

United States Department of Agriculture



Natural Resources Conservation Service
P.O. Box 2890
Washington, D.C. 20013

CONSERVATION PROGRAMS MANUAL (CPM)
440-PGM
Circular No. 7, Part 514, Infrastructure Policy on Easements

September 6, 2007

SUBJECT: PGM – Policy Regarding Infrastructure Projects on Easement Lands Enrolled in Wetlands Reserve Program (WRP), Farm & Ranch Land Protection Program (FRPP), Grassland Reserve Program (GRP), Healthy Forests Reserve Program (HFRP), and Emergency Watershed Protection Program - Floodplain Easement Component (EWPP-FP), or a Recorded Easement as Part of a Wetland Compliance Mitigation Project

Purpose. To establish policy and procedural guidance to NRCS State Offices when an infrastructure project being considered will have an impact on any easements held by Natural Resources Conservation Service (NRCS). Infrastructure projects covered by this policy include, but are not limited to—

- Overhead and buried electrical transmission lines
- Transportation projects
- Airport expansion or installation
- Wind generator farms
- Various types of pipelines, including—
 - Crude oil
 - Natural gas
 - Water supply
 - Carbon dioxide

Effective Date. This Circular is effective upon receipt.

Policy. State Offices must seek to avoid impacts to NRCS easements from proposed infrastructure projects such as pipelines, transmission lines, and airport expansions by remaining aware of existing and proposed infrastructure projects. States shall document consideration of potential impacts by existing or proposed infrastructure projects when deciding whether to enroll conservation land in any NRCS easement program. NRCS will not knowingly enroll potential easements areas in the potential rights-of-way of infrastructure projects. Furthermore, to allow for inevitable expansion, States will enroll only conservation lands with adequate buffers from existing infrastructure. NRCS shall respond to proposed infrastructure projects immediately and will seek to avoid impacts in order to protect the interests of the United States. Early involvement is essential, as is early engagement with the Office of the General Counsel (OGC).

Helping People Help the Land

An Equal Opportunity Provider and Employer

The first response to any infrastructure project request is to **avoid** NRCS easement lands. The infrastructure project proponent is responsible for proving to NRCS that the easement lands cannot be avoided. There may be a few instances where the easement cannot be avoided. Only WRP easements can be modified in limited circumstances with the Chief's approval. **Proposed infrastructure projects must avoid FRPP, GRP, HFRP, and EWPP-FPE easements because the agency has no authority under those programs to modify their terms.**

- Easement Programs Division (EPD) will contact the appropriate Federal permitting agency (the Federal Energy Regulatory Commission (FERC) or the Federal Aviation Administration (FAA) or Department (the Department of Energy or the Department of State)) and will notify State Conservationists of new projects and proposed multi-state infrastructure routes. If a State is contacted by a Federal permitting agency or pipeline company they will notify EPD.
- State Offices will maintain contacts with appropriate State permitting agencies.
- In cooperation with the permitting agency, States will ascertain whether proposed infrastructure routes will have an impact on existing easements, and advise EPD and OGC of any projects that may be affected.

If any easement properties are affected by proposed infrastructure projects, NRCS will initiate National Environmental Policy Act (NEPA) responsibilities by conducting an Environmental Evaluation (EE). NRCS may request "cooperating agency" status from the lead Federal permitting agency to participate in its environmental analysis (Exhibit A). If there is no other lead Federal agency, NRCS will initiate its own NEPA process.

- When the proposed infrastructure lies entirely within the boundaries of a single State, the State Conservationist or his/her designee serves as the Responsible Federal Official (RFO). When the proposed infrastructure crosses multiple States, EPD and the appropriate Regional Assistant Chief (RAC) will coordinate with the affected States to determine which State Conservationist will serve as the agency RFO. The RFO is responsible for the following:
 - Maintaining close communications with all affected parties including the landowner.
 - Communicating agency needs and concerns to the permitting agency.
 - Coordinating requests for information, assessments and comments for NRCS.
- RFO and appropriate RAC or RACs will designate a Point of Contact (POC) for NEPA compliance. The POC is responsible for the following:
 - (1) Consulting with EPD about requesting cooperating agency status. The POC will send requests for cooperating agency status to the appropriate Federal permitting agency (Exhibit A) or undertake NEPA analysis when appropriate.
 - (2) Requesting planning documents and conducting functional assessments during the scoping or preliminary stage of environmental analysis.
 - (3) Conducting environmental analysis. The environmental analysis will be used by NRCS to decide:

- Whether to modify a WRP easement, and
 - What mitigation will be required?
- (4) Notifying permitting agency of significant impacts and requesting alteration of proposed route or project to avoid impacts.
 - (5) Deciding course of action in consultation with the EPD.
 - (6) Preparing decision documents. If NRCS is a cooperating agency, NRCS decision documents shall not be prepared until the lead Federal agency issues its decision document.

NRCS Technology Support Centers shall provide NEPA technical assistance as requested by States. Exhibit B outlines the NEPA process.

NRCS may consider modifying a WRP easement—on a case-by-case basis—if avoiding the easement is clearly shown not to be possible. The following guidelines may be used for WRP easements only:

- Determine if a modification to the easement can be made and if the modification complies with WRP authority.
- Minimize onsite damages during construction.
- Determine how impacted areas should be restored, including potential compensatory mitigation of additional acreage for each specific case provided by the project proponent.

NRCS decisions will be documented either in a Finding of No Significant Impact (FONSI) or in a Record of Decision (ROD). If a decision is made to subordinate a WRP easement, the State Conservationist will work with OGC to prepare necessary subordination agreements (Exhibit C) and other required legal documents.

Background. NRCS acquires interests in lands through various easement programs to restore, improve, and protect conservation values for public benefit. Each year, NRCS enrolls more acres in these easement programs. And the number of requests to allow infrastructure projects increases.

NRCS easement lands are not subject to condemnation through eminent domain proceedings unless they are being crossed by Federal transportation projects, because Department of Transportation (DOT) has specific authority to set aside Federal lands (23 USC 317). States can still request that DOT not exercise that authority.

The right to grant a right-of-way for an infrastructure project to go across land encumbered by an NRCS easement resides partly with the landowner and partly with NRCS. The rights conveyed to the United States under the conservation easement deed generally give NRCS authority to restrict projects from and on easement lands. The terms of the individual easements depend on the specific program requirements, the rights retained by the landowner, and any applicable restoration agreements made with NRCS. As the easement holder, NRCS must ensure that lands subject to these easements support the intended conservation purposes for which the easements were purchased.

NRCS does not have statutory authority to allow all infrastructure projects to be installed. Installation of an infrastructure project requires NRCS to modify the warranty easement deed to subordinate the rights of the United States. Any consideration by NRCS to modify a WRP easement triggers the National Environmental Policy Act (NEPA) and possibly Endangered Species Act (ESA) compliance.

Projects permitted by Federal agencies (FERC and FAA) and Departments (the Department of Energy, and the Department of State, etc.) require analysis of environmental impacts in accordance with NEPA. Under these circumstances, NRCS may request cooperating agency status and participate in the permitting agency's NEPA process. NRCS must conduct an Environmental Evaluation (EE) to determine the level of NEPA analysis required according to NRCS policy and regulations. If NRCS is not a cooperating agency, NRCS must conduct its own independent NEPA analysis. Instances where NRCS is not a cooperating agency will likely occur when permitting of infrastructure is done by a State, and there is no Federal permitting agency. Under these circumstances, NRCS still must comply with all Federal laws, including NEPA, if it considers taking any action relative to WRP easements.

Contact. If you have any questions, contact Robin Heard, Director, Easement Programs Division at (202) 720-1854.

/s/

THOMAS W. CHRISTENSEN
Deputy Chief for Programs

Attachments

EXHIBIT A: Sample Request for Cooperating Agency Status

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, DC 20426

Dear Ms. Bose:

RE: Mid-continent Express Pipeline Project Docket No. PF07-4-000

NRCS is requesting to participate as a cooperating agency in the planning and development of the Mid Continent Express Pipeline Project Environmental Impact Statement (EIS). The proposed project has the potential to impact a number of NRCS Wetlands Reserve Program easements. Additionally, NRCS has jurisdiction over the conversion of prime farmland as well as special expertise (as identified in 49 Fed. Reg. 49750, December 21, 1984) in the following areas that may be applicable to this project:

- Erosion and sediment control
- Land use data
- Soil and water condition data
- Resource management technology
- Technical assistance for watershed planning
- Protection of environmentally sensitive areas in rural regions

- Soil and related resource surveys
- Land conversion and utilization
- Water resources protection
- Fish and wildlife habitat

If you have any questions or comments, please contact *insert name* of my staff at *insert email* or *insert phone*.

Sincerely,

State Conservationist

cc: OEP – Gas 3, PJ-11.3, FERC, Washington DC

Regional Assistant Chief-Central, NRCS, Washington, DC

Deputy Chief for Programs, NRCS, Washington, DC

Director, Easement Programs Division, NRCS, Washington, DC

ASTC/Operations, NRCS

EXHIBIT B: Process for Addressing Proposed Infrastructure Projects Affecting NRCS Easements

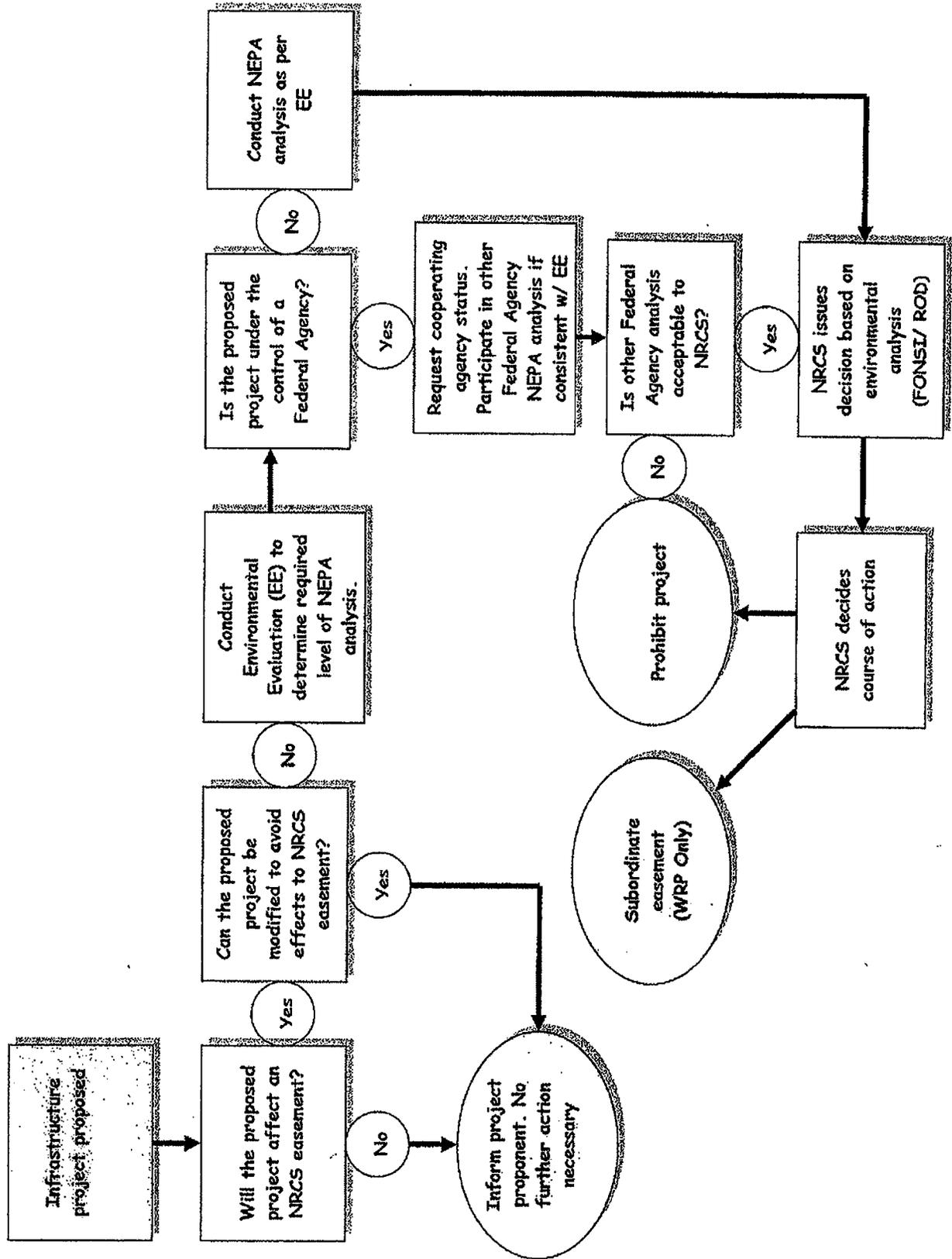


EXHIBIT C: Sample Subordination Agreement

Subordination Agreement

WETLANDS RESERVE PROGRAM

CONTRACT NO. _____

WHEREAS, the United States of America, acting by and through the Commodity Credit Corporation, (hereinafter referred to as the "United States") is the owner of rights in real property which are described in a Warranty Easement Deed dated _____ from _____, Landowner and Grantor, which was recorded in Book _____, Page _____, [Registry #] _____ of the Deed Records of the [Parish/County] of _____, State of _____. These rights were acquired by the United States for the Wetlands Reserve Program ("WRP") under the authority found in 16 U.S.C. §§ 3837, *et seq.*, and as administered by the Natural Resources Conservation Service, United States Department of Agriculture pursuant to 7 C.F.R. Part 1467.

WHEREAS, the Warranty Easement Deed covers the following real property (hereinafter referred to as "Property") and described in "Exhibit A", attached hereto, and fully incorporated herein.

WHEREAS, the _____ Company, a _____ corporation, whose address is _____ (hereinafter referred to as "Company") has acquired a right-of-way on the Property for the purpose of installing, operating and maintaining a

_____ pipeline. Said right-of-way is more particularly described in that certain instrument entitled " _____ " (hereinafter referred to as "Instrument") dated _____ and recorded in Book _____, Page _____, Registry # _____ of the Records of the _____ of _____, State of _____;

WHEREAS, the United States may, under 16 U.S.C. § 3837c, modify a Warranty Easement Deed if the current owner agrees to such modification and the United States determines that the modification is desirable to carry out the purposes of the WRP, to facilitate the practical administration of the WRP or to achieve such other appropriate and consistent goals;

WHEREAS, this Subordination Agreement is, for the purposes of the WRP, a modification of the Warranty Easement Deed and the rights acquired by the United States under that Deed;

WHEREAS, the current owner(s) has agreed to this modification, as reflected in this Subordination Agreement;

WHEREAS, this modification, as reflected in this Subordination Agreement, is desirable to carry out the purposes of the WRP, to facilitate the practical administration of the WRP or to achieve such other appropriate and consistent goals, provided that there is full and complete compliance with all of the requirements of the Subordination Conditions;

NOW THEREFORE, for and in consideration of ONE AND NO/100 DOLLARS (\$1.00), the Company's compliance with all requirements of the Subordination Conditions and other good and valuable consideration, the receipt of which is hereby acknowledged, the United States does hereby subordinate its rights under the Warranty Easement Deed, subject to the Subordination Conditions, to the rights of the Company under the Instrument.

I. Subordination Conditions - The subordination provided by the United States in this Subordination Agreement is expressly made subject to the Company's compliance with the following conditions:

A. The Company's right-of-way is comprised of a permanent and temporary right-of-way as is fully shown on the plats attached hereto marked as "Exhibit B" and fully incorporated herein. In particular, the permanent right-of-way shall be no greater than a strip of land ____ feet wide, being ____' feet on each side of the center of the pipeline, and the temporary right-of-way shall be no greater than ____' feet wide. The sole purpose of the subordination is to allow the Company to survey, clear and excavate along a route to lay, construct, operate, maintain, inspect, test, repair, protect, replace, or remove one pipeline for the transportation of _____ and no other substance, and to install and utilize below ground _____ protection equipment and other such equipment that can be installed under ground as necessary in the construction, operation and maintenance of the pipeline. The pipeline, except for markers at road crossings or fence crossings, shall be buried so as not to interfere with the rights, title, and interests that the United States acquired under the Warranty Easement Deed. The Company has only the rights of ingress and egress over and across lands under the permanent right-of-way. The Company shall only use the temporary right-of-way during the construction phase of the pipeline. The Company agrees to restore any damages which may arise to vegetative cover resulting from the construction, maintenance and operation of its pipeline. The Company recognizes the Rights of the United States including the right to impound water over the right-of-way.

B. The Company must fully comply with all other requirements as set forth in the Restoration Agreement dated _____ between the United States and the Company, a copy of which is attached hereto, marked "Exhibit C" and made a part hereof for all purposes.

C. The Company must fully comply with the terms of the Indemnification and Resource Protection Agreement executed by the Company on _____, a copy of which is attached hereto, marked "Exhibit D" and made a part hereof for all purposes.

The Warranty Easement Deed remains in full force and effect, subject only to the rights of the Company acquired under the Instrument as modified by the Subordination Conditions.

II. Termination of Subordination Agreement - The United States may declare this subordination void, with the rights of all parties in and to the Property the same as though this Subordination Agreement had never been executed, and require restoration of the Property, if the United States determines:

- a. There is a termination of the interest conveyed by the Instrument; or
- b. There is a modification of the Instrument without the written approval or consent of the United States; or
- c. There is a breach of any of the terms, conditions or stipulations contained in the Instrument, this Subordination Agreement, the Restoration Agreement or the Indemnification and Resource Protection Agreement.

Dated this _____ day of _____, 2006.

[company name]

By:

{name and title}

WITNESS

WITNESS

NOTARY PUBLIC: _____

MY COMMISSION EXPIRES: _____

(SEAL)

UNITED STATES OF AMERICA
NATURAL RESOURCES CONSERVATION SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE

By:

STATE CONSERVATIONIST

WITNESS

WITNESS

NOTARYPUBLIC: _____

MY COMMISSION EXPIRES: _____

(SEAL)

EXHIBIT C

RESTORATION and POST CONSTRUCTION MAINTENANCE AGREEMENT

[Name of Company]

PROPERTY

OWNER(S):

WRP NUMBER:

PARISH/COUNTY:

STATE:

This Restoration and Post Construction Maintenance Agreement ("Restoration Agreement") and its satisfactory implementation by _____ ("the Company") is a condition of the Subordination Agreement to which this Restoration Agreement is appended. The purpose of this Restoration Agreement is to fully restore the wetland functions and values of the lands encumbered by the Wetland Reserve Program (WRP) Warranty Easement Deed number _____ ("WRP Easement") which were impacted by the Company's installation of pipeline.

The Company agrees to the terms set forth herein and agrees that it must restore all lands subject to the above referenced WRP Easement to the satisfaction of the Natural Resources Conservation Service (NRCS). The Company agrees that the restoration must be completed within 12 months of the date that the Company executes this Restoration Agreement, unless the requirements below specifically indicate otherwise. In addition, the Company agrees to the Post Construction Maintenance terms for the duration that any pipeline is maintained in the subject right-of-way.

This Restoration Agreement is in effect when signed and dated by all required parties.

A. Vegetation Restoration

The Company agrees to conduct the following restoration activities:

1. [instructions: set forth each of the restoration requirements needed to restore and/or mitigate the right-of-way area. These requirements should be based in large part on NRCS's NEPA analysis which considered the impacts of the proposed pipeline right-of-way. Add extra numbered paragraphs as necessary.]

2.

3.

B. Additional Requirements. In addition, this Restoration Agreement requires the following measures to be completed by the Company to the satisfaction of NRCS:

1.

2.

C. Post Construction of Pipeline Maintenance Requirements.

Further, the Company agrees to adhere to the following terms related to pipeline maintenance:

1. [insert permitted right-of-way maintenance]. No other vegetation maintenance is permitted.
2. To not use herbicides or pesticides on the WRP Easement, except as specifically permitted by NRCS.
3. [insert other requirements]

All restoration and post-pipeline maintenance is subject to the review and approval of NRCS.

By signing below, the parties hereto agree to the terms of this Restoration Agreement.

Dated this _____ day of _____, _____.

[company name]

By:
[name and title]

WITNESS

WITNESS

NOTARY PUBLIC: _____

MY COMMISSION EXPIRES: _____

(SEAL)

UNITED STATES OF AMERICA
NATURAL RESOURCES CONSERVATION SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE

By:

STATE CONSERVATIONIST

WITNESS

WITNESS

NOTARY PUBLIC: _____

MY COMMISSION EXPIRES: _____

(SEAL)

EXHIBIT D

INDEMNIFICATION and RESOURCE PROTECTION AGREEMENT

[Company Name]

PROPERTY

OWNER(S):

WRP NUMBER:

PARISH/COUNTY:

STATE:

Compliance with the terms of this Indemnification and Resource Protection Agreement ("Indemnification Agreement") by _____ ("the Company") is a condition of the Subordination Agreement to which this Indemnification Agreement is appended.

A. Legal Responsibilities. The Company acknowledges and agrees that the United States shall not assume any obligations or liability under any law (including, but not limited to, liability in tort and obligations or liability under any Environmental Laws) related to the construction, maintenance or operation of any pipeline or any past, present, or future use, storage, disposal, release, transportation, or management of Hazardous Materials on, at, beneath, or from the Property by the Company. Nor shall the United States assume any obligation or liability related to any violation of any law (including, but not limited to, Environmental Laws and Pipeline Safety Laws) by the Company.

B. Indemnification. The Company agrees to indemnify, release, and hold harmless the United States (including its agencies, employees and agents) from and against all liabilities, judgments, claims, demands, losses, expenses, damages, fines, penalties, lawsuits, proceedings, actions, and sanctions asserted by or on behalf of any person or governmental authority, and from any other liabilities, whether legal or equitable in nature, and including, without limitation, court costs and attorneys fees, which the United States may be subject to, or may incur under any law, related to any release or threatened release of any Hazardous Materials from the pipeline or violation of any Environmental Laws or Pipeline Safety Laws by the Company.

C. Notification. In addition to any notifications required by Environmental Laws, the Company agrees to immediately notify the State Conservationist of any discharge or release of any Hazardous Material equal to or exceeding reportable quantities.

D. Cultural Resource Protection.

1. Discoveries of Historic or Archaeological Resources. Upon discovery of any historic, archaeological or cultural objects or features, including prehistoric or suspected human remains, during the construction or maintenance of the pipeline on the Property, the Company agrees to immediately cease ground disturbing activities, secure the location, and notify the State Conservationist of the discovery. The Company shall leave these discoveries intact and in place until directed otherwise by Natural Resources Conservation Service ("NRCS"). NRCS will proceed expeditiously to: inform the landowner of the discovery, consult with appropriate State or tribal authorities, and develop any mitigation or protection measures. The Company agrees to take financial responsibility for any protection and mitigation measures specified by NRCS. The measures may be completed by NRCS or

contractors selected by NRCS who meet the Secretary of Interior's Personnel Qualification Standards for Historic Preservation Projects.

2. Discovery of Human Remains or Burial Sites. Upon discovery of any human remains, funerary objects, sacred objects, or objects of cultural patrimony during the construction or maintenance of the pipeline on the Property, the Company agrees to immediately cease ground disturbing activities in the area of the discovery and make reasonable efforts to protect and secure the items in place. In addition, the Company agrees to immediately notify the State Conservationist by telephone of the discovery and to send follow-up written confirmation. NRCS will proceed expeditiously to: notify the landowner of the discovery, consult with appropriate State and tribal authorities, and make recommendations of protective measures to the Company consistent with the Advisory Counsel on Historic Preservation's Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects ("Policy"). The activity that resulted in the discovery may not resume until the later of (i) 30 days after the State Conservationist certifies receipt of the written confirmation of notice; and (ii) the date the State Conservationist certifies that protective measures are completed. The Company agrees to take financial responsibility for the cost of any protection measures specified by NRCS. The protective measures may be completed by NRCS staff or contractors selected by NRCS who meet the Secretary of Interior's Personnel Qualification Standards for Historic Preservation Projects.

E. Definitions.

1. The term "Hazardous Materials" means any petroleum product or its derivative; any "hazardous substance" or "pollutant or contaminant" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA),

42 U.S.C. §§ 9601 et seq.; any hazardous substance, hazardous waste, pollutant, contaminant, or any other hazardous or toxic material under applicable Federal, state, or local laws and/or regulations; explosives; reactive materials; ignitable materials; corrosive materials; oxidizing materials; radioactive materials; infectious materials; compressed or liquefied gas; and any other element, compound, mixture, solution or substance that may pose a hazard to human health or to the environment.

2. The term “Environmental Law” means any and all Federal, state, local or municipal laws; rules; orders; regulations; statutes; ordinances; codes; policies; or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct concerning air; water; solid waste; hazardous materials; worker and community right-to-know; hazard communication; noise; radioactive material; resource protection; subdivision; inland wetlands and watercourses; health protection; and similar environmental health, safety, building and land use as may now or at any time hereafter be in effect. The term includes, but is not limited to, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 USC 9601 et seq., the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq., the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., the Clean Air Act (CAA), 42 U.S.C. §§ 7401 et seq., the Oil Pollution Act (OPA), 33 U.S.C. §§ 2701 et seq., the Toxic Substances Control Act (TSCA), 7 U.S.C. §§ 136 et seq., and the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 et seq.

3. The term “Pipeline Safety Laws” means the Natural Gas Pipeline Safety Act of 1968, as amended (NGPSA) and the Hazardous Liquid Pipeline Safety Act of 1979, as amended (HLPSA), codified at 49 U.S.C. §§ 60101 et seq.; the Federal Pipeline Safety Regulations, 49 CFR Parts 190-199; and any and all other applicable Federal, State, and local laws, rules,

orders, regulations, statutes, ordinances, codes, policies, or requirements related to pipeline safety and or the transport of petroleum products and/or gas by pipeline.

4. The term "the Company" means the [insert entity's name], including its employees, contractors, successors and assigns.

5. The term "State Conservationist" means the highest ranking official of the Natural Resources Conservation Service in the state in which the subject WRP easement and pipeline are located.

6. The term "Property" means property as defined in Exhibit A to which this Exhibit D is appended.

By signing below, the Company agrees to the above terms.

Dated this _____ day of _____, _____.

[company name]

By:

{name and title}

WITNESS

WITNESS

NOTARY PUBLIC: _____

MY COMMISSION EXPIRES: _____

(SEAL)