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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.

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:

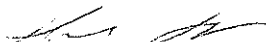
1. The Confidential Information was disclosed to MDE pursuant to a valid NDA executed by a person who had apparent, if not actual, authority to do so.
2. The Confidential Information was disclosed to MDE consistent with the US DOT Emergency Order and subsequent guidance relating thereto, which clearly 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