



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

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Secretary of Natural Resources

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Director

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## STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO NORFOLK SOUTHERN RAILWAY COMPANY

### SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.34:20, between the State Water Control Board and Norfolk Southern Railway Company for the purpose of resolving certain violations of the State Water Control Law and the applicable regulations.

### SECTION B: Definitions

Unless the context indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.3
2. "BRRO" means the Blue Ridge Regional Office of DEQ, located in Roanoke, Virginia.
3. "Containment and cleanup" means abatement, containment, removal and disposal of oil and, to the extent possible, the restoration of the environment to its existing state prior to an oil discharge.
4. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
5. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

6. "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.
7. "Location" means the railroad right of way at or near railroad mile marker MP 304.7, in the proximity of 6103 Old Route 11, Dublin, Pulaski County, VA where the Oil discharge occurred.
8. "Norfolk Southern" means Norfolk Southern Railway Company, a corporation authorized to do business in Virginia, and its parent, affiliates, and subsidiaries. Norfolk Southern is a "person" within the meaning of Va. Code § 62.1-44.3.
9. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
10. "Oil" means oil of any kind and in any form, including, but not limited to, petroleum and petroleum by-products, fuel oil, lubricating oils, sludge, oil refuse, oil mixed with other wastes, crude oils and all other liquid hydrocarbons regardless of specific gravity. *See* Va. Code §62.1-44.34:14.
11. "Operator" means any person who owns, operates, charters, rents or otherwise exercises control over or responsibility for a facility or a vehicle or vessel.
12. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
13. "Person" means any firm, corporation, association or partnership, one or more individuals, or any governmental unit or agency thereof.
14. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 11 (Va. Code §§ 62.1-44.34:14 through 62.1-44.34:23) of the State Water Control Law addresses discharge of oil into waters.
15. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.
16. "Va. Code" means the Code of Virginia (1950), as amended.
17. "VAC" means the Virginia Administrative Code.
18. "Vehicle" means any motor vehicle, rolling stock or other artificial contrivance for transport whether self-propelled or otherwise, except vessels.

## SECTION C: Findings of Fact and Conclusions of Law

1. Norfolk Southern is a person and is from time to time an operator of railroad tank cars, which for purposes of the State Water Control Law are “vehicles,” that transports Oil via rail to customers.
2. On July 14, 2015, DEQ received notification of a discharge of Oil in Dublin, VA. The notification indicated that one Norfolk Southern train had collided with another Norfolk Southern train resulting in derailment of two locomotives and multiple rail cars. DEQ assigned PC #2016 -2017 to this incident.
3. DEQ staff inspected the Location and observed that one of the derailed rail cars was a tank car carrying approximately 23,500 gallons of lubricating oil. As a result of the collision, the tank car (SHPX 204807) ruptured and discharged most of the contents into a dry low-lying area near the railroad tracks. Approximately 6,109 gallons of Oil remained in the tank car immediately following the derailment, and was recovered from that tank car during the response activities.
4. Norfolk Southern immediately instituted containment and cleanup measures including (a) installing an inflatable packer in a culvert under U.S. Route 11, (b) placing absorbent booms around the upgradient edge of the Oil impact area, and (c) constructing an underflow dam approximately 1,000 feet east in the drainage swale of the south side of US Route 11, although none of the released Oil was observed to migrate that far. In addition, Norfolk Southern excavated and appropriately disposed off-site approximately 1735 tons of potentially impacted soils, excavating until visual impacts could no longer be detected or until bedrock was encountered, to the extent feasible. Groundwater was not encountered in the excavation activities. A lined soil berm was constructed south of bridge footers in order to eliminate future potential for impact to stormwater flow. The 6,109 gallons of Oil recovered from the tank car during the emergency response was transported to Spirit Services of VA, LLC for recycling.
5. Va. Code § 62.1-44.34:18(A) states that, “The discharge of oil into or upon state waters, lands, or storm drain systems within the Commonwealth is prohibited. For purposes of this section, discharges of oil into or upon state waters include discharges of oil that (i) violate applicable water quality standards or a permit or certificate of the Board or (ii) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.”
6. On August 07, 2015, the Department issued Notice of Violation (NOV) No. NOV-15-08-BRRO-002 to Norfolk Southern for a discharge of oil in violation of Va. Code § 62.1-44.34:18(A).

7. On August 14, 2015, the Department spoke with Norfolk Southern regarding the NOV, the path forward, and submittal of the initial abatement measure report, in satisfaction of the response requirements contained in the NOV.
8. On October 10, 2015, Norfolk Southern submitted the Initial Abatement Measure Report which detailed all initial containment and cleanup efforts and associated confirmation soil sampling completed at the Location through September 8, 2015.
9. On November 10, 2015, the Department reviewed the Initial Abatement Measures Report submitted by Norfolk Southern and requested a Site Characterization Report because moderate levels of petroleum constituents were present in the subsurface soil after the initial excavations. The Department requested that Norfolk Southern perform an additional subsurface investigation in order to verify that any remaining residual phase petroleum will not present a significant risk to sensitive receptors in the future.
10. Based on the results of the July 14, 2015 inspection, the Initial Abatement Measures Report, and the Site Characterization Report, the State Water Control Board concludes that Norfolk Southern has violated Va. Code § 62.1-44.34:18(A), which prohibits the discharge of oil into or upon state waters, lands, or storm drain systems, as described in paragraphs C2 and C3 above.
11. DEQ staff and representatives of Norfolk Sothern have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code § 62.1-44.34:20, the Board orders Norfolk Southern and Norfolk Southern agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$25,000 within 45 days of the effective date of the Order in settlement of the violations cited in this Order.
3. Reimburse DEQ \$5,231.62 for oil discharge investigative costs within 45 days of the effective date of this Order;

Payments shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

Norfolk Southern shall include its Federal Employer Identification Number (FEIN) (53-6002016) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Petroleum Storage Tank Fund (VPSTF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Norfolk Southern shall be liable for attorneys' fees of 30% of the amount outstanding.

### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Norfolk Southern for good cause shown by Norfolk Southern, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and NOV-15-08-BRRO-002 dated August 07, 2015. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent containment and cleanup of the Location; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Norfolk Southern admits the jurisdictional allegations, and agrees not to contest, but neither admits nor denies, the findings of fact and conclusions of law in this Order. This Order represents a compromise settlement of contested claims and shall not constitute, be interpreted, construed or used as evidence of any admission of liability, law or fact against Norfolk Southern.
4. Norfolk Southern consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Norfolk Southern agrees not to contest that it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Norfolk Southern to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. Norfolk Southern shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Norfolk Southern shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Norfolk Southern shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim of inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Norfolk Southern.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after Norfolk Southern has completed all of the requirements of the Order;
  - b. Norfolk Southern petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
  - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Norfolk Southern.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Norfolk Southern from its obligation to comply with any statute, regulation, permit

condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by Norfolk Southern and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
13. The undersigned representative of Norfolk Southern certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Norfolk Southern to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Norfolk Southern or his/her designee.
14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
15. By its signature below, Norfolk Southern voluntarily agrees to the issuance of this Order.

And it is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2016

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Jefferson D. Reynolds  
Director of Enforcement  
Department of Environmental Quality

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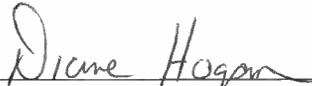
Norfolk Sothern voluntarily agrees to the issuance of this Order.

Date: May 10, 2016 By:   
Helen M. Hart  
General Solicitor  
For Norfolk Southern Railway Company

Commonwealth of Virginia

City of Norfolk

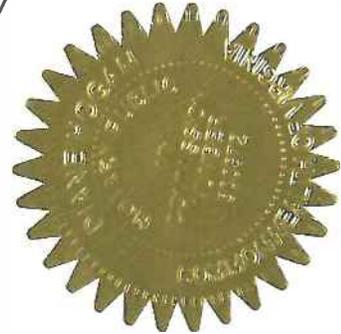
The foregoing instrument was subscribed and sworn before me this 10<sup>th</sup> day of  
May, 2016, by Helen M. Hart.

  
Notary Public

300972  
Registration No.

My commission expires: June 30, 2017

Notary seal:



**APPENDIX A  
SCHEDULE OF COMPLIANCE**

1. No later than **July 22, 2016**, Norfolk Southern shall compile the following information into a Site Characterization Report Addendum (SCRA):
  - a. Additional soil borings should be installed around soil borings D2, D3, D4, E3, and E4. Continuous soil sampling should be conducted from beneath the “clean fill” to the top of bedrock in each soil boring using direct push methodology.
  - b. Soil samples should be described in accordance with the Unified Soil Classification System (USCS) and examined for visible staining. Soil sample headspace should be screened using a photoionization detector (PID) and a representative soil sample from each boring should be submitted to a Virginia certified laboratory for the analysis of PAH in accordance with United States Environmental Protection Agency (USEPA) Method 8270C.
  - c. Leaching models should be developed to determine if PAH (if present) will pose a leaching risk to the groundwater.
  - d. The three monitoring points (MP-1W, MP-1E, and MP-2) located in the North excavation area should continue to be gauged monthly for the presence or absence of lubricating oil for three months.
  - e. The water supply well (designated “6104 Old Route 11”) should be resampled and analyzed for semi-volatiles by EPA Method 8270 in addition to TPH-DRO and TPH-ORO. This sampling event should be conducted in June of 2016.
2. Norfolk Southern shall implement any additional containment and cleanup recommended by DEQ as needed.
3. Unless otherwise specified in this Order, Norfolk Southern shall submit all requirements of Appendix A of this Order to:

**Virginia Department of Environmental Quality**  
**Blue Ridge Regional Office**  
3019 Peters Creek Road  
Roanoke, VA 24019  
(540) 562-6700