors, agents and employees, and all successors and assigns of the foregoing; and
  - 3) CSXT, its corporate affiliates, its licensees, including entities which have trackage rights with CSXT to the extent CSXT may be liable, its officers, directors, agents and employees, and all successors and assigns of the foregoing.
- 5) INDEMNITEE - means Norfolk Southern Railway Company, its officers, agents, employees and corporate affiliates, and all successors and assigns of the foregoing.
- 6) OCCURRENCE - means an event or series of events which are attributable in any way to or which are exacerbated by the operation of or the performance of the Commuter Rail Service or to the presence of cars, equipment, personnel or passengers of the Commuter Rail Service on or about the property of any Rail Entity.
- 7) OPERATING AND/OR ACCESS AGREEMENTS - means Agreements between the Commissions and any railroad for use of its respective facilities and for services to operate the Commuter Rail Service.

**Deleted:** The Richmond, Fredericksburg and Potomac Railroad Company (RF&P), the RF&P Corporation.

**Deleted:** RF&P

**Deleted:** RF&P

**Deleted:** ; and¶

¶  
4) The Consolidated Rail Corporation (CONRAIL), its corporate affiliates, its licensees, officers and employees.

**PART F. NOTICE OF CLAIM**

- 1) The INSURED/INDEMNITEE, as a condition precedent to coverage under this Plan, shall give the Plan notice in writing as soon as practicable of any claim made and shall give the Plan such information and cooperation as it may reasonably require. Such notice shall be given to AMTRAK on behalf of the Plan.
- 2) If, during the period of coverage, an INSURED/INDEMNITEE receives written or oral notice from any party that it is the intention of such party to hold an INSURED/INDEMNITEE responsible for loss or damage arising from an OCCURRENCE, such INSURED/INDEMNITEE shall, as soon as practicable, give written notice to the Plan of the receipt of such notice, whether or not such notice is expressed in the form of a claim.

**Deleted:** the Division of Risk Management, Department of General Services, Commonwealth of Virginia

PART G. CONDITIONS

- 1) ACTION UNDER THIS PLAN. No action shall be brought by any INSURED/INDEMNITEE under this Plan unless, as a condition precedent thereto, such INSURED/INDEMNITEE has fully complied with all the terms hereof nor until the amount of the INSURED/INDEMNITEE'S obligation to pay shall have been finally determined either by judgment against the INSURED/INDEMNITEE after actual trial or by written agreement of the INSURED/INDEMNITEE, the claimant and the Plan. In the event of the bankruptcy or insolvency of the INSURED/INDEMNITEE, the Plan shall not be relieved of the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency.
- 2) ASSIGNMENT. Assignment of interest under this Plan shall not bind the Plan until its consent is endorsed thereon by the Division of Risk Management and the Commissions.
- 3) CHANGES. Notice to any agent or knowledge possessed by any agent or by any other person shall neither effect a waiver or a change in any part of this Plan nor estop the Plan from asserting any right under the terms hereof. No provisions of this Plan may be waived or changed, except by amendment hereto approved in accordance with §2.2-1839 of the Code of Virginia, as amended, and except with the approval of all INSUREDS/INDEMNITEES.
- 4) SUBROGATION CLAUSE. In the event of any payment under this Plan, the Plan shall be subrogated to the extent of such payment to all rights of recovery therefor, and the INSUREDS/INDEMNITEES shall execute all papers required and shall do everything that may be necessary to secure and preserve such rights including the execution of such documents necessary to enable the Plan effectively to bring suit in the name of the INSURED/INDEMNITEE.
- 5) SETTLEMENT OF DISPUTES.
  - a) To the extent permitted by law, issues that arise about the coverage or operation of this Plan, excluding interpretations or applications of provisions of an OPERATING AND/OR ACCESS AGREEMENT between the Commissions and an INSURED/INDEMNITEE, that cannot be resolved between any INSURED/INDEMNITEE and the Plan, shall be resolved by submitting the matter to arbitration as provided in Part G(5)(b) below.
  - b) Any controversy which is referable to arbitration shall be submitted to disinterested arbitrators, one of which shall be appointed by each disputant; and the arbitrators so chosen shall select a third arbitrator, or such numbers of arbitrators that would result in an uneven number of arbitrators if there are an odd number of disputants, and the decisions of a majority of them shall be final and conclusive between the parties hereto. In case either of the said parties shall fail or refuse to appoint an arbitrator as aforesaid for the period of thirty (30) calendar days after written notice given by the other party to make such appointment, then

Deleted: Section 2.1-526:8.1 of the Code

Formatted: All caps

and in that event, a second arbitrator shall be appointed, upon application of the first arbitrator, by the American Arbitration Association, and the said two arbitrators, so appointed, shall select a third arbitrator, and the three so chosen shall hear and decide such difference or dispute, and their decision, or that of a majority of them, shall be final and conclusive upon the parties hereto. In the event that the appointed arbitrators shall be unable to agree upon a third or such additional arbitrators within thirty (30) days after the appointment of the last of the disputant's arbitrators, as needed to comprise an odd-numbered panel, such additional arbitrator or arbitrators shall be appointed, upon the application of any party hereto, upon reasonable notice to the other parties by the American Arbitration Association. If any arbitrator shall decline or fail to act, the party or person by whom he was chosen or appointed, as the case may be, shall appoint another to act in his place.

- c) Each party hereto shall bear the costs and expenses incurred by it in connection with such arbitration, including the cost of the arbitrator appointed by or for it. The parties shall share equally the costs and expenses attributable to the services of the third arbitrator or additional arbitrators provided for herein.
- d) Any findings made in any other proceeding involving the conduct out of which the dispute arises may be considered by the arbitrators, but shall not be conclusive, unless the arbitrators so determine.

- 6) No person or organization shall have any right under this plan to join the Commonwealth of Virginia, [the Department of Treasury](#), the Division of Risk Management, or any of its employees as a party to any action against an INSURED/INDEMNITEE to determine the liability of the INSURED/INDEMNITEE, nor shall the Commonwealth of Virginia, [the Department of Treasury](#), the Division of Risk Management, or any of its employees be impleaded by the INSURED/INDEMNITEE or its legal representative.

PART H. NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT  
(Broad Form)

This endorsement modifies the provisions of this Plan relating to ALL COVERAGE.

It is agreed that:

- 1) This Plan does not apply:
  - A) Under any Liability Coverage,
    - 1) with respect to which an INSURED/INDEMNITEE under this policy is also an INSURED under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an INSURED under any such policy but for its termination upon exhaustion of its limit of liability; or
    - 2) resulting from the HAZARDOUS PROPERTIES OF NUCLEAR MATERIAL and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 954, or any law amendatory thereof, or (b) the INSURED/INDEMNITEE is, or had this policy not been issued would be, entitled to indemnity from the United States of American, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.
  - B) Liability resulting from the HAZARDOUS PROPERTIES of NUCLEAR MATERIAL, if
    - 1) the NUCLEAR MATERIAL a) is at any NUCLEAR FACILITY owned by, or operated by or on behalf of an INSURED/INDEMNITEE or b) has been discharged or dispersed therefrom.
    - 2) the NUCLEAR MATERIAL is contained in SPENT FUEL or WASTE at any time possessed, handled, used, processed, stored, transported, or disposed of by or on behalf of the INSURED/INDEMNITEE, or
    - 3) Any injury or damage arises out of the furnishing by an INSURED/INDEMNITEE of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any NUCLEAR FACILITY, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to damage to such NUCLEAR FACILITY and any property threat.

2) As used in this endorsement:

"HAZARDOUS PROPERTIES" include radioactive, toxic or explosive properties.

"NUCLEAR MATERIAL" means SOURCE MATERIAL, SPECIAL NUCLEAR MATERIAL or BY-PRODUCT MATERIAL.

"SOURCE MATERIAL", "SPECIAL NUCLEAR MATERIAL", and "BY-PRODUCT MATERIAL" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"SPENT FUEL" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a NUCLEAR REACTOR.

"WASTE" means any waste material (a) containing by-product material, other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its SOURCE MATERIAL content, and (b) resulting from the operation by any person or organization of any NUCLEAR FACILITY included under the first two paragraphs of the definition of NUCLEAR FACILITY.

"NUCLEAR FACILITY" means

- a) any NUCLEAR REACTOR.
- b) any equipment or device designed or used for
  - (1) separating the isotopes of uranium or plutonium,
  - (2) processing or utilizing SPENT FUEL, or (3) handling, processing, or packaging WASTE.
- c) any equipment or device used for the processing, fabricating or alloying of SPECIAL NUCLEAR MATERIAL if at any time the total amount of such material in the custody of the INSURED/INDEMNITEE at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.
- d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of WASTE.

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"NUCLEAR REACTOR" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"DAMAGE" includes all forms of radioactive contamination of property.

IN WITNESS WHEREOF, this Plan has been executed, effective this \_\_\_\_ day of \_\_\_\_\_, 2007.

Deleted: 1989

APPROVED BY NORTHERN VIRGINIA AND POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSIONS:

\_\_\_\_\_  
Chair, Northern Virginia Transportation Commission

\_\_\_\_\_  
Chair, Potomac and Rappahannock Transportation Commission

APPROVED:

\_\_\_\_\_  
J. Braxton Powell, Treasurer  
Department of Treasury

\_\_\_\_\_  
Don W. LeMond, Director  
Division of Risk Management

Deleted: Wendell L. Seldon, Director

Deleted: Department of General Services

APPROVED BY THE GOVERNOR:

\_\_\_\_\_  
Jody Wagner  
Secretary of Finance

Deleted: Secretary of Administration, pursuant to the authority of Executive Order 25 (Revised), dated November 14, 1986

NORTHERN VIRGINIA COMMUTER RAIL PROJECT

VIRGINIA RAILWAY EXPRESS

---

AMENDED AND RESTATED  
INSURANCE FUND AGREEMENT

FOR

COMMUTER RAIL OPERATION LIABILITY INSURANCE PLAN

AMENDED AND RESTATED  
INSURANCE FUND AGREEMENT

Between

NORTHERN VIRGINIA TRANSPORTATION COMMISSION

And

POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION

And

DIVISION OF RISK MANAGEMENT  
DEPARTMENT OF TREASURY  
COMMONWEALTH OF VIRGINIA

Deleted: GENERAL SERVICES

-----  
DATED                     , 2007

Deleted: JUNE 1, 1990

November 8, 2007

THIS AMENDED AND RESTATED INSURANCE FUND AGREEMENT

(“Agreement”), is entered into as of \_\_\_\_\_, 2007, between NORTHERN VIRGINIA TRANSPORTATION COMMISSION and POTOMAC AND RAPPAHANNOCK TRANSPORTATION COMMISSION (collectively, the Commissions”) and DIVISION OF RISK MANAGEMENT OF THE DEPARTMENT OF TREASURY OF THE COMMONWEALTH OF VIRGINIA (“Administrator”).

Deleted: December 1, 1989

Deleted: GENERAL SERVICES

WITNESSETH:

The Commissions have entered into a Master Agreement for the Provision of Commuter Rail Services in Northern Virginia – The Establishment of the Virginia Railway Express, dated as of October 3, 1989 (“Master Agreement”) and amended April 2, 1992 and July, 2007, with the Participating and the Contributing Jurisdictions, as defined in the Master Agreement, which provides for establishment of commuter rail service in Northern Virginia.

Deleted: 27

In furtherance of the Master Agreement, the Commissions have entered into separate Access Agreements, dated May 5, 2000, as amended and extended, and February 10, 1995, as amended and extended, (“Access Agreements”), with the Norfolk Southern Railway Company, and CSX Transportation, Inc., (the “Railroads”), respectively, and an operating access agreement with the National Railroad Passenger Corporation (“Amtrak”), dated March 1, 1998, as amended, the terms of which, among other things, require that the Commissions maintain an insurance plan described in Exhibit F to the Master Agreement (“Insurance Plan”) consisting in part of purchased commercial insurance or other insuring risk transfer mechanisms and in part of

Deleted: as of December 1, 1989

Deleted: the Richmond, Fredericksburg & Potomac Railroad Company,

Deleted: the Consolidated Rail Corporation

Deleted: as of October 27, 1989

reserves to be administered by the Division of Risk Management (“Administrator”) of the Department of Treasury of the Commonwealth of Virginia.

Deleted: General Services

In order to meet their obligations under the Access Agreements and pursuant to §2.2-1839 of the Code of Virginia, as amended (“Code”), the Commissions have entered into an Amended and Restated Management Agreement, dated as of \_\_\_\_\_, 2007, with the Administrator for management of the Insurance Plan (“Management Agreement”). The Commissions desire to establish this fund with the Administrator for the purposes of holding the reserves provided for under the Insurance Plan and Management Agreement.

Deleted: Section 2.1-526.8:1

Deleted: October 27, 1989

## ARTICLE I

### Creation of Fund

Section 1.1 Creation of Fund. In order to establish insurance reserve required by the Insurance Plan and the Management Agreement, the Commissions establish with the Administrator this Insurance Fund to be held and administered under the terms of this Agreement. The Commission will pay or cause to be paid the Administrator to be administered under this Agreement all amounts required by the Management Agreement.

## ARTICLE II

### Authorized Payments

Section 2.1 Authorized Payments. The Administrator is authorized to make the following payments from the money held under this Agreement:

- (a) Administrative costs of the Administrator and the Commissions, including actuarial costs, professional administrative expense, personnel costs and all other direct and indirect expenses related to the administration of the Insurance Plan;

(b) Liquidated liability insurance claims in amounts and to parties determined by the Administrator;

(c) Investigation and legal defense costs;

(d) Fees incurred by the Administrator in the administration of this Agreement;

(e) Amounts to be paid to Amtrak to establish and maintain the imprest fund of \$50,000 as described in the Management Agreement at such time in such amounts as directed by the Administrator;

Deleted: s

(f) Premiums on insurance purchased pursuant to the Insurance Plan including deductible amounts if applicable;

Deleted: and

(g) Purchase of stock in any excess or captive in insurance company for the purpose of obtaining insurance coverage and

Deleted: .

(h) Costs related to subrogation.

All payments will be made at the sole discretion of the Administrator, unless otherwise noted above.

Section 2.2 Form of Application for Payment. Before any payment is made, the Administrator may require such written evidence to support the payment as the Administrator deems appropriate, including in the case of any payment to the Commission, a written request, signed by an authorized representative of the Commissions, stating:

(a) The name or names of the person, firm or corporation to whom the payment is due;

(b) The amount to be paid; and

(c) The purpose in reasonable detail for which the obligation to be paid was incurred.

Section 2.3 Prompt Payment. The practice of the Administrator and the two Commissions shall be to effect prompt payment of all amounts due under the terms of the Insurance Plan and the Management Agreement.

### ARTICLE III

#### Authorized Investments

Section 3.1 Investments. In addition to the making of payments authorized hereunder, any money held by the Administrator under this Agreement may be invested and reinvested by the Administrator in investments which are at the time permitted by §§2.2-1839 and 1806, and §§2.2-4500 et seq., the Investment of Public Funds Act, of the Code, and approved by the Treasury Board. These may include but are not limited to the following:

Deleted: Section 2.1—185, 327 and 328

(a) Bonds, notes and other evidence of indebtedness to which the full faith and credit of the Commonwealth or of any of its political subdivisions is pledged for payment of its political subdivisions, agencies, districts, authorities or other public bodies and are rated in one of the two highest long-term debt rating categories by at least one of the Rating Agencies, without regard to any refinement or gradation of such rating category by numerical modifier or otherwise;

(b) Bonds, notes and other obligations of the United States of America and securities unconditionally guaranteed as to the payment of principal and interest by the United States of America;

(c) Certificates representing ownership of United State Treasury bond principal at maturity or coupons for accrued periods, which bonds or coupons are held by a bank or trust company organized and existing under the laws of the United States of America or any of its

states acceptable to the Administrator in the capacity of custodian and independent to the seller of such certificates.

(d) Bond, notes and other evidence of indebtedness issued by an agency of the United States of America; and

(e) Savings accounts, time deposits and certificates of deposit in any bank and its affiliates, within or without the Commonwealth, provided that such funds are secured in the manner required by [§§2.2-4400 et seq. of the Code](#), the Virginia Security for Public Deposits Act, or any successor legislation.

Any investments described in subsections (b) and (d) above may be purchased pursuant to a repurchase agreement with any bank within or without the Commonwealth having a combined capital, surplus and undivided profits of not less than \$50,000,000 or any Primary Government Securities Dealers reporting to the Federal Reserve Bank of New York. Such repurchase agreement shall be considered a purchase of such investments even if title to and/or possession of such securities is not transferred to the Administrator so long as (i) the repurchase obligation is collateralized by the investments themselves, (ii) the investments have on each day that the repurchase agreement is in effect a fair market value equal to at least 102% of the amount of term repurchase obligations, and, at least 100% of the amount of overnight repurchase obligations including principal and interest, (iii) the investments are held by a third party (not as agent for the bank) for the benefit of the Administrator as fiduciary under this Agreement and segregated from securities owned generally by such third party or the bank, and (iv) a perfected security interest under the Uniform Commercial Code of Virginia or book entry procedures prescribed at 31 C.F.R. 306.1 et seq. or 31 C.F.R. 350.0 et seq., as amended, in the investments is created for the benefit of the beneficiaries under this Agreement.

All such investments shall be held by or under the control of the Administrator and while so held shall be deemed a part of the Insurance Fund. The interest accruing on and any profit realized from such investments shall be credited to the Insurance Fund and any loss resulting from such investments shall be charged to the Fund. The Administrator shall sell or cause to be sold a sufficient amount of such investments whenever the cash balance in the Insurance Fund is insufficient for its purposes.

In determining the amount on deposit in the Insurance Fund, investments will be valued at their market price, exclusive of accrued interest.

Section 3.2 Department of Treasury. Any investment of money held by the Administrator may be made through the Department of Treasury in accordance with such policies and procedures for investments as may then be in effect.

#### ARTICLE IV

##### The Administrator

Section 4.1 Reports by Administrator. Within fifteen business days following the end of each calendar quarter, the Administrator will deliver to the Commissions a statement describing the amounts held under this Agreement on the last day of the previous quarter, deposits to the Fund by the Commissions and others during the quarter, income earned during the quarter, and all payments made from the Insurance Fund since the last statement furnished pursuant to this Section.

**Deleted:** commencing with the first quarter of 1990

**Deleted:** Railroads and the

Section 4.2 Liability of Administrator. The Administrator will have no responsibility to the Commissions, the Railroads, Amtrak, or any other person in connection with this Agreement, except as specifically provided, and will not be responsible for anything done or omitted to be done by it except for its own negligence or default in the performance of any obligation imposed

on it under this Agreement in accordance with the provisions of the Virginia Tort Claims Act. The Administrator is not a party to, nor bound by or need it give consideration to the terms or provisions of any other person, and the Administrator assents to and is to give consideration only to the terms and provisions of this Agreement. Unless specifically provided in this Agreement, the Administrator has no duty to determine or inquire into the happening or occurrence of any event or contingency or the performance or failure of performance of the Commissions with respect to arrangements or contracts with others, the Administrator's sole duty being to safeguard the Insurance Fund and to invest, pay out, and dispose of it in accordance with this Agreement. If the Administrator is called upon by the terms of this Agreement to determine the occurrence of any event or contingency, the Administrator may reasonably request from the Commissions or any other person such additional evidence as the Administrator in its discretion may deem necessary to determine any fact relating to the occurrence of such event or contingency, and in this connection may inquire and consult with the Commissions at any time.

Section 4.3 Evidence Upon Which Administrator May Act. The Administrator may act upon any notice, request, waiver, consent, certificate, receipt, authorization, power of attorney or other instrument of document which the Administrator in good faith believes to be genuine and to be what it purports to be.

Section 4.4 Replacement of Administrator. The Administrator may resign, and thereby become discharged from the Commissions. Such resignation shall take effect immediately, however, except as may hereafter be provided by law, the Administrator shall continue to serve as Administrator until a successor is appointed, the funds held under this Agreement, this or any successor Administrator shall rebate to the Commissions a ratable portion of any fee paid by the Commission to the Administrator for its services under this Agreement.

Section 4.5 Fees, Charges and Expenses of the Administrator. The Administrator is entitled to payment of and reimbursement for reasonable fees for its services and all expenses reasonably incurred by it under this Agreement, including the reasonable fees and disbursements of its counsel.

## ARTICLE V

### Termination

Section 5.1 Termination of Agreement. This Agreement shall terminate upon final payment of all distribution set forth in Section 5.2.

Section 5.2 Distribution of Funds on Termination. On termination of the Access Agreements with the Railroads, the Commissions reserve the right to terminate this Agreement with the Administrator. On receipt of written notice of termination from the Commissions, the Administrator will continue to perform its obligation under this Agreement until the expiration of those years after the date of the termination notice at which time any amounts remaining in the Insurance Fund, less any amounts to be reserved for the payment of pending claims and expenses, shall be paid by the Administrator to the Commissions or as the Commissions may direct.

## ARTICLE VI

### Miscellaneous

Section 6.1 Notices. Unless otherwise provided in this Agreement, all demands, notices, approvals, consents requests, opinions and other communications hereunder will be in writing and will be deemed to have been given when delivered in person or mailed by registered or certified mail, postage prepaid, addressed as follows:

(a) If to the Commissions, Virginia Railway Express, 1500 King Street, Suite 202, Alexandria, Virginia 22314, Attention: Chief Executive Officer; and

(b) if to the Administrator, 101 North 14<sup>th</sup> Street, 3rd Floor, Richmond, Virginia 23219, Attention Director.

**Deleted:** c/o Northern Virginia Transportation Commission, Arlington Executive Building, 2009 North 14<sup>th</sup> Street, Suite 300, Arlington, Virginia 22201, Attention: Executive Director, with a copy to the Potomac and Rappahannock Transportation Commission, 9257 Lee Avenue, Manassas, Virginia 22110

**Deleted:** 805 East Broad Street, 9<sup>th</sup> Floor

**Formatted:** Superscript

The parties may, by notice given under this Agreement, designate any further or different addresses to which subsequent demands, notices, approvals, consents, requests, opinions or other communications will be sent or persons to whose attention they will be directed.

Section 6.2 Successors and Assigns. This Agreement will be binding upon, inure to the benefit or and be enforceable by its parties and their respective successors and assigns.

Section 6.3 Counterparts. This Agreement may be executed in several counterparts each of which will be an original and all of which together will constitute but one and the same instrument.

Section 6.4 Conflicts between Various Agreements. Except with respect to the naming of the parties to the Insurance Fund Agreement, appearing on Page 2 of the Management Agreement, in which case the Insurance Fund Agreement will control, in the event of any conflict between the terms of this Agreement and the terms of the Management Agreement, the terms of the Management Agreement shall control. In the event of any conflict between the terms of this Agreement and/or the terms of the Management Agreement and the terms of the Master Agreement, the terms of the Master Agreement shall control.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers.

COMMONWEALTH OF VIRGINIA  
OFFICE OF THE GOVERNOR

NORTHERN VIRGINIA  
TRANSPORTATION COMMISSION

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA  
TRANSPORTATION COMMISSION  
DEPARTMENT OF TREASURY

POTOMAC AND RAPPAHANNOCK

Deleted: DEPARTMENT OF  
GENERAL SERVICES

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF TREASURY  
DIVISION OF RISK MANAGEMENT

Deleted: DEPARTMENT OF  
GENERAL SERVICES

Deleted: ¶

By: \_\_\_\_\_

Title: \_\_\_\_\_