

NORFOLK SOUTHERN  
RAILWAY COMPANY  
Three Commercial Place  
Norfolk, Virginia 23510

Plaintiff

v.

MARYLAND DEPARTMENT OF  
THE ENVIRONMENT  
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

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### MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiff Norfolk Southern Railway Company ("Norfolk Southern"), by and through its undersigned counsel, pursuant to Maryland Rules 15-501 through 15-505, hereby moves for an *ex parte* temporary restraining order to prevent Defendant Maryland Department of the Environment ("MDE") from disclosing certain confidential information of Norfolk Southern and for grounds states:

1. Norfolk Southern incorporates the "Facts" section set forth in the Complaint filed contemporaneously with this motion in its entirety as if fully set forth herein.<sup>1</sup>

2. Temporary Restraining Orders ("TRO") are governed by Maryland Rule 15-504 (a), which states in relevant part:

**Standard for granting.** A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person

<sup>1</sup> For ease of reference and the Court's convenience, all defined terms in this Motion will have the same meaning as in the Complaint.

seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

3. In determining whether the standard for granting a TRO has been met, Maryland courts consider the following four factors:

- 1.) the likelihood that the plaintiff will succeed on the merits;
- 2.) the ‘balance of convenience’ determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal;
- 3.) whether plaintiff will suffer irreparable injury unless the injunction is granted; and
- 4.) the public interest.

*Teferi v. Dupont Plaza Associates*, 77 Md. App. 566, 578 (1989) (citing *Department of Transportation v. Armacost*, 299 Md. 392, 404–05 (1984); *State Dep’t v. Baltimore County*, 281 Md. 548, 554 (1977)).

4. Here, pursuant to Md. Rule 15-504(a) and the *Teferi* factors, Norfolk Southern is entitled to the grant of a TRO.

5. First, the likelihood of success on the merits factor militates in favor of Norfolk Southern because MDE cannot satisfy its burden of “sustaining its denial of the inspection of [the Confidential Information.]” *Fioretti v. Maryland State Bd. of Dental Examiners*, 351 Md. 66, 78 (1998). Indeed, the Confidential Information contains both “confidential commercial information” and information with a high degree of security sensitivity – both of which are recognized exemptions under PIA.

6. Md. Code Ann., State Gov’t § 10-617(d)(2) (“Commercial information”) specifically provides for mandatory protection from disclosure of “confidential commercial information.” The Confidential Information includes commercially sensitive information regarding the nature of cargo, the quantities of cargo, shipping routes and frequency. *See Exhibit A*, Aff. of Michael McClellan, at ¶¶ 6-16. Knowledge of the Confidential Information

will permit Norfolk Southern's competitors to identify certain customers of Norfolk Southern and to gain knowledge of volume and utilization rates for particular customers, both of which will allow competitors to encroach on Norfolk Southern's market share. *See id.* Similarly, knowledge of the Confidential Information may allow pipeline and sea/water vessel owners to make targeted, specific investments in infrastructure that may significantly reduce or even eliminate NSRC market share in certain markets. Norfolk Southern's competitors, therefore, will obtain a business advantage from this information by reducing their competitive risk. *See id.*

7. Further, Md. Code Ann., State Gov't § 10-618(j)(2) ("Emergency plans") permits MDE to deny disclosure because the Confidential Information includes shipping routes and dates of highly volatile cargo that may "facilitate the planning of a terrorist attack" or "endanger the life or physical safety of an individual." *See Exhibit B*, Aff. of Carl E. Carbaugh, at ¶¶ 6-31.

8. Thus, as a matter of law, the Confidential Information is protected from disclosure.

9. Second, Norfolk Southern will suffer immediate, substantial and irreparable injury unless the injunction is granted because, as previously noted, the Confidential Information contains sensitive commercial information, which if made available to its competitors, will provide a clear business advantage over Norfolk Southern. *Exhibit A*, Aff. of Michael McClellan, at ¶¶ 17-19.

10. Third, the "balance of convenience" weighs in favor of Norfolk Southern. MDE will suffer no harm if it is prohibited from releasing the Confidential Information. 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. *See* Exhibit B, Aff. of Carl E. Carbaugh, at ¶ 4. 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.

11. Finally, the public interest is best served by granting the injunctive relief because the Confidential Information contains the very kind security sensitive material, *i.e.*, specific commodity information, locations, trade routes, and shipping information of highly flammable material, which Md. Code Ann., State Gov't § 10-618(j)(2) (inspection of public record would “facilitate the planning of a terrorist attack” or “endanger the life or physical safety of an individual”) seeks to exempt from disclosure. *See* Exhibit B, Aff. of Carl E. Carbaugh, at ¶¶ 6-31. Thus, protection from disclosure will avoid potential public harm, as contemplated by Maryland law.

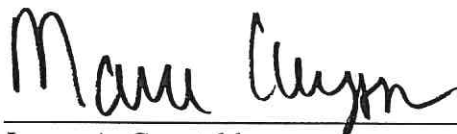
12. In accordance with Maryland Rule 15-504(b), the undersigned counsel for Norfolk Southern has notified Ellen Cohill of the Maryland Attorney General's Office and Amanda R. Degan of the MDE, of Norfolk Southern's intent to file this Motion for Temporary Restraining Order and the accompanying Complaint.

WHEREFORE, Norfolk Southern Railway Company respectfully requests that this Honorable Court issue a Temporary Restraining Order prohibiting Defendant Maryland Department of the Environment from releasing the Confidential Information pursuant to Maryland Public Information Act requests and grant such other and further relief as this Court deems necessary and appropriate.

**REQUEST FOR HEARING**

Plaintiff hereby requests a hearing on his Motion for Temporary Restraining Order.

Respectfully Submitted,



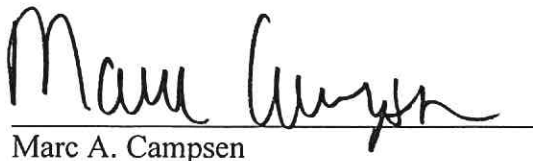
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Marc A. Campsen  
Wright, Constable & Skeen, LLP  
One Charles Center, 16<sup>th</sup> Floor  
Baltimore, Maryland 21201  
(410) 659-1300 telephone  
(410) 659-1350 fax  
Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23 day of July 2014, a copy of the Plaintiff's Motion for Temporary Restraining Order, Request for Hearing, and Proposed Order were served via e-mail and first class mail postage pre-paid:

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

Amanda R. Degan  
Maryland Department of  
the Environment  
Public Information Act Coordinator  
1800 Washington Boulevard  
Baltimore, Maryland 21230

  
Marc A. Campsen

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### **TEMPORARY RESTRAINING ORDER**

Upon consideration of the foregoing Motion for Temporary Restraining Order and the Verified Complaint for Injunctive Relief, the Court having found that Plaintiff Norfolk Southern Railway Company will suffer irreparable harm if the Temporary Restraining Order is not issued in that its "confidential commercial information" will be publicly available if Defendant is not enjoined from disclosing such information pursuant to Maryland Public Information Act requests, the Court having found that it is manifest that the harm to Plaintiff will be irreparable and is not susceptible to monetary compensation, it is this \_\_\_\_\_ day of \_\_\_\_\_ 2014 at \_\_\_\_\_ am/pm hereby

ORDERED that Defendant Maryland Department of the Environment and its agents, servants and employees shall not disclose any information received from Norfolk Southern pursuant to the May 7, 2014, U.S. Department of Transportation Emergency Restriction/Prohibition Order under Docket No. DOT -OST- 2014 -0067; and it is

FURTHER ORDERED that this Temporary Restraining Order, unless further extended by Court Order, will expire on \_\_\_\_\_ day of \_\_\_\_\_ 2014; and, it is

FURTHER ORDERED that a party or any person affected by this Order may apply for a modification or dissolution of this Order on two (2) days' notice, or on such shorter notice as this Court may prescribe, to the party who obtained the Order; and, it is

FURTHER ORDERED that the requirement that Plaintiff post a bond pursuant to Maryland Rule 15-503 shall be and hereby is waived.

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JUDGE

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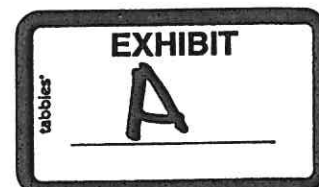
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**AFFIDAVIT OF MICHAEL McCLELLAN**

I, Michael McClellan, am over 18 years of age and competent to testify to all matters set forth herein, based upon my personal knowledge. I hereby make this affidavit in support of Norfolk Southern Railway Company's Motion for Temporary Restraining Order and state under oath as follows:

1. I am employed by Norfolk Southern Corporation (NSC) as Vice President/Industrial Products.
2. As Vice President/Industrial Products I am responsible for five business divisions of NSC including agricultural and consumer goods, chemicals, metals and construction, paper, clay and forest products and short-line marketing and commercial development.
3. In that same capacity, I am responsible for and knowledgeable of monitoring proprietary information of NSC concerning the markets and customers of NSC throughout the twenty-two states and the District of Columbia and the Canadian provinces of Ontario and Quebec in





which NSC through its affiliated railroad operating facilities including Norfolk Southern Railway Company (NSRC) operates and competes. I am also familiar with the other rail competitors of NSC/NSRC and the other transportation competitors which also compete for freight such as truckers, pipeline operators, and vessel operators (barge and ship). In my position as set forth above, I am also familiar with the Emergency Restrictions/Prohibition Order (Order) of the U.S. Department of Transportation issued May 7, 2014 concerning the transportation by rail of Bakken Crude Oil (BCO). See Norfolk Southern's Complaint, Exhibit 1. I am also knowledgeable of NSC/NSRC's response to that Order provided to the Maryland Department of the Environment (MDE) containing information concerning the routing and weekly volume of trains carrying a million gallons or more of BCO.

4. I am also knowledgeable that this information was provided to MDE under and subject to the terms of a confidentiality agreement whereby NSRC declared the information to be confidential and proprietary and not to be released by MDE except to those specific entities, namely first responders and other emergency management personnel. See Norfolk Southern's Complaint, Exhibit 3.

5. Particularly in the area of commodities, such as BCO, NSRC and the railroad industry in general keep this type of specific information confidential for several reasons.

6. Only a limited number of railroads are capable of carrying the volume of crude oil subject to the Order.

7. Only a limited number of terminals and refineries receive such a commodity in the regions serviced by NSRC.

8. For example, in Pennsylvania, Delaware and New Jersey there are less than 10 such refineries or terminals that receive shipments of BCO in the quantity subject to the Order
9. The track systems of those railroads are generally publicly available on the internet through various sources including the railroad themselves, rail enthusiasts web sites and similar information sites.
10. Information concerning the capacity of those refineries or terminals to accept or process crude oil is generally available on the internet as well. For example, the internet site of the Bayway Refinery of Phillips 66 located in Linden and Elizabeth, New Jersey contains such information. Internet sites such as Wikipedia also provide information regarding refining capacity and barrels per day of such refineries. The site [www.sunocologistics.com](http://www.sunocologistics.com) provides information on Sunoco refineries including the Eagle Point Refinery in Westville, New Jersey and indicates not only refining capacity but the number of rail cars that can be off-loaded over a period of time.
11. The foregoing information in isolation cannot be used to determine exact customers, pricing or shipping information by a particular rail or other transportation provider.
12. However, when combined with knowledge of the specific routing of trains carrying BCO, and the volume of such trains over a finite period of time combined with the knowledge that they carry more than one million gallons of BCO, all as provided to MDE under the Order, a competitor can then combine these sources to determine available capacity of a customer (capacity utilization rate) that can be used to compete with NSRC . A competitor can then use this knowledge to approach specific customers handling BCO and specifically target NSRC business and market share. This competitive risk is magnified due to the small number of

customers within NSRC's service region combined with general visibility of rail pricing levels, thus causing substantial harm to NSRC with not only its existing capacity/market share to supply these customers, but also any additional capacity/market share that may be available for future marketing opportunities for NSRC with those same finite number of customers.

13. In addition to rail competitors, the information provided by NSRC under the Order may also be used by competitors of NSRC - specifically truckers, pipeline operators, and vessel operators - in precisely the same manner. To our knowledge, these other forms of transportation are not required to make similar disclosures, thus placing NSRC at a further competitive disadvantage if this information is made publicly available.

14. BCO, as a specialized commodity to a limited number of customers, is more vulnerable to this type of competitive harm than more general, widely-used commodities which are shipped to a much larger number of customers over a larger area of the country to which NSRC provides rail transportation services.

15. For these reasons, both NSRC and the rail industry in general keep confidential these types of information (specific routing, volume of trains and quantity carried) of specified commodities like BCO because of the competitive harm that could be caused by knowing that information.

16. The public release of this information would make it available to NSRC's competitors and cause substantial harm to the ability of NSRC to service its existing customers and to compete for other business to those same types of customers.

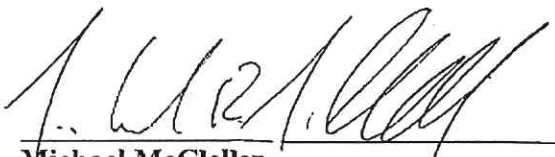
17. Currently, other rail, pipeline and vessel transportation companies are actively competing for this business with NSRC in its service regions.

18. Finally, based upon my experience in the rail industry and the marketing of rail transportation services, the types of customers referred to above who transfer and/or process BCO, expect such information to be kept confidential and the release of such information could cause substantial harm to the business relationships between those customers and NSRC.

19. Therefore based upon my experience in the marketing of rail services for a specified commodity such as BCO, the competitive market place in which the commodity is shipped and based upon my experience and knowledge of marketing and pricing within the rail industry and between competing modes of transportation (truck, pipeline and vessel) of such a commodity, the release of the information provided to MDE by NSRC under the Order to the public would release it into the hands of NSRC's competitors and cause substantial competitive harm to NSRC which would be irreparable.

NOW THEREFORE, I solemnly affirm under penalties of perjury that the contents of the foregoing Affidavit are true and accurate, based upon my personal knowledge.

7/23/14  
Date

  
**Michael McClellan**  
Vice President/Industrial Products  
Norfolk Southern Corporation

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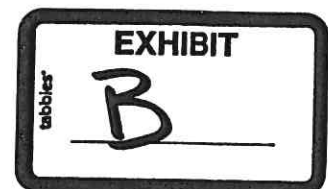
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**AFFIDAVIT OF CARL E. CARBAUGH**

I, Carl E. Carbaugh, am over 18 years of age and competent to testify to all matters set forth herein, based upon my personal knowledge. I hereby make this affidavit in support of Norfolk Southern Railway Company's Motion for Temporary Restraining Order and state under oath as follows:

1. I am employed by Norfolk Southern Corporation (NSC) as Director Infrastructure Security and Facility Security Officer.
2. In my capacity as Director Infrastructure Security and Facility Security Officer, I oversee security issues and policy pertaining to regulatory compliance and relations with the US Department of Homeland Security (DHS), Transportation Security Administration (TSA), US Coast Guard (USCG), Federal Bureau of Investigation (FBI), among other agencies that pertain to security, on behalf of NSC and its railroad operating subsidiaries including Norfolk Southern Railway Company (NSRC). I serve as NSC's Rail Security Coordinator (RSC) as required by



DHS' regulations, 49 CFR § 1580.101; and as NSC's Facility Security Officer (FSO) as required by US Department of Defense (DoD) regulations, DoD 5220.22-M (NISPOM) 1-201.

3. I am familiar with the Emergency Restriction/Prohibition Order of the US Department of Transportation (DOT) pursuant to 49 USC 5121(d), dated May 7, 2014, issued by US Secretary of Transportation Anthony R. Foxx (Order). See Norfolk Southern's Complaint, Exhibit 1. That Order directed railroad carriers operating trains transporting 1,000,000 gallons or more of Bakken crude oil (BCO) to provide notifications containing the operating routes and weekly train volumes of trains meeting this criteria to state emergency response commissions (SERCs). The Order further requires updating of such notifications when the reported numbers are anticipated to change more than 25%.
4. The Order specifically requests this information for the purpose of providing response planning information to state and local emergency responders and law enforcement officials on a need to know basis for responding to public needs and safety should an accident or incident occur involving a BCO train. The DOT has issued guidance that railroads and the recipients of such information should protect this information as confidential, as it should only be shared on a need-to-know basis due to train/public safety concerns surrounding such shipments. See Norfolk Southern's Complaint, Exhibit 2.
5. This affidavit addresses the Maryland Public Information Act requests submitted to Maryland Department of Environment in connection with NSRC's compliance with the Order.
6. In my professional opinion, the information provided by railroads must not be shared nor made available to anyone other than those select entities for whom the information was intended as outlined in the Order.

7. The reason the DOT advised for need-to-know confidentiality of the crude oil train information required by the Order is to prevent the potential for sabotage to trains carrying this commodity by terrorist/extremist perpetrators which could occur if the information on routing and volume was publicly disclosed.

8. The DOT, in its May 23, 2014 release, Exhibit 2 to Norfolk Southern's Complaint, made the following relevant determinations: "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...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." See Norfolk Southern's Complaint, Exhibit 2.

9. The use of information requested in the Order is damaging to security because terrorist/extremists have targeted and attacked freight trains internationally. The numbers of attacks over the years have ranged as high as 60 to 70. TSA annual modal assessments have delineated and summarized the attacks that have occurred against freight trains and infrastructure.

10. Government security agencies – TSA, DHS, and FBI – are unified in the conclusion that certain known terrorist groups and their affiliated organizations and sympathizers pose the principal threat for destructive terrorist attacks to freight railroads.

11. Recent information indicates planning of known terrorist affiliates to attack freight trains transporting flammable liquids. TSA has integrated attack scenarios on tank cars transporting flammable liquids for its 2014 risk assessment of the Transportation Sector as mandated by Congress.
12. According to briefings offered by TSA to date, terrorist/extremist perpetrator threats directed against the US are aspirational in nature. Terrorist postings and publications have directly identified the US freight rail network, and aspirational as a target for terrorist to consider.
13. The most recent edition of Inspire magazine, March 2014, the online, English-language propaganda publication of a known terrorist group, presents a full-page collage depicting varied images that include a listing of grievances, components “to buy” in order to construct an explosive device, and related photographs and items. Among these images are a derailed passenger train and a partly covered note paper listing cities in the United States as well as the terms “Dakota” and “Train crude oil.”
14. While there is no specific reference to freight rail, tank cars, or crude oil as potential targets elsewhere in the magazine, this image does indicate knowledge of the derailment and explosion that occurred in North Dakota of a freight train carrying crude oil in late December 2013.
15. A recent analysis recounts media reporting of the arrest in August 2013 of the co-founder of an Indian extremist group that indicated interest in attaching explosive devices to tank cars to create a “firestorm.” Similar types of explosives have been used successfully against public transport buses in 30 attacks during the past nearly 7 years. Current assessments cite interest in use of similar explosive devices against tank cars carrying flammable liquids.



16. Among the materials seized in the May 1, 2011, raid on Osama bin Laden's compound in Abbottabad, Pakistan, were notes indicating interest in "tipping" or "toppling" trains – that is, causing their derailment. Producing this effect at a bridge was cited as a means of increasing the lethal and destructive effects.
17. The plot targeting VIA Rail passenger train service in the Toronto area, disrupted in April 2013, envisioned damage to track infrastructure to cause derailment of a passenger train at a bridge.
18. We seek to learn from the adverse experience against railroads overseas in order to prevent such attacks in the United States and Canada.
19. The US freight rail industry moves about 30% of all US freight.
20. The US nationwide rail grid consists of numerous line segments and terminals, and to the observer, understanding when and where trains operate is difficult to discern without routing information or knowing type and volume of commodity shipped.
21. Protection of the US freight rail infrastructure is critical to national security. All of US freight rail infrastructure and property is private and subject to trespassing laws. At the same time, the property is open and can be subject to entry at multiple points by the public or a perpetrator of harm. Nationally, there are more than 250,000 miles of railroad rights-of-way, so it is not feasible to build or erect physical barriers to entry.
22. To an observer, then, train operations appear random and constantly different since specific routes, quantity and type of material/commodity shipped are not public.
23. Publicizing data on specific routes and volumes of specific hazardous commodities, like BCO, coupled with details on the frequency of train operations, undercuts an inherent strength in the freight rail industry's risk profile.

24. Unpredictability, i.e. when freight trains operate, where they will be during particular periods, how often, and in what consist, is important from a security standpoint, and these matters are not easily discerned, particularly by a distant adversary with aspirations to commit acts of destructive and lethal violence.
25. This unpredictability is an inherent strength in freight rail security.
26. Terrorists thrive on patterns; patterns in operations and train consists are not easily discerned due to this unpredictability.
27. The availability of specific routing (when and where) and knowledge of the high volume of a flammable material on such trains destroys the unpredictability and greatly increases the risk of attack.
28. The recent manifestations of terrorist interest in freight rail and crude oil and other flammable liquids as potential targets when combined with the rail operations information sought here from MDE will enhance the understanding of these types of rail operations and thus enhance the opportunities and threats to rail shipments of this commodity as terrorist targets.
29. Providing access to routes and train load volumes potentially allows the terrorist to move from being aspirational to developing a strategy and an opportunity - a connecting of the dots - to specifically identify locations to exploit for terrorist incidents. The terrorist can change focus from the large array of freight rail line segments to a smaller, narrower group of specific areas, then matched with volumes that increase the likelihood of incident, increasing the terrorist opportunity, especially when knowing specific routing information through populated or other high risk areas.
30. Recognizing the need to keep such information confidential, NSRC provided the information required by the Order to MDE only after MDE executed a confidentiality agreement

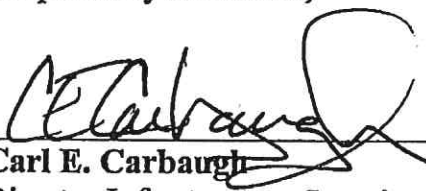
recognizing the information as security and commercially sensitive and agreeing only to release such information to bona fide emergency planning and response organizations for emergency and contingency planning. See Norfolk Southern's Complaint, Exhibit 3.

31. Making public the information that NSRC provided to MDE as confidential under the Order, i.e. specific routing, quantity and frequency of BCO trains, greatly increases the vulnerability of such shipments to attack and potential use as large scale explosives and, as such, creates a reasonable likelihood of endangering both the safety and physical security of NS's train operations, its crews and other employees, and the public and the communities through which such commodities move.

NOW THEREFORE, I solemnly affirm under penalties of perjury that the contents of the foregoing Affidavit are true and accurate, based upon my personal knowledge.

Respectfully submitted,

July 23, 2014  
Date

  
**Carl E. Carbaugh**  
Director Infrastructure Security & FSO  
Norfolk Southern Corporation