

## Notice of Intent to Conduct Restoration Planning

(Pursuant to 15 C.F.R. Section 990.44)

### Reed Point Bridge Derailment

**SUMMARY:** On June 24, 2023, the Twin Bridges Road railroad bridge collapsed and Montana Rail Link, Inc. rail line cars derailed near Reed Point, Montana, approximately 40 miles west of Billings, Montana. A total of 17 cars derailed, 10 of which entered the Yellowstone River. Rail cars containing asphalt liquified petroleum (“asphalt;” 6 cars), molten sulfur (3 cars), and scrap metal (1 car) spilled contents into the river. The Unified Command (consisting of the U.S. Environmental Protection Agency, Montana Rail Link, Montana Department of Environmental Quality, and Stillwater County Disaster and Emergency Services) estimate that about 420,000 pounds of asphalt were released and approximately 236,000 pounds of asphalt have been recovered. The asphalt continues to adversely affect and threaten natural resources within the jurisdiction of the State of Montana.

Asphalt has been found on the banks of the Yellowstone River greater than 100 miles downstream of the incident. Wildlife fatalities resulting from the asphalt have been recorded during the response activities. On September 7, 2023, the Unified Command released a transition plan on EPA’s website documenting how cleanup has moved from an initial emergency response to maintenance operations and potential for a Phase 2 cleanup next summer.

**NATURAL RESOURCE TRUSTEE:** Pursuant to Section 1006 of the Oil Pollution Act (OPA), 33, U.S.C. § 2706, the state trustee for natural resources is authorized to (1) assess natural resource injuries resulting from a discharge of oil or the substantial threat of a discharge, as well as response activities associated with clean-up of the oil, and (2) develop and implement a plan for restoration, rehabilitation, replacement, or acquisition of the equivalent, of such injured resources.

The Governor of the State of Montana is the natural resource trustee for State resources, in accordance with 40 C.F.R. § 300.605 and 33 U.S.C. 2706(b)(3). In addition to acting as a trustee for this Incident under OPA, the State of Montana is also acting pursuant to its applicable state laws and authorities, including, without limitation, the Comprehensive Environmental Cleanup and Responsibility Act (“CECRA”), 75-10-701, MCA, *et seq.* The Montana Natural Resource Damage Program (NRDP) works on behalf of the Trustee.

**RESPONSIBLE PARTY:** As defined by OPA, under 33 U.S.C. § 2701 (32)(A), the identified Responsible Party for this Incident is Montana Rail Link, Inc. (“MRL”). MRL is also identified as a potentially liable person pursuant to Section 75-10-715, MCA. Pursuant to 15 C.F.R. §§990.14(c) and 990.44(d), concurrent with this Notice of Intent to Conduct Restoration Planning (“Notice”), the Trustee invited MRL to participate in a Natural Resource Damage Assessment (“NRDA”). Federal regulators have approved the early termination of Montana Rail Link’s lease of the former Northern Pacific main line between Jones Junction, Mont., and

Sandpoint, Idaho, with BNSF Railway Company resuming operation of the line January 1, 2024; accordingly, this Notice of Intent will also be provided to BNSF Railway Company.

**PREASSESSMENT PHASE:** In June 2023, NRDP on behalf of the Trustee began the preassessment phase of the NRDA in accordance with 15 C.F.R Part 990, Subpart D, to determine if the Trustee had jurisdiction to pursue restoration under OPA, and, if so, whether it was appropriate to do so. During the preassessment phase, NRDP collected and analyzed and is continuing to collect and analyze the following: (1) “[d]ata reasonably expected to be necessary to make a determination of [the Trustee’s jurisdiction], or a determination to conduct restoration planning,” (2) “ephemeral data,” and (3) “information needed to design or implement” restoration and assessment activities as part of the restoration planning phase, pursuant to 15 C.F.R. § 990.43. NRDP on behalf of the Trustee collected water, sediment, and product samples, conducted site visits, and evaluated information related to potential feasible restoration alternatives and assessment activities, discussed below, pursuant to 15 C.F.R. §§ 990.44(b)(4) and (5).

Under the NRDA regulations applicable to OPA, 15 C.F.R. Part 990 (“NRDA regulations”), the Trustee prepares and issues a Notice if the Trustee determines conditions that confirm the jurisdiction of the Trustee and the appropriateness of pursuing restoration of natural resources have been met.

Pursuant to 15 C.F.R. § 990.44, this Notice states that the Trustee has determined it is appropriate to proceed with restoration planning to fully evaluate, assess, quantify, and develop plans for restoring, rehabilitating, replacing, or acquiring the equivalent of natural resources injured and losses resulting from the Incident. The restoration planning process will include the collection of information that the Trustee determines is appropriate for identifying and quantifying the injuries and losses of natural resources, including natural resource services, and to determine the need for, type, and scale of restoration actions.

#### **SUPPLEMENTARY INFORMATION:**

**DETERMINATION OF JURISDICTION:** The Trustee makes the following findings pursuant to 15 C.F.R. § 990.41:

1. The derailment released asphalt (“oil” as defined by 33 U.S.C. § 2701(23)) into and upon navigable waters as well as adjoining shorelines, which constitutes an “Incident” within the meaning of 15 C.F.R. §930.30 and 33 U.S.C. § 2701(14).
2. The Incident was not permitted or authorized under a permit or license issued under federal, state, or local law; was not from a public vessel under 33 U.S.C. § 2701(29); and was not from an onshore facility subject to the Trans-Alaska Pipeline Authority Act, 43 U.S.C. 1651, *et seq.*
3. Natural resources under the trusteeship of the State of Montana may have been, or may be, injured as a result of the Incident, including, but not limited to, birds (including migratory birds), fish and other aquatic organisms (including pallid sturgeon), wildlife, surface water, riverine aquatic habitat, terrestrial habitat, shoreline habitat, biota supported by these habitats, and the natural resource services provided by these

resources. Discharged asphalt and the response activities to address the discharges of asphalt have resulted in adverse effects on natural resources and impaired natural resource services that those resources provide, including recreational use. The full extent of potential injuries is currently unknown.

The Trustee, with NRDP acting on the Governor's behalf, has determined that the State has jurisdiction to pursue restoration under OPA and CECRA, including Section 75-10-715(2)(b), MCA.

**DETERMINATION TO CONDUCT RESTORATION PLANNING:** Pursuant to 15 C.F.R. § 990.42(a), the Trustee determined that:

1. Observations and data collected pursuant to 15 C.F.R. §990.43 demonstrate that injuries to natural resources and natural resource services have resulted from the Incident; however, the nature and extent of such injuries has not been fully determined at this time. NRDP has been conducting, and is continuing to conduct, activities to evaluate injuries and potential injuries within these categories. More information on these resource categories is and will be available in the administrative record (as defined below). The full nature and extent of injuries will be determined during the injury assessment phase of restoration planning.

As part of the preassessment activities, the Trustee has identified a number of categories of trust resources where injuries have resulted or are likely to result from the Incident. Categories of natural resources that are likely to be lost, injured, and/or threatened as a result of discharged asphalt and associated response activities include, but are not limited to:

- Birds (including migratory birds): injury to birds, including the bald eagle (federally protected by the Bald and Golden Eagle Protection Act), ospreys, waterfowl, shorebirds, riparian songbirds, and raptors, along with their habitat. Oiled birds were found downstream of the spill site in asphalt along the shoreline. The Incident and response occurred while birds (including those listed above) were present and may have caused specific injury to these species.
- Reptiles: injury to reptiles, including snakes, turtles, and their habitat. Deceased snakes were recovered from the asphalt along the shoreline. The Incident and response occurred during the nesting season for spiny softshell turtles and may have caused specific injury to this species.
- Fish (including pallid sturgeon) and aquatic life: injury to fish and other aquatic organisms (such as macroinvertebrates and mussels) and their habitat. A fish health survey showed abrasions and scarring in fish downstream of the spill site. Fish tissue sampling showed elevated levels of phenanthrene, naphthalene, 1-methylnaphthalene, 2-methylnaphthalene, and acenaphthylene in multiple fish species downstream of the site (though it is not yet clear whether these are connected to the site). Pallid sturgeon are not present at the spill site, but are

present in the Yellowstone River downstream of the spill where asphalt was found during cleanup operations, and so may have been impacted by the Incident.

- Aquatic habitat: injury to aquatic habitat, including habitat for pallid sturgeon. Asphalt likely remains on the bottom of the river, continuing to impact fish and aquatic organisms and their habitat. The Incident and response resulted in physical alterations to the river channel at the derailment site.
  - Shoreline habitat: injury to shorelines, including vegetated and unvegetated shorelines, which provide various habitat functions to aquatic and terrestrial food webs. Asphalt smaller than the actionable size for response remains on shorelines downstream from the spill. Additionally, damage to the shoreline occurred during certain response activities. The Incident and response resulted in physical alterations to the shoreline at the derailment site.
  - Surface water: injury to surface water. Temporary and localized sheens were observed downstream of the spill site at various points after the Incident, potentially indicating impact to water quality. Asphalt left in the river may weather over time and impact surface water quality.
  - Human use: natural resource services may include, without limitation, lost and diminished use and non-use values, including but not limited to fishing and other recreational uses. For example, fishing and other recreational uses were prohibited, curtailed, or otherwise adversely affected, either directly or indirectly on or adjacent to the Yellowstone River due to river closures enacted following the spill and closure of the Holmgren Fishing Access Site for response activities. The Fish Consumption Advisory Board, consisting of representatives from Montana Department of Public Health & Human Services (DPHHS), Montana Department of Environmental Quality (DEQ), and Montana Fish, Wildlife & Parks (FWP), issued an initial consumption advisory on August 11, 2023, on all mountain whitefish caught in the Yellowstone River from Twin Bridges Road railroad bridge to Laurel based on phenanthrene results noted above. Additional polycyclic aromatic hydrocarbons (PAHs) were detected in fish during follow-up sampling, leading to another consumption advisory being issued on September 19, 2023, for all fish in the Yellowstone River from Indian Fort Fishing Access Site to the Highway 212 Bridge in Laurel. Further investigation is needed to determine whether this contamination was caused by the spill.
2. The response actions did not address and are not expected to address all injuries resulting from the discharge of asphalt. The U.S. Environmental Protection Agency entered into the Unified Command with MRL, the Montana Department of Environmental Quality, and Stillwater County Disaster and Emergency Services on June 25, 2023. The Unified Command was responsible for directing response activities, including cleanup of asphalt from the Yellowstone River. The Unified Command estimated that approximately 420,000 pounds of asphalt discharged into the Yellowstone River. An estimated 236,000 pounds of asphalt was recovered during Phase I of the response activities and subsequent conducted under the Emergency Operations Transition Plan in October of 2023.

While response activities were initiated soon after the Incident, the circumstances surrounding the Incident prevented recovery of much of the discharged asphalt. For example, logistical constraints and environmental conditions, including safety of the assessment/clean-up crew and ability to locate asphalt in high flows with turbid water prevented recovery of some of the asphalt. As a result, the Trustee anticipates that the response activities alone were unable to prevent injuries to natural resources. In addition, some of the response activities caused injuries to natural resources and the services provided, including but not limited to the Yellowstone River channel and access to the river.

Interim losses have occurred and are likely to occur in the future until baseline conditions are restored. In addition, there have been and will continue to be losses of and diminution of the human uses and non-use values of the resources resulting from the impacts on the natural resources and from the response activities themselves.

3. Feasible restoration actions exist to address the natural resource injuries and losses, including lost human uses, resulting from the discharges of asphalt. Potential restoration actions relevant to the expected injuries include, but are not limited to restoring, rehabilitating, replacing, or acquiring riparian habitat; bird habitat, including breeding, nesting, and foraging habitat; shoreline habitat; and fish habitat, including improving connectivity. Assessment procedures are available to scale the appropriate amount of restoration required to offset these ecological and human use service losses. During the restoration planning phase, the Trustee, in accordance with 15 C.F.R. Part 990, Subpart E, will evaluate potential projects, determine the scale of restoration actions needed to make the environment and the public whole, and release a draft restoration plan for public review and comment.
4. Potential assessment procedures to evaluate the injuries further may include but are not limited to evaluating the anticipated aquatic and terrestrial habitat covered by the asphalt that remains in the environment and laboratory studies to evaluate the impact on fish (including pallid sturgeon) and aquatic life from extended exposure to asphalt in the water column. Other assessment procedures may include studies on weathering of the asphalt material in river and shoreline environments to evaluate long-term impacts to wildlife and habitat. Further or different assessment procedures may be identified during the restoration planning phase conducted in accordance with 15 C.F.R. Part 990, Subpart E.

Based upon these determinations, the Trustee intends to proceed with restoration planning for the Incident.

**ADMINISTRATIVE RECORD:** NRDP, on behalf of the Trustee, has opened an administrative record in compliance with 15 C.F.R. § 990.45. The administrative record is publicly accessible and includes documents that served as a basis for the Trustee's determination to conduct restoration planning. The administrative record will continue to be augmented with additional information over the course of the NRDA process and include documents considered by the Trustee during the preassessment, assessment, and restoration planning phases of the NRDA performed in connection with the Incident.

The publicly available administrative record is available through the Montana Natural Resource Damage Program and documents may be requested by following the procedures at: [NRDP-Public-Information-Request-Process-and-Fees-2023.08.17.pdf \(dojmt.gov\)](#)

**OPPORTUNITIES FOR PUBLIC INVOLVEMENT:** The Trustee invites the public to participate in restoration planning for this Incident in accordance with 15 C.F.R. § 990.14(d). This Notice is being made available to the public pursuant to 15 C.F.R. § 990.44(c). The Trustee will provide opportunities for public involvement in the restoration planning for this Incident. The opportunities for public involvement will be addressed in future notices and announcements.

**ADOPTION BY STATE NATURAL RESOURCE TRUSTEE:** The undersigned, on behalf of the Governor of the State of Montana, hereby adopts the foregoing.

**SIGNATURE:**

STATE OF MONTANA

NATURAL RESOURCE DAMAGE PROGRAM



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Douglas H. Martin



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Date

Interim Program Director

State of Montana Natural Resource Damage Program