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Senator Anne Carney
Chair
Committee on Judiciary
Maine State Legislature
100 State House Station
Augusta, ME 04333

Representative Matthew W. Moonen
Chair
Committee on Judiciary
Maine State Legislature
100 State House Station
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RE: LD 1937 An Act to Remove the Confidentiality of the Transportation of Hazardous Materials by Railroad Companies

Dear Chair Carney & Chair Moonen,

On behalf of Canadian Pacific Kansas City (CPKC) through our subsidiary, the Central Maine & Quebec Railway US, Inc., I respectfully submit the following comments to express our opposition to Legislative Document No. 1937 (LD 1937). CPKC shares the same commitment to safety as the State of Maine. However, it is clear to us that the proposed legislation will undermine the safety and security of the first responders we work with, the communities we operate through, and our employees. In fact, LD 1937 would increase safety risks and presents a significant threat to national security. Additionally, as discussed in detail below, CPKC would be pre-empted from the proposed LD 1937. Notwithstanding that, we are submitting our comments due to the importance of the subject matter and hope that our views, gained from nearly a century and a half of rail operations across state and international borders, will be of assistance.



Operating safely is a core principle at CPKC and foundational to everything CPKC does. Indeed, protecting the safety of our employees, the communities we operate through, and the environment is fundamental to our decision-making; it drives our disciplined operating practices, capital investment, and company culture. CPKC's dedication to safety resulted in it leading the industry with the lowest Federal Railroad Administration reportable train accident frequency in North America for the 17th straight year in 2022.

When it comes to the transportation of hazardous materials, under common carrier obligations, CPKC is required by law to transport hazardous materials that have been properly prepared and offered for freight rail transportation in accordance with U.S. Federal Department of Transportation regulations. As a federally regulated rail carrier, CPKC's movement of hazardous materials is subject to a mature, complex and comprehensive set of federal government regulations and well-established industry standards. CPKC and other railways make continual efforts and substantial investments designed to safely transport dangerous goods. As a result, rail transportation today is the safest way to transport dangerous goods or hazardous materials over land. According to information published by the American Association of Railroads, more than 99.9% of all hazmat moved by rail reaches its destination without a release caused by a train accident. Since 2000, the freight rail hazmat accident rate is down 78%.

The proposed legislation presents significant safety and security concerns and threatens the safe transportation of hazardous materials. LD 1937 proposes to eliminate the following statutory exception from the definition of "Public Records":

U. Records provided by a railroad company describing hazardous materials transported by the railroad company in this State, the routes of hazardous materials shipments and the frequency of hazardous materials operations on those routes that are in the possession of a state or local emergency management entity or law enforcement agency, fire department or other first responder, except that records related to a discharge of hazardous materials transported by a railroad company that poses a threat to public health, safety and welfare are subject to public disclosure after that discharge. For the purposes of this paragraph, "hazardous material" has the same meaning as set forth in 49 Code of Federal Regulations, Section 105.5; ...

In practical terms, this change would mean that anyone could request, from any emergency response agency in the State, any railroad hazardous materials-related information at any time for any purpose.



To be clear, emergency response agencies already have access to this type of information, both to help them prepare for any potential emergency, as well as to respond to any emergency that occurs. For example, the rail industry has developed an application, "AskRail", which can be installed on the mobile devices of verified emergency responders to provide them with information in real time as to the contents of a particular rail car and the appropriate response to an incident involving those specific contents. Moreover, if a discharge of hazardous materials occurs and poses a threat to public health, safety, or welfare, such records are already subject to public disclosure. LD 1937 does not impact the access to information of either such category.

Instead, what LD 1937 proposes to do is to make available – to anyone – core security-sensitive information. The ramifications of this change would be extraordinary. To put it plainly, CPKC believes that LD 1937, as drafted, would result in material increased risks to the safety of the public, local communities, emergency responders, rail employees, the environment, rail infrastructure, and, without overstatement, national security.

CPKC considers information that, if disclosed, would be of operational utility to a person or persons seeking to harm CPKC's infrastructure and thereby to adversely affect transportation security and public safety, to be security-sensitive information. All CPKC Security and Emergency Response Plans and commodity flow data contain detailed security-sensitive information, including specific response resources, tactical resource deployment plans, and other information regulated by federal law.

If anyone could obtain such information, the possibility that such information may be obtained by an individual or group with nefarious intent and used to identify potential targets or to exploit vulnerabilities increases dramatically. At the same time, LD 1937 would reduce the ability of railroads and/or law enforcement to detect and prevent potential threats before they are carried out. Even if a requestor's intent is entirely innocent, the requestor may publicize the information or simply fail to institute appropriate cybersecurity protections. Nor can the State of Maine control whether such information remains inside the State of Maine, or even inside the United States.

To put the concern plainly, this change could make available a map of potential high value security targets to anyone, while making any management of access to or use of that information impossible. As such, the proposal not only adversely affects transportation security, but could jeopardize critical infrastructure and materially increase risks to those that the proposal presumably intends to help protect: the public and the emergency responders who may be called upon to assist in the event of an incident.



CPKC believes that thoughtful weighing of the security and safety concerns is essential. Particularly where those who can actually use the information for the benefit of the public – emergency responders – already have access to it. CPKC does not believe that LD 1937 does anything to further public safety, whereas widely disseminating detailed information about potential vulnerabilities would create a material risk to public safety, not an enhancement.

Furthermore, CPKC believes that LD 1937 is preempted by federal laws governing access to information about critical infrastructure in the rail industry, including the movement of certain commodities and proprietary information or security-sensitive information.

Federal law requires that the state not release to the public information that Class 1 carriers provide the State about movement of unit oil trains. The considerations that motivated that requirement likewise counsel against releasing to the public information that violent threat actors could misuse to cause a high-consequence hazmat incident.

When the U.S. Department of Transportation (U.S. DOT) began requiring Class 1 railroads to report to State Emergency Response Centers (SERCs) the frequency of trains carrying one million or more gallons of Bakken crude oil,¹ U.S. DOT issued an explanatory Frequently Asked Questions (FAQ) document. Cognizant of the security impacts that its reporting requirements could have, U.S. DOT said the following:

This data is intended for those persons with a need-to-know; that is, first responders at the State and local level, as well other appropriate emergency response planners. DOT expects the SERCs to treat this data as confidential, providing it only to those with a need-to-know, and with the understanding that recipients of the data will continue to treat it as confidential. Accordingly, railroads may require reasonable confidentiality agreements prior to providing this information. Historically, railroads and States have routinely entered into confidentiality agreements prior to railroads providing States with information on commodities transported in trains within their jurisdictions, as this information has traditionally been viewed as confidential from business and security perspectives. DOT believes that following precedent and sharing the data required by this EO under confidentiality agreements is appropriate.

¹ Emergency Restriction/Prohibition Order, Petroleum Crude Oil Railroad Carriers, Docket No. DOT-OST-2014-0067 (May 7, 2014) (EO 2014-0067).



Section 7302 of the FAST Act² codified the requirements of EO 2014-0067. There, Congress mandated that U.S. DOT establish regulations on disclosing to SERCs the frequency of so-called "high-hazard flammable train" (HHFT) movements and, in doing so, that U.S. DOT -

establish security and confidentiality protections, including protections from the public release of proprietary information or security-sensitive information, to prevent the release to unauthorized persons any electronic train consist information or advanced notification or information provided by Class I railroads under this section.

FAST Act, Section 7302(a)(6) (129 Stat. 1595)(codified at 49 U.S.C. 20103 note; redesignated as Section 7302(a)(5) by Section 26003 of Pub. L. 117-58 at 135 Stat. 883).

U.S. DOT's Pipeline and Hazardous Materials Safety Administration (PHMSA) promulgated 49 C.F.R. §174.312, "HHFT information sharing notification for emergency response planning," to implement Section 7302 of the FAST Act. In doing so, PHMSA said that, to meet Section 7302(a)(6)'s requirement to establish "protections from the public release of proprietary or security-sensitive information," "If the disclosure includes information that railroads believe is security sensitive or proprietary and exempt from public disclosure, the railroads should indicate that in the notification." 84 Fed. Reg. 6910, 6914 (Feb. 28, 2019).

Accordingly, 49 C.F.R. §174.312 provides that a railroad may notify a state that the railroad considers information that the railroad discloses to the state is security-sensitive. Such notice, under federal law (Section 7302(a)(6) of the FAST Act), prevents public disclosure of that information.

Because PHMSA has acted under federal law in 49 C.F.R. §174.312 to prevent public disclosure of information that railroads label security-sensitive, the State may not allow disclosure contrary to that labeling. "Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. §20106(a)(1). A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security only when doing so meets this conjunctive, three-part test, that the law or regulation:

- "(A) is necessary to eliminate or reduce an essentially local safety or security hazard;
- "(B) is not incompatible with a law, regulation, or order of the United States Government; and

² Fixing America's Surface Transportation Act, Pub. L. 114-94, 129 Stat. 1312 (Dec. 4, 2015).



"(C) does not unreasonably burden interstate commerce."

LD 1937 fails at least parts (A) and (B) of this three-part test. The passage of trains carrying hazardous materials is not unique to Maine or any of its communities, and the legislation's purpose to "[make] those records [provided by railroad companies describing hazardous materials transported in the State, the routes of hazardous materials shipments and the frequency of hazardous materials operations on those routes] subject to public disclosure" directly contradicts 49 C.F.R. §174.312's provision that railroads may prevent public disclosure of records filed under that regulation by designating them as security-sensitive.

The same security sensitivity that motivated Congress in Section 7302(a)(6) of the Fast Act to prevent public disclosure of HHFT movements applies equally to prohibit public disclosure of all other hazardous material shipping information. Every week events occur that remind us that violent threat actors are active in this world, many acting on motivations that are hard or impossible to understand. Allowing public disclosure of railroad information about movements of chemicals and other products that, if targeted and intentionally released from their rail containers, could cause significant public harm is facilitating the potential weaponization of that information by foreign and domestic violent threat actors, risking harm to Maine's citizens.

Further, as you may be aware, the federal government is in the process of reviewing communications channels and protocols between the rail industry and emergency responders or other authorities. CPKC urges the Legislature, at a minimum, to defer action on LD 1937 until the federal government has an opportunity to complete the process underway.

As a final matter, it is important to take into consideration the stated objective of LD 1937 and consider if public disclosure of the data relating to the hazardous materials would be necessary. Public disclosure of said data will not deliver any public benefit, much less preserve public peace or health and safety as suggested in the preamble of the proposed amendment. In the absence of any public benefit, and in light of the potential safety and security harm, LD 1937 should fail. For example, LD 1937 would have had no benefit in relation to an unfortunate derailment that occurred on CPKC's line in the State of Maine on April 15, 2023 or the ability of emergency responders or CPKC hazmat personnel to respond. Although that derailment is being thoroughly addressed in other forums, CPKC will briefly highlight a few relevant distinctions to illustrate the point.

The April 15, 2023 derailment occurred due to a track washout. State, local and federal emergency response and environmental agencies had ready access to information about the train. The majority of cars on the train carried consumer goods-commodities needed for every part of the US and Canadian economies-not hazardous materials or dangerous goods. The incident resulted in a



fire involving the locomotives and four derailed lumber cars and no other cars were impacted by the fire. Two intermodal cars carrying intermodal shipping containers derailed but were not involved in the fire. There were drums of hazardous materials inside containers but no leaks or spills of the hazardous materials occurred from the intermodal containers carrying the drums and there were no evacuations ordered or threats to public safety.

CPKC environmental response teams have and will continue to responsibly address any released diesel until such time as the remediation is complete in accordance with all applicable legal requirements, and they have been working closely with state and federal environmental authorities throughout the process.

With such grave safety and security consequences, CPKC must strongly oppose progressing this bill through the legislature. At the end of the day, CPKC wants to protect the safety of the public, local communities, emergency responders, rail employees, the environment, rail infrastructure, and national security.

We appreciate the opportunity to comment and look forward to continued engagement on this critical safety and security matter.

For the foregoing reasons, CPKC respectfully submits the above opposition to LD 1937.

Respectfully,

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