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November 21, 2018

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Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. FD 36186, Texas Railway Exchange LLC – Construction and
Operation Exemption – Galveston County, TX

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket please find (i) an executed original and ten copies of the *Petition of the Texas Railway Exchange LLC for an Exemption under 49 U.S.C. § 10502 from the Requirements of 49 U.S.C. § 10901* (which contains marked color pages); (ii) a check for the filing fee of \$88,700; and (iii) three CDs with a PDF copy of the filing.

Kindly date stamp the extra copy of this cover letter and the enclosed filing and return them to the bearer of this letter. Thank you for your attention to this matter.

Respectfully submitted,

Peter A. Pfohl

An Attorney for Texas Railway Exchange LLC

FEE RECEIVED
November 21, 2018
SURFACE
TRANSPORTATION BOARD

FILED
November 21, 2018
SURFACE
TRANSPORTATION BOARD

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

	)	
TEXAS RAILWAY EXCHANGE LLC –	)	
Construction and Operation Exemption –	)	FD 36186
Galveston County, TX	)	
	)	

**PETITION OF
TEXAS RAILWAY EXCHANGE LLC
FOR AN EXEMPTION UNDER 49 U.S.C. § 10502 FROM THE
REQUIREMENTS OF 49 U.S.C. § 10901**

TEXAS RAILWAY EXCHANGE LLC

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Dated: November 21, 2018

Its Attorneys

EXPEDITED CONSIDERATION REQUESTED

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INTRODUCTION

The Texas Railway Exchange LLC (“TREX”) petitions for an exemption to construct and operate a short new common carrier rail line in Galveston, Texas. TREX’s proposed rail line will provide the Texas International Terminals Ltd. (“TIT”) with a permanent, direct, and more efficient connection to the BNSF Railway Company (“BNSF”) to better serve the business needs of TIT, BNSF, third party shippers, and the public. This project is supported by both BNSF¹ and shippers.²

The Surface Transportation Board (“STB” or “Board”) should exempt TREX’s proposed rail construction and operation pursuant to 49 U.S.C. § 10502(a) and 49 C.F.R. §§ 1121.1 *et seq.* because it promotes the rail transportation policy specified at 49

¹ Letter from BNSF to Surface Transportation Board dated Nov. 19, 2018, attached as Counsel’s Exhibit 1.

² Verified Statement of Todd Sullivan (“Sullivan V.S.”) at Exhibit (“Exh.”) 4 (Valero Marketing & Supply Co. letter of support) & Exh. 5 (International Raw Materials Ltd. letter of support).

U.S.C. § 10101 by increasing competition, streamlining operations, significantly reducing train switching, and reducing energy demands; it is limited in scope as it consists of only approximately one-half mile of rail line; and it will assist shippers in obtaining improved rail service and reduced train turnaround times. Exemption of TREX's proposed rail construction is also consistent with numerous decisions of the Board and its predecessor, the Interstate Commerce Commission ("ICC"), exempting similar transactions from the prior approval requirements of 49 U.S.C. § 10901.

TREX respectfully requests expedited action on this Petition in order to mitigate ongoing service issues and to avoid undue construction delays, and specifically asks that the Board conditionally grant this petition within 90 days, subject to the issuance of a final Board decision after the environmental review is completed.

I. BACKGROUND, PURPOSE, AND NEED

TREX proposes to construct and operate a new common carrier line that is approximately 2,800 feet or less in length. Maps depicting the four proposed alignments under consideration are attached to the Verified Statement of R. Lee Meadows, Jr., P.E. ("Meadows V.S."), TREX's engineering consultant, at Exhs. 1-4. Because of existing infrastructure and the limited size of the project area, these four potential routings are the only practical alternatives available. Meadows V.S. at 4-5. Of the four routings, TREX prefers either "Blue Route – Alt A" or "Blue Route – Alt B" over either of the "Green" routes because the Blue routes present less environmental impact and thus require less permitting and mitigation. *See* Johnson, Mirmiran & Thompson, Inc. ("JMT") letter report

(dated Oct. 2, 2018) (submitted with letter requesting EIS waiver to STB's Office of Environmental Analysis) (attached as Counsel's Exh. 2).

The purpose of TREX's proposed rail line construction is to provide direct and permanent railroad service between BNSF's Valley Yard and TIT's loop track. Sullivan V.S. at ¶¶ 38-39. Currently, TIT's customers must rely on reciprocal switching service from the Union Pacific Railroad Company ("UP") in order for BNSF trains to access TIT. *Id.* at ¶ 14. However, UP's reciprocal switching entails restrictive operating conditions and rules that require several additional and unnecessary train movements that result in significant train turnaround delays. Sullivan V.S. at ¶¶ 14, 16-31; R.L. Banks & Associates, Inc. letter to City of Galveston, dated Sept. 7, 2018 at 2 (Meadows V.S., Exh. 5); *BNSF Ry. Co & Musket Corp. v. Union Pac. R.R. — Pet. for Decl. Order*, FD 35740 (filed May 17, 2013).

In particular, UP is now willing to move only a half-unit train into TIT's facility each day, even though TIT has the infrastructure to accept full unit trains, and UP has moved full unit trains to TIT in the past without incident. Sullivan V.S. at ¶¶ 16-18. In order to receive the other half of a BNSF unit train, TIT must order a "special switch" for either the evening or the weekend, at an additional charge of \$3,200 per switch. *Id.* at ¶22; UP Tariff 6004-C, Item 7040-J (attached as Counsel's Exh. 3). Even then, UP has generally denied TIT's requests for such additional switching. Sullivan V.S. at ¶¶22-24. TIT requested 35 such special switches from March 2017 to the present, and UP granted only four. *Id.* In contrast, UP's own trains are delivered to TIT's industry track intact,

enabling TIT to then move the full train into TIT's facility at TIT's convenience, at any time of day, including weekends. *Id.* at ¶¶ 16-21.

Also, while BNSF local crews operate seven days a week, 24 hours a day, UP only operates one local crew five days a week over one shift, from approximately 7:00 a.m. until 4:00 p.m., and not on weekends, causing further train turnaround delays. *Id.* at ¶ 20. As a result, the turnaround on trains delivered to Galveston immediately before a weekend has been up to six days. *Id.* at ¶¶ 25-26. Furthermore, UP has denied almost 90% of TIT's requests for additional reciprocal switches on the weekends or at any other time. *Id.* at ¶¶ 22-23.

UP's operating conditions and rules cause BNSF trains to be slow-switched into TIT's facility with excessive turnaround times.³ Additionally, UP has claimed that it is providing the reciprocal switching only on a voluntary basis, which creates business uncertainty and potentially places up to one-half of TIT's shipments, and that of its customers, at risk for future access to TIT. *Id.* at ¶¶ 31, 36.

Direct access would eliminate the need for the existing reciprocal switching service and the difficulties arising from multiple train movements and car switching events between the BNSF Valley Yard, UP Interchange Yard, TIT Industry tracks, and TIT Loop tracks, and replace it with permanent, direct BNSF access to TIT.⁴

³ Sullivan V.S. at ¶¶ 16-27.

⁴ R.L. Banks & Associates, Inc. letter to City of Galveston, dated Sept. 7, 2018 at 2 (Meadows V.S., Exh. 5).

TREX's proposed rail line will provide operational efficiency gains and save crew time for both BNSF and UP. Based on expected operations over the line, the number of switches "will be reduced from 11 to 17 times per BNSF train to approximately three times per train, or by 73 to 82 percent as a result of the Project." R.L. Banks & Associates, Inc. letter to City of Galveston, dated Sept. 7, 2018 at 2 (Meadows V.S., Exh. 5). The proposed line will also benefit public health and safety because "the number of times that [a] BNSF unit train will be required to cross [Old] Port Industrial Road at-grade will be reduced from 8 to 14 times per BNSF train to approximately four times per train, or by 50 to 71 percent." *Id.* at 2-3.

TREX will have a common carrier obligation to provide service on the line once it is constructed.⁵ TREX expects to enter into overhead trackage rights arrangements for BNSF to operate over the line to serve TIT. Sullivan V.S. at 39. If BNSF is unable or unwilling to operate the rail line, or for other reasons, TREX would either contract with a short line railroad or provide its own service directly to any customers located on the line, or it may enter into arrangements with TIT to provide private switching of BNSF trains to TIT. *Id.* TIT will continue to assist and engage in private switching as necessary, and in coordination with BNSF and TREX. *Id.* All construction and operations will be performed subject to, and in compliance with, all applicable existing track and operational agreements, and regulatory requirements, in coordination with UP and BNSF. *Id.*

⁵ *Id.* at ¶ 39. See *Cal. High-Speed Rail Auth. – Constr. Exemption – In Merced, Madera & Fresno Cntys., Cal*, FD 35724 (STB served June 13, 2013) at 2 n. 6.

TIT is presently TREX's only anticipated customer, but BNSF traffic could be routed over TREX's proposed rail line in the future to other nearby rail customers. *Id.* at ¶ 52. TREX's project will be financed directly or arranged for by TREX's officers and investors, which have considerable property holdings in Texas. *Id.* at ¶¶ 2-4, 53-57.

TREX's proposed rail line is not expected to have a significant environmental impact, and the operational efficiency gains and the energy savings should create a net benefit. TREX's proposed line will not significantly modify the existing land use, which is in an area zoned as "Industrial Heavy."⁶ The line should also not increase the total volume of rail traffic moving to TIT, as it is being constructed to accommodate existing BNSF unit trains.

TREX has contracted and received approval for a third party contractor to provide assistance with the environmental documentation.⁷ The Office of Environmental Analysis ("OEA") has also approved the preparation of an Environmental Assessment ("EA") as opposed to an Environmental Impact Statement ("EIS") as the "[i]nformation collected to date indicates that there would be no significant impacts to transportation systems, land use, energy, air quality, noise, safety, biological resources, or surface or groundwater resources."⁸

⁶ City of Galveston - Zoning, <http://galveston.maps.arcgis.com/apps/webappviewer/index.html?id=d2e9b86c8c704919bcfe9b111763914c> (accessed Sept. 21, 2018).

⁷ OEA letter dated Apr. 23, 2018 approving TREX's request to retain an independent third-party consultant.

⁸ OEA letter dated Oct. 10, 2018 approving TREX's request that an EA be prepared instead of an EIS ("OEA Letter").

II. ARGUMENT

Generally, construction and operation of a new common carrier rail line requires Board approval under 49 U.S.C. § 10901(a)(1), (2). Under 49 U.S.C. § 10901(c), the Board is directed to authorize construction and operation of a rail line “unless the Board finds that such activities are inconsistent with the public convenience and necessity.” While there is a “clear presumption in favor of rail construction” under § 10901,⁹ and the regulations promulgated thereunder, the Board will exempt rail construction and operations from its normal procedures and requirements where the 49 U.S.C. § 10502 criteria are met. As described below, the Board should grant an exemption because TREX’s proposed construction clearly meets the § 10502 criteria. Additionally, TREX requests that the Board provide an expedited review and grant a provisional decision subject to final approval upon completion of the environmental review.

A. The Board Should Exempt the Proposed Construction and Operation Under 49 U.S.C. § 10502 From the Prior Approval Requirements of 49 U.S.C. § 10901

49 U.S.C. § 10502 provides that:

- (a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—
 - (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
 - (2) either—

⁹ *Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – for Constr. in Will Cnty., IL*, No. 34060 (Sub-No. 1) (STB served Oct. 4. 2002) at 5.

- (A) the transaction or service is of limited scope; or
- (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

TREX's proposed rail construction should be exempted because it meets all of the §10502 criteria. Further, while only either subpart (2)(A) or (2)(B) conditions need be satisfied for an exemption, TREX's construction satisfies both subparts.

1. The Board Has Jurisdiction Over This Construction Project

As indicated, UP's existing reciprocal switching for TIT's BNSF traffic is inefficient, causes undue delay, and increases costs to TIT and its customers. Sullivan V.S. at ¶¶ 16-37. UP also informed TIT that the reciprocal switching service it provides for BNSF unit trains is voluntary, and it regularly refuses to provide additional switches. *Id.* at ¶¶ 22-24, 30-31; TIT letter to UP dated Jan. 19, 2018 (Sullivan V.S., Exh. 1); UP letter to TIT dated Feb. 15, 2018 (Sullivan V.S., Exh. 2). While BNSF unit trains require numerous switching moves in multiple train "cuts,"¹⁰ UP's own unit trains are delivered directly to TIT's loop tracks immediately in one unit and without any extra train cuts and switching moves. Sullivan V.S. at ¶¶ 17-19. UP's operations are far more efficient and train turnaround times are significantly faster than for BNSF unit trains. *Id.*

"The purpose of TREX's proposed rail line construction is to provide more efficient, direct rail service for the existing rail traffic to TIT." *Id.* at 38. Because TREX's construction will significantly change and equalize the competitive status quo for BNSF

¹⁰ R.L. Banks & Associates, Inc. letter to City of Galveston, dated Sept. 7, 2018 at 2 (Meadows V.S., Exh. 5).

traffic to TIT's facility, the STB has jurisdiction over the line, which represents the type of pro-competitive rail construction project that the Board has regularly exempted.¹¹ TREX's proposed rail construction will change the "competitive status quo . . . requiring [Board] approval." *Pub. Serv. Co. of Colo. – Constr. Exemption – Pueblo Cnty., CO*, FD 33862 (Aug. 16, 2000) at 2.

2. Board Regulation Is Not Necessary to Carry Out the Transportation Policy of Section 10101(a).

The Board (and its predecessor, the ICC), has regularly waived the normal detailed construction filing requirements under 49 U.S.C. § 10901 for pro-competitive construction projects as unnecessary to further the national rail transportation policy. *See, e.g., Lone Star R.R. & S. Switching Co. – Track Constr. & Operation Exemption – In Howard Cnty, Tex.*, FD 35874 (STB served Mar. 3, 2016) ("*Lone Star*"). TREX respectfully submits that compliance with the formal requirements under 49 U.S.C. § 10901, and the Board need not perform a "[d]etailed scrutiny of [TREX's] proposal" under that provision. *Id.* at 3.¹² The Board's approval of TREX's construction and operation exemption petition will be consistent with, and will promote the national rail transportation policy for the reasons stated above and in Mr. Sullivan's Verified Statement (at ¶¶ 38-51) because:

¹¹ *See, e.g., Lone Star*; *see also Itasca Cnty. RRA – Pet. for Exemption – Constr. Of a Rail Line in Itasca Cnty.*, MN, FD 34992 (STB served Sept. 8, 2008); *WFEC R.R. – Constr. & Operation Exemption – Choctaw & McCurtain Cntys., OK*, FD 32607 (ICC served Feb. 27, 1995) at 3; *Chicago & N.W. Transp. Co. – Constr. & Operation Exemption – City of Superior, Douglas Cnty., WI*, (ICC served May 11, 1994) at 3.

¹² *Lone Star*, at 3.

- It will provide a direct rail line connection between TIT and BNSF that will allow BNSF to compete fairly with UP, prevent exploitive practices, promote competition, allow shippers to avoid UP's reciprocal switch fees and associated service problems for BNSF movements, and potentially lower line-haul rates (§ 10101(1), (4), (12));
- The potential increase in competition between BNSF and UP will help improve service and minimize regulatory oversight required to guarantee reasonable service and rates (§10101(2));
- It will allow TREX to more easily enter the rail industry (§10101(7));
- Reducing the number of switches and at-grade crossings, which will benefit public health and safety and lower emissions (§10101(8));
- Reducing the number of switches will require less crew time and allow for more efficient operations and management of the rail lines (§ 10101(9));
- Creating direct access for BNSF trains will drastically reduce the number of switching moves required for BNSF unit trains, and reduce the fuel consumed by locomotives, conserving energy (§ 10101(14)); and
- It will allow TIT to avoid the costs, operating impediments, and uncertainty with UP's reciprocal switching service (§10101(1), (4), (12)).

Accordingly, relieving TREX from the obligation of filing a formal application for authority to construct the proposed rail line would be consistent with the national rail transportation policy, and “would minimize unnecessary expense associated with the preparation and filing of a formal construction application, expedite regulatory decisions, and reduce regulatory barriers to entry for the Line, whose purpose is to permit more efficient transportation and delivery” of commodities. *See, e.g., Lone Star*, at 3.

3. The Transaction Is Limited In Scope

TREX's proposed construction is of a limited scope, consisting of less than 2,800 feet of rail line, and is on a scale that has consistently been exempted by the Board.

A partial list of similar rail construction projects that have been exempted by the Board from the formal requirements under 49 U.S.C. § 10901 include:

- The construction of 3.18 miles of track to “be used to provide rail service to an industrial park near Big Spring, Tex.” *Lone Star*, at 1.
- The construction of a “9-mile rail line from a connection with an existing rail line at Taconite, MN.” *Itasca Cnty. RRA – Pet. for Exemption – Constr. of a Rail Line in Itasca Cnty., MN*, FD 34992 (STB served Sept. 8, 2008), at 1.
- Conditional exemption subject to environmental review granted for construction and operation of “an approximately 7-mile line of railroad in Medina County, TX.” *Sw. Gulf R.R. – Constr. & Oper. Exempt. – Medina Cnty, TX*, FD 34284 (STB served May 19, 2003), at 1.
- Conditional exemption subject to environmental review granted for construction and operation of “a 7½-mile line of railroad between Seadrift and Kamey, TX.” *The Burlington N. & SF Ry. Co. – Constr. & Operation Exemption – Seadrift & Kamey, TX*, FD 34003 (STB served June 19, 2001), at 1.

TREX’s proposed rail line construction is even shorter in length, and more limited in scope than any of these construction projects, with fewer potential environmental impacts.

4. Regulation Is Not Needed to Protect Shippers From Service and Market Power Abuses

While TREX’s proposed construction qualifies for an exemption under 49 U.S.C. § 10502(2)(A) for being limited in scope, it also qualifies because Board oversight and regulation over this rail line is not necessary for the protection of shippers. To the contrary, the proposed construction is pro-competitive and supported by shippers. Sullivan V.S. ¶¶ 49-52 and Exhs. 4 & 5 (shipper letters of support).

TREX's proposed construction will assist shippers in preventing unfair operational and market exploitation under the existing reciprocal switching arrangements that prevent timely delivery and turnaround of BNSF unit trains. *Id.* Presently, UP shipments have a distinct advantage over BNSF shipments to and from TIT. While TIT can receive both BNSF and UP unit trains, BNSF has no direct connection to TIT, TIT is only able to receive BNSF trains by UP reciprocal switch, and even then, UP imposes considerable operational constraints on the service. *Id.* at ¶¶32-37.

Despite the significant steps TIT has taken to maximize terminal receipt, processing, and return efficiencies and improve its rail infrastructure improvements, including the construction of an additional 30,000 feet of train landing and industry track on railroad property that TIT leases, significant operational problems and service constraints on BNSF train service to TIT have continued. *Id.* at ¶¶ 10-11. TIT has requested that UP allow it to undertake additional infrastructure improvements to improve service, including to authorize it to directly connect with BNSF. *Id.* at ¶ 28. However, UP has refused. *Id.*¹³

Recently, TIT sought the assistance of the Board's Office of Rail Consumer and Public Assistance to attempt to improve the situation. As part of that process, TIT requested UP to: (i) agree to increase inbound switches from a half-train (54 cars/day) at a time, to a full train, to allow TIT to process and unload trains within 24 hours; (ii) expand

¹³ While TIT has requested, and UP has agreed to periodically meet to coordinate over operational matters, UP has still refused to take reasonable steps to improve its operations. *Id.* at ¶ 24.

operations from weekday service only from approximately 7:00 a.m. to 4:00 p.m., to full-time, 24 hour a day service, 7 days a week as TIT and BNSF do locally and UP did several years ago, as required to meet TIT's traffic demands; and (iii) accept and perform extra "special switches" on request, with reasonable notice. *Id.* at ¶ 29; TIT letter to UP dated Jan. 19, 2018 (Sullivan V.S., Exh. 1). Unfortunately, UP refused to agree to any of these requests, except to agree "to providing special switches when resources are available," but such resources have generally not been made available to TIT, as UP has continued to deny most of TIT's extra switching requests. *Id.* at ¶ 30; UP letter to TIT dated Feb. 15, 2018 (Sullivan V.S., Exh. 2).¹⁴

By providing BNSF with direct, competitive access to TIT, TREX's rail construction will eliminate the existing service problems for BNSF shippers, provide more dependable and efficient service for BNSF trains destined to TIT's facility,¹⁵ and improve competition. As such, additional regulation and oversight of TREX's proposed rail construction is unnecessary, and the exemption petition should be granted.

B. Expedited Treatment and a Conditional Exemption Should Be Granted

The Board generally refrains from issuing a conditional grant of approval absent "unique or compelling circumstances" as "one possible outcome of the

¹⁴ UP further asserted that its reciprocal switching service for BNSF unit trains is voluntary (UP letter to TIT dated Feb. 15, 2018, see Sullivan V.S., Exh. 2), potentially compromising TIT's investment of millions of dollars in new industry track and causing business uncertainty. Sullivan V.S. at ¶¶ 31-33, 36. This is track placed on railroad property that UP agreed to and induced. *Id.* at ¶ 36.

¹⁵ See letter from BNSF to Surface Transportation Board dated Nov. 19, 2018, attached as Counsel's Exhibit 1.

environmental review is the denial of the construction proposal notwithstanding the prior conditional grant.”¹⁶ Expedited treatment and a grant of conditional approval are warranted here because there are unique and compelling circumstances.

First, there is a demonstrable need to provide a direct connection between BNSF and TIT to remedy the ongoing significant operational constraints and customer delay/train turnaround issues.

Second, expedited treatment and a conditional exemption are warranted because of the additional potential delay in the construction process that is expected due to the configuration of the crossing. TREX will require a custom diamond to cross over the existing UP and TIT track.¹⁷ The lead time required for the manufacturing of these diamonds is projected to be 46 to 54 weeks. *Meadows V.S.* at 9. The diamond crossing is the most expensive component of the construction projected, expected to cost approximately \$500,000, which would be difficult, if not impossible, for TREX to approve and finance without at least conditional approval from the Board. *Sullivan V.S.* ¶¶ 55-56.

While conditional approval will not authorize TREX to proceed with construction, it would allow for TREX to “move forward with various engineering and

¹⁶ *Six Cnty. Ass’n of Gov’ts – Constr. & Operation Exemption – A Rail Line Between Levan & Salina, Utah*, FD 34075 (STB served Sept. 3, 2015) at 2 n.4 (citing *Alaska R.R. – Constr. & Operation Exemption – Rail Line Between Eielson Air Force Base (N. Pole) & Fort Greely (Delta Junction), Alaska*, FD 34658 (STB served Oct. 4, 2007)).

¹⁷ If UP opposes TREX’s construction, TREX is prepared to pursue a crossing petition under 49 U.S.C. 10901(d)

other plans relating to the proposed rail line,”¹⁸ such as pre-ordering the diamonds. TREX will be able to orderly proceed with the project without unnecessary delay.

Third, the proposed construction is not expected to have any significant environmental impact. The proposed construction is very limited at less than 3,000 feet in length in an industrial area, and the proposed routings are adjacent to existing rail lines. TREX selected the location to minimize environmental impacts, and the construction and engineering work will be conducted to minimize environmental impacts. R.L. Banks & Associates, Inc. letter to Burns & McDonnell, dated Sept. 14, 2018 at 1-2 (Meadows V.S., Exh. 6). In fact, the proposed construction could have some environmental benefits, as the OEA explained in granting the EIS waiver:

- “If TREX’s proposal increases the efficiency of rail operations serving the Terminal, emissions from locomotives could decrease and local air quality could be improved.”
- “The Texas SHPO has submitted comments stating that no historic properties would be affected by TREX’s proposal.”
- “OEA understands that rail traffic at this crossing would be diverted from an existing at-grade crossing that is currently used during UP switching operations. Therefore, impacts to public transportation and safety would be minor and could potentially be beneficial if TREX’s proposal results in increased efficiency of rail operations and shorter processing times for trains moving in and out of the Terminal.”¹⁹

¹⁸ *Sw. Gulf R.R. – Constr. & Oper. Exempt. – Medina Cnty, TX*, FD 34284 (Dec. 17, 2008), at 1-2.

¹⁹ OEA Letter to TIT dated Oct. 10, 2018 (granting TIT’s request for a waiver regarding the formal requirements of an EIS).

To date, consulting agencies have not identified any potentially significant environmental impacts associated with the project,²⁰ and there does not appear to be anything of consequence that would require the Board to rescind its preliminary approval. TREX also will accept and implement all reasonable mitigation measures required by the Board. Therefore, there is no appreciable risk that the Board would need to rescind its conditional approval after the environmental review is complete in this instance.²¹

C. The Board Should Summarily Issue a Certificate of Public Convenience and Necessity

If the Board grants this exemption petition, TREX respectfully requests that the Board revoke the exemption in order to summarily issue a certificate of public convenience and necessity (“PC&N”) to the extent necessary to enable TREX to pursue a

²⁰ “In June 2018, OEA sent out agency consultation letters to various federal, state, and local agencies. To date, OEA has received responses from the U.S. Army Corps of Engineers (the Corps); the Federal Emergency Management Agency (FEMA); the Texas Commission on Environmental Quality (TCEQ); the Natural Resources Conservation Service (NRCS); the Texas Parks and Wildlife Department (TPWD); the City of Galveston; and the Texas Historical Commission (the Texas State Historic Preservation Officer or Texas SHPO). Those comments have not identified potentially significant environmental impacts that could occur as a result of TREX’s proposal.” OEA letter at 2.

²¹ Cf. *Alaska R.R. – Constr. & Operation Exemption – Rail Line Between Eielson Air Force Base (N. Pole) & Fort Greely (Delta Junction), Alaska*, FD 34658 (STB served Oct. 4, 2007) (“*Alaska*”) (80 miles of rail line in pristine areas of Alaska and approval of Petition “was made subject to 121 environmental conditions”) and *Ameren Energy Generating Co. – Constr. & Operation Exemption – in Coffeen & Walshville, IL*, FD 34435 (STB served May 5, 2004) (approximately 13 miles of rail line). These cases are readily distinguishable from TREX’s proposed construction, which is very small in length and scope, is located in an industrial area, and poses a very low risk of any significant environmental impact.

crossing petition under 49 U.S.C. 10901(d). TREX's proposed rail line construction requires the at-grade crossing of certain local UP rail lines and property. UP may voluntarily allow TREX to cross its lines. However, if UP is unwilling to do so, TREX will need to file a formal § 10901(d) crossing petition with the Board. The STB will revoke a grant of exemption in part and issue a certificate under 49 U.S.C. § 10901 where necessary "to remove any possible room for doubt that the statutory requirements for the implementation of 49 U.S.C. 10901(d) are met." *Midwest Generation, LLC – Exemption from 49 U.S.C. 10901 – for Constr. in Will Cnty., IL*, No. 34060 (Sub-No. 1) (STB served Oct. 4, 2002) at 5. To eliminate any uncertainty as for the possible need for a certificate, and to help facilitate construction, TREX respectfully requests that the Board summarily issue a PC&N certificate as part of its exemption petition decision.

III. CONCLUSION

Based on the foregoing, TREX respectfully requests that this exemption petition be granted, and that the Board conditionally grant this petition within 90 days, subject to the issuance of a final decision after completion of the environmental review. TREX also respectfully requests that the Board summarily issue a PC&N certificate as part of its exemption petition decision.

Respectfully submitted,

TEXAS RAILWAY EXCHANGE LLC



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Dated: November 21, 2018

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COUNSEL'S EXHIBITS

COUNSEL'S EXHIBIT 1



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November 19, 2018

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Chief, Section of Administration
Office of Proceedings
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395 E Street, SW
Washington, DC 20423-0001

Re: Finance Docket No. 36186, Texas Railway Exchange LLC—Construction and Operation
Exemption—Galveston County, Tex.

Dear Ms. Brown:

This letter expresses the support of BNSF Railway Company ("BNSF") for the Petition for Exemption filed by Texas Railway Exchange LLC ("TREX") in the above-referenced proceeding. I am Rob M. Reilly, Vice President South Region Operations, with responsibility for transportation operations in the southern half of BNSF's network. My territory includes the BNSF's Red River Division which covers the Texas Gulf Coast area, including Galveston, Texas.

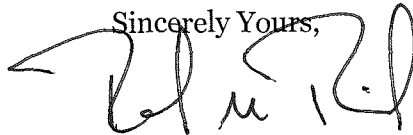
TREX's proposed construction of a new rail line that would directly connect the Texas International Terminals ("TIT") facility on the Galveston Ship Channel to the BNSF Valley Yard would result in more efficient rail service to shippers located at TIT. As noted by TREX in its petition, only Union Pacific Railroad Company ("UP") currently has direct rail access to the TIT, and BNSF relies on an inefficient reciprocal switching arrangement with UP to facilitate BNSF service to TIT. The proposed TREX rail line would allow for an alternative to this switching arrangement for BNSF traffic to TIT.

BNSF anticipates that the new connection and TREX service between TIT and the BNSF Valley Yard will allow for the more efficient and timely staging, receipt, and delivery of BNSF unit trains destined to and originated from TIT. This direct TREX connection will reduce the unnecessary delays and costs currently incurred by BNSF and its shippers under the UP reciprocal switching arrangement. By reducing the current number of switching moves for BNSF traffic, both BNSF and UP will be able to introduce efficiencies that will save time, energy, and resources.

BNSF has coordinated with TREX regarding the proposed routing, construction, and operating plan described in the TREX Petition for Exemption, and BNSF plans to continue to work with TREX and support its proposed track construction throughout this process.

Please contact me if you have any questions.

Sincerely Yours,

A handwritten signature in black ink, appearing to read 'Rob M. Reilly', written over the 'Sincerely Yours,' text.

Rob M. Reilly

Regional Vice President – South Operations

BNSF Railway Company

COUNSEL'S EXHIBIT 2



October 2, 2018

Mr. Peter A. Pfohl
Ms. Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036

RE: Texas Railway Exchange LLC
Track Construction in Galveston County, Texas

Dear Mr. Pfohl and Ms. Waring:

Johnson, Mirmiran & Thompson (JMT) is pleased to submit this letter report to you and Slover & Loftus LLP (S&L) to provide an analysis of the wetland permitting requirements and costs related the above referenced project being developed by Texas Railway Exchange LLC (TREX). As you are aware, I previously managed a wetland delineation under contract with Spirit Environmental LLC (Spirit) for two alternative routes (i.e., the "Blue" Alternative and the "Green" Alternative) associated with this project. Spirit prepared a *Wetland Delineation Report* dated August 8, 2018 that details the potentially jurisdictional aquatic resources that were surveyed within the limits of both alternatives. Figures 8A and 8B from Spirit's report, attached herein for reference, depict the size and locations of the potentially jurisdictional aquatic resources. Table 1 below summarizes the aquatic features surveyed within the areas potentially impacted by each alternative.

Table 1: Delineated Aquatic Resources

Blue Alternative		Green Alternative	
Feature Name	Resource Size (Acres)	Feature Name	Resource Size (Acres)
Water 1*	0.099	Water 1*	0.099
Water 2*	0.017	Water 2*	0.060
SWD1	0.003	SWD1	0.024
EEM1*	0.035	EEM1*	0.232
Total Size	0.154	Total Size	0.415

*Tidally Influenced Waters/Wetlands

Subsequently, TREX's rail engineer with R.L. Banks & Associates (RLBA) reviewed Spirit's *Wetland Delineation Report* and concluded that the "blue routing can avoid all wetland areas identified by Spirit Environmental east of where TREX's proposed track will intersect the existing track, south of State Highway 275. However, the 0.099 acres of tidal waters located west of the proposed track crossing cannot be avoided and TREX's proposed construction most likely will affect this aquatic resource." See RLBA letter to Stephen G. Thornhill of Burns & McDonnell dated September 14, 2018 (copy of which is attached herein). From this, Table 2 provides an estimate of the proposed impacts associated with each alternative, considering the avoidance and minimization efforts proposed by RLBA.

Table 2: Anticipated Project Impacts

Blue Alternative		Green Alternative	
Feature Name	Impact Size (Acres)	Feature Name	Impact Size (Acres)
Water 1*	0.099	Water 1*	0.099
Water 2*	Avoided	Water 2*	0.060
SWD1	Avoided	SWD1	0.024
EEM1*	Avoided	EEM1*	0.232
Total Impact Size	0.099	Total Size	0.415

*Tidally Influenced Waters/Wetlands

The type of project being contemplated (Linear Transportation) could potentially qualify for a Nationwide Permit (NWP) 14. In order to qualify for an NWP 14, no more than 1/3 acre of tidal waters of the U.S. can be impacted, therefore the Blue Alternative would qualify to be permitted under NWP 14. The impacts associated with the Green Alternative exceed allowable NWP 14 limits, thus a Standard Individual Permit (IP) would be necessary to permit the Green Alternative. Based upon the anticipated impacts depicted in Table 2, permitting specifications associated with each alternative for authorization to discharge fill into jurisdictional waters of the U.S. under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act are included in Table 3.

Table 3: Permitting Specifications

	Blue Alternative	Green Alternative
Permit Type	NWP 14	IP
Notification Requirement	No Pre-Construction Notification (PCN) Required*	PCN with Alternatives Analysis and Mitigation Plan
Typical Permit Timeframe**	45 days	12-18 months**
Permit Commitments	Compliance with NWP General and Regional Conditions^ and No Mitigation Requirement^^	Mitigation for 0.232 acres of EEM wetlands^^^ will be required. National Marine Fisheries Service may require mitigation for impacts to 0.159 acres of tidal waters^^^.
Approximate Permit Cost Estimates%	\$0	Estimated Total: \$1,350,000 Permit Application: \$15,000 USACE Coordination: \$10,000 Mitigation Planning%% & Design: \$100,000 Land Acquisition: \$500,000 Construction: \$300,000 Monitoring/Maintenance: \$100,000 Long Term Stewardship: \$100,000 Contingency (20%): \$225,000

* Under NWP 14, no PCN is required if less than 1/10 acre of waters of U.S. will be impacted

** Assuming submittal of an administratively complete permit application

** IP timeframe can be greater based on USACE workload and amount/degree of public scrutiny received during public review

^ Copy of General and Regional Conditions are attached

^^ NWP General Condition 23 does not require mitigation for projects that impact less than 1/10 acre of waters of U.S.

^^^ No wetland mitigation banks are available for the geographic location of the proposed impacts, thus permittee-responsible mitigation would be required.

% Includes a rough, high-level approximation of costs associated with permit application preparation; coordination with USACE; and mitigation planning, design, land acquisition, construction, monitoring/maintenance, and long-term stewardship. This estimate does not constitute an official quote for professional services.

%% Assumes a 7:1 mitigation ratio and that approximately 3 acres of mitigation will be required

In conclusion, both the cost and timeframes associated with implementation of the Blue Alternative are far less than those of the Green Alternative. The Blue Alternative can be permitted under a non-notifying NWP 14, while the Green Alternative will require permitting under a Standard IP. The timeframe associated with a standard IP is significantly longer than that of an NWP. It is expected that if the Green Alternative is implemented instead of the Blue Alternative that the project would be delayed by 10.5 to 16.5 months. In addition to delay, the costs associated with permitting the Green Alternative (approximately \$1.35 million) are significantly greater than the Blue Alternative (\$0). This is because the Green Alternative will require the preparation and submittal of a permit application to the USACE for review and processing, which would include an alternatives analysis and a permittee-responsible mitigation (PRM) plan. The development and implementation of the PRM would also add significant costs to the project because of the requisite planning and design, land acquisition, construction, monitoring and maintenance, and long-term stewardship.

If you have any questions or need further information, please do not hesitate to contact me in the office at 346-307-3237, on my cell at 713-299-9030, or by email at rrobol@jmt.com.

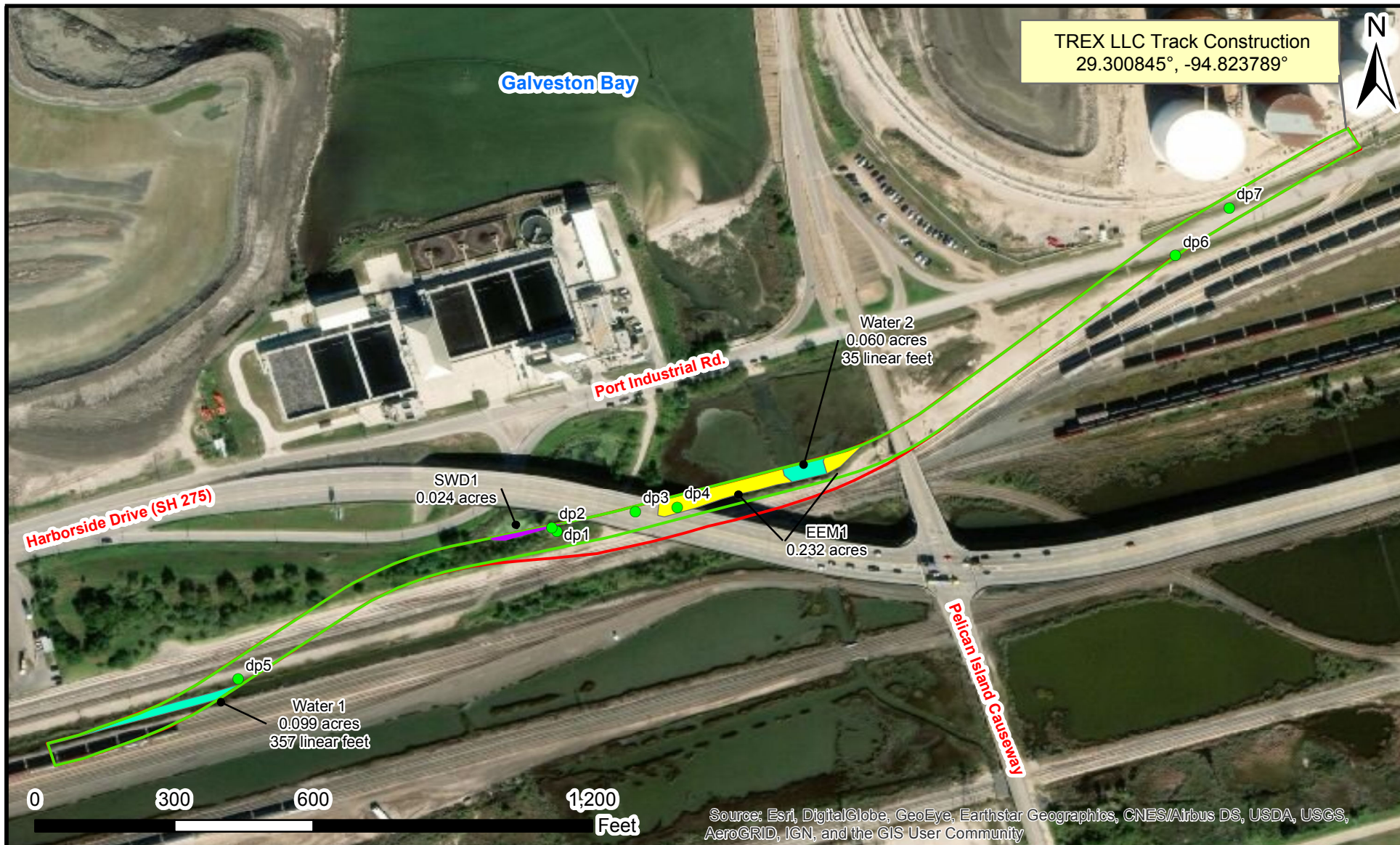
Very truly yours,

JOHNSON, MIRMIRAN & THOMPSON, INC.



Ryan Robol
Section Head
Texas Natural & Cultural Resources

Figures 8A and 8B



Legend

- TREX Composite Study Area Boundary
- Proposed Green Route Project Boundary
- Sample Points
- Stormwater Detention Pond (0.024 acres)
- Tidal Wetlands (0.232 acres)
- Tidal Waters (0.156 acres)

TREX LLC TRACK CONSTRUCTION AQUATIC FEATURES MAP - GREEN ROUTE TEXAS RAILWAY EXCHANGE, LLC GALVESTON COUNTY, TEXAS



20465 State Highway 249, Suite 300
Houston, TX 77070

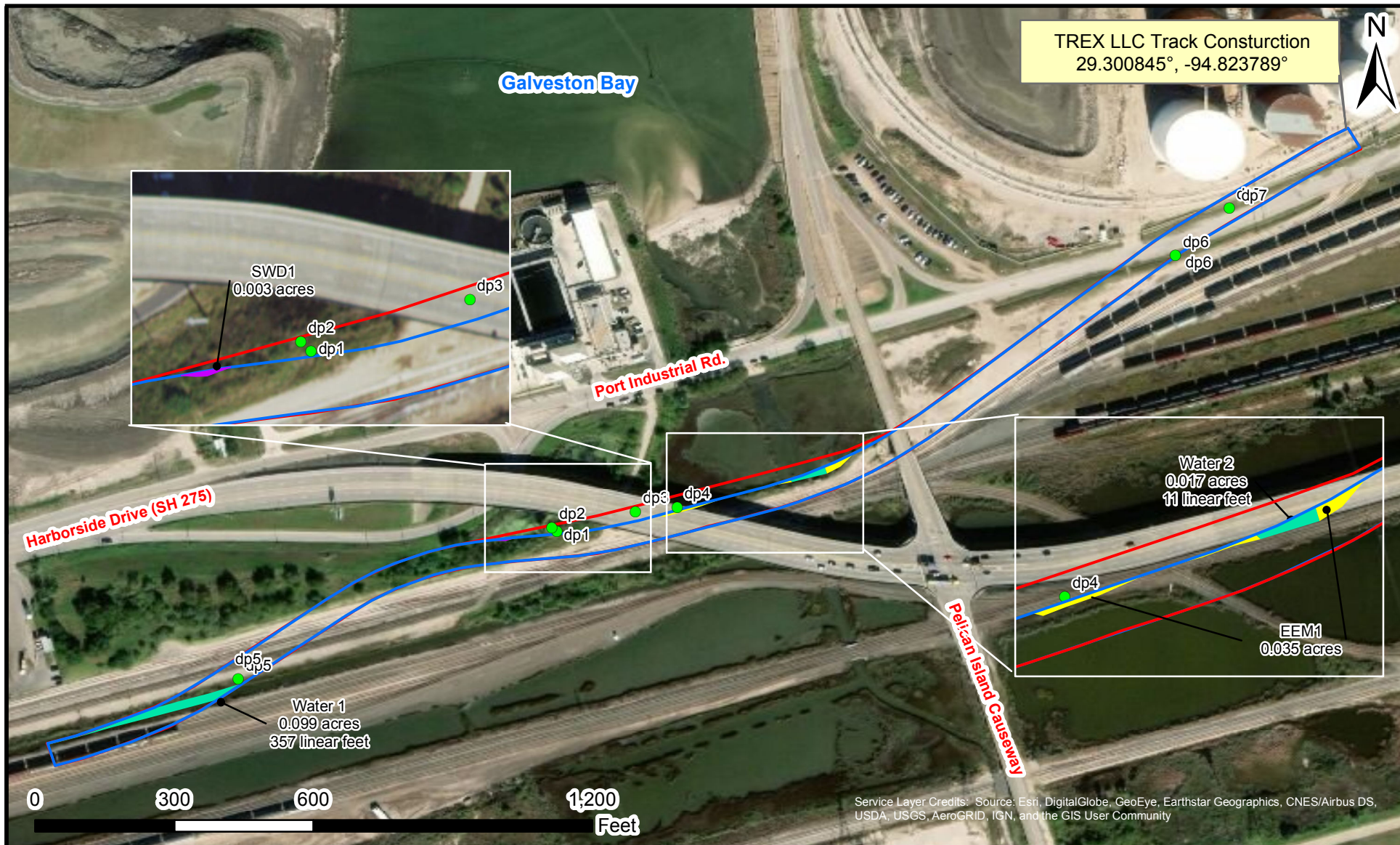
Figure No.: 8A

Date: 8/7/2018

Project No.: 18494.00F

Drawn By: Alngram

Note: This is not a
Property Boundary Survey



Legend

- TREX Composite Study Area Boundary
- Proposed Blue Route Project Boundary
- Sample Points
- Tidal Wetlands (0.035 acres)
- Tidal Waters (0.116 acres)
- Stormwater Detention Pond (0.003 acres)

TREX LLC TRACK CONSTRUCTION AQUATIC FEATURES MAP - BLUE ROUTE TEXAS RAILWAY EXCHANGE, LLC GALVESTON COUNTY, TEXAS



20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 8B

Date: 8/8/2018

Project No.: 18494.00F

Drawn By: Alngram

Note: This is not a
Property Boundary Survey

R.L. Banks & Associates Letter Dated September 14, 2018

VIA Email

September 14, 2018

Mr. Stephen G. Thornhill
Project Manager
Environmental Studies & Permitting
Burns & McDonnell
9400 Ward Parkway
Kansas City, MO 64114

RE: Texas Railway Exchange – Construction & Operation – Galveston County, Texas,
STB Docket No. FD 36186

Dear Mr. Thornhill:

R.L. Banks & Associates, Inc. (“RLBA”) has been retained by Texas Railway Exchange LLC (“TREX”) to assist it in developing the construction and operating plans for TREX’s proposed common carrier railroad in the above-referenced proceeding before the U.S. Surface Transportation Board (STB). RLBA is a national firm providing railroad economics, engineering and operations planning consulting services to freight railroads and shippers for over 62 years. The purpose of this letter report is to provide additional information regarding the proposed limits of potential disturbance associated with TREX’s proposed construction, as RLBA has determined that TREX’s preferred routing can avoid almost all aquatic resources using existing and available construction methods.

RLBA has reviewed Spirit Environmental’s *Wetland Delineation Report* dated August 8, 2018 and specifically Figure Nos. 6, 7, 8A and 8B, which depict the extent of the areas potentially impacted by TREX’s construction and delineate the aquatic resources. Based on this review, knowledge of the alignment of the proposed routings, and an understanding of existing available construction methods, it is RLBA’s opinion that TREX’s preferred blue routing can avoid all wetland areas identified by Spirit Environmental east of where TREX’s proposed track will intersect the existing track, south of State Highway 275. However, the 0.099 acres of tidal waters located west of the proposed track crossing cannot be avoided and TREX’s proposed construction most likely will affect this aquatic resource. See attached Figure No. 1, prepared by Spirit Environmental, which reflects TREX’s preferred blue alignment as drawn by RLBA and which illustrates the proposed limits of potential disturbance and impacted aquatic resources as identified by Spirit.

WASHINGTON, D.C. AREA OFFICE

The construction methods that will be used to avoid the wetland areas and water resources located east of the proposed crossing location include, but are not limited to, the following:

- No construction equipment will occupy the Spirit-delineated wetlands;
- At any location where the sloped portion of the “Blue Route Roadbed” would potentially encroach upon the wetlands, sheet piling or large rip rap will be installed to protect the horizontal component of the track roadbed and
- At any location where the walkway for train personnel may extend over wetlands, *i.e.* the “Water 2” location, a cantilevered walkway will be provided.

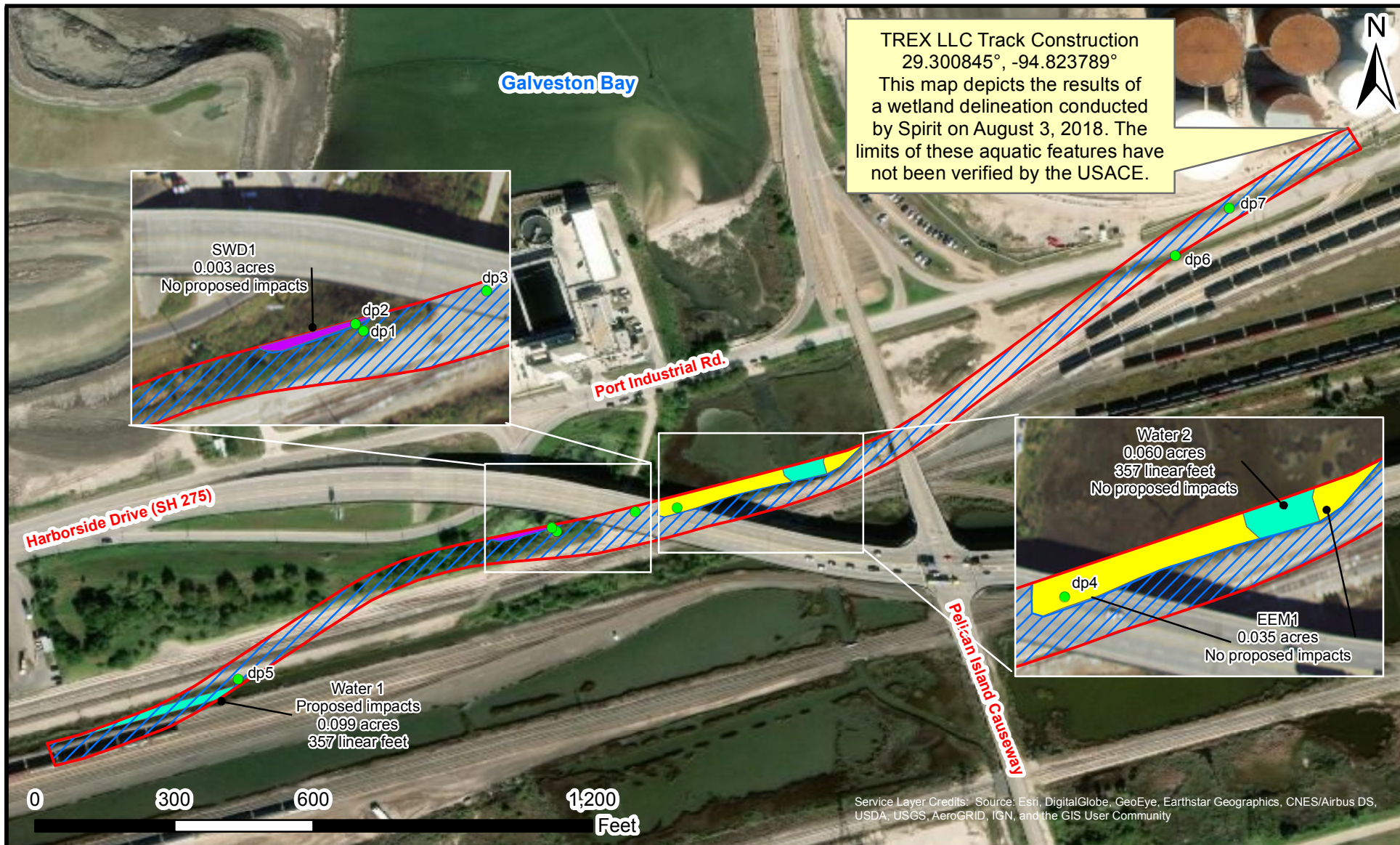
In summary, it is RLBA’s opinion that construction of TREX’s preferred blue routing as currently designed will only impact the tidal water area measuring 0.099 acres located west of the proposed crossing and that it will be possible to avoid all other aquatic resources as identified in Spirit Environmental’s *Wetland Delineation Report*.

Sincerely,

A handwritten signature in black ink that reads "R.L. Meadows, Jr." with a stylized, looping flourish at the end.

R. Lee Meadows, Jr. PE

Enclosure: Figure No.1, map of proposed limits of potential disturbance and impacted aquatic resources



Legend

- Sample Points
- Delineation Boundary
- Proposed Limits of Disturbance
- Stormwater Detention Pond (0.024 acres)
- Tidal Wetlands (0.232 acres)
- Tidal Waters (0.159 acres)

TREX LLC TRACK CONSTRUCTION AQUATIC FEATURES MAP TEXAS RAILWAY EXCHANGE, LLC GALVESTON COUNTY, TEXAS



20465 State Highway 249, Suite 300
 Houston, TX 77070

Figure No.: 1

Date: 8/14/2018

Project No.: 18494.00F

Drawn By: EVDonato

Note: This is not a
 Property Boundary Survey

2017 Nationwide Permits General and Regional Conditions

tidal or lacustrine fringe wetlands or reef structures. The following conditions must be met:

(a) The structures and fill area, including sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used;

(e) Discharges of dredged or fill material into waters of the United States, and reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore;

(g) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects; and

(h) The living shoreline must be properly maintained as a living shoreline, which may require repairing sills, breakwaters, and reefs, replacing sand fills, and replanting vegetation after severe storms or erosion events. This NWP authorizes those maintenance and repair activities to the original permitted conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to

commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Sections 10 and 404)

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those

species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if

it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* (a) No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a "study river" for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification

(see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have "no effect" on listed species or critical habitat, or until section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,

including breeding, feeding or sheltering.

(f) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether “incidental take” permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the

potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h–2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with

the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and proposed NWP B, notification is required in accordance with general condition 32, for any activity proposed

in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWP's only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.*, on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed $\frac{1}{10}$ -acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of $\frac{1}{10}$ -acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no more than minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.*, conservation easements) of riparian areas next to open waters. In some cases, the restoration of riparian

areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.*, riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWP's, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)).

(2) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration of these areas should be the first compensatory mitigation option considered.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to

ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(4) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(5) Compensatory mitigation requirements (*e.g.*, resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan.

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWP's. For example, if an NWP has an acreage limit of $\frac{1}{2}$ -acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWP's.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely

designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed $\frac{1}{3}$ -acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by

submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

“When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”

(Transferee)

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a “USACE project”), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps district office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is

“no effect” on listed species or “no potential to cause effects” on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWP 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee’s right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;
 (2) Location of the proposed activity;
 (3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity’s purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must

include the quantity of proposed losses of waters of the United States for each single and complete crossing of waters of the United States. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than $\frac{1}{10}$ -acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For any NWP activity that requires pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-Federal permittees, if the NWP activity may have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property may have the potential to be

affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the “study river” (see general condition 16); and

(10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from the Corps district having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (9) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than $\frac{1}{2}$ -acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) proposed NWP B activities in excess of

500 linear feet, that extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, or involve discharges into special aquatic sites.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-

construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the verification for that NWP if it meets the terms in the text of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal adverse environmental effects and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or proposed NWP B, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer

may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than $\frac{1}{10}$ -acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (e.g., streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added

to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from

development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term "discharge" means any discharge of dredged or fill material into waters of the United States.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water

against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that is filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled,

flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(c)(4). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.*, spring high tide line).

Open water: For purposes of the NWP, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of “open waters” include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(c)(6)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-

construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain

local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.*, spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term “single and complete project” is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.*, a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term “single and complete project” is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or

improve the quality (*i.e.*, by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat

ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (*i.e.*, water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(c)(4) and (d), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(c)(7).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWP, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1) through (5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of "waterbodies" include streams, rivers, lakes, ponds, and wetlands.

[FR Doc. 2016-12083 Filed 5-31-16; 8:45 am]

BILLING CODE 3720-58-P

2017 NATIONWIDE PERMIT (NWP) REGIONAL CONDITIONS FOR THE STATE OF TEXAS

The following regional conditions apply within the entire State of Texas:

1. For all discharges proposed for authorization under Nationwide Permits (NWP) 3, 6, 7, 12, 14, 18, 19, 21, 23, 25, 27, 29, 39, 40, 41, 42, 43, 44, 49, 51, and 52, into the following habitat types or specific areas, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32, Pre-Construction Notification (PCN). The Corps of Engineers (Corps) will coordinate with the resource agencies as specified in NWP General Condition 32(d) (PCN). The habitat types or areas are:

- a. Pitcher Plant Bogs: Wetlands typically characterized by an organic surface soil layer and include vegetation such as pitcher plants (*Sarracenia* spp.) and/or sundews (*Drosera* spp.).
- b. Bald Cypress-Tupelo Swamps: Wetlands dominated by bald cypress (*Taxodium distichum*) and/or water tupelo (*Nyssa aquatic*).

2. For all activities proposed for authorization under any Nationwide Permit (NWP) at sites approved as compensatory mitigation sites (either permittee-responsible, mitigation bank and/or in-lieu fee) under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

3. For all activities proposed for authorization under NWP 16, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32 (Pre-Construction Notification) and must obtain an individual water quality certification (WQC) from the TCEQ. Work cannot begin under NWP 16 until the applicant has received written approval from the Corps and WQC.

NOTE: For all activities proposing to use equipment that has operated or been stored in a water body on the Texas list of zebra mussel (*Dreissena polymorpha*) infected water bodies, equipment should be decontaminated prior to relocation in accordance with Texas Administrative Code, Title 31, Part 2, Chapter 57, Subchapter A. The following decontamination Best Management Practices (BMPs), as a minimum, are indicated:

- a. Clean: Clean both the inside and outside of equipment and gear, by removing all plants, animals, and mud and thoroughly washing the equipment using a high pressure spray nozzle.
- b. Drain: Drain all water from receptacles before leaving the area, including livewells, bilges, ballast, and engine cooling water on boats.
- c. Dry: Allow time for your equipment to dry completely before relocating in other waters. Equipment should be dried prior to relocation. High temperature pressure washing (greater than or equal to 140F) or professional cleaning may be substituted for drying time.

The following regional condition only applies within the Albuquerque, Fort Worth, and Galveston Districts:

4. For all activities proposed for authorization under Nationwide Permit (NWP) 12 that involve a discharge of fill material associated with mechanized land clearing of wetlands dominated by native woody shrubs, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32 – Pre-Construction Notification prior to commencing the activity. For the purpose of this regional condition, a shrub dominated wetland is characterized by woody vegetation less than 3.0 inches in diameter at breast height but greater than 3.2 feet in height, which covers 20% or more of the area. Woody vines are not included.

The following regional conditions apply within the Albuquerque District.

5. Nationwide Permit (NWP) 23 – Approved Categorical Exclusions. A pre-construction notification (PCN) to the District Engineer in accordance with General Condition 32 - PCN is required for all proposed activities under NWP 23.

6. Nationwide Permit (NWP) 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities. For all proposed activities under NWP 27 that require pre-construction notification, a monitoring plan commensurate with the scale of the proposed restoration project and the potential for risk to the aquatic environment must be submitted to the Corps. (See “NWP 27 Guidelines” at <http://www.spa.usace.army.mil/Missions/RegulatoryProgramandPermits/NWP.aspx>).

7. Channelization. Nationwide Permit (NWP) General Condition 9 for Management of Water Flows is amended to add the following: Projects that would result in permanent channelization to previously un-channelized streams require pre-construction notification to the Albuquerque District Engineer in accordance with NWP General Condition 32 – Pre-Construction Notification.

8. Dredge and Fill Activities in Intermittent and Perennial Streams, and Special Aquatic Sites: For all activities subject to regulation under the Clean Water Act Section 404 in intermittent and perennial streams, and special aquatic sites (including wetlands, riffle and pool complexes, and sanctuaries and refuges), pre-construction notification (PCN) to the Albuquerque District Engineer is required in accordance with Nationwide Permit General Condition 32 - PCN.

9. Springs. For all discharges of dredged or fill material within 100 feet of the point of groundwater discharge of natural springs located in an aquatic resource, a pre-construction notification (PCN) is required to the Albuquerque District Engineer in accordance with Nationwide Permit General Condition 32 - PCN. A natural spring is defined as any location where ground water emanates from a point in the ground and has a defined surface water connection to another waters of the United States. For purposes of this regional condition, springs do not include seeps or other groundwater discharges which lack a defined surface water connection.

10. Suitable Fill. Use of broken concrete as fill or bank stabilization material is prohibited unless the applicant demonstrates that its use is the only practicable material (with respect to cost, existing technology, and logistics). Any applicant who wishes to use broken concrete as bank stabilization must provide notification to the Albuquerque District Engineer in accordance with Nationwide Permit General Condition 32 - Pre-Construction Notification along with justification for such use. Use of broken concrete with rebar or used tires (loose or formed into bales) is prohibited in all waters of the United States.

The following regional conditions apply only within the Fort Worth District.

11. For all discharges proposed for authorization under all Nationwide Permits (NWP) into the area of Caddo Lake within Texas that is designated as a "Wetland of International Importance" under the Ramsar Convention, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 32 – Pre-Construction Notification (PCN). The Fort Worth District will coordinate with the resource agencies as specified in NWP General Condition 32(d) - PCN.

12. Compensatory mitigation is generally required for losses of waters of the United States that exceed 1/10 acre and/or for all losses to streams that exceed 300 linear feet. Loss is defined in Section F of the Nationwide Permits (NWP). Mitigation thresholds are cumulative irrespective of aquatic resource type at each single and complete crossing. Compensatory mitigation requirements will be determined in accordance with the appropriate district standard operating procedures and processes. The applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

13. For all activities proposed for authorization under Nationwide Permits (NWP) 12, 14 and/or 33 that involve a temporary discharge of fill material into 1/2 acre or more of emergent wetland OR 1/10 acre of scrub-shrub/forested wetland, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

14. For all discharges proposed for authorization under Nationwide Permits (NWP) 51 and 52, the Fort Worth District will provide the pre-construction notification (PCN) to the U.S. Fish and Wildlife Service as specified in NWP General Condition 32(d)(2) - PCN for its review and comments.

The following regional conditions apply only within the Galveston District.

15. No Nationwide Permits (NWP), except NWP 3, shall be used to authorize discharges into the habitat types or specific areas listed in paragraphs a through c, below. The applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity under NWP 3.

- a. Mangrove Marshes. For the purpose of this regional condition, Mangrove marshes are those waters of the United States that are dominated by mangroves (*Avicennia* spp., *Laguncularia* spp., *Conocarpus* spp., and *Rhizophora* spp.).
- b. Coastal Dune Swales. For the purpose of this regional condition, coastal dune swales are wetlands and/or other waters of the United States located within the backshore and dune areas in the coastal zone of Texas. They are formed as depressions within and among multiple beach ridge barriers, dune complexes, or dune areas adjacent to beaches fronting tidal waters of the United States.
- c. Columbia Bottomlands. For the purpose of this regional condition, Columbia bottomlands are defined as waters of the United States that are dominated by bottomland hardwoods in the Lower Brazos and San Bernard River basins identified in the 1997 Memorandum of Agreement between the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Natural Resource Conservation Service, and Texas Parks and Wildlife Department for bottomland hardwoods in Brazoria County. (For further information, see <http://www.swg.usace.army.mil/Business-With-U/Regulatory/Permits/Nationwide-General-Permits/>)

16. A Compensatory Mitigation Plan is required for all special aquatic site losses, as defined in Section F of the Nationwide Permits (NWP), that exceed 1/10 acre and/or for all losses to streams that exceed 200 linear feet. Compensatory mitigation requirements will be determined in accordance with the appropriate district standard operating procedures and processes. The applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

17. For all seismic testing activities proposed for authorization under Nationwide Permit (NWP) 6, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification (PCN). The PCN must state the time period for which the temporary fill is proposed, and must include a restoration plan for the special aquatic sites. For seismic testing under NWP 6 within the Cowardin Marine System, Subtidal Subsystem; as defined by the U.S. Fish and Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States, December 1979/Reprinted 1992, the Corps will coordinate with the resource agencies in accordance with NWP General Condition 32(d) - PCN.

18. For all activities proposed under Nationwide Permits (NWP) 10 and 11 located in vegetated shallows and coral reefs; as defined by 40 CFR 230.43 and 230.44 respectively, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification. Examples include, but are not limited to: seagrass beds, oyster reefs, and coral reefs.

19. Nationwide Permit 12 shall not be used to authorize discharges within 500 feet of vegetated shallows and coral reefs; as defined by 40 CFR 230.43 and 230.44 respectively. Examples include, but are not limited to: seagrass beds, oyster reefs, and coral reefs.

20. For all activities proposed for authorization under Nationwide Permit 12 that involve underground placement below a non-navigable river bed and/or perennial stream bed there shall be a minimum cover of 48 inches (1,219 millimeters) of soil below the river and/or perennial stream thalweg.

21. For all discharges and work proposed below the high tide line under Nationwide Permits (NWP) 14 and 18, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification (PCN). The Galveston District will coordinate with the resource agencies in accordance with NWP General Condition 32(d) - PCN.

22. For all activities proposed for authorization under Nationwide Permit (NWP) 33 the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 – Pre-Construction Notification (PCN). The PCN must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. Activities causing the temporary loss, as defined in Section F of the NWPs, of more than 0.5 acres of tidal waters and/or 200 linear feet of stream will be coordinated with the agencies in accordance with NWP General Condition 32(d) - PCN.

23. No Nationwide Permits (NWP), except NWPs 3, 16, 20, 22, 37, shall be used to authorize discharges, structures, and/or fill within the standard setback and high hazard zones of the Sabine-Neches Waterway as defined in the Standard Operating Procedure - Permit Setbacks along the Sabine-Neches Waterway. The applicant shall notify the Galveston District Engineer in accordance with NWP General Condition 32 - Pre-Construction Notification for all discharge, structures and/or work in medium hazard zones and all NWP 3 applications within the standard setback and high hazard zones of the Sabine-Neches Waterway.

24. No Nationwide Permits (NWP), except 20, 22, and 37, shall be used to authorize discharges, structures, and/or fill within the standard setback exemptions of the Gulf Intracoastal Waterway as defined in the Standard Operating Procedure- Department of the Army Permit Evaluation Setbacks along the Gulf Intracoastal Waterway. The applicant shall notify the Galveston District Engineer in accordance with NWP General Condition 32 (Pre-Construction Notification) for all discharges, structures and/or work within the standard setback, shoreward of the standard setback, and/or standard setback exemption zones.

25. The use of Nationwide Permits in the San Jacinto River Waste Pits Area of Concern are revoked. (For further information, see <http://www.swg.usace.army.mil/Business-With-Us/Regulatory/Permits/Nationwide-General-Permits/>)

26. The use of Nationwide Permits 51 and 52 are revoked within the Galveston District boundaries.

27. Nationwide Permit (NWP) 53 pre-construction notifications will be coordinated with resource agencies as specified in NWP General Condition 32(d) – Pre-construction Notification.

28. For all activities proposed under Nationwide Permits (NWP) 21, 29, 39, 40, 42, 43, 44, and 50 that result in greater than 300 feet of loss in intermittent and/or ephemeral streams, as defined in Section F of the NWPs, require evaluation under an Individual Permit.

The following regional conditions apply only within the Tulsa District.

29. Upland Disposal: Except where authorized by Nationwide Permit 16, material disposed of in uplands shall be placed in a location and manner that prevents discharge of the material and/or return water into waters or wetlands unless otherwise authorized by the Tulsa District Engineer.

30. Major Rivers: The prospective permittee shall notify the Tulsa District Engineer for all Nationwide Permit 14 verifications which cross major rivers within Tulsa District. For the purposes of this condition, major rivers include the following: Canadian River, Prairie Dog Town Fork of the Red River, and Red River.

COUNSEL'S EXHIBIT 3



UP 6004-C

Item: 7040-J
CHARGES FOR SPECIAL FREIGHT & SWITCHING SERVICE

CHANGE KEY: A-Add; C-Change; D-Decrease; I-Increase; and X-Expire

For billing purposes use the following rate authority: UP 6004-C-7040-J

STCC/GROUP	STCC	DESCRIPTION
NON-REVENUE EMPTY EQUIPMENT		
		Empty Equip Moving in Non-Freight Revenue Service
ALL STCCS MINUS AUTO PARTS		
	01-99	All Commodities
	Except 3714	Motor Vehicle Parts Or Accessories
	Except 4111465	Bins, Crates, Racks, Trays Or Parts Thereof, Other Than Collapsible, Other Than New, Empty, Used For The Transporta- Tion Of Automobile Parts
	Except 4111471	Automobile Body Sections, Nec, Bodies, Body Sections Combined With Hoods, Fenders, Rear Decks, Radiators Or Other Automobile Parts, Or Hoods, Fenders, Rear Decks Or Radiators Com- Bined, Or Combined With Other Automobile Parts, Used, Having Value For Reconditioning Or Surface Refinishing And Reuse
	Except 4211299	Nonrevenue Movement Of Empty Containers Or Devices, Or Parts There- Of, Viz. Racks, Crates, Bins, Braces, Brackets, Spacers, Spacer Bars Or Protective Shields, For Shipping Automobile Parts, Returning In Reverse Of Route Used In Loaded Movement
	Except 4231299	Revenue Movement Of Empty Containers Or Devices, Or Parts Thereof, Viz. Racks, Crates, Bins, Braces, Brackets, Spacers, Spacer Bars Or Protective Shields, For Shipping Automobile Parts, Returning In Reverse Of Route Used In Loaded Movement
ALL STCCS INTERNAL		
	01-99	All Commodities

GENERAL RULE ITEM 7040

Section 5 - CHARGES FOR SPECIAL FREIGHT TRAIN AND SWITCHING SERVICES

1. Special freight train service will be subject to the charge published herein.
2. Special switching service will be subject to the charge published herein **(See Exception)**.
3. The above charges are in addition to the regular freight charges and switching charges.

Exception: Not applicable when Item 7041 applies.

APPLICATION AND SPECIAL TRAIN CHARGES			
COLUMN	SPECIAL TRAIN APPLICATION RULES		
1.	SPECIAL TRAIN charges are in U.S. dollars Per Mile and apply under these conditions: A minimum charge of \$25,000.00 per Train will be assessed.		
		Col 1 Amount	Route Code / Group
STCC Group:	ALL STCCS INTERNAL GROUP		
From:	ALL LOCATIONS GROUP		
To:	ALL LOCATIONS GROUP	^A 125.00	ALL ROUTES
APPLICATION AND SPECIAL SWITCHING CHARGES			
COLUMN	SPECIAL SWITCHING APPLICATION RULES		
1.	SPECIAL SWITCHING charges are in U.S. dollars Per Switch and apply under these conditions:		
		Col 1 Amount	Route Code / Group
STCC Group:	ALL STCCS MINUS AUTO PARTS GROUP		
From:	ALL LOCATIONS GROUP		
To:	ALL LOCATIONS GROUP	3200.00	ALL ROUTES
APPLICATION AND SPECIAL TRAIN CHARGES			
COLUMN	SPECIAL TRAIN APPLICATION RULES		
1.	SPECIAL TRAIN charges are in U.S. dollars Per Mile and apply under these conditions: A minimum charge of \$25,000.00 per Train will be assessed.		
		Col 1 Amount	Route Code / Group
STCC Group:	NON-REVENUE EMPTY EQUIPMENT GROUP		
From:	ALL LOCATIONS GROUP		
To:	ALL LOCATIONS GROUP	125.00	ALL ROUTES
APPLICATION AND SPECIAL SWITCHING CHARGES			
COLUMN	SPECIAL SWITCHING APPLICATION RULES		
1.	SPECIAL SWITCHING charges are in U.S. dollars Per Switch and apply under these conditions:		
		Col 1 Amount	Route Code / Group
STCC Group:	NON-REVENUE EMPTY EQUIPMENT GROUP		
From:	ALL LOCATIONS GROUP		
To:	ALL LOCATIONS GROUP	3200.00	ALL ROUTES
ROUTE CODE	ROUTE GROUP	ROUTE / (JCT CODE)	
UP UP 0	ALL ROUTES	UP	
JCT CONN 1	ALL ROUTES	UP -Any Junction-CONN	
Issued:	December 2, 2014	UP 6004-C	Page: 2 of 3
Effective:	January 1, 2015		Item: 7040-J
			Continued on next page

Verified Statement of
Todd Sullivan

Verified Statement of Todd Sullivan

Introduction

1. My name is Todd Sullivan. I am a Managing Member with William Sullivan and John Sullivan of Texas Railway Exchange LLC (“TREX”). My business address is P.O. Box 17017 Galveston, Texas 77552.
2. William Sullivan, John Sullivan, and I (collectively “Sullivan Brothers”), jointly own several individual companies, with each of us having a 1/3 ownership interest in each company.
3. I serve as President of Texas International Terminals, Ltd. (TIT), a major terminal facility located in Galveston, Texas, described below. Sullivan Brothers has a 99.9% ownership interest in TIT, and Sullivan Industrial LLC is a General Partner with a 0.1% ownership interest in TIT.
4. In addition to TREX and TIT, the Sullivan Brothers control and manage the following companies:
 - Callan Marine, Ltd. - Gulf Coast-based heavy civil marine contractor;
 - DRC Emergency Services - disaster management and civil construction group;
 - Energy Guard Foam Insulators - foam insulation company;
 - GCC Bunkers - develops and supplies high quality fuels and compliance solutions;
 - SLSCO, Ltd. - construction management group that oversees varied commercial, residential, disaster recovery, and building projects; and
 - Sullivan Brothers Builders, Ltd. – home builders.

5. I serve as a Board Trustee for the Galveston Wharves, which oversees the property, management, and operations of the Port of Galveston, Texas' oldest port.

6. I have a Bachelor of Science degree in Petroleum Engineering from Texas A&M University.

7. I am submitting this Verified Statement in support of the *Petition of Texas Railway Exchange LLC for an Exemption Under 49 U.S.C. § 10502 from the Requirements of 49 U.S.C. § 10901* filed in STB Docket No. 36186.

8. The purpose of this statement is to provide the Surface Transportation Board ("Board" or "STB") with background information on TIT and its current rail operations and service; a review of the railroad service limitations facing TIT and the negative impacts of those limitations; the business justification for the proposed rail line construction; and information on the investors and financing of the proposed construction.

TIT's Business and Rail Service

9. TIT was founded in 2009 and is a world-class liquid and dry bulk multi-modal facility for deep draft vessel, unit train, manifest rail, barge, and trucking. TIT is located along the Galveston Ship Channel.

10. TIT has 350,000 square feet of on-site covered storage space permitted for up to 14 million tons of dry bulk commodities, along with liquid storage capacity of ~2,000,000 barrels of crude oil, ethanol, and refined liquid products. TIT operates 24 hours a day, seven days a week, to serve the needs of its customers and its transportation partners.

11. TIT has significant on-site railroad trackage to receive unit train service, including two independent rail loop tracks of 11,000 feet. TIT also has access to approximately 30,000 feet of additional train landing and railcar storage trackage that was paid for by TIT and installed on leased property owned by Union Pacific Railroad Company (UP). In total, TIT has spent well over \$12 million in adding new industry trackage, and has made significant additional infrastructure improvements, including an extensive under-track rail unloading and conveyer system, to maximize terminal receipt, processing, and train return efficiencies.

12. TIT is dependent on rail service to meet its customers' service needs, who currently ship over 708,000 tons and 10.5 million barrels of commodities to TIT annually, predominantly in unit train service. Inbound commodities are transloaded via liquid and dry bulk conveyance systems to on-site storage of liquid or dry bulk cargo or direct transfer to vessel. TIT also processes outbound shipments, arriving by vessel to the terminal, and transloaded by TIT to rail cars.

13. TIT is served by UP through UP's directly connecting rail line.

14. TIT is also served by the BNSF Railway ("BNSF"). However, BNSF has no direct rail line connection to TIT. Both loaded and empty BNSF trains are brought to BNSF's nearby Valley Yard, and then reciprocally switched by UP approximately one-half mile to TIT for unloading or loading.

15. TIT is believed to be UP's most significant local customer in Galveston, often handling 16 or more 100+ car unit trains a month. While the Port of Galveston also has substantial rail traffic, the Port is served locally by the Galveston Railroad, L.P.

(GVSR), and not by UP and BNSF. GVSR connects with the UP on UP's separate mainline to the south (the former GH&H line). The other local traffic directly served by UP on the same line as TIT (the former SP line), is relatively small, and consists of approximately 50-60 cars per week to MI-SWACO and Sullivan Land and Cattle.¹

BNSF's Rail Service Limitations

16. TIT quickly and efficiently processes and returns UP unit trains within 24 hours of full train receipt, and it is easily capable of processing and returning BNSF trains on the same schedule. However, BNSF's unit trains, which again must be reciprocally switched by UP at an extra charge for our customers, take substantially longer to turn around because of significant UP service constraints.

17. First, UP restricts switching of BNSF unit trains to TIT to approximately 54 cars per day, or only one-half of a unit train each day. This is despite TIT having four dedicated tracks and two separate loop tracks at its facility that can accommodate receipt of full unit trains, just as TIT does with UP unit trains.

18. In fact, UP has reciprocally switched full BNSF unit trains to TIT on limited occasions without incident when it serves its own operational convenience, simply by bringing in a full unit train in four separate train cuts of 26-27 cars. For example, UP's local crews have delivered entire BNSF unit trains in one switch to TIT seven (7) times since December 2018. However, UP seems to have a policy of refusing all of TIT's requests to reciprocally switch full BNSF unit trains in one day, explaining

¹ Sullivan Land and Cattle is not owned or controlled by Sullivan Brothers.

generally that to do so might unreasonably delay service to its limited other local customers on the same line.

19. TIT is unaware of any other terminal or facility in the United States that has sufficient track capacity to accommodate full unit trains (even in four train cuts), and still elects to restrict train service to one-half unit train per day. Again, UP does not restrict its own unit train service to TIT to only one-half unit train per day.

20. Second, UP complicates and reduces TIT's ability to schedule reciprocal switches due to UP's local crew scheduling constraints. Even though TIT and BNSF operate 24 hours a day, seven days a week, UP only operates only one local crew, five days a week, generally from 7:00 a.m. to 4:00 p.m., although UP has in the past operated 24/7 as required to meet TIT's traffic demands. However, UP has advised that it has insufficient local business demands to undertake its own 24/7 local operations, even while at the same time advising that its crews have inadequate time to complete full unit train reciprocal switches to TIT in a single day.

21. UP's own train service to TIT is not affected by its local crew work time limitations, because TIT has constructed significant unit train staging track for receipt of UP's trains, with TIT crews performing all switching after delivery to the staging track, eliminating the need for any local switching of UP trains.

22. Third, UP has denied virtually all of TIT's requests for after-hours and weekend "special switches," authorized under UP's governing accessorial tariff at \$3,200 per switch.

23. Since March of 2017, UP has refused 31 of TIT's 35 requests for additional switches of BNSF unit trains citing "lack of resources," making such requests essentially pointless.

24. On October 18, 2018, TIT had a conference call with UP to discuss service issues. During the call, UP conveyed to TIT the difficulty in performing additional switches on weekends. In response, TIT queried whether it would be better to request additional switches during the week, to which UP responded by stating that weekday switches would be even more problematic.

25. UP frequently fails to turnaround BNSF unit trains delivered to Galveston in less than four (4) to six (6) days. In some cases, BNSF trains can even take up to ten (10) days for UP to turnaround.

26. For example, it takes UP approximately six (6) days to turnaround BNSF trains that are delivered to Galveston just prior to the start of a weekend. Even earlier in the week, it takes a minimum of two days for UP to deliver a unit train to TIT under its limited, one-half train per day delivery service plan. Because of UP's limited daily service hours, trains that are delivered to UP on weekday afternoons, are not switched by UP to TIT until the next day at the earliest.

27. Over the past year, UP has also failed to switch BNSF half unit trains on weekdays. UP has conveyed to TIT that it has missed these switches because: (i) the normal conductor was on vacation and the conductor's replacement lacked adequate training, (ii) the conductor made an error, or (iii) there was a bad locomotive order.

28. Efforts have been made in the past to directly connect with BNSF in partnership with the carriers and to make other infrastructure improvements to facilitate BNSF service to TIT. However, unfortunately, UP has not been supportive and has refused to cooperate to date.

29. Earlier this year, TIT contacted the Board's Rail Customer Public Assistance office in an attempt to facilitate UP reciprocal switching service improvements. Among other things, through that process, TIT requested UP to: (i) commit to performing full unit train reciprocal switches to TIT at one time and as part of one switch move; (ii) operate its railroad on a 24 hours a day/seven days a week basis as required to meet TIT's traffic demands; and (iii) accept and perform any necessary special switches on reasonable request. A copy of TIT's specific requests is included in **Exhibit 1** to this Statement.

30. Unfortunately, UP denied TIT's requests, although UP did indicate that it would consider performing special switching if such requests were entered into UP's system in a specified manner. However, as indicated, TIT has provided UP with adequate notice of requested special switches and has complied with all UP instructions, but UP has generally declined TIT's special switch requests.

31. Additionally, in its response to TIT's requests, UP stated that the reciprocal switching service it provides for BNSF unit trains is a "voluntary arrangement" executed by UP, indicating that it has little interest in improving its reciprocal switching service, and creating further business uncertainty for continuing BNSF service to TIT. A copy of UP's response is included as **Exhibit 2** to this Statement.

The Negative Impacts of UP's Reciprocal Service Limitations

32. UP's refusal to conduct BNSF reciprocal switching except on limited weekday service hours, and its refusal of TIT's requests for extra switches, are harmful to TIT and its Customers' businesses because they cause significant delays and increased costs for TIT and its customers.

33. UP's reciprocal switching service inefficiencies also substantially reduce TIT's return on its multi-million dollar investment to maximize terminal receipt, processing, and return efficiencies, including the construction of 30,000 feet of train landing and industry track to better facilitate switching and delivery of trains.

34. Additionally, UP's excessive train turnaround times for reciprocal switching service harms TIT's BNSF-served customers, and its ability to market its service to new BNSF-served customers.

35. For example, one of TIT's largest customers, Valero Marketing and Supply Company (Valero), has expressed considerable frustration with train delays and excessive train turnaround times with its reciprocal switching service, as confirmed by Valero in a letter to the Board dated November 5, 2018:

Currently, TXIT is served by both UP and BNSF, however, BNSF unit trains must be switched by UP into service TXIT's facility. Unfortunately, UP's operational restrictions and rules with respect to the reciprocal switching service for BNSF trains has resulted in unnecessary delays, excessive switching, increased train turnaround times, and increased transportation costs for VMSC. Notably, the UP has also refused to perform special or additional switching when requested by TXIT on behalf of VMSC, which adds to the delay and further hinders operations. For example, a vessel be can be ready and waiting, but if the ethanol unit train is not timely moved into TXIT's facility it cannot be transloaded and vessel demurrage charges may occur.

A copy of the Valero letter is included as **Exhibit 3** to this Statement.

36. Further, UP's statement that its switching service is merely a "voluntary arrangement" creates a built-in disincentive for UP to improve its service and jeopardizes TIT's substantial facility investments, made with UP's full knowledge and support.

37. Finally, because UP has refused to deliver BNSF trains as a unit train in one switch and in a timely manner, the UP shipments have a significant competitive advantage over BNSF shipments, and are able to be processed more efficiently and returned to customers more expediently.

Business Justification and Need for Proposed Construction

38. The purpose of TREX's proposed rail line construction is to provide more efficient and direct rail service for the existing rail traffic to TIT.

39. TREX's proposed rail line will provide a dependable connection from the BNSF Valley Yard to TIT's loop track that will allow BNSF trains to move directly to and from TIT's facility. It is anticipated that BNSF would serve TIT through overhead trackage rights on the line. TREX would also have the option to provide common carrier switching on the line, or possibly through arrangements with an existing short line, or have TIT provide private switching of BNSF trains. Construction of the line, and operations will be made in coordination with UP and BNSF, and in compliance with all applicable existing track and operational agreements. Also, BNSF has no ownership or other interest in the to be constructed line and TREX will maintain the common carrier obligation.

40. Following rail line construction, TIT's facility will still have the same rail capacity, but it will be able to conduct more efficient operations and lower costs because it will be able to process BNSF trains as full unit trains, instead of being limited to receiving a maximum of one-half unit trains per day.

41. The proposed rail line construction will allow TIT to receive BNSF trains 24 hours a day, seven days a week, rather than only receive limited weekday-only service of BNSF half-trains during limited hours.

42. The proposed rail line construction will eliminate the need to request UP to perform special switches for the timely receipt of BNSF trains.

43. Further, if BNSF unit trains can be brought directly into TIT, which is how UP trains are received, TIT's customers that rely on BNSF will have more dependable service, train turnaround times will be significantly reduced, and it will minimize the risk to TIT's customers of being assessed vessel demurrage fees.

44. UP and TIT will both benefit from having more efficient rail operations to TIT's facility, as TIT will be able to more timely process and turnaround UP trains through reduced train interferences. This is because when TIT is processing a BNSF train through its multi-day reciprocal switch process, TIT must clear this train before it can bring in and process any UP trains that may be waiting to enter the terminal. Being relieved of BNSF train reciprocal switch duties will also free UP crews to better serve other local customers.

45. BNSF and its local customers will benefit as there will be an increase in available track at BNSF's yard because dwell time will be avoided with BNSF trains being delivered directly to TIT's facility.

46. TREX's proposed rail line will improve the competitive status of BNSF rail traffic destined to TIT's facility because it will no longer depend on UP's reciprocal switching service for BNSF unit trains.

47. The proposed rail line will remove any uncertainty over the future availability of BNSF service by eliminating UP's indirect threats to further limit or cease its switching service.

48. TIT has been unsuccessful in its attempts to have UP improve its reciprocal switching service and operations. However, even if UP would agree to all of TIT's specific requests, under current UP operating protocols, each BNSF train would still need to move from the BNSF Valley Yard to the BNSF/UP interchange track, then to TIT's industry track before it is finally switched into TIT's terminal. By providing a direct connection to BNSF, TREX's proposed construction will save time, crew resources, and energy to the benefit of UP, BNSF, TIT, and all of their customers.

49. TIT customers are also very aware of the rail service issues and are in support of the project for the above-referenced reasons.

50. For example, as stated by Valero in its November 5, 2018 letter to the Board (attached as **Exhibit 3** to this Statement), "TREX's proposed construction will provide a direct connection between BNSF and TXIT's facility, reducing the turnaround time for BNSF unit trains from upwards of nine (9) days or more, to approximately two

days. TREX's proposed construction will therefore provide more efficient, predictable, and more competitive rail service to TXIT's facility."

51. Another of TIT's major customers, International Raw Materials, Ltd. (IRM) has also confirmed that the proposed construction will "provid[e] significant benefits to IRM and its customers," including:

- 1) **Improved and more competitive rail service.** Elimination of UP's switching fees and control over BNSF unit trains at TIT will promote improved competitive service. Such improved competitive service to destinations throughout the Midwest and Western United States, as well as to Canada, will benefit IRM and the farmers it serves.
- 2) **Streamlined operations.** The U.S. demand for crop nutrients exceeds supply, making it necessary to import these products. Farmers, and thus the U.S. food supply, hinges on a reliable receipt and distribution of these critical commodities. TREX's project will yield efficiencies through BNSF-direct service that will result in a stronger and more efficient supply chain for these nutrients.
- 3) **More timely and predictable service.** The proposed rail line will eliminate labor and time intensive switching operations between the carriers at the terminal, simplify carrier coordination, and provide for a more expeditious means for IRM to ship fertilizer products to all destinations through reduced train turnaround times.

A copy of the IRM letter is included as **Exhibit 4** to this Statement.

52. TIT's neighbors have also expressed support for the proposed construction and at least one, MI-SWACO, could potentially be served using the TREX track in coordination with UP and BNSF.

Investor and Financing Information for Proposed Construction

53. Financing of TREX's proposed track will be arranged by the Sullivan Brothers.

54. The Sullivan Brothers have extensive construction, property development, and financing experience, and manage several companies and have considerable property holdings in the State of Texas.

55. The manufacturing of diamond crossings, which is both capital and time intensive, will dictate the timeline for construction.

56. Absent at least conditional approval from the Board, it would be difficult, if not impossible, for TREX to approve and finance the diamond crossing, which is the single most expensive component of the construction project, expected to cost approximately \$500,000.

57. Sullivan Brothers will provide any and all financial information requested by the Board relevant to TREX's proposed track construction.

VERIFICATION

I, Todd Sullivan, verify that I have read the foregoing Statement, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement.



Todd Sullivan
Managing Member
Texas Railway Exchange LLC

Executed on November 19, 2018

EXHIBIT 1



Via Electronic and Fed Ex

January 19, 2018

Ms. Kari Kirchhoefer
Vice President Customer Care & Support
1400 Douglas Street
Omaha, NE 68179

Re: Texas International Terminals, UP Reciprocal Switching Service

Dear Ms. Kirchhoefer:

Texas International Terminals Ltd. (TIT) appreciates your participation and taking the lead for UP on our call with the STB's Office of Public Assistance last Friday concerning UP's reciprocal switching service to TIT. We regret that the call had to end abruptly without discussion of next steps and resolution of continuing service issues. To this end, below is an overview of the ongoing issues and TIT's recommendations.

As discussed, TIT is an extremely busy terminal, providing 24/7 service. TIT is the largest railroad customer in Galveston, often handling 16 or more 100+ car unit trains a month. TIT has expended well over \$10 million dollars in track expansion and other infrastructure improvements to maximize terminal receipt, processing, and return efficiencies, with two onsite rail loop tracks of 11,000 feet and an additional 30,000 feet of train landing and industry track.

As a result of these improvements, TIT can easily accommodate and quickly process unit trains, including UP's trains, which are usually unloaded and returned to UP within 24 hours, except on rare occasion (e.g., vessel delays). In contrast, the interchanged BNSF unit trains typically take in excess of five (5) days for UP to clear the tracks once placed, which creates significant operational, system fluidity, and customer delay/train turn around issues.

TIT has expressed to UP its concerns about UP's reciprocal switching service on a number of occasions. UP's service is severely constrained by UP's limited service hours, with weekday only service, usually from 7 a.m. to 4 p.m., in contrast to BNSF, which switches traffic locally 24/7 to UP's designated interchange tracks. At the same time, since March, 2017, UP has denied TIT's requests for "special switches" almost every time (32 times), responding only "lack of resources" – making such requests essentially pointless.¹ TIT recognizes that other local traffic also needs to be accommodated, but that traffic is relatively insignificant, especially in relation to TIT,² and should not create any meaningful resource challenges.

¹ UP performed one special switch request for TIT in August, 2017.

² As discussed, TIT understands that M-I Swaco ships approximately 40 cars per week and Sullivan Land and Cattle ships approximately 10-12 cars per week on our line (former SP line), although Savage Sulfur's previous weekly unit train service has ceased. TIT also understands that most of the other UP traffic on the Island, including traffic moving to/from the Port of Galveston, is served locally by the Galveston Railroad, which connects with UP on its separate mainline to the south (former GH&H line).

Texas International Terminals Ltd.
Mailing Address: P.O. Box 17017 – Galveston, TX 77554

Additionally, until recently, UP has refused to switch a full BNSF unit train to TIT tracks, preferring instead to move a half train (54 cars/day) at a time. As a result, both UP and TIT are forced to switch/unload a BNSF train over multiple days, using multiple crew shifts.

TIT is pleased that UP has taken recent action to meet with it (and BNSF) regularly to discuss service, and by increasing inbound switches from a half train to a full train,³ thereby creating improved operational efficiencies. However, TIT submits that UP needs to engage in more specific and proactive efforts to improve its service, including employing a “keep full” approach to filling TIT’s tracks as successfully employed by UP elsewhere, by taking the following actions:

First, UP should commit to continuing to perform full unit train reciprocal switches to TIT’s industry tracks at one time and as one switch move, which have proven to be successful. TIT asks that such switches be performed in the morning, so that TIT can process/unload the train in 24 hours, in time for the UP crew to pick up the empty and return it to BNSF 24 hours later. Each empty unit train should be returned to BNSF within 24 hours and the next loaded unit train, if currently on the BNSF interchange track, should be loaded onto the TIT industry track that same day before the UP crew times out. (E.g. a unit train placed on TIT industry track on Monday morning will be unloaded by TIT and ready for pick-up by UP on Tuesday morning. UP, when it returns the train to BNSF on Tuesday morning, will then spot the next loaded unit train onto the TIT industry track in order to allow for unloading that same day. This process is to be repeated every 24 hours, such that five unit trains can be processed at the TIT facility from Monday-Friday.)

Second, UP should operate its railroad 24/7, including at nights and on weekends, just as TIT and BNSF do, and as UP did several years ago, as required to meet TIT’s traffic demands.

Third, in the event that special switches are required, UP should accept and perform special switches on request, with reasonable notice, including at night and on weekends.

TIT’s recommended actions will not and cannot be as efficient as direct service, but are reasonable and necessary under the circumstances to reduce overall switch times, improve operational and system fluidity efficiencies for UP, TIT, and BNSF, and most importantly, return cars to customers for service as soon as possible and without unnecessary delay. We appreciate your attention to this matter and look forward to your prompt response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Todd P. Sullivan".

Todd P. Sullivan
President

cc: Michael Higgins (via email)
Elisa Davies, Esq. (via email)
Peter Pfohl, Esq. (via email)

³ As shown, TIT can easily accommodate unit trains on its industry tracks. UP successfully spotted full reciprocal switch unit trains to TIT without incident on 12/18/2017; 12/22/2017; 12/27/2017; 12/29/2017; 1/4/2018; and 1/8/2018.

EXHIBIT 2



BUILDING AMERICA®

VIA Electronic Mail

February 15, 2018

Dear Mr. Sullivan:

The purpose of this letter is to respond to your January 19 letter. We want TIT and all our customers to have an excellent experience. We pledge to continue to work with you and your team to meet TIT's actual service needs. We understand that if your business succeeds, we succeed. Unfortunately, however, we cannot agree to TIT's specific demands, which appear to be based on some significant misconceptions.

Union Pacific understands the nature of TIT's operations and track improvements. As you know, Union Pacific leases TIT the land on which TIT constructed additional storage tracks to facilitate handling Union Pacific and BNSF cars to and from TIT's loop tracks, as well as a staging track for trainload traffic delivered by Union Pacific. We have collaborated together with TIT for years to facilitate TIT's growth and improve its operations.

TIT's facility was opened to BNSF service through a voluntary reciprocal switching agreement between BNSF and Southern Pacific prior to SP's merger with Union Pacific. Since the merger was consummated in 1996, Union Pacific has continued to honor that voluntary reciprocal switching arrangement for BNSF traffic moving to and from TIT.

Union Pacific provides reciprocal switching on a voluntary basis to make the most efficient use of shared rail resources to serve all Galveston customers. On most days, our crews have time to switch TIT while still serving our other customers on the same line. Your letter suggests we should elevate TIT's interests over the interests of the other shippers on the line, but Union Pacific has an obligation to serve all of its customers, not just TIT.

TIT's traffic data from 2017 demonstrate that our present service plan for BNSF traffic – switching in and out cuts of 54 cars each day, five days a week – should accommodate the volume of TIT traffic that requires reciprocal switching. Specifically, our data show that TIT received 5,809 cars from BNSF in all of 2017; under the current service plan, we have plenty of capacity for growth. In addition, our data indicate we average <2.5 days from the time of customer release to the time UP interchange delivered the cars.

We understand TIT would prefer Union Pacific to move full BNSF unit trains to TIT in a single switch. Unfortunately, that is not possible given the configuration of the tracks used for reciprocal switching. TIT misunderstood what happened on the days it says Union Pacific “successfully spotted full reciprocal switch unit trains.” On a finite number days during the winter holiday months, Union Pacific crews performed an extra switch by separately switching two cuts of cars to TIT. That is, our crews delayed service to other customers and spent twice as long performing an extra switch to TIT in a unique and extraordinary effort to accommodate TIT. Our crews cannot do that on a sustained basis, while maintaining service levels to other shippers on the line. In any event, TIT's volume of business simply

does not justify what would amount to a doubling of reciprocal switching capacity by providing two switches per day.

We also understand that TIT would prefer Union Pacific's switching crews to operate on a 24/7 basis. That is not realistic given the volume of local business. TIT cannot compare railroads' 24/7 operation of yards that process line-of-road trains with more limited local switching operations. Our local service to Galveston is consistent with service levels on other parts of our network with similar traffic volumes. Also, as explained above, based on our understanding of TIT's volume, our current switching service should accommodate TIT's traffic that requires reciprocal switching. Operating local switching crews on a 24/7 basis would more than triple our reciprocal switching capacity, and TIT's business is nowhere near the level that would make such operations reasonable or economical.

Finally, we appreciate TIT's traffic from BNSF may not be spread evenly throughout each month, and that TIT thus has an interest in obtaining special switches when necessary. Your letter incorrectly suggests that Union Pacific has been unwilling or unable to provide special switches. In fact, the problem has been that most of TIT's requests have not complied with our policies, which require a separate request for each day a special switch is needed and 36-hours' notice. These requirements ensure a special switch is actually needed and a crew is available. As one example, the switch denials your letter mentions appear to count separately our denial of TIT's December 2 combined request for nine special switches, where even the first requests were made without proper notice. Your letter also fails to acknowledge that we actually provided special switches on three of the nine days, despite formally denying TIT's requests because they failed to comply with our policies. In addition, your letter fails to acknowledge occasions when TIT improperly requested special switches days in advance, and it turned out there were no cars to be brought to TIT.

Based on conversations with TIT last month, we believe TIT may not have understood our policies for requesting reciprocal switches. We believe we addressed TIT's apparent misunderstanding during an in-person meeting on January 24, where members of the Union Pacific team specifically instructed TIT on how to enter compliant special switches in our system. We expect that, going forward, TIT's special switch requests will be made in compliance with our policies, and in good faith based on actual need.

We are committed to providing TIT service per plan, and to providing special switches when resources are available. We look forward to growing with you.

Sincerely,

A handwritten signature in black ink, appearing to read "Kari Kirchhoefer". The signature is fluid and cursive, with the first name "Kari" being more prominent and the last name "Kirchhoefer" written in a more compact, connected style.

Kari Kirchhoefer
Vice President Customer Care & Support

cc: Michael Higgins (via email)

EXHIBIT 3



November 5, 2018

The Honorable Ann D. Begeman
Chairman

The Honorable Deb Miller
Vice Chairman

Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Re: Docket No. FD 36186, Texas Railway Exchange LLC –
Construction and Operation Exemption – Galveston County, TX

Dear Chairman Begeman and Vice Chairman Miller:

Valero Marketing and Supply Company ("VMSC") respectfully requests that the Surface Transportation Board approve the Texas Railway Exchange LLC's (TREX's) petition for an exemption to construct and operate a new rail line in Galveston, Texas in Docket No. FD 36186.

VMSC presently ships ethanol to the Texas International Terminals ("TXIT") from ethanol plants primarily located in the Midwestern United States, using both the Union Pacific Railroad Company (UP) and the BNSF Railway Company (BNSF) for delivery to TXIT where it is transloaded onto vessels. It is expected that in 2018, VMSC will be shipping over 100 unit trains to TXIT, and as such, efficient, competitive rail service in and out of the terminal is of significant interest to VMSC.

Currently, TXIT is served by both UP and BNSF, however, BNSF unit trains must be switched by UP into TXIT's facility. Unfortunately, UP's operational restrictions and rules with respect to the reciprocal switching service for BNSF trains has resulted in unnecessary delays, excessive switching, increased train turnaround times, and increased transportation costs for VMSC. Notably, the UP has also refused to perform special or additional switching when requested by TXIT on behalf of VMSC, which adds to the delay and further hinders operations. For example, a vessel can be ready and waiting, but if the ethanol unit train is not timely moved into TXIT's facility it cannot be transloaded and vessel demurrage charges may occur. TREX's proposed construction will provide a direct connection between BNSF and TXIT's facility, reducing the turnaround time for BNSF unit trains from upwards of nine (9) days or more, to approximately two days. TREX's proposed construction will therefore provide more efficient, predictable, and more competitive rail service to TXIT's facility.

For the reasons cited herein, VMSC respectfully requests that TREX's proposed track construction be promptly approved.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Harrison', is written over a horizontal line.

Michael Harrison
Vice President
Valero Marketing and Supply Company

EXHIBIT 4



INTERNATIONAL RAW MATERIALS LTD

November 1, 2018

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

The Honorable Deb Miller
Vice Chairman
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

Dear Chairman Begeman and Vice Chairman Miller,

International Raw Materials, Ltd. (IRM) respectfully requests that the Surface Transportation Board approve the Texas Railway Exchange LLC's (TREX's) petition for an exemption to construct and operate a rail line in Galveston, Texas in Docket No. FD 36186.

IRM delivers phosphates, fertilizer, and other nutrients essential for healthy, sustainable farming, and for maximizing crop yields in the United States and around the world. We operate in six countries including the United States, Canada, Australia, Singapore, Madagascar, and Mauritius.

IRM recently entered into new business arrangements with Texas International Terminals (TIT) to receive and transload phosphate fertilizer by vessel. The transloaded product is shipped on the Union Pacific Railroad (UP) and the BNSF Railway (BNSF), and its railroad connections to destinations across the United States and Canada. TREX's proposed rail line will provide a direct connection between BNSF and TIT's facility, providing significant benefits to IRM and its customers, including the following:

- 1) **Improved and more competitive rail service.** Elimination of UP's switching fees and control over BNSF unit trains at TIT will promote improved competitive service. Such improved competitive service to destinations throughout the Midwest and Western United States, as well as to Canada, will benefit IRM and the farmers it serves.
- 2) **Streamlined operations.** The U.S. demand for crop nutrients exceeds supply, making it necessary to import these products. Farmers, and thus the U.S. food supply, hinges on a reliable receipt and distribution of these critical commodities. TREX's project will yield efficiencies through BNSF-direct service that will result in a stronger and more efficient supply chain for these nutrients.
- 3) **More timely and predictable service.** The proposed rail line will eliminate labor and time intensive switching operations between the carriers at the terminal, simplify carrier coordination, and provide for a more expeditious means for IRM to ship fertilizer products to all destinations through reduced train turnaround times.

In summary, IRM expects TREX's proposed track construction to result in significant benefits, including improved and more reliable competitive service, as well as improved operational efficiencies and system fluidity, and reduced train turnaround times by a few days or more for each train. As such, we respectfully request that the Board approve TREX's proposed track construction.

Sincerely,

William P. O'Neill, Jr.
President
International Raw Materials Ltd

Verified Statement of
R. Lee Meadows, Jr. PE

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36186

TEXAS RAILWAY EXCHANGE LLC–
CONSTRUCTION AND OPERATION EXEMPTION – GALVESTON COUNTY, TX

VERIFIED STATEMENT OF

R. LEE MEADOWS, Jr.

ON BEHALF OF

TEXAS RAILWAY EXCHANGE LLC

DATED: NOVEMBER 20, 2018

I. Introduction

My name is R. Lee Meadows, Jr. I am an independent contractor, and Director, Transportation Engineering for R.L. Banks & Associates, Inc. My business address is P.O Box 84, Williamsville, Virginia 24487; my home office address is 16169 Indian Draft Road, Millboro, Virginia 24460.

I earned an AS degree in Civil Engineering Technology from Bluefield State College in 1970; and then earned a BS degree in Civil Engineering Technology from Bluefield State College in 1972. In 1980, I earned an MS degree in Civil Construction Management from Wayne State University. I am also a Registered Professional Civil Engineer.

I currently have over 46 years of transportation experience. I have worked as a contractor for R.L. Banks & Associates since May of 2012, after working more than three decades at Norfolk Southern Corporation (NS) and its predecessor, the Norfolk & Western Railway (N&W). At NS and N&W, I held positions with increasing responsibility within the Engineering Department spanning management and engineering of railroad track structure, bridge and building inspection, condition assessment, maintenance, rehabilitation, design, and construction. I participated in redesigning the track layout to eliminate the westbound hump at the NS dual hump yard at Conway, PA and its final construction. I have also participated in numerous design projects as an independent consultant. I have experience with switching and yard operations, train performance, customer service, Federal Railroad Administration (FRA) rules,

regulations, and labor agreements. Specifically, my experience designing and constructing railroads includes:

- **Warren Terminal** - Surveyed proposed route area, designed proposed track, provided contract drawings, and procured material to support track facilities at a rail/barge facility in southern Ohio.
- **Vulcan Materials** - Surveyed, designed, provided contract documents, and procured materials to support track facilities for outbound shipments from a granite quarry in eastern Virginia.
- **SunCoke Energy** - Designed track layout for a loop track operation for a new coke facility for inbound 130 car coal unit trains and for outbound 90 car coke trains in Ohio.
- **United Coal Company** - Designed track layout, provided contract documents, and procured material for track construction for shipping 100 car coal unit trains for coal company in southern West Virginia.
- **Rosebud Mining Company** - Managed the design, permitting, material procurement, and construction with hired force for a ten (10) mile branch rail line on a former railway right-of-way for shipment of 130 car coal unit trains for a coal company in western Pennsylvania.
- **First Energy** - Surveyed and designed a track expansion to accommodate 130 car coal unit trains unloading at a power generating station in southern West Virginia.

- **Carmeuse** - Designed horizontal and vertical alignment for a loop track connected to two rail carriers for inbound non-processed lime and coke, and for outbound shipments of lime and aggregate for a quarry in northern Virginia.
- **United Coal Company** - Surveyed and designed track layout, provided contract drawings, and procured material for sidetrack construction for loading 120 car coal unit trains for a coal company in southern Virginia.
- **United Coal Company** - Surveyed, designed track alignment, and prepared permitting and contract drawings for a new ten (10) mile railroad to be constructed on an abandoned railroad right-of-way for outbound shipments of 130 car coal unit trains for a coal company in middle West Virginia.

I have been retained by the Texas Railway Exchange LLC (TREX) to design and provide guidance on the construction of the proposed rail line to connect the BNSF Railway Company's (BNSF)'s Valley Yard to the Texas International Terminals (TIT) loop track in Galveston County, Texas. My testimony provides an overview of the site, the proposed alignment, and planned construction.

II. TREX Project Site Description

TREX proposes to construct a new common carrier rail line that is approximately 2,787 feet in length from the BNSF's Valley Yard to the TIT's industry loop track at Galveston, Texas. Maps depicting the four proposed alignments are attached hereto as Exhibits 1-4. Presently, BNSF trains are delivered to TIT's facility by reciprocal switch

performed by UP. By installing TREX's proposed track, it is expected that the total number of switching moves will be reduced by up to 82 percent.¹

Prior to my site visit, I reviewed engineering drawings provided by TREX, which provided information on the existing track and rail facilities, and included preliminary routings for the proposed track. I performed a site inspection on July 24th and 25th of 2018. At the time of the site inspection, I also met with BNSF and TIT representatives. I inspected the rail facilities in the vicinity of the BNSF Valley Yard and TIT's facility, with a significant amount of time spent at the location where TREX's track would cross the tracks immediately north of the BNSF Valley Yard. This includes the southern two tracks, which are understood to be owned by the Union Pacific Railroad Company (UP), and the northernmost track owned by TIT, but both BNSF and UP operate over the first track to the north, UP operates over the center track, and TIT and UP operate over the northernmost track. The proposed alignment would require the installation of crossing diamonds, a track appliance that allows a track to cross another track at an acute angle of several degrees to ninety degrees. Neither of the aforementioned tracks would access the north-south route created by the crossing diamonds. The proposed diamonds are for the movement of BNSF unit trains to the TIT loop track.

III. Description of Proposed Track Alignment

There are four proposed routings for this project: the Green Routes (A and B) and the Blue Routes (A and B). See Exhibits 1-4. Based on my inspection of the site, there

¹ R.L. Banks & Associates, Inc. letter to City of Galveston, dated Sept. 7, 2018 at 3 (attached as Exhibit 5).

are no other feasible alternatives from an engineering standpoint available except for these four routes because of the limited project site; the infrastructure in the area including a highway, two overhead bridges with limited vertical clearance; and other railway tracks. The limited size of the project site and the existing infrastructure dictates the geometry of the routing across the crossing, requiring a diamond angle of 20 degrees and 09 minutes and 30 seconds, and an adequate tangent distance to ensure that all eight wheels of a rail car are clear before the train enters the turn to the east towards TIT's facility. The only significant difference between the Green and Blue routings from the BNSF Valley Yard to the Pelican Island Causeway is the portion of track west of the Pelican Island Causeway to where it crosses the existing TIT and UP track. As such, the proposed alignments for the Green Routes (A and B) and the Blue Routes (A and B) are described separately from the BNSF Valley Yard to the Pelican Island Causeway. East of the Pelican Island Causeway, the Green and Blue "A" Routes are the same, and likewise the Green and Blue "B" Routes are the same. As such, the A and B Routes are described separately from the Pelican Island Causeway to the connection with TIT's loop track.

BNSF Valley Yard to Pelican Island Causeway

BNSF Valley Yard to Crossing: All Routes the Same

Both the Blue and Green Routings connect to the BNSF Valley Yard at Station 0+00. From Station 0+00 the track leaves the BNSF Valley Yard through a left hand number 9 turnout heading in a northeasterly direction crossing a tidewater waterway to UP property and crosses the first two tracks owned by UP at an angle of 20 degrees and

09 minutes and 30 seconds and continues across the last track owned by TIT with a crossing diamond of the same angle. As the track alignment leaves the UP right-of-way, the Green Routes and Blue Routes diverge. See Exhibits 1-4.

Crossing to Pelican Island Causeway: Green Routes different from Blue Routes, with Green Routes encroaching more onto City property and wetlands

Green Routes (A and B)

The Green Routes from the crossing curve to the right and head eastward under the north side of the columns supporting the overhead highway bridge for State Route 275/Harborside Drive. The Green Routes must cross a highway-runoff retention basin and wetlands, which may require environmental permitting. After immediately crossing the wetlands, the Green Routes converge with the Blue Routes at the Pelican Island Causeway. See Exhibits 1 and 2.

Blue Routes (A and B)

The Blue Routes from the crossing curve to the right and head eastward, but are located south of the Green Routes and are closer to the existing TIT track. See Exhibits 3 and 4. The Blue Routes also pass on the south side of the columns supporting the overhead highway bridge for State Route 275/Harborside Drive. TREX would prefer constructing one of the Blue Routes because for these routes it will be possible to use construction methods to avoid impacting most of the aquatic resources.²

² RLBA Letter to Stephen G. Thornhill, Burns & McDonnell, Sept. 14, 2018 (attached as Exhibit 5).

Pelican Island Causeway to TIT's Loop Track

Both the Blue and Green Routes converge as they cross under the Pelican Island Causeway under the same span where the existing TIT and UP track crosses. The A and B Routes then diverge, with the A Routes trending more north-northeast in an effort to minimize the amount of track on UP's property; whereas the B Routes parallel the existing track in an effort to minimize the overall impact to UP's property, by keeping all track crossing the property at one location.

Green and Blue "A" Route

The A Route is the alternative located as far as possible from the existing track and was designed to cross as little of UP's property as possible. See Exhibits 1 and 3. It was not possible to avoid UP's property altogether or to locate TREX's track further away from the existing track without running into issues of vertical clearance because of the existing bridges. The A Route reduces the amount of UP property crossed by approximately 250-275 feet. Specifically, Green Route A crosses UP's property from stations 3+55 to 5+88, & 17+80 to 20+95, for a total of 548 feet; and Blue Route A crosses the UP's property from stations 3+55 to 5+88, 11+50 to 15+20, & 17+80 to 21+24, for a total of 947 feet.

Green and Blue "B" Route

The B Routes from the Pelican Island Causeway head northeast and parallel the existing track to TIT's loop track. This routing is being proposed because it is likely to minimize the impact to UP's property. However, this routing is also longer and requires more track to be installed on UP's property. See Exhibits 2 and 4. Specifically, Green

Route B crosses the UP's property from stations 3+55 to 5+88, & 17+80 to 23+70 for a total of 823 feet; and Blue Route B crosses the UP's property from stations 3+55 to 5+88, 11+50 to 15+20, & 17+80 to 23+80, for a total of 1,203 feet.

IV. Description of Track Construction

Based on the survey of the existing rail section of affected tracks, the rail section for construction will be 115RE, except for the turnout for the east connection to TIT's loop track, which will be 136RE.

BNSF Valley Yard to Crossing

The first segment to be constructed will be the section of track from the BNSF Valley Yard to the crossing. Prior to track construction, the grading contractor will prepare the track roadbed grade by installing pipe at the track crossing (Sta. 2+00) to (Sta. 3+00) between BNSF Valley Yard and UP right-of-way and place sub-ballast. TREX or BNSF will install No.9 LH Turnout at Sta. 0+00 as first track work step for construction on the project. TREX or BNSF personnel and/or contractors would then construct track by laying track panels or laying out ties and rail and spiking track up to the UP right-of-way at approximately Sta. 3+55. Ballast can be dumped from a railcar and the track surfaced short of Sta. 3+50. None of this track construction would interfere with train operations on the TIT or UP tracks. The construction of this track first will facilitate surfacing of the diamonds in the north-south direction.

Installation of Diamonds

Installation of the diamonds will occur after the first segment of track as described above is constructed. The diamonds themselves are on the critical path and will likely

drive the construction timeline as the manufacturing lead time for diamonds (steel components only) is 46 to 54 weeks. The remaining diamond material would be wooden crossties with a very short delivery time. Once the diamonds arrive onsite, an off-track crane (consisting of a crane of sufficient capacity to lift each constructed diamond with crossties attached to the southernmost UP track) will be used to unload the components of the diamonds in the area south of Harborside Drive from the truck or railcar. Each diamond will be assembled and the respective crossties installed.

It is expected that installation of the diamonds will have minimal impact on UP train operations. TREX/UP will only require an estimated window of twenty-four (24) hours total, with each diamond taking approximately eight (8) hours to install. The steps for diamond installation are as follows:

1. Once the diamonds are assembled, TREX's contractor, in cooperation with UP, will measure the length of each of the diamonds in the east-west direction, locate these same measurements on both rails based on the surveyor's centerline, make four saw cuts on the existing rail, drill rail ends, and then bolt on joint bars.
2. Starting with the southernmost track, joint bars, track panel and sufficient ballast will be removed from the slot to accommodate the diamond such that the diamond can be aligned with the existing track. This process will then be repeated on the center and northernmost tracks.
3. Once the diamond is inserted, joint bars and bolts are used to connect the diamond with the existing track.

4. A backhoe or end-loader will place new ballast that has been stockpiled onsite into the diamond slot.
5. The east-to-west rails on the diamond will then be jacked with track jacks and the crossties tamped with air tampers, hydraulic tampers, or a backup tamper.

Between diamond installations or concurrently, TREX's contractor, in cooperation with UP, can construct track by laying out ties and rail between the BNSF track and the first diamond installed. As the diamonds are constructed it will also be necessary to construct the track between the diamonds.

Installation of At-Grade Crossing and Turnout

Concurrent with or prior to the work above, TREX's contractor will install the turnout in the TIT loop track. The A Routes will use a No. 15 left hand turnout, and the B Routes will use a No. 11 Left hand turnout. Following the installation of the turnout, TREX's contractor will install track from the turnout to the proposed grade crossing at Old Port Industrial Road. TREX's contractor will then construct a track panel (rail of sufficient length to clear the edges of the grade crossing spiked down to ties).

Prior to installation of the track panel for the at-grade crossing, a traffic plan for a temporary bypass or detour will be established in coordination with the City of Galveston. With the necessary traffic plan in place, TREX's contractor will begin installation by saw cutting the asphalt paving a sufficient width to fit the track panel. Next, the contractor will excavate from the top of the asphalt to the subgrade a minimum of 24 inches, assuming this will leave a subgrade of 6 inches. If necessary, the contractor

will excavate an additional 6 inches and install 6 inches of compacted sub-ballast.

Mainline ballast will be placed in the excavation to a depth of 8 inches.

The track panel will then be placed in the roadway and the track will be connected to the track north of the roadway. The track will be surfaced with an on-track tamper adding additional ballast to bring the surface of the track to the design elevation. The roadway will then be infilled with 3 to 5 inches of stone and covered with a temporary layer of hot mix asphalt.

Once the track surface is prepared, precast concrete crossing panels will be installed while providing one lane vehicle traffic over the crossing until both sides are installed. A final layer of asphalt paving will be installed one lane at a time while maintaining vehicular traffic to provide a smooth transition over the track. Prior to placing the crossing in service appropriate signage will be installed in coordination with the City. Of note, is that the track will require resurfacing after sufficient train traffic has crossed in order to maintain the relative elevation of the track. After the at-grade crossing has been constructed, TREX's contractor will construct the track west-to-southwest to the location of the diamond crossings.

In total, it is expected that the construction of TREX's track could be constructed over a period of 14 days.

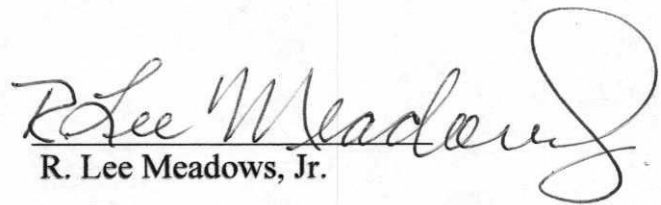
V. Conclusion

In summary, TREX's track has been carefully designed and will be constructed to provide a reliable and efficient connection between BNSF's Valley Yard and TIT's Loop Track and without interfering with existing UP local switching operations or

infrastructure. With adequate notice to UP and coordination with BNSF, TREX will also be able to minimize any negative effects on UP operations during the construction period.

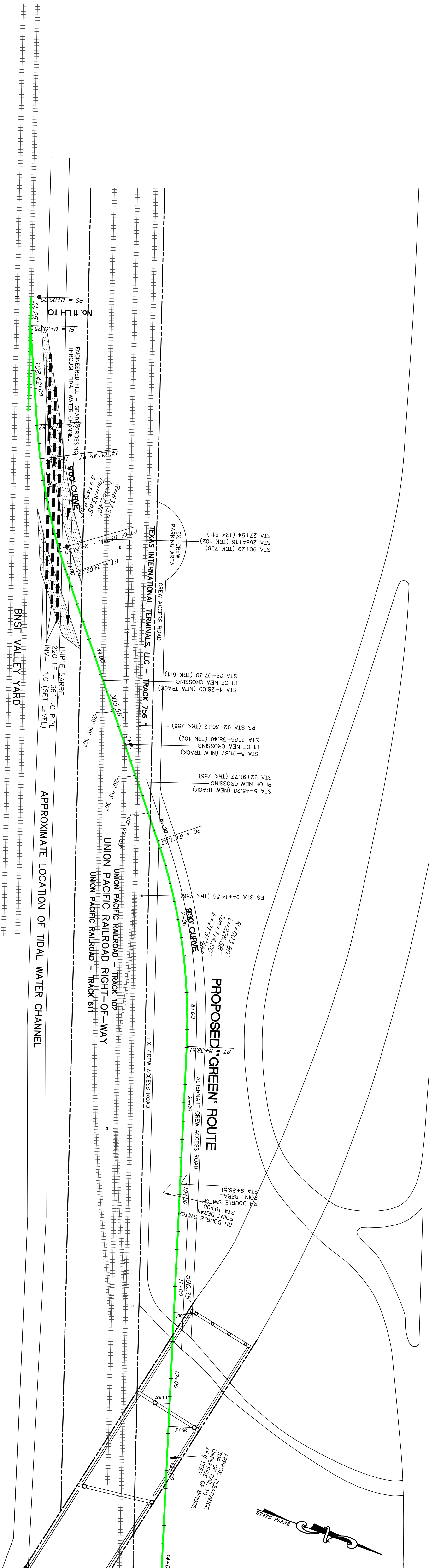
VERIFICATION

I, R. Lee Meadows, Jr., verify under penalty of perjury that I have read my Verified Statement, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

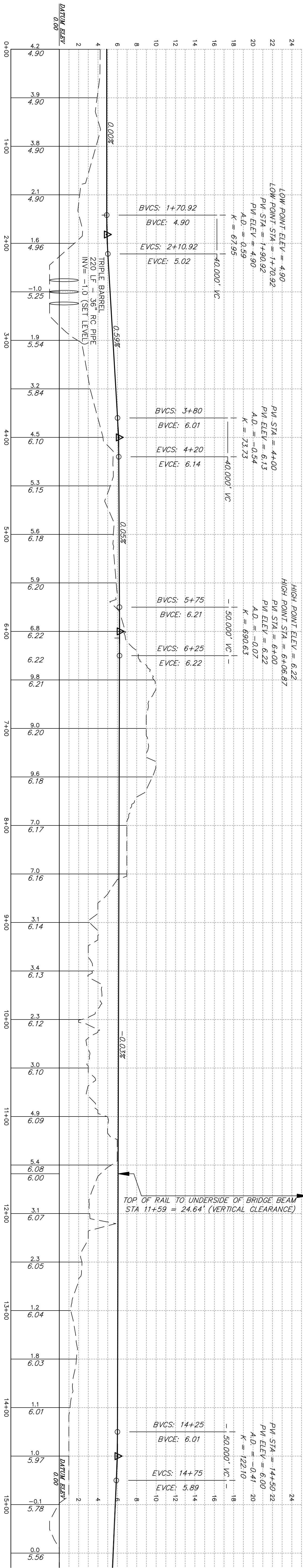

R. Lee Meadows, Jr.

Executed on November 20, 2018

EXHIBIT 1

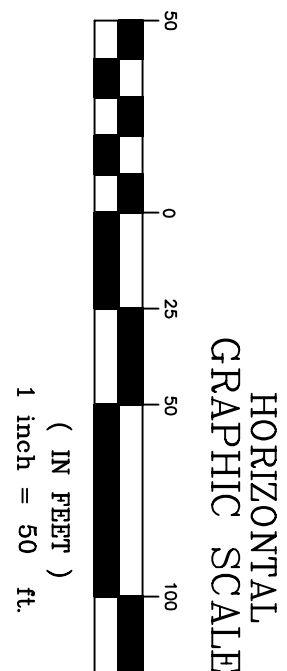
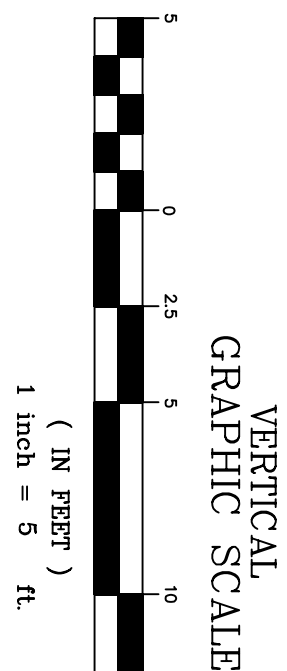


GREEN ROUTE - ALT "A"



1. RAILROAD RIGHT OF ENTRY IS REQUIRED FOR ALL RAILROADS AND SUBURBAN RAILROADS. RAILROAD REPRESENTATIVES FOR RIGHT OF ENTRY REQUIREMENTS AND DOCUMENTS.
2. RAILROAD FLAGGING IS REQUIRED FOR WORK WITHIN 25 FEET OF CENTERLINE OF TRACK. CONTACT RAILROAD REPRESENTATIVE FOR FLAGGING SERVICES.
3. SEE TYPICAL SECTIONS FOR DETAILS ON RAIL, TIES, BALLAST AND SUBBALLAST REQUIREMENTS.
4. SEE HORIZONTAL ALIGNMENT DATA SHEETS FOR PROPOSED TRACK ALIGNMENT DATA.
5. SEE CONSTRUCTION SEQUENCE PLAN FOR PHASING OF CONSTRUCTION ACTIVITIES.

INTERIM REVIEW ONLY - NOT FOR CONSTRUCTION
DOCUMENTS ARE INCOMPLETE AND NOT INTENDED FOR PERMIT, BIDDING OR CONSTRUCTION.
ENGINEER: R. L. MEADOWS, JR.
P.E. REGISTRATION NO. 8299 (WEST VIRGINIA)
DATED: NOVEMBER 2, 2018



TREX Proposed Rail Construction
Green Route (ALT "A")
Galveston, Texas

MOUNTAIN RAILWAY CONSULTING
P.O. BOX 84 WILMINGTON, VA 24487
(540) 250-3887

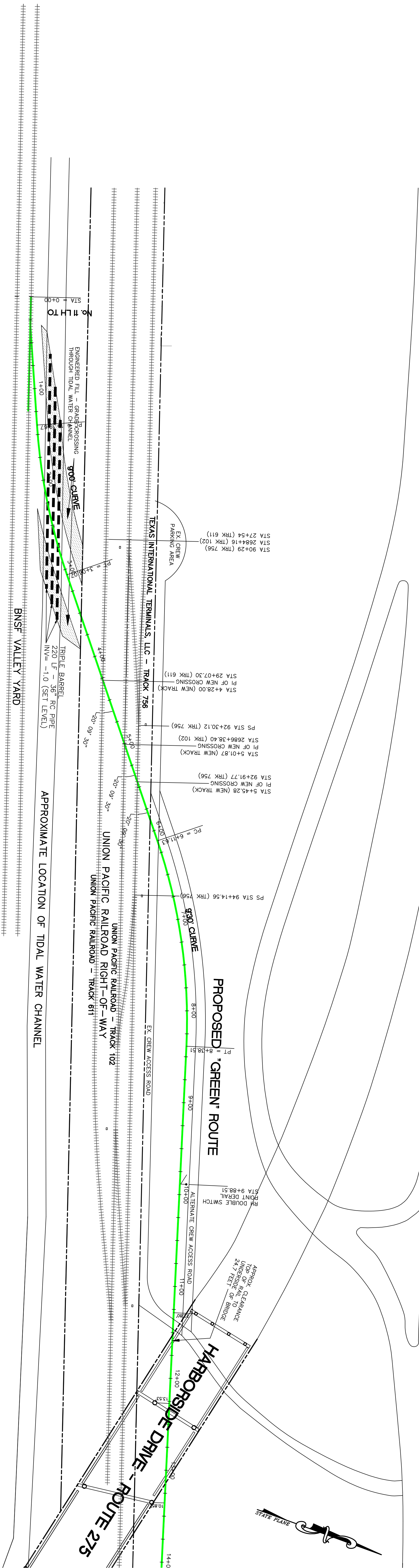
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VERTICAL SCALE: 1"=5'
SHEET 1 OF 2
DATE: JANUARY 19, 2018
FILE: TR0-041503V

TREX
Texas Railway
Exchange LLC

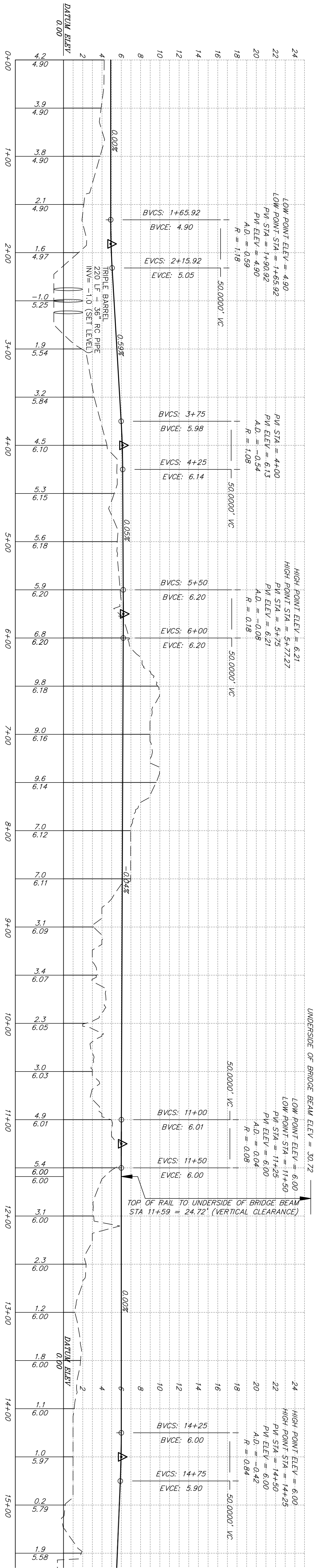
EXHIBIT 2

HARBORSIDE DRIVE - ROUTE 275

PORT INDUSTRIAL ROAD

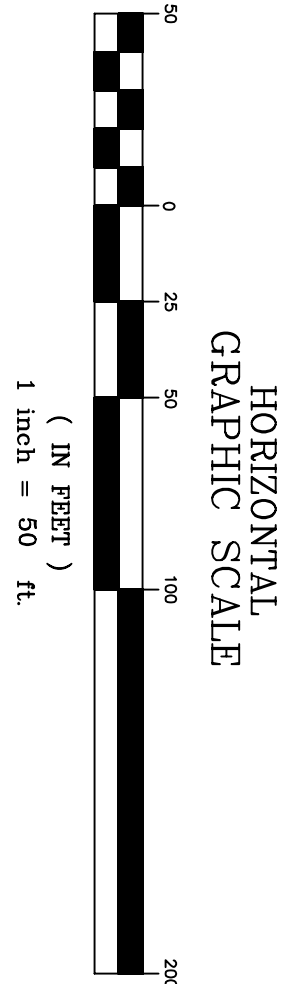
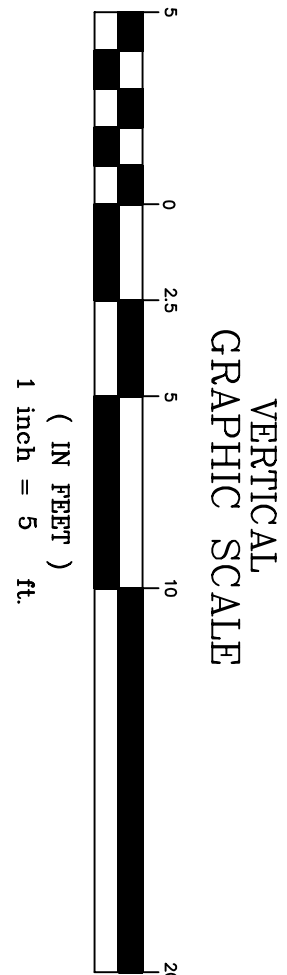


GREEN ROUTE - ALT "B"



1. RAILROAD RIGHT OF ENTRY IS REQUIRED FOR ALL RAILROAD CROSSINGS. RAILROAD REPRESENTATIVES FOR RIGHT OF ENTRY REQUIREMENTS AND DOCUMENTS.
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ENGINEER: R. L. MEADOWS, JR.
P.E. REGISTRATION NO. 8299 (WEST VIRGINIA)
DATED: NOVEMBER 2, 2018



TREX Proposed Rail Construction
Green Route (ALT "B")
Galveston, Texas

MOUNTAIN RAILWAY
CONSULTING

P.O. BOX 84 WILMAMISTLE, VA 24687
(540) 250-3887

HORIZONTAL SCALE: 1"=50'

VERTICAL SCALE: 1"= 6'

DATE: JANUARY 19, 2018

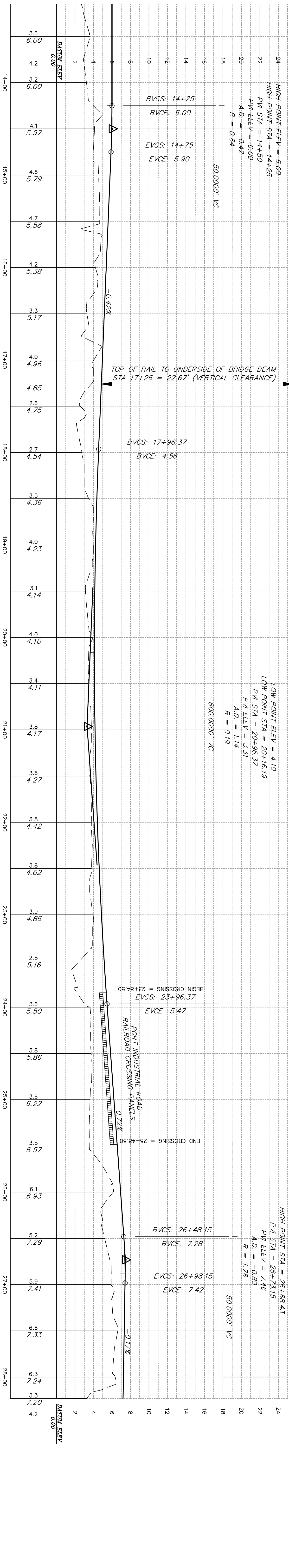
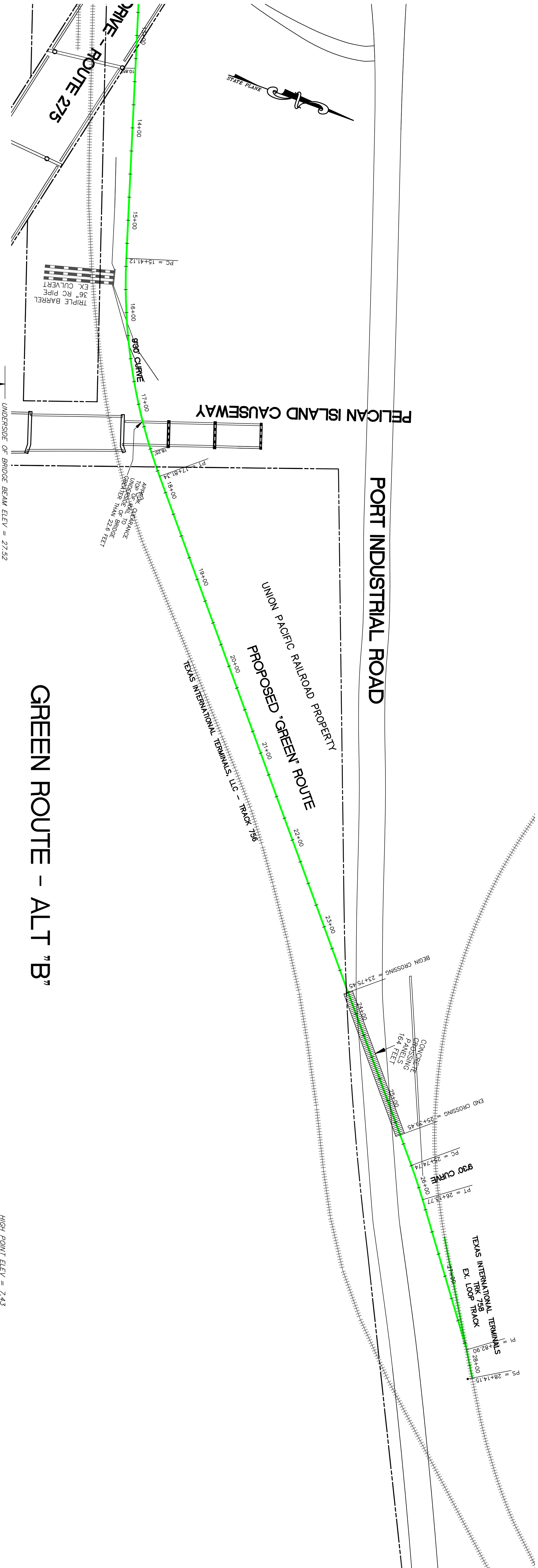
DESIGNER: J. L. MEADOWS, JR.

SCALE: 1"= 60'

SHEET: 1 OF 2

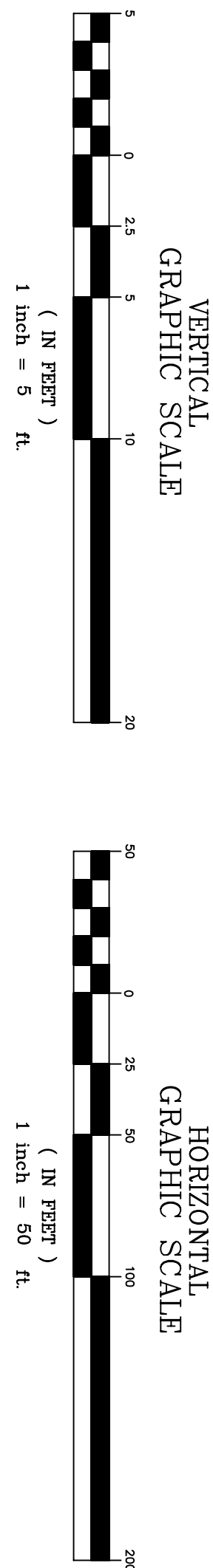
TITLE: TIDAL WATER CHANNEL

TREX
Texas Railway
Exchange LLC



1. RAILROAD RIGHT OF ENTRY IS REQUIRED FOR ALL RAILROADS AND RAILROADS ARE REQUIRED TO OBTAIN RAILROAD REPRESENTATIVES FOR RIGHT OF ENTRY REQUIREMENTS AND DOCUMENTS.
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ENGINEER: R. L. MEADOWS, JR.
P.E. REGISTRATION NO. 8229 (WEST VIRGINIA)
DATED: NOVEMBER 2, 2018



TREX Proposed Rail Construction
Green Route (ALT "B")
Galveston, Texas

MOUNTAIN RAILWAY
CONSULTING

P.O. BOX 84 WILLIAMSBURG, VA 24487
(540) 250-3887

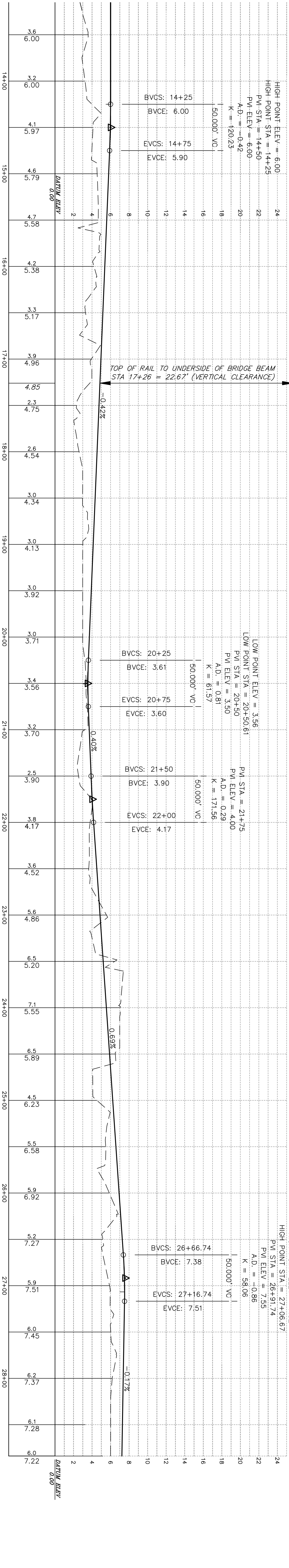
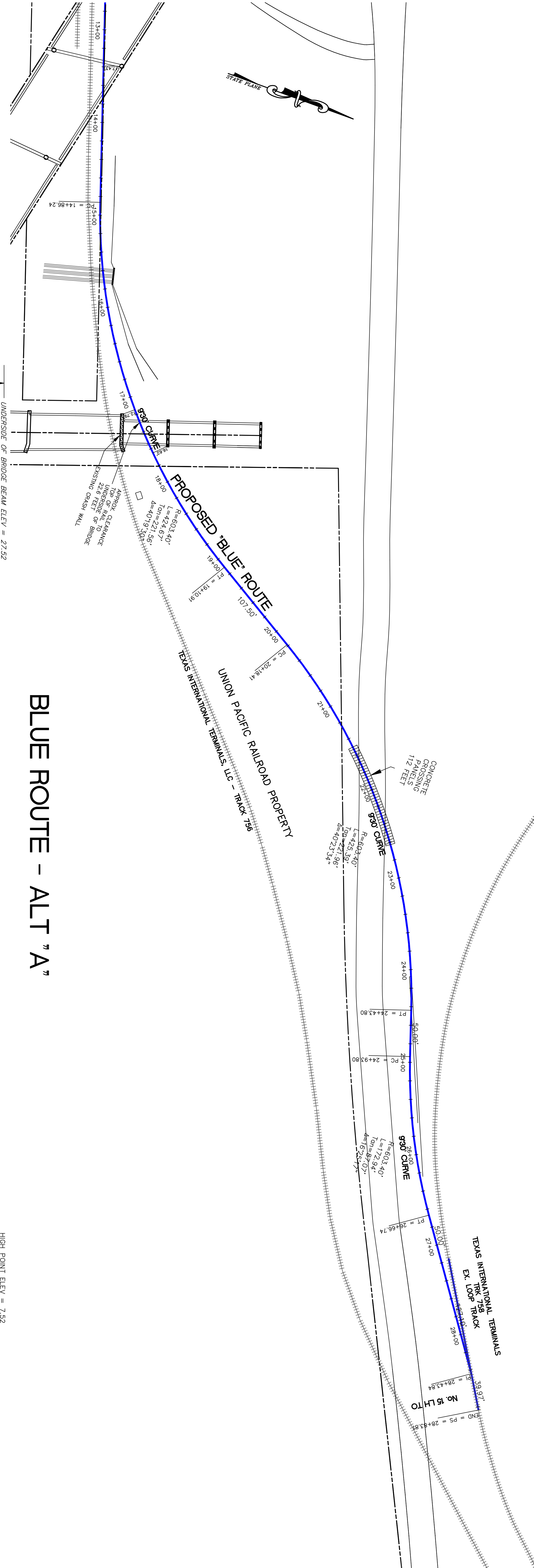
TREX
Texas Railway
Exchange LLC

HORIZONTAL SCALE: 1"=50'
VERTICAL SCALE: 1"=5'

SHEET 2 OF 2

DATE: NOVEMBER 19, 2018
FILE: TTX-GALVESTON

EXHIBIT 3



1. RAILROAD RIGHT OF ENTRY IS REQUIRED FOR ALL RAILROAD CROSSINGS. RAILROAD REPRESENTATIVES FOR RIGHT OF ENTRY REQUIREMENTS AND DOCUMENTS.
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5. SEE CONSTRUCTION SEQUENCE PLAN FOR PHASING OF CONSTRUCTION ACTIVITIES.

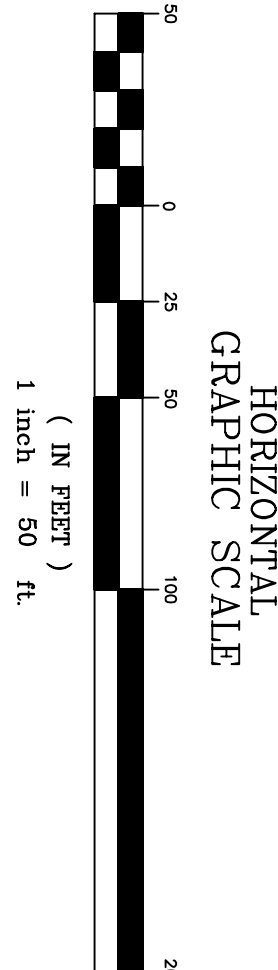
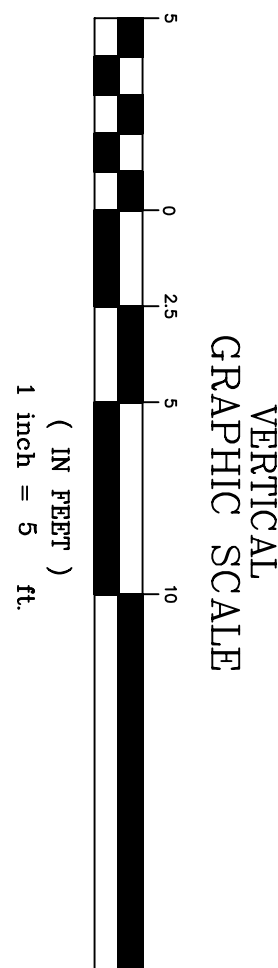
INTERIM REVIEW ONLY - NOT FOR CONSTRUCTION

DOCUMENTS ARE INCOMPLETE AND NOT INTENDED FOR PERMIT, BIDDING OR CONSTRUCTION.

ENGINEER: R. L. MEADOWS, JR.

P.E. REGISTRATION NO. 8229 (WEST VIRGINIA)

DATED: NOVEMBER 2, 2018



TREX Proposed Rail Construction

Blue Route (ALT "A")

Galveston, Texas

MOUNTAIN RAILWAY CONSULTING

P.O. BOX 841115, SUITE 1A, 2487

(540) 250-3887

TREX

Texas Railway Exchange LLC

HORIZONTAL SCALE: 1"=50'

VERTICAL SCALE: 1"=5'

SHEET 2 OF 2

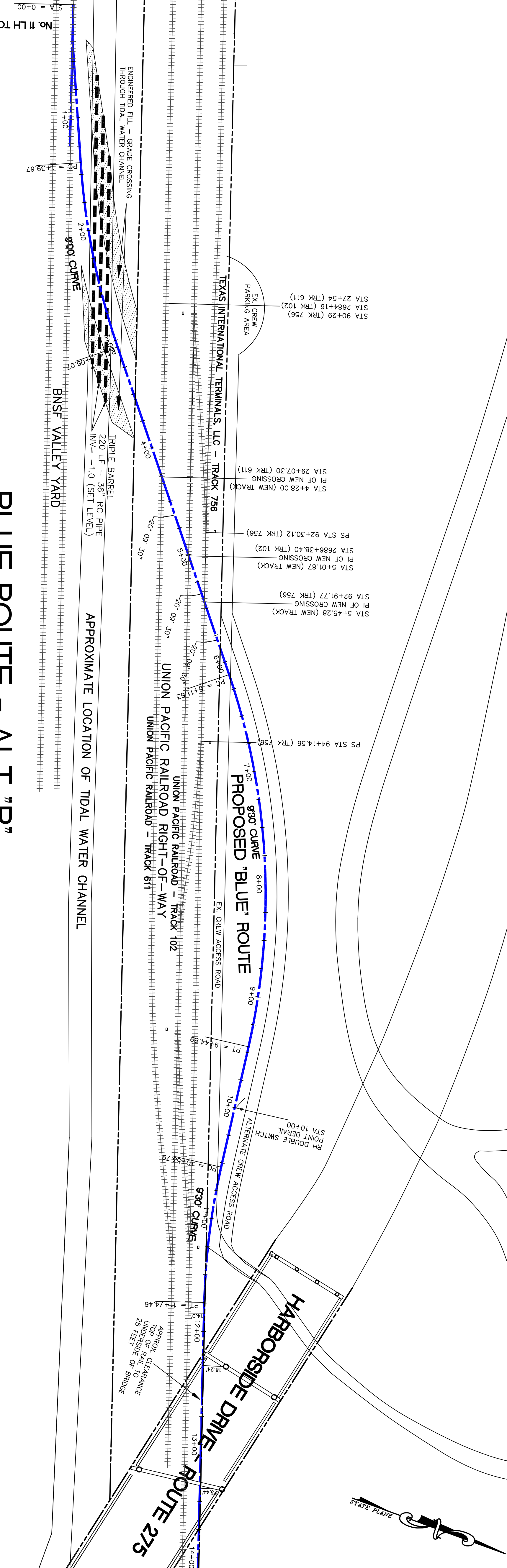
DATE: JANUARY 19, 2018

FILE: TRX-ALT-A-REV

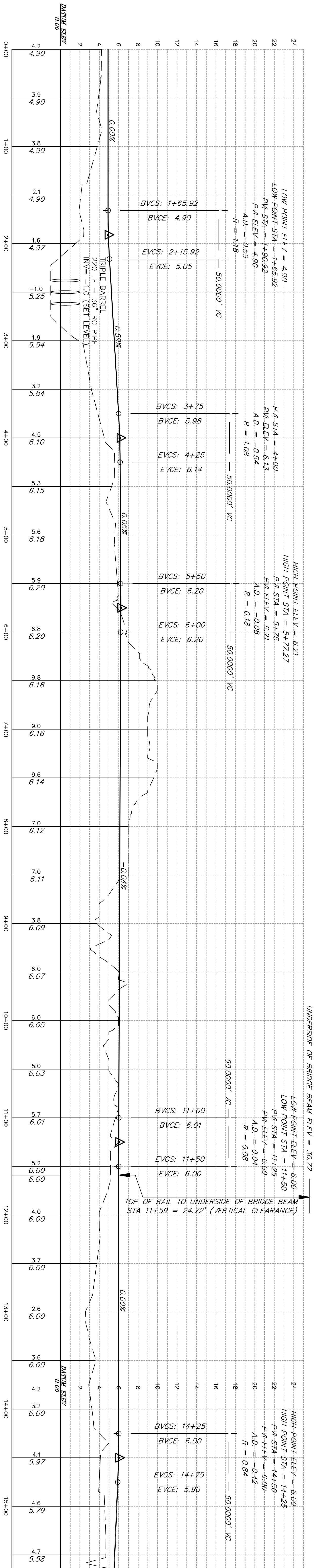
EXHIBIT 4

HARBORSIDE DRIVE - ROUTE 275

PORT INDUSTRIAL ROAD



BLUE ROUTE - ALT "B"



1. RAILROAD RIGHT OF ENTRY IS REQUIRED FOR ALL RAILROADS AND SUBURBAN RAILROADS. RAILROAD REPRESENTATIVES FOR RIGHT OF ENTRY REQUIREMENTS AND DOCUMENTS.
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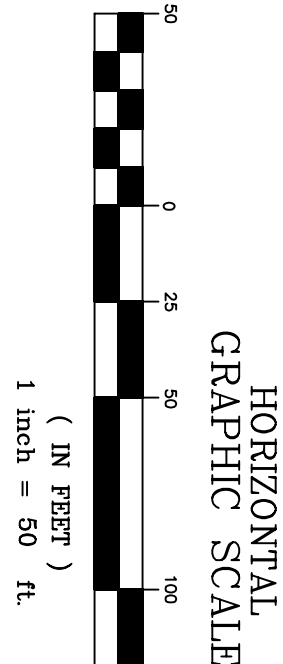
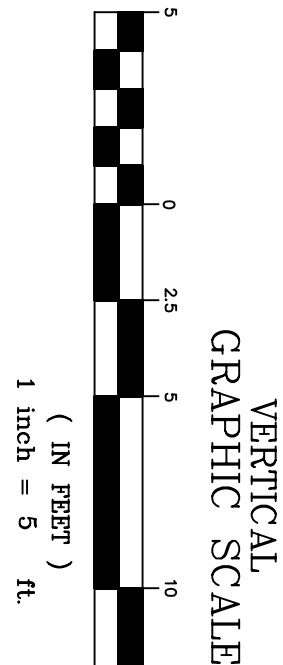
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ENGINEER: R. L. MEADOWS, JR.

P.E. REGISTRATION NO. 8299 (WEST VIRGINIA)

DATED: NOVEMBER 2, 2018



TREX Proposed Rail Construction

Blue Route (ALT "B")

Galveston, Texas

MOUNTAIN RAILWAY CONSULTING

P.O. BOX 841115

WILMINGTON, VA 23487

(540) 250-3887

TREX

Texas Railway Exchange LLC

HORIZONTAL SCALE: 1"=50'

VERTICAL SCALE: 1"=5'

SHEET 1 OF 2

DATE: JANUARY 19, 2018

FILE: TRD-04-05-01-01

HIGH POINT ELEV = 6.00
 HIGH POINT STA = 14+23
 PV STA = 14+50
 PV ELEV = 6.00
 A.D. = -0.42
 R = 0.84
 50.0000' VC
 BVCS: 14+25
 BVCE: 6.00
 EVCS: 14+75
 EVCE: 5.90
 TOP OF RAIL TO UNDERSIDE OF BRIDGE BEAM
 STA 17+26 = 22.67' (VERTICAL CLEARANCE)
 BVCS: 17+96.37
 BVCE: 4.56
 600.0000' VC
 LOW POINT ELEV = 4.10
 LOW POINT STA = 20+16.19
 PV STA = 20+96.37
 PV ELEV = 5.31
 A.D. = 1.14
 R = 0.19
 BEGIN CROSSING = 23+64.50
 EVCS: 23+66.37
 EVCE: 5.47
 PORT INDUSTRIAL ROAD
 RAILROAD CROSSING PANELS
 END CROSSING = 25+48.50
 BVCS: 26+48.15
 BVCE: 7.28
 EVCS: 26+98.15
 EVCE: 7.42
 50.0000' VC
 HIGH POINT ELEV = 7.43
 HIGH POINT STA = 26+98.43
 PV STA = 26+73.15
 PV ELEV = 7.46
 A.D. = -0.89
 R = 1.78

STATION	ELEVATION
14+00	3.6 6.00
15+00	4.2 6.00
16+00	4.1 5.97
17+00	4.6 5.79
18+00	4.7 5.58
19+00	4.2 5.38
20+00	3.3 5.17
21+00	4.0 4.96
22+00	4.85 4.75
23+00	2.7 4.54
24+00	3.5 4.36
25+00	4.0 4.23
26+00	3.1 4.14
27+00	4.0 4.10
28+00	3.4 4.11
29+00	3.8 4.17
30+00	3.6 4.27
31+00	3.8 4.42
32+00	3.8 4.62
33+00	3.9 4.86
34+00	2.5 5.16
35+00	3.6 5.50
36+00	3.8 5.86
37+00	3.6 6.22
38+00	3.5 6.57
39+00	6.1 6.93
40+00	5.2 7.29
41+00	5.9 7.41
42+00	6.6 7.33
43+00	6.3 7.24
44+00	3.3 7.20
45+00	4.2

5. SEE CONSTRUCTION SEQUENCE PLAN FOR PHASING OF CONSTRUCTION ACTIVITIES.

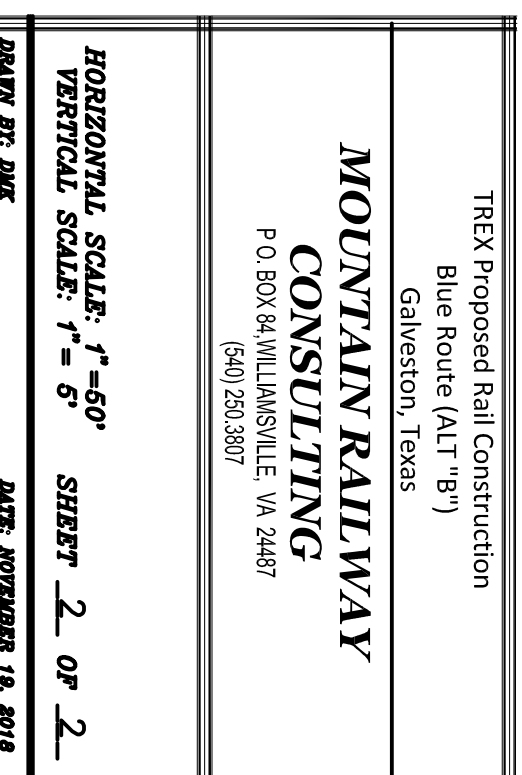


EXHIBIT 5



September 7, 2018

VIA Email

Mr. Brian Maxwell
City Manager
City of Galveston
823 Rosenberg Street
Galveston, Texas 77550

**RE: Texas Railway Exchange – Construction & Operation – Galveston County,
Texas, STB Docket No. FD 36186**

Dear Mr. Maxwell:

R.L. Banks & Associates, Inc. (“RLBA”) has been retained by Texas Railway Exchange LLC (“TREX”) to assist it in developing the construction and operating plans for TREX’s proposed common carrier railroad in the above-referenced proceeding before the U.S. Surface Transportation Board (STB). RLBA is a national firm providing railroad economics, engineering, and operations planning consulting services to freight railroads and shippers for over 62 years. TREX has requested RLBA provide the City of Galveston with additional information regarding the impacts of the Project upon the movement of BNSF Railway (BNSF) unit trains traveling to and from the Texas International Terminals’ (TIT) facility across at-grade crossings of the Port Industrial Road and under the 51st Street Bridge (Pelican Island Causeway) and SH 275 (Harborside Drive).

RLBA understands the Fire Department, on behalf of the City, has three primary concerns:

1. Train movements to and from TIT crossing Port Industrial Road at-grade;
2. Train switching movements occurring on track beneath the 51st Street/SH 275 Bridges; and
3. Parking (or “laying-down”) of trains on track beneath the 51st Street/SH 275 Bridges.

WASHINGTON, D.C. AREA OFFICE

The following explanation of the proposed train operations provides context as to why the Project aligns with the City's and Fire Department's interests in promoting safety and protecting the public and environment. RLBA's preliminary analysis and findings are based upon a review of data depicting train operations during June 2018 and TREX's proposed operating plan, which was developed in consultation with the BNSF Railway.

The proposed operating plan envisions the construction of TREX's common carrier line as enabling BNSF unit trains to move directly between BNSF's Valley Yard and the TIT Loop tracks (unloading tracks) within TIT's facility. Inbound loaded trains would arrive at TIT's facility in two cuts to facilitate spotting the cars for unloading. When empty, the two cuts would be assembled into a single, outbound empty unit train and would be returned to BNSF's Valley Yard. In doing so, the BNSF – TIT unit trains would avoid the more frequent occupation of the at-grade crossing of Port Industrial Road and drastically reduce train movements and car switching under both roadway overpasses. This would be achieved because, with direct access, the BNSF unit trains would avoid the numerous existing train movements and car switching events occurring between the BNSF Valley Yard, Union Pacific Railroad (UP) Interchange Yard, TIT Industry tracks and TIT Loop tracks under UP's current inefficient reciprocal switching arrangements.

As TREX has previously advised, under the current reciprocal switching arrangements by which UP delivers BNSF unit trains to TIT, UP insists on only delivering small groups ("cuts") of between 13 and 59 cars, even though the TIT-destined unit trains which BNSF interchanges to UP are generally between 98 and 112 cars. Consequently, considerable extra handling of the cars (switching) among carriers and TIT is required. Specifically, 8 to 14 crossings can occur over Port Industrial Road for each BNSF train. Furthermore, under current operations required by UP, this process results in an equal or greater number of times a train passes under both roadway overpasses.

In contrast, TREX's proposed Project will allow direct access between the BNSF Valley Yard and TIT's Loop tracks, producing significant operating efficiencies in the form of reduced train movements and railcar switching. The reduced number of switching movements on each BNSF – TIT train also will benefit public safety and the environment in the form of fewer train movements across roadway at-grade crossings and beneath roadway overpasses. Specifically, RLBA estimates that the number of times a BNSF unit train will be switched will be reduced from 11 to 17 times per BNSF train to approximately three times per train, or by 73 to 82 percent as a result of the Project. Likewise, the number of times that a BNSF unit train will be required to cross Port

Industrial Road at-grade will be reduced from 8 to 14 times per BNSF train to approximately four times per train, or by 50 to 71 percent.

Concerning the parking of trains¹ beneath both roadway overpasses, the higher concern for the Fire Chief, the General Code of Operating Rules² provides that when possible, a train or engine must not stop at crossings or junctions where they could interfere with train movements on other tracks. Consistent with this rule, the proposed operating plan, under which trains would normally operate via TREX's proposed project, neither requires nor anticipates the parking of any trains beneath the bridges as this would block existing switches and potentially interfere with other train traffic. Normal operations under the proposed operating plan call for BNSF trains to be brought directly from BNSF's yard to TIT's facility.

RLBA and TREX/TIT have reviewed with BNSF the proposed operating plan and proposed track alignments under which BNSF unit trains would operate directly between BNSF's Valley Yard and TIT's facility via the TREX connecting track. During this review, neither BNSF nor TREX/TIT identified any need for TIT trains to be parked beneath the 51st Street/SH 275 bridges during the course of normal operations. RLBA concurs with this assessment based upon its independent assessment of track lengths, train lengths, train and switching movements that would be involved, BNSF's ability to park TIT trains at outlying locations, and RLBA's railroad operating expertise.

Put simply, because the Project will result in direct BNSF access to TIT, the Project will actually reduce train handling, car switching, and at-grade crossings associated with BNSF – TIT unit trains, not increase them. In summary, under the proposed operating plan, RLBA expects that:

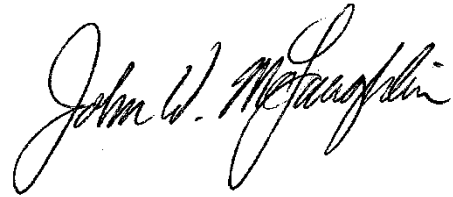
1. The number of times that a BNSF unit train will be required to cross Port Industrial Road at-grade will be reduced by up to 71 percent;
2. The number of times a BNSF unit train will be required to be switched will be reduced by up to 82 percent; and
3. BNSF unit trains will not be parked beneath 51st Street/SH 275 Bridges.

¹ "Parking of trains," in this context, means an instance in which a train operating to or from TIT's terminal might be stopped and left unattended by BNSF, TREX/TIT or UP, generally for a period of a day or more. This also is referred to as a train being "laid-down."

² The General Code of Operating Rules is authored by a committee comprised of railroad company representatives, and these rules have been adopted by the Class I Railroads west of the Mississippi and most of the Class II Railroads.

I have enclosed a map that illustrates the track at TIT and trackage in locations relevant to this project to assist you in understanding the public safety benefits and the reduced train and railcar switching and at-grade road crossings to be brought about by the Project.

Sincerely,

A handwritten signature in black ink, reading "John W. McLaughlin". The signature is fluid and cursive, with the first name "John" and last name "McLaughlin" clearly legible.

John W. McLaughlin

Enclosure (map of proposed routing)

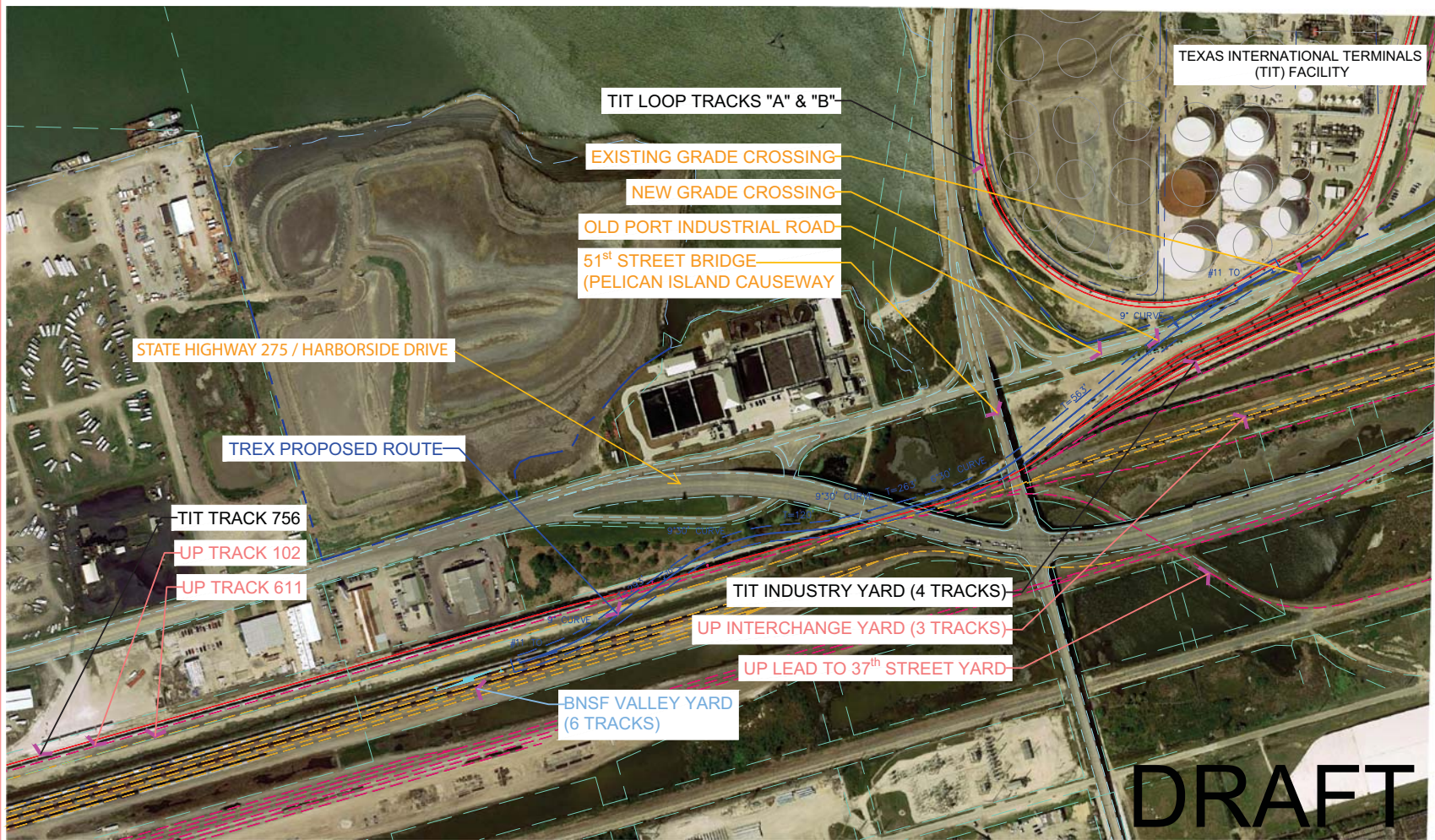
VERIFICATION

I, John McLaughlin, verify under penalty of perjury that I have read Exhibit 5 to the Verified Statement of R. Lee Meadows, Jr., that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.



John McLaughlin

Executed on November 21, 2018



R.L. BANKS &
ASSOCIATES,
INC.

PROPOSED TREX CONNECTING TRACK & EXISTING RAILROAD FACILITIES

TEXAS
RAILWAYS
EXCHANGE, LLC

#1	REVISION/ISSUE	DATE
No.		
PROJECT: TREX PROPOSED TRACK		
DATE: 08/30/18		SHEET: 1 of 1
SCALE: NOT TO SCALE		



EXHIBIT 6

VIA Email

September 14, 2018

Mr. Stephen G. Thornhill
Project Manager
Environmental Studies & Permitting
Burns & McDonnell
9400 Ward Parkway
Kansas City, MO 64114

RE: Texas Railway Exchange – Construction & Operation – Galveston County, Texas,
STB Docket No. FD 36186

Dear Mr. Thornhill:

R.L. Banks & Associates, Inc. (“RLBA”) has been retained by Texas Railway Exchange LLC (“TREX”) to assist it in developing the construction and operating plans for TREX’s proposed common carrier railroad in the above-referenced proceeding before the U.S. Surface Transportation Board (STB). RLBA is a national firm providing railroad economics, engineering and operations planning consulting services to freight railroads and shippers for over 62 years. The purpose of this letter report is to provide additional information regarding the proposed limits of potential disturbance associated with TREX’s proposed construction, as RLBA has determined that TREX’s preferred routing can avoid almost all aquatic resources using existing and available construction methods.

RLBA has reviewed Spirit Environmental’s *Wetland Delineation Report* dated August 8, 2018 and specifically Figure Nos. 6, 7, 8A and 8B, which depict the extent of the areas potentially impacted by TREX’s construction and delineate the aquatic resources. Based on this review, knowledge of the alignment of the proposed routings, and an understanding of existing available construction methods, it is RLBA’s opinion that TREX’s preferred blue routing can avoid all wetland areas identified by Spirit Environmental east of where TREX’s proposed track will intersect the existing track, south of State Highway 275. However, the 0.099 acres of tidal waters located west of the proposed track crossing cannot be avoided and TREX’s proposed construction most likely will affect this aquatic resource. See attached Figure No. 1, prepared by Spirit Environmental, which reflects TREX’s preferred blue alignment as drawn by RLBA and which illustrates the proposed limits of potential disturbance and impacted aquatic resources as identified by Spirit.

WASHINGTON, D.C. AREA OFFICE

The construction methods that will be used to avoid the wetland areas and water resources located east of the proposed crossing location include, but are not limited to, the following:

- No construction equipment will occupy the Spirit-delineated wetlands;
- At any location where the sloped portion of the “Blue Route Roadbed” would potentially encroach upon the wetlands, sheet piling or large rip rap will be installed to protect the horizontal component of the track roadbed and
- At any location where the walkway for train personnel may extend over wetlands, *i.e.* the “Water 2” location, a cantilevered walkway will be provided.

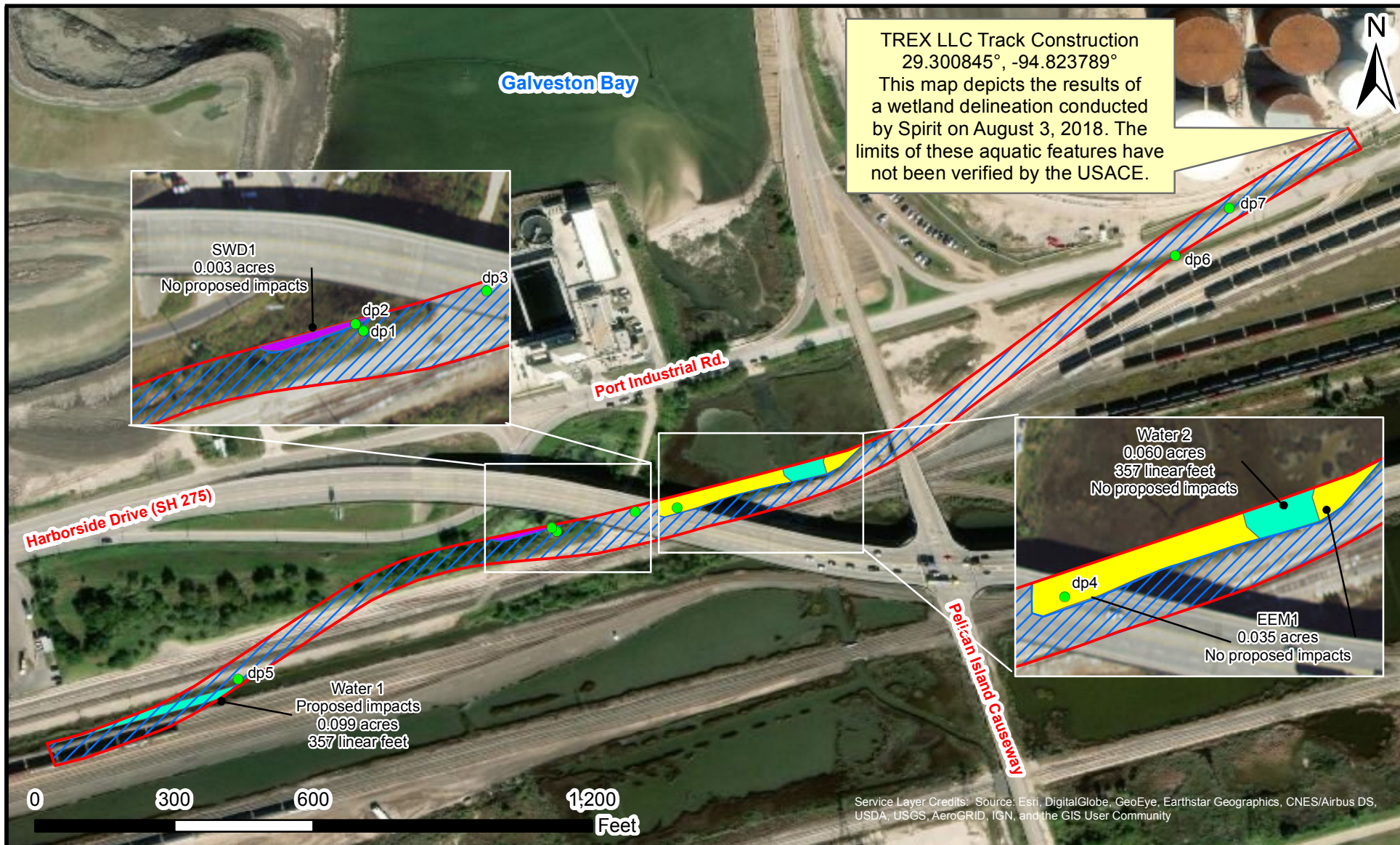
In summary, it is RLBA’s opinion that construction of TREX’s preferred blue routing as currently designed will only impact the tidal water area measuring 0.099 acres located west of the proposed crossing and that it will be possible to avoid all other aquatic resources as identified in Spirit Environmental’s *Wetland Delineation Report*.

Sincerely,

A handwritten signature in black ink that reads "R.L. Meadows, Jr." with a stylized flourish at the end.

R. Lee Meadows, Jr. PE

Enclosure: Figure No.1, map of proposed limits of potential disturbance and impacted aquatic resources



Legend

- Sample Points
- Delineation Boundary
- Proposed Limits of Disturbance
- Stormwater Detention Pond (0.024 acres)
- Tidal Wetlands (0.232 acres)
- Tidal Waters (0.159 acres)

TREX LLC TRACK CONSTRUCTION AQUATIC FEATURES MAP TEXAS RAILWAY EXCHANGE, LLC GALVESTON COUNTY, TEXAS



20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 1

Date: 8/14/2018

Project No.: 18494.00F

Drawn By: EVDonato

Note: This is not a
Property Boundary Survey