

NORFOLK SOUTHERN
RAILWAY COMPANY
Three Commercial Place
Norfolk, Virginia 23510

Plaintiff

v.

MARYLAND DEPARTMENT OF
THE ENVIRONMENT
1800 Washington Boulevard
Baltimore, Maryland 21230

SERVE ON:

Office of the Attorney General
Ellen Cohill
1800 Washington Boulevard
Baltimore, Maryland 21230

Defendant.

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY

Case No. _____

CIVIL DIVISION

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RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY

* * * * *

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff Norfolk Southern Railway Company, by and through its attorneys, James W. Constable, Marc A. Campsen and Wright, Constable & Skeen, LLP, hereby sues the defendant Maryland Department of the Environment for injunctive relief and for grounds states:

PARTIES AND VENUE

1. This is an action for a temporary restraining order and preliminary and permanent injunctive relief pursuant to Maryland Rules 15-501 through 15-505.

2. Plaintiff Norfolk Southern Railway Company ("Norfolk Southern") is a Virginia corporation in good standing with principal offices located at Three Commercial Place, Norfolk, Virginia 23510.

3. Defendant Maryland Department of the Environment (“MDE”) is an agency of the State of Maryland and maintains a principal place of business at 1800 Washington Boulevard, Baltimore, Maryland.

4. Venue is appropriate in this Court because Defendant MDE carries on regular business in Baltimore City.

FACTS

5. On May 7, 2014, the United States Department of Transportation (“US DOT”) issued an Emergency Restriction/Prohibition Order under Docket No. DOT -OST- 2014 -0067 (“Emergency Order”) to all railroad carriers “that transport in a single train in commerce within the United States, 1,000,000 gallons or more of UN1267, Petroleum crude oil, Class 3, sourced from the Bakken shale formation in Williston Basin (Bakken crude oil).” The Emergency Order is attached as **Exhibit 1**. The Emergency Order states the “pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d).” *See id.* at pp. 1-2.

6. The Emergency Order requires that all railroad carriers “provide the State Emergency Response Commission (SERC) for each state in which it operates trains transporting 1,000,000 gallons or more of Bakken crude oil, notification regarding the expected movement of such trains through the counties in the state.” *See Exhibit 1, Emergency Order, p. 1.* Specifically, the Emergency Order requires that the notification: “(a) provide a reasonable estimate of the number of trains implicated by this Order that are expected to travel, per week, through each county within the state, (b) identify and describe the petroleum crude oil expected to be transported in accordance with 49 CFR 172, subpart C; (c) provide all applicable

emergency response information required by 49 CFR 172, subpart G, and, (d) identify the routes over which the material will be transported.” *See id.*, p. 2.

7. Notably, US DOT issued a memorandum regarding the Emergency Order, attached as **Exhibit 2** (“Frequently Asked Questions on DOT’s May 7, 2014, Emergency Order”), which states, in relevant part:

DOT expects the SERCs to treat this data as confidential, providing it only to those with a need-to-know, and with the understanding that recipients of the data will continue to treat it as confidential. Accordingly, railroads may require reasonable confidentiality agreements prior to providing this information. Historically, railroads and States have routinely entered into confidentiality agreements prior to railroads providing States with information on commodities transported in trains within their jurisdictions, as this information has traditionally been viewed as confidential from business and security perspectives. DOT believes that following precedent and sharing the data required by this [Emergency Order] under confidentiality agreements is appropriate.

Exhibit 2, at ¶ 3.

8. Pursuant to the Emergency Order, Norfolk Southern contacted the Maryland SERC, which designated Tom Levering, the Director of Emergency Preparedness Planning for the MDE, as the SERC contact to provide the notifications required by the Emergency Order. On May 28, 2014, Mr. Levering, in his MDE capacity, executed a Confidential Information Non-Disclosure Agreement (“NDA”) regarding the information to be provided by Norfolk Southern to MDE pursuant to the Emergency Order. The NDA is attached as **Exhibit 3**.

9. Subsequently, consistent with the Emergency Order and the NDA, Norfolk Southern provided MDE the information required by the Emergency Order (“Confidential Information”).

10. On June 13, 2014, Norfolk Southern received a letter from the Maryland Attorney General’s Office (“AG’s Office”) stating it received a Public Information Act (“PIA”) request

pursuant to Md. Code Ann., State Gov't § 10-611 *et seq.* AG's Office June 13, 2014, Letter to Norfolk Southern is attached as **Exhibit 4**. The letter further stated the NDA is null and void because Mr. Levering "has no legal authority to sign as the SERC or on behalf of the SERC" and is in "contravention" of the PIA. *See id.* Finally, the letter advised Norfolk Southern that MDE was "engaged in making a determination" as to whether the information provided by Norfolk Southern pursuant to the Emergency Order was "confidential commercial information" and provided Norfolk Southern an opportunity to submit additional comments before a final decision was made. *See id.*

11. On June 27, 2014, Norfolk Southern responded to the AG's Office via letter objecting to the claims regarding the invalidity of the NDA. Norfolk Southern's June 27, 2014, Letter to the AG's Office is attached as **Exhibit 5**.

12. Norfolk Southern also objected to disclosure of the Confidential Information and pointed out the Confidential Information enjoyed mandatory protection from disclosure pursuant to Md. Code Ann., State Gov't § 10-617(d) ("Commercial information") because it contained "confidential commercial information." *See id.*

13. Moreover, Norfolk Southern informed the AG's Office that because the Confidential Information pertained to public security, MDE was empowered to deny inspection or disclosure of the information pursuant Md. Code Ann., State Gov't § 10-618(j)(2) ("Emergency plans") because disclosure of the Confidential Information may facilitate the planning of a terrorist attack or endanger the life or physical safety of an individual. *See id.*

14. On July 22, 2014, MDE responded via letter to Norfolk Southern stating two PIA requests were received and:

The Department believes there are no applicable exemptions that would prevent the disclosure of public records to the public. Consequently, the

Department is required to release the public records by July 24, 2014. In accordance with our letter dated June 13, 2014, we are providing you advance notice to allow you an opportunity to pursue a motion for court protection of the information.

If by July 24, 2014, the Department has not received a copy of your court determination showing that a motion for court protection has been filed, the public records will be released. If a motion has been filed, and we receive a copy of that documentation prior to July 24, 2014, we will hold the public records until the court rules on the motion for protection from disclosure.

MDE's July 22, 2014, Letter to Norfolk Southern is attached as **Exhibit 6**.

REQUEST FOR INJUNCTIVE RELIEF

15. Norfolk Southern hereby incorporates paragraphs 1 through 14 of this Complaint as though fully set forth herein.

16. Norfolk Southern has a recognizable right in preventing the public release of the Confidential Information. Indeed, the Confidential Information contains both "confidential commercial information" and information with a high degree of security sensitivity. Since the PIA specifically permits the denial of information requests on both grounds, there exists a strong likelihood that Norfolk Southern will succeed on the merits of its claim.

17. Unless MDE is prohibited from releasing the Confidential Information, Norfolk Southern will suffer immediate, substantial and irreparable injury because sensitive commercial information regarding specific commodities, shipment routes, and train frequencies will be available to its competitors, which provides a clear business advantage over Norfolk Southern. Moreover, the nature of this information will also permit Norfolk Southern's competitors to identify certain customers of Norfolk Southern for which Norfolk Southern is transporting the cargo and to gain knowledge of volume and utilization rates for particular customers, thus allowing those competitors to make targeted, specific investments that could significantly reduce or even eliminate NSRC market share in certain markets.

18. By contrast, MDE will suffer no harm if it is prohibited from releasing the Confidential Information. Indeed, the injunctive relief sought by Norfolk Southern in no manner affects MDE or Maryland SERCs from obtaining and using the information to prepare for and manage any emergency response arising from Norfolk Southern's cargo – the sole purpose of the Emergency Order. As Norfolk Southern recognizes and noted by US DOT:

[The Confidential Information] is intended for those persons with a need-to-know; that is, first responders at the State and local level, as well [as] other appropriate emergency response planners.

Exhibit 2, at ¶ 3.

19. Accordingly, the immediate and irreparable harm to Norfolk Southern in denying injunctive relief greatly outweighs the *de minimis*, if any, harm to MDE if the injunctive relief is granted.

20. Finally, the public interest is best served by granting the injunctive relief because the Confidential Information contains security sensitive material regarding the trade routes of highly volatile material that, if disclosed, create public safety concerns.

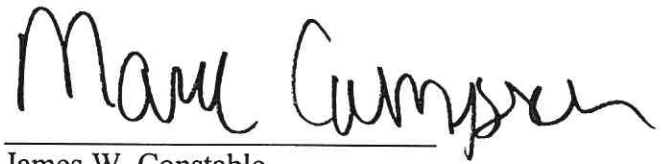
WHEREFORE, Norfolk Southern respectfully requests:

A. That this Court issue an Order granting Norfolk Southern a temporary restraining order restraining and enjoining Defendant MDE from disclosing the Confidential Information; and

B. That this Court issue an Order granting Plaintiff a preliminary injunction restraining and enjoining Defendant MDE from disclosing the Confidential Information; and

C. That this Court issue an Order granting Plaintiff a permanent injunction restraining and enjoining Defendant MDE from disclosing the Confidential Information while the Emergency Order remains in effect; and

D. Judgment for costs incurred by the Plaintiff in pursuing this action.



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UNITED STATES DEPARTMENT OF TRANSPORTATION

Petroleum Crude Oil Railroad Carriers

)
)
) Docket No. DOT-OST-2014-0067

EMERGENCY RESTRICTION/PROHIBITION ORDER

This notice constitutes an Emergency Restriction/Prohibition Order (Order) by the United States Department of Transportation (DOT; Department) pursuant to 49 U.S.C. 5121(d). This Order is issued to all railroad carriers that transport in a single train in commerce within the United States, 1,000,000 gallons or more of UN 1267, Petroleum crude oil, Class 3,¹ sourced from the Bakken shale formation in the Williston Basin (Bakken crude oil). By this Order, DOT is requiring that each railroad carrier provide the State Emergency Response Commission (SERC) for each state in which it operates trains transporting 1,000,000 gallons or more of Bakken crude oil, notification regarding the expected movement of such trains through the counties in the state. The notification shall identify each county, or a particular state or commonwealth's equivalent jurisdiction (e.g., Louisiana parishes, Alaska boroughs, Virginia independent cities) (county), in the state through which the trains will operate.

Upon information derived from recent railroad accidents and subsequent DOT investigations, the Secretary of Transportation (Secretary) has found that an unsafe condition or an unsafe practice is causing or otherwise constitutes an imminent hazard to the safe transportation of hazardous materials. Specifically, a pattern of releases and fires involving petroleum crude oil

¹ As described by 49 CFR 172.101.



shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d).

EFFECTIVE IMMEDIATELY ANY RAILROAD CARRIER IDENTIFIED BY THIS ORDER:

Shall, within 30 days of the date of this Order, provide certain information in writing to the SERC in each state in which the railroad carrier operates trains transporting 1,000,000 gallons or more of Bakken crude oil. The contact information for each SERC is located on the U.S. Environmental Protection Agency's (EPA) website related to the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).² If notification is not made to a SERC within 30 days of the date of this Order, a railroad is prohibited from operating any train transporting 1,000,000 gallons or more of Bakken crude oil in that state until such notification is provided. The notification must provide information regarding the estimated volumes and frequencies of train traffic implicated. Specifically, the notification must: (a) provide a reasonable estimate of the number of trains implicated by this Order that are expected to travel, per week, through each county within the state; (b) identify and describe the petroleum crude oil expected to be transported in accordance with 49 CFR part 172, subpart C; (c) provide all applicable emergency response information required by 49 CFR part 172, subpart G; and, (d) identify the routes over which the material will be transported. This notification also must identify at least one point of contact at the railroad (including name, title, phone number and address) responsible for serving as the point of contact for SERCs and relevant emergency responders related to the railroad's transportation of Bakken crude oil. To ensure that the information provided to a SERC remains reliable, railroad carriers shall update notifications prior to making any material changes in the estimated volumes or frequencies of trains traveling through a county. Railroad carriers must assist the SERCs as

² <http://www2.epa.gov/epcra/state-emergency-response-commissions-contacts>.

necessary to aid in the dissemination of the information to the appropriate emergency responders in affected counties. Copies of railroad notifications to SERCs must be made available to the DOT's Federal Railroad Administration (FRA) upon request. This Order does not preclude railroad carriers from taking any additional steps to communicate with state and local emergency responders regarding the transportation of hazardous materials or any other commodities within a state or local jurisdiction.

This Order applies to all railroad carriers who transport 1,000,000 gallons or more of Bakken crude oil in a single train in commerce within the United States, and its officers, directors, employees, subcontractors, and agents. This Order is effective immediately and remains in effect unless withdrawn in writing by the Secretary, or until it otherwise expires by operation of regulation and/or law.

I. Authority

The Secretary of Transportation has the authority to regulate the transportation of petroleum crude oil in commerce. 49 U.S.C. 5103(b). The Secretary of Transportation has designated petroleum crude oil, UN 1267, 3, Packing Group I, II, or III, as a hazardous material subject to the requirements of DOT's Hazardous Materials Regulation (HMR) (49 CFR parts 171 to 180). 49 U.S.C. 5121(d); 49 U.S.C. 5103(a). Commerce is as defined by 49 U.S.C. 5102(1) and 49 CFR 171.8, and "transportation" or "transport" are as defined by 49 U.S.C. 5102(13) and 49 CFR 171.8. A "railroad" is as defined by 49 CFR 171.8. Accordingly, railroads that transport petroleum crude oil in commerce by rail are subject to the authority and jurisdiction of the Secretary, including the authority to impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for hearing, to the extent necessary to abate the imminent hazard. 49 U.S.C. 5121(d).

II. Background/Basis for Order

An imminent hazard, as defined by 49 U.S.C. 5102(5), constitutes the existence of a condition relating to hazardous materials that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk that death, illness, injury or endangerment.

The number and type of petroleum crude oil railroad accidents described below that have occurred during the last year is startling, and the quantity of petroleum crude oil spilled as a result of those accidents is voluminous in comparison to past precedents. Due to the volume of crude oil currently being shipped by railroads, the demonstrated recent propensity for rail accidents involving trains transporting crude oil to occur, and the subsequent releases of large quantities of crude oil into the environment and the imminent hazard those releases present, this Order requires that railroads take the action described above to assist emergency responders in mitigating the effects of accidents involving petroleum crude oil trains. Releases of petroleum crude oil, subsequent fires, and environmental damage resulting from such releases represent an imminent hazard as defined by 49 U.S.C. 5102(5), presenting a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur.

A. Recent Crude Oil Incidents

The United States has experienced a rapid growth in the quantity of petroleum crude oil being shipped by rail in recent years. The growth has largely been sparked by developments in North Dakota, where the Bakken formation in the Williston Basin has become a major source of crude oil in the United States. Much of the Bakken crude oil is shipped via rail to refineries located

near the U.S. Gulf Coast or to pipeline connections, most notably to connections located in Oklahoma.³

Shipping hazardous materials is inherently dangerous. Transporting petroleum crude oil can be problematic if the crude oil is released into the environment because of its flammability. This risk of ignition is compounded in the context of rail transportation because petroleum crude oil is commonly shipped in unit trains that may consist of over 100 loaded tank cars. With the rising demand for rail carriage of petroleum crude oil⁴ throughout the United States, the risk of rail incidents increases along with the increase in the volume of crude oil shipped. There have been several significant derailments in the U.S. and Canada over the last ten months causing deaths and property and environmental damage that involved petroleum crude oil shipments. These accidents have demonstrated the need for emergency action to address unsafe conditions or practices in the shipment of petroleum crude oil by rail.

Most recently, on April 30, 2014, an eastbound CSX Transportation, Inc. (CSX) unit train consisting of 105 tank cars loaded with petroleum crude oil derailed in Lynchburg, Virginia. Seventeen of the train's cars derailed, and one of the tank cars was breached. A petroleum crude oil fire ensued, and emergency responders evacuated approximately 350 individuals from the immediate area. Three of the derailed tank cars containing petroleum crude oil came to rest in the adjacent James River, spilling up to 30,000 gallons of petroleum crude oil into the river. The National Transportation Safety Board (NTSB) and DOT are both investigating this accident.

³ See Association of American Railroads' (AAR) December 2013 paper "Moving Crude Oil by Rail", available online at: <https://www.aar.org/keyissues/Documents/Background-Papers/Crude-oil-by-rail.pdf>.

⁴ In 2011 there were 65,751 originations of tank car loads of crude oil. In 2012, there were 233,811 originations. *Id.*

On December 30, 2013, 13 cars in a westbound BNSF Railway (BNSF) grain train derailed near Casselton, North Dakota,⁵ fouling an adjacent main track. At the same time, an eastbound BNSF petroleum crude oil unit train with 106 cars was operating on that adjacent main track. The petroleum crude oil unit train reduced its speed but collided with the derailed car that was fouling the main track, resulting in the derailment of the lead locomotives and the first 21 cars of the petroleum crude oil unit train. Eighteen of the 21 derailed tank cars ruptured, and an estimated 400,000 gallons of petroleum crude oil was released. The ruptured tank cars ignited, causing a significant fire. Approximately 1,400 people were evacuated. Damages from the derailment have been estimated at \$8 million.

On November 8, 2013, a 90-car petroleum crude oil train operated by Alabama & Gulf Coast Railway derailed in a rural area near Aliceville, Alabama. The petroleum crude oil shipment originated in North Dakota, and was bound for Walnut Hill, Florida, to be transported by a regional pipeline to a refinery in Saraland, Alabama. Twenty-six cars derailed, resulting in eleven cars impinged by a crude oil pool fire. An undetermined amount of petroleum crude oil escaped from derailed cars and found its way into wetlands area nearby the derailment site. Clean up costs are estimated at \$3.9 million.

On July 6, 2013, a catastrophic railroad accident involving a U.S. railroad company occurred in Lac-Mégantic, Quebec, Canada, when an unattended freight train transporting petroleum crude oil rolled down a descending grade and subsequently derailed.⁶ The subsequent fires, along with other effects of the accident, resulted in the confirmed deaths of 47 individuals. In addition, the

⁵ This derailment currently is being investigated by the National Transportation Safety Board (NTSB), and information regarding this incident can be found at the NTSB website. See http://www.nts.gov/doclib/reports/2014/Casselton_ND_Preliminary.pdf.

⁶ This derailment currently is being investigated by the Transportation Safety Board of Canada and information regarding this incident can be found at the TSB website. See <http://www.bst-tsb.gc.ca/eng/enquetes-investigations/rail/2013/R13D0054/R13D0054.asp>.

derailment caused extensive damage to the town center, a release of hazardous materials that will require substantial clean-up costs, and the evacuation of approximately 2,000 people from the surrounding area.

B. DOT Actions and Investigations

In the wake of these and other events, PHMSA and FRA have taken a number of steps to increase the safety of petroleum crude oil shipments by rail. Following the Lac-Mégantic derailment, FRA issued Emergency Order No. 28 (EO 28), which established certain securement requirements for unattended trains and rail equipment, including petroleum crude oil unit trains. EO 28 remains in effect until further notice by FRA. In addition, on August 7, 2013, PHMSA and FRA issued Safety Advisory 2013-06, which made a number of safety-related recommendations to railroads and hazardous materials offerors operating in the United States, including the recommendation that offerors evaluate their processes to ensure that hazardous materials are properly classed and described in accordance with the HMR, and the recommendation that offerors and carriers conduct reviews of their safety and security plans. On August 27-28, 2013, FRA and PHMSA held a public meeting with industry stakeholders to solicit input on a comprehensive review of safety regulations contained in 49 CFR part 174 applicable to the safe transportation of hazardous materials by rail. PHMSA and FRA have initiated a rulemaking (RIN 2137-AF07) to address comments received as a result of the public meeting.

On August 29, 2013, FRA convened an emergency session of the Railroad Safety Advisory Committee (RSAC). RSAC is a group composed of railroad industry, labor, and governmental representatives who develop recommendations on new regulatory standards and other rail safety programs. During the emergency meeting, RSAC established three collaborative working groups to formulate new rulemaking recommendations regarding hazardous materials transportation by rail,

appropriate train crew sizes, and train securement procedures. Each of these working groups has met on a regular basis and has now finished with its work. DOT has initiated rulemaking proceedings as appropriate to codify in Federal regulation certain of the items discussed by the working groups.

On September 6, 2013, PHMSA issued an Advanced Notice of Proposed Rulemaking (ANPRM (HM-251); 78 FR 54849) to solicit comments on petitions for rulemaking and NTSB recommendations related to rail hazmat safety, including regulations for DOT specification tank cars most commonly used to move crude oil by rail. The comment period closed on December 5, 2013, and PHMSA received nearly 150 substantive comments representing over 150,000 stakeholders. PHMSA, in cooperation with FRA, has developed a comprehensive Notice of Proposed Rulemaking (NPRM). The NPRM is titled: PHMSA-2012-0082 (HM-251; RIN 2137-AE91): Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains. The NPRM is under review by the Office of Management and Budget pursuant to Executive Order 12866. (See <http://www.reginfo.gov/public>).

PHMSA and FRA issued a supplementary safety advisory, Safety Advisory 2013-07, on November 20, 2013, to emphasize the importance of proper characterization, classification, and selection of a packing group for Class 3 materials (flammable liquids, including petroleum crude oil), and to reinforce the need to follow the Federal hazardous materials regulations for safety and security planning. On January 2, 2014, PHMSA issued a Safety Alert, which warned of crude oil variability and emphasized that unprocessed crude oil may affect the integrity of packaging or present additional hazards related to corrosivity, sulfur content, and dissolved gas content. Further, noting that mined natural resources, such as crude oil, may have widely variable chemical

compositions and properties, the Safety Alert noted that crude oil being transported from the Bakken region of North Dakota may be more flammable than traditional heavy crude oil.

On January 16, 2014, the Secretary met with members of the rail and the petroleum industries in a Call to Action to address the risks associated with the transportation of crude oil by rail. As a result, on February 21, 2014, the Secretary of Transportation sent a letter to the President and Chief Executive Officer at the AAR requesting that he and his members subscribe to voluntary actions to improve the safe transportation of crude oil by rail. These include: speed restrictions, braking signal propagation systems, routing analyses, additional track and rail integrity inspections, more frequent mechanical inspections, development of an emergency response inventory, funding for emergency responder training, and continued communication with communities about the hazards of crude oil being transported by rail. To date, all Class I railroads have subscribed to the voluntary actions and several more have expressed their intent to sign.

On February 25, 2014, DOT issued an Emergency Order requiring all shippers to test product from the Bakken to ensure the proper classification of crude oil in accordance with the HMR before it is transported by rail, while also prohibiting the transportation of crude oil in the lowest-strength packing group. That Emergency Order was issued, in part, out of concerns over proper classification and packaging of petroleum crude oil that are under investigation as part of DOT's Operation Classification, also known as the "Bakken Blitz." On March 6, 2014, DOT issued an amended emergency order replacing the February 25 Emergency Order.⁷ The Amended Emergency Order is still in effect.

Notwithstanding the above DOT actions, in light of continued risks associated with petroleum crude oil shipments by rail, the further actions described in this Order are necessary to

⁷ The Amended Emergency Order addressed shipments already in transportation at the time of the emergency order's issuance. <http://www.dot.gov/sites/dot.gov/files/docs/Amended%20Emergency%20Order%20030614.pdf>.

eliminate unsafe conditions and practices that create an imminent hazard to public health and safety and the environment.

C. Railroad-Provided Emergency Responder Information to State Emergency Response Commissions

Due to the volume of crude oil being shipped by railroads, the demonstrated recent propensity for rail accidents involving trains transporting crude oil to occur, and the subsequent releases of large quantities of crude oil into the environment and the imminent hazard those releases present, the Order is requiring that each railroad carrier notify the SERC for each state in which it operates regarding the expected movement of trains transporting 1,000,000 gallons or more of Bakken crude oil through each county in that state.

As prior accidents demonstrate, prompt and effective emergency response to any hazardous materials release is critical. The HMR require offerors of hazardous materials to provide appropriate emergency response information applicable to the specific hazard or hazards of the material being offered for transportation and the HMR require that this information be maintained and immediately available to any person who, as a representative of a Federal, state or local government agency, responds to an incident. See 49 CFR 172. 200-.205 and 172.600-606. See also 49 CFR 130.11 (pertaining to oil in particular).

Given the unique hazardous characteristics of Bakken crude oil and the risks presented by large quantities of this commodity being transported in single trains, additional communication between railroads and emergency responders is necessary to ensure that the emergency responders are prepared to respond to an incident involving a train carrying a large quantity of petroleum crude oil. Currently, state and local emergency responders may not know if, or how many, such trains transporting large quantities of Bakken crude oil are moving through their jurisdiction until after an incident with a train has been reported. Because state and local emergency responders are

typically the first to arrive on any accident scene, before any railroad response personnel or any Federal official, it is essential that these individuals be as well-informed as possible as to the presence of trains carrying large quantities of Bakken crude oil within their jurisdictions. Accordingly, to help state and local emergency responders best be able to protect life, property, and the environment in the event of a derailment, this Order requires that a railroad carrier transporting 1,000,000 gallons or more of Bakken crude oil notify, in writing, the SERC in each state in which it operates these trains of the expected movement of the trains through each county in that state.

DOT has determined that, for purposes of this Order, the 1,000,000 gallon threshold is appropriate to trigger the written notification requirement. Considering the typical 30,000-gallon capacity railroad tank car used for the transport of petroleum crude oil, a 1,000,000-gallon threshold for a unit train would require a comprehensive response plan being required for unit trains composed of approximately 35 cars of petroleum crude oil.⁸ This is a reasonable threshold when considering that the aforementioned incidents all involved trains consisting of more than 70 railroad tank cars carrying petroleum crude oil, or well above the Order's threshold of 1,000,000 gallons or more of petroleum crude oil being transported in a single train. In setting this threshold quantity of 1,000,000 gallons, DOT has also relied on a Federal Water Pollution Control Act mandate for regulations requiring a comprehensive spill response plan to be prepared by an owner or operator of an onshore facility.⁹ For purposes of addressing an imminent hazard, that threshold amount of petroleum crude oil also ensures DOT is assisting local emergency responders to be prepared for the

⁸ This approximation assumes that the tank cars would not be entirely filled to capacity.

⁹ See 40 CFR 112.20. The Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990, directs the President, at section 311(j)(1)(C) (33 U.S.C. 1321(j)(1)(C)) and section 311(j)(5) (33 U.S.C. 1321(j)(5)), respectively, to issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges."

type of accidents that have been occurring regularly, and represent the greatest risks to public safety and the environment with regard to the transportation of Bakken crude oil. Further, this threshold amount of Bakken crude oil ensures that DOT is not unnecessarily imposing safety-related burdens on lesser risks that have not, to date, proven to represent the same safety and environmental concerns.

DOT has determined that SERCs are the most appropriate point of contact to convey written notifications regarding the transportation of trains transporting large quantities of Bakken crude oil. Each state has a designated SERC in accordance with the requirements of the ECPRA, which was created to help local entities plan for emergencies involving hazardous substances.¹⁰ Generally, SERCs are responsible for supervising and coordinating with the local emergency planning committees (LEPC) in states, and are best situated to convey information regarding hazardous materials shipments to LEPC's and state and local emergency response agencies. This Order requires that railroad carriers, to the extent reasonably practicable, assist SERCs as necessary in responding to any requests for information from local emergency response agencies regarding the volume and frequency of train traffic implicated by this Order within that agency's jurisdiction.

Written notification containing the required information to states in which trains affected by this Order operate must be made within 30 days of the effective date of this Order. If initial notification is not made to a SERC within 30 days of the date of this Order, a railroad is prohibited from operating any train transporting 1,000,000 gallons or more of Bakken crude oil through that state until such notification is provided. This notification must reflect the expected volume and frequency of train traffic implicated in each county in a particular state, with updated notifications required to be made when there is a material change in the volume of those trains. DOT is aware that the nature of freight railroad operations does not make it possible in many instances to

¹⁰ <http://www2.epa.gov/epcra>.

estimate the exact number of trains implicated by this Order that will travel over a particular route in a specified time period. Thus, this Order requires that railroads make a reasonable estimate as to the number of implicated trains expected to travel through a county per week, and to update the notification whenever a significant increase or decrease in that estimated number occurs. For purposes of complying with the requirements of this Order, DOT considers any increase or decrease of twenty-five percent or more in the number of implicated trains per week to be a material change. In making these notifications to SERCs, railroads must identify that Bakken crude oil is the commodity involved, and convey the applicable petroleum crude oil emergency response information that is required by 49 CFR part 172, subpart G in the notice. The railroad's notice to the SERCs must identify the routes over which the material will be transported through each affected county in a state. The above requirements will enable SERCs, and accordingly, state and local emergency responders, to have a reasonable expectation of the petroleum crude oil train traffic, and prepare accordingly for the possibility of an accident involving a train transporting a large quantity of Bakken crude oil.

In addition, railroads must also identify at least one point of contact (including name, title, phone number and address) at the railroad responsible for serving as the railroad's point of contact for state and local emergency response agencies on issues related to the transportation of Bakken crude oil through their jurisdictions. This point of contact must be communicated in the notice to the SERCs so that a jurisdiction may contact the railroad to obtain information regarding the transportation of large quantities of Bakken crude oil via rail. Copies of the written notification to SERCs must be made available upon request to FRA. FRA will audit railroad compliance with this Order by reviewing the notices that railroads provide to SERCs to ensure the accuracy of those notices, and also to ensure that state and local emergency responders are able to communicate with

the railroad contact identified in the written notification when necessary.

Nothing in this Order precludes railroad carriers from taking any additional steps to communicate with state and local emergency responders regarding the transportation of hazardous commodities within a state or local jurisdiction. If a railroad carrier has existing methods of communications with first responders along affected routes, DOT encourages railroads carrier to also continue to utilize those existing methods of communication.

To further enhance emergency response efforts, DOT is also recommending that railroads continue to commit resources to develop specialized crude oil by rail training and tuition assistance program for local first responders. Through the Transportation Community Awareness and Emergency Response (TRANSCAER®) program¹¹ and other initiatives, the railroad and hazardous materials shipping industries collaborate and cooperate with communities through which hazardous materials are transported. For example, in accordance with Association of American Railroads (AAR) Circular OT-55-N, railroads are to assist in implementing TRANSCAER's outreach program to improve community awareness, emergency planning and incident response for the transportation of hazardous materials. The same industry standard provides for the disclosure of certain commodity flow data upon request to local emergency response agencies and planning groups.

In response to the Secretary's recent "Call to Action," the rail and shipping industries have renewed their commitment to the TRANSCAER® program and have agreed to conduct additional outreach and training to local emergency responders in jurisdictions through which crude oil is

¹¹ www.transcaer.com

transported in large quantities.¹² At the same time, industry has committed to providing additional funding for emergency response resources for local emergency responders, and to continued communication with communities about the hazards of crude oil being transported by rail. DOT views these efforts as supporting the emergency response capability planning requirement.

D. Remedial Action

Within 30 days of this Order, to abate this imminent hazard, each affected railroad carrier shall, within 30 days of the date of this Order, notify the SERC in each state in which the railroad carrier operates trains transporting 1,000,000 gallons or more of Bakken crude oil. The contact information for each SERC is on the U.S. EPA's website related to the ECPRA as discussed above. If notification is not made to a SERC within 30 days of the date of this Order, a railroad is prohibited from operating any train transporting 1,000,000 gallons or more of Bakken crude oil in that State until such notification is provided. This notification must provide information regarding the estimated volumes and frequencies of train traffic implicated. Specifically, this notification must: (a) provide a reasonable estimate of the number of trains implicated by this Order that are expected to travel, per week, through each county within the state; (b) identify and describe the petroleum crude oil being transported in accordance with 49 CFR part 172, subpart C; (c) provide all applicable emergency response information required by 49 CFR part 172, subpart G; and, (d) identify the route over which the material will be transported. This notification also must identify at least one point of contact at the railroad (including name, title, phone number and address) responsible for serving as the point of contact for SERCs and local emergency responders related to the railroad's transportation of Bakken crude oil. To ensure that the information provided to a SERC remains reliable, railroad carriers shall update notifications

¹² See February 21, 2014 letter from Secretary Anthony Foxx to President and Chief Executive Officer of the Association of American Railroads Ed Hamberger. <http://www.dot.gov/briefing-room/letter-association-american-railroads>

prior to making any material changes – defined as any increase or decrease of twenty-five percent or more – in the estimated number of trains per week transporting 1,000,000 gallons or more of Bakken crude oil through local communities. Railroad carriers must assist the SERCs as necessary in disseminating the information to local emergency responders in affected counties. Copies of railroad notifications to SERCs must be made available to the FRA upon request.

E. Rescission of Order

This Order remains in effect until the Secretary determines that an imminent hazard no longer exists or a change in applicable statute or Federal regulation occurs that supersedes the requirements of the Order, in which case the Secretary will issue a Rescission Order.

F. Failure to Comply

Any railroad carrier or person failing to comply with this Emergency Order is subject to civil penalties of up to \$175,000 for each violation or for each day it is found to be in violation (49 U.S.C. 5123). A person willfully or recklessly violating this Emergency Order is also subject to criminal prosecution, which may result in fines under title 18, imprisonment of up to ten years, or both (49 U.S.C. 5124).

G. Right to Review

Pursuant to 49 U.S.C. 5121(d)(3) and in accordance with section 554 of the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq*, a review of this action may be filed. Any petition seeking relief must be filed within 20 calendar days of the date of this order (49 U.S.C. § 5121(d)(3)), and addressed to: Office of the General Counsel, U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, DC 20590. Please include the docket number of this Emergency Order in your petition, and state the material facts at issue which you believe disputes the existence of an imminent hazard and must include all evidence and exhibits to be considered.

The petition must also state the relief sought. Within 30 days from the date the petition for review is filed, the Secretary must approve or deny the relief in writing; or find that the imminent hazard continues to exist, and extend the original Emergency Order. In response to a petition for review, the Secretary may grant the requested relief in whole or in part; or may order other relief as justice may require (including the immediate assignment of the case to the Office of Hearings for a formal hearing on the record).

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public. DOT has determined that this Emergency Order imposes new information collection requirements. FRA will be publishing a Paperwork Reduction Act notice for comment, following publication of this order.

IV. Emergency Contact Officials

If you have any questions concerning this Emergency Order, you should contact the U.S. Department of Transportation at (202) 493-6245.

Dated: May 7, 2014

A handwritten signature in black ink, appearing to read 'Anthony R. Foxx', is written over a solid horizontal line.

Anthony R. Foxx
Secretary of Transportation

Frequently Asked Questions on DOT's May 7, 2014, Emergency Order (EO) Regarding Notification to Communities of Bakken Crude Oil Shipments

1. How can railroads identify Bakken crude oil when they are the carrier, not the offeror of the product?

DOT recognizes that distinguishing shipments of Bakken crude oil from other crude oil, without the offeror positively identifying it, is a difficult task. Therefore, for purposes of this EO, crude oil tendered to railroads for transportation from any facility directly located within the Williston Basin (North Dakota, South Dakota, Montana in the United States or Saskatchewan or Manitoba in Canada) is Bakken crude oil for the purposes of this EO. However, to ensure the most accurate compliance with the EO going forward, railroads and offerors should work together to develop a means for identifying Bakken crude oil prior to transport, such as a Standard Transportation Commodity Code number, that identifies the crude oil by its geographic source.

2. As railroad schedules can vary for many reasons, when reporting on Bakken crude oil traffic through communities, what is the required level of specificity for traffic data?

The aim of this reporting requirement is to give first responders an understanding of the volume and frequency with which Bakken crude oil is transported through their communities so that they can prepare their response plans accordingly. With this in mind, when reporting the traffic data required by the EO, railroads should look at their aggregate traffic of Bakken crude oil through the jurisdiction for the prior year, and after considering any reasonably anticipated changes in that traffic, provide a reasonable estimate of the weekly traffic along the affected routes. This estimate can be provided in a range to account for normal variations in traffic. If a railroad's Bakken crude oil traffic changes materially ($\geq 25\%$) from the aggregate estimate provided, railroads must provide updated traffic information to the SERCs as soon as possible.

3. Who will have access to the data submitted to a SERC pursuant to this EO?

This data is intended for those persons with a need-to-know; that is, first responders at the State and local level, as well other appropriate emergency response planners. DOT expects the SERCs to treat this data as confidential, providing it only to those with a need-to-know, and with the understanding that recipients of the data will continue to treat it as confidential.

Accordingly, railroads may require reasonable confidentiality agreements prior to providing this information. Historically, railroads and States have routinely entered into confidentiality agreements prior to railroads providing States with information on commodities transported in trains within their jurisdictions, as this information has traditionally been viewed as confidential from business and security perspectives. DOT believes that following precedent and sharing the data required by this EO under confidentiality agreements is appropriate.



4. May railroads share the data with Fusion Centers or other State agencies responsible for emergency response planning instead of SERCs?

DOT understands that States have varying methods and agencies responsible for emergency response planning and preparedness within their jurisdictions. For example, Fusion Centers are established on a State and regional basis, with one of their purposes being to share emergency response information. Railroads currently routinely share data on their shipments with Fusion Centers. Given that railroads and Fusion Centers have already established protocols for sharing information under existing confidentiality agreements, in some situations, there might be advantages to States and railroads in utilizing Fusion Centers instead of SERCs for the sharing of information required by this EO. DOT also notes that there is an existing mechanism for Tribal Nations to interact with the Fusion Centers through the State, Local, Tribal and Territorial Government Coordinating Council. Similarly, DOT recognizes that individual States may have an agency other than the SERC or Fusion Center that is more directly involved in emergency response planning and preparedness than either the SERC or Fusion Center. Accordingly, if a State agrees that it would be advantageous for the information required by this EO to be shared with a Fusion Center or other State agency involved with emergency response planning and/or preparedness, as opposed to the SERC, a railroad may share the required information with that agency instead of the SERC.

5. Must separate outreach be done with Tribal Emergency Response Commissions (TERCs)?

No. DOT will be reaching out to Tribal leaders to let them know that their TERCs can coordinate with the appropriate SERC(s) for access to data supplied under this EO. Railroads must therefore ensure that SERCs (or relevant Fusion Centers, if States so choose) are also supplied with information for traffic through tribal lands.

DOT Emergency Order to Petroleum Crude Oil Railroad Carriers

Docket: DOT-OST-2014-0067

On May 7, 2014, the United States Department of Transportation issued an Emergency Order to Petroleum Crude Oil Railroad Carriers under Docket No. DOT-OST-2014-0067 (copy attached). The Order provides that railroad carriers must provide certain notifications to State Emergency Response Commissions (SERCs) by June 6, 2014 or the railroad carrier will be prohibited from operating certain trains through states to which such notification has not been provided until such time as the railroad carrier provides that notification. For informational purposes, and not for legal interpretations, a summary of the Order's notification requirements is provided below. We encourage you to review the Order and its impact on your SERC, as well as the Frequently Asked Questions issued by DOT on May 23, 2014 (copy attached).

May 7, 2014 Emergency Restriction / Prohibition Order Notification Requirements:

- 1) Carrier must notify the SERC in each state in which the carrier operates trains transporting 1,000,000 gallons or more of Bakken crude oil.
- 2) The SERC notification must:
 - (a) Provide a reasonable estimate of the number of trains implicated by the Order that are expected to travel per week through each county within the state.
 - (b) Identify and describe the petroleum crude oil expected to be transported in accordance with 49 CFR Part 172, subpart C.
 - (c) Provide applicable emergency response information required by 49 CFR Part 172, subpart G.
 - (d) Identify the routes over which the material will be transported.
 - (e) Identify at least one point of contact at the railroad (name, title, phone number, and address) responsible for serving as the point of contact for SERCs and local emergency responders related to the railroad's transportation of Bakken crude oil.
- 3) Railroad carriers must update the notifications prior to making a material change in volume of trains implicated by the Order (DOT defines material change as an increase or decrease of 25% or more in the estimated number of trains per week transporting 1,000,000 gallons or more of Bakken crude oil through a particular area).
- 4) Railroad carriers must assist the SERCs as necessary to aid in dissemination of information to the appropriate emergency responders in affected counties.
- 5) Copies of railroad notifications to SERCs must be available to FRA upon request.

Norfolk Southern is prepared to provide each SERC through which it transports trains covered by the Order a map depicting the its routes for Bakken crude oil trains subject to the Order, as well as individual county maps showing these routes in greater detail.



Norfolk Southern also has prepared a spreadsheet that provides a reasonable estimate of the number of trains with greater than 1,000,000 gallons of Bakken crude oil that are expected to travel per week through each county within the state.

It is important to note that this data is strictly intended for those persons with a need to know, that is, first responders at the state and local level, as well other appropriate emergency response planners. DOT and Norfolk Southern expect the SERCs or designated agency to treat this data as confidential, providing it only to those with a need to know, and with the understanding that recipients of the data will continue to treat it as confidential. Accordingly, DOT has authorized railroads to require reasonable confidentiality agreements prior to providing this information.

Further, railroads and states have routinely entered into confidentiality agreements prior to railroads providing information on commodities transported in trains within their jurisdictions, as this information has traditionally been viewed as confidential from business and security perspectives. DOT believes that following precedent and sharing the data required by this Order under confidentiality agreements is appropriate.

DOT also understands that states have varying methods and agencies responsible for emergency response planning and preparedness within their jurisdictions. For example, Fusion Centers are established on a State and regional basis, with one of their purposes being to share emergency response information. Accordingly, if a State agrees that it would be advantageous for the information required by this Order to be shared with a Fusion Center or other state agency involved with emergency response planning and/or preparedness, as opposed to the SERC, the SERC should so advise the railroad carrier, which will share the required information with that agency instead of the SERC.

Norfolk Southern requests that you identify the appropriate state agency to receive the information required by this Order (SERC, Fusion Center, or other emergency preparedness agency) and execute the attached Confidential Information Non-Disclosure Agreement. In light of the deadline imposed by the Order, Norfolk Southern asks that you designate the appropriate agency and execute the Non-Disclosure Agreement no later than Saturday, May 31, 2014, and return a copy to the undersigned at David.Schoendorfer@nscorp.com .


*David Schoendorfer, CHMM
Manager Hazardous Materials
Norfolk Southern Corp.
1200 Peachtree St., NE
Atlanta, GA 30309
404-582-3762 (Office)
540-529-1691 (Mobile)*

CONFIDENTIAL INFORMATION NON-DISCLOSURE AGREEMENT

**DOT Emergency Restriction / Prohibition Order
to Petroleum Crude Oil Railroad Carriers
Docket: DOT-OST-2014-0067**

Agency Name: Maryland Department of The Environment
Contact Name: Tom Levering
Title: Director, Emergency Preparedness Planning
City: Baltimore State: Maryland 21230
County: _____
Phone (Office): 410 537-4460
Phone (Mobile): 443-721-7891
Email: Tom.Levering@Maryland.gov

By signing below, I acknowledge and agree on behalf of the Agency to the terms set forth herein for use and dissemination of the Norfolk Southern Railway Company (NSRC) petroleum crude oil routes as required by DOT Docket: DOT-OST-2014-0067 ("the Information"). NSRC considers the Information to be restricted information of a security sensitive nature. The Information also constitutes commercially sensitive information that is not subject to disclosure. Agency acknowledges and agrees that the Information is to be considered confidential and not subject to any disclosure other than that permitted by this Agreement. On behalf of the Agency, I thus affirm and agree that the information provided by NSRC in this report will be used solely for and by bona fide emergency planning and response organizations for the express purpose of emergency and contingency planning. The Agency agrees that the recipient organizations will be advised of and will agree to maintain the confidential nature of the Information. This information will not be distributed publicly in whole or in part without the express written permission of NSRC. The Agency acknowledges and agrees that the Information is given without any warranty by NS as to the accuracy and completeness of the Information and is received by the Agency "AS-IS". The Agency agrees that the Information is not subject to release under the terms of any governing Freedom of Information Act or similar statute.



(Signature of person authorized by SERC to receive information)

5/28/14
Date

Return completed form no later than May 31, 2014 to:

Norfolk Southern Railway Company
Attn: David Schoendorfer, Manager Hazardous Materials
David.Schoendorfer@nscorp.com
404-582-3762

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
CHIEF DEPUTY ATTORNEY GENERAL

JOHN B. HOWARD, JR.
DEPUTY ATTORNEY GENERAL

STEVEN R. JOHNSON
PRINCIPAL COUNSEL

ANDREA S. BAKER
LYNN R. ANGOTTI
DEPUTY COUNSEL

WRITER'S DIRECT DIAL NO.
(410) 537-3050

ellen.cohill@maryland.gov



OFFICE OF
THE ATTORNEY GENERAL
DEPARTMENT OF THE ENVIRONMENT
1800 WASHINGTON BLVD, SUITE 6048
BALTIMORE, MARYLAND 21230
FAX: (410) 537-3943

June 13, 2014

HELENE AKPARANTA
PRISCILLA N. CARROLL
ELLEN W. COHILL
CHRIS S. CORZINE
PAUL N. DE SANTIS
KRISTEN S. DE WIRE
ROBERTA R. JAMES
GEORGE A. KOHUTIAK
SARIM. LEVIN
JEANEEN M. LOGAN
JONATHAN E.C. MAY
JEAN POPE
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LAWRENCE A. THROWER
PATRICIA V. TIPON
EMILY A. VAINIERI
STEPHANIE COBB WILLIAMS
NANCY W. YOUNG
MATTHEW ZIMMERMAN
ASSISTANT ATTORNEY GENERAL

MATTHEW D. STANDEVEN
STAFF ATTORNEY

URGENT REQUEST – SENT BY E-MAIL AND BY FIRST CLASS MAIL

Helen M. Hart, Esquire
General Solicitor
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510

RE: Maryland Public Information Act Request

Dear Ms. Hart:

On June 11, 2014, I informed David Schoendorfer of Norfolk Southern Railroad Company (NSRC), via telephone, that my client, the Maryland Department of the Environment (MDE), received a public information request on June 9, 2014 pursuant to the Maryland Public Information Act (PIA), §§ 10-611 et seq. of the State Government Article, Annotated Code of Maryland (SG). The PIA request is for the information that NSRC provided to MDE that involves the shipment of one million gallons or more of crude oil by rail into Maryland, including the frequency of the shipments, the quantity of the shipments, and the route(s) of the shipments.

As I advised NSRC in writing on June 6, 2014, the non-disclosure agreement (NDA) signed by Tom Levering of MDE is null and void for several reasons. First, the NDA is in contravention of the Maryland Public Information Act (PIA). Secondly, Tom Levering is an employee of MDE and has no legal authority to sign as the SERC or on behalf of the SERC.

In your email of June 11, 2014, you stated that you would like to come to an agreement on an alternative non-disclosure language or similar arrangement as soon as possible. There is no NDA that the parties can enter into that would allow anything other than compliance with the requirements of the Maryland Public Information Act (PIA). MDE is required by State law to comply with the requirements of the PIA and violations of the PIA are subject to civil and criminal penalties. That was the problem with your NDA from the onset. The NDA has no effect



because it cannot be performed and enforced due to it is in contravention of the PIA. Thus, all public information requests received by MDE for information that NSRC has provided to MDE will be handled and processed in compliance with the PIA.

Out of the information MDE received from NSRC, the only documents that NSRC marked, "Railroad Restricted Information" are two maps, one state map and one county map showing the routes of the shipments (hereinafter collectively, "Maps"). NSRC states in the legends of the Maps that the Maps are to be of a security sensitive nature containing confidential commercial information to be released on a need-to-know basis. Since the remaining information provided by NSRC to MDE, including the spreadsheet showing the range of weekly train frequencies in excel format, were not marked confidential, such information is to be made available to the public.

Under the PIA, MDE must either make the Maps (or portions of them) available to the requester or determine that they are entitled to confidential treatment and not make them available to the requester. In this regard, the requirements of the State law are very similar to those of the Federal Freedom of Information Act.

This letter is to advise you that MDE is engaged in making a determination as to whether the Maps marked, "Railroad Restricted Information" contain confidential commercial information under SG § 10-617(d) of the PIA and to give you an opportunity to submit your comments on this issue. Your comments should address the following questions:

1. The specific portions of the Maps which you contend are entitled to confidential treatment;
2. Federal or state law that requires the Maps be specifically kept confidential and not disclosed to the public;
3. The period of time for which confidential treatment is desired (e.g., until a certain date, until the occurrence of a specified event, or permanently);
4. All measures taken to guard against undesired disclosure of the Maps to others;
5. The extent to which the Maps have been disclosed to others and the precautions taken in connection therewith;
6. Whether disclosure of the Maps would likely result in substantial harmful effects to your competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects;
7. The extent to which the Maps are customarily regarded as confidential in your trade, and evidence to support this information; and
8. Whether the Maps to be provided to first responders on a need-to-know basis with a promise of confidentiality affects the requirement to keep the Maps confidential and why.

Please provide your comments to this office **no later than June 23, 2014**, as MDE needs to timely respond to the requester. Failure to submit comments by that date will be treated by MDE as a waiver of any claim you might make for confidential treatment of the information under SG § 10-617(d). Also, if information submitted as part of your comments is marked

confidential when received, it will be regarded by MDE as entitled to confidential treatment to the extent permitted by law.

Please be advised that should MDE make a determination that there are no exemptions under the PIA that entitles the Maps (or portions of them) to confidential treatment, before any disclosure occurs to the requester, MDE agrees to notify NSRC in writing so that NSRC may seek a court order to protect the Maps (or portions of them) and any other information that NSRC provided to MDE from disclosure under Maryland state law. Unless otherwise directed, the aforementioned notification will be sent to you at the e-mail and address listed in your e-mail communications with this office.

If you should have any questions, please do not hesitate to contact me directly at (410) 537-3050.

Sincerely,

Ellen W. Cohill
Ellen W. Cohill
Assistant Attorney General

cc: David Schoendorfer, NSRC



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

757-629-2752 (Direct)
757-823-5963 (Fax)
Helen.Hart@nscorp.com

Helen M. Hart
General Solicitor

June 27, 2014

Via Email to ellen.cohill@maryland.gov and Overnight Mail

Office of the Attorney General
Maryland Department of the Environment
1800 Washington Blvd, Ste 6048
Baltimore, MD 21230
Attn: Ms. Ellen W. Cohill

Re: Norfolk Southern Railway Company Confidential Information

Dear Ms. Cohill:

Norfolk Southern Railway Company (Norfolk Southern) received your letter of June 13, 2014 regarding the confidentiality of certain information Norfolk Southern has disclosed pursuant to the Emergency Restriction / Prohibition Order under Docket No. DOT-OST-2014-0067 (Emergency Order), issued on May 7, 2014 by the United States Department of Transportation (US DOT). On June 20, 2014, you granted an extension of time for Norfolk Southern to respond to your June 13 letter until June 27, 2014.

As we understand it, your contentions are that: (1) the director of emergency preparedness planning for the Maryland Department of the Environment (MDE) did not have authority to execute the non-disclosure agreement (NDA) pursuant to which in good faith Norfolk Southern disclosed sensitive and confidential commercial and national security information (the Confidential Information); (2) the NDA is null and void and is contrary to the Maryland Public Information Act (PIA); (3) MDE is going to release certain portions of the Confidential Information in response to an information request, and will release certain other portions unless Norfolk Southern further justifies its confidentiality. Norfolk Southern does not concede, and specifically objects to, the foregoing contentions. Following is Norfolk Southern's perspective on your assertions.

As you are aware, Norfolk Southern disclosed the Confidential Information to MDE pursuant to the Emergency Order, which requires that Norfolk Southern notify the State Emergency Response Commission (SERC) or its designated state emergency response agency in each state in which Norfolk Southern operates trains transporting one million gallons or more of Bakken crude oil. Consistent with the Emergency Order, Norfolk Southern provided to the MDE's director of emergency preparedness planning, who was designated by the Maryland



SERC, a reasonable estimate of the number of trains implicated by the Emergency Order that are expected to travel per week through each county within the state, and the routes by county over which that transportation is anticipated to occur. The aim of the notification requirement is to provide information that first responders may use in preparing their emergency response plans. US DOT has clarified in guidance that railroads may require reasonable confidentiality agreements prior to providing this information due to its sensitive nature. In addition, US DOT has clarified that it expects distribution of the information to be limited to those emergency response and planning personnel with a need to know. Norfolk Southern has a long history of working with emergency response agencies throughout its service territory. At the same time, emergency responders also use confidential information from chemical plants and the like for similar purposes. In short, they understand and are practiced in the need to maintain confidentiality for security and commercial reasons.

The Confidential Information enjoys mandatory protection from disclosure under the plain language of the Maryland Public Information Act. §10-617(d) of the Annotated Code of Maryland, State Government Article requires that the custodian deny disclosure of confidential commercial/financial information. As specifically stated in Norfolk Southern's letter transmitting the Confidential Information, that information is commercially sensitive and should be maintained as confidential. This is true whether or not each and every page of the electronically submitted documents is marked with the confidential notations. Specifically, Norfolk Southern deems not only the entirety of the maps but also the entirety of the train volume information contained in the spreadsheets to be commercially and security sensitive. If disclosed, the Confidential Information would provide our competitors and others with information specific to certain commercial transactions with particular customers. Moreover, Norfolk Southern is concerned with compliance under 49 USC §11904 should such Confidential Information be disclosed. In light of the foregoing, Norfolk Southern does not disclose the type of Confidential Information that was compiled in accordance with the requirements of the Emergency Order to any parties other than as required by law – in this case, those with a need to know as directed in the Emergency Order. Indeed, each person outside the company to whom Norfolk Southern has sent this Confidential Information has made a commitment to maintain its confidentiality in accordance with that Emergency Order.

In addition to these federal and state requirements mandating denial of disclosure of the Confidential Information due to its commercial sensitivity, §10-618(j) of the Annotated Code of Maryland, State Government Article specifically permits the custodian to deny inspection of information that pertains to public security. This section provides for protection of operational and location information related to emergency response, and specifically relates to information that could jeopardize the security of a facility or facilitate the planning of a terrorist attack. In addition to the US DOT guidance mentioned above that specifically notes the security sensitivity of and limited distribution for this Confidential Information, US DOT Secretary Foxx has reiterated that message in May 2014 letters to certain state governors and city mayors.¹ In those recent letters, the Secretary asked the governors and mayors to share the information with the appropriate emergency responders in affected communities, "bearing in mind that this is sensitive information with security implications and that we must respect homeland security regulations regarding the widespread publication of this information." Notwithstanding that the Confidential Information may not be considered "Security Sensitive Information," a term that has special meaning both from definitional and operational perspectives under the Transportation Security Administration regulations, US DOT has clearly recognized that the information has

¹ These letters are posted on the Federal Railroad Administration website eLibrary.

Ms. Ellen Cohill
June 27, 2014
Page 3

sensitivity from a security standpoint. As such, in addition to the mandatory requirement to deny the disclosure of the Confidential Information as outlined above, the MDE as the custodian should exercise its discretion to deny the disclosure based on the security risk posed by the Confidential Information.

The following summarizes Norfolk Southern's position with regard to the June 13, 2014 letter:

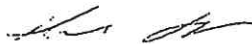
1. The Confidential Information was disclosed to MDE pursuant to a valid NDA executed by a person who had apparent, if not actual, authority to do so.
2. The Confidential Information was disclosed to MDE consistent with the US DOT Emergency Order and subsequent guidance relating thereto, which clearly contemplates the individual states receiving the Confidential Information keeping the Confidential Information confidential without disclosure to any person or party not specified in the Emergency Order.
3. All estimates of the number of trains implicated by the Emergency Order and the routes over which that transportation is anticipated to occur constitute Confidential Information disclosed by Norfolk Southern pursuant to the NDA, and is confidential and protected whether or not each page is specifically marked as confidential. In this regard, the transmittal letter clearly indicates that all such disclosed information is confidential and should be treated as such.
4. Norfolk Southern has no duty to justify to MDE the confidentiality of the Confidential Information as requested by the eight questions on page two of the June 13 letter. The Confidential Information is already protected. Nevertheless, information responsive to those questions is contained in this letter.

Accordingly, regardless of any requests MDE has received or may receive under the PIA, MDE is not to release the Confidential Information (including both the maps and the train count information) to any person or party other than those persons and parties specified in the Emergency Order, i.e., bona fide emergency planning and response organizations with a need to know for the express purpose of emergency and contingency planning.

Norfolk Southern does not waive any of its rights to have the Confidential Information protected from disclosure, and MDE is not to treat any Norfolk Southern action as a waiver. If, despite this letter and the NDA, MDE intends to make an unauthorized disclosure of the Confidential Information, please advise me immediately so that Norfolk Southern may avail itself of legal remedies, which may include injunctive relief through the courts.

Please contact me if you have any questions.

Sincerely,



Helen M. Hart

Cc: J.W. Constable, Wright, Constable & Skeen, LLP



MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore, Maryland 21230

410-537-3000 • 1-800-633-6101 • <http://www.mde.state.md.us>

Martin O'Malley
Governor

Robert M. Summers, Ph.D
Secretary

Anthony G. Brown
Lieutenant Governor

July 22, 2014

SENT BY E-MAIL AND BY FIRST-CLASS MAIL

Helen M. Hart, Esquire
Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, VA 23510-9241

RE: Notification of Public Records Requests

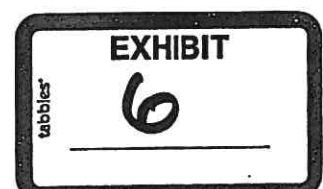
Dear Ms. Hart:

The Maryland Department of the Environment ("Department") has received public information requests for notifications that Norfolk Southern Railroad Company ("NSRC") sent to the Department. According to the United States Department of Transportation's Emergency Order DOT-OST-2014-0067, railroads transporting one million or more gallons of Bakken crude oil through a state are required, within 30 days, to send notifications to that state's state emergency response commission ("SERC").

Although the Department is not Maryland's SERC, your information ("public records") has been received by the Department. The Department is required to respond to all public information requests for public records in its possession pursuant to the Maryland Public Information Act ("PIA"). To date, the Department has received two requests for public records. The first request is from Curtis Tate with McClatchy Newspapers, 700 12 Street, N.W., #1000, Washington, D.C. 20005. The second request is from Matthew Brown with the Associated Press, P.O. Box 36300, Billings, MT 59107.

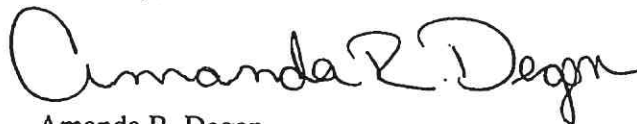
The Department believes there are no applicable exemptions that would prevent the disclosure of public records to the public. Consequently, the Department is required to release the public records by July 24, 2014. In accordance with our letter dated June 13, 2014, we are providing you advance notice to allow you an opportunity to pursue a motion for court protection of the information.

If by July 24, 2014 the Department has not received a copy of your court determination showing that a motion for court protection from disclosure has been filed, the public records will be released. If a motion has been filed, and we receive a copy of that documentation prior to July 24, 2014, we will hold the public records until the court rules on the motion for protection from disclosure.



Helen M. Hart, Esquire
Page Two
July 22, 2014

Sincerely,

A handwritten signature in black ink that reads "Amanda R. Degen". The signature is written in a cursive style with a large initial 'A'.

Amanda R. Degen
Public Information Act Coordinator
Office of the Secretary

cc: J.W. Constable, Wright, Constable & Skeen, LLP