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U.S. Department of Transportation
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Washington, D.C. 20590-0001

Re: Administrative Appeal of the Final Rule: “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains,”
Docket No. PHMSA 2012-0082 (HM-251), 80 Fed. Reg. 26,644 (May 8, 2015)

INTRODUCTION AND SUMMARY

Pursuant to 49 C.F.R. §§ 106.55 and 106.110, the Village of Barrington and City of Aurora, Illinois, join Earthjustice, Sierra Club, ForestEthics, Waterkeeper Alliance, Riverkeeper, Washington Environmental Council, Friends of the Columbia Gorge, Spokane Riverkeeper, Center for Biological Diversity, and Scenic Hudson in administratively appealing the notification provisions of the Final Rule, “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains” (“Tank Car Rule”), Docket No. PHMSA 2012-0082 (HM-251), 80 Fed. Reg. 26,644 (May 8, 2015). This appeal focuses on the Tank Car Rule’s apparent abandonment of the previous notification requirements put in place through Emergency Order DOT-OST-2014-0067 (May 2, 2014) (“Emergency Order”) and the Rule’s limits on the availability and utility of information to first responders and the public.

On May 28, 2015, the Secretary of Transportation and the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a statement responding to concerns expressed by emergency responders, local governments, conservation groups, and eight U.S. Senators about the Tank Car Rule’s about-face with respect to the previous notification requirements. The statement indicated that superseding the Emergency Order and limiting the availability of emergency response information “certainly was not the intent of the Rule.” The statement promised that: “To address the concerns raised by stakeholders, the May 2014 Emergency Order will remain in full force and effect until further notice while the agency considers options for codifying the May 2014 disclosure requirement on a permanent basis.” PHMSA Notice regarding Emergency Response Notifications for Shipments of Petroleum Crude

Oil by Rail (May 28, 2015) (emphasis in original).¹ We commend the Secretary and PHMSA for issuing this statement and committing to retain the Emergency Order notifications.

The final Tank Car Rule, however, contains extensive discussion of information-sharing approaches that is contrary to the May 28, 2015 statement. On its face, the Tank Car Rule could be read to abandon the Emergency Order and cut back on both emergency responder and public access to train route and emergency response information. This appeal asks the Secretary to revise the final Tank Car Rule to conform to the agency's recently stated intent and eliminate any confusion or risk that the rule could be misread in the future. This appeal explains why the Tank Car Rule could not legally and should not as a matter of public policy repeal the Emergency Order and substitute another scheme that reduces the amount and utility of the information available to emergency responders and the public.

At the outset, the Proposed Tank Car Rule (August 1, 2014) sought comments on codifying the Emergency Order and on potential modifications, such as lowering the triggering threshold and expanding the types of crude oil or possibly other hazardous materials covered by the notification scheme. Nowhere did the Proposed Rule alert the public to, or seek comment on, the possibility that the notification scheme would be abandoned. Nor did the Proposed Rule inform the public that the Department of Transportation ("DOT") might consider utilizing a pre-existing regulatory process designed for anti-terrorism planning that covers a smaller universe of information about train routes, frequency, and hazardous cargo, erects obstacles to emergency responders' access to important information, and eliminates public access to information that has been available over the past year. As a result, neither we nor any other segment of the interested public (apart from the railroad associations that lobbied for the notification proposal's deletion) had an opportunity to review or provide comments on the wholesale removal in the final rule of the notification scheme. Language in the Tank Car Rule indicating that the Emergency Order notifications are superseded was included in violation of the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. Accordingly, the Emergency Order

¹ Available at <http://phmsa.dot.gov/hazmat/phmsa-notice-regarding-emergency-response-notifications-for-shipments-of-petroleum-crude-oil-by-rail>.

requirements must remain in place.²

Apart from this procedural violation, allowing the Tank Car Rule's information sharing provisions to supplant the Emergency Order would run counter to the facts, relevant laws, and logic. First, DOT has repeatedly found that emergency responders need additional information about train routes and threats in order to be prepared for oil spills and disasters. Indeed, this was the purpose behind the Emergency Order. The Tank Car Rule's information sharing provisions limit and make it more difficult for emergency responders to obtain such information. Second, the Tank Car Rule piggybacks on a regulatory scheme that is designed primarily for anti-terrorism planning and response. Not surprisingly, a scheme developed to thwart deliberate sabotage and terrorism is poorly suited to providing communities the information they need to prepare for and lessen the consequences of unintentional rail accidents and oil spills. Third, in removing the proposed state notification section from the final rule and reversing course in order to placate the railroads' desire for secrecy, DOT made a decision that is counter to law and the agency's own findings of fact. DOT's governing statutes do not support treating this information as sensitive security information that must be restricted to a need-to-know basis, and DOT itself has found the railroads have failed to substantiate their assertions that the information contains confidential business information. DOT is constrained by the governing statutes, the Freedom of Information Act, and other principles of openness from allowing information to be kept secret when a documented and legally cognizable basis for secrecy has not been demonstrated. For these reasons, we urge DOT to (1) modify the final Tank Car Rule to eliminate any suggestion that it supplants the Emergency Order and (2) codify and expand the Emergency Order requirements.

² Indeed, when it issued the Advanced Notice of Proposed Rulemaking on September 6, 2013, PHMSA noted that it was addressing the NTSB recommendation that it "require that railroads immediately provide to emergency responders accurate, real-time information regarding the identity and location of all hazardous materials on a train." The NTSB recommendation had served as a partial basis for the Village of Barrington and TRAC Coalition's Petition for Rulemaking (docketed as P-1587). In the Proposed Rule, however, PHMSA summarily announced that it would not address NTSB's real-time information recommendation. 79 Fed. Reg. at 45036. Thereafter, although TRAC, in its Proposed Rule comments explicitly urged the federal agencies "not to ignore its requests of 2012 and 2013 that railroads be required to transmit electronically to emergency dispatch centers a train's manifest immediately following an accident or derailment, (TRAC Comments at 27), the Final Rule, without any mention of the issue, disregarded TRAC's request. Because there is no rational reason to deny first responders real-time information, and because the Final Rule could be viewed as a means to avoid providing such information to first responders, DOT should take immediate steps to move beyond any voluntary agreements with railroads regarding the provision of such vital information.

BACKGROUND

I. THE SECRETARY ISSUED THE NOTIFICATION EMERGENCY ORDER TO ABATE IMMINENT HAZARDS FROM THE SURGE IN EXPLOSIVE CRUDE-BY-RAIL SHIPMENTS.

A. Imminent Hazard Findings

Secretary of Transportation Anthony Foxx has responded to the surge in crude-by-rail disasters by issuing a series of emergency orders, encouraging voluntary industry measures, and promulgating new regulations. On May 7, 2014, Secretary Foxx issued the notification Emergency Order at issue here upon finding (at 1-2) “that an unsafe condition or 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 shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d).” He elaborated by calling the number of recent rail accidents “startling” and the amount of oil spilled “voluminous,” and citing the demonstrated propensity for rail accidents to occur and spill large quantities of flammable crude oil that present imminent hazards. Order at 4. More specifically, the Order states: “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.” Order at 4; *see also id.* at 5 (“These accidents have demonstrated the need for emergency action to address unsafe conditions or practices in the shipment of petroleum crude oil by rail”).

The Emergency Order came after the Secretary and the railroads had taken numerous steps to reduce rail risks, including the industry adoption of the voluntary CPC-1232 tank car standards for tank cars built after October 2011. The Order itself reviewed other emergency orders and voluntary measures that addressed classification of Bakken crude, reduced speed limits to those adopted in the final rule, subjected crude unit trains to routing analysis as required in the final rule, and required train securement. It nonetheless concluded:

Notwithstanding the above DOT actions, in light of the continued risks associated with petroleum crude oil shipments by rail, the further actions described in this Order are necessary to eliminate unsafe conditions and practices that create an imminent hazard to public health and safety and the environment.

Order at 9-10. The Secretary then made specific findings about how critical prompt and effective emergency response can be, the reality that local emergency responders are often the first on the scene, and the need for additional communication between the railroads and emergency responders to ensure responders are prepared for an accident involving large quantities of explosive crude. Order at 10-11.

B. The Emergency Order's Notification Requirements

To facilitate this critical communication connection and give emergency first responders the information they need to prepare for rail accidents, the Emergency Order requires railroads with trains transporting one million gallons or more of Bakken crude oil to submit notifications to state emergency response centers ("SERCs") in each state in which the railroad operates trains transporting 1 million gallons or more of Bakken crude oil. This gallon threshold translates to approximately 35 tank cars laden with crude oil. The disclosures must: (1) estimate the number of trains expected to travel weekly through each county within the state; (2) identify and describe the petroleum crude oil expected to be transported; (3) provide basic emergency response information;³ (4) identify the rail routes over which the material will be transported; and (5) designate a railroad point of contact for SERCs and other emergency responders. Emergency Order at 2, 15. The initial notifications were due in early June 2014, and the railroads were required to update the notifications when there was a material change in the estimated volumes or frequencies of trains traveling through any county. *Id.* at 2, 13, 15-16. The Order specifies that a 25% increase or decrease in the number of implicated trains per week constitutes a material change. *Id.* at 13, 15-16.

C. Public Access to the Notifications

Shortly after issuance of the Emergency Order, controversy arose over public disclosure of the notifications. In particular, the railroads actively fought to enter into nondisclosure agreements with the SERCs (and the States themselves) in order to keep the train routes and emergency preparedness information from the public. 79 Fed. Reg. 45,016, 45,041 (Aug. 1, 2014). For its part, DOT issued a document providing answers to frequently asked questions ("FAQs") in which it indicated that "DOT prefers that this information be kept confidential, and acknowledged that railroads may have an appropriate claim that this information constitutes confidential business information, but that such claims may differ by state depending on each state's applicable laws." Frequently Asked Questions on DOT's May 7, 2014 Emergency Order Regarding Notification to Communities of Bakken Crude Oil Shipments.⁴ Neither the Emergency Order nor DOT's FAQs required that states sign confidentiality agreements in order to receive the SERC notifications.

When pressed by the railroads to agree to confidentiality, most states refused, deciding instead to let their own public records laws control public access. Throughout the country, news outlets and nongovernmental organizations filed public records requests seeking access to the

³ The Emergency Order requires that the notifications contain information specified in 49 C.F.R. part 172, which calls for: "(1) The basic description and technical name of the hazardous material ...; (2) Immediate hazards to health; (3) Risks of fire or explosion; (4) Immediate precautions to be taken in the event of an accident or incident; (5) Immediate methods for handling fires; (6) Initial methods for handling spills or leaks in the absence of fire; and (7) Preliminary first aid measures." 49 C.F.R. § 172.602.

⁴ Available at <https://www.fra.dot.gov/eLib/Details/L05237>.

notifications, including requests filed by Earthjustice on behalf of Sierra Club and Sightline Institute in over a dozen states. Most states determined that the notifications did not contain sensitive security or confidential business information and had to be released to the public, unless the railroads went to court and obtained a court order blocking disclosure. Despite making pleas for secrecy, the railroads failed to sue to block access with the sole exception of Maryland, where two railroads have brought such a lawsuit. *See* Curtis Tate, *Norfolk Southern sues to block disclosure of crude oil shipments*, McClatchy DC (July 24, 2014).⁵ Throughout the country, the train route and emergency response information is widely available to the public, including in some states that regularly post the entirety of the SERC notifications on a state-agency website.⁶

Pennsylvania became the subject of a contested proceeding when the Pennsylvania Emergency Management Agency (“PEMA”) denied a request from McClatchy Newspapers, claiming the records contain confidential proprietary information. On appeal, the Pennsylvania Office of Open Records reversed and ordered public release of the notifications. *In re Curtis Tate and McClatchy Newspapers v. PEMA*, Docket No. AP 2014-1199 (Oct. 3, 2014) (attached as Exhibit 1). The Open Records Office issued a decision rejecting the railroads’ contention that the information is commercial in nature and that its release would cause any competitive harm. Based on its review of the notifications, it described them as (1) general statistical information, estimating the number of trains in each country, their frequency, and the anticipated routes of travel; and (2) general safety information, such as Norfolk Southern’s emergency response guidebook, descriptions of how to identify hazardous materials transported by train, methods of remediating spills, and the roles of emergency responders and the railroads in a rail accident. Importantly, the Office also rejected the railroads’ argument that disclosure would harm public security and make the trains the target of a terrorist attack, as the notifications did not disclose specific building plans, exact locations of static hazardous goods, or technical information about vulnerable infrastructure—generally the types of information that the State would keep confidential.

The issue of public disclosure also arose during the Paperwork Reduction Act review of the information collection aspects of the Emergency Order. In response to DOT’s Federal Register notice of information collection, the Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”) filed comments objecting to the notification requirement. AAR and ASLRRA filed their comments in secret, but

⁵ Available at <http://www.mcclatchydc.com/2014/07/24/234381/norfolk-southern-sues-to-block.html>.

⁶ *See, e.g.*, Joshua Shneyer, *Dozens of Trains Haul Volatile Bakken Oil to NY Weekly: Railroads*, Reuters (Jul. 15, 2014), available at <http://www.reuters.com/article/2014/07/15/us-oil-trains-new-york-idUSKBN0FK2NR20140715>; Scott Fallon, *Trains Carrying Highly Explosive Bakken Oil Coming Into N.J. By The Dozens Every Week*, NorthJersey.com (Aug. 12, 2014), available at <http://www.northjersey.com/news/trains-carrying-highly-explosive-bakken-oil-coming-into-n-j-by-the-dozens-every-week-1.1066053>; Oregon State Police/Office of State Fire Marshal, *Crude Oil Reports*, <http://www.oregon.gov/osp/SFM/Pages/SERC/CrudeOilReports.aspx>.

DOT subsequently disagreed and added the railroads' comments to the public docket. The railroads claimed that the Emergency Order notification requirements were redundant and that public disclosure of the notifications raises security and confidentiality concerns.

DOT rejected the associations' arguments. 79 Fed. Reg. 59,891, 59,892 (Oct. 3, 2014). First, DOT and the Federal Railroad Administration ("FRA") strongly disagreed with the assertion that the Emergency Order serves no useful purpose in light of voluntary industry disclosures. As DOT noted, such disclosures are purely voluntary, only available upon written request by each emergency response group, and more limited in terms of the information made available. Specifically, the voluntarily shared information is limited to annual commodity flow information covering the top 25 hazardous commodities transported through a community, which might not include Bakken oil. Second, DOT consulted with the Department of Homeland Security and rejected the railroads' security claims:

DOT notes that the information does not fall into any of the fifteen categories of Sensitive Security Information (SSI) defined by either DOT or Transportation Security Administration (TSA) regulations.... Further, at this time, DOT finds no basis to conclude that the public disclosure of the information is detrimental to transportation security.

Id. Third, DOT concluded that the notifications contain no information that is protected as confidential business information under federal law. While it held out the possibility that the railroads might be able to muster such a claim, the railroads had documented no actual harm from public disclosure of the notifications. *Id.* Finally, DOT reiterated that it is critical that emergency responders have this information and indicated that it did not want to prohibit disclosure without "full public scrutiny and comment through the rulemaking process." *Id.*

II. THE PROPOSED RULE SOUGHT COMMENT ON CODIFICATION OF THE EMERGENCY ORDER.

In the Proposed Tank Car Rule, DOT proposed codifying the Emergency Order because the recent "accidents have demonstrated the need for action in the form of additional communication between railroads and emergency responders to ensure that the emergency responders are aware of train movements carrying large quantities of crude oil through their communities." 79 Fed. Reg. at 45,041. It sought comment on whether SERCs should be the entities receiving the notifications, whether the one million gallon threshold should be lowered, whether notification requirements should extend beyond Bakken crude, and whether the notifications should be disclosed to the public. It did not solicit comments on (or even disclose it was considering) abandonment of the proactive notification system.

The vast majority of public comments supported a notification scheme, like that in the Emergency Order, with an overwhelming majority wanting to expand the reach of the notifications. *Id.* at 26,710 ("[w]ith near unanimity, commenters believe the one million gallons threshold is too high and the idea of limiting it to just Bakken crude oil was too narrow.").

A diverse array of interests weighed in. Cities and towns from around the country also urged increased transparency and expansion of the notification coverage in their comments on the Proposed Rule. The Association of Washington Cities stated that “increasing transparency of the transport of flammable liquids [is a] critical step[] for federal regulators to take to prevent train accidents and protect communities along rail lines.” The City of Berkeley urged that “[t]his requirement should be expanded to cover any hazardous materials, not just Bakken crude, and to apply to all trains carrying these materials because of the serious safety and health risks.” Illinois’ Emergency Management Agency stressed that “[p]lanning is critical to saving lives in the event of an incident. In order to do this effectively, response agencies need to be made aware of Bakken Crude Oil transportation in a more detailed and realistic way.” The NTSB emphasized its concerns that the proposed requirements for notification did not include ethanol and were limited to Bakken crude. State environmental agencies, unions, first responders, and Senators and Members of Congress likewise urged expansion of the notification rule. *See* Regulations.gov: PHMSA 2012-0082 (comments on Proposed Rule, comment period closed Sept. 30, 2014).

III. THE FINAL RULE ELIMINATED THE EMERGENCY ORDER NOTIFICATION SCHEME.

In the final rule, DOT again found that recent crude-by-rail accidents “demonstrated the need for improved awareness of communities and first responders of train movements carrying large quantities of hazardous materials through their communities, and thus being prepared for any necessary emergency response.” 80 Fed. Reg. at 26,709. The final Tank Car Rule indicates that it abandoned the proposal to codify the Emergency Order notification scheme in order to address the railroads’ concerns about disclosing the notifications. 80 Fed. Reg. at 26,648, 26,711, 26,712, 26,713-14. Instead, the final rule expanded the existing rail routing requirements so that they now apply to High-Hazard Flammable Trains, *i.e.*, those with a contiguous block of 20 loaded tank cars or with 35 loaded tank cars in train, and then found that this change counted as notification. 80 Fed. Reg. at 26,648, 26,709-14 (amending 49 C.F.R. § 172.802). Another part of the Tank Car Rule makes the existing rail routing analysis requirements applicable to High-Hazard Flammable Trains, so that railroads will need to analyze whether alternative routes should be used to ship large quantities of crude oil by rail.⁷ As part of that analysis, the railroads must compile commodity data for their rail lines on an annual basis after the year’s end. In addition, the final rule relies on rail security plans, which must identify a railroad point of contact related to routing designated hazardous materials, as a substitute for direct notification of SERCs of a responsible rail official for emergency response. 80 Fed. Reg. at 26,713-14.

⁷ Oddly, DOT agreed with the majority of commenters who argued for a reporting threshold smaller than one million gallons, but then it adopted the High-Hazard Flammable Trains definition as the threshold, even though it concurrently relaxed that definition so that it applies to 35 loaded tank cars in a train, which is approximately one million gallons. *Id.* at 26,710. Using the High-Hazard Flammable Trains definition makes the meager reporting requirements applicable to all hazardous flammable materials, not just Bakken crude.

The Tank Car Rule repeatedly states that it did not adhere to the Proposed Rule and instead relied on the rail routing analysis and rail security plans as the vehicle for making a different set of information available to emergency responders upon request. 80 Fed. Reg. at 26,648, 26,711, 26,712, 26,713-14. It goes on to describe the fate of the Emergency Order:

In this rulemaking, we have adopted notification requirements for large volumes of crude oil transported by rail. These requirements were designed to codify the requirements of the May 7, 2014 EO. While some amendments to the original proposal are made, the requirements adopted in this rulemaking align with the intent of the May 7, 2014 emergency order.

As the May 7, 2014 emergency order and the requirements adopted in this rulemaking related to notification address the same safety issue, the May 7, 2014 emergency order is no longer necessary. Therefore, the requirements adopted in this rule supersede the May 7, 2014 emergency order and make it no longer necessary once the information sharing portion of the routing requirements come into full force. Therefore, this emergency order will remain in effect until March 31, 2016.

80 Fed. Reg. at 26,718 (emphasis added).

Taken at face value, the Tank Car Rule weakens the notification scheme in four ways. First, the rail routing regulation calls for annual compilation of aggregate commodity data after the close of the year. This information is far less informative and useful to emergency responders than the weekly train routes by county and emergency response information covered by the Emergency Order. Second, the rail routing regulation was promulgated to increase security and reduce vulnerability to intentional acts of terrorism. It therefore limits the dissemination to those demonstrating a need-to-know, and it has mandatory secrecy provisions. By piggybacking on this regulation, the Tank Car Rule indicates that it is acceding to the railroads' demands for secrecy. Third, instead of requiring notifications to the SERCs, which were established to coordinate and improve emergency response, the rail routing rule makes information available to state fusion centers, established to fight terrorism, that are integrated into some of the rail routing analysis information sharing. Fourth, the final rule points to a voluntary program in which the railroads say they will release to bona fide emergency response agencies who agree to secrecy annual reports of hazardous commodities flowing through the community for a previous 12-month period. Even though, in other parts of the rule, DOT decided that voluntary railroad programs are no substitute for regulatory requirements, and even though DOT previously made such a finding in rejecting the railroads' voluntary disclosure program as a substitute for the Emergency Order notification scheme, DOT here stepped away from those conclusions and ceded the public interest to private railroads.

GROUNDNS FOR APPEAL

I. IT WOULD VIOLATE NOTICE AND COMMENT RULEMAKING REQUIREMENTS FOR DOT TO REPLACE THE EMERGENCY ORDER WITH A NEW SCHEME IT NEVER PROPOSED FOR PUBLIC COMMENT.

Federal agencies, like DOT or PHMSA, must adopt administrative rules through notice and comment rulemaking. They must propose regulations with sufficient detail to enable the public to know the parameters of what is on the table and to provide meaningful comments. 5 U.S.C. § 553.

In the Proposed Rule, DOT revealed its intention to codify the Emergency Order and posed specific questions about modifying its scope. For example, it sought comment on whether the notifications should be required for hazardous fuels other than Bakken and for trains carrying less than one million gallons of Bakken or such other hazardous flammable liquids. It also sought comment on whether the SERCs are best able to ensure emergency responders have ready access to the information and on public disclosure. These questions addressed potential expansions to when notifications would be required, not elimination of the notifications altogether. The Emergency Order remained the centerpiece of the notification scheme in terms of the contents of the notifications. DOT also never suggested that it might deviate from its goal of ensuring train routes and basic emergency response information would affirmatively be made available to emergency responders through means designed to ensure it would be disseminated quickly and effectively.⁸

The plain language of the final rule, however, jettisons the Emergency Order notification scheme because another part of the Tank Car Rule makes a pre-existing rail routing analysis requirement applicable to High-Hazard Flammable Trains. That rail routing analysis includes an annual compilation of aggregate commodity data by rail line on a retrospective basis, and the railroads say they will voluntarily make available on request to bona fide emergency response entities that commit to secrecy. Annual commodity compilation is less useful to emergency responders who must evaluate and respond to real-time threats. DOT eliminated affirmative notification of SERCs of a railroad contact responsible for emergency response because the railroads must identify a contact person for rail routing analysis in their security plans. 80 Fed. Reg. at 26,713-14.

Nothing in the Proposed Rule presaged this switcheroo. The Proposed Rule included a proposal to make the rail routing analysis applicable to High-Hazard Flammable Trains, but it never discussed the information collection components of such a routing analysis or whether the

⁸ Nor is the Final Rule a “logical outgrowth” of what was proposed, as it replaced more public notification with less. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); see also DOT Rulemaking Discussion at <http://www.dot.gov/regulations/rulemaking-process> (“If the “logical outgrowth test” is not met, we would need to provide a second notice with an opportunity for public comment on the changes” to comply with the APA).

information generated through that process would be available to emergency responders. Nor did the Proposed Rule describe the role of security plans in disseminating information to emergency responders. The public was not put on notice that DOT might abandon the Emergency Order notification scheme and instead defer to the rail routing analysis process for conveyance of train route and emergency response information to responders (or the public). In connection with other aspects of the final rule, DOT refused to consider comments that suggest an approach that had not been presented as part of the Proposed Rule for public comment. 80 Fed. Reg. at 26,706 (API RP 3000); 26,708 (expanding the rail routing factors); 26,708 (allowing communities to opt out of High-Hazard Flammable Trains traffic through their communities). Yet, that is what the text of the Tank Car Rule purports to do with respect to the notification scheme.

Proceeding in this fashion shuts the public out of developing the notification requirements in the face of intense public interest and engagement on this issue. The overwhelming majority of public comments, including from local governments, emergency response agencies, state and federal agencies, Senators, and Members of Congress, favored expanding the Emergency Order notification scheme by lowering threshold and expanding beyond Bakken crude oil. 80 Fed. Reg. at 20,710, 26,712, 26,713. These comments assumed DOT would continue to promote its stated goal of ensuring emergency responders have easy access to the train route information spelled out in the Emergency Order. For its part, the National Transportation Safety Board (“NTSB”) favored lowering the reporting threshold, applying notification requirements to all crude and ethanol, and increasing disclosures to emergency responders and communities along the rails. NTSB Comments, at 3-7 (Sept. 26, 2014).

If DOT had suggested that it might cut back on affirmatively requiring the Emergency Order notifications to emergency responders, such a proposal would have elicited extensive input on whether the pre-existing rail routing analysis scheme would deprive emergency responders and the public of useful information. In fact, after release of the final Tank Car Rule, the Washington State Response Commission explained that having notifications go only to state Fusion Centers “adds unnecessary layers to obtaining the information that is critical to our local communities” and that SERCs should be designated recipients because they have established, ongoing communications with local responders. Letter to Washington Emergency Management Division from State Emergency Response Commission (May 8, 2015) (attached as Exhibit 2). Soliciting comments would have enabled DOT to assess whether putting the burden on emergency response centers to make an affirmative request for information from the railroads would reduce or delay their access to critical information.

The vociferous response to the repeal of the Emergency Order illustrates the intense public interest in this matter and the need for DOT to abide by notice-and-comment rulemaking procedures before changing its mind on such important public issues.. Senator Cantwell and seven other U.S. Senators immediately sent a letter calling upon Secretary Foxx to keep the SERCs in the disclosure scheme, require that the critical train route and response information be made proactively available to emergency responders, and ensure public access to crude-by-rail

information. Letter to Secretary Anthony Foxx from Senators Cantwell, Casey, Durbin, Murray, Schumer, Baldwin, Franken, and Gillibrand (May 6, 2015) (attached as Exhibit 3). And within days of the release of the Tank Car Rule, a Spokesman Review editorial lamented the fact that DOT “capitulated” to the railroads’ pleas for secrecy and decided to keep the public from knowing how much crude has been passing through their communities. New Rules on Oil Trains May Block Transparency, May 5, 2015.⁹

Candidly seeking public input before abandoning the Emergency Order notification scheme is also compelled by presidential direction to ensure that government is participatory. President Obama has issued such direction and explained that:

Public engagement enhances the Government’s effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Memorandum on Transparency and Open Government for the Heads of Executive Departments and Agencies (Jan. 21, 2009).¹⁰

The Secretary and PHMSA have now committed to keep the Emergency Order in place until it is codified, which addresses our concern that the Tank Car Rule purports to abandon the Emergency Order without first proposing such a course of action and eliciting public comment. We urge DOT to revise the Tank Car Rule to withdraw and modify the language embedded throughout, which indicates defaulting to the rail routing rule’s information sharing provisions will supplant the Emergency Order notification scheme.

Finally, DOT should adopt regulatory language finishing what it started in this rulemaking: expanding the Emergency Order beyond Bakken crude. 80 Fed. Reg. at 26,713. DOT also solicited and reviewed public comments on lowering the reporting threshold to less than one million gallons. DOT concluded that a lower threshold is appropriate. *Id.* at 26,710. Given that DOT completed the notice-and-comment process and concluded that such modifications were appropriate, it should amend the final Tank Car Rule to incorporate such expansions.

⁹ Available at <http://www.spokesman.com/stories/2015/may/05/editorial-new-rules-on-oil-trains-may-block/>.

¹⁰ Available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>.

II. DOT'S RAIL ROUTING REGIME WAS DEVELOPED TO SERVE ANTI-TERRORISM AND RAIL SECURITY PURPOSES, NOT TO STRENGTHEN TIMELY EMERGENCY RESPONSE TO RAIL ACCIDENTS.

The Tank Car Rule extends a pre-existing rail routing regulation to cover High-Hazard Flammable Trains. However, DOT promulgated the rail routing regulation to address terrorism threats and improve rail security, not to provide information to emergency responders. DOT adopted the existing rail routing regulation in 2008 both under its HMTA authority and as directed by the Implementing Recommendations of the 9/11 Commission Act of 2007. 73 Fed. Reg. 20,752 (April 16, 2008). The regulation requires rail carriers to compile annual data on rail shipments of certain hazardous materials, use the data to analyze the security and safety risks along rail routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments. 49 C.F.R. § 172.820.

PHMSA coordinated with FRA and the Transportation Security Administration in proposing the rail routing regulation under HMTA with a heavy focus on densely populated cities, events with large numbers of people, iconic buildings, and environmentally sensitive areas, which it called "high-consequence events." While such high-consequence events could be rail accidents like those we have seen in the past few years, the rule focused extensively on intentional acts of terrorism and sabotage and what it called "high-consequence targets." The rule was not designed to address risks of rail accidents throughout the country, but honed in on these particular types of risks.

After PHMSA had proposed the rule, the 9/11 Commission Act directed PHMSA to include a requirement directing rail carriers transporting "security-sensitive materials" to select the safest and most secure route for transporting such materials based on the rail analyses. Pub. L. No. 110-53, § 1551(e), 121 Stat. 266. The Secretary of Homeland Security, in consultation with the Secretary of Transportation, determines through rulemaking what materials will be deemed "security-sensitive material" based on their significant risk to national security while being transported in commerce. 73 Fed. Reg. at 20,755. The agencies designated security-sensitive materials based on their attractiveness as targets for terrorists and the potential for them to be used as weapons of opportunity or weapons of mass destruction. *Id.* at 20,757.

As the first step in the rail routing analysis, rail carriers must compile commodity data for the previous calendar year for the hazardous materials covered by the regulation. The data must be collected by route, line segment or a series of line segments as aggregated by the rail carrier. The data must identify the geographic location of the route (although the degree of specificity and scale is unstated) and the total number of shipments. 49 C.F.R. § 172.820(b). The rail carrier must use the commodity data in analyzing the security and safety along rail routes and making routing decisions. 49 C.F.R. § 172.820 (c)-(f).

The routing regulation allows the rail carriers "to share information as necessary and appropriate to enable state and local governments to provide meaningful input into the process." 73 Fed. Reg. at 20,759. The purpose of such information sharing is not to ensure local

governments are prepared for rail accidents, but instead to enable the railroads to obtain information about risks. *Id.* at 20,755, 20,768. DOT explained:

the specific authority to states, localities, and Indian tribes is limited to providing information on the security risks to high-consequence targets along or in close proximity to a route used by a rail carrier to transport security-sensitive materials. Nonetheless, as discussed above, this does not prevent rail carriers from working with state, local, and tribal governments, including sharing information as necessary and appropriate, to enable these non-Federal government bodies to provide meaningful input into the rail carrier's process of conducting the route safety and security analysis, and making routing decisions based on that analysis.

Id. at 20,768.

State, local, and tribal government access is limited "to those with a need-to-know for transportation safety and security purposes" and cannot be disclosed under state, local, or tribal laws. *Id.* at 20,759. It cannot be broadly disclosed to government entities. This need-to-know limitation was imposed pursuant to Sensitive Security Information regulations. *Id.* at 20,765. The final rail routing rule acknowledged that state, local, and tribal governments need information about hazardous shipments through their jurisdictions, but referred to guidance and emergency preparedness programs to meet that need. *Id.* at 20,757.

The Tank Car Rule depicts the commodity data compilation as a substitute for the train route information required to be disclosed under the Emergency Order. However, the commodity data covers a longer time span, is retrospective in nature, is aggregated, and contains no emergency response information. In these ways, it is different in kind from the information provided under the Emergency Order in ways that are never addressed in the final Tank Car Rule.

Moreover, the rail routing rule does not require the submission of the commodity data to SERCs or other emergency responders. Nor does it compel submission of the commodity data to DOT or to state, local, or tribal governments. Unless it makes its way into their government files, the commodity data would not be subject to public records laws applicable to government records.

For disclosure to emergency responders, DOT is placing its faith in a set of voluntary industry recommended practices. AAR has developed recommended operating practices, the most recent set of which is embodied in AAR Circular OT-55-O. AAR recently amended the objectives of its Transportation Community Awareness and Emergency Response Implementation to apply to all hazardous commodities, not its prior list of 25. As amended, the objectives provide:

When requested assist Local Emergency Planning Committees (LEPC's) in assessing the hazardous materials moving through their communities and the

safeguards that are in place to protect against unintentional releases. Upon written request, AAR members will provide bona fide emergency response agencies or planning groups with specific commodity flow information covering all hazardous commodities transported through the community for a 12 month period in rank order. The request must be made using the form included as Appendix 3 by an official emergency response or planning group with a cover letter on appropriate letterhead bearing an authorized signature. The form reflects the fact that the railroad industry considers this information to be restricted information of a security sensitive nature and that the recipient of the information must agree to release the information only to bona fide emergency response planning and response organizations and not distribute the information publicly in whole or in part without the individual railroad's express written permission. It should be noted that commercial requirements change over time, and it is possible that a hazardous materials transported tomorrow might not be included in the specific commodity flow information provided upon request, since that information was not available at the time the list was provided.

It is far from clear that local emergency responders will be able to obtain information through this process that will assist them in being aware in a timely manner of train movements through their communities.

In addition to train routes, the Emergency Order directed the railroads to designate a contact responsible for emergency response and to share that designation with the SERCs. In place of this affirmative designation and notification, the final Tank Car Rule refers to security plans developed by the railroads. In 2003, DOT adopted security regulations requiring railroads transporting designated hazardous materials to develop and implement security plans and to train their employees to recognize and respond to security threats. 68 Fed. Reg. 14,510 (March 25, 2003); 49 C.F.R. § 172.800(b). These plans must address such matters as personnel security, background checks, unauthorized access to security information, and en route security. 49 C.F.R. § 172.802. They also are required to designate a rail carrier point of contact for routing issues. 49 C.F.R. § 172.820(g). The point of contact name and contact information must be given to state or regional Fusion Centers, which have been established to coordinate with state, local and tribal officials on security matters. State, local and tribal officials in jurisdictions affected by a rail carrier's routing decisions may contact the railroad to obtain the point of contact information. 49 C.F.R. § 172.820(g).

III. UNLESS THE EMERGENCY ORDER IS KEPT IN PLACE, THE NEW SCHEME WILL REDUCE THE AMOUNT AND UTILITY OF CRITICAL INFORMATION AVAILABLE TO EMERGENCY RESPONDERS AND MAKE IT HARDER FOR RESPONDERS TO OBTAIN EVEN THAT INFORMATION.

By purporting to jettison the Emergency Order notification scheme and defaulting to the meager rail routing consultation and information sharing provisions, the Tank Car Rule would cut back on the amount of information made available to emergency responders and

communities, revert to an after-the-fact aggregate compilation of data with less utility in preparing emergency responders for rail disasters, replace SERCS, which regularly coordinate with local emergency responders, with Fusion Centers, which focus first and foremost on anti-terrorism, and place the onus on local emergency responders to obtain information from the railroads. While purporting to make such a shift, the Tank Car Rule barely acknowledges the many ways in which it cuts back on emergency responder preparedness and community right to know.

DOT has not backtracked from its goal originally stated in the Emergency Order and repeated in the Proposed Rule. The final rule reiterates that recent crude-by-rail accidents “demonstrated the need for improved awareness of communities and first responders of train movements carrying large quantities of hazardous materials through their communities, and thus being prepared for any necessary emergency response.” 80 Fed. Reg. at 26,709. More specifically, “[r]ecent accidents have demonstrated the need for action in the form of additional communication between railroads and emergency responders to ensure that the emergency responders are aware of train movements carrying large quantities of flammable liquid through their communities in order to better prepare emergency responders for accident response.” *Id.* at 26,735. In assessing the alternative of rescinding the Emergency Order with no other substitute information sharing mechanism, DOT concludes:

This alternative effectively would return to the status quo prior to publication of the emergency order. This EO was designed to inform communities of large volumes of crude oil transported by rail through their areas and to provide information to better prepare emergency responders for accidents involving large volumes of crude oil. As the primary intent of this EO was to eliminate unsafe conditions and practice that created an imminent hazard to public health and safety and the environment, removal of this order without a corresponding action to reduce the risk is not acceptable and thus not selected.

Id. at 26,735.

Given this goal, one would expect the Tank Car Rule to examine whether the rail routing regulation would afford emergency responders with information comparable to what railroads provide to the SERCs under the Emergency Order. One also would expect an assessment of whether emergency responders would have ready and timely access to such information. However, the final rule is devoid of such an analysis.¹¹

With respect to the information made available to emergency responders (public access is addressed in the next section), the Tank Car Rule (without the Emergency Order) would backtrack in four significant respects: (1) the scale of the information collected; (2) its

¹¹ In several places in the final Tank Car Rule, DOT clearly stated that the rail routing provisions would supersede the emergency order notifications. *See, e.g.*, 80 Fed. Reg. at 26,648 (chart); 26,709; 26,711; 26,712; 26,713-14; 26,718.

timeframe and timeliness; (3) substituting Fusion Centers for SERCs; and (4) placing the onus on emergency responders to make requests for the information from the railroads under voluntary industry practices. In each of these ways, allowing the Tank Car Rule to replace the Emergency Order would constitute a retrenchment and move DOT away from its goal of ensuring emergency responders will have the information they need to prepare for crude by rail accidents.

First, the information covered by the Emergency Order is far more useful to emergency responders than the commodity data gathered by railroads under the rail routing regulation. The Emergency Order requires the railroads to provide SERCs with (1) an estimate of the number of unit trains traveling through each county within the state on a weekly basis, (2) a description of the crude; (3) the rail routes over which the material would be transported; (4) a point of contact for emergency response; and (5) basic emergency response information. In contrast, rail carriers are required to compile aggregate commodity data for each route and the total number of shipments for the previous calendar year. Nowhere does the final rule reveal whether the commodity data will be broken down by county or whether a local community will otherwise be able to discern what crude or other hazardous fuels are traveling through their community and how often. The rule discusses the listing of commodities in rank order, which may not enable a community to obtain the same information they currently have about Bakken crude by rail train shipments.

Second, railroads must compile the commodity data for the previous calendar year in the first quarter of the next year. In other words, the commodity data provide a retrospective picture of aggregate train shipments of hazardous materials for an entire calendar year. In contrast, the Emergency Order requires an estimate of the number of trains transporting large volumes of Bakken crude through each county each week. Whenever the weekly number of crude by rail trains changes significantly, the railroads must update their estimates. This information is far more useful to communities than annual after-the-fact aggregates in informing them of the risks they face in real time.

Third, the Emergency Order directs the railroads to provide the notifications to SERCs. As the final rule explains, each state is required to have a SERC under the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”), 42 U.S.C. § 11001(a), to help local communities plan for emergencies involving hazardous spills. Because SERCs are responsible for supervising and coordinating with local emergency planning committees, the Emergency Order found that SERCs “are the most appropriate point of contact” for the train route and emergency response information. Order at 12. The final rule reiterates that the SERCs “are best situated to convey information regarding hazardous materials shipments to” state and local emergency responders. 80 Fed. Reg. at 26,710.

Despite making this finding, the final rule, on its face, defaults to a scheme in which the railroads must let State Fusion Centers know the designated railroad point of contact for rail routing issues. The Tank Car Rule seems to assume that this person would also be the responsible railroad official for emergency response, which is far from clear. In any event, it is the State Fusion Centers, not the SERCs who receive this point of contact designation under the

rail routing rule. The Fusion Centers were established to be part of a national anti-terrorism network. The federal government leverages the Fusion Centers to enlist intelligence, law enforcement, and homeland security information and personnel to gather, receive, and analyze threat information, as well as to prevent and respond to crime and terrorism. The final rule is candid in stating that it made the shift in order to enable the railroads to operate within a secretive system that makes information sharing contingent on the railroads' determining there is a need-to-know and the local, state, or tribal government's willingness to commit to confidentiality. *See, e.g.*, 80 Fed. Reg. at 26,648, 26,711. Lost in the shuffle is whether emergency responders will have ready access even to the point of contact information required to be sent to the Fusion Centers under the rail routing rule.

Fourth, the Emergency Order calls for affirmative notifications to the SERCs that must be updated on a timely basis whenever the train route information changes substantially. Because the SERCs supervise and coordinate with local emergency responders, they can readily disseminate the notifications directly to the emergency responders or post the notifications to ensure even wider dissemination. The rail routing rule has no comparable affirmative disclosure mandates. While the rail routing rule directs the railroads to provide their point of contact on routing issues to the Fusion Centers, state, local, and tribal officials and emergency responders in jurisdictions affected by the rail carrier's routing decisions must ask the railroads in writing for this point of contact information, as well as the commodity data. Subject to voluntary industry practices, the railroads say they will release annual aggregated commodity data upon written request on a specified form to "a bona fide emergency responder" that agrees not to distribute the information in whole or in part without the railroad's express written permission. AAR Circular OT-55-O.

The Tank Car Rule states that it will default to the rail routing rule and voluntary industry practices, which would place the burden on states, tribes, local governments, and emergency responders to make individual requests to the railroads to obtain point of contact information and annual commodity aggregations. Even when one official obtains the information, s/he is prohibited by the railroad's operating practices from sharing the information with another responder or official. Such a scheme is poorly suited to achieve DOT's stated goal of ensuring local governments and emergency responders will have timely and ready access to information about train movements and emergency response measures. Ironically, in other places in the final rule, DOT refused to defer to voluntary industry measures because they lack accountability, can be changed by industry, and can have uneven reach based on which companies choose to follow them. *See, e.g.*, 80 Fed. Reg. at 26,688, 26,691. Yet the Tank Car Rule defaults to recommended railroad industry practices with respect to providing commodity data and point of contact information to state, local, and tribal governments and responders.

The Tank Car Rule lacks any discussion of how the default rail routing scheme will meet the need for greater communication between railroads and communities and for specific information on crude-by-rail train movements. The rail routing scheme is designed primarily to identify and devise plans to protect terrorist targets and other security threats. In contrast, DOT issued the Emergency Order to abate imminent hazards posed by regular crude-by-rail trains traveling

throughout the entire country, both where high consequence terrorist targets are present and where they are not. Both DOT and the NTSB have highlighted the need for vastly improved communication, planning, and preparation for rail disasters both in the Emergency Order, the Proposed Rule, and the final rule, and also in the ongoing rulemaking to require railroads to prepare and obtain federal approval for oil spill response plans, like other facilities and vessels that handle oil do. *See* 79 Fed. Reg. 45,079 (Aug. 1, 2014); NTSB Safety Recommendation 14-5 (Jan. 21, 2014). Allowing the rail routing scheme to supplant the Emergency Order notifications would be counter to DOT's stated goals, the NTSB's recommendations, and overall public sentiment.

IV. THE TANK CAR RULE ENDORSES RESTRICTING PUBLIC ACCESS WITHOUT A BASIS COGNIZABLE UNDER THE LAW OR UNDER THE EVIDENCE AND DOT'S FINDINGS.

A federal agency, like DOT, is governed by open government principles embodied in the Freedom of Information Act ("FOIA") and presidential directives. FOIA establishes a presumption in favor of public access to government records. To withhold agency records from the public, the agency bears the burden of establishing that the information falls within a specific exemption. Two such exemptions are relevant here. First, FOIA Exemption 3 allows the withholding of information that is "specifically exempt from disclosure by statute" that either requires nondisclosure, leaving no discretion on the issue, or establishes particularly withholding criteria or identifies particular matters to be withheld. 5 U.S.C. § 552(b)(3). Second, confidential business information can be withheld if the information is commercial or financial, has been kept confidential, and its disclosure will cause competitive harm. *Id.* § 552 (b)(4); *see, e.g., Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999); *Inner City Press/Cmt. on the Move v. Bd. of Governors of Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006).

The Tank Car Rule indicates that DOT was motivated to default to the rail routing rule in lieu of the Emergency Order to accommodate the railroads' desire for secrecy. *See, e.g.,* 80 Fed. Reg. at 26,648, 26,711. Yet, the final rule never walks through the permissible grounds for secrecy in FOIA or other applicable statutes to determine whether they authorize such secrecy, even though DOT previously found that the notifications fell outside the reach of applicable statutes and that the railroads had failed to show that disclosure would expose confidential business information.

This disregard of open government principles is made all the more troubling in light of presidential directives calling for transparency. While FOIA applies only to records in the possession of a federal agency, President Obama has issued directives holding federal agencies to principles of openness and transparency. Early in his presidency, he issued a memorandum on transparency and open government to federal agencies directing that government should be transparent:

Transparency promotes accountability and provides information for citizens about

what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use.

Memorandum on Transparency and Open Government for the Heads of Executive Departments and Agencies (Jan. 21, 2009).¹² A subsequent Executive Order declares that “[o]penness in government strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth,” and directs federal agencies, wherever possible, to ensure that data are released to the public in ways that make the data easy to find, accessible and usable. Exec. Order 13,642, Making Open and Machine Readable the New Default for Government Information (May 9, 2013).¹³ DOT, like all other federal agencies, has been directed “to take specific actions to implement the principles of transparency, participation, and collaboration.” Executive Office of the President, Mem. For Heads of Executive Department & Agencies, Dec. 8, 2009.¹⁴ We urge DOT to abide by these principles and promote public access to train route and emergency preparedness information.

A. The SERC Notifications Cannot be Kept Secret as Sensitive Security Information.

Prior to September 11, 2001, the Federal Aviation Administration (“FAA”) was the primary agency that engaged in security screening programs and had the statutory authority to prohibit disclosure of information obtained or developed in carrying out security or in research and development activities. *See, e.g., Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993). In the aftermath of the September 11 attacks, Congress gave DOT authority to conduct security research and develop programs with respect to other modes of transportation, which encompass: research (including behavioral research) and development activities appropriate to develop, modify, test, and evaluate a system, procedure, facility, or device to protect passengers and property against acts of criminal violence, aircraft piracy, and terrorism and to ensure security. 49 U.S.C. § 40119.

That authority includes the power to designate information generated in the course of such research and development as Sensitive Security Information or SSI, which can then be withheld from the public. Specifically, the statute provides:

[T]he Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would—

- (A) be an unwarranted invasion of personal privacy;

¹² Available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>.

¹³ Available at <http://www.gpo.gov/fdsys/pkg/DCPD-201300318/pdf/DCPD-201300318.pdf>.

¹⁴ Available at <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to transportation safety.

49 U.S.C. § 40119(b)(1). The statute goes on to clarify that information may not be withheld under a pretext of SSI when it is actually being withheld to “prevent embarrassment to a person, organization, or agency” or to prevent release of information that does not require protection in the interests of transportation security. 49 U.S.C. § 40119(b)(3)(B), (D). The Supreme Court recently held that a companion authority does not by itself prohibit any disclosures; instead, the statute authorizes DOT and Transportation Security Administration (“TSA”) to promulgate regulations that prohibit disclosures based on their terms. *Department of Homeland Security v. MacLean*, 574 U.S. ___, 135 S.Ct. 913 (Jan. 21, 2015).

Pursuant to this statutory authority, the Department of Transportation promulgated regulations in May 2004. 49 C.F.R. pt. 15. The regulations repeat the statutory description of SSI and contain a list of 15 categories of information that could be designated as SSI. Several of the categories apply only to aviation or maritime transportation security, but several apply to all modes of transportation, including security contingency plans for preparing, responding, and mitigating security incidents or threats; TSA directives regarding security; DOT or Homeland Security notices regarding transportation threats; vulnerability assessments; and threat information. 49 C.F.R. § 15.5(b)(1), (2), (3), (5), (7).

In responding to the railroads’ comments in opposition to the Emergency Order information collection activities, DOT appropriately determined that the SERC notifications are ineligible for designation as SSI. The SERC notifications fall outside the statutory and regulatory SSI parameters because the notifications and their contents were neither developed nor obtained by DOT in the course of security research and development programs. Both the underlying statutes and the implementing regulations limit SSI to information “obtained or developed” in carrying out research and development related to transportation security. DOT clearly did not develop the information contained in the notifications; the railroads did. And as structured in the Emergency Order, DOT has not obtained the notifications. Instead, the railroads are required to submit the notifications to state emergency response agencies. While the railroads must provide the notifications to the Federal Railroad Administration upon request, Emergency Order at 3, the submissions are not given to DOT as a matter of course. Even if they were submitted directly to DOT, as many of the undersigned urged the final rule to require, the notifications would remain outside the purview of the SSI secrecy authority because the information they contain was not developed as part of DOT security research and development programs.

Even if the information had been developed as part of a DOT security R&D program, it does not fall within any of the categories of information that may be withheld as SSI under the DOT regulations. The information is obviously not a TSA directive, a Homeland Security or TSA security notice, or threat information. The only arguably relevant categories would be

security contingency plans and vulnerability assessments. However, the regulations define “security contingency plan” as a plan detailing response procedures to address a transportation security incident, threat assessment, or specific threat against transportation.” 49 C.F.R. § 15.3. The definition goes on to describe the contents of security contingency plans as focusing on such matters as ensuring the continuity of government and transportation operations. *Id.* A “vulnerability assessment” is defined as a review, audit, or other examination of the security of a transportation infrastructure asset, including a train or transportation network “to determine its vulnerability to unlawful interference” and including actions or countermeasures to address security concerns. *Id.*

It is possible that some aspects of the railroads’ routing analyses might constitute vulnerability assessments, but the Emergency Order notifications contain none of the defining features of either vulnerability assessments or security contingency plans. Instead, the notifications provided information about train movements through communities and basic emergency response information. They did not focus on specific threats against transportation or vulnerability to unlawful interference. Nor did the notifications contain countermeasures or other actions to ensure the continuity of government or transportation operations or to address security concerns.

While the Tank Car Rule piggybacks on the rail routing process to allow the railroads to keep information from the public and control its dissemination even to emergency responders, DOT’s rail routing and SSI regulations do not envision such secrecy. As discussed above, the Emergency Order notifications and the substituted aggregated commodity data fall outside the SSI regulation’s prohibitions on disclosure. Moreover, the rail routing rule directs rail carriers to restrict disclosure of certain information to covered persons on a need-to-know basis, but this direction is not applicable to the commodity data or the point of contact designation. See 49 C.F.R. § 172.820(j). Presumably, DOT recognized that restricting public access to such information exceeded its authority.

The Tank Car Rule nevertheless suggests that the rail routing rule’s preemption language will preclude public disclosure of the commodity data or bar states, tribes, or local governments from requiring disclosure of other train route or emergency response information. This backhanded attempt to circumvent open government laws and the terms of the statutes that authorize keeping information from the public is to no avail. The rail routing rule includes an express preemption section, which provides in its entirety:

A law, order, or other directive of a state, political subdivision of a state, or an Indian tribe that designates, limits, or prohibits the use of a rail line (other than a rail line owned by a state, political subdivision of a state, or an Indian tribe) for the transportation of hazardous materials, including but not limited to the materials specified in § 172.820(a), is preempted.

49 C.F.R. § 172.822. On its face, this regulation preempts state, tribal, or local government designations, limitations, or prohibitions on the use of a rail line for transporting hazardous

materials. It does not preempt nonfederal governments from requiring the submission or disseminating information like that contained in the Emergency Order notifications.

The only evidence offered by DOT in support of secrecy is a reference to an act of vandalism on a segment of track in South Dakota. It states that widespread access to SSI “could be used for criminal purposes when it comes to crude oil by rail transportation.” 80 Fed. Reg. at 26,712. It then cites an investigation by the FBI and Bureau of Alcohol, Tobacco, Firearms, and Explosives into a vandalism incident in which a two-foot piece of rail line was blown up in South Dakota.

McClatchy Newspapers revealed, however, that the track is not used for oil trains and, in fact, had been out of service for years. The track itself is buried under prairie grass, several road crossings have been paved over, and it took officials weeks to notice the missing piece of rail. “Vandalism on inactive rail line used to justify oil train secrecy,” Curtis Tate, McClatchy (May 10, 2015).¹⁵

B. The SERC Notifications Cannot be Kept Secret as Confidential Business Information.

Nor do the Emergency Order notifications contain information that can be kept secret as confidential business information. To qualify as confidential business information, the information must be confidential, *i.e.*, kept secret from competitors, and its disclosure would cause the business entity competitive harm. The Emergency Order notifications contain two types of information: (1) basic emergency response information; and (2) the routes of trains carrying huge quantities of explosive crude.

As to the emergency preparedness information, there is absolutely no basis for claiming the basic emergency response information is confidential or that its disclosure would cause any competitive harm. The notifications must disclose the technical name of the hazardous cargo, immediate hazards posed to health, risks of fire or explosion, and immediate measures for handling spills or fire, and preliminary first aid measures. Emergency Order at 2, 15 (requiring disclosure of information specified in 49 C.F.R. § 172.602). Much of this information is contained in Material Safety Data Sheets, which are in the public domain. To illustrate the nature of the information, a BNSF disclosure made pursuant to the Emergency Order reveals that the proper treatment when crude oil irritates the eyes is to “immediately flush eyes with plenty of water for at least 15 minutes, while holding eyelids apart in order to rinse entire surface of eye and lids with water.”¹⁶ The disclosures also describe appropriate protective clothing, such as rubber boots, which could let people who live near the tracks know they should have a pair of rubber boots in their disaster kits.

¹⁵ Available at <http://www.mcclatchydc.com/2015/05/10/266177/vandalism-on-inactive-rail-line.html>.

¹⁶ BNSF Notification to Emergency Management Division, Response Section of the Washington State Military Department (June 6, 2004).

As to the train route information, the number and frequency of trains laden with Bakken crude (or other crude or ethanol) is not confidential business information both because it is hardly a secret and the railroads would be unable to demonstrate that its disclosure would cause them competitive harm. Trains must literally follow the tracks, and unit trains are visible for miles. Any competitor can easily discern the routes a train will follow and knows which company owns each rail line. Competitors can also tell whether a train consists of rail cars that carry hazardous flammable liquids. The DOT-111 and CPC-1232 tank cars, for example, have signature features that can readily be observed as a train passes by. Indeed, loaded tank cars must be placarded to reflect hazards posed by their contents. *See, e.g.*, 49 C.F.R. § 172.542. Again, competitors can discern merely from observing a passing train that it is carrying crude oil or ethanol. Competitors are also privy to industry trends, and many have agreements to use each other's tracks, which makes them privy to shipment information. Competitors can also readily figure out that unit trains that begin their journey in North Dakota and move toward refineries are carrying Bakken crude.

Given the clear public interest in obtaining the basic safety information and the lack of competitive harm from disclosure, most states have appropriately determined that the SERC notifications may not be kept from the public as confidential business information. The Pennsylvania Office of Open Records rejected the railroads' contention that the Emergency Order notifications contained any information that is commercial in nature or that release of the information would cause any competitive harm. Exhibit 1 at 5-9. It characterized the information as general statistical data and general safety information of the type that is regularly made available to the public without causing competitive harm. *Id.* DOT likewise found that the railroads had failed to show that the Emergency Order notifications contained confidential business information. Even though it has been candid about its preference that the notifications be kept secret and it held out the possibility that the information might contain confidential business information, it concluded that the railroads had failed to document any actual harm from the disclosures. 79 Fed. Reg. at 58,892.

In its comments on the Proposed Rule, the NTSB urged DOT to allow the notifications to continue to be made available to the public. It objected to the suggestion that DOT might classify the notifications as SSI to prevent public disclosure because doing so "would unreasonably restrict the public's access to information that is important to its safety":

We believe that notification information should raise the awareness of both the general public and stakeholders about hazardous materials routes running through their communities. Having an informed public along rail routes could supplement a carrier's safety measures and help reduce the consequences of emergencies involving hazardous materials.

An informed public can be prepared to implement protective actions when accidents occur. While the general public may not require detailed information, such as specific numbers, dates, and times of hazardous materials tank cars

traveling on a route, people need to know whether they live or work near a hazardous materials route. They also need to be aware of the hazards associated with releases, what rail carriers do to prevent accidents and mitigate consequences, how to recognize and respond to an emergency, what protective action to take in the event of a hazardous materials release, and how to contact rail carriers regarding specific concerns.

NTSB Comments at 7.

In purporting to jettison the Emergency Order notification scheme and default to a scheme in which the railroads control access to far less useful information, the Tank Car Rule never addressed the NTSB's comments and the many others making the case for the public's right to know about crude by rail and other hazardous materials train routes and about preparations for an emergency. As a public agency and under the presidential directives to be open and transparent, DOT had an obligation to promote the public's right to know to the maximum extent possible, which the Tank Car Rule's plain terms failed to do.

RELIEF REQUESTED

We ask DOT to follow through with its May 28, 2015 clarification and formally amend its final Tank Car Rule to codify the notification requirements of the May 7, 2014 Emergency Order, expand the types of hazardous materials subject to notification beyond Bakken crude, lower the threshold for notification requirements, and rebuff the railroads' unnecessary and self-serving desire for secrecy. It is also important the DOT conform its Federal Register publication (rule and narrative) to its stated intent of transparency and increased information. In order to clean-up the final Tank Car Rule as it appears DOT wishes to do, it may be necessary for DOT to provide another short notice-and-comment period to comply with the Administrative Procedure Act; it will certainly be necessary for DOT to undertake government-to-government consultations with U.S. Tribal Nations pursuant to Executive Order 13175 and DOT's tribal policies.

Respectfully submitted this 4th day of June, 2015,



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EXHIBIT 1



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

**CURTIS TATE AND MCCLATCHY
NEWSPAPERS,
Requester**

v.

**PENNSYLVANIA EMERGENCY
MANAGEMENT AGENCY,
Respondent**

**NORFOLK SOUTHERN RAILWAY
COMPANY,
Direct Interest Participant**

**CSX TRANSPORTATION, INC.,
Direct Interest Participant**

Docket No.: AP 2014-1199

INTRODUCTION

Curtis Tate (“Requester”), a correspondent for *McClatchy Newspapers*, submitted a request (“Request”) to the Pennsylvania Emergency Management Agency (“PEMA”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking reports/notifications submitted to PEMA in accordance with an Emergency Order issued by the United States Department of Transportation (“USDOT”) and correspondence relating to crude oil shipments. PEMA denied the Request, arguing, among other things, that the requested records contain confidential proprietary information. The Requester appealed to the Office of Open Records

(“OOR”). For the reasons set forth in this Final Determination, the appeal is **granted** and PEMA is required to take further action as directed.

FACTUAL BACKGROUND

On July 9, 2014, the Request was filed, seeking electronic copies of the following records:

1. [N]otifications provided state agencies by rail companies about shipments of 1 million gallons or more of Bakken crude oil within state borders, as required by a May 7 [USDOT] emergency order.
2. [A]ll electronic communications since Jan. 1, 2014, between state agencies and state Reps. Joe Hackett and Steve Barrar regarding crude oil shipments by rail.

On July 15, 2014, PEMA denied the Request, arguing that the records responsive to Item 1 of the Request are exempt from disclosure under Section 708(b)(11) (confidential proprietary information) and that the records responsive to Item 2 of the Request do not exist within PEMA’s possession, custody or control. PEMA explains that the reports responsive to Item 1 contain information designated by the railroad carriers as being “confidential proprietary commercial information.”

On August 4, 2014, the Requester appealed to the OOR, challenging only the denial of Item 1 of the Request, and stating grounds for disclosure. The OOR invited the parties to supplement the record, and directed PEMA to notify third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). By correspondence dated August 5, 2014, PEMA notified the relevant third parties of the appeal. On August 11, 2014 and August 19, 2014, respectively, Norfolk Southern Railway Company (“Norfolk Southern”) and CSX Transportation, Inc. (“CSXT”) asserted a direct interest in the records subject to this appeal and

requested to participate and provide information pursuant to 65 P.S. § 67.1101(c).¹ On August 15, 2014, Norfolk Southern's request to participate was granted and, on August 21, 2014, CSXT's request to participate was granted.

On August 11, 2014, along with its request to participate in this appeal, Norfolk Southern submitted a position statement, arguing that the reports are exempt from disclosure under 65 P.S. § 67.708(b)(3) (exempting public utility and infrastructure records), 65 P.S. § 67.708(b)(11) and the Public Utility Confidential Security Information Disclosure Protection Act ("CSI Act"), 35 P.S. § 2141.1 *et seq.* Along with its position statement, Norfolk Southern provided the sworn affidavits of Carl Carbaugh, Norfolk Southern's Director of Infrastructure Security, and Michael McClellan, Norfolk Southern's Vice President of Industrial Products, as well as other documentation addressing the confidential nature of the reports.

On August 14, 2014, PEMA submitted a position statement and the affirmation made under penalty of perjury of David Holl, PEMA's Deputy Director of Operations. PEMA also submitted various other documents, including copies of confidentiality agreements it executed with the carriers prior to receiving the requested reports.

On August 19, 2014, along with its request to participate in this appeal, CSXT provided a position statement, arguing the reports are exempt from disclosure under 65 P.S. § 67.708(b)(2) (relating to public safety records) and 65 P.S. § 67.708(b)(11), as well as by the Federal Interstate Transportation Act ("Transportation Act"), 49 U.S.C. §§ 10101 *et seq.*² In support of its position, CSXT submitted the affidavit of Paul Hitchcock, CSXT's Associate General Counsel and Corporate Secretary.

¹ Norfolk Southern and CSXT will be collectively referred to as the "third parties" or, alternatively, the "carriers."

² By correspondence dated August 21, 2014, Norfolk Southern incorporated by reference CSXT's argument relating to the Transportation Act.

On August 25, 2014, the OOR ordered PEMA to provide copies of the requested reports for *in camera* review. These reports were provided to the OOR on September 5, 2014, and the OOR conducted an *in camera* review of the records thereafter.

LEGAL ANALYSIS

“The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government.” *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions.” *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request” and may consider testimony, evidence and documents that are reasonably probative and relevant to the matter at issue. 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal; however, the decision to hold a hearing is discretionary and non-appealable. *Id.*; *Giurintano v. Dep’t of Gen. Servs.*, 20 A.3d 613, 617 (Pa. Commw. Ct. 2011). Here, the Requester requested that an evidentiary hearing be held; however, a hearing is not necessary, as the OOR has the requisite information and evidence before it to properly adjudicate this matter.

PEMA is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege,

judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and to respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemption(s). *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “such proof as leads the fact-finder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

1. The reports do not contain “commercial” or “financial” information exempt from disclosure under 65 P.S. § 67.708(b)(11)

PEMA and the third parties argue that the reports are protected from public access under Section 708(b)(11) of the RTKL, which exempts from disclosure “[a] record that constitutes or reveals ... confidential proprietary information.” 65 P.S. § 67.708(b)(11). The RTKL defines “confidential proprietary information” as “[c]ommercial or financial information received by an agency: which is privileged or confidential; and (2) the disclosure of which would cause substantial competitive harm of the person that submitted the information.” 65 P.S. § 67.102. However, neither the RTKL nor the Statutory Construction Act of 1972, 1 Pa.C.S. §§ 1501 *et seq.*, defines “commercial” or “financial” information; and therefore, the words must “be

construed according to the rules of grammar and to their common and approved usage...” 1 Pa.C.S. § 1903(a).

The term “commercial” is defined as: “occupied with or engaged in commerce or work intended for commerce ...” MERIAM-WEBSTER’S COLLEGIATE DICTIONARY 249 (11th ed. 2012). “Commerce” is defined as “the exchange or buying and selling of commodities on a large scale involving transportation from place to place.” *Id.* The term “financial” is defined as “relating to finance...” *Id.* at 469. “Finance” has been defined as “money or other liquid resources of a government, business, group, or individual,” *Id.* at 469, and as “money resources, income, etc.” *see Dep’t of Cons. and Natural Res. v. Office of Open Records*, 1 A.3d 929, 937-38 (Pa. Commw. Ct. 2010).

The OOR has conducted an *in camera* review of the reports.³ Based upon this review, the OOR notes that the responsive reports at issue in this case contain general statistical information, estimated from data compiled by the carriers, including, among other things, the number of qualifying trains operating in any given Pennsylvania County, the frequency in which the trains operate in those Counties and their anticipated routes of travel. This statistical information is accompanied by maps depicting the railway systems over which the trains operate in Pennsylvania. The balance of the reports contain general safety information, such as Norfolk Southern’s “Emergency Response Guidebook” and CSXT’s “Community Awareness and Emergency Planning Guide,” as well as descriptions of how to identify the hazardous materials transported by a train, the methods of remediating those hazardous materials in the event of a

³ Section IV(D)(11) of the OOR Interim Guidelines provides, among other things, that “[r]eferences to specific records submitted for *in camera* inspection, or the contents of such records, in the final determination will be ... by reference to generic descriptions or characterizations as set forth in the *in camera* inspection index.” As such, the OOR’s written analysis is constrained to generic descriptions of the withheld records.

derailment or spill/leak, the duties of local emergency management personnel and representatives of the carriers during an incident involving a train transporting hazardous material, and more.

Recently, in *Dep't of Public Welfare v. Eiseman*, the Commonwealth Court analyzed Section 708(b)(11) in terms of rate-setting information relating to the Pennsylvania Department of Public Welfare's ("DPW") administration of the Medicaid Program. 85 A.3d 1117 (Pa. Commw. Ct. 2014). After concluding that the rate information represented financial records, the Court found that the medical providers with which DPW contracted undertook efforts to maintain the secrecy of certain rate information, and that the release of the information would result in substantial harm to the providers' competitive positions. *Id.* at 1131. In making this determination, the Court relied upon numerous affidavits and the extensive fact and expert witness testimony developed during hearings before the OOR. *Id.* at 1129-30.

Here, unlike in *Eiseman*, *supra*, the responsive reports contain information that is neither "commercial," nor "financial," as those terms are defined above, and, therefore, the OOR need not address whether the reports constitute "confidential proprietary information" under the RTKL. Based upon the evidence provided, therefore, the OOR finds that the type of information included in the reports is not the type of information envisioned to be protected under Section 708(b)(11) of the RTKL, especially given the public's interest in knowing whether these trains are operating in close proximity to their homes or businesses.

Even if the information contained in the reports was deemed to be "commercial" or "financial" information, PEMA and the third parties must establish both elements of the two-part test set forth above in order for the exemption to apply. 65 P.S. § 67.102; *see, e.g., Sansoni v. Pa. Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375. In determining whether certain information is "confidential," the OOR must consider "the efforts

the parties undertook to maintain [the information's] secrecy.” *Eiseman*, 85 A.3d at 1128. “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.*

The third parties attest that they have undertaken measures to keep shipment and routing information confidential, as evidenced by the confidentiality agreements executed by PEMA and the third parties prior to the release of the reports.⁴ Further, Norfolk Southern attests that the “harm” it will suffer upon the release of the information to the public is competition from competitors, particularly those companies utilizing rail, pipeline and vessel transportation. For example, the McClellan affidavit attests that the release of the shipment and routing information could: (1) harm Norfolk Southern’s ability to “service its existing customers and to compete for other business,” and (2) undermine the “business relationships” between Norfolk Southern and those customers expecting that their shipping information will be kept confidential. Mr. McClellan further opines that the release of the reports will cause “irreparable” harm to Norfolk Southern’s competitive position. Notably, the CSXT and PEMA affidavits do not address the issue of competitive harm in any meaningful way.

Assuming that PEMA and the third parties have established the first prong of the test, they must also provide sufficient evidence to establish that the release of the reports will cause substantial harm to the third parties’ respective competitive positions. *See, e.g., Eiseman, supra*

⁴ While the execution of a confidentiality agreement is suggestive of a carrier’s intent to maintain the secrecy of the information protected by the agreement, the courts and the OOR have consistently held that confidentiality agreements/clauses, alone, are unenforceable under the RTKL. *See Tribune-Review Publishing Co. v. Westmoreland County Housing Authority*, 833 A.3d 112, 117 (Pa. 2003) (“That the litigation settlement involves ‘personal’ as well as ‘official’ conduct, or contains a confidentiality clause, does not vitiate the public nature of the document”); *see also Gould v. North Strabane Township*, OOR Dkt. AP 2014-0905, 2014 PA O.O.R.D. LEXIS 784; *Schwartz v. Borough of Berwick*, OOR Dkt. AP 2011-0995, 2011 PA O.O.R.D. LEXIS 529.

(denying access to records based upon numerous affidavits and extensive fact/expert witness testimony regarding the sensitive nature of the information and the potential for substantial harm from its disclosure); *Giurintano, supra* (denying access to records based upon evidence describing the investment of resources spent in training and developing a cadre of quality interpreters and the potential for substantial economic harm if records identifying those interpreters is released); *Colgate-Palmolive Co. v. Dep't of Insurance*, OOR Dkt. AP 2013-1631, 2014 PA O.O.R.D. LEXIS 252 (denying access to records based upon affidavits detailing the substantial harm in terms of the disclosure of business strategy, stock information and other financial data).

Here, however, the third parties have submitted only limited evidence, in the form of conclusory, self-serving affidavits/statements, discussing the degree of harm that could befall the third parties if the requested reports are disclosed to the public. *See Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013) (“[A] generic determination or conclusory statements are not sufficient to justify the exemption of public records”). There is no evidence establishing a likelihood of substantial competitive injury to the third parties if the reports were released. *Cf. Eiseman, supra*. Based upon the evidence provided, therefore, neither PEMA nor the third parties have proven that the responsive reports are entitled to protection from disclosure under 65 P.S. § 67.708(b)(11). *See* 65 P.S. § 67.708(a)(1); *Allegheny County Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1042 (Pa. Commw. Ct. 2011) (“[W]e believe it equally appropriate under the law to place the burden on third-party contractors....”).

2. The reports are not exempt from disclosure under 65 P.S. § 67.708(b)(2)

CSXT asserts that the reports are protected from public access under the public safety exception of the RTKL, which exempts from disclosure records “maintained by an agency in

connection with ... law enforcement or other public safety activity that if disclosed would be reasonably likely to jeopardize or threaten public safety ... or public protection activity[.]” 65 P.S. § 67.708(b)(2).⁵ To establish this exemption, an agency must show: (1) the record at issue relates to law enforcement or public safety activity; and (2) disclosure of the record would be reasonably likely to threaten public safety or a public protection activity. *Carey v. Dep’t of Corrections*, 61 A.3d 367, 374-75 (Pa. Commw. Ct. 2013); *Adams v. Pennsylvania State Police*, 51 A.3d 322 (Pa. Commw. Ct. 2012).

In support of its position, CSXT provides the affidavit of Paul Hitchcock; however, Mr. Hitchcock’s affidavit notably does not address whether the record relates to a law enforcement or public safety activity, or whether disclosure of the reports is likely to threaten public safety. Except for its unsworn position statement, CSXT has provided no other evidence to support its assertion that the reports are protected under Section 708(b)(2) of the RTKL. Under the RTKL, an affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency’s burden of proof, *see Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). Here, CSXT’s unsworn statements may not be relied upon as competent evidence to withhold records under the RTKL. *See Housing Authority of the City of Pittsburgh v. Van Osdol*, 40 A.3d 209 (Pa. Commw. Ct. 2012) (holding that statements of counsel are not competent evidence); *City of Philadelphia v. Juzang*, July Term 2010, No. 2048 (Phila. Com. Pl. June 28, 2011) (“Because the letter written by City’s counsel is a legal brief, it cannot be ... evidence at all”). Additionally, based upon the OOR’s *in camera* review of these records, it is not evident that disclosure of these records would pose a threat to public safety. Based upon the

⁵ PEMA does not raise this reason for denial of public access to the reports.

evidence provided, CSXT has not met its burden of proving that the reports are exempt from disclosure under 65 P.S. § 67.708(b)(2).

3. The reports are not protected from disclosure by the Transportation Act

Norfolk Southern and CSXT also contend that the reports are exempt from disclosure under the Federal Transportation Act, which provides that a rail carrier may be fined if its representatives knowingly disclose “information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that rail carrier for transportation ... that may be used to the detriment of the shipper or consignee or may disclose improperly, to a competitor, the business transactions of a shipper or consignee.” 49 U.S.C. §§ 11904(a)-(b). However, the carriers do not provide evidence establishing the detriment that would befall its shippers/consignees, or the nature of the business transactions that would be improperly disclosed, if the reports were released to the public.

4. The reports are not exempt from disclosure under 65 P.S. § 67.708(b)(3)

Norfolk Southern argues that the disclosure of the reports and their constituent information is reasonably likely to endanger the safety and/or physical security of Pennsylvania’s railway system.⁶ Section 708(b)(3) of the RTKL exempts from public access “[a] record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a ... public utility[,]” including “building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems...” 65 P.S. § 67.708(b)(3)(iii). “Reasonably likely” has been interpreted as “requiring more than speculation.” *Carey*, 61 A.3d at 374-75.

⁶ Like Section 708(b)(2) of the RTKL discussed above, PEMA does not raise this reason for denial of access to the reports.

Norfolk Southern attests that the disclosure of the information would be damaging to public safety and security because the trains could become the target of a terrorist attack. Specifically, Carl Carbaugh attests that “[t]he use of information requested in the [USDOT’s Emergency Order] is damaging to security because terrorist/extremists have targeted and attacked trains internationally.” Mr. Carbaugh further attests that “[t]o an observer... train operations appear random and constantly different since specific routes, quantity and type of material/commodity shipped are not public.” Therefore, “[p]ublicizing 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.”

In further support of its position, Norfolk Southern cites the Commonwealth Court’s decision in *Bowling*, 990 A.2d 813, 825 (Pa. Commw. Ct. 2010) (holding that knowledge of the location of some goods and services may pose a threat to public safety), and several OOR cases in which we recognized the dangers of disclosing records pertaining to the infrastructure of public utility systems. See *Schultz v. PHMC*, OOR Dkt. AP 2011-0102, 2011 PA O.O.R.D. LEXIS 243 (denying access to a report containing detailed design drawings and technical information for hydroelectric power project); *Moss v. Londonderry Township*, OOR Dkt. AP 2009-1088, 2010 PA O.O.R.D. LEXIS 50 (denying access to building plans for structures at nuclear facility); *Schumacher v. City of Scranton*, OOR Dkt. AP 2009-0280, 2009 PA O.O.R.D. LEXIS 153 (denying access to fire hydrant reports).⁷

However, unlike *Bowling* and the various OOR decisions, the OOR’s *in camera* review of the records in this case demonstrates that the responsive reports contain general statistical

⁷ In *Bowling*, the Court also concluded that the determination of whether knowledge of the location of a particular item is reasonably likely to pose a threat to or endanger public safety cannot be made using a “blanket approach,” an approach which Norfolk Southern appears to be advocating in this case. 990 A.2d at 825.

information estimated from data collected over the prior year and certain other discretionary factors. The reports do not include building plans or drawings, technical information regarding infrastructure, or the exact location of static goods or services to become operational in the event of an emergency, as in *Bowling*. Nor do the reports identify or contain real-time routing information for trains carrying BOC. Despite Norfolk Southern's assertion that the disclosure of the reports may permit individuals to use the information for nefarious purposes, the release of innocuous statistical and safety information does not, in and of itself, create a reasonable likelihood of endangering public safety, *see generally Peirce v. Office of Admin.*, OOR Dkt. AP 2013-1658, 2014 PA O.O.R.D. LEXIS 810, particularly where information regarding Pennsylvania's railway system is already available to the public online, as noted in the McClellan affidavit. Accordingly, Norfolk Southern has not proven that the reports are entitled to protection from disclosure under 65 P.S. § 67.708(b)(3).

5. The reports are not protected from disclosure by the CSI Act

Norfolk Southern also argues that the reports are protected from disclosure by the CSI Act. However, Section 2141.3 of the CSI Act requires agencies to develop protocols for the submission and public challenge of information deemed to be classified as "confidential security information," and there is no evidence in the record of this appeal that PEMA has developed and adopted such protocols with respect to the records at issue. 35 P.S. § 2141.3(b). While the CSI Act specifically exempts "confidential security information" from disclosure under the RTKL, *see* 35 P.S. § 2141.4, and imposes penalties for the release of such information, *see* 35 P.S. § 2141.6, PEMA's compliance with "[p]rocedures for submitting, challenging, and protecting confidential security information" set forth in Section 2141.3 is a condition precedent for

nondisclosure. *See* 35 P.S. §§ 2141.3; *see also Schumacher, supra.* Accordingly, Norfolk Southern has not established that the provisions of the CSI Act apply to this case.

CONCLUSION

For the foregoing reasons, the Requester's appeal is **granted** and PEMA is required to provide copies of all records responsive to Item 1 of the Request within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: 3 October 2014



APPEALS OFFICER
JOSHUA T. YOUNG, ESQ.

Sent to: Jeffrey Bower, Esq. (via e-mail only);
Tanya Leshko, Esq. (via e-mail only);
Craig Staudenmaier, Esq. (via e-mail only);
Jamie Edwards, Esq. (via e-mail only)

EXHIBIT 2



**State
Emergency
Response
Commission**

May 8, 2015

Robert Ezelle, Director
Emergency Management Division
Washington State Military Department
20 Aviation Drive
Building 20, MS TA-20
Camp Murray, WA 98430-5112

RE: Comments on proposed Final Rule U.S. DOT No. 30 for Senator M. Cantwell

Dear Mr. Ezelle:

It is apparent that some of the concerns expressed by local communities have been addressed in this new rule. Many have called for reduction of operating speeds, while recognizing that derailments can and do happen even at speeds as low as 5 mph. The more accurate classification of the Unrefined Petroleum-Based Products, and enhancements on the braking systems are slight improvements. However, the change to rail routing notifications is significant and disconcerting.

It was and is more appropriate for the rail routing notifications to go to the State Emergency Response Commissions (SERC). To have these notifications sent only to the State Fusion Centers adds unnecessary layers to obtaining the information that is critical to our local communities. The rail system goes through local jurisdictions and any incidents with these shipments will be dealt with first and primarily at the local level. The SERCs have established relationships and ongoing communications with the locals. This information needs to be delivered and readily available to the local jurisdictions and their responders. This information is critical for our local responders to appropriately train, prepare and plan for this specific type of hazard.

The information flow needs to have a direct conduit to the local jurisdictions and this can most readily be achieved by providing the State Emergency Response Commissions, Tribal Emergency Response Commissions, and the Local Emergency Planning Committees (LEPCs) with this information directly. This approach supports community planning and response, while attempting to meet the concerns of the carrier(s). I would strongly encourage that this substantial change be re-addressed and that such notifications be directed to the State Emergency Response Commission and be immediately shared with local and tribal jurisdictions.

I would like to reiterate the three primary areas local level responders are concerned with: 1.) The train cars should be hardened/enhanced further – possibly by double hulls as well as increased thermal protection etc.; 2.) Inspection and Maintenance of the tracks and cars carrying these fuel products needs to be increased and inspection and maintenance standards defined; 3.) Increased training for responders that specifically addresses the unique attributes of these fuel products.

On behalf of State Emergency Response Commission, thank you for your time and consideration of pushing this recommendation and concerns forward. Because I am sure we all would agree the safety of the citizens of the State of Washington is our primary focus, and these recommendations will help to ensure the safety of both citizens and first responders to the emergency incidents in our state.

Respectfully,

William (Bill) Whealan, Chair
State Emergency Response Commission

EXHIBIT 3



THE SECRETARY OF TRANSPORTATION
WASHINGTON, DC 20590

May 28, 2015

The Honorable Maria Cantwell
United States Senate
Washington, DC 20510

Dear Senator Cantwell:

Thank you for your May 6, 2015, letter regarding the U.S. Department of Transportation's (DOT) recently promulgated Final Rule on "Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains" (HHFT Rule). I appreciate your strong support for the Department's ongoing efforts to enhance the safe shipment of flammable liquids (including crude oil) by rail, and I agree that it is imperative that our country's various agencies and emergency response offices have access to the information they need to keep our communities safe.

Transparency is a critical piece of the Federal Government's comprehensive approach to safety, an approach that includes DOT's current disclosure requirements under the Federal hazardous materials regulations, our Emergency Order issued in May 2014, and the recent HHFT Rule emphasize transparency and information-sharing. Nonetheless, we take to heart the concern you raise in your letter—namely, the concern that the HHFT Rule may limit the availability of emergency response information. That was certainly not the intent of the Rule. To remedy that concern, DOT, in coordination with its interagency partners, will take action to ensure that current levels of information will continue to be provided to State Emergency Response Commissions (SERCs) as well as other State, local, and tribal officials, on an ongoing basis.

Since the dramatic increase in production and transportation of domestic crude oil by rail, DOT, including the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration (PHMSA), has been laser-focused on ensuring that crude oil is shipped as safely and efficiently as possible throughout the United States. Over the past two-and-a-half years, DOT has taken nearly 30 separate actions to mitigate the risks posed by the transportation of flammable liquids by rail. The Department's issuance of the May 1, 2015, final HHFT Rule represents DOT's most comprehensive and aggressive action to date, but our efforts continue.

Safety is a shared responsibility, which is why DOT has engaged, and continues to engage, all of its stakeholders in its effort to improve the safety of shipping crude oil by rail. The Department is—and always has been—committed to making certain that these entities have the information they need to prepare for and respond to incidents involving hazardous materials.

First, longstanding Federal law requires shippers and offerors to carry critical information necessary for emergency responders to respond appropriately to an incident involving the transportation of any hazardous material and to have someone available to provide emergency

response information at all times that the hazardous material is in transportation.¹ On April 17, 2015, PHMSA issued a safety advisory reminding the regulated community of these legal obligations. This information includes, but is not limited to, identification and volume of the specific hazardous material; location of the hazardous material on the train; risks of fire and explosion; immediate precautions to be taken in the event of an incident; initial methods for handling spills or leaks in the absence of fire; and preliminary first aid measures. All of this information must be immediately available to any person who, as a representative of a Federal, State, local, or tribal government (including a SERC), responds to an incident involving hazardous material or is conducting an investigation which involves a hazardous material.

Second, the Department appreciates the desire of local communities to know what hazardous materials are moving through their cities and towns and understands your position that DOT's May 2014 Emergency Order ensured that such information was provided on a routine basis related to any train carrying 1 million gallons or more of Bakken crude oil. We fully support the public disclosure of this information to the extent allowed by applicable State, local, and tribal laws. Given the important concerns that you and other stakeholders have raised regarding this issue, we have concluded that the May 2014 Emergency Order will remain in full force and effect until further notice while DOT considers options for codifying the May 2014 disclosure requirement on a permanent basis.

Third, although the HHFT rule does not address community right-to-know issues, it does require each railroad operating HHFTs to engage in a comprehensive safety and security analysis that will support more timely and effective emergency planning, preparedness, and response.² In conducting an analysis, a railroad is required to seek relevant information from State, local, and tribal officials. Because of the detailed and sensitive nature of the safety and security analysis information, the Federal Government requires the information to be treated as "Sensitive Security Information" that cannot be publicly disclosed. For this same reason, the HHFT Rule does not require railroads to proactively share the information with State, local, and tribal officials. It is, however, available to any emergency responder (including SERCs) with a need-to-know upon request from a railroad or from a State/local fusion center.

Information and support for State, local, and tribal governments' emergency preparedness and response efforts are also available from other Federal sources. For example, the U.S. Department of Homeland Security operates the National Operations Center 24 hours a day, 365 days a year to, among other measures, interact with State governors, emergency responders, and critical infrastructure operations across the country to prepare for, respond to, and recover from hazardous materials incidents. In addition, the U.S. Environmental Protection Agency administers the Emergency Planning and Community Right-To-Know Act, which was enacted by Congress in 1986 to ensure that Federal, State, and local governments adequately plan for emergency incidents and share information with the public.

The railroad industry, hazardous materials shippers, and other organizations also provide emergency response assistance and training to communities through a variety of means,

¹ 49 CFR § 174.26 and part 172, subpart G.

² See 49 CFR § 172.820 and Part 172, Appendix D (minimum criteria that must be considered in a routing risk analysis).

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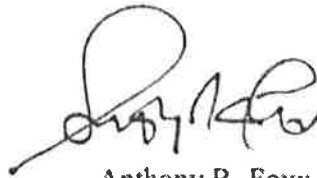
The Honorable Maria Cantwell

including the TRANSCAER® program. This program offers emergency response information, emergency planning assistance, and training to Local Emergency Planning Committees and others. In addition, the railroad industry has an industry protocol in place, known as AAR Circular OT-55-O, that outlines a procedure whereby local emergency response officials and emergency planning organizations may obtain a list of the types and volumes of hazardous materials that are transported through their communities.

I appreciate your continued support of our ongoing efforts to improve the safe shipment of flammable liquids by rail, and I assure you that the Department remains committed to ensuring that State, local, and tribal officials (including SERCs) have the information they need to plan and prepare for and respond to hazardous materials incidents if they occur.

I have sent a similar response to each cosigner of your letter. If I can provide further information or assistance, please feel free to call me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anthony R. Foxx', with a large loop at the beginning and a long horizontal stroke extending to the left.

Anthony R. Foxx