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July 1, 2008



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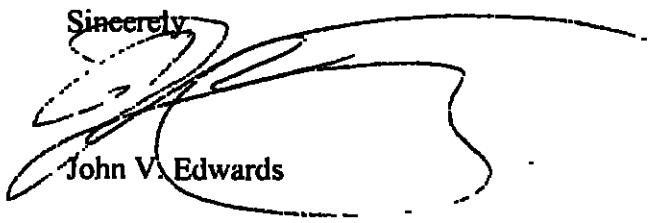
Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: Petition for Declaratory Order
Finance Docket No 35157

Dear Ms. Quinlan

I enclose an original and ten copies of the Response of Norfolk Southern Railway Company to Petition for Declaratory Order in the above-referenced proceeding. I also have enclosed an extra copy, which I ask you to please date stamp and return in the enclosed self-addressed envelope.

Sincerely,



John V. Edwards

Before The
Surface Transportation Board

Finance Docket No. 35157



**PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER**

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO
PETITION FOR DECLARATORY ORDER**

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July 1, 2008

Before The
Surface Transportation Board

Finance Docket No. 35157

PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO
PETITION FOR DECLARATORY ORDER**

The Petition by the City of Alexandria, Virginia ("Alexandria" or the "City") for a Declaratory Order is without merit. The simple fact is that, contrary to what is alleged by the City, the Norfolk Southern Railway Company ("Norfolk Southern") ethanol transloading facility located in Alexandria, Virginia (the "Facility") is not leased to Norfolk Southern's contractor, RSI Leasing, LLC ("RSI"), or to any other party. Instead, the Facility is owned and operated by and on behalf of Norfolk Southern. The City's Petition should be denied.

Moreover, as will be made clear, this matter goes beyond the narrow legal questions presented to the Surface Transportation Board (the "Board"). Indeed, the City has filed its Petition, based as it is on mere speculation with no evidence, in the heat of political passions that threaten to boil over and overwhelm reason as an interstate railroad attempts to be a good corporate citizen while carrying on its business. This proceeding involves an Alexandria City Council member's reference to a "three mile" impact area and other reckless statements that unnecessarily inflame fear in the Alexandria

community. It involves nothing less than political vows to do “everything [the City of Alexandria] can do to shut down this facility,” ignoring two years of communication and cooperation and ultimate findings by City officials that the Facility meets all of the requirements of the Statewide Fire Prevention Code. All of this is about the transportation of ethanol, the use of which the Federal government effectively mandates.¹

There can be no disagreement as to the facts. The relevant facts set forth herein are undisputed, coming from the City itself or otherwise supported with documentation. There is no disagreement as to the relevant law. While Norfolk Southern disagrees with the City’s interpretation of a Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“DOT”) regulation and the City’s erroneous belief that the regulation applies to transloading facilities, Norfolk Southern demonstrates that application of that regulation is not relevant to the Board’s review of the City’s Petition. Otherwise, the parties agree as to the application of law.

The Board has all the information it needs to decide the City’s Petition. It should not permit the City to perpetuate this proceeding further by engaging in unnecessary discovery. As will be shown, the City is, and has been, engaged in a political battle, and

¹ Under the Clean Air Act, EPA requires that reformulated gasoline (“RFG”) be used in certain regions, and other regions have voluntarily adopted such requirements. Much of Northern VA is required to use RFG. The law specifies that RFG contain oxygen (2 percent by weight). See Clean Air Act Section 211(k), 42 U.S.C. 7545. Ethanol and MTBE (methyl tertiary butyl ether) are the two most commonly used substances that add oxygen to gasoline. Because of concerns with MTBE in groundwater, many oil companies are opting to use ethanol, and in fact the federal government encourages use of ethanol in general as an energy resource. See, e.g., “Fact Sheet: Harnessing the Power of Technology for a Secure Energy Future,” <http://www.whitehouse.gov/news/releases/2007/02/20070222-2.html> (section titled Ethanol And Other Biofuels Are Part Of A Larger Strategy To Address Energy Security, Cleaner Air, And Climate Change), Feb. 22, 2007, Fact Sheet “Developing Renewable Fuels and Clean Diesel Technologies”, <http://www.whitehouse.gov/news/releases/2005/05/20050516-3.html>, May 16, 2005.

the Board should not allow itself to be brought into the melee, permitting its processes to be used to perpetuate the conflict.

This Response will first set out the history and background of the controversy leading up to the filing of the Petition. It will then detail the facts regarding the Facility and its operations, a picture of reality that is woefully lacking in the Petition. Contrary to the claims set forth in the Petition, the Facility is not leased to anyone – it is owned and operated by and on behalf of Norfolk Southern. This Response will demonstrate why the cited DOT regulation regarding the transport of hazardous materials is both inapplicable to transportation to the Facility and, more importantly, not relevant to the Board's analysis as to whether the Facility is operated by or on behalf of the railroad. Finally, this Response will detail why the Petition must be denied without the need for discovery.

HISTORY AND BACKGROUND

History of the Van Dorn Street Yard Area

Norfolk Southern and its predecessors have operated in the City of Alexandria for over a century. An important part of those operations have taken place at the Van Dorn Street Yard. Over the years, that yard has been very active. It supports traffic moving over the four adjacent main line tracks. (Not only Norfolk Southern, but also Virginia Railway Express and Amtrak operate over those main line tracks.) As recently as 2006, the yard served as an intermodal facility with nearly 100 trucks per day entering and leaving the yard.

Van Dorn Street Yard is located in the western part of the city in an area that, until recently, was characteristically highly industrial. The immediate area is still largely

an industrial area – for example nearby is Virginia Paving Company, an asphalt paving producer, and abutting the yard is the Covanta Alexandria/Arlington Waste-to-Energy Facility, co-owned by the City of Alexandria and Arlington County and constructed in 1988.

Lately, however, the City has allowed construction and location of some residential units in the area, and has itself located educational facilities there, notwithstanding the continued rail and other industrial use. The military, which had a base located at Cameron Station, sold the property to a developer in the mid-1990's, and Alexandria permitted residential townhouse development on this former army base. About the same time, a developer purchased and began constructing a residential area called Summers Grove. In the same area, the City built Samuel W. Tucker Elementary School, which was opened in September 2000.² The City wants to move other non-industrial facilities to the area, and finds the presence of Virginia Paving and Norfolk Southern to be a hindrance.

The History of the Facility and the City's Involvement

Norfolk Southern first met with the mayor of Alexandria over two years ago to open the communication stream concerning what was then a proposed facility. Norfolk Southern thereafter promptly began working with Alexandria city officials concerning the proper configuration and equipment for the Facility to be located in the yard.

This consultation led the Facility to be configured, for example, with four new fire hydrants, several eye wash stations and other safety equipment, a bermed area

capable of holding the entire liquid contents of eighteen rail tank cars (or well over 515,000 gallons), and special grounding rods designed to prevent the discharge of static electricity. Norfolk Southern, as requested by city officials, purchased 1,640 gallons of specialized ethanol fire-fighting foam ("AR-AFFF Foam"),³ and, before the Facility opened, prepositioned that AR-AFFF Foam at the Facility in a special temperature controlled container.⁴

Norfolk Southern wrote letters to the City, explaining when it intended to begin construction, and then again when it discovered that construction would be somewhat delayed.⁵ It consulted with City offices during the design of the Facility. During the construction phase, Norfolk Southern, in coordination with Alexandria's water

² Tucker Elementary is not located adjacent to the Facility. Separating the specially bermed and fenced Facility and Tucker Elementary is an asphalted expanse, four main line tracks, and a wide, free flowing stream which is now a part of a flood control project.

³ The "AR" in "AR-AFFF" stands for "alcohol resistant." Ethanol has an affinity for water, so it is difficult, though not impossible, to fight an ethanol fire with water or non-alcohol resistant foam.

⁴ Much is made in both the Petition and the public forums that the City did not have a means to deliver the AR-AFFF Foam. It was 2006, however, when the City told Norfolk Southern to acquire the foam, so it would be reasonable for Norfolk Southern to assume that the City either had, or intended to acquire, a means to deliver the foam. Not only did the City not tell Norfolk Southern that it did not have the means to apply the foam, apparently, the City believed it did, in fact, have that capability. See, City Memorandum, communicated from Robert Rodriguez (Alexandria Chief Fire Marshall) to John Catlett (Alexandria Director of Code Enforcement), via e-mail dated November 28, 2007 attached as Exhibit A ("Alcohol fuel fires require alcohol resistant foam that is designed to work with alcohols and polar solvents. Norfolk Southern has agreed to provide up to 1600 gallons of AFFF type foam in portable containers to be stored on site for use by the Alexandria Fire Department. *Currently, the fire department already carries this type of foam on most of the unit*") (emphasis added). As is discussed further below, City officials were instructed beginning January 2, 2008 not to communicate with Norfolk Southern. See note 7 and accompanying text. The City should not be heard to complain about Norfolk Southern initiating operations at a time that the City did not have the capacity to utilize the foam when it was under a communications lock down until after operations were initiated. See Petition at 4 (claiming that "the operation started at a point when the railroad knew that the City (as well as all other jurisdictions in the region) lacked even the most basic equipment and material to fight an ethanol-fueled fire")

department agents, connected the Facility and its four fire hydrants to the City's water system. On November 8, 2007, an on-site meeting was held with City officials to discuss the Facility, and Norfolk Southern informed the City that it intended to open the facility in April 2008.⁶

Unbeknownst to Norfolk Southern at the time, in early 2008, the City gave strict instructions to its officials to cut off communication with Norfolk Southern.⁷ As the date approached for the Facility to begin operations, Norfolk Southern and its contractor RSI called the City's fire department several times to arrange delivery of the Facility's keys so that the fire department would have twenty-four hour access to the Facility. For some time, the City's fire department ignored the calls and declined delivery of the keys.

⁵ These letters are attached as Exhibits B and C.

⁶ See Exhibit A: "Norfolk Southern provided an educational briefing on how exactly the process will function. The target date to begin operation has been identified as April of 2008."

⁷ See e-mail from Michele Evans (Alexandria Deputy City Manager) to John Catlett (Alexandria Director of Code Enforcement), Ignacio Pessora (Alexandria City Attorney) and another unnamed person, dated January 2, 2008 (Exhibit D) ("Please do not communicate with Norfolk Southern further until we have determined the status of this"). The prohibition on communication with Norfolk Southern continued for several months. See e-mail from Robert Rodriguez (Alexandria Chief Fire Marshall) to Ignacio Pessora and Richard Josephson (Alexandria Department of Planning and Zoning), dated April 1, 2008 (noting that the City had received communication from Norfolk Southern's contractor about commencing operations, but expressing concern that he has not received any further direction regarding communication with Norfolk Southern since receiving the instruction to "monitor and report") Appendix E.

The City's Efforts to Remove the Facility

Notwithstanding this significant interaction with the City, the Mayor and the City Council have claimed that they were taken by surprise by the presence of the Facility in its community.⁸ They are determined to have it removed: "The City is moving forward [to do] everything we can to shut down this facility..."⁹

To accomplish the removal of the Norfolk Southern Facility, Alexandria first tried to apply a city ordinance that, on its face, applied only to the hauling of construction equipment and supplies, and dirt and debris or fill of any type, to the movement of ethanol. That City Ordinance is reproduced in Exhibit I. On June 3, 2008, the City unilaterally issued Norfolk Southern a hauling permit pursuant to that ordinance, placing limits on the time that the Facility could be open, and the number of trucks that could enter or leave the Facility, as well as truck routing restrictions. The permit is reproduced as Exhibit J. Not surprisingly, Norfolk Southern declined to accept the permit that (1) it did not request, (2) was issued pursuant to a City ordinance that on its face did not apply to the movement of ethanol, and (3) was otherwise preempted. Norfolk Southern's letter declining the permit is reproduced as Exhibit K.

⁸ The City was not taken by surprise by the presence of the Facility. The City has posted on its website a four-page chronology of the internal and external communications that took place with regard to the Facility over the past 2 years. That chronology is reproduced in Exhibit F. Norfolk Southern does not agree with all of the entries, and cannot vouch for the entries concerning communications to which it was not a party, but does note that the evidence demonstrates that there were no surprises. The memorandum from the Chief Fire Marshall to the City Attorney, dated January 25, 2008, is illustrative of the amount of information available to the City. That memorandum is attached as Exhibit G.

⁹ "Statement of the Mayor and City Council on the Norfolk Southern Ethanol Transloading Facility," undated, reproduced as Exhibit H

The Mayor called Norfolk Southern to a City Council meeting on May 27, 2008.¹⁰ At that meeting, the Alexandria Fire Chief informed the City Council that the Facility, in its present configuration, “meets all requirements of [the] Statewide Fire Prevention Code” for facilities of this type.¹¹ After being informed by the City Attorney that the Facility is a railroad facility covered by 49 U.S.C. Section 10501(b),¹² the Mayor made it clear that the law did not matter, stating that “we are going to do everything we can to cease operations, shut you down and get you out of the city – o k – plain and simple.”¹³ The Mayor was not alone. The Vice Mayor spoke of a “three-mile” accident impact area and another Council member compared Norfolk Southern’s presence to “a neighbor who moves into the vacant house and turns it into a crackhouse.”¹⁴

Notwithstanding this, Norfolk Southern continued to cooperate with city officials. When informed that the City had no equipment to deliver the foam it had asked Norfolk Southern to provide, Norfolk Southern purchased for the City the requested AR-AFFF Foam delivery equipment and a heavy duty pickup truck dedicated to pull that equipment. Norfolk Southern donated its own AR-AFFF Foam and continued use of the climate control container to Alexandria, and purchased substantially more AR-AFFF Foam for

¹⁰ The video of this May 27, 2008 City Council meeting is available on the world wide web at http://alexandria.granicus.com/ViewPublisher.php?view_id=2, and references to that video will be made by a reference to the “City Council Meeting Video” followed by a time stamp location within that video

¹¹ See the presentation by the Alexandria Fire Chief in Exhibit L, page 5 (unnumbered pages); see also, City Council Meeting Video at 1:16:52.

¹² The Alexandria City Attorney advised the Alexandria City Council that it was his conclusion, arrived at after further investigation, that the facility was operated as an integral part of the railroads operations covered by 49 U.S.C. Section 10501(b). City Council Video at 1:55:35

¹³ Id. at 2:18:40

¹⁴ Id. at 1:28:00 and 2:30:51.

use by the City¹⁵ Over an extended period, Norfolk Southern provided facilities for firefighter training and support. This equipment, AR-AFFF Foam and training benefit the City of Alexandria and its mutual aid jurisdictions with respect to any ethanol incident regardless of origin.

Alexandria was not satisfied. It modified the construction equipment and supply hauling ordinance in direct response to the presence of the Facility¹⁶ so that it now applies to the transloading of all bulk commodities – flour, corn syrups, and other bulk transload commodities – moving from a rail head to a non-retail facility. That City Ordinance is reproduced in Exhibit M.

Other Legal Actions Involving the Facility

Finally, due to the City's continued public threats to close the Facility and Norfolk Southern's unsuccessful efforts to resolve the City's objections to the Facility by addressing the City's expressed safety concerns, Norfolk Southern had no recourse but to file suit in the U.S. District Court for the Eastern District of Virginia seeking a declaration that the haulage ordinances and the permit issued thereunder do not apply or otherwise are preempted. That complaint is reproduced in Exhibit N. Norfolk Southern called the City Attorney to inform him of the suit, and ensured that he had a copy of the complaint.

The complaint enunciated facts clearly in conflict with those later contained in the City's Petition, in particular with regard to two central (but erroneous) claims essential to

¹⁵ The equipment Norfolk Southern purchased for the City has an on-board supply of foam. The 1,640 gallons of foam that Norfolk Southern purchased remains just outside of the Facility in the specially-equipped climate controlled container.

¹⁶ Id. at 2:00:09.

that Petition – whether (1) the Facility was leased to RSI (it is not) and (2) whether RSI operated the Facility independent of Norfolk Southern (it does not) Despite having the complaint in hand, and despite the several avenues of communication open with Norfolk Southern and the demonstrated cooperative efforts taken by Norfolk Southern, the City filed its Petition for Declaratory Order.¹⁷

The Petition claims that Norfolk Southern lied to Alexandria¹⁸ and, apparently, the U.S. District Court for the Eastern District of Virginia.¹⁹ It states:

In this case, Norfolk Southern claims that the ethanol transloading operation is being conducted by or on behalf of the railroad, and that local regulation is preempted. However, the facts of the operation demonstrate otherwise. Norfolk Southern appears to be simply a landlord renting to an independent operator.

Petition at 7. Further, the Petition claims:

At the Alexandria facility, the ethanol from the railway tank cars is directly offloaded to the roadway tanker trailers. * * * The operation is being conducted as if the railway tank cars are being unloaded by a private operator, not a rail carrier. * * * RSI's president publicly stated in January 2008 that the subject facility is his company's "newest terminal in Alexandria, Virginia, which will open early next year and be dedicated exclusively to the shipment of ethanol "

Petition at 8

¹⁷ According to the City's timeline, the Petition and the Complaint were filed on June 18, 2008. See, Exhibit F. This is incorrect. Norfolk Southern filed the Complaint on June 16, 2008 and the City filed its Petition on June 17, 2008.

¹⁸ Given the facts, coming from the City this allegation is simply astounding.

¹⁹ It is not clear when the City Attorney's office changed its mind about the nature of the operations at the Facility. As discussed above in note 12, the City Attorney advised the Mayor and the City Council of his conclusion that the Facility was operated by or on behalf of Norfolk Southern in pursuit of its interstate rail operations, and preempted by 49 U.S.C. 10501(b).

The only piece of evidence that Alexandria relies upon to demonstrate its central and determinative alleged fact that the Norfolk Southern – RSI relationship is that of landlord-lessee is a single article appearing in January 2008 in the Greater Lansing Business Monthly. The “public statement” attributed to the RSI president is the Greater Lansing Business Monthly’s characterization of something RSI’s president said

Assistant City Attorney Christopher Spera is quoted as saying “We don’t know the actual wording of the arrangement between Norfolk Southern and RSI because they have not shared that with us,”²⁰ but Alexandria has not asked Norfolk Southern for the RSI Agreement (it is provided as an exhibit to this Response), clarification or documentation regarding the facts. It is to these facts that this Response now turns.

THE FACTS

Norfolk Southern provides, as Exhibit P, a redacted copy of the contract between Norfolk Southern and RSI relating to the operation of the Alexandria ethanol transload facility. If the Board does not dismiss this proceeding, Norfolk Southern, upon the issuance of a protective order in this proceeding, will produce to Alexandria and the Board, an unredacted copy of the same.²¹ That contract (the “RSI Agreement”) demonstrates

²⁰ “City Files Petition Against Norfolk Southern: Mayor issues apology to the citizens for ethanol operation,” Alexandria Gazette Packet, June 19, 2008, attached as Exhibit O.

²¹ There are two pieces of information redacted, both found in Appendix C to the RSI Agreement. The first is the per-gallon transloaded rate that Norfolk Southern pays to RSI as compensation for RSI providing the transloading services for Norfolk Southern. The second is the percentage of other amounts (track occupancy charges (“TOCs”) that Norfolk Southern charges its customers) which RSI collects and remits over to Norfolk Southern. This latter payment made by Norfolk Southern to RSI is compensation for the billing and collecting of the TOCs. One exhibit to the RSI Agreement should have been

- RSI is a contractor, providing its services to Norfolk Southern.
- RSI does not lease the property, and has no right to admit, deny, sell or market the Facility's services to anyone.
- The Facility is Norfolk Southern's, and Norfolk Southern's alone.

But the Petition is as much about what is being transloaded and the Facility as it is about the legal arrangements between RSI and Norfolk Southern

Ethanol

Ethanol is a clean-burning, high-octane motor fuel that is produced from renewable sources. At its most basic, ethanol is grain alcohol, produced from crops such as corn. Pure ethanol is not generally used as a motor fuel, instead, ethanol generally is combined with unleaded gasoline at blending facilities with a resulting mixture to be provided to local gasoline filling stations for use in commercial and private vehicles

Unlike gasoline, ethanol does not transport well in pipelines. It has a chemical affinity to water and other contaminants. Therefore, over long distances it must travel by truck, train or barge. If the ethanol moves over long distances by train, it often must be transloaded from the train car to a truck to move between the rail transloading facility and the blending facility

Norfolk Southern did not introduce ethanol transportation to the City of Alexandria. As the City's fire chief noted to the City Council, "it is important to note

an indemnity agreement that all truck operators would be expected to sign before obtaining access to the Facility. Unfortunately, what was attached to the RSI agreement was a form appropriate to a different type of facility. In any event, the form provides no rights on RSI or change the nature of the underlying agreement

that, .. as long as you have been hearing about 'live green, go yellow,' ... that product has been traveling through the area --²²

Van Dorn Street Yard and the Facility

As discussed above, Norfolk Southern and its predecessors have operated in Alexandria for over a century. In Alexandria, just off of the Van Dorn Street exit from the Capital Beltway, is a rail yard that has a long history in this mixed use neighborhood.²³ At one time, circus trains were unloaded in the yard. Up until a couple years ago, the yard also held an intermodal facility dedicated to the movement of United Parcel Service traffic, with trucks entering and leaving the facility at a rate sometimes as high as 100 per day.

The yard is uniquely located near major interstate highway and rail facilities. This is important when it comes to the movement of intermodal, ethanol and other bulk commodities that require transloading for movement to the product's final destination.

At this yard, Norfolk Southern operates several through and local trains daily, both within and through Alexandria. The movements of rail cars within the Van Dorn Street Yard and switch service to the Facility are performed by Norfolk Southern employees.

Encompassed within the Van Dorn Street Yard is an area that is segregated by physical barriers (berms, spill containment, full track and tank car electrical grounding system, and fences) that is used for the transloading of ethanol - the "Facility."

²² City Council Meeting Video, at 1:41:20.

²³ The immediate neighborhood includes a [concrete/asphalt] transloading, a waste-to-energy facility, a waste oil recycling plant and an impound lot, in addition to the residential and the educational facility. *Id.*, statement of Vice Mayor Pepper at 2:24:25.

Currently, one train daily enters Van Dorn Street Yard transporting rail tank cars loaded with ethanol which is being shipped from various locations in the Mid-Western and Western United States. The loaded ethanol tank cars are placed at the Facility by a Norfolk Southern switch crew Monday through Friday on the specially designed and built twenty-car unloading track located within the bermed spill containment area.²⁴

The ethanol in the tank cars is subsequently transloaded from the rail cars to empty trucks by Norfolk Southern's contractor, RSI.²⁵ Another Norfolk Southern switch crew on Monday through Friday pulls the "residue" tank cars after they have been unloaded so these tank cars can be returned to their origins (the various ethanol production facilities in the Mid-Western and Western United States) or otherwise are used in the interstate rail transportation system.

As is typical of railroad facilities, the Facility is capable of operations twenty-four hours per day. Due to interstate rail operations, rail cars are generally delivered and pulled from the Facility at night (5 pm to 5 am), and transloading operations are generally conducted between 7 am and 6 pm, but the Facility is able to operate around the clock.

The ethanol arrives at the Facility in railroad tank cars that hold approximately 29,000 gallons each. The Facility can hold up to 20 rail tank cars on the specially designed unloading track. Additional loaded tank cars can also be stored incidental to transportation inside the fenced Facility. Currently up to three rail cars can be transloaded to trucks at a time. Norfolk Southern is transloading ethanol into

²⁴ The bermed spill containment area is capable of containing 515,282 gallons, or the equivalent of liquid that would be released if eighteen tank cars simultaneously lost their entire load. *See id.*, statement of Alexandria Fire Chief, at 1:14:26.

²⁵ The transloading takes place pursuant to a "closed loop system" where even the vapors are recovered. *See id.*, statement of Alexandria Fire Chief, at 1:17:53. "There is nothing that escapes into the atmosphere during the transfer operation." *Id.* at 1:18:16.

approximately 24 trucks per day. This number, however, can and will go up or down on a daily basis, depending upon interstate rail operations, the number of ethanol rail tank cars in the transportation system, and ethanol customer demands.

When empty trucks arrive for transloading at the Facility, the trucks are queued within the Facility or inside the railroad yard (notably not on any city street). After the ethanol has been transloaded into the trucks, the ethanol is then transported in the trucks to various gasoline blending facilities located elsewhere in the Commonwealth of Virginia. Customer use of the transportation and transloading services offered by the Facility is increasing.

The Norfolk Southern/RSI Agreement

The Norfolk Southern/RSI Agreement clearly sets up a contractor relationship, not a leasing relationship. It requires RSI, as Norfolk Southern's contractor, to operate the Facility during certain set hours, maintain the site, perform transloading services, test the product transloaded, and collect and pay over to Norfolk Southern certain payments. It requires RSI to provide those other miscellaneous additional services which Norfolk Southern deems reasonably necessary for the efficient operation of the Terminal. Norfolk Southern, in turn, pays RSI for its services on a per gallon basis, with a minimum annual payment, plus, as special compensation for certain billing and processing services, a percentage of Track Occupancy Charges collected from Norfolk Southern rail customers.

The RSI Agreement requires RSI to provide the proper employees and equipment, and to train the employees and maintain its equipment. It requires RSI to perform

employee screening on any of the employees that RSI uses at the Facility. Notwithstanding that, Norfolk Southern still retains the right to exclude any person from working at the Facility.

Under the RSI Agreement, RSI has no right to market the Facility's services to anyone. RSI does not have the right to set or collect fees from any third party for its services. If Norfolk Southern decides that it wants to change the nature of the Facility from an ethanol transload facility to any other type of railroad facility, Norfolk Southern has the right to terminate the RSI Agreement on thirty (30) days notice.

Alexandria makes several erroneous statements in its Petition, and has made other misstatements in the public arena,²⁶ but the central erroneous statement is that the Facility is leased to RSI. The Facility is not.

The Law

Both Norfolk Southern and the City agree on the applicable statutory provision.

Section 10502(b) of Title 49 currently reads:

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

²⁶ For example, in the Petition, the City complains that “[n]either Norfolk Southern nor RSI provided any public information or outreach prior to commencing operation.” Petition at 4. Throughout this Response, Norfolk Southern demonstrates that it began and sustained outreach to the City to the best of its ability. The City cannot complain about any lack of communication with it intentionally cuts off that communication. See Exhibit E. Further, any claims by the City that Norfolk Southern did not communicate with the City about the impending opening of the Facility are wrong, as demonstrated by the City's own documents. See Exhibit Q, e-mail from Jeffrey Farnce (Alexandria Planning and Zoning Division Chief) to Richard Josephson, dated April 4, 2008 (e-mail seeing direction because Norfolk Southern “want[s] to open next week”).

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

“The purpose of the Federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.”²⁷ In short, Section 10501(b) provides that the Surface Transportation Board (“STB” or the “Board”) has exclusive jurisdiction over transportation performed by or on behalf of a rail carrier, and over the associated transportation facilities.²⁸

The term “rail carrier” is defined, in relevant part, as “a person providing common carrier railroad transportation for compensation.”²⁹ The term “transportation” is defined as well. According to Section 10102(9), the definition of “transportation” is as follows:

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

²⁷ STB Finance Docket No. 34797, New England Transrail, LLC d/b/a/ Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, served July 10, 2007 (“NET”), slip op. at 8, petition for reconsideration filed, July 30, 2007, appeal docketed, sub nom., Commonwealth of Massachusetts v. STB, Docket No. 07-2393, September 11, 2007 (citing H R. REP. NO. 104-311, at 95-96 (1995), as reprinted in 1995 U.S.C.A.N. at 807-08).

²⁸ STB Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC – Petition for Declaratory Order, served August 14, 2003 (“Hi Tech II”), slip op. at 5 (“To come within the preemptive scope of 49 U.S.C. 10501(b), [the] activities [under scrutiny] must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier”).

²⁹ 49 U.S.C. § 10102(5).

The term “transportation” is to be broadly interpreted. According to the Board,³⁰ “‘transportation’ is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage.”³⁰ It “encompass[es] the facilities used for and services related to the movement of property by rail, expressly including ‘receipt, delivery,’ ‘transfer in transit,’ ‘storage,’ and ‘handling’ of property.”³¹ As such, the transloading operation is a rail operation under §10502(b).

The only question before the Board, therefore, is whether RSI is a contractor of Norfolk Southern or, to the contrary, an independent operator that is performing its own business on property leased to it by Norfolk Southern.³² As the Petition itself states, at 6. “The Board’s jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are preformed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party’s operations.”³³ See also, Canadian National Railway Co. v. Rockwood, Civil

³⁰ NET, slip op. at 2.

³¹ Id.

³² At one point, the City seems to argue that the question is whether RSI is a railroad. See Petition at 6 (“The Interstate Commerce Commission (ICC) . . . developed standards to determine whether terminal-type companies that are commonly owned by, or contract with, railroads to provide services are themselves rail carriers.”) There is no assertion that RSI is a railroad in its own right. Instead, it acts as a contractor to Norfolk Southern in the performance of Norfolk Southern’s rail operations.

³³ Norfolk Southern concurs with the City’s statement of the law in this regard, which is itself a quote from the Board’s decision in Town of Babylon and Pine Lawn Cemetery – Petition for Declaratory Order, STB Finance Docket No. 35057 (served February 1, 2008) (“Babylon”), petition for reconsideration filed, February 20, 2008, slip op. at 4. Some of the cases cited by the STB in that paragraph seem to particularly on point. The STB compared Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640-42 (2nd Cir. 2005) (transloading and temporary storage of bulk salt, cement and non-bulk foods by a rail carrier preempted) with Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444 (served August 12, 2004) (Board lacked jurisdiction over non-carrier operating a rail yard where it transloaded steel pursuant to an

Case No. 04-40323, U.S. District Court for the Eastern District of Michigan, Southern Division, 2005 U.S. Dist. LEXIS 40131, at *18 (June 1, 2005) (attached as Exhibit R) (the relationship of operator of a transloading facility is one of a contractor performing services for the rail carrier, and the activities occurring at the facility are therefore subject to the Board's jurisdiction, with the attempted local regulation preempted).

Under the facts, and pursuant to the agreement produced, the inescapable conclusion is that RSI indeed is a contractor of Norfolk Southern, and the Facility is a railroad facility operated by and on behalf of a rail carrier. The Petition must be denied.

Two other issues remain. The first is whether the DOT regulation cited by the City has any relevance to the issue presented to the Board (it does not). The second is whether discovery should be permitted (it should not).

Lack of Relevance of Cited DOT Regulation

Alexandria claims that a DOT regulation -- specifically 49 C.F.R. §174.304 - prohibits railroads from transporting Class 3 flammable liquids in tank cars unless the

agreement with the carrier but the transloading services were not being offered as part of common carrier services offered to the public). Alexandria adds to the Babylon excerpt a reference to the Babylon decision itself, but characterizes that decision holding as: "no STB jurisdiction where tenant of licensed rail carrier, not rail carrier itself, had exclusive right to conduct transloading operation for construction and demolition debris and exclusive responsibility to construct and maintain facilities and to market and bill public for services." Railroads often enter into agreements with contractors to construct buildings and other railroad facilities, and to perform electrical and other maintenance on those facilities. The real question is whether the railroad transloading performed at the facility is being performed by or on behalf of the railroad, or instead by or on behalf of the contractor. The real holding of the Babylon decision is that the totality of the facts in the case fail to establish that the lessee's activities are being offered by the railroad or through the lessee as the railroad's agent or contract operator. "In sum, the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent under the auspices of NYAR." Babylon,

movement of the tank car begins on a private track and ends on a private track.⁵ In essence, the City argues that it would be illegal for any railroad to operate any facility for the transloading of a Class 3 flammable liquid. The City assumes from this (mis)interpretation of the regulation that the track on which the ethanol transloading takes place therefore must be a private track. The City then takes its strained logic one further step, leaping to the conclusion that Norfolk Southern cannot be anything but a landlord to that track.

The City has mistakenly alleged that 49 C.F.R. §174.304 – which applies to delivery of rail cars containing Class III materials to private track used by a consignee for storage/unloading of rail cars after the rail car has been delivered to its final destination – also applies to spotting of rail cars at interim transloading facilities. The City misunderstands the regulation, for 49 C.F.R. §174.304 does not apply to transloading.

As information, the Hazardous Materials Transportation Act (“HMTA”) requires DOT to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.” 49 U.S.C. §5103(b)(1). The Term “transportation” is defined in HMTA as meaning “the movement of property and loading, unloading, or storage incidental to the movement.” 49 U.S.C. §5102(12) (emphasis added).

In 2003 DOT originally issued its final rule in a proceeding designated as HM-223. That rule differentiated between “transportation” functions – i.e. those that generally occur between the time a rail carrier takes possession of the rail car containing hazardous materials until the time that the rail car is delivered to a consignee – and “post-

slip op at 5. Of course, the facts regarding the Alexandria Facility indicate just the opposite.

transportation functions” which occur after a rail car is finally delivered to the consignee “Transportation” functions, including storage incidental to movement of hazardous material, are regulated by the DOT “Post-transportation” functions, including storage of rail cars on “private track” after delivery to a consignee, are not regulated by DOT.

In 2004, in response to an Administrative Appeal filed by the Association of American Railroads and Norfolk Southern, among others, DOT clarified any ambiguity by ruling that delivery of a rail car to a transloading facility and “transloading” between rail and cargo tank truck is a “transportation” function regulated by the DOT See DOT Pipeline and Hazardous Materials Safety Administration, Docket No PHMSA-98-4952 (HM-223), 70 Fed. Reg. 20018, 20020-20021 (April 15, 2004) These DOT regulations apply to the “operator” of the transloading facility, regardless of whether it is the railroad, the railroad’s agent, or a lessee of railroad property who is operating the transloading facility See 49 C.F.R. §174.67. Unlike transloading, storage of a rail car containing hazardous materials on a consignee’s private track after delivery by the rail carrier is considered to be a post-transportation function and is not regulated by DOT. See 70 Fed. Reg. at 20021.

In any event, it is not for the STB to decide whether the City has correctly argued that 49 C.F.R. §174.304 prohibits a railroad from operating a facility for the transloading of a Class 3 flammable liquid. It is the DOT - not the STB – that has the power to enforce regulations issued under HMTA. The question of whether the rail carrier is complying with any DOT regulation that applies (or not) to the Facility is not relevant to the question of whether the Facility is operated by or on behalf of a rail carrier.

Discovery

If there was ever a declaratory judgment proceeding in which a decision should be rendered on the initial pleadings, this is it. The facts are not in dispute – all of the facts cited in this pleading are undisputed, come from the City itself, or are documented. The law generally is not in dispute – with the exception of the relevance of the cited DOT regulation, the parties agree as to the applicable law. The Board has enough to make its determination.

Of more importance is the demonstrated fact that this proceeding is a political one. The City has ignored its own legal counsel and proceeded to file this action. It has ignored several opportunities to discuss the dispute. It had the opportunity even the day before the Petition was filed to ask for the RSI Agreement, but it instead buried its head. It ignored and failed to inform the Board of the fact that Norfolk Southern and the City were already in court, and it put blinders on with regard to the facts that were revealed in the District Court complaint.

The Board should not permit its processes to be abused for political gain. It should dispense with discovery and deny the petition.

CONCLUSION

The City has asked for the institution of a declaratory order proceeding. None is needed. The relevant facts set forth herein are undisputed, supported with documentation or come from the City itself. The parties agree as to the relevant law. Under those circumstances, the Board need not institute a declaratory order proceeding, and discovery

would only serve to permit the City to use this Board's processes for its own political ends.

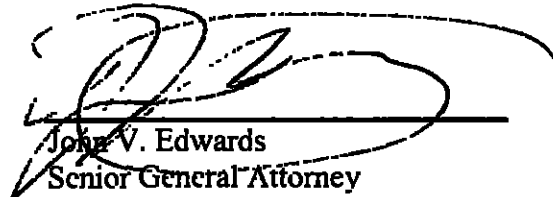
The City seeks "a declaratory order finding that the [Facility] does not constitute 'transportation by rail carrier'" Petition at 2 The Board should decline to provide that order because such a finding would be contrary to the facts and the law.

The City has asked the Board to determine that "the City's proper regulatory authority" over the Facility is not preempted by federal jurisdiction. The City does not define what it means by that term. In any event, at least one aspect of that regulatory authority (the attempt to regulate the Facility by regulating access thereto) was put into question before a U.S. Federal District Court prior to the submission of the City's Petition to the Board. The Board need not reach that issue.

Respectfully submitted,

Gary A. Bryant
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500
(757) 628-5566 Facsimile

July 1, 2008



John V. Edwards
Senior General Attorney
NORFOLK SOUTHERN
CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838

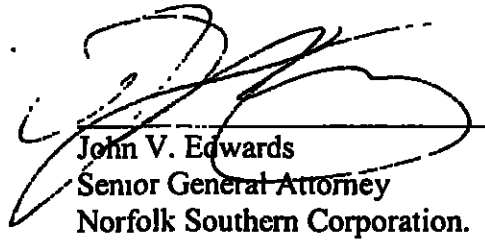
*Attorneys for Norfolk Southern
Railway Company*

Certificate of Service

I hereby certify that on this first day of July, 2008, I have caused to be served, by overnight courier to the persons listed below, a copy of the Response of Norfolk Southern Railway Company to Petition for Declaratory Order.

Ignacio B. Pessoa
Christopher P. Spera
Office of the City Attorney
301 King Street
Suite 1300
Alexandria, VA 22314
703-838-4433

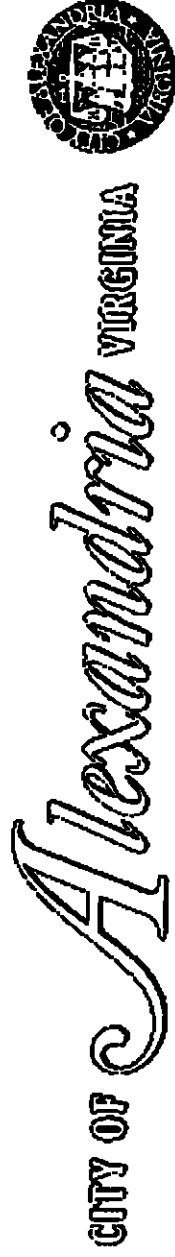
Charles A. Spitulnik
W. Eric Pilsch
Allison I. Fultz
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, N.W.
Suite 905
Washington, D.C. 20036
202-955-5600



John V. Edwards
Senior General Attorney
Norfolk Southern Corporation.

July 1, 2008

A



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June 20, 2008

Letter from
Senator John Warner &
Congressman Jim Moran to Dept
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Norfolk Southern Ethanol Transloading Facility Information

This page contains references and links to all electronic communications among City staff, and between City staff, Norfolk Southern, and the community regarding the establishment and operation of the Ethanol Transloading Facility. The communications, furnished in response to requests made under the Virginia Freedom of Information Act, cover the period from June 20, 2006 at 8 a.m. to May 29, 2008, at 5 p.m.

E-mail addresses and telephone numbers have been redacted to protect the privacy of residents and of City staff whose home and mobile phone numbers were included on the communications. To contact City officials or staff, please use the links on the left side of this page, or Contact Us.

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Proposed Ethanol Transfer facility at Norfolk Southern

- [To: John Cattlett](#)
- [Subject: Proposed Ethanol Transfer facility at Norfolk Southern](#)
- [From: Robert Rodriguez/Alex](#)
- [Date: 28 Nov 2007 08 01 35](#)
- [Bcc:](#)
- [Cc:](#)

June 18, 2008
STB Hearing on Toxic Materials
Transport July 16

June 17, 2008
City Petitions Surface
Transportation Board

? QUESTIONS OR COMMENTS

Project Manager

Steve Mason
Special Assistant to City Manager
City of Alexandria
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transloading@alexandriava.gov

Other Contacts

Norfolk Southern
757.629.2713
contactus@nscorp.com

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202.224.2023
E-mail

Hon. James Webb
U.S. Senate
144 Russell Building
Washington, DC 20510
202.224.4024
E-mail

Hon. James Moran
U.S. House of Representatives
2239 Rayburn Building
Washington, DC 20515
202.225.4376
E-mail

City Council
301 King Street

John,
Attached is the briefing paper on the proposed Ethanol Fuel Transfer Facility by the Van Dorn Metro station. I recommend it be shared with P&Z and T&ES. As this is railroad property, they will be exempt from Fire Prevention Permits.

Bob

Robert B. Rodriguez
Chief Fire Marshal
Alexandria Fire Department / Code Enforcement
301 King Street, Room 4200
Alexandria, Virginia 22314

Office xxx-xxx-xxxx
Fax xxx-xxx-xxxx

Attachment: Proposed Ethanol Offloading Facility at Norfolk Southern.doc
Description Binary data

- Prev by Date Fw: Ethanol Transfer Station at the Piggy Back Railyard on Metro Road
- Next by Date Fw: Ethanol Transfer Station at the Piggy Back Railyard on Metro Road
- Previous by thread Ethanol Transfer Station at the Piggy Back Railyard on Metro Road
- Next by thread Fw: Ethanol site
- Index(es)
 - o Date
 - o Thread

Alexandria, VA 22314
703.838.4550
E-mail

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Proposed Ethanol Offloading Facility at Norfolk-Southern Rail Yard

Introduction

A meeting was held on November 8, 2007 at the Norfolk Southern Rail Yard, which is located off of Metro Road between Eisenhower Avenue and South Van Dorn Street. The meeting was attended by Deputy Fire Marshals Duane Perry, Darryl Stanton, and Assistant Fire Marshal Russell Furr. The purpose of the meeting was to discuss the proposed use of the rail yard for the offloading of ethanol fuel directly from rail car to highway tanker. This is private property regulated by the railroad to which the City of Alexandria has no enforcement authority. Norfolk Southern provided an educational briefing on how exactly the process will function. The target date to begin the operation has been identified as April of 2008. Norfolk Southern already has similar facilities in operation in Baltimore, MD and Petersburg, VA.

The following are the highlights from the meeting:

- Ethanol fuel will be transported by rail car into the yard and will be directly offloaded onto highway fuel tankers by means of an electronic pump transfer
- Ethanol is classified as a flammable liquid and behaves much like gasoline in a fire situation. NFPA recommends the same firefighting procedures for ethanol based fuels as are recommended for gasoline. One unique characteristic of pure ethanol is that it burns with a very pale blue flame, which is nearly invisible. It also behaves like most alcohol based fuels in that it is not compatible with normal foam used to fight hydrocarbon based fires. Alcohol fuel fires require alcohol resistant foam that is designed to work with alcohols and polar solvents. Norfolk Southern has agreed to provide up to 1600 gallons of AFFF type foam in portable containers to be stored on site for use by the Alexandria Fire Department. Currently, the fire department already carries this type of foam on most of the units. The foam will be stored on site in a trailer near the main entrance gate off of Metro Road. Ethanol has a flash point of 55 degrees Fahrenheit, a boiling point of 173 degrees Fahrenheit and its explosive limits are between 3.3% and 19%; specific gravity is 0.79 and it is miscible in water. It appears as clear liquid with a weak odor.
- Norfolk Southern is adding 4 hydrants to the site accessed from an 8 inch main to the site. They were given contact information for Maurice Jones and are consulting with him on this task. The hydrant installation is currently in progress.
- The pumping operation will be a "bottom offload" taken from piping at the bottom of the rail car. The pump is an electric type pump driven by a 25 HP explosion proof motor. The pumps and tanks will be bonded and grounded while transfer operations are taking place. Additionally, there will be an encapsulated vapor recovery system in place and a secondary containment area will be provided around the transfer site to contain any spills (approximately 29,000 gallons).

- There are proposed to be 3 pumps on site. According to staff, each pump can fill a tanker in approximately 30 minutes, which would yield approximately 6 tankers per hour.
- Environmental concerns: Spills will be contained in the secondary containment. Norfolk Southern has their own environmental contractor that they would use to clean up any spills on site. The operation is expected to produce minimal noise to surrounding communities from the actual operation, however it is likely that there will be a substantial increase in road traffic and noise from the additional traffic created by the tankers entering and leaving the site (approximately 25-30 tankers a day, up to 40 maximum). They will then be accessing the interstates by Eisenhower Ave and Van Dorn Street, with Summers Grove being the closest current residential area of concern. Staff has advised that tankers will be contained to the site and will not sit idle on the roadway. A site assessment reveals that there should be enough room to contain at least 6 tankers on the site. There will also probably be some minor increase in rail traffic. Noise to Cameron Station should be minimal, as normal rail cars staging in this area would block a substantial amount of the noise created by the operation. Operations would be performed on a Monday-Friday from 0700-1800, which may increase to weekends also, but there are no specific plans. There will be no night operations expected. There will be fire extinguishers at each pump area and drip pans will be in place under connections. No obnoxious vapors or fumes are expected to be produced as there will be an encapsulated vapor recovery system on site. The only vapors which may be present are when equipment connections are broken, which will be minimal. Spill containment equipment will also be provided on site in the form of absorbent booms and spill drums with seal mats.
- Security concerns: There are two access points to the property. The property is surrounded by chain link fence and gates are locked after hours. Additionally, Norfolk Southern Police routinely patrol their properties. There will be no additional on site security after hours, other than the routine patrols.
- Norfolk Southern is in the process of producing a spill and safety plan for the site. A sample plan was obtained for the Baltimore Facility.
- Additional requests: Requests have been made to have a hazardous materials Knox box installed at the front gate, which will contain site contact information and site specific information. We have also requested that an NFPA 704 placard be placed on the gate to identify the hazard. We have also requested NO SMOKING signs at each fueling location and requested that an emergency electrical shut off switch be located at the small existing office located near the front gate, in the event of a catastrophic pump failure where it is necessary to shut power down to the site.

B



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

William A. Galanko
Vice President Law

Writer's Direct Dial Number
(757) 629-2374
(757) 633-4943 (FAX)
E-mail: william.galanko@nscorp.com

September 18, 2006

Via Overnight Mail

Mr. Rich Josephson
Deputy Director
Department of Planning and Zoning
City of Alexandria
301 King Street
Alexandria, VA 22314

Dear Mr. Josephson:

David Lawson has asked me to respond to your e-mail of August 25, 2006, concerning the Norfolk Southern Railway Company transload facility in Alexandria, Virginia. As you are aware, Norfolk Southern intends to modify this railroad operating facility to receive rail cars and to transload ethanol from those rail cars to trucks. Norfolk Southern will operate the facility through a contractor. You have ventured that this use would be a use not permitted under the current UT zoning, and thus Norfolk Southern could only modify and operate the facility under a special use permit. The transload facility, however, is quintessentially a rail transportation facility that will be used by a freight rail common carrier subject to the jurisdiction of the U.S. Surface Transportation Board ("STB") in order to perform transportation operations. As such, pursuant to 49 U.S.C. § 10505(b), the UT zoning ordinance is preempted to the extent that it would require a permit or a special use permit to be issued before modification and/or operation.

The facility will be merely an adaptation of the former so-called Alexandria Intermodal Facility, which property has a long history of use for various railroad purposes. It will be open to any Norfolk Southern customer seeking ethanol transloading as a part of the Norfolk Southern transportation service package. Norfolk Southern already has received several indications of interest from its customers. The facility will not be devoted to any particular customer. Norfolk Southern will commence work in the very near future, and anticipates that the facility will be open no later than January 2007.

We believe it important to be a good corporate citizen – to work with local officials in order to address concerns that might arise in the modification and operation of our facilities, and we believe we have achieved that here. Accordingly, since June 19, 2006, Norfolk Southern has met with, and provided facility plans to, various Alexandria officials. This includes Mayor Bill Euille, City Manager Jim Hartmann and Deputy City Manager Mark Jinks, as well as D.T. Perry and Art Dahlberg from the Alexandria Fire Department. We have integrated all modifications proposed by Alexandria fire officials to address perceived safety and fire concerns, including but not limited to special spill containment facilities, additional fire hydrant locations (including a mobile fire hydrant), foam capability, and additional portable fire extinguishers. The facility will be fenced, gated and secured, and will be operated in a safe manner in conformance with any applicable health and safety requirements.

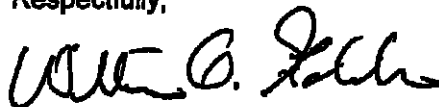
Mr. Josephson
Page 2
September 18, 2006

Having said that, however, we do note that the Interstate Commerce Commission Termination Act ("ICCTA") provides that the jurisdiction of the Surface Transportation Board ("STB") over "transportation by rail carriers" and the construction and operation of rail facilities "is exclusive." 49 U.S.C. § 10501(b). Further, the ICCTA provides that, "except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* "Transportation" is defined as including rail cars, warehouses, wharfs, piers, yards, property, facilities "or other equipment of any kind related to the movement of passengers or property, or both, by rail ... and ... services related to that movement, including receipt, delivery, elevation, transfer in transit, ... storage, handling, and interchange of passengers and property..." 49 U.S.C. § 10102(9). ICCTA was passed in an effort to strengthen the rail transportation system by reducing the regulation of railroads and other modes of surface transportation. See 49 U.S.C. § 10101. Application of this section preempts Alexandria's zoning statute to the extent that it would require any permit prior to the modification or operation of the facility.

Courts have repeatedly invoked 49 U.S.C. § 10501(b) as a basis for preemption of state and local zoning, land use planning and permit requirements in the construction of rail facilities to be operated by or on behalf of rail carriers. See City of Auburn v. United States Government, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 119 S.Ct. 2367 (1999) (relating to the construction of a rail line); Canadian National Railway Co. v. City of Rockwood, Civ. Case No. 04-40323 (U.S. District Court, E.D. of Michigan, Opinion and Order Granting Preliminary Injunction) (activities taking place at a transload facility are considered "transportation," relating to the preemption of permit requirements for the construction and operation of a transload facility), Norfolk Southern Railway Company, et al. v. City of Austell, et al., 1997 WL 1113647 (N.D. Ga., 1997) (intermodal facility). There are several other cases along similar lines.

These decisions, and the statute that they interpret, implement Congress' expressed intention to preempt such regulations that may stand as an obstacle to an interstate rail carrier's ability to construct facilities or conduct interstate rail operations. Nevertheless, we believe it incumbent upon us to work with the local community to address its concerns. We have done so in the past and we will continue to do so where it makes sense in modifying the facility and opening it on a timely basis to operation. Please let me know if there is anything further I can provide you. Further, if desired, I will be happy to speak with your legal counsel concerning this matter.

Respectfully,



William A. Galanko
Vice President - Law

cc: David Lawson

C



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

William A. Galanko
Vice President-Law

Writer's Direct Dial Number

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E-mail: william.galanko@nscorp.com

November 7, 2006

Mr. Rich Josephson
Deputy Director
Department of Planning and Zoning
City of Alexandria
301 King Street
Alexandria, VA 22314

Dear Mr. Josephson:

This follows up on my letter to you dated September 18, 2006, concerning the Norfolk Southern Railway Company ethanol transload facility in Alexandria, Virginia. I do not believe that Norfolk Southern has received any response to that letter, but I did want to make sure that I touched base with you and keep you up to date as we progress.

We now anticipate initiating necessary terminal improvements (previously reviewed with appropriate city officials) soon after Thanksgiving. Although most of this work will be transparent to others (for example, additional engineering work), there will be some surveyors and others working around the property. We now believe that the terminal improvements will be completed sometime after January 2007, but our work in the coming couple of months will give us a better idea of the exact date.

Please let me know if there is anything further I can provide you. I remain available to speak with you concerning this.

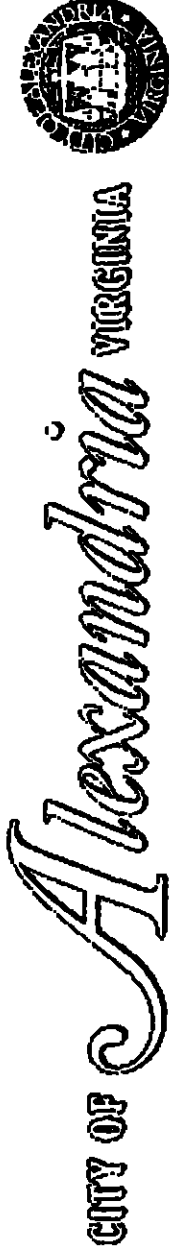
Respectfully,

A handwritten signature in cursive script, appearing to read 'William A. Galanko'.

William A. Galanko
Vice President - Law

cc: David Lawson

D



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June 20, 2008

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Re: Ethanol trans-loading facility at Norfolk Southern intermodal ramp in Alexandria

- To John Catlett, Ignacio Pessoa, xxxxxxxx@xxxx xxx
- Subject Re Ethanol trans-loading facility at Norfolk Southern intermodal ramp in Alexandria
- From Michele Evans/Alex
- Date 02 Jan 2008 17 20.32

June 18, 2008

STB Hearing on Toxic Materials
Transport July 16

June 17, 2008

City Petitions Surface
Transportation Board

QUESTIONS OR COMMENTS

Project Manager

Steve Mason
Special Assistant to City Manager
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transloading@alexandriava.gov

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Hon James Webb
U.S Senate
144 Russell Building
Washington, DC 20510
202.224.4024
E-mail

Hon James Moran
U.S House of Representatives
2239 Rayburn Building
Washington, DC 20515
202.225.4376
E-mail

City Council
301 King Street

- Bcc.
- Cc: Mark Jinks, Jim xxxxxxxx@xxxx xxx, Faroll Hamer

John and Adam,

There was a top management level discussion on this with Norfolk Southern some time ago before either of you were here. I think before you (the Fire Department/Code Enforcement) do anything further, we need to find out what is going on. As we recall, there is a requirement for City approval in our view. Please do not communicate with Norfolk Southern further until we have determined the status of this.

Ignacio, we probably need to find out what is going on.

Thanks

Michele

John Catlett/Alex

To Robert Rodriguez@Alex, Michele Evans@Alex
cc Adam Thiel/Alex@Alex

01/02/2008 04:28 PM Subject: Re: Ethanol trans-loading facility at Norfolk Southern intermodal ramp in AlexandriaLink

Thanks Bob,

I remember us discussing doing this.

I'll pass on.

John D. Catlett, MCP
Code Enforcement Director
Alexandria Fire Department
301 King Street, Room 4200
Alexandria, Virginia 22314

Office: xxx-xxx-xxxx, Ext. 110

Alexandria, VA 22314
703.838.4550
E-mail

Fax: xxx-xxx-xxxx

"Don't be afraid to give up the good to go for the great."
John D. Rockefeller

Robert Rodriguez/Alex To: John Catlett/Alex@Alex
cc: Adam Thiel/Alex@Alex
01/02/2008 04:25 PM Subject: Re: Ethanol trans-loading facility at Norfolk Southern intermodal ramp in AlexandriaLink

John,

I forwarded all the information we had to Farrell to make her office aware. When I sent the e-mail to Farrell I indicated this may be a citizen issue with Cameron Station. I did not hear back from either Farrell or her staff on this matter.

According to City records, the property where this is occurring is railroad property. As such they are not required to get permits from Code Enforcement. We are working with the railroad in an advisory capacity to address hydrant installation / testing, fire extinguisher placement and tours of a similar facility in Baltimore for the Fire Operations staff.

Bob

Robert B. Rodriguez
Chief Fire Marshal
Alexandria Fire Department / Code Enforcement
301 King Street, Room 4200
Alexandria, Virginia 22314

Office xxx-xxx-xxxx
Direct xxx-xxx-xxxx ext. 118
Fax xxx-xxx-xxxx

John Catlett/Alex To Adam Thiel/Alex@Alex
01/02/2008 04 17 PM cc Mark Jinks/Alex@Alex, Michela Evans/Alex@Alex, Robert Rodriguez@Alex@Alex
Subject Re Ethanol trans-loading facility at Norfolk Southern intermodal ramp in AlexandriaLink

It is my understanding from Bob Rodriguez's previous emails that all of this is being conducted on railroad property. I believe he indicated that there was no avenue for city review. From my past dealing with railroads, I believe they are governed by federal regulations that exempt them from local authority. I believe that Bob has confirmed this with PZ, but I'll ask him to confirm.

John D. Catlett, MCP
Code Enforcement Director
Alexandria Fire Department
301 King Street, Room 4200
Alexandria, Virginia 22314

Office: xxx-xxx-xxxx, Ext 110
Fax: xxx-xxx-xxxx

"Don't be afraid to give up the good to go for the great."
John D. Rockefeller

Adam Thiel/Alex To Michela Evans/Alex@Alex
01/02/2008 02 56 PM cc John Catlett/Alex@Alex, Mark Jinks/Alex@Alex
Subject Re Ethanol trans-loading facility at Norfolk Southern intermodal ramp in AlexandriaLink

Great question!

We heard about it "through the grapevine" from some Fairfax County firefighters.

My impression is that this entire deal is somewhat "convoluted" right now.

John might have some additional insight...

Thanks for the quick follow-up!

Adam

Adam K. Thiel

Fire Chief

Alexandria Fire Department

900 Second Street

Alexandria, VA 22314

Phone: xxx-xxx-xxxx

Fax: xxx-xxx-xxxx

E-mail: adam.thiel@alexandriava.gov

Michele Evans/Alex

To xxxxxxxx@xxx xxx, John Catielli/Alex@Alex

cc Mark Jinks/Alex@Alex

01/02/2008 02 51 PM

Subject Re Ethanol trans-loading facility at Norfolk Southern intermodal ramp in AlexandriaLink

Hi Adam and John,

Can either of you tell me how this is coming forward? We had understood that City land use approval was required. Has Norfolk Southern come in to request such approval?

Thanks

Michele

Adam
Thiele/Alex

To "Michele Evans" <Michele.Evans@alexandriava.gov>

cc "John Callett" <John.Callett@alexandriava.gov>, "Mark Penn" <Mark.Penn@alexandriava.gov>, "Russell Middleton" <Russell.Middleton@alexandriava.gov>

01/01/2008
12 55 PM

Subject Ethanol trans-loading facility at Norfolk Southern intermodal ramp in Alexandria

As we're following-up on subject, it appears we're going to have some meaningful challenges to address with respect to fire protection/hazmat preparedness.

Probably the subject of a meeting in the near future our present understanding is this facility will open in April/May 2008

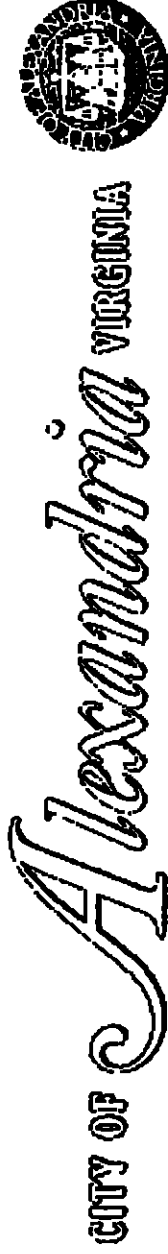
Just FYI

Thanks!

Adam

- Prev by Date: Fw: Ethanol Transfer Station at the Piggy Back Railyard on Metro Road
- Next by Date: Re: Ethanol trans-loading facility at Norfolk Southern intermodal ramp in Alexandria
- Previous by thread: Re: Ethanol trans-loading facility at Norfolk Southern intermodal ramp in Alexandria
- Next by thread: Re: Ethanol trans-loading facility at Norfolk Southern intermodal ramp in Alexandria
- Index(es)
 - Date
 - Thread

E



Home > Norfolk Southern Ethanol Transloading Facility Information > Email Archive

★ LATEST UPDATES

June 25, 2008

Electronic Communications
Regarding Norfolk Southern
Ethanol Transloading Facility

June 25, 2008

City Council Forms Norfolk
Southern Ethanol Transloading
Facility Community Monitoring
Group

June 25, 2008

Congressional Committee Directs
Homeland Security to Review
Ethanol Transloading Facilities
Security

June 24, 2008

Norfolk Southern Files Lawsuit
Challenging Haul Route Permit,
City Responds

June 23, 2008

Letter from Mayor Euille to Norfolk
Southern, Security Assessment
Recommendations

June 20, 2008

Letter from
Senator John Warner &
Congressman Jim Moran to Dept
of Homeland Security

Norfolk Southern Ethanol Transloading Facility Information

This page contains references and links to all electronic communications among City staff, and between City staff, Norfolk Southern, and the community regarding the establishment and operation of the Ethanol Transloading Facility. The communications, furnished in response to requests made under the Virginia Freedom of Information Act, cover the period from June 20, 2006 at 8 a m to May 29, 2008, at 5 p m

E-mail addresses and telephone numbers have been redacted to protect the privacy of residents and of City staff whose home and mobile phone numbers were included on the communications. To contact City officials or staff, please use the links on the left side of this page, or Contact Us

[\[Date Prev\]](#)[\[Date Next\]](#)[\[Thread Prev\]](#)[\[Thread Next\]](#)[\[Date Index\]](#)[\[Thread Index\]](#)

IMPORTANT: Norfolk Southern to start ethanol transfer operations shortly.

- To Ignacio Pessoa, Richard Josephson
- **Subject:** IMPORTANT: Norfolk Southern to start ethanol transfer operations shortly.
- **From:** Robert Rodriguez/Alex
- **Date:** 01 Apr 2008 08 02:42
- **Bcc:** Russell Furr/Alex
- Cc: Adam Thiel, John Catlett

June 18, 2008
STB Hearing on Toxic Materials
Transport July 16

June 17, 2008
City Petitions Surface
Transportation Board

QUESTIONS OR COMMENTS

Project Manager

Steve Mason
Special Assistant to City Manager
City of Alexandria
703 838.3861
transloading@alexandrava.gov

Other Contacts

Norfolk Southern
757 629.2713
contactus@nscorp.com

Hon. John Warner
U.S. Senate
225 Russell Building
Washington, D C 20510
202 224 2023
E-mail

Hon. James Webb
U.S. Senate
144 Russell Building
Washington, DC 20510
202.224 4024
E-mail

Hon. James Moran
U.S. House of Representatives
2239 Rayburn Building
Washington, DC 20515
202 225 4376
E-mail

City Council
301 King Street

Ignacio and Rich,

I wish I could say this was an April Fool's joke but it is not. We received a voice mail message this morning from Kelley Minniehan (xxx-xxx-xxxx) of RSI Logistics. He wants to put keys in their Knox Box at the NS site. He stated they will be starting up operations shortly. We have not received any further direction since our meeting several months ago with the City Manager at which time we were directed to monitor and report. Can you advise how we should proceed?

Thanks,
Bob

Robert B. Rodriguez
Chief Fire Marshal
Alexandria Fire Department / Code Enforcement
301 King Street, Room 4200
Alexandria, Virginia 22314

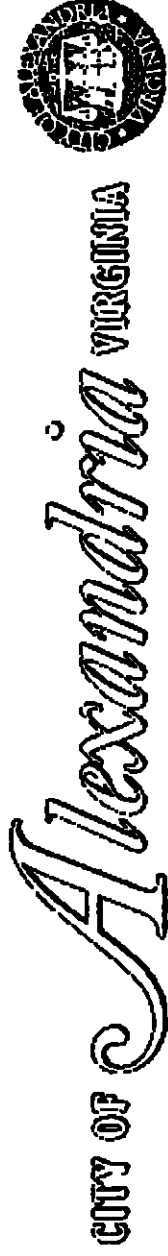
Office xxx-xxx-xxxx
Direct xxx-xxx-xxxx ext. 118
Fax xxx-xxx-xxxx

- Prev by Date. Re: Phone message about Fire Marshal trips
- Next by Date. Fw: IMPORTANT: Norfolk Southern to start ethanol transfer operations shortly.
- Previous by thread Phone message about Fire Marshal trips
- Next by thread Fw: IMPORTANT: Norfolk Southern to start ethanol transfer operations shortly.
- Index(es):
 - o Date
 - o Thread

Alexandria, VA 22314
703 838 4550
E-mail

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Home > Norfolk Southern Ethanol Transloading Facility Information > Timeline of Events and Documents

Norfolk Southern Ethanol Transloading Facility Information

Ethanol Facility Timeline

June 23, 2008	Residents stage protest at Norfolk Southern Ethanol Transloading Facility
June 20, 2008	Senator John Warner and Congressman James P. Moran send letter to Homeland Security Secretary Michael Chertoff requesting a Department of Homeland Security threat analysis of the Norfolk Southern ethanol transfer facility.
June 18, 2008	Norfolk Southern files suit against the City in the United States District Court in Alexandria, claiming that the City's authority to require a Haul Route Permit for tanker trucks leaving the Ethanol Transloading Facility is preempted by federal law
June 18, 2008	Representatives of the City of Alexandria meet with the Senator John Warner, Congressman James P. Moran, and Department of Homeland Security staff to seek assistance in addressing the establishment and operation of the Norfolk Southern ethanol transfer facility
June 18, 2008	The City submits a Petition for a Declaratory Order to the Surface Transportation Board (STB), a federal oversight body responsible for resolving railroad rate and service disputes.
June 16, 2008	City launches Norfolk Southern Ethanol Transloading Facility Information web page
May 15, 2008	City Manager Hartmann sends final memo to City Council and selected staff
May 14, 2008	<i>AFD sent a revised needs assessment and NS emailed its willingness to acquire the requested materials for the AFD</i>
May 9, 2008	<i>Conference call with City Staff and Fire Department to discuss the Fire Dept needs assessment of April 29</i>
May 9, 2008	A conference call is conducted between City Staff and Doug McNeil and other representatives from NS
May 7, 2008	Chief Thiel requests a meeting with Doug McNeil of NS on May 9
May 7, 2008	Chief Thiel advises City Manager Hartmann, City Attorney Pessoa and Deputy City Manager Evans that the response was helpful

May 7, 2008	but not enough.
May 7, 2008	<i>NS agreed to donate a foam trailer, a set of 4 nozzle/eductors, and 1,640 gallons of foam concentrate</i>
May 7, 2008	Letter received from Norfolk Southern
May 6, 2008	Chief Thiel advises City Manager Hartmann, Deputy City Manager Evans, and City Attorney Pessoa that NS has promised a response to his April 29 letter by noon on May 7, and requests holding off on sending the memo to council until it is reviewed
May 5, 2008	Deputy City Manager Evans sends the final draft of the memo to Council to City Manager Hartmann, City Attorney Pessoa, Chief Thiel and Steve Mason for review with the goal of releasing it by May 6
May 5, 2008	Chief Thiel advises Deputy City Manager Evans that there have been quite a few accidents involving ethanol throughout the country.
May 5, 2008	Chief Thiel sends a letter to Michael Webb of NS with an itemized list of equipment, supplies and training needed
May 3, 2008	Deputy City Manager Jinks alerts a representative for the Victory Center (Joseph Brennan) about the operation
May 2, 2008	Deputy City Manager Evans sends out a redrafted memo to City Manager Hartmann, Steve Mason, City Attorney Pessoa and Chief Thiel. She directs City Attorney Pessoa to review the memo for legality and Chief Thiel to contribute photos and advise hours of operation
April 30, 2008	City Manager Hartmann directs Steve Mason to coordinate the development and release of information to the Council and the public. He asks to have it no later than the following morning
April 29, 2008	<i>Chief Thiel sent NS a current needs assessment for the City of Alexandria to deal with an incident involving bulk quantities of ethanol and followed up with a detailed list on May 5</i>
April 29, 2008	Chief Thiel drafts a letter to Michael Webb of NS regarding the City's ongoing concerns. He sends the letter to city staff for review.
April 29, 2008	Deputy Fire Marshal Sullivan advises Fire Marshal Rodriguez that an inspection of the site was conducted on April 28. It was found that the facility was generally in compliance with code. Chief Thiel and John Catlett are advised.
April 25, 2008	<i>Doug McNeil, Mike Webb, James Renner, and Jim Weglicku met in Alexandria with Chief Thiel, Rich Baier, Mark Penn and George McAndrews to discuss fire protection for the terminal and delivered a set of keys for the Knox Box</i>
April 25, 2008	Staff from Fire, Planning and Zoning, Code, T&ES, and the City Attorney's Office meet with Norfolk Southern
April 14, 2008	<i>Fire Chief Adam Thiel emailed David Lawson to set up a meeting to review the facility operations and how the AFD could ensure they were properly prepared, trained, and equipped to protect the facility and the city. Mr. Lawson returned the email and called the same day.</i>
April 14, 2008	Chief Thiel e-mails David Lawson from NS and asks for a meeting to discuss the transloading operation and how they can ensure the Fire Department is properly prepared, trained, and equipped. City Manager Hartmann, Deputy City Manager Evans and Cameron Hall cc'd
April 10, 2008	Fire Marshal Rodriguez advises Chief Thiel, Rich Josephson, City Attorney Pessoa and John Catlett that the facility started operations late on April 9

April 9, 2008	<i>Operations at the ethanol facility commenced</i>
April 9, 2008	City Manager Hartmann directs Chief Thiel to set up the meeting and to ensure that someone from Fire is prepared to go over their process and discuss vulnerable points and site layout. He further states the need to draft something to distribute to other stakeholders and the general public. Finally he states, the City should go on record with NS regarding our position.
April 8, 2008	Chief Thiel asks City Manager Hartmann and Deputy City Manager Evans if they should schedule a meeting to develop a strategy
April 8, 2008	Chief Thiel directs John Catlett and Fire Marshal Rodriguez to notify him when the operations begin
April 4, 2008	City Manager Hartmann advises Chief Thiel to notify operational staff and partners. Multiple fire personnel are notified
April 4, 2008	City Attorney Pessoa advises that the most recent decision by the Surface Transportation Board (STB) dictates that local zoning regulation has unequivocally been found to be preempted. He states that the City is now left with no viable zoning objection to the use. This is sent to City Manager Hartmann, Deputy City Manager Evans, Chief Thiel and Farroll Hamer. John Catlett, Richard Josephson and Fire Marshal Rodriguez cc'd.
April 4, 2008	City Manager Hartmann asks City Attorney Pessoa if they can put legal pressure on NS for the intensification of use
April 4, 2008	Chief Thiel advises City Manager Hartmann, Deputy City Manager Evans and City Attorney Pessoa that the fire department is behind in preparation and readiness for an emergency on the site. He requested a meeting ASAP.
April 4, 2008	John Catlett advises Deputy City Manager Evans and City Attorney Pessoa that the facility will be in operation within a couple of days, and that fire staff need training.
April 4, 2008	Fire Marshal Rodriguez advises John Catlett, Chief Thiel, Richard Josephson, and City Attorney Pessoa that he observed 10 new tank cars on the site and had received another request to place keys in the Knox box. He requested advice on how to proceed.
April 4, 2008	<i>Tony Rosenthal again called Mr. Furr, left him a second message and sent a follow up email</i>
April 3, 2008	Fire Marshal Rodriguez advises City Attorney Pessoa and Rich Josephson that NS planned to start their operation the following week.
April 2, 2008	<i>NS facility contractor, Tony Rosenthal called Russell Furr of the Alexandria Fire Dept and left a message to advise the opening of the terminal and to arrange delivery of the keys to the facility Knox Box</i>
April 2, 2008	Asst Fire Marshal Furr advises Fire Marshal Rodriguez that he received a voice mail from Tony Rosenthal of RSI requesting a meeting to put keys in the Knox box and advising that they (NS) would be in operation by the following week
April 1, 2008	Fire Marshal Rodriguez reports that he received a voicemail message from Kelley Minniehan of RSI logistics. He wanted to put the keys in their Knox box on the site and advised they would be starting up operations shortly. Fire Marshal Rodriguez asks how to proceed. City Attorney Pessoa, Richard Josephson, John Catlett, Chief Thiel and Farroll Hamer received this e-mail
March 4, 2008	George McAndrews responds that he knows nothing about the issues with NS
March 1, 2008	Fire Marshal Rodriguez asks to meet with George McAndrews to be brought up to speed on recent developments.
February 5, 2008	Asst Fire Marshal Furr sends photos of NS progress on the site to Fire Marshal Rodriguez.
January 25, 2008	Fire Marshal Rodriguez sends the above referenced memo to City Attorney Pessoa

January 18, 2008	Rich Josephson sends City Attorney Pessoa a sitemap and informs him of the proximity of various residences and the school to the proposed site
January 18, 2008	Fire Marshal Rodriguez prepares a memo to City Attorney Pessoa discussing Fire protection and operational issues to Chief Thiel for review
January 17, 2008	Asst Fire Marshal Furr sends Fire Marshal Rodriguez a list of concerns and target hazards
January 16, 2008	Chief Thiel forwards the above reference email from NS Manager Paul Williams to City Attorney Pessoa.
January 16, 2008	City Staff meeting on the Issue
January 14, 2008	Fire Marshal Rodriguez provides Chief Thiel with a summary of contacts/actions by Fire Marshal's Office personnel from the November 8 meeting to the present and also provides background from 2006.
January 10, 2008	Meeting w/City Staff is scheduled for January 16 at 10 am
January 10, 2008	Chief Thiel forwards John Catlett an email from NS Haz Mat Manager Paul Williams to Glen Rudner advising that NS had been working with City Fire Marshal's Office for over a year and doesn't know what more they can do to accommodate the City
January 10, 2008	Chief Thiel advises Deputy City Manager Michele Evans and John Catlett that a meeting is needed ASAP w/ City Staff as NS appears to be moving ahead
January 3, 2008	Chief Thiel directs all Fire staff to stand down until further notice
January 2, 2008	Deputy City Manager Michele Evans directs John Catlett to do nothing until further notice and advises that City Attorney Pessoa will handle from that point forward Chief Thiel, Chief Fire Marshal Rodriguez, and City Attorney Pessoa cc'd
January 2, 2008	Chief Thiel advises John Catlett, Robert Rodriguez, John North, and Asst Chief Middleton not to contact NS until further notice
January 2, 2008	City Manager Hartmann forwards Rich Josephson's August 25, 2006 email to NS stating the City's position to Michele Evans, Chief Thiel, John Catlett, Mark Jinks, and Faroll Hamer Rich Josephson and City Attorney Pessoa cc'd
January 2, 2008	Deputy City Manager Michele Evans informs Chief Thiel and John Catlett that the City dealt with this issue prior to either of them being in their current positions and that their (CMO) understanding was that City approval was required She directs them not to communicate with NS until the status is determined. Tells City Attorney Pessoa they need to find out what is going on City Manager Hartmann, Deputy City Manager Mark Jinks, and Faroll Hamer cc'd
January 2, 2008	Chief Fire Marshal Rodriguez advises John Catlett that he forwarded the info to Faroll Hamer and also warned of possible citizen issues, but had not heard back from her office
January 2, 2008	John Catlett responds that he believes that Federal regulations exempt NS from local authority and thought that Chief Fire Marshal Rodriguez confirmed this with Planning and Zoning.
January 2, 2008	Chief Thiel responds that Fire heard about it from Fairfax
January 2, 2008	Deputy City Manager Michele Evans advises Chief Thiel and John Catlett that they (CMO) understood that land use approval (SUP) was required and asked if NS had made the request
January 1, 2008	Chief Thiel advises Deputy City Manager Michele Evans that Fire has issues with the protection and Haz Mat preparedness

December 16, 2007	Suggests a meeting and notifies her of NS's intent to open the facility in April Battalion Chief Farni advises Asst Chief Middleton that Fire does not have the resources to handle a large spill if it occurred There are several attachments with information and fire safety issues Chief Thiel cc'd
December 12, 2007	Charlie McRorie reports on the ethanol facility at the LEPC Meeting, noting that it is scheduled to open in April 2008.
December 3, 2007	Chief Fire Marshal Rodriguez forwards the November 8 meeting info to Farroll Hamer and Richard Josephson Advises them that Code has no regulatory authority and says that he expects citizen concerns when the facility opens in April
November 30, 2007	Mark Penn forwards the info to Charlie McRorie
November 29, 2007	Asst Chief Middleton advises his staff that the proposed facility is scheduled to open in April 2008 States that operational plans need to be developed with input from Code, Haz Mat, and Suppression personnel Mark Penn cc'd
November 29, 2007	Chief Fire Marshal Rodriguez responds to Asst Chief Middleton that they recently became aware of it and met with NS on November 8 He advised that the property is exempt from local regulation
November 29, 2007	Asst Chief Middleton asks John Callett and Robert Rodriguez if they know anything about the proposed ethanol transfer station
November 26, 2007	Fire Marshal Furr emails Robert Rodriguez with details from the November 8 meeting with NS
November 23, 2007	Battalion Chief Michael Farni advises Fire Chief Thiel and Asst Chief Middleton that Fairfax Fire informed their staff about the transloading station during an unrelated training exercise on November 19 and asked for advice on how to proceed
November 8, 2007	Norfolk Southern meeting with Fire Marshals Duane Perry, Darryl Stanton and Russell Furr to discuss proposed use of rail yard for transloading ethanol NS advises them that the City has no enforcement authority and that operations will begin in April 2008
November 2007	NS connected to the city water line in order to get water to the new on-site fire hydrants.
October 2007	Engineering design completed and construction of the facility began, as outlined in both letters, although later than anticipated due to engineering and design changes
November 22, 2006	City Attorney Pessoa leaves a message for William Galanko, reiterating the City's objection, but willingness to discuss further
November 8, 2006 - October 2007	NS continued the necessary engineering design, modifications, and contractor bid specifications No communication or response from the City during this time
November 7, 2006	Bill Galanko sent a follow-up letter to Mr Josephson (stating that) NS had not received any response to the September 18 letter
November 7, 2006	William Galanko of Norfolk Southern sends a second letter to Rich Josephson stating that no response was received following the September 18 letter and advising that NS estimated site improvements would be completed by January 2007 Letter was received by Planning and Zoning on November 10, 2006.
October 20, 2006	City Attorney Pessoa emails Mr Galanko of Norfolk Southern stating that the City rejects their claim of preemption
September 18, 2006	Bill Galanko provided Mr Josephson a written response to the August 25th email
September 18, 2006	William Galanko of Norfolk Southern sends a letter, via overnight mail, to Rich Josephson stating that NS does not require an SUP based on U S Surface Transportation Board preemption Letter was received by Planning and Zoning on September 19, 2006.

August 25, 2006	<i>Rich Josephson sent David Lawson of Norfolk Southern an email regarding the city's position regarding a Special Use Permit and outreach to the community</i>
August 25, 2006	Rich Josephson emails a letter to David Lawson of Norfolk Southern advising him that an SUP is required. City Staff cc'd
August 23, 2006	Deputy City Manager Mark Jinks directs Rich Josephson to send a letter to Norfolk Southern advising them that they are required to have an SUP based on the opinion of City Attorney Pessoa
August 22, 2006	City Attorney Pessoa emails his opinion to City Manager Hartmann, Eileen Fogarty, Rich Josephson, and Jill Applebaum stating that an SUP is required for the proposed ethanol transfer facility Mr Dahlberg and Deputy City Manager Jinks are cc'd
August 22, 2006	Jannine Pennell responds to City Manager Hartmann for Mr Dahlberg outlining the results of the August 9 meeting
August 22, 2006	City Manager Hartmann emails Art Dahlberg and City Attorney Pessoa requesting a status update
August 10, 2006	Duane Perry reports the results of the August 9 meeting to Jannine Pennell
August 9, 2006	<i>Rob Robinson, Gayle Jordan, Mike Webb and others met with Art Dahlberg and D T Perry to review the facility design The fire department officials made several suggestions that were all incorporated into the facility design</i>
August 9, 2006	Norfolk Southern staff meets with Art Dahlberg and Duane Perry Mr Dahlberg discusses possible community impact and safety issues. Recommends that Norfolk Southern conduct a three-phase community outreach effort
August 7, 2006	Deputy City Manager Jinks asks City Attorney Pessoa if he has completed his opinion.
July 17, 2006	Rich Josephson sends details of the proposed operation to Jill Applebaum to assist the City Attorney with his opinion.
July 12, 2006	Rich Josephson asks Jill Applebaum if City Attorney Pessoa has rendered an opinion on the issue
June 20, 2006	Gregg Fields advises Robert Rodriguez and Maurice Jones that site plan will be up coming for their review.
June 23, 2006	<i>Rob Robinson, Lloyd Clingmpeel, and I met with Mayor Euille, Jim Hartmann, Mark Jinks, Rich Baier, Rich Josephson, and Art Dahlberg to review NS plans to develop the ethanol terminal at the NS rail yard</i>
June 23, 2006	Norfolk Southern meets with the Mayor, City Manager, Deputy City Manager Jinks, Art Dahlberg and Duane Perry to discuss their intention to utilize their site on Eisenhower Avenue as an ethanol transloading facility Following this, City Manager asks City Attorney for opinion regarding use.
June 20, 2006	<i>Blair Wimbush (Vice President-Real Estate, NS) and David Lawson met with Mayor Euille to advise him of Norfolk Southern's plans to develop our ethanol terminal at the NS rail yard</i>
June 20, 2006	Norfolk Southern meets with the Mayor

* Items in italics were submitted by Norfolk Southern

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City of Alexandria Virginia

MEMORANDUM

DATE: JANUARY 25, 2008

TO: IGNACIO B. PESSOA, CITY ATTORNEY

FROM: ROBERT B. RODRIGUEZ, CHIEF FIRE MARSHAL

**THROUGH: JOHN CATLETT, DIRECTOR, CODE ENFORCEMENT
ADAM K. THIEL, FIRE CHIEF**

**SUBJECT: FIRE PROTECTION AND OPERATIONAL ISSUES RELATING TO A
PROPOSED NORFOLK SOUTHERN ETHANOL TRANSFER FACILITY**

The purpose of this memorandum is to provide some discussion items that relate to fire protection and fire operational issues should a rail car to tank car ethanol transfer facility be located in the City of Alexandria. As discussed in a meeting with the City Manager recently, Norfolk Southern Corporation has engaged in a number of conversations with various City officials and agencies which indicate a desire to operate an ethanol transfer facility at their former intermodal yard located on Metro Road in the West end of the City. As of the writing of this memorandum, it is my understanding that the facility proposes to operate Monday through Saturday from 9:00 am to 6:00 pm. The facility would have a capability to store ten rail cars filled with ethanol on site and transfer this product to approximately forty trucks a day. These trucks would then depart the facility and deliver this product to several area tank farms including the Newington and Fairfax City tank farms.

The site for the proposed facility is located in the 1000 block of Metro Road. The facility is located across from the Summers Grove town home community, the Newton Asphalt plant and the Cameron Station community as well as Samuel Tucker Elementary School. The site abuts properties for the Van Dorn Street Metro station; United Parcel Service; the Covanta Waste to Energy plant; the Police Firing Range, the City Impound lot and the proposed Victory Center office complex. Backlick Run passes along this site and feeds into Cameron Run just past the Norfolk Southern railroad bridge.

A target hazard assessment conducted by staff has identified a number of critical fire protection issues within a one mile radius of the site. Should a major fire or hazardous materials emergency occur at the proposed facility, the initial impact of such an incident would affect approximately 2000 homes; on going infrastructure and environmental recycling processes; City government operations as they relate to law enforcement and vehicle impoundment activities, and interstate commerce. Retail, commercial and educational activities would also be impacted in the immediate vicinity if a significant incident were to occur. Immediate properties and operations affected include Metrorail, Virginia Railway Express, Amtrak, CSX and Norfolk Southern rail traffic, local roads and interstate

Memo to I.Pessoa from R.Rodriguez

Re: Fire Protection And Operational Issues Relating To A Proposed Norfolk Southern Ethanol Transfer Facility

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highway traffic, Backlick Run and Cameron Run waterways, United Parcel Service, Covanta Waste to Energy Plant; City Impound lot and Police range, and the Summers Grove town home community. Secondary properties affected include the Cameron Station community, Samuel Tucker Elementary School; Virginia Paving Asphalt Plant. Vulcan Plant, Van Dorn and Pickett Street commercial and residential properties

Ethanol is classified as a flammable liquid (Class 1B) It has a flash point of 55 degrees Fahrenheit and a boiling point of 173 degrees Fahrenheit It is a polar solvent, alcohol based fuel which is miscible in water and does not respond well to traditional fire fighting foams. As a result, fire protection features and fire operations tactics and strategies must be specialized in order to properly mitigate any emergencies that can potentially occur on the property.

Because ethanol is an alcohol based fuel, special alcohol based foam is required to fight any type of fire involving this product. The foam must be in ample supply and deployed through the proper delivery system in order to be effective In addition to fighting a fire, the issue of foam and product run off into Backlick and Cameron Runs complicate the matter. Because ethanol is miscible in water, traditional diking methods associated with petroleum run off will be ineffective. Most likely a site containment berm combined with recovery equipment to immediately reclaim runoff is essential to reducing the environmental impact of such an incident. Lastly, because the transfer process utilizes specialized equipment, operations staff must be very familiar with all aspects of this type of operation in order to address fuel and equipment shutoffs in addition to firefighting concerns

Based on the discussion above, the Fire Department is faced with two challenges The first is on site fire protection and prevention Stopping or mitigating the majority of an incident prior to the arrival of the fire department is the best option in this type of scenario. The issue of jurisdiction as it relates to building and fire code enforcement by a locality on railroad property needs to be reviewed and determined At present, it is the opinion of our Code Enforcement staff that this proposed operation falls outside the authority of the Uniform Statewide Building Code and the Virginia Statewide Fire Prevention Code as there is no on site storage. The mere transfer of product from one mode of transportation to another raises the question "Is this an extension of interstate commerce or not?" The answer to this question needs to be determined so that the level of enforcement and oversight can be addressed during further discussions That said, should an ethanol transfer facility become a reality, the facility should comply with a number of fire protection and prevention measures. These general measures are outlined below. More specific details can be provided upon request:

- Provide improved water supply and infrastructure improvements to address fire flow demands for the facility,
- Provide spill containment facilities which protect surrounding waterways during transfer operations;
- Install on-site fire protection equipment including portable master streams and associated infrastructure, fixed fire protection designed for ethanol based fuels; and an ample supply of foam for alcohol based firefighting;

Memo to L.Pessoa from R.Rodriguez

Re: Fire Protection And Operational Issues Relating To A Proposed Norfolk Southern Ethanol Transfer Facility

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- Provide increased site security including vehicle impact protection and perimeter fencing;
- Upgrade and install explosion proof electrical equipment on site;
- Eliminate all sources of static electricity,
- Install hazardous materials and informational signage at approved locations;
- Provide a Fire Department Rapid Entry System;
- Eliminate all smoking on site;
- Install an approved vapor recovery system for fuel transfer operations,
- Obtain an annual Fire Prevention Permit and submit to annual and semi-annual inspections by Code Enforcement staff;
- Conduct yearly safety surveys with Alexandria Fire Department Operations personnel;
- Provide pre-planning and emergency response plans to the City for review and approval;
- Conduct annual training drills with staff from the Fire Operations Division and employees,
- Maintain up to date Material Safety Data Sheets and pre-plan procedures;

The second challenge faced by the Fire Department relates to emergency operations at the proposed facility. Currently the Alexandria Fire Department does not have the resources or capability to effectively manage an incident at an ethanol transfer facility within a first alarm assignment. While resources can be pulled from our surrounding jurisdictions through our mutual aid agreements, there will be a significant delay in getting those resources to this facility. This will result in any incident rapidly expanding which will necessitate use of large scale resources to mitigate the emergency and conduct evacuations of the surrounding target hazards mentioned earlier. The Alexandria Fire Department must have sufficient resources immediately available in order to quickly contain any incident and minimize the life safety risk and economic impact to citizens and businesses in the immediate area. In order to accomplish this, I propose the following equipment and training be provided by Norfolk Southern Corporation in consultation with the Alexandria Fire Department. Said equipment and training would be fully funded from a special revenue account established for and paid by Norfolk Southern Corporation. This account would cover initial outlays of expenditures for equipment and training, as well as continued funding for re-supply of material, replacement of equipment, and refresher training courses for personnel.

In order to manage an ethanol emergency at the Norfolk Southern facility, the Alexandria Fire Department will require:

- A Foam Unit equipped to deliver Class B, AR-AFFF type foam on board with automatic nozzles similar to foam units utilized by area airports,
- Training for fire operations staff in the use of the above foam unit and foam firefighting operations;
- A Foam Trailer or Foam Tender which will provide additional containers of foam concentrate to supplement scene operations on large scale emergencies;
- A Spill Response Vehicle and equipment which is capable of handling large spills of product at the facility,

Memo to I.Pessoa from R.Rodriguez

Re: Fire Protection And Operational Issues Relating To A Proposed Norfolk Southern Ethanol Transfer Facility

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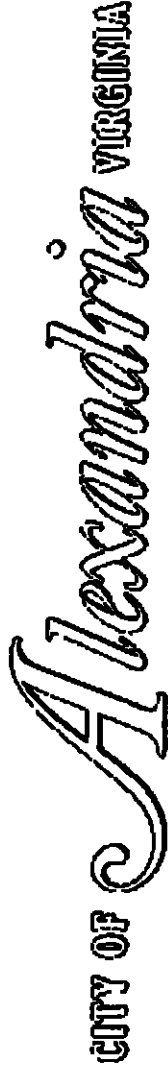
- Provide a minimum of 500 gallons of reserve foam concentrate at an approved location as stipulated by the Alexandria Fire Department;
- Annual funding to cover replenishment and disposal of foam supplies which approach their expiration date;
- Four training slots annually for Alexandria Fire Department personnel to attend a tank car specialist school currently held in Pueblo, Colorado;
- Norfolk Southern communications equipment, emergency contact information, and site plans readily available for use by operations personnel,
- A remote electrical disconnect switch at entrance to site to secure power to transfer operation area
- Leased space to store the above equipment for an interim period of at least five years until the construction and operation of Fire Station 210. In addition, should City funds limit the creation of bay space within Station 210 for storage of the above equipment, Norfolk Southern Corporation will contribute additional funding to the City in order to provide the construction of the necessary bay space within this fire station.

Costs associated with the above requirements are projected at \$2 million dollars. These initial cost outlays are general estimates as of the writing of this memorandum; however, staff can provide more detailed estimates should they be required at a later date

In summary, an ethanol transfer facility in the City of Alexandria will present a significant fire operations problem. The problem must be addressed through strong on site fire protection measures and fire prevention inspection activities coupled with immediately available fire fighting equipment that is specialized in handling alcohol based fuel emergencies. Such emergencies necessitate rapid intervention by highly trained personnel in order to minimize the hazards to life safety and commerce in the surrounding areas. Only through the above measures can the Alexandria Fire Department hope to continue to maintain and preserve the City's valuable building stock in the presence of this type of operation. Please feel free to contact me if you have any questions or need further information on this matter.

Cc: James K. Hartmann, City Manager
Michele Evans, Deputy City Manager
Correspondence File

H



Home > Norfolk Southern Ethanol Transloading Facility Information > Homepage

Norfolk Southern Ethanol Transloading Facility Information

Statement of the Mayor and City Council on the Norfolk Southern Ethanol Transloading Facility

We share the concerns of many Alexandrians about the risks posed by the Norfolk Southern ethanol transloading facility.

We are also extremely disappointed in the inadequate communication provided to the community leading up to and after the opening of the operation

The residents of Alexandria deserve better.

We have conducted a thorough review of the actions pertaining to the opening of the transloading facility. We have concluded there was a serious breakdown in internal and external communications by City staff

City Manager Jim Hartmann and City Attorney Ignacio Pessoa have acknowledged and apologized for mistakes made during this process. The City Council is taking swift action to address this situation. We have instructed the City Manager to address deficiencies in his organization to ensure that these failures are never repeated

We have directed that materials related to this matter be made available to the public.

We also recognize that Norfolk Southern acted irresponsibly in locating this facility in a residential neighborhood near a school, opening the facility without appropriate notification to the City or the community, and operating the facility when the City was unable to adequately respond had there been a serious emergency at the site.

The City is moving forward on two simultaneous fronts—doing everything we can to shut down this facility and to protect the health and safety of our residents from any dangers posed by this facility

Mayor William D Euille, Vice Mayor Redella S "Del" Pepper, Councilman Ludwig P Games, Councilman Rob Krupicka, Councilmember Timothy B Lovain, Councilman Paul C Smedberg, Councilman Justin M Wilson

Background Information

The following information summarizes the City of Alexandria's correspondence and actions regarding the Norfolk Southern Corporation's Ethanol Transloading Facility. The facility, which began operation in April 2008, is located at the former Norfolk Southern intermodal terminal in the City's West End. Documentation includes a timeline of events, letters, e-mail correspondence, a presentation by the Alexandria Fire Department, and a comparison of the Alexandria transloading facility site with other Norfolk Southern ethanol transloading facility sites.

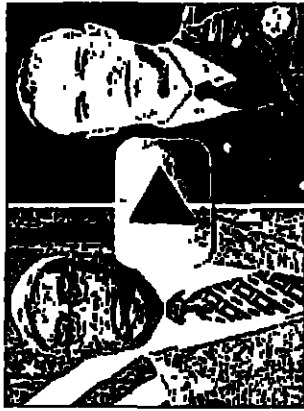
From the time City officials were first contacted, The City has objected to the unilateral, ill-advised decision by Norfolk Southern to locate and operate a bulk ethanol transloading terminal in proximity to

- A high density residential area, where thousands of City residents live, which includes two condominium complexes
- Samuel Tucker Elementary, located approximately 600 feet from the facility, and three other schools, located within less than a mile of the facility
- The Van Dorn Metrorail station, located within less than 1,000 feet of the facility, and the Metrorail Blue Line, which transports thousands of commuters across the Washington, D C Metropolitan region
- The Capital Beltway (located less than 33 miles from the facility), which handles hundreds of thousands of vehicles daily, and is part of the major north-south interstate route serving the East Coast.

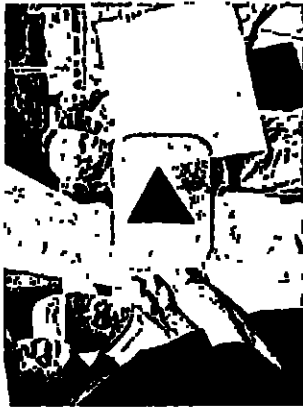
Norfolk Southern has claimed that the City's zoning and other authority to permit or regulate this railroad operation is preempted by federal law, and has refused to abide by the City's normal regulatory processes. The City is seeking a Declaratory Order from the appropriate federal agency, the Surface Transportation Board, to establish the City's authority over this use. In addition, an Ethanol Transloading Facility Monitoring Group will be established to communicate with the public about the City's progress towards restricting Norfolk Southern's actions. In the interim, the City has requested that that Norfolk Southern cease this operation immediately.

- Letter from Mayor William D. Euille
- Timeline of Events and Documents
- Electronic Communications Regarding the Norfolk Southern Ethanol Transloading Facility
- Haul Route
- Official Letters

Media Coverage



A message from Mayor William D. Euille and Fire Chief Adam Thiel
[VIDEO]



Residents and members of City Council participate in a peaceful protest near the Norfolk Southern entrance on Metro Road in the City's West End
[SLIDESHOW]

- WTOP 103.5 News Coverage - June 26, 2008
- Alexandria Gazette Packet Article - June 19, 2008
- Alexandria Times Article - June 19, 2008
- WUSA Channel 9 News Coverage - June 13, 2008
- WRC Channel 4 News Coverage - June 12, 2008
- Alexandria Times Article - June 12, 2008
- Alexandria Gazette Packet Article - June 11, 2008
- Alexandria Gazette Packet Article - May 28, 2008

Frequently Asked Questions

- What is ethanol?
- What is transloading?
- What is the issue with the Norfolk Southern Ethanol Transloading Facility in Alexandria?
- What are the risks associated with the Norfolk Southern facility?
- What is the City doing to address the risks posed by the transloading operations?
- What is the City doing to address security issues?
- What should I do to be prepared for emergencies?
- Who can I contact for questions or comments?

Presentations

- Alexandria Fire Department Presentation to City Council - May 27, 2008
- Characteristics of Norfolk Southern Ethanol Transloading Facilities

Emergency Preparedness Information

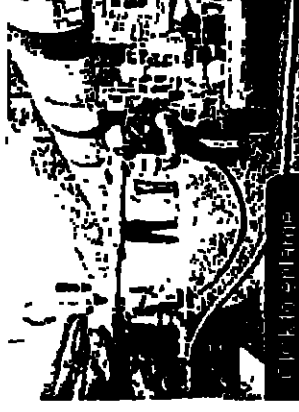
- Emergency Management Office
- Fire and Life Safety Education
- Emergency Preparedness Guide
- Citizen Corps Council
- More Emergency Preparedness Info

Additional Links

- Norfolk Southern
- RSI Logistics
- Federal Railroad Administration



Community Leaders Attend Fire Dept Training at Norfolk Southern Facility
[SLIDESHOW]



Ethanol is transloaded from railcars (right) to tanker trucks (left)
[PHOTO]



View an interactive map of the facility and the surrounding area
[MAP]

- [Surface Transportation Board](#)
- [Cameron Station Civic Association](#)
- [Summers Grove Homeowners Association](#)
- [Pipeline and Hazardous Materials Safety Administration](#)

[Contact Us](#) | [Privacy & Legal Notices](#) | © 1995-2008 City of Alexandria, VA

I

Sec. 5-2-27 Hauling of waste materials, construction materials, etc., prohibited.

(a) Hauling waste materials of any type, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type is prohibited on all streets within the city, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under subsection (e) of this section.

(b) The director of transportation and environmental services is hereby authorized to issue permits to haul such materials or equipment over the streets within the city, subject to such conditions and restrictions specifying the time and route for such hauling, and such additional conditions and restrictions, as the director may deem appropriate to promote traffic safety and to minimize disruption to established residential, commercial, institutional and other areas in the city.

(c) Any person who, as the owner, lessee, operator or driver of a motor vehicle or trailer, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(d) Any person who, as the owner of any land, building or structure to or from which such materials or equipment are hauled, or the agent thereof having possession or control of such property as employee, lessee, tenant, architect, builder, contractor or otherwise, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(e) The prohibition set forth in subsection (a) of this section shall not apply to the hauling of such materials or equipment to or from any specific location or site at the rate of five or fewer trips for pickup or delivery of such materials or equipment in any consecutive thirty day period, nor to the non-commercial hauling of such materials or equipment to or from a dwelling unit, by a resident therein. (Code 1963, Sec. 33-28, Ord. No. 4224, 10/13/01, Sec. 1)

J



CITY OF ALEXANDRIA
Transportation and Environmental Services
301 King Street, Suite 4130
Alexandria, Virginia 22314
703.838.4324



T & ES PERMIT

CASE NUMBER: TES2008-00882

ISSUED: 6/3/2008

EXPIRES: 7/3/2008

LOCATION: 1000 S VAN DORN ST

PROJECT NAME: HAULING

PROJECT DESCRIPTION:

Contact: Doug McNeil or Mike Webb. 757-823-5421 Hauling ethanol from transloading facility in Alexandria to various locations via I-95

Primary Contact :

Norfolk Southern Railway Co
8 N Jefferson St
Roanoke VA 24042-0001

No Phone Number on Record

License Type and Policy Number:

Secondary Contact :

No Phone Number on Record

License Type and Policy Number:

START DATE:	6/4/2008	STREET EXCAVATION	INGRESS/EGRESS
END DATE:	7/3/2008	CRANE	SCAFFOLD/ LADDER
TIME:	7 00 AM - 7 00 PM	DUMPSTER	SIDEWALK CLOSING
INSURANCE:		X HAULING:	BLOCK PARTY
POLICY #:		CROSS CURB/ SIDEWALK	OTHER
EXPIRES:			

1. Any damage to the public right-of-way (sidewalk, curb & gutter or street) is the responsibility of the permittee.
2. The permittee is responsible for compliance with the current version of the "Virginia Work Area Protection Manual"
3. Maximum protection must be given to pedestrians and motor vehicles at all times.
4. This permit may be revoked without notice when the privilege hereby granted is abused or exercised contrary to ordinance or regulation. By issuing this permit, the City of Alexandria assumes no liability for injury or damage to persons or property and the permittee shall save the City harmless from any claim resulting
5. Other specific conditions as attached.

Distribution
Permittee
Police
Traffic
Transportation
Fire Dept
T & ES Inspector
Office Copy

City Manager

By Director of Transportation and Environmental Services

If there are any questions concerning this permit, call 703.838.4324

Conditions of Approval - Permit no.: TES2008-00882

For: NORFOLK SOUTHERN RAILWAY CO

- 1) No dirt, mud or debris shall be tracked/spilled onto the public right-of-way.
- 2) A copy of this permit must be provided each driver. Failure to follow routing will result in revocation of this permit. No entering the city before 7 00 a m. No jake brakes or engine braking within the city limits. Driver shall obey all traffic signs and markings.
- 3) Hauling route is from the Alexandria facility to Metro Road, Metro Road to Eisenhower Avenue, west on Eisenhower Avenue to Van Dorn Street, south on Van Dorn Street and out of the city limits.

Hauling is permitted Monday through Friday, 7 00 a m to 7.00 p m only

Hauling is limited to a maximum of 20 trucks per day

- 4) This permit is being issued despite city concerns and objections to Norfolk Southern and its contractors relating to the appropriateness of ethanol transloading at this location.
- 5) This permit will be revoked should this operation be halted by any governing authority.

K



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

Writer's Direct Dial Number

John V. Edwards
Senior General Attorney

June 4, 2008

Phone (757) 629-2838
Fax (757) 633-4872
E-mail John.Edwards@nscorp.com

Via E-Mail and U.S. Mail

Joan Wagner
Director of Transportation and Environmental Services
City of Alexandria
301 King Street, Suite 4130
Alexandria, VA 22314

Re: T&ES Permit No. TES2008-00882

Dear Ms. Wagner:

Yesterday you transmitted to Doug McNeil a "permit" which purports to grant Norfolk Southern the conditional privilege, for a period of one month, to haul ethanol from its Van Dorn Street rail yard in Alexandria to "various locations via I-95." The conditions in the permit restrict the hours of operation of the facility, the number of trucks able to access the facility on a daily basis, and the routing of the trucks once they have left the facility. Norfolk Southern did not request this permit. In any event, the City of Alexandria does not have the authority to impose on Norfolk Southern's Van Dorn Street facility operating conditions of the type included in the permit you sent to Mr. McNeil.

As representatives of the City have been previously advised, the City is precluded from engaging in this type of regulation by the Interstate Commerce Commission Termination Act (see 49 U.S.C. 10501(b)), the Federal Railroad Safety Act (see 49 U.S.C. 20106(a)) and the Hazardous Materials Transportation Act (see 49 U.S.C. 5125). In fact, as we have explained, Section 5-2-27 of the City Code does not apply to the hauling of ethanol, gasoline or any other similar substances.

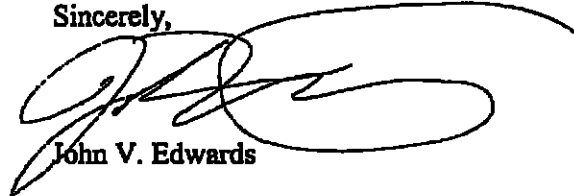
Insofar as the routing of the trucks entering and leaving the facility is concerned, it is our sincere belief that the route currently being used (Metro Road directly to Van Dorn and then to the Beltway) has less of an impact on the surrounding neighborhood than the route apparently preferred by the City. Nevertheless, in an effort to cooperate with the City, we will request that the trucks entering and leaving the facility incident to the transportation of ethanol use the route you have specified. We do not employ or retain the services of the truckers whose vehicles are

Joan Wagner
June 4, 2008
Page 2

loaded at the Van Dorn Street facility and cannot guarantee that they will follow our request, but we believe that most of them will do so.

Norfolk Southern and its predecessor rail lines have been a part of the Alexandria community for nearly 150 years. For all of that time we have tried very hard to cooperate with the City and to be a good corporate citizen. The operation of the ethanol facility at our Van Dorn Street Yard is not an exception to that rule. We contacted the City more than two years ago and advised its representatives of our intention to build and operate the facility, and during the intervening months have tried very hard to keep the City informed and to address its concerns. We remain committed to those objectives.

Sincerely,

A handwritten signature in black ink, appearing to be 'J. Edwards', with a large, sweeping loop at the end.

John V. Edwards

L

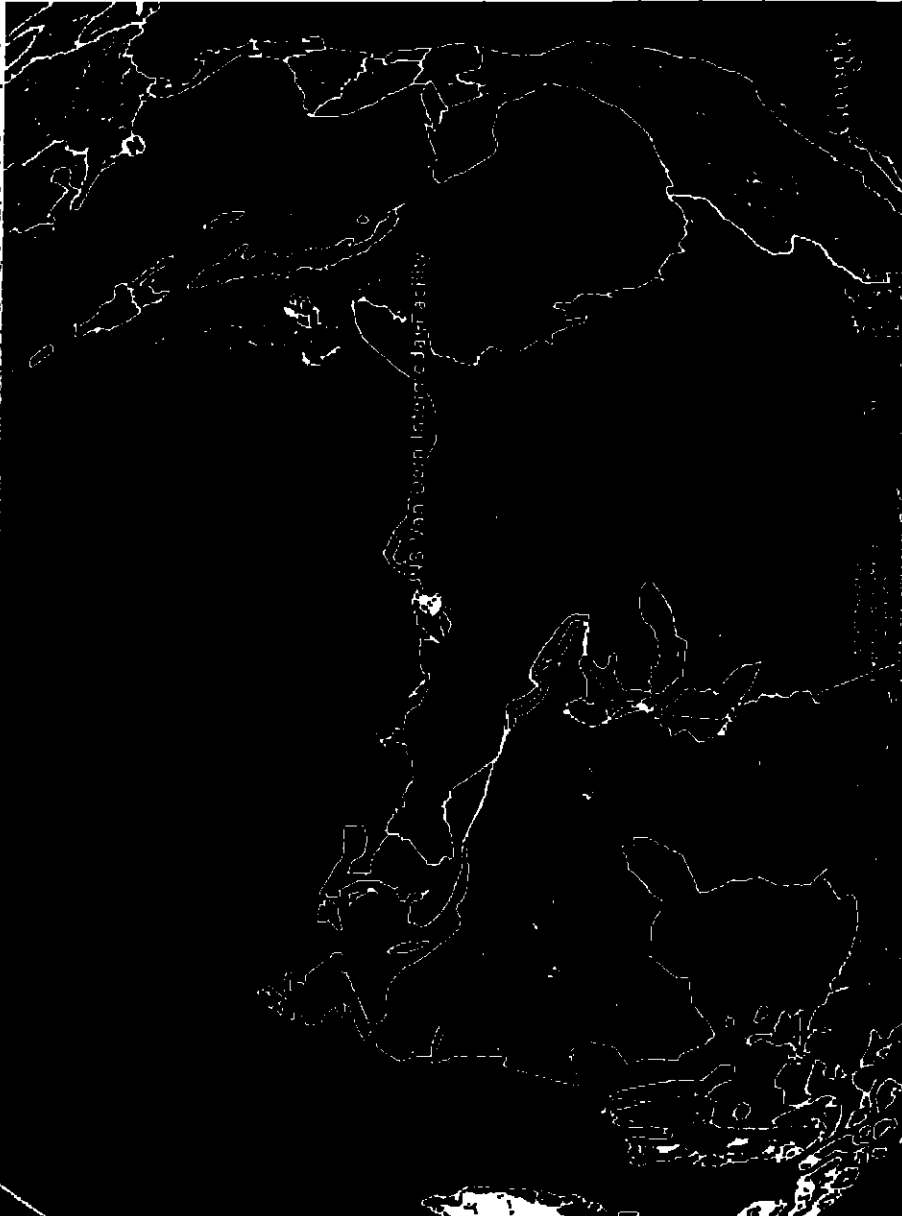
Ethanol Transloading

**City of Alexandria
Presentation to City Council
May 27, 2008**

Ethanol Transloading Presentation—May 27, 2008



Site Overview



Ethanol Transloading Presentation—May 27, 2008

Site Map



Ethanol Transloading Presentation—May 27, 2008



Facility Characteristics

Track capacity

(Additional cars on storage track)

• Ethanol per tankcar

• Spill containment area

• ~515,282 gallon capacity

- Four fire hydrants
- Security fencing
- Knox Box rapid entry key system for emergency vehicle access

Ethanol Transloading Presentation—May 27, 2008



Facility Characteristics

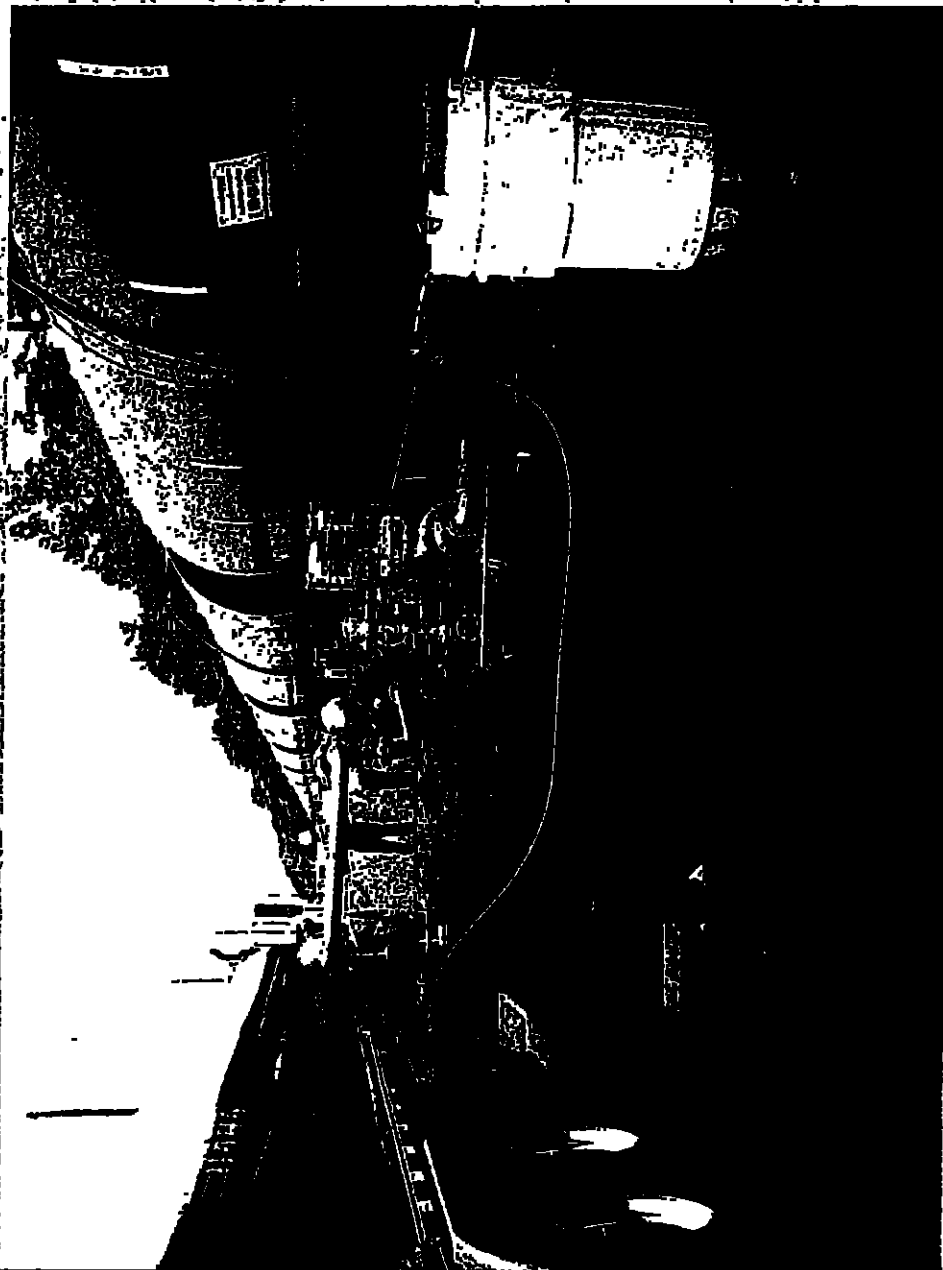
• Loading/bonding equipment
• Protected storage shed on-site
• Withstands attacks of Alcohol Resistant
Aqueous Film Forming Foam
(AR-AFFF)

- Facility meets all requirements of
Statewide Fire Prevention Code

Ethanol Transloading Presentation—May 27, 2008



Transloading



Ethanol Transloading Presentation—May 27, 2008



Ethanol Characteristics

... produced from corn in

• Water soluble

• Flashpoint is -50 deg. F for E95

• Heavier than air (1.59 vapor density)

• Lighter than water (0.79 specific gravity)

Sources: Ethanol Emergency Response Coalition, 2008

Marathon Petroleum Institute, 2008

Ethanol Transloading Presentation—May 27, 2008



Ethanol Characteristics

wide range

sources (NIOSH, 2008)

Denatured ethanol ~5% gasoline for transport (E95)

- Blended with gasoline and used as motor fuel (E85)
- Greatest hazard is flammability

– Little or no smoke/flame produced in a fire



Emergency Scenarios

Leak

Spill

Fire

Ethanol Transloading Presentation—May 27, 2008



Response Capability

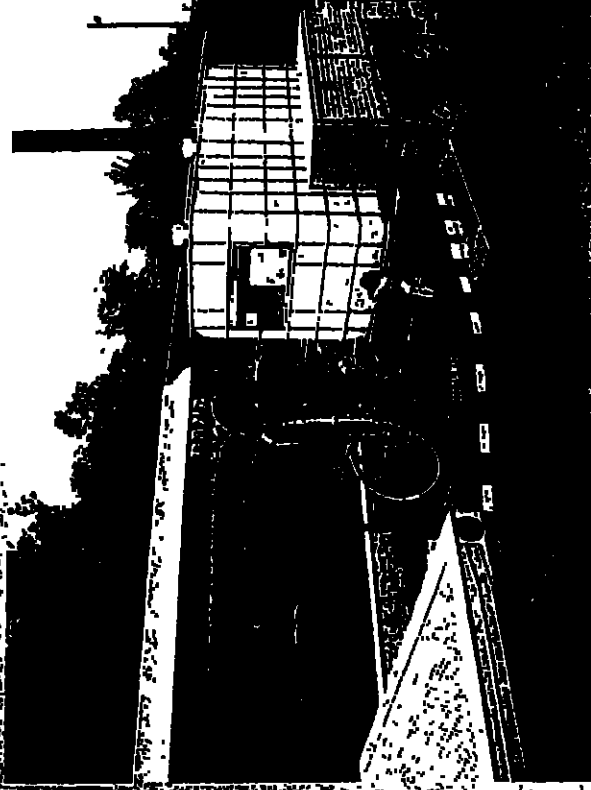
Boat trailer

FFF concentrate onboard
1000 gpm (gpm) nozzle

Leak/spill response

Leak/spill equipment

- Absorbents
- Collection pools
- Recovery drums
- Atmospheric monitors
- Recovery pump



Ethanol Transloading Presentation—May 27, 2008



Response Capability

FAFF

Front

— Four 1 1/2" foam eductors
(150 gpm flow)

— Four air-aspirating foam
nozzles



Ethanol Transloading Presentation—May 27, 2008



Response Capability

Materials Response Team

Partnership with Arlington County Fire Department (A-CFD) and the Virginia Department of Emergency Management (VDEM); hosts the Northern Virginia Regional Hazmat Team

— Minimum of three AFD hazmat technicians
on-duty 24/7/365

Ethanol Transloading Presentation—May 27, 2008



Response Capability

Materials Response Team

Emergency Protective Equipment

- Computers and research
- Leak control/containment
- Spill recovery
- Atmospheric monitoring

— Support 202



Ethanol Transloading Presentation—May 27, 2008



Emergency Planning

Emergency Management planning will be a major part of the City's

Comprehensive Emergency

Management Plan (CEMP) development

- Homeland Security Threat Assessment is being conducted by AFD and APD

Ethanol Transloading Presentation—May 27, 2008.



M

ORDINANCE NO. _____

AN ORDINANCE to amend and reordain Section 5-2-27 (HAULING OF WASTE MATERIALS, CONSTRUCTION MATERIALS, ETC., PROHIBITED) of Chapter 2 (STREETS AND SIDEWALKS), Title 5 (TRANSPORTATION AND ENVIRONMENTAL SERVICES) of The Code of the City of Alexandria, Virginia, 1981, as amended.

THE CITY COUNCIL OF ALEXANDRIA HEREBY ORDAINS:

Section 1. That Section 5-2-27 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 5-2-27 Hauling of waste materials, construction materials, etc., prohibited.

(a) Hauling waste materials of any type, building or construction supplies of any type, bulk materials or commodities of any type, heavy vehicles or equipment of any type not licensed for street use, or dirt, debris or fill of any type is prohibited on all streets within the City, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under subsection (e) of this section.

(b) The director of transportation and environmental services is hereby authorized to issue permits to haul such materials, supplies or equipment over the streets within the City, subject to such conditions and restrictions specifying the time and route for such hauling, and such additional conditions and restrictions, as the director may deem appropriate to promote traffic safety and to minimize disruption to established residential, commercial, institutional and other areas in the City.

(c) Any person who, as the owner, lessee, operator or driver of a motor vehicle or trailer, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(d) Any person who, as the owner of any land, building or structure to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or control of such property as employee, lessee, tenant, architect, builder, contractor or otherwise, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(e) The prohibition set forth in subsection (a) of this section shall not apply to the hauling of such materials, supplies or equipment (1) to or from any specific location or site at the rate of five or fewer trips for pickup or delivery of such materials or equipment in any consecutive thirty day period, (2) to the business location of a retail merchant for use by such merchant in the ordinary course of such merchant's business or from the business location of such a merchant in the ordinary course of such merchant's business to specific locations or sites, but subject to the limitation in clause (1) for each such location or site, nor (3) to the non-

1 commercial hauling of such materials or equipment to or from a dwelling unit, by a resident
2 therein.

3
4 Section 2. That this ordinance is declaratory of existing law.

5
6 Section 3. That this ordinance shall become effective upon the date and at the time
7 of its final passage.

8
9 WILLIAM D. EULLE
10 Mayor

11
12 Introduction: 6/10/08
13 First Reading: 6/10/08
14 Publication:
15 Public Hearing:
16 Second Reading:
17 Final Passage:
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SINCE 1895

WILCOX & SAVAGE

ATTORNEYS AT LAW

Gary A. Bryant
(757) 628-5520
gbryant@wilsav.com

65848 005

June 16, 2008

Via Hand Delivery

Fernando Galindo, Clerk
United States District Court
Eastern District of Virginia
401 Courthouse Square
Alexandria, Virginia 22314-5798

Re. Norfolk Southern Railway Company
v. City of Alexandria, a municipal corporation organized under the laws of the
Commonwealth of Virginia, and Richard Baier, in his official capacity as Director
of Transportation and Environmental Services for the City of Alexandria

Dear Sir,

Enclosed please find the following documents for filing on behalf of Norfolk Southern
Railway Company in the above-referenced matter:

1. An original and three service copies of a Complaint, along with the appropriate
Civil Cover Sheet and Summons for each defendant;
2. Two originals of a Financial Interest Disclosure Statement;
3. Our check in the amount of \$350.00 representing the filing fee for the Complaint;
and
4. An extra copy of the Complaint which we would appreciate having "filed"
stamped and returned to our office

Please have a member of your staff contact me at the above number when the service
packages are ready, and we will have a courier pick them up.

1-821244 1

Reply to Norfolk Office

ONE COMMERCIAL PLACE SUITE 1800 NORFOLK, VIRGINIA 23510 757 628 5500 FACSIMILE 757 628 5566
222 CENTRAL PARK AVENUE SUITE 1500 VIRGINIA BEACH, VIRGINIA 23462 757 628 5600 FACSIMILE 757 628 5659

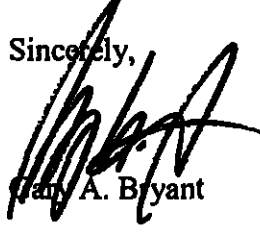
WWW.WILCOXANDSAVAGE.COM

Willcox & Savage

Fernando Galindo, Clerk
June 16, 2008
Page 2

If you should have any questions concerning the enclosed, please feel free to contact me

Sincerely,



Gary A. Bryant

GAB:ceb

Enclosures

cc: ✓ John V Edwards, Esquire
A. Gayle Jordan, Esquire
J. Frederick Sinclair, Esquire

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NORFOLK SOUTHERN
RAILWAY COMPANY,

Plaintiff,

v

Case No. _____

CITY OF ALEXANDRIA,
a municipal corporation organized under the
laws of the Commonwealth of Virginia,
and
RICHARD BAIER, in his official capacity as
Director of Transportation and Environmental
Services for the City of Alexandria,

Defendants.

**CORPORATE DISCLOSURE STATEMENT PURSUANT TO
RULE 7.1 OF NORFOLK SOUTHERN RAILWAY COMPANY**

Pursuant to Local Rule 7.1 of the Eastern District of Virginia and to enable the Judges and Magistrate Judges to evaluate possible disqualification or recusal, the undersigned counsel for Norfolk Southern Railway Company certifies that it is a wholly-owned operating subsidiary of Norfolk Southern Corporation. The following are subsidiaries and/or affiliates of Norfolk Southern Corporation that have issued shares or debt securities to the public:

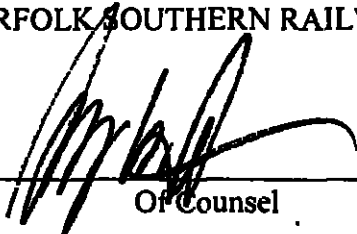
High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
Norfolk Southern Railway Company
North Carolina Midland Railroad Company
South Western Rail Road Company
State University Railroad Company
Mobile and Birmingham Railroad Company

Date: June 16, 2008

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

By


Of Counsel

Gary A. Bryant
Virginia State Bar No. 27558
Counsel for Norfolk Southern Railway Company
WILLCOX & SAVAGE, P.C.
One Commercial Place, Suite 1800
Norfolk, Virginia 23510
(757) 628-5500 Telephone
(757) 628-5566 Facsimile
gbryant@wilsav.com

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

I. (a) PLAINTIFFS

NORFOLK SOUTHERN RAILWAY COMPANY

DEFENDANTS

CITY OF ALEXANDRIA, a municipal corporation organized under the laws of the Commonwealth of Virginia, and RICHARD BAIER, in his official capacity as Director of Transportation & Environmental Services for the City of Alexandria,

(b) County of Residence of First Listed Plaintiff Norfolk
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

(c) Attorney's (Firm Name, Address, and Telephone Number)

Gary A Bryant, Esquire
Willcox & Savage, PC
1800 Bank of America Center
Norfolk, Virginia 23510
Telephone: (757) 628-5500

Attorneys (If Known)
Ignacio Pessoa, City Attorney for Alexandria
301 King Street, Room 1300
Alexandria, Virginia 22314

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PIF | DEF | | PTI | DEF |
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business in This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business in Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (L&L Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury	PERSONAL INJURY ☐ 362 Personal Injury—Med Malpractice ☐ 365 Personal Injury—Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☒ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☐ 445 Amer w/Disabilities—Employment ☐ 446 Amer w/Disabilities—Other ☐ 440 Other Civil Rights	PRISONER PETITIONS ☐ 510 Motions to Vacate Sentence ☐ Habeas Corpus ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition	LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt Relations ☐ 730 Labor/Mgmt Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl Ret Inc Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 463 Habeas Corpus—Alien Detainee ☐ 465 Other Immigration Actions	☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) SOCIAL SECURITY ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609 FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609
				☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☒ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 810 Selective Service ☐ 850 Securities/Commodities/Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization Act ☐ 893 Environmental Matters ☐ 894 Energy Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Fee Determination Under Equal Access to Justice ☐ 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Remanded or Reopened
☐ 5 Transferred from another district (specify) _____
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):

49 U.S.C. §§ 10501, 20106(a), 5125

Brief description of cause

Preemption of application of municipal ordinance

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$1.00

CHECK YES only if demanded in complaint
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S)

IF ANY

(See instructions)

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG JUDGE _____

American LegalNet, Inc.
www.FormsWorldflow.com

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant (2) When the plaintiff is suing the United States, its officers, or agencies, place an "X" in this box.

Federal question (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below, federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings (1) Cases which originate in the United States district courts.

Removed from State Court (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity.

Example:

U.S. Civil Statute, 47 USC 553

Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff

v.

Civil Action No. _____

CITY OF ALEXANDRIA, a municipal corporation
organized under the laws of the Commonwealth of
Virginia, and RICHARD BAIER, in his official
capacity as Director of Transportation and
Environmental Services for the City of Alexandria,

Defendant

Summons in a Civil Action

To *(Defendant's name and address)*

CITY OF ALEXANDRIA, a municipal corporation organized
under the laws of the Commonwealth of Virginia

Serve: William D. Euille, Mayor
301 King Street, Room 2300
Alexandria, Virginia 22314

A lawsuit has been filed against you

Within 20 (twenty) days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

Gary A. Bryant, Esquire
Willcox & Savage, PC
1800 Bank of America Center
Norfolk, Virginia 23510

J. Frederick Sinclair, Esquire
J. Frederick Sinclair, P.C.
100 N. Pitt St., Ste. 200
Alexandria, Virginia 22314

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Name of clerk of court

Date. _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3))

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by:

- (1) personally delivering a copy of each to the individual at this place, _____;
_____; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____; or
- (4) returning the summons unexecuted to the court clerk on _____; or
- (5) other (*specify*) _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____

Date. _____

Server's signature

Printed name and title

Server's address

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff

v.

CITY OF ALEXANDRIA, a municipal corporation
organized under the laws of the Commonwealth of
Virginia, and RICHARD BAIER, in his official
capacity as Director of Transportation and
Environmental Services for the City of Alexandria,

Defendant

Civil Action No

Summons in a Civil Action

To *(Defendant's name and address)*

CITY OF ALEXANDRIA, a municipal corporation
organized under the laws of the Commonwealth of Virginia
Serve Ignacio Pessoa, City Attorney
301 King Street, Room 1300
Alexandria, Virginia 22314

A lawsuit has been filed against you

Within 20 (twenty) days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are

Gary A Bryant, Esquire
Willcox & Savage, PC
1800 Bank of America Center
Norfolk, Virginia 23510

J. Frederick Sinclair, Esquire
J. Frederick Sinclair, P.C.
100 N Pitt St., Ste 200
Alexandria, Virginia 22314

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Name of clerk of court

Date: _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3))

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by

(1) personally delivering a copy of each to the individual at this place, _____;
_____ ; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion, or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____ ; or

(4) returning the summons unexecuted to the court clerk on _____, or

(5) other (specify) _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____

Date _____

Server's signature

Printed name and title

Server's address

I-820895 I
06/13/2008

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff

v

CITY OF ALEXANDRIA, a municipal corporation
organized under the laws of the Commonwealth of
Virginia, and RICHARD BAIER, in his official
capacity as Director of Transportation and
Environmental Services for the City of Alexandria,

Defendant

Civil Action No

Summons in a Civil Action

To *(Defendant's name and address)*

RICHARD BAIER, in his official capacity as Director of
Transportation and Environmental Services for the City of Alexandria
301 King Street
Alexandria, Virginia 22314

A lawsuit has been filed against you.

Within 20 (twenty) days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are.

Gary A Bryant, Esquire
Willcox & Savage, PC
1800 Bank of America Center
Norfolk Virginia 23510

J. Frederick Sinclair, Esquire
J. Frederick Sinclair, P.C.
100 N Pitt St., Ste 200
Alexandria, Virginia 22314

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court

Name of clerk of court

Date: _____

Deputy clerk's signature

(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)

Proof of Service

I declare under penalty of perjury that I served the summons and complaint in this case on _____,
by.

(1) personally delivering a copy of each to the individual at this place, _____;
_____ ; or

(2) leaving a copy of each at the individual's dwelling or usual place of abode with _____
who resides there and is of suitable age and discretion; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is
_____, or

(4) returning the summons unexecuted to the court clerk on _____, or

(5) other (*specify*) _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____

Date _____

Server's signature

Printed name and title

Server's address

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

**NORFOLK SOUTHERN
RAILWAY COMPANY,**

Plaintiff,

v.

Case No. _____

CITY OF ALEXANDRIA,
a municipal corporation organized under the
laws of the Commonwealth of Virginia.

**Serve: William D. Euille, Mayor
301 King Street, Room 2300
Alexandria, Virginia 22314**

**Serve: Ignacio Pessoa, City Attorney
301 King Street, Room 1300
Alexandria, Virginia 22314**

and

**RICHARD BAIER, in his official capacity as
Director of Transportation and Environmental
Services for the City of Alexandria,**

**Serve: Richard Baier
301 King Street
Alexandria, Virginia 22314**

Defendants.

COMPLAINT

**NOW COMES the Plaintiff, Norfolk Southern Railway Company ("NSRC"), by counsel,
and pursuant to the Federal Rules of Civil Procedure, and states as its Complaint against
Defendants, the City of Alexandria, Virginia ("Alexandria") and Richard Baier, in his official**

capacity as Director of Transportation and Environmental Services for Alexandria ("Baier") (collectively "Defendants"), as follows

SUMMARY OF COMPLAINT

1. In this Complaint, NSRC challenges the City of Alexandria's application of municipal ordinance Section 5-2-27 ("City Ordinance"), both as it existed prior to amendment on June 14, 2008 ("Original City Ordinance"), and as it exists after the amendment ("Amended City Ordinance"), as applied to NSRC's Van Dorn Street railroad facility (the "Facility") and cargo tank trucks (hereinafter "trucks") entering the Facility and transporting ethanol from the Facility

2. The Original City Ordinance required a haul permit for motor vehicles hauling "wastes materials of any type, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type." The Original City Ordinance makes it a class two misdemeanor crime for any person, "as the owner of any land . . . to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or control of such property as employee. . . contractor or otherwise," to assist in a violation of the Original City Ordinance.

3. On June 3, 2008, the City of Alexandria ("Alexandria") unilaterally issued to NSRC a permit pursuant to the Original City Ordinance which, *inter alia*, restricts the use of the Facility and the days and hours of operation for the Facility by limiting the number of trucks that can access the Facility in any given day to twenty trucks and restricting the hours of operation for said access. Alexandria has also used the permit to designate the route by which these limited number of trucks may access the Facility.

4. On June 4, 2008, NSRC advised Alexandria, *inter alia*, that the Original City Ordinance did not apply on its face, and that, as applied to the Facility and trucks accessing the Facility, the Ordinance was preempted by federal law.

5. On June 10, 2008, the Alexandria City Council introduced and reported for first reading of an ordinance introduced for the purpose of amending the Original City Ordinance. At that time, the proposed ordinance was scheduled for public hearing four days later, on Saturday afternoon, June 14, 2008. The proposed ordinance was scheduled for a second, and final reading to take place immediately after the public hearing.

6. On June 14, 2008, the Alexandria City Council held a public hearing on the proposed ordinance. Following that public hearing, the City Council adopted the proposed ordinance, thereby amending the City Ordinance.

7. The Amended City Ordinance requires a haul permit for motor vehicles hauling "waste materials, building or construction supplies of any type, bulk materials or commodities of any type, heavy vehicles or equipment of any type not licensed for street use, or dirt, debris or fill of any type," provided the movements are not to or from a retail facility and do occur five (5) or fewer times per month to any particular site. Thus, the Amended City Ordinance requires a haul permit for motor vehicles serving a bulk transload facility (of any commodity), when (a) the commodity is moved to or from a non-retail establishment (so, either to a wholesaler or a manufacturing facility) and (b) the movement to the non-retail establishment takes place more than five (5) times per month.

8. Like the Original City Ordinance, the Amended City Ordinance also makes it a class two misdemeanor crime for any person, "as the owner of any land . . . to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or

control of such property as employee, ... contractor or otherwise," to assist in a violation of the Amended City Ordinance.

9. NSRC alleges that Alexandria's attempts to apply the City Ordinance, in either its original or amended form, must fail for the following reasons:

a. The City Ordinance, in either its original or amended form, on its face does not apply to the Facility, and the Original City Ordinance does not apply to trucks accessing the Facility;

b. the City Ordinance, in either its original or amended form, as applied to the Facility, is void for vagueness and denies NSRC due process of law under the Fourteenth Amendment to the United States Constitution; and

c. the City Ordinance, in either its original or amended form, as applied to the Facility and the trucks accessing the Facility, is preempted under 49 U.S.C. §20106(a) - the preemptive provision of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §10501 - the preemptive provision of the Interstate Commerce Commission Termination Act ("ICCTA"); and 49 U.S.C. §5125 - the preemptive provision of the Hazardous Materials Transportation Act ("HMTA").

JURISDICTION AND VENUE

10 Jurisdiction is conferred upon this court by 28 U.S.C.A. §1331 providing that district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. §1337 providing that district courts shall have original jurisdiction over all civil actions arising under any act of Congress regulating commerce and 28 U.S.C. §2202 authorizing this Court to issue a Declaratory Judgment in this matter. Specifically, this action arises under the Federal Railroad Safety Act, 49 U.S.C.

§§20101 – 20155; the Interstate Commerce Commission Termination Act, 49 U.S.C. §§10101 – 11908; the Hazardous Materials Transportation Act, 49 U.S. §§5101 – 5127; Article VI, cl. 2 of the United States Constitution (“Supremacy Clause”), and the Fourteenth Amendment to the United States Constitution prohibiting a municipal entity from enforcing an ordinance against any person without due process of law.

11. Venue is conferred upon this court by 28 U.S.C.A. §1391(b) and (c) because defendants are residents of this judicial district and the events giving rise to NSRC’s claims occurred in this judicial district.

THE PARTIES

12 NSRC is a Virginia corporation with its principal office and place of business in Norfolk, Virginia.

13. NSRC is a “rail carrier,” as defined in the ICCTA (49 U.S.C. §10102(5)), engaged in interstate commerce subject to the jurisdiction of the Surface Transportation Board (“STB”); a “railroad carrier,” as defined in 49 U.S.C. §20102 of the FRSA, subject to regulation by the Secretary of Transportation acting through the Federal Railroad Administration under the FRSA and the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) under the HMTA.

14. Alexandria is a municipality organized and existing pursuant to Title 15.2 of the Code of Virginia.

15. Richard Baier is the Director of the Department of Transportation and Environmental Services for Alexandria.

THE FACTS

16. NSRC operates an interstate railroad system with trains originating, terminating, traversing and/or interchanging traffic with other rail carriers and/or transportation modes in 22 states, including the Commonwealth of Virginia, and the District of Columbia. NSRC and its predecessor companies have had railroad facilities within the city of Alexandria for over a century. NSRC's railroad facilities within Alexandria are integral to its interstate rail network, providing facilities that move rail traffic interchanged with other rail carriers at interchange points on NSRC's railroad system, originating on NSRC's lines or transloaded or terminating on NSRC's railroad system, including NSRC's rail lines in the Commonwealth of Virginia and the city of Alexandria.

17. NSRC owns and operates one railroad yard named Van Dorn Yard (the "Yard"), located in Alexandria. As with many of NSRC's rail yards, this Yard serves several important rail transportation purposes. At this Yard, NSRC receives rail cars for local delivery; for transfer to other NSRC trains departing the Yard either for delivery to customers along NSRC's railroad lines or interchange with other rail carriers, and for transfer from rail tank cars to motor carriers for delivery to the ultimate consignees through the railroad transloading activities. In the past, the Yard has served for the transfer of intermodal containers filled with a variety of commodities to trucks, which trucks often travel to and from nonretail facilities. At its peak, this truck traffic was at a rate of more than 100 trucks per week, far greater than the five trucks per month allowed under the ordinance, and even greater than the 20 trucks per day allowed under the permit.

18. In addition, at this Yard NSRC operates approximately two transfer trains daily, four local switcher train movements five days per week and an additional four to five trains

monthly within and/or through Alexandria. The movements of rail cars within the Yard and switch service to the Facility are performed by NSRC employees. The Yard is a railroad facility that operates 24 hours per day, 365 days per year.

19. Encompassed within the Yard is a separate area that is segregated by physical barriers – berms, spill containment and fences - that is used for the transloading of ethanol, referred to herein as the “Facility.” At present, one train daily enters the Yard transporting rail tank cars loaded with ethanol which is being shipped from various locations in the Mid-Western and Western United States. The loaded ethanol tank cars are placed at the Facility by a train switch crew Monday through Friday on the specially designed and built twenty-car unloading track located within a bermed spill containment area. The ethanol in the tank cars is subsequently transloaded from the rail cars to empty trucks by NSRC’s contractor. Another train switch crew on Monday through Friday pulls the “residue” tank cars after they have been unloaded so these tank cars can be returned to their origins (the various ethanol production facilities in the Mid-Western and Western United States) or otherwise are used in the interstate rail transportation system. All train crews consist of employees of NSRC.

20. As is typical of railroad facilities, the Facility is capable of operations twenty-four hours per day. Due to the integrated nature of the interstate rail operations that results in rail cars arriving at the Yard, and due to the varied rail operations that occur at the Yard, rail cars generally are delivered from other parts of the Yard, and pulled from the Facility to other parts of the Yard, at night (5 pm to 5 am). Transloading operations generally are conducted from 7 am to 6 pm, but the Facility is able to operate around the clock.

21. The ethanol arrives at the Facility in railroad tank cars that hold approximately 29,000 gallons each. The Facility can hold up to 20 rail tank cars on the specially designed

unloading track. Additional loaded tank cars can also be stored incidental to transportation inside the fenced Facility. Currently up to three rail cars can be transloaded to trucks at a time. The transloading operation itself is performed by a contractor acting by and on behalf of NSRC. NSRC is transloading ethanol into approximately 24 trucks per day. This number, however, can go up or down on a daily basis, depending upon interstate rail operations, the number of ethanol rail tank cars in the transportation system, and ethanol customer demands.

22. Ethanol is a clean-burning, high-octane motor fuel that is produced from renewable sources. At its most basic, *ethanol is grain alcohol*, produced from crops such as corn, and is classified and regulated as a hazardous material by the U.S. Department of Transportation at 49 C.F.R. § 172.101. Pure ethanol is not generally used as a motor fuel; instead, ethanol generally is combined with unleaded gasoline at blending facilities with a resulting mixture to be provided to local gasoline filling stations for use in commercial and private vehicles.

23. When empty trucks arrive for transloading at the Facility, the trucks are queued within the Facility or inside the railroad yard (notably not on any city street). After the ethanol has been transloaded into the trucks, the ethanol is then transported in the trucks to various gasoline blending facilities located elsewhere in the Commonwealth of Virginia. Customer use of the transportation and transloading services offered by NSRC at the Facility is increasing.

24 City Ordinance 5-2-27 as it existed prior to amendment on June 14, 2008 (the Original City Ordinance) prohibited the transportation of "waste materials, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type" within Alexandria without securing from Alexandria a permit for such haulage. The Original

City Ordinance also made it a class two misdemeanor crime for any person, "as the owner of any land . . . to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or control of such property as employee, .. contractor or otherwise," to assist in a violation of the Original City Ordinance. A copy of the Original City Ordinance is attached to this Complaint as Exhibit A.

25 On or about April 25, 2008 Alexandria notified NSRC that NSRC was required to secure a haulage permit pursuant to the Original City Ordinance before trucks could access the Facility. NSRC responded that, because it was not transporting any materials specifically covered by the Original City Ordinance – in that the Original City Ordinance did not cover the transportation of ethanol – the Original City Ordinance did not apply, and that NSRC was not seeking for or asking for a hauler permit. Notwithstanding its contention that the Original City Ordinance did not apply, in an effort to cooperate with Alexandria, NSRC nonetheless supplied Alexandria with the type of information requested so Alexandria would be fully informed of how NSRC expected the Facility would be operated at this time

26. On May 27, 2008, the City Council for Alexandria held a public hearing at which the Facility was discussed. At that City Council hearing, the Mayor, the Vice Mayor and several members of the City Council threatened to close down the Facility. At that same City Council hearing, the City Attorney informed the City Council that he would draft an amendment to the then-existing Section 5-2-27 (the Original City Ordinance) to make it clear that Alexandria had jurisdiction to regulate the Facility and truck traffic to and from the Facility as a means of fulfilling the City Council's intent to shut down the Facility. The minutes from the City Council meeting report that the Mayor said "The City would do everything it could do get Norfolk Southern to cease operations, shut it down and get them out

of the City.”

27. On June 3, 2008, prior to any amendment to the City Ordinance, Alexandria unilaterally issued a one month temporary “T&ES Permit” to NSRC purporting to grant NSRC authority to haul ethanol from the Facility to various locations via Interstate 95. That permit, which again NSRC did not request, purports to place several limits on the operation of the Facility. Specifically, the permit purports to limit truck access to and from the Facility both in number and in time (limiting access to the Facility to twenty trucks per day and only between 7 am and 7 pm, Monday through Friday). The permit also specifies routing for trucks entering or departing from the Facility. By its terms, the permit is valid for just one month, from June 4, 2008 through July 3, 2008, and may be revoked by Alexandria at any time. A copy of the permit is attached to this Complaint as Exhibit B.

28. By letter dated June 4, 2008, NSRC again advised that the City did not have the authority to impose the conditions included in the permit, and that the City was precluded from engaging in this type of regulation by the Interstate Commerce Commission Termination Act, the Federal Railroad Safety Act and the Hazardous Material Transportation Act. A copy of the letter is attached to this Complaint as Exhibit C.

29. On June 6, 2008, in response to a request from Alexandria’s vice-mayor, NSRC provided a timeline of events and communications between NSRC and Alexandria officials as it related to the development of the Facility to address any suggestion that NSRC did not communicate with the City regarding the Facility. A copy of the letter and all attachments thereto is attached to this Complaint as Exhibit D.

30. The City Ordinance was amended on June 14, 2008. As amended, the City Ordinance prohibits the transportation of “waste materials, building or construction supplies of

any type, bulk materials or commodities of any type, heavy vehicles or equipment of any type not licensed for street use, or dirt, debris or fill of any type" within Alexandria, unless the covered materials are transported to or from a retail merchant and the involvement movements are less than five times a month for any specific site, without securing from Alexandria a permit for such haulage. A copy of the Amended City Ordinance is attached to this Complaint as Exhibit E.

31. Like the original City Ordinance, the Amended City Ordinance makes it a class two misdemeanor crime for any person, "as the owner of any land . . . to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or control of such property as employee, . . . contractor or otherwise," to assist in a violation of the Amended City Ordinance.

32. On information and belief, the permit requirements as applied by Defendants have not been developed in accordance with the federal standards on highway routing of hazardous materials transportation, under 49 U.S.C. 5125(c) and 5112(b) as implemented by the U.S. Department of Transportation in 49 CFR Part 397, Subpart C.

33. Enforcement of the City Ordinance, in either its original or amended form, would result in irreparable harm to NSRC, as access to NSRC's Facility and other areas of the Yard would materially and adversely affect NSRC's interstate rail operations, the ethanol rail traffic that is currently transloaded, and other products and materials that NSRC, as a rail common carrier in interstate commerce moves, as follows:

a The restrictions on the number of trucks that could access the Facility and other areas of the Yard would impact the number of tank cars and other rail cars that could be transloaded, notwithstanding the number of tank cars and other rail cars in the

interstate rail system bound for this Facility and other areas of the Yard, potentially creating congestion at the Yard, and a shortage of ethanol tank cars or other cars for shippers throughout the NSRC rail system;

b. The restrictions on the time in which the Facility and other areas of the Yard could operate could both limit the number of rail cars that could be processed at the Facility and other areas of the Yard with the same material and adverse result as the restrictions on the number of trucks that could access the Facility and other areas of the Yard; and

c. The flow of rail cars through the system would be interrupted, with rail cars that should be moving back to ethanol processing facilities for further loading instead being kept in-transit storage waiting for a transloading time at the Facility or other areas of the Yard.

34. Enforcement of the City Ordinance in either its original or amended form would result in irreparable harm to NSRC, as extended in-transit storage of the loaded ethanol cars is directly contrary to the U. S Department of Transportation's requirement to expedite hazardous material shipments (including ethanol, a DOT regulated hazardous material under 49 C.F.R. §172.101) per 49 CFR §§174.14 and 174.16.

35. In both its original and amended form, the City Ordinance includes the purported authority to withhold or revoke the permit, and the implied authority to prevent operation of the Facility and other areas of the Yard, and to prevent trucks from entering or leaving the Facility and other areas of the Yard, and thus constitutes an implied authority to shut the Facility and other areas of the Yard down, the ultimate in regulatory control.

36. Threat of criminal prosecution contained in the City Ordinance would have the likely result of making contractors and employees reluctant to perform work for NSRC at the Facility and other areas of the Yard, severely limiting, if not making impossible, NSRC's fulfillment of its Federal common carrier rail obligations.

37. NSRC has no adequate remedy at law Unless the injunctive relief requested herein is granted, NSRC, its employees and contractors will suffer irreparable injury, loss and damage. as described in paragraphs 33 through 36 of this Complaint.

FIRST CLAIM FOR RELIEF – ORIGINAL ORDINANCE INAPPLICABLE

38. For its first claim for relief, NSRC incorporates the averments contained in paragraphs 1 through 37 as if fully rewritten herein.

39. On June 3, 2008, Alexandria unilaterally issued a one month temporary permit to NSRC limiting ethanol transloading at the Facility and imposing specific routes for trucks entering and departing the Facility pursuant to the City Ordinance, Section 5-2-27.

40. When the permit was issued, Section 5-2-27(a) of the City Ordinance read, in pertinent part, as follows:

Hauling waste material of any type, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type is prohibited on all streets within the city, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under subsection (c) of this section.

41. When the permit was issued, Section 5-2-27(d) of the City Ordinance read, in pertinent part, as follows:

Any person who, as the owner of any land, building or structure to or from which such materials or equipment are hauled, or the agent thereof having possession or control of such property as employee, lessee, tenant, architect, builder, contractor or otherwise, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor

42. Original City Ordinance Section 5-2-27(a) imposed a permit requirement for hauling (1) waste material, (2) building or construction supplies, material or equipment, and (3) dirt, debris or fill.

43. Original City Ordinance Section 5-2-27 on its face has no application to NSRC's Yard, NSRC's Facility or the trucks accessing the Facility because the trucks accessing the Facility transport ethanol, and not "waste materials of any type, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type... ."

44. On information and belief, notwithstanding the fact that NSRC rejected the permit issued by Alexandria pursuant to the Original City Ordinance, and notwithstanding the fact that the Original City Ordinance has now been amended, Alexandria considers the permit purportedly issued to NSRC pursuant to the Original City Ordinance to have continued effectiveness and applicability

SECOND CLAIM FOR RELIEF - FOURTEENTH AMENDMENT

45. For its second claim for relief, NSRC incorporates the averments contained in paragraphs 1 through 44 as if fully rewritten herein.

46. Section 5-2-27(d) of the Original City Ordinance applies Section 5-2-27(a) of the City Ordinance to the owner of land, building or structures to or from which such material or equipment are hauled, making it a class two misdemeanor to violate or assist in the violation of this section.

47. As construed by Alexandria through the issuance of the permit and otherwise, the Original City Ordinance 5-2-27 is so vague that it could be selectively construed and

enforced without fair warning so as to deprive NSRC of due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

48. Alexandria's application of 5-2-27 of the Original City Ordinance to NSRC, NSRC's Facility or the trucks accessing the Facility renders the Original City Ordinance void for vagueness and denies NSRC due process of law as required by the Fourteenth Amendment to the United States Constitution, as no reasonable construction of the ordinance could result in its application to NSRC or NSRC's Facility.

THIRD CLAIM FOR RELIEF – FEDERAL RAIL SAFETY ACT PREEMPTION

49. For its third claim for relief, NSRC incorporates the averments contained in paragraphs 1 through 48 as if fully rewritten herein.

50. Under FRSA, rules, regulations, orders and standards relating to all areas of railroad safety, including railroad security, must be nationally uniform to the extent practical. 49 U.S.C. §20106(a). A copy of the code provision is attached to this Complaint as Exhibit F.

51. Authority to prescribe rules, regulations, orders and standards for all areas of railroad safety and railroad security is vested in the Secretary of Transportation pursuant to 49 U.S.C. §20103 of FRSA.

52. Pursuant to 49 U.S.C. §20106(a) , until the Secretary has adopted a regulation or order relating to a subject matter of an area of railroad safety or security, a State is authorized to adopt and enforce a law or regulation relating to the same subject matter. However, once either the Secretary of Transportation or the Secretary of Homeland Security has adopted a regulation or order covering a subject matter relating to an area of railroad safety or security, only a state may adopt or continue in force any law or regulation covering

the same subject matter and then only if a state can meet the three-prong test that the state requirement is necessary to reduce or eliminate any local safety hazard (and thus is not state-wide in nature), is not incompatible with the federal regulation and does not create an undue burden on interstate commerce. 49 U.S.C. § 20106(a). The three-prong test could not be met here even by a state. Moreover, states are proscribed from delegating their authority to regulate a subject matter relating to railroad safety under Section 20106(a) to municipalities.

53 Regulation of the transloading of rail tank cars containing hazardous materials, such as ethanol, relates to railroad safety. The Secretary of Transportation, acting through PHMSA, has regulated rail tank car to tanker truck transloading activities in 49 CFR §§ 171.1, 171.8 and 174.67 as part of “transportation” as that term is defined in HMTA. Also see 70 Federal Register 20018 at 20020 - 20021 (April 15, 2005).

54 The Secretary of Transportation also has issued regulations at 49 C.F.R. §§ 174.14 and 174.16 requiring that transloading and delivery hazardous material, such as ethanol, from a rail yard, not be delayed.

55 Unlike state regulation, municipal regulation of a subject matter relating to railroad safety is wholly preempted under 49 U.S.C. §20106(a) even if the subject matter has not been regulated by the Secretary of Transportation, regardless of the circumstances.

56. The City Ordinance in either its original or amended form, as applied to the Facility and the transloading activities taking place at the Facility, in effect regulates the use and operation of the Facility and will result in delaying transport and transloading of ethanol, a subject matter that “relates to railroad safety,” and, therefore, is preempted by 49 U.S.C. §20106(a).

**FOURTH CLAIM FOR RELIEF - ICCTA PREEMPTION AS APPLIED
TO THE AMENDED CITY ORDINANCE**

57. For its fourth claim for relief, NSRC incorporates the averments contained in paragraph 1 through 56 as if fully rewritten herein.

58. Pursuant to 49 U.S.C. §10501(b) of ICCTA, the jurisdiction of the Surface Transportation Board over (1) transportation by rail carriers and (2) the operation of their facilities "is exclusive." Preemption as defined in 49 U.S.C. §10501(b) generally is referred to as "ICCTA Preemption." Railroad transloading facilities, when operated by or on behalf of the rail carrier, constitute a rail facility covered by ICCTA. A copy of the code provision is attached to this Complaint as Exhibit G.

59. Application of the City Ordinance in either its original or amended form to the Facility and its operations, including the implied right to withhold the right of the Facility to operate, and the implied right to withhold the right of NSRC to operate other bulk transload operations at the Yard, and the right to prevent trucks from accessing the Facility or other bulk transload facilities at the Yard, and indirectly limiting the number of tank cars and other bulk material rail cars that can enter the Facility and other areas of the Yard constitutes an impermissible regulation of "rail transportation" by Alexandria and is preempted under ICCTA.

**FIFTH CLAIM FOR RELIEF - HMTA PREEMPTION AS APPLIED
TO THE AMENDED CITY ORDINANCE**

60. For its fifth claim for relief, NSRC incorporates the averments contained in paragraph 1 through 59 as if fully rewritten herein.

61. The Facility meets the definition of a "transloading facility" under 49 CFR 171.1 and 171.8 and is within the definition of "transportation functions" regulated in detail

by the Secretary of Transportation under the HMTA, 49 U.S.C. Section 5103. The concept of preemption established in 49 U.S.C. 5125 applies to actions of states, political subdivisions of a state, such as the city of Alexandria, and Indian tribes. A copy of the code provision is attached to this Complaint as Exhibit H.

62 Numerous decisions by the Secretary of Transportation under Section 5125(d) and the courts have established that permit requirements and detailed conditions of permits such as the number of loads authorized, cannot be used to delay or impede the flow of otherwise lawful transportation of hazardous materials. These restrictions are deemed obstacles to the accomplishment of the objectives of Congress in establishing a national hazardous materials regulatory system, and often are in conflict with specific DOT regulations applicable to rail and highway carriers.

63. Hazardous materials regulations in 49 CFR 174.14 and 177.800(d) require transportation by rail and highway carriers without unnecessary delay, from and including the time of commencement of the loading of materials into the rail cars until final unloading from the trucks at destination. Delays inherent in the Alexandria permitting process and related requirements, particularly time of day restrictions and load limits, constitute an irreconcilable conflict with federal requirements and are thus preempted by the HMTA.

64 In addition, 49 U.S.C. 5125(c), through reference to 5112(b), has established federal standards for the designation by states for the routing of hazardous materials within their jurisdictions. This authority is not granted to cities, but to states in order to assure wider coordination within the jurisdiction. A copy of Code 49 U.S.C. 5112 is attached to this Complaint as Exhibit I.

65. These standards include requirements for risk analyses, public processes,

coordination with and acceptance by neighboring jurisdictions, and "reasonable routes for motor vehicles transporting hazardous material to reach terminals, facilities for food, fuel, repairs, and rest, and places to load and unload hazardous material."

66. The federal standards have been implemented by the Secretary of Transportation through the Federal Motor Carrier Safety Administration in 49 CFR Part 397, Subpart C, and Subpart E describing preemption procedures.

67. Upon information and belief, Alexandria has not developed its new permit time-of-day, routing, and truck number limitation requirements in accordance with the DOT "Guidelines for Applying Criteria to Designate Routes for Transporting Hazardous Materials" referenced in 49 CFR 397.71, the public processes, consultation with affected parties, the designation of reasonable access to facilities, and other requirements of Part 397.

68. The permit limitations imposed pursuant to the City Ordinance in either its original or amended form are preempted as enunciated in 49 CFR 397.203. The City Ordinance, as applied to NSRC's transloading Facility and to cargo tank truck loading and transportation operated from the Facility, is preempted under 49 U.S.C. Section 5125 of the HMTA.

WHEREFORE, Norfolk Southern Railway Company respectfully prays that this honorable court issue an order:

(1) enjoining and restraining Defendants City of Alexandria and Richard Baier, and all others acting in concert or participation with said Defendants, within the jurisdiction of this court from enforcing City Ordinance No. 5-2-27, in either its original or amended form, as applied under the hauler permit issued by Alexandria, against NSRC and/or any of NSRC's agents or employees in connection with the Facility and transloading activities at the Facility, and

access/routing for trucks operated by cargo tank truck carriers to and from said Facility, within and/or through the City of Alexandria;

(2) declaring that Original City Ordinance No. 5-2-27 is inapplicable on its face to NSRC's Facility and inapplicable to trucks transporting ethanol from NSRC's Facility;

(3) declaring that Original City Ordinance No. 5-2-27, as it has been applied by the hauler permit issued by Alexandria to the Facility, is void for vagueness and denies NSRC due process of law under the Fourteenth Amendment to the United States Constitution and, as a result, the application is of no effect;

(4) declaring that City Ordinance No. 5-2-27, in either its original or amended form, as it has been applied by the hauler permit issued by Alexandria to the Facility, is preempted by the preemptive provision of the Federal Railroad Safety Act, 49 U.S.C. §20106(a) and, as a result, the application is of no effect;

(5) declaring that City Ordinance No. 5-2-27, in either its original or amended form, as it has been applied by the hauler permit issued by Alexandria to the Facility, is preempted by the preemptive provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. §10501(h) and, as a result, the application is of no effect;

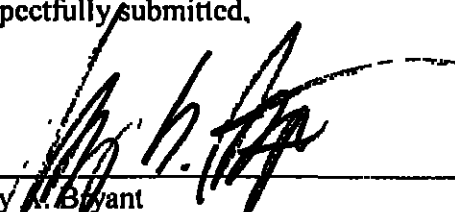
(6) declaring that City Ordinance No. 5-2-27, in either its original or amended form, as it has been applied by the hauler permit issued by Alexandria to the Facility, is preempted by the preemptive provision of the Hazardous Materials Transportation Act, 49 U.S.C. Section 5125 and, as a result, the application is of no effect;

(7) declaring that City Ordinance No. 5-2-27, in either its original or amended form, as it has been applied in the hauler permit issued by Alexandria to NSRC containing routing, including time of day restrictions for trucks accessing the Facility and numerical limitation on

trucks accessing the Facility, is preempted by the Hazardous Materials Transportation Act, 49 U.S.C. §5125 (c) and, as a result, the application is of no effect; and

(8) for such other relief as the court may deem just and proper.

Respectfully submitted,



Gary A. Bryant

Virginia State Bar No. 27558

Counsel for Norfolk Southern Railway Company
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J. Frederick Sinclair

Virginia State Bar No. 08073

Counsel for Norfolk Southern Railway Company
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Alexandria, Virginia 22314

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(703) 299-0603 Facsimile

fred@jfsinclairlaw.com

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Sec. 5-2-27 Hauling of waste materials, construction materials, etc., prohibited.

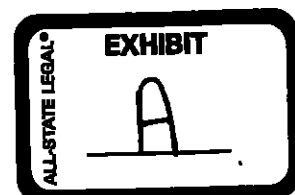
(a) Hauling waste materials of any type, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type is prohibited on all streets within the city, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under subsection (e) of this section.

(b) The director of transportation and environmental services is hereby authorized to issue permits to haul such materials or equipment over the streets within the city, subject to such conditions and restrictions specifying the time and route for such hauling, and such additional conditions and restrictions, as the director may deem appropriate to promote traffic safety and to minimize disruption to established residential, commercial, institutional and other areas in the city.

(c) Any person who, as the owner, lessee, operator or driver of a motor vehicle or trailer, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(d) Any person who, as the owner of any land, building or structure to or from which such materials or equipment are hauled, or the agent thereof having possession or control of such property as employee, lessee, tenant, architect, builder, contractor or otherwise, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(e) The prohibition set forth in subsection (a) of this section shall not apply to the hauling of such materials or equipment to or from any specific location or site at the rate of five or fewer trips for pickup or delivery of such materials or equipment in any consecutive thirty day period, nor to the non-commercial hauling of such materials or equipment to or from a dwelling unit, by a resident therein (Code 1963, Sec. 33-28; Ord. No. 4224, 10/13/01, Sec. 1)





CITY OF ALEXANDRIA
Transportation and Environmental Services
301 King Street, Suite 4130
Alexandria, Virginia 22314
703.838.4324



T & ES PERMIT

CASE NUMBER: TES2008-00882

ISSUED: 6/3/2008

EXPIRES: 7/3/2008

LOCATION: 1000 S VAN DORN ST

PROJECT NAME: HAULING

PROJECT DESCRIPTION:

Contact Doug McNeil or Mike Webb. 757-823-5421 Hauling ethanol from transloading facility in Alexandria to various locations via I-95

Primary Contact :

Norfolk Southern Railway Co
8 N Jefferson St
Roanoke VA 24042-0001

No Phone Number on Record

License Type and Policy Number:

Secondary Contact :

No Phone Number on Record

License Type and Policy Number:

START DATE: 6/4/2008

STREET EXCAVATION

INGRESS/EGRESS

END DATE: 7/3/2008

CRANE

SCAFFOLD/ LADDER

TIME: 7 00 AM - 7 00 PM

DUMPSTER

SIDEWALK CLOSING

INSURANCE:

X HAULING:

BLOCK PARTY

POLICY #:

CROSS CURB/ SIDEWALK

OTHER

EXPIRES:

1. Any damage to the public right-of-way (sidewalk, curb & gutter or street) is the responsibility of the permittee
2. The permittee is responsible for compliance with the current version of the "Virginia Work Area Protection Manual"
3. Maximum protection must be given to pedestrians and motor vehicles at all times
4. This permit may be revoked without notice when the privilege hereby granted is abused or exercised contrary to ordinance or regulation By issuing this permit, the City of Alexandria assumes no liability for injury or damage to persons or property and the permittee shall save the City harmless from any claim resulting
5. Other specific conditions as attached

Distribution

Permittee

Police

Traffic

Transportation

Fire Dept

T & ES Inspector

Office Copy

City Manager

By Director of Transportation and Environmental Services



If there are any questions concerning this permit, call 703.838.4324

Conditions of Approval - Permit no.: TES2008-00882

For: NORFOLK SOUTHERN RAILWAY CO

- 1) No dirt, mud or debris shall be tracked/spilled onto the public right-of-way.
- 2) A copy of this permit must be provided each driver. Failure to follow routing will result in revocation of this permit.
No entering the city before 7:00 a.m. No jake brakes or engine braking within the city limits. Driver shall obey all traffic signs and markings.
- 3) Hauling route is from the Alexandria facility to Metro Road, Metro Road to Eisenhower Avenue, west on Eisenhower Avenue to Van Dorn Street, south on Van Dorn Street and out of the city limits.

Hauling is permitted Monday through Friday, 7:00 a.m. to 7:00 p.m. only.

Hauling is limited to a maximum of 20 trucks per day.
- 4) This permit is being issued despite city concerns and objections to Norfolk Southern and its contractors relating to the appropriateness of ethanol transloading at this location.
- 5) This permit will be revoked should this operation be halted by any governing authority.



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

Writer's Direct Dial Number

John V. Edwards
Senior General Attorney

June 4, 2008

Phone (757) 629-2838
Fax (757) 633-4872
E-mail John.Edwards@nscorp.com

Via E-Mail and U.S. Mail

Joan Wagner
Director of Transportation and Environmental Services
City of Alexandria
301 King Street, Suite 4130
Alexandria, VA 22314

Re: T&ES Permit No. TES2008-00882

Dear Ms. Wagner:

Yesterday you transmitted to Doug McNeil a "permit" which purports to grant Norfolk Southern the conditional privilege, for a period of one month, to haul ethanol from its Van Dorn Street rail yard in Alexandria to "various locations via I-95." The conditions in the permit restrict the hours of operation of the facility, the number of trucks able to access the facility on a daily basis, and the routing of the trucks once they have left the facility. Norfolk Southern did not request this permit. In any event, the City of Alexandria does not have the authority to impose on Norfolk Southern's Van Dorn Street facility operating conditions of the type included in the permit you sent to Mr. McNeil.

As representatives of the City have been previously advised, the City is precluded from engaging in this type of regulation by the Interstate Commerce Commission Termination Act (see 49 U.S.C. 10501(b)), the Federal Railroad Safety Act (see 49 U.S.C. 20106(a)) and the Hazardous Materials Transportation Act (see 49 U.S.C. 5125). In fact, as we have explained, Section 5-2-27 of the City Code does not apply to the hauling of ethanol, gasoline or any other similar substances.

Insofar as the routing of the trucks entering and leaving the facility is concerned, it is our sincere belief that the route currently being used (Metro Road directly to Van Dorn and then to the Beltway) has less of an impact on the surrounding neighborhood than the route apparently preferred by the City. Nevertheless, in an effort to cooperate with the City, we will request that the trucks entering and leaving the facility incident to the transportation of ethanol use the route you have specified. We do not employ or retain the services of the truckers whose vehicles are

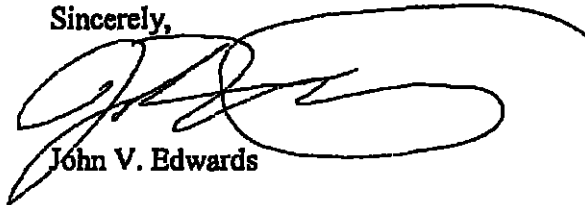


Joan Wagner
June 4, 2008
Page 2

loaded at the Van Dorn Street facility and cannot guarantee that they will follow our request, but we believe that most of them will do so.

Norfolk Southern and its predecessor rail lines have been a part of the Alexandria community for nearly 150 years. For all of that time we have tried very hard to cooperate with the City and to be a good corporate citizen. The operation of the ethanol facility at our Van Dorn Street Yard is not an exception to that rule. We contacted the City more than two years ago and advised its representatives of our intention to build and operate the facility, and during the intervening months have tried very hard to keep the City informed and to address its concerns. We remain committed to those objectives.

Sincerely,

A handwritten signature in black ink, appearing to read "John V. Edwards", with a large, sweeping loop at the end.

John V. Edwards



Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-9206
757 823-5358
757 629-2366 FAX

David T. Lawson
Vice President
Industrial Products

June 6, 2008

Via E-mail and U.S. Mail

Redella S. Pepper
Vice Mayor
City of Alexandria
301 King Street, Suite 2300
Alexandria, VA 22314

Dear Vice Mayor Pepper:

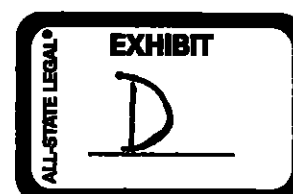
This letter is in reference to your request for the timeline of events and communications between Norfolk Southern and the City of Alexandria officials as it relates to the development of the ethanol transfer facility.

There have been public statements suggesting that Norfolk Southern did not communicate with the City regarding this facility. I appreciate your request to clarify this point and I hope this timeline will provide you, the Mayor, the other Council members, and the City Manager a clear understanding of the work process and communication that began in June 2006 between the City and Norfolk Southern.

June 20, 2006 – Blair Wimbush (Vice President – Real Estate, NS) and I met with Mayor Euille to advise him of Norfolk Southern's plans to develop our ethanol terminal at the Norfolk Southern rail yard.

June 23, 2006 – Rob Robinson, (Director - Distribution Services, NS); Lloyd Clinginpeel (Manager - Real Estate, NS) and I met with Mayor Euille, Jim Hartmann (City Manager), Mark Jinks (Deputy City Manager), Rich Baier (Director Transportation and Environmental Services), Rich Josephson (Deputy Director – Department of Planning and Zoning), and Art Dahlberg (Director - Code Enforcement, AFD) to review Norfolk Southern's plans to develop the ethanol terminal at the Norfolk Southern rail yard.

August 9, 2006 – Rob Robinson; Gayle Jordan (General Solicitor, NS); Mike Webb (Manager – Distribution Services, NS); and representatives from Norfolk Southern's Engineering and Environmental and Safety Departments met with Art Dahlberg and D. T. Perry (Deputy Fire Marshal, AFD) to review the facility design. The fire department officials made several suggestions that were all incorporated into the facility design.



**Redella S. Pepper
Vice Mayor
City of Alexandria
June 6, 2008
Page 2**

August 25, 2006 – Rich Josephson sent me an e-mail (Attachment A) regarding the city's position regarding a Special Use Permit and outreach to the community.

September 18, 2006 – Bill Galanko (Vice President – Law, Norfolk Southern) provided Mr. Josephson a written response (Attachment B) to the August 25th e-mail. Mr. Galanko's letter made the following points:

- **The facility is a rail transportation facility that will be used by a freight rail common carrier subject to the jurisdiction of the U.S. Surface Transportation Board (STB) in order to perform transportation operations and that the UT zoning ordinance is preempted to the extent that it would require a permit or special use permit.**
- **Norfolk Southern would commence work in the very near future, and anticipated that the facility would open no later than January 2007.**
- **Norfolk Southern worked with various local city officials to address facility design concerns and had incorporated all modifications proposed by Alexandria fire officials, including special spill containment facilities, additional fire hydrant locations, foam capability, and additional portable fire extinguishers.**
- **Stated that Norfolk Southern believed it was incumbent upon us to work with the local community to address its concerns.**
- **Suggested that, if desired, Norfolk Southern could speak to the city's legal counsel.**

November 7, 2006 - Bill Galanko sent a follow-up letter (Attachment C) to Mr. Josephson. Mr. Galanko's letter made the following points:

- **The letter was a follow up to the September 18, 2006 letter and that Norfolk Southern had not received any response to that letter.**
- **Norfolk Southern wanted to touch base with Mr. Josephson to keep him up to date on the progress of the facility.**
- **Advised that Norfolk Southern anticipates initiating terminal improvements soon after Thanksgiving (2006) and that most of the work would be transparent to other (for example, engineering work) and that some surveyors would be on the property.**
- **Advised that terminal improvements would be completed sometime after January 2007, but the work in the coming months (late 2006/early 2007) would give Norfolk Southern a better idea of the exact date.**
- **Reiterated that if there was anything further Norfolk Southern could provide, we were available.**

November 8, 2006 – October, 2007 - Norfolk Southern continued the necessary engineering design, modifications, and contractor bid specifications. No communication or response from the City during this time.

October 2007 – Engineering design completed and construction of the facility began, as outlined in both letters, although later than anticipated due to engineering & design changes/delays.

Redella S. Pepper
Vice Mayor
City of Alexandria
June 6, 2008
Page 3

November 2007 – Norfolk Southern connected to the city water line in order to get water to the new on-site fire hydrants.

April 2, 2008 – Norfolk Southern's facility contractor, Tony Rosenthal (Terminal Manager - RSI Logistics), called Russell Furr of the Alexandria Fire Department and left a message to advise the opening of the terminal and to arrange to delivery the keys to the facility for the Knox Box.

April 4, 2008 – Tony Rosenthal again called Mr. Furr, left him a second message and sent a follow up e-mail (Attachment D).

April 9, 2008 – Operations at the ethanol facility commenced.

April 14, 2008 – Fire Chief Adam Thiel e-mailed me (Attachment E) to set up meeting to review the facility operations and how the AFD could ensure they were properly prepared, trained, and equipped to protect the facility and the city. I returned Fire Chief Thiel's e-mail (Attachment E) and called him on the same day on his cell to discuss the facility.

April 25, 2008 – Doug McNeil (Director Distribution Services - NS), Mike Webb, James Reiner (Trainmaster - NS) and Jim Weglicki (Vice President Operations - RSI) met in Alexandria with Fire Chief Thiel, Rich Baier, Mark Penn (Emergency Management Coordinator), and George McAndrews (Assistant City Attorney) to discuss fire protection for the terminal and delivered a set of keys for the Knox Box.

April 29, 2008 – Chief Thiel sent Norfolk Southern a current needs assessment (Attachment F) for the City of Alexandria to deal with an incident involving bulk quantities of ethanol and followed up with a detailed list (Attachment G) on May 5.

May 7, 2008 – Norfolk Southern agreed (Attachment H) to donate a foam trailer, a set of 4 nozzle/eductors, and 1,640 gallons of foam concentrate.

May 9, 2008 – Conference call with City Staff and Fire Department to discuss the Fire Departments needs assessment of April 29.

May 14, 2008 – Alexandria Fire Department sent a revised needs assessment and Norfolk Southern e-mailed (Attachment I) its willingness to acquire the requested materials for the Alexandria Fire Department.

May 15, 2008 – Jim Hartmann sends a letter (Attachment J) to the Mayor and Members of City Council, with copy to Norfolk Southern, detailing issues regarding the transload facility.

May 27, 2008 – Doug McNeil and Mike Webb appeared before City Council.

**Redella S. Pepper
Vice Mayor
City of Alexandria
June 6, 2008
Page 4**

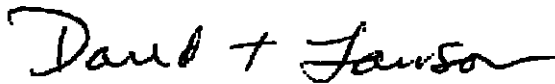
June 2, 2008 – Chuck Wehrmeister (Vice President – Safety and Environmental), Doug McNeil, other NS representatives, and I attended the Summer's Grove Civic Association meeting.

June 4, 2008 – Doug McNeil and Mike Clark (Supervisor Property Loss Prevention - NS) attended the Alexandria LEPC meeting.

These are the primary dates and contacts as best as we can determine. If I have inadvertently omitted a key communication, please let me know and we will certainly include it in our timeline.

If you have any questions, or need further clarification, please do not hesitate to call me

Sincerely,

A handwritten signature in black ink that reads "David T. Lawson". The signature is fluid and cursive, with the first and last names being more prominent than the middle initial.

**David T. Lawson
Vice President Industrial Products**

Attachments

**cc: The Honorable Mayor William D. Euille
Councilman Ludwig P. Gaines
Councilman Rob Krupicka
Councilman Timothy B. Lovain
Councilman Paul C. Smedberg
Councilman Justin M. Wilson
City Manager James K. Hartmann**

Attachment A

-----Original Message-----

From: Richard Josephson@alexandriava.gov [mailto:Richard.Josephson@alexandriava.gov]
Sent: Friday, August 25, 2006 11:35 AM
To: dtlawson@nscorp.com
Cc: rhrobin@nscorp.com; lrclinge@nscorp.com; Ignacio.Pessoa@alexandriava.gov;
Jim.Hartmann@alexandriava.gov; Mark.Jinks@alexandriava.gov;
Eileen.Fogarty@alexandriava.gov; Rich.Baier@alexandriava.gov;
Jill.Applebaum@alexandriava.gov; Arthur.Dahlberg@alexandriava.gov;
Jannine.Pennell@alexandriava.gov
Subject: Ethanol Transfer Use

David,

I wanted to get back to you on the question as to whether the proposed ethanol transfer use at the Norfolk Southern facility in Alexandria is a use permitted by right or requires a Special Use Permit. After a review of the information you provided on the proposed facility, we have concluded that the use is a railroad operating facility under the UT zone regulations, and is permitted only with a Special Use Permit. The basis for our determination is that ethanol transfer is a new use and would constitute an intensification of the existing use.

Please let me know if you want to pursue the Special Use Permit and we can discuss the timing for consideration by Planning Commission and City Council as well as outreach to the community.

Rich Josephson
Deputy Director
Department of Planning and Zoning
City of Alexandria
301 King Street
Alexandria, VA 22314

Phone: 703-838-4666, x 302

Attachment B



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-8241

William A. Galanko
Vice President/Law

Writer's Direct Dial Number
(757) 628-2374
(757) 633-4843 (FAX)
E-mail: william.galanko@nscorp.com

September 18, 2006

Via Overnight Mail

Mr. Rich Josephson
Deputy Director
Department of Planning and Zoning
City of Alexandria
301 King Street
Alexandria, VA 22314

Dear Mr. Josephson:

David Lawson has asked me to respond to your e-mail of August 25, 2006, concerning the Norfolk Southern Railway Company transload facility in Alexandria, Virginia. As you are aware, Norfolk Southern intends to modify this railroad operating facility to receive rail cars and to transload ethanol from those rail cars to trucks. Norfolk Southern will operate the facility through a contractor. You have ventured that this use would be a use not permitted under the current UT zoning, and thus Norfolk Southern could only modify and operate the facility under a special use permit. The transload facility, however, is quintessentially a rail transportation facility that will be used by a freight rail common carrier subject to the jurisdiction of the U.S. Surface Transportation Board ("STB") in order to perform transportation operations. As such, pursuant to 49 U.S.C. § 10505(b), the UT zoning ordinance is preempted to the extent that it would require a permit or a special use permit to be issued before modification and/or operation.

The facility will be merely an adaptation of the former so-called Alexandria Intermodal Facility, which property has a long history of use for various railroad purposes. It will be open to any Norfolk Southern customer seeking ethanol transloading as a part of the Norfolk Southern transportation service package. Norfolk Southern already has received several indications of interest from its customers. The facility will not be devoted to any particular customer. Norfolk Southern will commence work in the very near future, and anticipates that the facility will be open no later than January 2007.

We believe it important to be a good corporate citizen -- to work with local officials in order to address concerns that might arise in the modification and operation of our facilities, and we believe we have achieved that here. Accordingly, since June 19, 2006, Norfolk Southern has met with, and provided facility plans to, various Alexandria officials. This includes Mayor Bill Euille, City Manager Jim Hartmann and Deputy City Manager Mark Jinks, as well as D.T. Perry and Art Dahlberg from the Alexandria Fire Department. We have integrated all modifications proposed by Alexandria fire officials to address perceived safety and fire concerns, including but not limited to special spill containment facilities, additional fire hydrant locations (including a mobile fire hydrant), foam capability, and additional portable fire extinguishers. The facility will be fenced, gated and secured, and will be operated in a safe manner in conformance with any applicable health and safety requirements.

Mr. Josephson
Page 2
September 18, 2008

Having said that, however, we do note that the Interstate Commerce Commission Termination Act ("ICCTA") provides that the jurisdiction of the Surface Transportation Board ("STB") over "transportation by rail carriers" and the construction and operation of rail facilities "is exclusive." 49 U.S.C. § 10501(b). Further, the ICCTA provides that, "except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* "Transportation" is defined as including rail cars, warehouses, wharfs, piers, yards, property, facilities "or other equipment of any kind related to the movement of passengers or property, or both, by rail ... and ... services related to that movement, including receipt, delivery, elevation, transfer in transit, ... storage, handling, and interchange of passengers and property..." 49 U.S.C. § 10102(9). ICCTA was passed in an effort to strengthen the rail transportation system by reducing the regulation of railroads and other modes of surface transportation. See 49 U.S.C. § 10101. Application of this section preempts Alexandria's zoning statute to the extent that it would require any permit prior to the modification or operation of the facility.

Courts have repeatedly invoked 49 U.S.C. § 10501(b) as a basis for preemption of state and local zoning, land use planning and permit requirements in the construction of rail facilities to be operated by or on behalf of rail carriers. See City of Auburn v. United States Government 154 F.3d 1025 (9th Cir. 1998), cert. denied, 119 S.Ct. 2367 (1999) (relating to the construction of a rail line); Canadian National Railway Co. v. City of Rockwood, Civ. Case No. 04-40323 (U.S. District Court, E.D. of Michigan, Opinion and Order Granting Preliminary Injunction) (activities taking place at a transload facility are considered "transportation," relating to the preemption of permit requirements for the construction and operation of a transload facility); Norfolk Southern Railway Company, et al. v. City of Austell, et al. 1997 WL 1113847 (N.D. Ga., 1997) (intermodal facility). There are several other cases along similar lines.

These decisions, and the statute that they interpret, implement Congress' expressed intention to preempt such regulations that may stand as an obstacle to an interstate rail carrier's ability to construct facilities or conduct interstate rail operations. Nevertheless, we believe it incumbent upon us to work with the local community to address its concerns. We have done so in the past and we will continue to do so where it makes sense in modifying the facility and opening it on a timely basis to operation. Please let me know if there is anything further I can provide you. Further, if desired, I will be happy to speak with your legal counsel concerning this matter.

Respectfully,



William A. Galenko
Vice President - Law

cc: David Lawson

[illegible]

Thank You
for Shipping
with Airborne!

Subject: Language and Literature

PLEASE TYPE OR PRINT

[illegible]

Attachment C



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-8241

William A. Galanko
Vice President-Law

Writer's Direct Dial Number

(757) 629-2374
(757) 633-4843 (FAX)
E-mail: william.galanko@nscorp.com

November 7, 2006

Mr. Rich Josephson
Deputy Director
Department of Planning and Zoning
City of Alexandria
301 King Street
Alexandria, VA 22314

Dear Mr. Josephson

This follows up on my letter to you dated September 18, 2006, concerning the Norfolk Southern Railway Company ethanol transload facility in Alexandria, Virginia. I do not believe that Norfolk Southern has received any response to that letter, but I did want to make sure that I touched base with you and keep you up to date as we progress.

We now anticipate initiating necessary terminal improvements (previously reviewed with appropriate city officials) soon after Thanksgiving. Although most of this work will be transparent to others (for example, additional engineering work), there will be some surveyors and others working around the property. We now believe that the terminal improvements will be completed sometime after January 2007, but our work in the coming couple of months will give us a better idea of the exact date.

Please let me know if there is anything further I can provide you. I remain available to speak with you concerning this.

Respectfully,

A handwritten signature in cursive script, appearing to read 'William A. Galanko'.

William A. Galanko
Vice President - Law

cc: David Lawson

From: Tony Rosenthal
Sent: Friday, April 04, 2008 1:29 PM
To: 'Russell.furr@alexandriava.gov'
Cc: Kelley Minnehan
Subject: Knox Box at 1000 S. Van Dorn Street

Mr. Furr.,

I am emailing to arrange a time to meet with you or your representative at the referenced location to set up the Knox Box with all pertinent keys to the facility.
Please give me a call at 404-431-7499 so we can arrange a meeting. We intend to begin our operations Tuesday, 4/8, and would to have the Knox Box set-up before then.

Thanks,

Tony Rosenthal
Terminal Manager
RSI Leasing, Inc
www.rsilogistics.com
404-431-7499

Attachment E

McNeil, Doug

From: Lawson David
Sent: Monday, April 14, 2008 9:59 AM
To: Adam.Thiel@alexandriava.gov
Cc: Michele.Evans@alexandriava.gov; Jim.Hartmann@alexandriava.gov; Cameron.Hall@alexandriava.gov; McNeil, Doug
Subject: RE: Ethanol transloading at the NS intermodal facility in Alexandria, VA

Adam Thiel
Fire Chief – Alexandria Fire Department

Thank you for your note and voice mail regarding Norfolk Southern's ethanol transload terminal in Alexandria. I will give you a call on your cell today. Thanks

David Lawson
Vice President – Industrial Products
Norfolk Southern Corporation
Norfolk, VA
(757) 823-5358 – Office
(757) 373-3550 – Cell

From: Adam.Thiel@alexandriava.gov [mailto:Adam.Thiel@alexandriava.gov]
Sent: Monday, April 14, 2008 8:53 AM
To: Lawson David
Cc: Michele.Evans@alexandriava.gov; Jim.Hartmann@alexandriava.gov; Cameron.Hall@alexandriava.gov
Subject: Ethanol transloading at the NS intermodal facility in Alexandria, VA

Mr. David T. Lawson, Vice President
Norfolk Southern Corporation

Dear Mr. Lawson:

By way of introduction, my name is Adam Thiel and I'm the "new" Alexandria fire chief.

I'm writing to seek your assistance with addressing the potential impacts of ethanol transloading at the NS intermodal facility here in Alexandria. While I'm not yet completely familiar with the history of this facility, my present understanding is that ethanol transloading operations have been recently initiated on the site.

I'd like to get together with you and your team at your earliest convenience to discuss the transloading operation and how the Alexandria Fire Department can ensure we are properly prepared, trained, and equipped to protect your facility and our City.

Please feel free to contact me directly using the information below, or on my mobile# 703.898.0838.

I look forward to meeting you soon.

Best regards,

Adam

6/5/2008

Adam K. Thiel, MPA, MIFireE, CFO, CEM
Fire Chief
Alexandria Fire Department
900 Second Street
Alexandria, VA 22314
Phone: 703.838.4600
Fax: 703.548.6952
E-mail: adam.thiel@alexandriava.gov



FIRE DEPARTMENT
900 Second Street
Alexandria, Virginia 22314-1395

Adam K. Thiel
Fire Chief

Phone (703) 838-4600
Fax (703) 838-5093

April 29, 2008

Mr. Michael A. Webb
Manager Distribution Services
Southern Region
Norfolk Southern Corporation
Three Commercial Place, Box 252
Norfolk, VA 23510

Dear Mr. Webb:

The City of Alexandria (City) is keenly interested in working with the Norfolk Southern Corporation (NS) to ensure adequate fire protection for the bulk ethanol transloading terminal located at the NS Van Dorn Intermodal Facility. Recognizing Norfolk Southern's commendable effort to design/build this facility with safety in mind, there are a number of remaining issues that must be addressed to help assure the City's ability to protect life, property, and the environment in case of an incident involving bulk quantities of ethanol at the facility.

As we discussed during our meeting on Friday, April 25, 2008, this letter provides the current needs assessment—based on information about the ethanol transloading operation that your group provided last Friday—of City staff from the Fire Department (AFD), AFD Code Enforcement Bureau (Code), AFD Office of Emergency Management (OEM), Planning and Zoning Department (P&Z), and Transportation and Environmental Services Department (T&ES). At your request, this communication is presented as an overview, but we are certainly available to discuss the details at your earliest convenience.

Fire Department (AFD)

After our meeting last Friday, AFD staff conducted a site visit to the facility and completed installation of the facility keys into the Knox Box™ rapid-entry key system. This site visit confirmed the City's need for additional equipment, supplies, and training to safely and effectively handle an incident involving bulk quantities of ethanol. The principal need is for a delivery system to apply a sufficient flow of alcohol-resistant aqueous film forming foam (AR-AFFF) to an ethanol spill/fire on the facility; neither the AFD nor the surrounding mutual-aid jurisdictions currently possess an appropriate delivery system. Large quantities of AR-AFFF must also be secured/maintained in a ready state and routinely replaced according to the manufacturer's recommendation (i.e., when the expiration date is reached). The City requires additional spill response equipment/supplies to protect the environment, especially adjacent waterways, from a bulk

ethanol release. Specialized training to contain/confine/extinguish ethanol releases/spills/fires is also needed for AFD and mutual-aid firefighters (Fairfax and Arlington Counties), as well as for members of the Alexandria/Arlington Hazardous Materials Response Team. Our estimate for providing the requisite equipment/supplies/training to protect the NS ethanol transloading terminal is \$321,020; with a recurring annual maintenance (i.e., equipment depreciation, ongoing training, and rotating expired AR-AFFF) cost of \$50,000.

AFD Code Enforcement Bureau (Code)

Code staff met with Mr. Tony Rosenthal of RSI Logistics (Norfolk Southern's terminal manager) on Monday, April 28, 2008. Generally speaking, the facility is in compliance with Section 3406 of the Fire Prevention Code (FPC). Remaining issues include: 1) confirmation of grounding compliance for the offloading track rails; 2) confirmation of secondary containment capacity; 3) new fire hydrant flushing/finalization; 4) provision of material safety data sheets (MSDS) for the 1500 gallon foam reserve stored on-site; and 5) development/review/approval of a comprehensive fire safety and evacuation plan for the facility, as required by Section 404 of the FPC.

AFD Office of Emergency Management (OEM)

As discussed during our meeting, OEM staff will meet with Mr. Rosenthal to conduct a homeland security threat assessment of the facility, and will include it in the City's overall emergency management planning process. Additional recommendations could result from these activities and will be shared with NS as soon as possible.

Transportation and Environmental Services Department (T&ES)

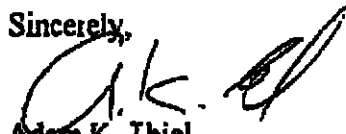
During our meeting, T&ES staff raised two issues: 1) the requirement for bulk tank trucks leaving the facility to obtain haul permits from T&ES; and 2) the need for a stormwater pollution and prevention plan as required by the state Department of Environmental Quality (DEQ).

One final issue concerns the ongoing need for collaboration between NS and the City to provide accurate information for our community concerning the NS Van Dorn Intermodal Facility and ethanol transloading terminal.

In summary, the City looks forward to working in partnership with NS to protect your investment, our citizens, infrastructure, and the environment. Since ethanol transloading operations are underway at your facility, we know NS will continue viewing this matter with a sense of urgency and I look forward to our next discussion and/or meeting.

Please feel free to contact me anytime via email (adam.thiel@alexandriava.gov) or mobile phone (703.898.0838).

Sincerely,


Adam K. Thiel
Fire Chief

**Cc: James K. Hartmann, City Manager
Michele R. Evans, Deputy City Manager
Mark Jinks, Deputy City Manager
Ignacio B. Pessoa, City Attorney
George A. McAndrews, Assistant City Attorney
John Catlett, Code Enforcement Director
Farrell Hamer, Planning and Zoning Director
Stephen Milone, Planning and Zoning Division Chief
Richard Baier, Transportation and Environmental Services Director
William Skrabak, Transportation and Environmental Services Division Chief
Mark Penn, Emergency Management Coordinator
John North, AFD Battalion Chief**

**ALEXANDRIA FIRE DEPARTMENT
ETHANOL NEEDS ASSESSMENT
EQUIPMENT/SUPPLIES/TRAINING**

EQUIPMENT

- | | |
|--|----------|
| • Delivery system tow vehicle, Ford F450 with utility body | \$55,000 |
| • Dual Foam Tote Trailer, | \$36,000 |
| ○ 1000gpm nozzle, 660-gal concentrate capacity | |
| • Bulk-spill response vehicle, 24-foot box truck | \$95,000 |
| ○ Lift gate | |
| ○ Response warning lights | |
| ○ Generator | |
| ○ 800 mhz radios | |
| ○ Interior configuration, shelving/cargo securing devices | |
| • (4) Foam nozzles/eductors \$1,400 per set | \$5,600 |
| • Spill/fire control equipment | \$55,000 |
| ○ Monitors | |
| ○ Grounding and bonding equipment | |
| ○ Plug and patch equipment | |
| ○ Absorbents | |
| ○ Containment pools and drums | |
| ○ Double diaphragm pump and supporting equipment | |

SUPPLIES

- | | |
|--|----------|
| • (2) 330-gallon totes AR-AFFF \$37.00 per gal. | \$24,420 |
| • (20) 5-gallon pails AR-AFFF <i>*Already provided by NS*</i> | \$0 |
| • (15) 55-gallon drums AR-AFFF <i>*Equivalent quantity provided by NS*</i> | \$0 |

TRAINING

- | | |
|---|----------|
| • Initial ethanol awareness training <i>*Already provided by CoA*</i> | \$0 |
| • Initial ethanol response training | \$25,000 |
| • Hazmat specialist training | \$25,000 |
| ○ Tank car emergencies | |
| ○ Highway vehicle emergencies | |
| ○ Advanced foam application | |
| ○ Advanced leak/spill control | |

TOTAL	\$371,020
--------------	------------------

ANNUAL MAINTENANCE	\$50,000
---------------------------	-----------------

(Equipment depreciation, supply rotation, ongoing training.)



May 7, 2008

Mr. Adam K. Thiel
Fire Chief
Alexandria Fire Department
900 Second Street
Alexandria, VA 22314-1395

Re: Norfolk Southern Railway Company's
Ethanol Transloading Facility, Alexandria, Virginia

Dear Mr. Thiel:

Over the past several weeks Norfolk Southern and the Alexandria Fire Department representatives have had several very constructive discussions concerning Norfolk Southern's ethanol transloading facility in Alexandria, Virginia. In part, these discussions have resulted in the placement of the Knox Box rapid-entry key system allowing the Alexandria Fire Department access to the facility at any time of any day. We view this as an important development in what has become a very strong working relationship. We thank you for your involvement and review towards our mutual goal of safety. This letter responds to your inquiry with regard to certain operations, and further to your letter of April 29, 2008.

The facility is available for service 24 hours per day, 7 days per week, but the current operational needs only require us to operate it from 7:00 a.m. to 6:00 p.m., Monday through Friday. What this means is that we generally open the facility to trucks at 6:00 a.m., though of course these trucks are empty. Although most trucks arrive grouped in the morning due to the exigencies of the transloading operation they leave spaced out throughout the day. Under current operations, the last loaded truck may leave after 6:00 p.m., but generally no later than 7:00 p.m. The rail switching operations to support the transload hours usually are at night - generally from 5:00 p.m. to 5:00 a.m., Monday night through Saturday morning, but the nature of railroad operations is such that the facility must take the traffic when available. As an integral part of our railroad network, we make this particular facility available to all customers, but currently traffic moves out of the facility destined for Springfield, VA and Fairfax, VA, generally via Interstate 95. Of course, if business expands or the customer base changes, then we will respond to that in service hours and rail switching requirements.

We are keenly aware of your safety mission, particularly as it involves the increased levels of ethanol transportation - not only from our facility but generally from a variety of sources as a result of the economic, governmental and international conditions. Given the presence of our facility in the community, we would be pleased to advance your ability to deal with this, and use as reference the Alexandria Fire Department Ethanol Needs Assessment Equipment/Supplies/Training list that you provided to us.

The primary ethanol fire fighting agent is alcohol-resistant aqueous film forming foam (AR-AFFF). We have acquired a significant quantity (1600 gallons) of Ansulite 3x3 AR-AFFF, as well as a specialized container for long-term storage of the same. We now understand from discussions with you that neither the Alexandria Fire Department nor any of the surrounding mutual aid jurisdictions have the necessary delivery system to apply the foam. We are acquiring such a delivery system and foam nozzles/eductors.

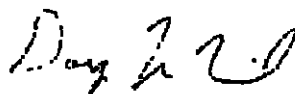
4
Mr. Adam K. Thiel
May 7 2008
Page 2

Because neither Alexandria nor any of the surrounding mutual aid jurisdictions have the necessary delivery system, nozzles/eductors and requisite supply of AR-AFFF, we anticipate contributing these to the Alexandria Fire Department for general purpose use. Further, we recognize some efficiencies could be gained by storing those items at the Norfolk Southern ethanol transload facility site, and would offer that to you at no cost. In case the Alexandria Fire Department would need the equipment and foam for response within Alexandria or in one of its mutual aid jurisdictions, the Alexandria Fire Department would have access to it through the Knox Box. If the Alexandria Fire Department chose to store the equipment and foam at the facility site, such storage would be at Alexandria's risk; we will not provide any security beyond what we actually provide to the facility itself. In addition, in the highly unlikely event that the equipment is used to respond to an incident at the Norfolk Southern ethanol transload facility, Norfolk Southern would replace any used foam. We estimate using your figures that the contribution discussed in this paragraph amounts to nearly \$90,000. In addition, we understand your desire to train Alexandria fire fighters in dealing with railroad emergencies of all kinds. We would be pleased to sponsor an attendee at the Transportation Technology Center, Inc. (TTCI) Emergency Response Training Center.

Some items on the Needs Assessment are not required or are or should be otherwise available to the Alexandria Fire Department or its surrounding mutual aid communities. For example, according to the manufacturer, the foam has a shelf life of 20-25 years, when properly stored, so the Alexandria Fire Department should not have a great concern with regard to foam supply rotation. Any Fire Department vehicle with a trailer hitch should be available to pull the delivery system trailer, so a Ford F250 pick up truck that would be dedicated solely to the towing of the delivery system trailer seems to us not necessary. We believe that we have a fully developed bulk-spill containment system at the facility. Further, a bulk-spill response vehicle and spill fire control equipment most likely are already justified for the Alexandria Fire Department and the surrounding mutual aid jurisdictions due to the already existing movement of non-ethanol bulk commodities moving through those jurisdictions. Because we would not own the delivery system, foam or other equipment, and because these would be available to Alexandria and its surrounding mutual aid jurisdictions for general use, we are disinclined to provide depreciation.

Norfolk Southern values the relationship we have developed with the Alexandria Fire Department, seeks to strengthen that relationship, and further our mutual safety mission. We believe that what we have offered in this letter, together with the design build of the facility itself, constitutes a very strong commitment to ensuring adequate fire protection. We look forward to continuing to work with you and putting to bed any final issues with regard to this facility.

Sincerely,



Doug McNeil
Director Distribution Services
Norfolk Southern Railway

cc: David Lawson, Vice President Industrial Products
Michael Webb, Manager Distribution Services
John V. Edwards, Senior General Attorney

Attachment I

From: McNeil, Doug
Sent: Wednesday, May 14, 2008 11:27 PM
To: 'Adam.Thiel@alexandriava.gov'
Cc: John.North@alexandriava.gov; Byron Andrews III; Webb, Mike; Edwards, John, V; Jordan, A Gayle; Lawson David; Wingo, William B.; Chapman, Robin C.; Reiner, James E.
Subject: RE: Detailed Alexandria FD Ethanol Fire/Spill Response Equipment List
Attachments: ETHANOL RESPONSE EQUIPMENT.XLS

Adam Thiel

As a follow up to our conference call on May 9, 2008, Norfolk Southern has reviewed the attached list of Ethanol Fire/Spill Response Equipment and Supplies provided by the Alexandria Fire Department. In summary this list includes.

Dedicated F450 Tow Vehicle with utility body
Foam Trailer with two loaded 330 gallon totes
Set of Foam Nozzle/Eductors
Monitoring/Spill Control Equipment

Because neither Alexandria nor any of the surrounding mutual aid jurisdictions have this equipment, we plan to contribute these as well as the 1,640 gallons of AR-AFFF foam on hand at the Norfolk Southern ethanol transloading facility to the Alexandria Fire Department for general purpose use. Further we recognize some efficiencies could be gained by storing some of these items at the Norfolk Southern site, and would offer that to you at no cost. If the Alexandria Fire Department chooses to store any equipment and/or foam at the facility site, such storage would be at Alexandria's risk, we will not provide any security beyond what we actually provide to the facility itself. In the highly unlikely event that the equipment is used to respond to an incident at the Norfolk Southern ethanol transload facility, Norfolk Southern would replace any used foam. In addition, we understand your desire to train Alexandria fire fighters in dealing with railroad emergencies of all kinds. We would be pleased to sponsor one attendee per year at the Transportation Technology Center, Inc. ("TTCI") Emergency Response Training Center.

Norfolk Southern continues to value the relationship we have developed with the Alexandria Fire Department. We believe that what we have offered, together with the design/build of the facility itself, constitutes a very strong commitment to ensuring adequate fire and spill protection. We look forward to continuing to work with you to provide fact based information to the community.

Douglas P. McNeil
Director Government & Distribution Services
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 823-5421

City of Alexandria, Virginia

MEMORANDUM

DATE: MAY 15, 2008
TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL
FROM: JAMES K. HARTMANN, CITY MANAGER 
SUBJECT: NORFOLK SOUTHERN CORPORATION ETHANOL
TRANSLOADING FACILITY

In mid-April the Norfolk Southern Corporation (NSC) began operation of an ethanol transloading terminal at their Van Dorn Intermodal Facility located behind the Waste to Energy plant. The NSC property is accessible from Metro Road, which runs between Eisenhower Avenue and Van Dorn Street (Attachment 1).

When we learned that the NSC intended to open this facility in April, City staff met to discuss our concerns about the impact of such an operation on the community and what could be done by the City government to ensure the safety and security of nearby residents and workers, and to protect our environmental assets.

City representatives from the Alexandria Fire Department, and its Code Enforcement Bureau and Emergency Management Office, the Transportation and Environmental Services Department and the Planning and Zoning Department have met with representatives of NSC and discussed the operation of the terminal, as well as City concerns about the safety, environmental and truck hauling issues that may arise.

In our discussions with Norfolk Southern we have encouraged them to meet with the community to discuss their new ethanol operation. City representatives from the Fire Department and Emergency Management will also attend.

Norfolk Southern's Ethanol Transloading Operation

Ethanol is a grain-based fuel that is used as a motor fuel and fuel additive. Ethanol cannot travel in pipelines along with gasoline, because it picks up excess water and impurities. As a result it must be transported by trucks, trains or barges. Transloading means transferring bulk shipments from the vehicle/container in one mode of transportation (railcars) to another mode (tanker trucks) at a terminal interchange point.

NSC ships liquid ethanol via rail car to the transloading facility, where the material is off-loaded by the railroad's contractor into tanker trucks for final delivery to gasoline tank farms in Springfield and in Fairfax City. A perimeter fence surrounds the NSC transloading facility and, according to NSC, the active transloading track has the capacity

to handle a maximum of 20 railroad tank cars. An NSC contractor oversees the transfer of ethanol directly from the railcars into tanker trucks (one tank car serves approximately four trucks).

Currently, about 16 trucks use the terminal each day, five days a week. This number is based on initial operations, and could change depending on the level of business in the terminal at any given time. According to NSC, the current hours of operation for the facility range from 6:00 a.m. to 7:00 p.m., with transloading occurring from 7:00 a.m. to 6:00 p.m., and truck arrivals/departures taking place from 6:00 a.m. to 7:00 p.m. Similarly, these hours are dependent on the amount of business in the terminal at any given time, and if the operation were to expand, the maximum hours of service would be 24 hours a day, seven days a week.

Currently, only one train is transloaded at the facility per day, and switch service for trains is provided from 5:00 p.m. to 5:00 a.m. five days a week. However, train arrivals may occur any day of a seven-day week, or at any hour of the day, based on volume, and crew availability.

Zoning/Legal Issues

While we are opposed to and have concerns about this type of facility, the City Attorney advised us that the federal Surface Transportation Board (STB) recently issued a decision that preempts local zoning laws that would regulate or prohibit such railroad transloading operations, including laws requiring a special use permit for the operation. The STB is the successor to the Interstate Commerce Commission as the federal agency with oversight of railroad operations. This decision is authorized pursuant to the Commerce Clause of the U.S. Constitution, and the Interstate Commerce Commission Termination Act of 1995 (the Act).

The City Attorney determined that the STB has unequivocally preempted local zoning regulation even if a contractor, and not the railroad itself, handles the transloading, provided that the contractor is acting as the agent of the railroad and is taking delivery or loading a bulk product, without making significant processing changes to the material at the rail site.

However, under the Act, the City is able to enforce traditional health and safety codes, such as building and fire prevention and hazardous materials regulations, so long as such codes regulate the manner in which the use is conducted, are reasonably objective in the standards imposed, are not applied in a discriminatory fashion, and will not have the effect of unreasonably preventing the use.

Safety Issues

Safety is of utmost concern to the City. NSC informed staff that in order to be prepared for potential spills of ethanol they have created primary and secondary containment areas, installed a grounded, bonded, and monitored product transfer system, and added several

fire hydrants and eye wash stations. NSC also has installed additional fencing around the transloading area and has provided a shed that contains a quantity of the foam needed for a fire incident. Water cannot be used on ethanol fires. Fighting ethanol fires requires a special type of firefighting foam, which is more expensive than conventional foam.

Following a series of discussions between the Fire Department and NSC over the last few weeks, NSC has agreed to provide the specialized equipment and supplies (including additional quantities of the foam discussed above) that we need. NSC will also help provide our Fire Department with the training needed to safely and effectively handle any incident involving large quantities of ethanol. We appreciate NSC's positive response to our requests.

We are currently discussing with NSC specific truck hauling routes and the preparation of a stormwater pollution and prevention plan as required by the state Department of Environmental Quality

We will be sending a copy of this letter to the business and citizen associations located nearby. We will keep City Council and community members informed as other information becomes available.

cc: Richard Baier, Transportation and Environmental Services Director
Tony Castrilli, Communications Director
John Catlett, Code Enforcement Director
Michele Evans, Deputy City Manager
Faroll Harner, Planning and Zoning Director
Mark Jinks, Deputy City Manager
Steve Mason, Special Assistant to the City Manager
Ignacio Pessoa, City Attorney
Adam Thiel, Fire Chief
David Lawson, Vice President, Norfolk Southern Corporation
Robin Chapman, Manager of Public Relations, Norfolk Southern Corporation
Doug McNeil, Director, Distribution Services, Norfolk Southern Corporation
Anthony Griffin, Fairfax County Executive
William Symonds, Alexandria Superintendent of Schools

E

ORDINANCE NO. _____

AN ORDINANCE to amend and reordain Section 5-2-27 (HAULING OF WASTE MATERIALS, CONSTRUCTION MATERIALS, ETC., PROHIBITED) of Chapter 2 (STREETS AND SIDEWALKS), Title 5 (TRANSPORTATION AND ENVIRONMENTAL SERVICES) of The Code of the City of Alexandria, Virginia, 1981, as amended.

THE CITY COUNCIL OF ALEXANDRIA HEREBY ORDAINS:

Section 1. That Section 5-2-27 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 5-2-27 Hauling of waste materials, construction materials, etc., prohibited.

(a) Hauling waste materials of any type, building or construction supplies of any type, bulk materials or commodities of any type, heavy vehicles or equipment of any type not licensed for street use, or dirt, debris or fill of any type is prohibited on all streets within the City, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under subsection (e) of this section.

(b) The director of transportation and environmental services is hereby authorized to issue permits to haul such materials, supplies or equipment over the streets within the City, subject to such conditions and restrictions specifying the time and route for such hauling, and such additional conditions and restrictions, as the director may deem appropriate to promote traffic safety and to minimize disruption to established residential, commercial, institutional and other areas in the City.

(c) Any person who, as the owner, lessee, operator or driver of a motor vehicle or trailer, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(d) Any person who, as the owner of any land, building or structure to or from which such materials, supplies or equipment are hauled, or the agent thereof having possession or control of such property as employee, lessee, tenant, architect, builder, contractor or otherwise, commits, permits, directs, assists in or attempts any violation of this section shall be guilty of a class two misdemeanor.

(e) The prohibition set forth in subsection (a) of this section shall not apply to the hauling of such materials, supplies or equipment (1) to or from any specific location or site at the rate of five or fewer trips for pickup or delivery of such materials or equipment in any consecutive thirty day period, (2) to the business location of a retail merchant for use by such merchant in the ordinary course of such merchant's business or from the business location of such a merchant in the ordinary course of such merchant's business to specific locations or sites, but subject to the limitation in clause (1) for each such location or site, nor (3) to the non-



1 commercial hauling of such materials or equipment to or from a dwelling unit, by a resident
2 therein.

3
4 Section 2. That this ordinance is declaratory of existing law.
5

6 Section 3. That this ordinance shall become effective upon the date and at the time
7 of its final passage.
8

9 WILLIAM D. EUILLE
10 Mayor

11
12 Introduction: 6/10/08
13 First Reading: 6/10/08
14 Publication:
15 Public Hearing:
16 Second Reading:
17 Final Passage:
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*196390 49 U.S.C.A. § 20106

**UNITED STATES CODE
ANNOTATED
TITLE 49.
TRANSPORTATION
SUBTITLE V—RAIL
PROGRAMS
PART A—SAFETY
CHAPTER 201—GENERAL
SUBCHAPTER I—GENERAL**

*Current through P L 110-171 (excluding
P L 110-161) approved January 4, 2008*

§ 20106. Preemption

(a) **National uniformity of regulation.**—(1) 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

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(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

(C) does not unreasonably burden interstate commerce.

(b) **Clarification regarding State law causes of action.**—(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the

Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section,

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries, or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002

***196391 (c) Jurisdiction.**—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 866, and amended Pub.L. 107-296, Title XVII, § 1710(c), Nov. 25, 2002, 116 Stat. 2319, Pub.L. 110-53, Title XV, § 1528, Aug. 3, 2007, 121 Stat. 453)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES**HISTORICAL AND STATUTORY NOTES**

Revision Notes and Legislative Reports

1994 Acts.

Revised Section	Source (U S. Code)
	at Large)
20106	45:434 Oct.
	Pub L
	§ 205, 84
	972

In this section, before clause (1), the words "The Congress declares that" are omitted as unnecessary. In clause (3), the word "unreasonably" is substituted for "undue" for



F

G

*195326 49 U.S.C.A. § 10501

UNITED STATES CODE
ANNOTATED
TITLE 49.
TRANSPORTATION
SUBTITLE IV--INTERSTATE
TRANSPORTATION
PART A--RAIL
CHAPTER 105--
JURISDICTION

*Current through P.L. 110-171 (excluding
P.L. 110-161) approved January 4, 2008*

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad, or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--

(A) a State and a place in the same or another State as part of the interstate rail network,

(B) a State and a place in a territory or possession of the United States,

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

(i) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such

carriers, and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection--

*195327 (A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302(a) of this title, and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services, and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety,

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor



contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

1996, 110 Stat 3390)

<General Materials (GM) - References, Annotations, or Tables>

CREDIT(S)

(Added Pub L 104-88, Title I, § 102(a), Dec 29, 1995, 109 Stat 807, and amended Pub L 104-287, § 5(21), Oct 11,

HISTORICAL NOTES

**HISTORICAL AND STATUTORY
NOTES**

*194657 49 U.S.C.A. § 5125

**UNITED STATES CODE
ANNOTATED
TITLE 49.
TRANSPORTATION
SUBTITLE III—GENERAL
AND INTERMODAL
PROGRAMS
CHAPTER 51—
TRANSPORTATION OF
HAZARDOUS MATERIAL**

*Current through P L 110-171 (excluding
P.L. 110-161) approved January 4, 2008*

§ 5125. Preemption

(a) **General.**—Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

(b) **Substantive differences.**—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

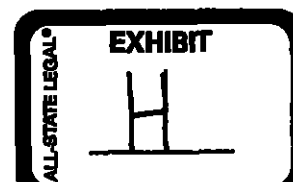
(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material

*194658 (E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce

(2) If the Secretary prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes. The effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.

(3) If a State, political subdivision of a State, or Indian tribe imposes a fine or penalty the Secretary decides is appropriate for a violation related to a subject referred to in paragraph (1) of this subsection, an additional fine or penalty may not be imposed by any other authority.

(c) **Compliance with section 5112(b) regulations.**—(1) Except as provided in paragraph (2) of this subsection, after the last day of the 2-year period beginning on the date a regulation is prescribed under section 5112(b) of this title, a



State or Indian tribe may establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with section 5112(b).

(2)(A) A highway routing designation, limitation, or requirement established before the date a regulation is prescribed under section 5112(b) of this title does not have to comply with section 5112(b)(1)(B), (C), and (F)

***194659 (B)** This subsection and section 5112 of this title do not require a State or Indian tribe to comply with section 5112(b)(1)(I) if the highway routing designation, limitation, or requirement was established before November 16, 1990.

(C) The Secretary may allow a highway routing designation, limitation, or requirement to continue in effect until a dispute related to the designation, limitation, or requirement is resolved under section 5112(d) of this title

(d) Decisions on preemption.—(1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section or section 5119(e). The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

(c) Waiver of preemption.—A State, political subdivision of a State, or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement the State, political subdivision, or tribe acknowledges is preempted by subsection (a), (b)(1), or (c) of this section or section 5119(b). Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement—

***194660 (1)** provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter, and

(2) is not an unreasonable burden on commerce.

(f) Fees.—(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

(2) A State or political subdivision thereof or Indian tribe that levies a fee in connection with the transportation of hazardous materials shall, upon the Secretary's request, report to the Secretary on--

(A) the basis on which the fee is levied upon persons involved in such transportation;

(B) the purposes for which the revenues from the fee are used;

(C) the annual total amount of the revenues collected from the fee, and

(D) such other matters as the Secretary requests

(g) Application of each preemption standard.—Each standard for preemption in subsection (b), (c)(1), or (d), and in section 5119(b), is independent in its application to a requirement of a State, political subdivision of a State, or Indian tribe

(h) Non-Federal enforcement standards.—This section does not apply to any procedure, penalty, required mental state, or other standard

utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material

CREDIT(S)

(Added Pub L. 103-272, § 1(d), July 5, 1994, 108 Stat. 781, and amended Pub L. 103-311, Title I, §§ 107, 117(a)(2),

120(b), Aug. 26, 1994, 108 Stat. 1674, 1678, 1681, Pub L. 103-429, § 6(6), Oct. 31, 1994, 108 Stat. 4378, Pub L. 107-296, Title XVII, § 1711(b), Nov. 25, 2002, 116 Stat. 2320, Pub L. 109-59, Title VII, §§ 7122, 7123(a), 7126, Aug. 10, 2005, 119 Stat. 1907, 1909.)

<General Materials (GM) - References, Annotations, or Tables>

*194594 49 U.S.C.A. § 5112

UNITED STATES CODE
ANNOTATED
TITLE 49.
TRANSPORTATION
SUBTITLE III—GENERAL
AND INTERMODAL
PROGRAMS
CHAPTER 51—
TRANSPORTATION OF
HAZARDOUS MATERIAL

*Current through P L 110-171 (excluding
 P L 110-161) approved January 4, 2008*

§ 5112. Highway routing of hazardous material

(a) Application.—(1) This section applies to a motor vehicle only if the vehicle is transporting hazardous material in commerce for which placarding of the vehicle is required under regulations prescribed under this chapter. However, the Secretary by regulation may extend application of this section or a standard prescribed under subsection (b) of this section to—

(A) any use of a vehicle under this paragraph to transport any hazardous material in commerce; and

(B) any motor vehicle used to transport hazardous material in commerce

(2) Except as provided by subsection (d) of this section and section 5125(c) of this title, each State and Indian tribe may establish, maintain, and enforce—

(A) designations of specific highway routes over which hazardous material may and may not be transported by motor vehicle; and

(B) limitations and requirements related to highway routing.

(b) Standards for States and Indian tribes.—

(1) The Secretary, in consultation with the States, shall prescribe by regulation standards for States and Indian tribes to use in carrying out subsection (a) of this section. The standards shall include—

(A) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe shall enhance public safety in the

area subject to the jurisdiction of the State or tribe and in areas of the United States not subject to the jurisdiction of the State or tribe and directly affected by the designation, limitation, or requirement;

(B) minimum procedural requirements to ensure public participation when the State or Indian tribe is establishing a highway routing designation, limitation, or requirement,

*194595 (C) a requirement that, in establishing a highway routing designation, limitation, or requirement, a State or Indian tribe consult with appropriate State, local, and tribal officials having jurisdiction over areas of the United States not subject to the jurisdiction of that State or tribe establishing the designation, limitation, or requirement and with affected industries;

(D) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe shall ensure through highway routing for the transportation of hazardous material between adjacent areas.

(E) a requirement that a highway routing designation, limitation, or requirement of one State or Indian tribe affecting the transportation of hazardous material in another State or tribe may be established, maintained, and enforced by the State or tribe establishing the designation, limitation, or requirement only if—

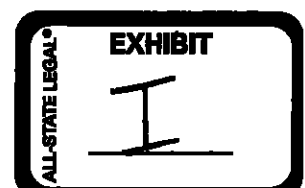
(i) the designation, limitation, or requirement is agreed to by the other State or tribe within a reasonable period or is approved by the Secretary under subsection (d) of this section, and

(ii) the designation, limitation, or requirement is not an unreasonable burden on commerce;

(F) a requirement that establishing a highway routing designation, limitation, or requirement of a State or Indian tribe be completed in a timely way;

(G) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe provide reasonable routes for motor vehicles transporting hazardous material to reach terminals, facilities for food, fuel, repairs, and rest, and places to load and unload hazardous material,

(H) a requirement that a State be



responsible--

(i) for ensuring that political subdivisions of the State comply with standards prescribed under this subsection in establishing, maintaining, and enforcing a highway routing designation, limitation, or requirement; and

(ii) for resolving a dispute between political subdivisions, and

(I) a requirement that, in carrying out subsection (a) of this section, a State or Indian tribe shall consider--

(i) population densities;

(ii) the types of highways;

(iii) the types and amounts of hazardous material,

(iv) emergency response capabilities,

*194596 (v) the results of consulting with affected persons,

(vi) exposure and other risk factors;

(vii) terrain considerations;

(viii) the continuity of routes,

(ix) alternative routes;

(x) the effects on commerce,

(xi) delays in transportation, and

(xii) other factors the Secretary

considers appropriate

(2) The Secretary may not assign a specific weight that a State or Indian tribe shall use when considering the factors under paragraph (1)(I) of this subsection

(c) List of route designations.--In coordination

with the States, the Secretary shall update and publish periodically a list of currently effective hazardous material highway route designations.

(d) Dispute resolution.--(1) The Secretary shall prescribe regulations for resolving a dispute related to through highway routing or to an agreement with a proposed highway route designation, limitation, or requirement between or among States, political subdivisions of different States, or Indian tribes

(2) A State or Indian tribe involved in a dispute under this subsection may petition the Secretary to resolve the dispute. The Secretary shall resolve the dispute not later than one year after receiving the petition. The resolution shall provide the greatest level of highway safety without being an unreasonable burden on commerce and shall ensure compliance with standards prescribed under subsection (b) of this section.

(3)(A) After a petition is filed under this subsection, a civil action about the subject matter of the dispute may be brought in a court only after the earlier of--

(i) the day the Secretary issues a final decision, or

(ii) the last day of the one-year period beginning on the day the Secretary receives the petition

(B) A State or Indian tribe adversely affected by a decision of the Secretary under this subsection may bring a civil action for judicial review of the decision in an appropriate district court of the United States not later than 89 days after the day the decision becomes final.

*194596 (v) the results of consulting with affected persons;

(vi) exposure and other risk factors;

(vii) terrain considerations;

(viii) the continuity of routes;

(ix) alternative routes;

(x) the effects on commerce,

(xi) delays in transportation; and

(xii) other factors the Secretary considers appropriate.

(2) The Secretary may not assign a specific weight that a State or Indian tribe shall use when considering the factors under paragraph (1)(I) of this subsection

(c) **List of route designations.**—In coordination with the States, the Secretary shall update and publish periodically a list of currently effective hazardous material highway route designations.

(d) **Dispute resolution.**—(1) The Secretary shall prescribe regulations for resolving a dispute related to through highway routing or to an agreement with a proposed highway route designation, limitation, or requirement between or among States, political subdivisions of different States, or Indian tribes.

(2) A State or Indian tribe involved in a dispute under this subsection may petition the Secretary to resolve the dispute. The Secretary shall resolve the dispute not later than one year after receiving the petition. The resolution shall provide the greatest level of highway safety without being an unreasonable burden on commerce and shall ensure compliance with standards prescribed under subsection (b) of this section.

(3)(A) After a petition is filed under this subsection, a civil action about the subject matter of the dispute may be brought in a court only after the earlier of—

(i) the day the Secretary issues a final decision, or

(ii) the last day of the one-year period beginning on the day the Secretary receives the petition.

(B) A State or Indian tribe adversely affected by a decision of the Secretary under this subsection may bring a civil action for judicial review of the decision in an appropriate district court of the United States not later than 89 days after the day the decision becomes final.

*194597 (e) **Relationship to other laws.**—This

section and regulations prescribed under this section do not affect sections 31111 and 31113 of this title or section 127 of title 23.

(f) **Existing radioactive material routing regulations.**—The Secretary is not required to amend or again prescribe regulations related to highway routing designations over which radioactive material may and may not be transported by motor vehicles, and limitations and requirements related to the routing, that were in effect on November 16, 1990

CREDIT(S)

(Added Pub L. 103-272, § 1(d), July 5, 1994, 108 Stat. 769, and amended Pub L. 109-59, Title VII, § 7126, Aug. 10, 2005, 119 Stat. 1909)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1994 Acts.

Revised Section	Source (U.S. Code)
	at Large)
5112(a)(1)	49 App 1804(b)(7)
	Pub.L
	§
	105(b)(1)"
	(5)"(9),
	88 Stat.
	restated
	16, 1990,
	Pub L
	§ 4, 104 Stat
	3248,

5112(a)(2) 49 App.:1804(b)(1).

5112(b)(1) 49 App.:1804(b)(2), (3).

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- Editions -

City Files Petition Against Norfolk Southern Mayor Issues apology to the citizens for ethanol operation.

By Chuck Hagee, Gazette Packet
Thursday, June 19, 2008

Who knew what when and what did they know? Or was it more a matter of not comprehending the facts rather than not knowing them?

Those questions appear to be at the core of the ethanol transloading controversy with Norfolk Southern Corporation and their facility in Alexandria's West End between Eisenhower Avenue and Duke and Pickett streets. Its proximity to Cameron Station, Summers Grove and Tucker Elementary School have raised not only safety concerns but also legal questions as to a possible solution

As a way to address the latter, City Attorney Ignacio Pessoa has filed a petition with the Surface Transportation Board (STB), successor to the Interstate Commerce Commission, seeking a declaratory order making the transloading facility and its operation subject to the city's special use permit process — something the railroad claims is not applicable under federal laws covering "transportation by rail carriers."

The petition maintains that "the ethanol transloading facility in the City of Alexandria operated by RSI Leasing, Inc., on property apparently leased from Norfolk Southern Railway Company does not constitute "transportation by rail carrier," and that the City's zoning and other regulatory authority is therefore not preempted "

It does not dispute the fact that the railway company "owns the property on which the facility is operated." However, the petition does maintain that "the facility commenced and is being operated by RSI and not by Norfolk Southern. As a result, the operation of the facility is not subject to preemption because it is being operated by a private, non-rail carrier operator."

What triggered this action by Pessoa was a tense and heated May 27 City Council

meeting when Alexandria Mayor William D. Euille and Council members publicly took a Norfolk Southern representative as well as City Manager James Hartmann and Pessoa to task for supposedly not keeping the city and its residents, particularly those in the West End, in the dark about the transloading facility being underway. Both Hartmann and Pessoa admitted to a breakdown in communications during that meeting, according to Euille.

That was followed by a joint statement news release from Euille and City Council, issued June 16, apologizing to Alexandria residents for "inadequate communication provided to the community leading up to and after the opening of the operation." It also placed the blame for that communications breakdown directly with Hartmann and Pessoa.

It further stated, "City Council is taking swift action to address this situation." The petition to the STB was filed Tuesday, June 17.

THE RELEASE goes on to state, "Norfolk Southern acted irresponsibly in locating the facility in a residential neighborhood near a school, opening the facility without appropriate notification to the City or the community, and opening the facility when the City was unable to adequately respond had there been a serious emergency at the site."

However, as far back as Sept. 18, 2006, in a letter addressed to Rich Josephson, deputy director, Alexandria Department of Planning and Zoning, William A. Galanko, vice president-law, Norfolk Southern Corporation, in responding to an Aug. 25, 2006 inquiry from Josephson about the transloading facility, stated, "Since June 19, 2006, Norfolk Southern has met with, and provided facility plans to various Alexandria officials."

Those officials included Euille, Hartmann, Deputy City Manager Mark Jinks "as well as D. T. Perry and Art Dahlberg from the Alexandria Fire Department," according to Galanko's letter. "We have integrated all modifications proposed by Alexandria fire officials to address perceived safety and fire concerns, including but not limited to special spill containment facilities, additional fire hydrant locations, foam capability, and additional portable fire extinguishers," Galanko stated.

"The facility will be fenced, gated and secured, and will be operated in a safe manner in conformance with any applicable health and safety requirements," he said. But, he also insisted that the STB jurisdiction over "Transportation by rail carriers is exclusive" and therefore not subject to local zoning regulations and processes.

"Application of this section (of the federal statute) preempts Alexandria's zoning statute to the extent that it would require any permit prior to the modification or

operation of the facility," Galanko noted in his letter written 20 months prior to the May 27, 2008 Council meeting.

He also maintained that the preemption of state and local zoning laws and permit requirements applies to "the construction of rail facilities to be operated by or on behalf of rail carriers." Norfolk Southern maintains RSI is operating the transloading operation "on behalf" of the railroad.

THE FACT THAT RSI is operating the facility under an agreement with Norfolk Southern goes to the heart of the City's petition to the STB. It claims this nullifies the federal exemption of rail carriers.

"We don't know the actual wording of the arrangement between Norfolk Southern and RSI because they have not shared that with us. But, if the railroad has surrendered control of the property to a third party we believe this negates the exemption," said Christopher Spera, assistant City Attorney.

"Our contention is that it is who controls the operation and not who owns the land on which the operation is taking place that determines if it is subject to our zoning laws," Spera said.

That was reiterated by Euille. "If the railroad has contracted out this operation then they are not entitled to the federal protection. They can't have it both ways," he said.

"It is my understanding that the regulations say that when this material comes in it must be unloaded and moved out. You can't have fully loaded rail cars waiting to be unloaded— that's against regulations," Euille said.

"I've heard the argument that there are a lot of dangerous fuels and materials moving all around us everyday. But, these rail cars are standing fully loaded at a site. That's the difference," he said.

In an article published in the January 2008 issue of the Greater Lansing Business Monthly, written by Jo Anne Paul-Stanton, entitled "Going Green with Freight Offers Benefits," she delves into the growing business of transloading ethanol by RSI owner Bob Tucheck whom she interviewed in 2007.

The article states that ethanol shipping by rail and off loading into tank trucks "has made RSI the largest bulk transloader of ethanol in North America." Tucheck stated in that article, "The trend (transloading ethanol) also has prompted construction of the newest terminal in Alexandria, Virginia, which will open early next year and be dedicated exclusively to the shipment of ethanol."

Tuchek further stated, "The cheapest way to get ethanol from the heartland of the United States into the consuming markets and to the gasoline storage facilities is via rail. We have the terminals, and they're in the proper markets."

It is this fact, that RSI and not Norfolk Southern is the sole operator of this transloading facility, that Pessoa states in his petition to the STB removes the federal protective cloak from the operation. Since the transloading operation commenced on April 9, 2008 no Norfolk Southern employees have been involved "in conducting or supervising the off-loading," according to the City's petition.

However, if the STB comes down on the side of Norfolk Southern, then the petition seeks an order from the Board directing the railroad "to comply with federal regulations governing the transloading of ethanol by railroad." That states, according to Pessoa, that "ethanol from a rail tank car be off-loaded to a permanent storage tank, with the capacity to hold the rail car's entire content."

Each rail car carries an average of 29,000 to 30,000 gallons of ethanol. The tank trucks to which their cargo is off loaded have a capacity of approximately 10,000 gallons each. This requires an estimated three tanker trucks to off-load one rail tank car.

There was no indication as to when the Board will decide upon the City's petition. However, as Euille stated in his news release, "The City is moving forward on two simultaneous fronts — doing everything we can to shut down this facility and to protect the health and safety of our residents from any dangers posed by this facility."



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CONTRACT NO.19543

AGREEMENT

This Agreement made and entered into as of the February 1, 2008, by and between Norfolk Southern Railway Company (hereinafter called "Railway") and RSI Leasing, Inc. (hereinafter called "Contractor"). This Agreement includes the attached appendices to the same extent as if the provisions of appendices were set forth verbatim herein, and the term "this Agreement" as used hereinafter shall include the appendices.

WITNESSETH

WHEREAS, Railway holds itself out to the public as offering to provide transportation and other specified services with regard to denatured ethanol and other products; and

WHEREAS, Railway desires to enter into an agreement with Contractor, for the performance of certain services incidental to such transportation and other services, as set forth herein and under the conditions hereinafter set forth below; and

WHEREAS, such services by Contractor include the rail-highway intermodal transloading of denatured ethanol from tank cars at Railway's transportation facility described in Appendix A (hereinafter called the "Terminal"), and the performance of certain other support services described more fully below; and

WHEREAS, Contractor is willing to perform the services described herein for the transloading of denatured ethanol; and

WHEREAS, the Parties desire the set forth a framework pursuant to which rates and terms for the transloading of products other than denatured ethanol can be determined and integrated into this Agreement.

NOW, THEREFORE, for and in consideration of the mutual undertakings set forth below, the parties hereto agree as follows:

SECTION 1. CONTRACTOR OBLIGATIONS.

A. Transload Process.

(i) Until Appendix C hereto is amended to include pricing for the transload of other commodities, a reference herein to "the Product" shall be a reference to denatured ethanol. After Appendix C hereto is amended to including pricing for the transload of other commodities, a reference to "the Product" shall be a reference to all commodities covered by Appendix C pricing. Contractor shall not transload any Product designated as hazardous pursuant to 49 C.F.R. Parts 171 and 172, including Section 172.101 (Hazardous Materials Table), as may be revised or replaced from time to time, including but not limited to denatured ethanol, until: (a) Railway agrees, in writing (including via e-mail), to permit the same, subject to such conditions as Railway deems appropriate, and taking into account the nature and characteristics of the

commodity as well as safety considerations in handling the Product; and (b) Contractor certifies that it is fully knowledgeable on how to handle and transload the Product in full accordance with all applicable safety and environmental regulations and conditions Railway deems appropriate, and that its employees, agents and contractors have received the proper training and safety protective equipment to transload the Product.

(ii) Contractor shall perform all activities required to transload the Product from rail tank cars and/or, in the case of commodities other than denatured ethanol, other rail cars, on the one hand, and trucks, on the other hand (such activities hereinafter called the "Transload Process"), including but not limited to the following:

- i. Perform, and ensure shipper compliance with, Tariff 9328-C, or any successor or replacement thereof.
- ii. Check in procedures for trucks showing up at the gate.
- iii. Manning the gate during open hours, which shall be at a minimum 7 a.m. to 6 p.m., five (5) days per week (Monday through Friday), but regular hours of service can be in addition to the minimum, if it is necessary to match the level of business at the terminal and the needs of the customers
- iv. Maintaining the site, including but not limited to the gates, fences, grounds, the building, in an orderly, clean state of good repair.
- v. Directing trucks within the loading site.
- vi. Completing paper work for truck drivers.
- vii. Attaching transload equipment to rail cars.
- viii. Attaching transload equipment to trucks.
- ix. Providing security, which shall mean, at a minimum, that the facility is occupied at all times during open hours, and that the facility is secured with locked gates during periods when the facility is not open.
- x. Determination of the Quality of the Product (upon request of Railway).
- xi. Supervision of independent inspector for the determination of the quality of the Product.
- xii. Actively manage the inventory pipelines of all customers to insure proper levels of Product at the terminal.
- xiii. Providing all necessary transload equipment to handle the Product.
- xiv. Collection of Track Occupancy Charges (TOC) from all terminal customers acting as NS' third party billing agent.

(iii) Contractor shall supply the necessary staffing, including a Terminal Manager (as a single point of contact for Contractor), drivers and qualified loaders, portable office, if necessary, and equipment, to provide the Transload Process on a timely basis for Railway's customers. All utilities will be paid by the Contractor. Personnel will be trained. The transfer process will be supervised and staffed with the appropriate number of OSHA and DOT

trained personnel. At least two (2) people will perform transfers of hazardous materials. This is in addition to the truck driver. Contractor will provide multiple unloading stations to match the anticipated daily volume and avoid delays in tank truck loading. Contractor shall be responsible for the purchase, maintenance and replacement of all equipment, fuel, lubricant, supplies, depreciation and parts used by Contractor pursuant to this Agreement. From time to time and upon mutual agreement of the parties, the minimum number of unloading stations shall be set and adjusted upward or downward to match material changes in anticipated daily volumes and hours of service.

(iv) Contractor will provide to Railway's customer Contractor's completed customary inspection report with respect to all of the Railway customer's rail cars entering the Terminal carrying a Product to be transloaded for the customer. All transloading equipment used by Contractor shall be equipped with a volume transloading meter. Contractor shall ensure that all transloading activities will be accurately metered and volume transloaded recorded. Contractor shall, at its sole cost, have an independent party perform a meter calibration test on all meters and shall provide the results of said test to Railway. If the amount of volume transloaded from any rail car varies from the customer reported volume by 500 gallons or more, then Contractor shall immediately visually inspect the cars and reported the variance to the customer.

(v) If requested by Railway, Contractor shall determine the quantity of the Product handled hereunder shall be determined by Contractor, or at Railway's customer's option by an independent inspector mutually acceptable to both parties. The charges for an independent inspector shall be borne by parties other than Contractor. Either party may dispute a determination under this section by delivering written notice thereof to the other party promptly upon receipt of the determination. The parties shall resolve any disputes in good faith.

(a) The quantity of denatured ethanol handled hereunder shall be determined as follows:

- (i) The quantity of Product received from rail cars shall be determined by the rail car's bill of lading from the origin point.
- (ii) The quantity of Product delivered to a tank truck shall be determined as follows: Contractor's loading meters, or in the case of meter failure or absence of meters, tank truck calibrations shall be used when the Product is loaded to the compartment measuring finger. RSI shall maintain seals on its meters and shall test and calibrate its meters at maximum intervals of six (6) months, or more often as found necessary (or as required by federal, state or local authorities), in accordance with approved methods.

(iii) For the purpose of the Agreement, a barrel shall consist of forty-two (42) U.S. gallons and a gallon shall contain two hundred thirty-one (231) cubic inches when corrected to 60°F. All measurements shall be in accordance with API standards. All quantities, however measured, shall be corrected to 60°F, using the applicable volume correction table for chemical products.

(b) The quality of commodities other than denatured ethanol shall be determined pursuant to a process developed at the time that the Parties amend Appendix C, and shall be appropriate to the commodity being transloaded.

(vi) Contractor shall not permit any motor carrier to enter onto the Facility unless such motor carrier has entered into an Indemnity and Hold Harmless Agreement with Railway substantially in the form attached hereto as Appendix E. Contractor shall not permit any motor carrier to enter onto the Facility, regardless of whether said motor carrier has entered into an Indemnity and Hold Harmless Agreement with Railway, if Railway denies such motor carrier access to the Facility.

B. Accessorial Yard Services.

Contractor shall also provide any additional services which are determined in Railway's sole but good faith judgment to be reasonably necessary for the efficient operation of the Terminal (hereinafter called "Accessorial Yard Services"), which shall include at a minimum those operating and administrative services specifically described in Appendix B, provided, however, that no language in Appendix B, or omission of language from Appendix B shall reduce or limit, in any manner, Contractor's obligation to provide all support and incidental services ordinarily and reasonably required in the operation of a rail-highway, denatured ethanol intermodal transload facility.

C. Supervision and Performance of Work.

Contractor is and shall remain an independent contractor. Contractor shall be solely responsible for, and Railway shall not participate in, the employing or supervising of each person engaged in discharging Contractor's responsibilities under this Agreement; all such persons shall be the sole agents, servants and employees of Contractor. The Contractor shall pay all expenses and charges involved or incurred in any way in the performance of its obligations under this Agreement, including without limitation compensation of personnel, fringe benefits, Social Security, Worker's Compensation unemployment insurance and any other employment taxes as may be required by State or Federal law). Should Contractor engage the services of a contractor or agent to carry out any of Contractor's activities under this contract, Contractor assumes full responsibility and shall indemnify and hold harmless Railway from any consequences of the acts and omissions of such contractor or agent. It is the intention of the parties that Contractor shall

remain an independent contractor and nothing herein shall be deemed to constitute a joint venture, partnership or agency of any kind for any purpose. Contractor shall not use the Facility other than for the purposes set forth in this contract, and shall not use the Facility to transload rail cars placed at the Facility by parties other than Railway.

D. Protection of Persons and Railway Property.

(i) Contractor shall require any person performing any obligation of Contractor under this Agreement, including, without limitation, Contractor's employees, prospective employees, agents, representatives, and subcontractors (hereinafter called "Workers"), to comply, while on or about Railway property, with the Operating Rules, if any, that apply to their activities and are supplied to Contractor by Railway, and also to comply with any other rules or regulations concerning operations or safety that Railway furnishes in writing to Contractor.

(ii) Contractor will provide any information reasonably requested by Railway about any of Contractor's Workers who may come on Railway property or perform any work for Railway under this Agreement. Contractor represents and warrants that, as to each of Contractor's Workers who will come onto Railway's premises or who will perform work hereunder, Contractor has performed, and such Contractor's Worker has passed, the required background check and a drug screening test, each of which shall be reasonably acceptable to Railway and otherwise in compliance with applicable laws, including, but not limited to the Fair Credit Reporting Act as applicable to background checks.

(iii) Except as provided in Section 1.A.(i), this contract does not cover the handling of any commodity designated as hazardous pursuant to 49 C.F.R. Parts 171 and 172, including Section 172.101 (Hazardous Materials Table), as may be revised or replaced from time to time. Contractor shall not bring on or permit the presence of, or permit or suffer others to bring on or permit the presence of, such materials without the expressed written approval of Railway.

(iv) Contractor shall ensure that spill containment will be used and will be, as appropriate, the placement of Product-resistant catch pans under hose connections during the transfer and breakdown.

(v) Contractor shall ensure that the transfer process will be performed: (a) only on grounded track; (b) isolated from other commodities to the degree possible as track space allows; (c) only through a pumping system with a "closed loop" vapor recovery system; (d) using hoses secured with straps/seals; (e) under conditions where all transfer equipment, car and tank trunk is grounded; (f) only using bonded tanks; and (g) inside the containment area for hazardous products.

(vi) Contractor shall ensure that all personnel involved in the transfer will: (a) wear selected protective clothing, including goggles, work boots, PVC gloves, and long-sleeved

uniforms, and (b) be trained, and receive regular and appropriate refresher training, regarding the hazards posed by the Product being transferred (such hazards as are set forth in the MSDS) and in the appropriate emergency response in the event of a release of the Product being transferred (such appropriate response as are set forth in the emergency response plan identified in Section 1.D(viii) below.

(vii) Contractor shall ensure that all necessary safety equipment, including blue flags, rail chocks, spill kits, safety showers, fire extinguishers, and eyewashes, shall be in place and in good working order.

(viii) Contractor shall ensure that the following will be maintained in the office of the Terminal during relevant Transfer Operation: (a) all Material Safety Data Sheet (MSDS) covering the specific Product being transferred; (b) the proper Emergency Response Guide covering the specific Product being transferred; (c) a working emergency response plan that incorporates response for the specific Product being transferred (which plan will also be provided to the local emergency response agency); and (d) a security plan.

(ix) Contractor shall implement the security plan identified in Section 1.D.(viii) above.

(x) Contractor shall report any and all accidental releases to Railway.

(xi) Contractor shall contain and dispose of any and all accidental releases in accordance with all applicable Federal, State, and local requirements.

E. E-Verifile.com

(i) Contractor must secure background investigations of its employees through e-VERIFILE.com. Contractor employees successfully undergoing the background investigation will be issued a picture identification card which will be required for the Contractor's employees to enter and work on Railway property or perform services for Railway. Contractor employees without the identification card will not be allowed to work on Railway property. Employees leaving the employment of Contractor must surrender the identification card to either Contractor or to Railway. While Railway has negotiated on the behalf of Contractor standard volume rates with e-VERIFILE.com for the investigations, identifications cards and other products, all charges incurred in the use of e-VERIFILE services and products are the sole responsibility of Contractor. Where a contract permits Contractor to charge travel and business expenses to Railway, the e-VERIFILE.com charges are not included among such recoverable expenses. Contractor may include such charges as a part of its overhead costs in determining its price proposals. Contractor must execute e-VERIFILE.com's standard Subscriber Agreement—failure to do so voids this Agreement. The contact information for e-VERIFILE.com is as follows: e-Verifile.com (770-859-0717 ext 212).

(ii) In the event that Railway ceases the use of e-VERIFILE.com for background investigations or switches to another similar service, Contractor will be notified by Railway of the termination and/or transfer. In the event that Railway switches to another vendor for similar services the requirements of this Section will apply to Contractor with regard to the use of the alternative vendor's services.

(iii) Railway does not warrant or guarantee either the accuracy or completeness of the services performed by e-VERIFILE.com; and Railway shall have no responsibility to Contractor for the services performed by e-VERIFILE.com. Contractor uses such services as between Railway and Contractor solely at the risk of Contractor. It is the sole discretion and responsibility of Contractor as to performing other background investigations of Contractor's employees.

(iv) A sample copy of e-VERIFILE.com's standard Subscriber Agreement is attached for information.

F. Other Investigations.

As to any of Contractor's Workers who have or may come onto Railway's premises or perform work hereunder, Contractor will perform any other investigation or procedure reasonably requested by Railway for the protection of Railway's property or operations, the protection of lading, and the protection of third parties.

G. Indemnification.

Contractor agrees that it will hold Railway harmless and will indemnify Railway in the event any actions are filed against Railway in connection with Contractor's completion of any of the foregoing, including but not limited to the conduct and communication of the background check and the drug screening test.

H. Waiver.

If Railway elects to waive the requirement of any background check, drug screen, or other investigation or procedure before permitting one of Contractor's Workers to perform work hereunder or to come on any Railway property, such waiver shall not constitute a waiver of Railway's right to subsequently require any such check, screen, investigation or procedure for that Worker after he or she has begun working under this Agreement.

I. Without limiting the generality of the foregoing in any way, Contractor shall also perform the following acts:

(i) Arrange an urinalysis screen for any substance specified by Railway for each of Contractor's Workers who will perform work under this Agreement, and

(ii) Before any Worker comes on Railway's property or performs any work hereunder, provide Railway with a certificate from the doctor, clinic, or hospital performing the urinalysis drug screen for that Worker certifying the results thereof

(iii) Upon request by Contractor, Railway will furnish it with a list of doctors, clinics, and hospitals that perform drug screening urinalysis.

(iv) Railway reserves the right to bar from the Terminal or other Railway property any of Contractor's Workers who, in Railway's sole judgment, could create any risk or operating or administrative problems either because of the excluded person's refusal to comply with operating safety procedures, questions about his or her honesty, discipline problems he or she creates with Railway's own employees, or any other reason Railway has for reasonably believing that person might cause risk or disruption to Railway's operations. Upon request by Railway, Contractor will exclude from the performance of any work under this Agreement and bar from the Terminal or other Railway property any of Contractor's Workers designated by Railway as excluded under this Agreement. Railway shall not be required to specify, in any such request or otherwise, either the basis for its decision or which of the foregoing objections it has to the excluded person.

(v) Railway's right under this section to exclude any person from its property or from work under this Agreement shall not be waived by its failure to require any background check, drug screen, or other investigation or procedure under the other provisions of this Section 1.I, by its prior failure to act upon any information that was, or should have been, included in such check, screen, investigation or procedure, by the successful passing by Contractor's employee of the required or any other background check or by any other act or omission of Railway.

(vi) Before permitting any of its Workers to perform any service under this Agreement, Contractor shall inform him or her of all of Railway's rights under this Section 1.I.

J. Conflict of Interest.

Contractor shall not permit any person, firm or corporation, or employees thereof, in any manner interested in the freight to be handled hereunder to perform any of Contractor's obligations under this Agreement or to become financially interested in Contractor's business. Contractor shall not employ, lease or rent any vehicle used in the usual course of business by such person, firm or corporation, and Contractor shall not permit any monies paid for services performed hereunder to be refunded, directly or indirectly, to any shipper, consignee or anyone interested in the freight so handled.

K. Damage and Injury Reports.

Contractor shall immediately notify the Railway employee specified on Appendix A of (i) any death of, or injury requiring medical treatment to, any person, including but not limited to

employees of Contractor while on Railway property or performing services hereunder, and (ii) any loss or destruction of or damage to any property whatsoever, including but not limited to the rail cars and the Product. Contractor agrees to furnish full details of any such accident or incident. Contractor acknowledges its knowledge of Railway's responsibility to report deaths or injuries to Federal agencies and its full knowledge of all penalties and damages to which Railway may be subjected if such reports are not made because of Contractor's failure to notify Railway.

L. Audit.

(i) The Contractor shall, during the existence of this Agreement and for one calendar year thereafter, upon written request of Railway, furnish Railway within sixty (60) days from the receipt of a written request, a detailed accounting of its expenses of operation and its charges to Railway verified by a written report of a Certified Public Accountant which contains no qualification of the verification of such expenses and charges in accordance with generally accepted accounting principles.

(ii) Contractor shall also permit Railway full and complete access to such books and records (including those of Contractor and of any corporate parent, subsidiary, or affiliate) as may be required to conduct a proper audit, in accordance with generally accepted accounting principles, of Contractor's operations, charges and accounting under this Agreement. Contractor shall also permit Railway to copy any portion of those books and records that Railway is entitled to examine under the foregoing sentence. In the event of any dispute about what records are required for a proper audit under this Subsection 1.L, Railway may designate as arbitrator any of the eight largest accounting firms in the United States, and both parties shall accept as final and binding that firm's decision about what records are subject to Railway's examination under this Subsection 1.L. The expense of such accounting firm for such services as arbitrator shall be borne equally by Railway and Contractor, unless it rules that all requested documents shall be made available to Railway, in which case the Contractor shall pay the entire fee, or that none of the requested documents shall be made available to Railway, in which case Railway shall pay the entire fee.

M. Demurrage, Car Hire and Transportation Charges.

As Railway's contractor, Contractor shall not be responsible for demurrage, car hire or transportation charges for the movement of the Product to and from the Facility. Contractor shall be responsible to act as a third party billing agent on Track Occupancy Charges applicable pursuant to Bulk Tariff 9328.

SECTION 2. COMPENSATION.

Railway covenants and agrees to pay, and Contractor agrees to accept, as full compensation for all services provided hereunder by Contractor and all obligations assumed hereunder by Contractor the amounts or rates of compensation set forth in Appendix C. Without

limiting the generality of the foregoing, the compensation shown in Appendix C includes all activities covered by the Transload Process Trailer and all Assessorial Yard Services, and Contractor shall not be entitled to any additional compensation for any such services.

SECTION 3. LIABILITY, INDEMNITY AND INSURANCE.

A. Indemnity for Railway.

(i) Contractor shall indemnify and hold harmless Railway and the other Indemnified Parties listed in Subsection 3.B below from and against any and all liability, damages, claims, suits, judgments, costs, expenses (including, but not limited to, litigation costs and attorney fees) and losses resulting from:

- a. Injury to or death of Contractor's agents, servants, or employees *and loss or destruction of or damage to property or equipment of Contractor or its agents, servants or employees arising directly or indirectly from this Agreement or the presence at or about the Terminal, or any other Railway property, of any of Contractor's agents, servants or employees, except to the extent such injury, death, loss or damage is caused directly or indirectly by the negligence of Railway, its agents, servants, or employees, or otherwise;*
- b. Except as provided in Subsection 3.A.(i).a, injury to or death of any person whomsoever (including, but not limited to, employees of Railway) and loss or destruction of or damage to any property whatsoever (including, but not limited to, property of Railway) caused directly or indirectly by the acts or omissions of Contractor, its agents, servants, or employees or arising in any manner either from the presence of Contractor, Contractor's agents, servants, or employees at or about the Terminal or any other Railway property in connection with this Agreement or from Contractor's performance or attempted performance of this Agreement (and regardless of whether a Trailer involved in such loss and damage or injury is in Contractor's possession at the time of loss, damage or injury), unless such injury, death, loss, or damage is caused solely by the negligence of Railway, its agents, servants, or employees; or
- c. Any failure by Contractor to comply with any covenant of this Agreement, including but not limited to Contractor's obligation to pay any applicable payroll, unemployment compensation, social security or other employment taxes arising in any manner, directly or indirectly, from or in connection with the Transfer Operation or

with the assertion by any federal, state, or local government of any such tax liability.

- d. Contractor shall not be responsible for the pre-existing environmental condition of the premises or any problem or condition caused or created by any person other than Contractor or its contractors or agents; provided, however, that in the event of any such problems or conditions (which is not a pre-existing environmental condition) is caused or created at the Facility and it cannot be determined who caused or created such problem or condition, then Railway and Contractor shall share equally in the cost of cleaning up or correcting such problem or condition.

B. Indemnified Parties.

Contractor shall indemnify and hold harmless the following parties (herein the "Indemnified Party" or "Indemnified Parties") to the extent described in Subsection 3.A above: (i) Norfolk Southern Corporation; (ii) any direct or indirect subsidiary of Norfolk Southern Corporation; and (iii) any officer, director, employee or agent of Norfolk Southern Corporation or of any of its direct or indirect subsidiaries.

C. Insurance.

- (i) Contractor, shall at its expense, obtain and maintain during the period of this Contract in a form and with companies satisfactory to Railway, the following insurance coverages:
 - (a) Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Contractor's officers, agents, servants or employees arising directly or indirectly out of the performance of the services herein undertaken;
 - (b) Employers' Liability Insurance with Limits of not less than \$1,000,000 each accident, \$1,000,000 policy limit for disease, and \$1,000,000 each employee for disease;
 - (c) Commercial General Liability Insurance with a combined single limit of not less than \$5,000,000 per occurrence for injury to or death of persons and damage to or loss or destruction of property. Such policy shall be endorsed to provide products and completed operations coverage and contractual liability coverage for liability assumed under this Contract. The contractual liability coverage shall be of a form that does not deny coverage for operations

conducted within 50 feet of any railroad hazard. In addition, said policy or policies shall be endorsed to name Railway as an additional insured and shall include a severability of interests provision;

- (d) If the use of motor vehicles is required, Automobile Liability Insurance with a combined single limit of not less than \$5,000,000 each occurrence for injury to or death of persons and damage to or loss or destruction of property. Said policy or policies shall be endorsed to name Railway as an additional insured and shall include a severability of interests provision;
- (e) In the event Contractor leases or otherwise uses Railway's equipment in order to perform the services specified in this Agreement, Contractor shall maintain all risk property insurance at replacement cost value on said equipment.

(ii) Contractor shall furnish certificates of insurance to Railway's Director Risk Management, Three Commercial Place, Norfolk, Virginia 23510-2191, certifying the existence of such insurance. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits without (30) days advance written notice to Railway. Upon request, Contractor and its subcontractors, if any, shall furnish Railway with copies of the insurance policies or other satisfactory evidence of such insurance. Contractor shall require all subcontractors who are not covered by the insurance carried by Contractor to maintain the insurance coverage described in this Section.

(iii) The insurance coverage required herein shall in no way limit the Contractor's liability under this Contract.

SECTION 4. LIENS

Contractor shall not cause any lien, claim or encumbrance to be placed against the Facility. If any such lien, claim or encumbrance caused by Contractor shall be filed or placed against the Facility or any part thereof, Contractor agrees to discharge the same within thirty (30) days after Contractor has notice thereof. If Contractor fails to do so, Railway shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amounts so paid, including interest, fees, charges and expenses shall be paid by Contractor to Railway.

SECTION 5. TERM AND TERMINATION.

A. This agreement shall have an initial term (the "Initial Term") beginning on the first day that the Facility is open and operational, which date shall be determined by an exchange of

letters between the Parties (the "Effective Date") and ending on the second anniversary of the Effective Date (the "Termination Date"). This agreement will automatically continue during a renewal term (the "Renewal Term") from month to month after the Termination Date until either party provides the other with thirty (30) days prior written notice of termination ("Renewal Term," and, collectively with the Initial Term, the "Contract Term").

B Notwithstanding anything in this Agreement to the contrary, Railway may terminate this Agreement at any time for any reason upon giving Contractor at least sixty (60) days' notice. Notwithstanding anything in this Agreement to the contrary, Contractor may terminate this Agreement upon at least sixty (60) days' prior written notice to Railway's Distribution Services Department, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510. If this Agreement is terminated during the Initial Term pursuant to this Section 5.B, the minimum payment set forth in Appendix C nevertheless will apply.

C. Notwithstanding anything in this Agreement to the contrary, if Contractor breaches any material provision of this Agreement, including, without limitation, any of its obligations under Sections 1, 3, 6.B and 6.G (all of which provisions are considered material), Railway shall have the right to terminate this Agreement without further prior notice to Contractor. Notwithstanding anything in this Agreement to the contrary, the minimum payment set forth in Appendix C shall be waived in the event this Agreement is terminated pursuant to this Section 5.C.

D. Notwithstanding anything in this Agreement to the contrary, if Railway decides, as a matter of business judgment and in its sole discretion, that the continued operation of the Terminal as a rail-highway intermodal facility for the transloading of the Product is not justified and that it will cease using the Terminal as a rail-highway intermodal facility for the transloading of the Product, Railway may terminate this Agreement upon at least thirty (30) days prior written notice to Contractor of its intent to cease using the Terminal as a rail-highway intermodal facility for the transloading of the Product. If this Agreement is terminated during the Initial Term pursuant to this Section 5.D, the minimum payment set forth in Appendix C nevertheless will apply.

SECTION 6. RAILWAY ACCESS TO THE FACILITY.

In addition to access to the Facility normally required for Railway operations, at any time during the term of this contract, Railway shall have the right to enter upon and inspect the Facility and the operations of Contractor, among other reasons, to ensure that Railway's premises are not being contaminated and Railway's employees are not at a health risk arising from Contractor's operations. If Railway detects any violation that results from such condition, including any contamination of the premises, Railway shall notify Contractor of such violation, provided, however, that the giving of said notice, or the failure of the giving of said notice, shall in no way affect the allocation of any liability arising there from or in connection therewith.

SECTION 7. GENERAL CONTRACT PROVISIONS.

A. **Notices.** All notices required to be given under this Agreement shall be in writing, signed by or on behalf of the party giving the same, and transmitted to the addresses shown below or such successor address(es) as that party may specify by notice hereunder. Such notices shall be transmitted by United States registered or certified mail return receipt requested, or by telegram or fax, with confirmed receipt, addressed to the following offices and addresses:

For Railway: Distribution Services Department
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
Fax # (757) 823-5425

For Contractor: RSI Leasing, Inc.
P.O. Box 1396
Okemos, MI 48805-1396
Attention: Robert B. Tuckek – President

All notices shall be effective on day following confirmed receipt of the letter, telegram, or fax.

B. Assignment.

Neither this Agreement nor any of the services to be performed hereunder shall be assigned or sublet without the prior written consent of Railway. The proceeds to be paid hereunder by Railway to Contractor shall not be assigned, sublet or factored by Contractor, and such assignment, sublet or factoring shall constitute a material breach of this Agreement. Subject to the foregoing restrictions, this Agreement shall inure to the benefit of and be binding upon all successors and assigns.

C. Amendment.

No terms or conditions, other than those stated herein, including any Appendix hereto, and no agreement or understanding, oral or written, in any way purporting to modify this Agreement, shall be binding on either party unless hereafter made in writing stating that it is intended as a change to this Agreement and signed by an authorized representative of both parties.

D. Integration.

This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

E. Counterparts.

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instruction.

D. Non-Waiver.

The waiver of any breach of any of the terms and conditions hereof shall be limited to the act or acts constituting such breach and shall not be construed as a continuing or permanent waiver of any such terms and conditions, all of which shall be and remain in full force and effect as to future acts or happenings notwithstanding such waiver. The parties intend that none of the provisions of this Agreement shall be thought by the other to have been waived by any act or knowledge of the parties, but only by a written instrument signed by the party waiving a right hereunder.

E. Severability.

If any provision in this Agreement is found for any reason to be unlawful or unenforceable, the parties intend for such provision or provisions to be severed and deleted from this Agreement and for the balance of this Agreement to constitute a binding agreement, enforceable against both Railway and Contractor.

F. Remedies Cumulative.

Any rights or remedies under this Agreement, including, without limitation, those provided in the preceding paragraph, are cumulative and in addition to all other rights and remedies hereunder or at law. Any cancellation or termination of this Agreement shall not relieve either party of any obligation or liability accruing under this Agreement prior to such cancellation or termination.

G. Arbitration.

(i) Except as provided in Section 1.L, any claim, dispute or controversy arising out of or relating to this Agreement, the parties' relationship under this Agreement, or the breach of this Agreement, shall be determined by arbitration by a single arbitrator pursuant to the applicable Rules of Practice and Procedure of the American Arbitration Association in effect at the time the demand for arbitration is filed. Unless, within sixty (60) days of the date of the notice initiating arbitration, the parties can mutually agree to an arbitrator, the arbitrator shall be chosen in accordance with the Uniform Arbitration Act. Unless otherwise agreed to by the parties, the location of the arbitration shall be in Norfolk, Virginia. The decision of the arbitrator shall be final and binding. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation and any costs and

expenses of the arbitrator shall be borne equally by the parties. Judgment to enforce the decision or award of the arbitrator may be entered in any court having jurisdiction.

(ii) Service of process in connection therewith shall be made by certified mail. In any judicial proceeding to enforce this agreement to arbitrate, the only issues to be determined shall be the existence of the Agreement to arbitrate and the failure of one party to comply with that Agreement to arbitrate, and those issues shall be determined summarily by the court without a jury. All other issues shall be decided by the arbitrator, whose decision thereon shall be final and binding. There may be no appeal of an order compelling arbitration except as part of an appeal concerning confirmation of the decision of the arbitrator.

(iii) Neither party shall institute any legal proceeding against the other to enforce any right hereunder, except that either party may institute litigation: (a) to enforce its rights of arbitration hereunder; (b) to confirm and have judgment entered upon any arbitration award issued hereunder; and (c) to stay the running of any statute of limitation or prevent any other occurrence (including, without limitation, the passage of time) which would constitute laches, estoppel, waiver or any other such legal consequence that suit is necessary to avoid, provided, however, that neither party shall pursue litigation under item (c) beyond such action as is necessary to prevent prejudice to its cause of action pending ultimate resolution by arbitration under this Section 6.G.

(iv) If any dispute between the parties arises from or in connection with any claim or litigation initiated by any third party (either as claimant, plaintiff, counter claimant, or defendant/third party plaintiff), then, unless the parties agree otherwise, the resolution of that dispute under the arbitration provisions of this Section 7.G may, at the option of either party, be deferred until the resolution of that third-party claim or litigation, provided, however that in the event of any such dispute in connection with such a claim or litigation so initiated by a third party, either party may at any time initiate arbitration under this Section 7.G to determine prospective liability between the parties upon facts which are stipulated, admitted solely for the purpose of arbitrating prospective liability, or not reasonably in dispute. The issue of whether any fact is "reasonably in dispute" under the preceding sentence shall be subject to mandatory arbitration hereunder upon the demand of either party. In the event Railway is made a party to such claim or litigation so initiated by a third party, Railway shall select its own counsel and have complete control over all claim or litigation decisions concerning its participation in that claim or litigation, regardless of whether Railway is required to, or in fact does, initiate a cross claim, counterclaim or third-party claim under subclause (iii) of Subsection 7.G.(3) above, and regardless of Contractor's indemnity obligations under Section 3 above.

H. Governing Law. The laws of the Commonwealth of Virginia shall govern the construction and interpretation of this Agreement and all rights and obligations of the parties under it, except that the legal effect of any indemnity obligation under this Agreement for claims arising from personal injury or property damage shall be governed by the law of the state in which that personal injury or property damage occurred.

I. Captions.

The caption of the paragraphs and sections are inserted for convenience only and shall in no way expand, restrict, or modify any of the terms and provisions hereof.

J. Confidentiality.

The terms and conditions of this Agreement shall be considered strictly confidential between the parties hereto and neither party shall disclose any such term, condition, or Railway customer information for any other purpose other than such disclosures as may be required by any government authority in order that it may discharge its regulatory functions, or to each parties' accountants, attorneys, agents and subcontractors who have a need to know the information, or as may otherwise be required by law.

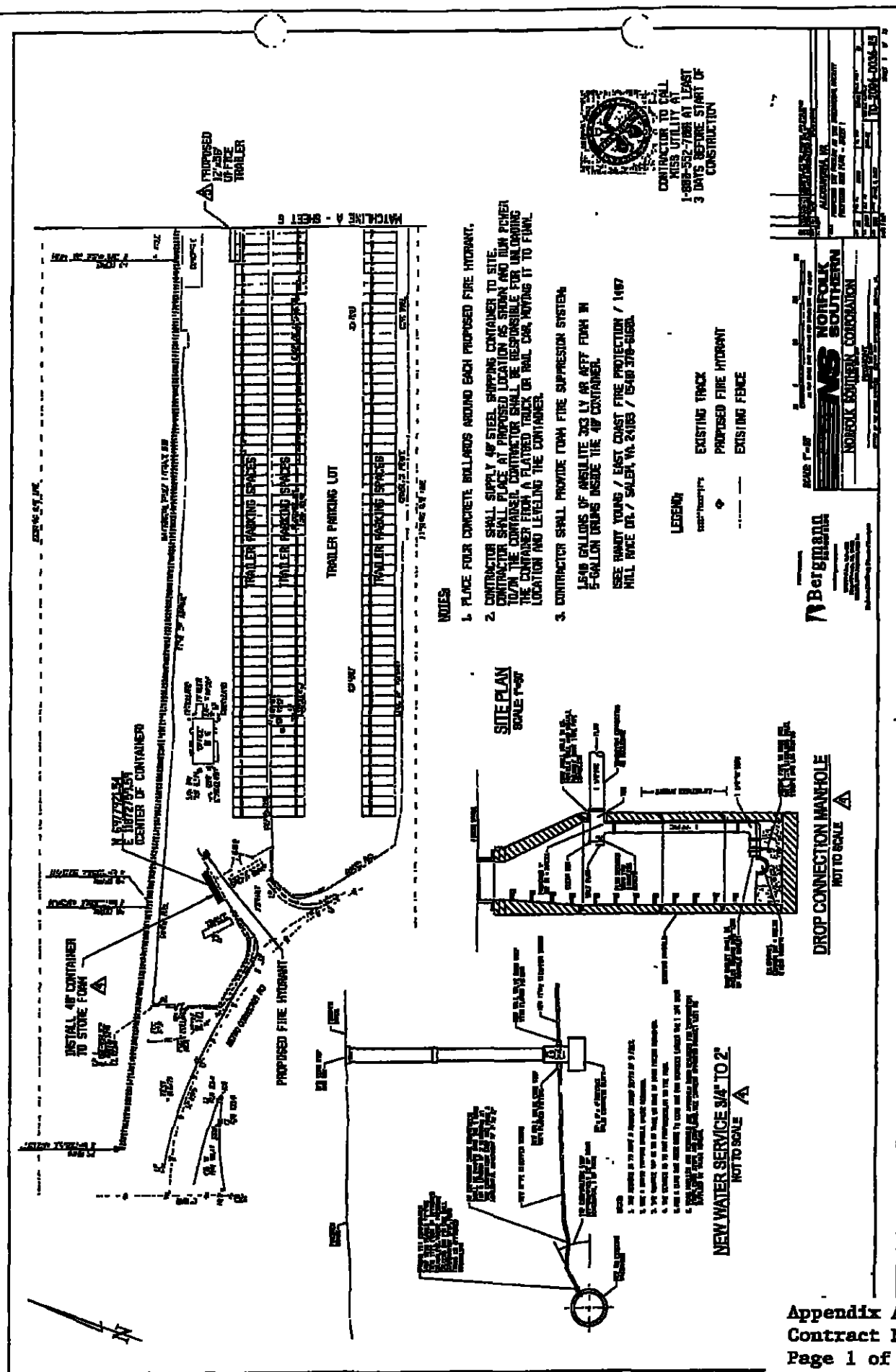
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day, month, and year first above written.

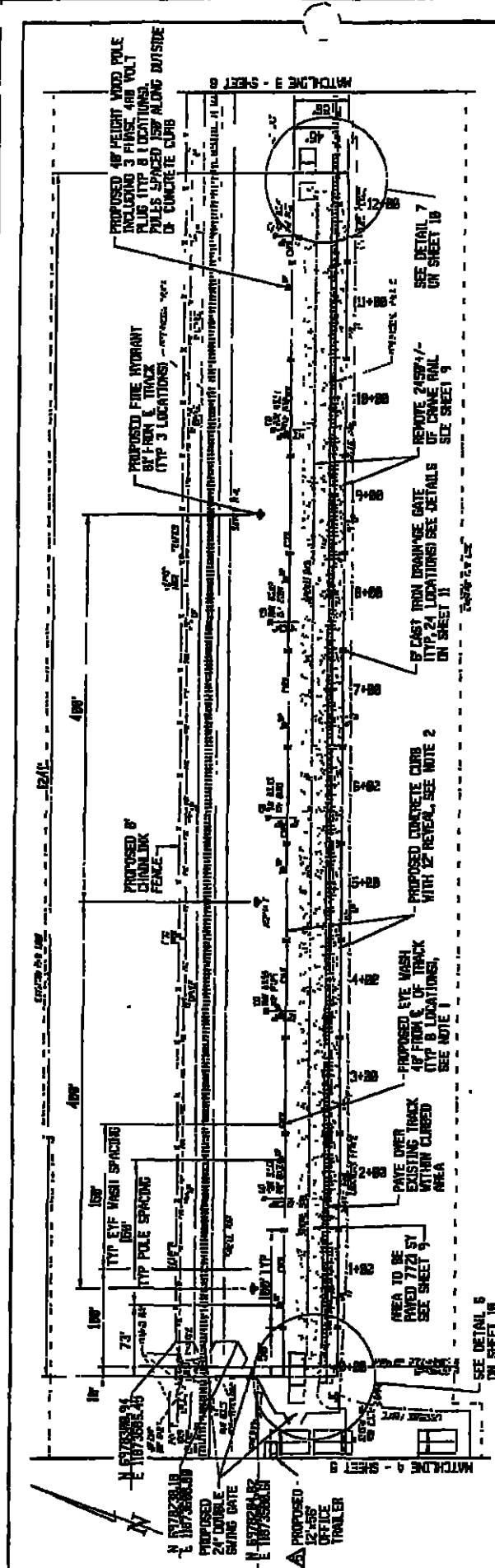
Norfolk Southern Railway Company

By: D. J. Z. Z.
Title: Director Distribution Services

(Contractor) Rail Services Inc.

By: Kelley Minner
Title: Vice President

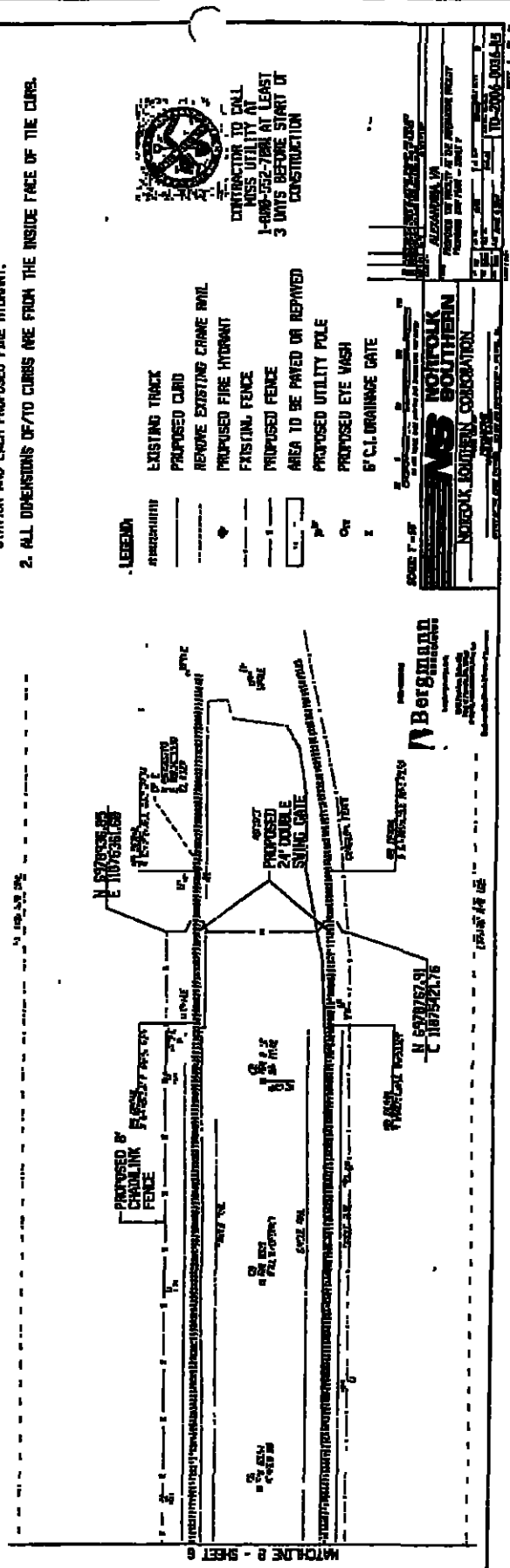




NOTES

1. PLACE FOUR CONCRETE ROLLERS AROUND EACH PROPOSED EYE WASH STATION AND EACH PROPOSED FIRE HYDRANT.
2. ALL DIMENSIONS OF 70 CURBS ARE FROM THE INSIDE FACE OF THE CURB.

SITE PLAN
SCALE: 1"=60'



- LEGEND**
- EXISTING TRACK
 - PROPOSED CURB
 - REMOVE EXISTING CRANE RAIL
 - PROPOSED FIRE HYDRANT
 - EXISTING FENCE
 - PROPOSED FENCE
 - AREA TO BE PAVED OR REPAVED
 - PROPOSED UTILITY POLE
 - PROPOSED EYE WASH
 - 8\"/>

In general, Contractor will perform the rail-highway intermodal transloading of the Product from tank cars at Railway's transportation facility described in Appendix A.

In performance of its duties, Contractor shall:

(A) Obtain a copy of Tariff NS 9328-C Bulk Distribution Tariff and review all sections of this manual with instructional implementation immediately. Contractor agrees to be governed by such rules applicable to the operation as Railway may publish from time to time, which prescribe certain responsibilities and authority concerning the operations and property of others, including those of the Railway, in Contractor's care, custody or control. A copy of the current editions of these publications is attached or will be given to contractor and incorporated by reference as part of this agreement.

(B) Provide and maintain sufficient yard vehicles, operating yard tractors, and transloading equipment to meet service requirements and train schedules. Equipment and tools must be in operating condition at all times with inspections and upkeep provided.

(C) Provide all yard vehicles with back-up alarms, speedometers, flashing strobe lights which are to be working at all times when vehicles are in motion. Provide fire extinguishers in all contractor owned equipment, maintain in serviceable condition, and make monthly inspections as required by Railway policy.

(D) Provide and maintain a two-way radio system for all vehicles used. Use approved Railway frequency. Additionally, provide hand-held radios for transload personnel, yard checkers, and office managers. Provide cell phone for Contractor's on site Managers to provide direct communication when necessary.

(E) Provide structured guidelines, documentation, and training for all personnel with emphasis on hazmat training. Provide noise monitoring and equipment to assure compliance with Railway/OSHA standards, and enforce hearing protection requirements, if any, for all transload operators at all times while performing duties.

(F) Maintain sufficient personnel at all times both inside and outside to perform quality, safe, and sufficient service in accordance with Railway requirements. This includes qualified outside supervisors during all loading and unloading times, management staff to oversee and insure that duties are coordinated and performed in a safe, courteous, efficient manner. Supervisors will be responsible for training and discipline. Maintain a minimum work force which must be approved and reviewed by Railway's Division Manager and have flexibility to respond to volume adjustments as necessary. Contractor will provide sufficient manpower to support the

operations of the Facility with a goal of providing 100% safety and customer satisfaction and in accordance with Railway's operating instructions and personnel. Contractor shall provide any and all operating and administrative services ordinarily and reasonably required in the operation of a rail-highway intermodal facility for the transloading of denatured ethanol, including but not limited to the performance of proper equipment inspections as requested by Railway management, the maintenance of records relating to such inspections, and any other paper work ordinarily and reasonably generated in the operation of such a facility.

(G) Perform joint safety audits with Railway's personnel from time to time

(H) Provide Railway with records of the kind and in the form specified by railroad that are legible, neat, and accurate. Documents must be sufficient to support the facts in the event of any dispute by litigation or otherwise. Contractor must maintain records consistent with the requirements of this Agreement.

(I) Be responsible for any portable office trailer, office rug service, cleaning of offices, restroom, and driver's room. Supply the cleaning material, toilet supplies, soap, paper towels, and any other items necessary for cleaning and daily use of the facility. Clean these areas daily or as needed to maintain clean healthy work environment. Railway will provide structures for office space for contractor administrative functions, outside personnel, and break room.

(J) Keep facility and fence lines free of trash and debris, weeds, grass, brush, etc., and cut and or trim vegetation a minimum of four (4) times during the growing season or as directed by Railway Management. Ensure that the loading and unloading tracks are kept free of all trash and other materials at all times. Failure to maintain these areas will result in Railway handling and billed back against the contractor at cost plus 10%.

(K) Keep all work and maintenance areas clean and organized at all times, provide up-to-date MSDS information, and ensure compliance with all environmental regulations including disposal of used oil, filters, and lubricants. Ensure that all fuels, lubricants, and any other items used for maintenance are properly stored and labeled.

(L) Ensure that all inbound traffic is transloaded in a timely manner after placement, and that outbound traffic is loaded in accordance with cutoffs, pull times and other service standards. Ensure that all ground transfers are promptly notified and delivered per instructions.

(M) Contractor shall be responsible for all damages or costs resulting from error of contractor personnel and make immediate arrangements to correct or repair. Contractor shall be responsible, at its sole cost, for all normal maintenance, repair and replacement to and of the Facility and its constituent parts, including but not limited to plumbing, lights, wash systems,

compressors, wash facilities, scales, gates, meters, and lights, and for any required certification thereof.

(N) Prepare necessary summary reports, daily pull and place sheets, end of month recaps, computer updates

(O) Provide all back up paperwork for proof of proper notification and provide proper information in Sims System.

(P) Supply all fuel for cranes, yard tractors, and will provide on site fuel tank, if necessary. Maintain on site fuel tank in compliance with all applicable laws regulating storage, use and labeling requirements, and equipped with a spill over prevention basin capable of holding 110% of total capacity of above ground storage tank.

(Q) Railway's facility will be in operation in conformance with Section 1(A)(ii)iii. Railway reserves the right in its sole discretion to change the hour of operation of its facility and to require Contractor to perform its services on any day and at any time of the day. Contractor shall not be entitled to bonus, extra or overtime compensation for service outside the normal operation hours of the facility or on holidays other than set forth herein.

(R) Comply with all applicable federal, state, and local laws, rules, regulations and ordinances controlling air, water, noise, solid wastes, and other pollution or relating to the storage, transport, release or disposal of hazardous materials, substances, or waste. Contractor shall, at its own expense, make all modifications, repairs or additions to its equipment used in the Transfer Operation and shall install and bear the expense of modifications or repairs to any devices or equipment affecting its operations which may be required under any such laws, rules, regulations or ordinances, or which is needed to safely conduct transloading operations. Contractor shall promptly advise Railway when any of Railway's equipment is in need of maintenance, repairs, or replacement. Contractor shall not dispose of any wastes of any kind, whether hazardous or not, at the Facility.

Contractor will perform the transload services at the following rates of compensation:

Denatured Ethanol:

- Rates: \$[REDACTED] per gallon, with a minimum of \$[REDACTED] over the Initial Term.
- Billing for Track Occupancy Charges ("TOC"): Contractor shall retain [REDACTED] % of all collected TOC as compensation for the billing and collection of TOCs.
- Other Services: All other denatured ethanol transload and services to be performed at no further compensation.

The name and address of the Railway employee to be notified under Section 1.G for any death or injury or of any loss or damage to property is:

DIRECTOR DISTRIBUTION SERVICES

3 Commercial Place, Box 252

Norfolk, VA 32510

Phone: 757-823-5428

Fax: 757-823-5425

INDEMNITY AND HOLD HARMLESS AGREEMENT

This Indemnity and Hold Harmless Agreement (this "Agreement") is made by and among _____, a _____ ("Indemnitor"), with a business address at _____, a RSI Leasing, Inc ("Operator") with a business address at 4131 Okemos Rd Okemos MI 48864, and Norfolk Southern Railway Company, a Virginia corporation ("Railroad"), with a business address at 110 Franklin Road, S.E., Roanoke, Virginia 24042-0041.

WITNESSETH:

WHEREAS, Operator is a licensee of Railroad and undertakes various services for shippers and customers of shippers using facilities located on property owned by Railroad (each a "Transfer Facility" and collectively the "Transfer Facilities"), and

Indemnitor may be a shipper and may wish to undertake services for itself and/or for shippers and customers of shippers on and using the Transfer Facilities, and

WHEREAS, Railroad is not willing to allow Indemnitor to perform such services on and using the Transfer Facilities unless Indemnitor enters into this Agreement agreeing to indemnify and hold harmless Railroad and Operator and certain related parties of each of them, as provided herein;

NOW, THEREFORE, in consideration of the premises and the agreements contained herein, the parties agree as follows:

SECTION 1. Access to Transfer Facilities. Railroad may from time to time permit Indemnitor to perform services for itself and/or for shippers and customers of shippers on and utilizing one or more Transfer Facilities. The provisions of this Agreement shall apply to any such services provided by Indemnitor on or using a Transfer Facility and to any act(s) or omission(s) of Indemnitor at any Transfer Facility.

SECTION 2. Indemnitor's Responsibility For Its Contractors and Agents. Should Indemnitor engage the services of a contractor or agent, Indemnitor assumes full responsibility and shall indemnify and hold harmless Railroad and Operator in accordance with the provisions of Section 4 from any consequences of the acts and/or omissions of such contractor or agent.

SECTION 3. Indemnitor's Obligations. In performing any services on or using any Transfer Facility, Indemnitor will promptly clean up or cause the clean-up of any material, commodity or product spilled through the act or omission of Indemnitor or its contractors and/or agents. Indemnitor will comply with all federal, state and local laws, rules, regulations and ordinances controlling air, water, noise, solid waste, and other pollution and relating to the storage, transport, release or disposal of hazardous materials, substances, or waste. Indemnitor

shall not dispose of any wastes of any kind, whether hazardous or not, on any Transfer Facility or any premises owned or operated by Railroad or Operator or any affiliate of Operator. Indemnitor shall immediately take steps to clean up and eliminate any violation of this Section 3 at the sole expense of Indemnitor. In addition, Indemnitor agrees to comply with and perform any duties imposed upon motor carriers in Freight Tariff NS 9328-A or any successor or reissued publications.

SECTION 4. Indemnification. Indemnitor will be responsible for, and will indemnify and hold harmless each of Operator and Railroad and each of their respective shareholders, directors, officers, agents, employees and affiliates from and against, any and all liabilities, losses, damages, claims, suits, judgments, costs and expenses (including without limitation attorneys' fees) resulting from or in connection with injury to or death of any persons whomsoever (including without limitation, agents, employees or representatives of Railroad or Operator or Operator's affiliates), or damage to or loss of any property whatsoever, including commodity, caused directly or indirectly by any of its acts or omissions at a Transfer Facility or relating to the performance of services by Indemnitor at a Transfer Facility; provided, however, that Indemnitor's obligation to indemnify and hold harmless any party shall not apply to the extent that any such injury, death, damage or loss is contributed to or caused by the negligence or wrongful act(s) or omission(s) of such party.

SECTION 5. Governing Law. Except as otherwise expressly provided in this contract, the laws of Virginia shall govern the interpretation and performance of this Agreement.

SECTION 6. Insurance. Indemnitor shall at its sole cost and expense obtain and maintain during the period of this Agreement in a form and with companies satisfactory to Railroad and Operator, the following insurance coverages:

(a) Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Indemnitor's officers, agents, servants or employees.

(b) Employers' Liability Insurance with limits of not less than \$1,000,000 each accident, \$1,000,000 policy limit for disease, and \$1,000,000 each employee for disease.

(c) Commercial General Liability Insurance with a combined single limit of not less than (i) \$5,000,000 per occurrence if Indemnitor will handle hazardous materials at any Transfer Facility, or (ii) \$1,000,000 per occurrence if Indemnitor will not be handling any hazardous materials at any Transfer Facility, for injury to or death of persons and damage to or loss or destruction of property. Such policy shall be endorsed to provide products and completed operations coverage and contractual liability coverage for liability assumed under this Agreement, shall name Railroad and Operator as

additional insureds and shall include a severability of interests provision. The contractual liability coverage shall be of a form that does not deny coverage for operations conducted within 50 feet of any railroad hazard.

(d) Truckers Liability Insurance with a combined single limit of not less than (i) \$5,000,000 per occurrence if Indemnitor will handle hazardous materials at any Transfer Facility, or (ii) \$1,000,000 per occurrence if Indemnitor will not be handling any hazardous materials at any Transfer Facility, for injury to or death of persons and damage to or loss or destruction of property. Said policy or policies shall be endorsed to provide contractual liability coverage for liability assumed under this Agreement, shall name Railroad and Operator as additional insureds and shall include a severability of interests provision. In addition, said policy or policies shall contain Endorsement Form MCS-90 for Motor Carrier Policies of Insurance for Public Liability under Section 30 of the Motor Carrier Act of 1980, or Form MCS-82 motor carrier public liability bond must be obtained.

Licensee shall furnish certificates of insurance to Railroad's Director Risk Management, Three Commercial Place, Norfolk, Virginia 23510-2191, certifying the existence of such insurance. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits without (30) days advance written notice to Railroad and Operator.

The furnishing and acceptance of the policies or certificates of insurance and bond referred to above shall not in any way or degree alter or lessen the liability of Indemnitor under this Agreement.

SECTION 7. Assignment. No assignment of this Agreement is permitted without prior written consent of the other parties hereto, except to successors in interest of a party.

SECTION 8. Waiver. Waiver by any party of any breach of these provisions shall not be construed as a waiver of any breach.

SECTION 9. Headings. The section headings contained in this Agreement are for convenience of reference only and in no way shall modify any of the terms or provisions of this Agreement.

SECTION 10. Notices. Any notices, requests or other communications hereunder shall be in writing and shall be deemed to have been duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or communications by certified mail, postage prepaid and return receipt requested, or by internationally recognized courier, or by transmitting such notice by facsimile, in each case to the following addresses or facsimile numbers, as the case may be:

INDEMNITOR:

Telecopy: _____

RAILROAD:

Director, Distribution Services
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510
Telecopy: _____

OPERATOR:

RSI Leasing Inc
4131 Okemos Rd
Okemos MI 48864
Telecopy: 517-349-7154

or to such other addresses or telecopy numbers as such party may specify in a notice given to the other party as provided in this Section 10.

SECTION 11. Counterparts: Facsimile. This Agreement may be executed simultaneously in several counterparts, and by facsimile, and each of such counterpart and facsimile signature shall be deemed an original, but all of such counterparts and facsimile signatures together shall constitute one and the same instrument.

SECTION 12. Severability. In the event any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision of this Agreement.

IN WITNESS WHEREOF, the parties have caused this AGREEMENT to be executed by their duly authorized representatives as of the date first above written.

INDEMNITOR:

OPERATOR:

By: _____

By: Kelley Minnehan

Title: _____

Title: Vice President

Date: _____

Date: 1-30-08

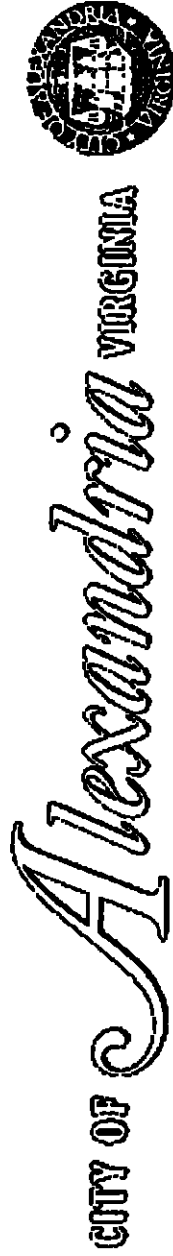
NORFOLK SOUTHERN RAILWAY
COMPANY:

By: D. J. H. H.

Title: Director Distribution Svcs

Date: 2/22/08

Q



Home > Norfolk Southern Ethanol Transloading Facility Information > Email Archive

★ LATEST UPDATES

June 25, 2008

Electronic Communications
Regarding Norfolk Southern
Ethanol Transloading Facility

June 25, 2008

City Council Forms Norfolk
Southern Ethanol Transloading
Facility Community Monitoring
Group

June 25, 2008

Congressional Committee Directs
Homeland Security to Review
Ethanol Transloading Facilities
Security

June 24, 2008

Norfolk Southern Files Lawsuit
Challenging Haul Route Permit,
City Responds

June 23, 2008

Letter from Mayor Euille to Norfolk
Southern, Security Assessment
Recommendations

June 20, 2008

Letter from
Senator John Warner &
Congressman Jim Moran to Dept
of Homeland Security

Norfolk Southern Ethanol Transloading Facility Information

This page contains references and links to all electronic communications among City staff, and between City staff, Norfolk Southern, and the community regarding the establishment and operation of the Ethanol Transloading Facility. The communications, furnished in response to requests made under the Virginia Freedom of Information Act, cover the period from June 20, 2006 at 8 a m to May 29, 2008, at 5 p m

E-mail addresses and telephone numbers have been redacted to protect the privacy of residents and of City staff whose home and mobile phone numbers were included on the communications. To contact City officials or staff, please use the links on the left side of this page, or Contact Us.

[\[Date Prev\]](#)[\[Date Next\]](#)[\[Thread Prev\]](#)[\[Thread Next\]](#)[\[Date Index\]](#)[\[Thread Index\]](#)

[no subject]

- To Richard Josephson
- Subject
- From Jeffrey Farmer/Alex
- Date 04 Apr 2008 08:46:30
- Bcc
- Cc

R:

June 18, 2008
STB Hearing on Toxic Materials
Transport July 16

June 17, 2008
City Petitions Surface
Transportation Board

? QUESTIONS OR COMMENTS

Project Manager

Steve Mason
Special Assistant to City Manager
City of Alexandria
703 838 3861
transloading@alexandriava.gov

Other Contacts

Norfolk Southern
757 629 2713
contactus@nscorp.com

Hon. John Warner
U S Senate
225 Russell Building
Washington, D.C. 20510
202 224 2023
E-mail

Hon. James Wobb
U S Senate
144 Russell Building
Washington, DC 20510
202 224 4024
E-mail

Hon. James Moran
U S House of Representatives
2239 Rayburn Building
Washington, DC 20515
202 225 4376
E-mail

City Council
301 King Street

Bob R from Code called yesterday regarding an ethanol plant and whether you made a determination on the use because they want to open next week. I told Bob R I would forward to you,

Jeffrey Farner
Division Chief, Development
Department of Planning & Zoning
City of Alexandria, Virginia 22314
Phone # xxx-xxx-xxxx ext. 315
Fax # xxx-xxx-xxxx
E-Mail: xxxxxxxx@xxxx.xxx

- Prev by Date Fw: Ethanol Message
- Next by Date Re.
- Previous by thread Fw: Ethanol Message
- Next by thread Re:
- Index(es)
 - o Date
 - o Thread

Alexandria, VA 22314
703 838 4550
E-mail

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R

**CANADIAN NATIONAL RAILWAY CO., and GRAND TRUNK WESTERN
RAILROAD, INC., Plaintiff, v. CITY OF ROCKWOOD, and WAYNE COUNTY,
Defendant.**

CIVIL CASE NO. 04-40323

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2005 U.S. Dist. LEXIS 40131

June 1, 2005, Decided

COUNSEL: [*1] For Canadian National Railway Company, Grand Trunk Western Railroad, Incorporated, Plaintiffs.
Howard E. Gurwin, Detroit, MI, James A. Fletcher, Fletcher & Sippel (Chicago), Chicago, IL

For Rockwood, City of, Defendant Steven A. Roach, Nelson O. Ropke, Miller, Canfield, (Detroit), Detroit, MI

For Wayne County, Defendant Kerry L. Morgan, Randall A. Pentruik, Pentruik, Couvreur, Wyandotte, MI

JUDGES: PAUL V. GADOLA, UNITED STATES DISTRICT JUDGE

OPINION BY: PAUL V. GADOLA

OPINION:

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

In this action for declaratory and injunctive relief, Plaintiffs Canadian National Railway Co. and its subsidiary, Grand Trunk Western Railroad, Inc. ("GTW"), (collectively "CN") move the Court for a preliminary injunction preventing Defendants City of Rockwood and Wayne County from enforcing against CN zoning laws, permitting and preclearance requirements, and other state and local regulations. Although CN's motion seeks a temporary restraining order and a preliminary injunction, CN's counsel has communicated to the Court that they are seeking only a preliminary injunction. As a result of this communication, the court will only consider the request [*2] for a preliminary injunction, which, for the following reasons, the Court will grant.

I. BACKGROUND

CN is an interstate rail transportation carrier operating rail lines and facilities in various states including Michigan. Desiring to enter the market for hauling construction and demolition debris ("CDD"), CN constructed a transload facility on property owned by GTW in the city of Rockwood, Michigan. This facility allows CDD transported from various locales by rail to be moved from rail cars onto trucks, which then haul the CDD to a nearby facility to dispose of it. Construction of the facility began in late October, 2004 and was completed in late November, 2004. The facility has been operational since December 6, 2004.

CN does not operate the transload facility. Instead, it has entered into an agreement with Industrial Waste Group, L.L.C. ("IWG"), to operate the facility. IWG in turn uses its affiliate J.R. Wolfe Co. to perform the actual operation of the equipment at the facility. It is, however, CN, not IWG or its affiliate, which enters into contracts with shippers, bills and collects from the shippers, and is liable to the shippers. CN sets the rates which comprise [*3] all IWG's compensation for services rendered. Furthermore, IWG must use equipment and personnel approved by CN, must meet the requirements set by CN in their shipping contracts, must perform the transloading services to CN's satisfaction, and must comply with CN's safety and behavior rules and guidelines. Nevertheless, the agreement between CN and IWG provides that IWG is to bear the sole responsibility and expense of constructing, maintaining, and operating the transload facility.

as well as ensuring that the facility complies with all applicable laws. The agreement expressly states that IWG is to act as an independent contractor and that the agreement does not create an agency relationship between CN and IWG. Finally, the agreement contains an extensive indemnification clause that requires IWG to indemnify and hold CN harmless from all liabilities, claims, costs, etc., arising from IWG's activities. The indemnification, though, does not extend to consequential, special, incidental, or punitive damages. See generally Terminal Construction and Services Agreement, Pl. Ex. 4 (from hearing).

In early November, 2004, before construction of the facility was completed, the city of Rockwood [*4] delivered to CN a stop work order on the basis that CN had failed to obtain the necessary permits for the construction. The order required CN to cease and desist from further construction on the site until health and safety measures adopted by the state, county, and city have been met. Shortly thereafter, the Wayne County Department of the Environment served CN with an order to cease and desist all earth changing activity until they had obtained a permit pursuant to the Wayne County Soil Erosion and Sedimentation Control Ordinance.

According to Wayne County, CN must comply with Wayne County's Soil Erosion Ordinance and Solid Waste Ordinance. The Soil Erosion Ordinance required that CN obtain a permit for their earth disturbance and erect a silt barrier to prevent silt from washing into a nearby creek. The Solid Waste Ordinance requires that CN pave the interior haul road of the facility, operate the facility in a manner that controls fugitive dust, such as by enclosing the facility in a building, and submit a site plan to the county for its approval. The county is also requiring CN to submit an off-site road maintenance plan and a facility inclusion application. Finally, state law [*5] requires that CN operate the facility in accordance with an approved site plan.

CN denies that it is subject these state and local regulations, because the regulations attempt to regulate transportation by rail and any such state or local regulation is preempted by the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) ("ICCTA"). Defendants, on the other hand, maintain that CN is subject to the regulations regardless of the ICCTA because the activities conducted at the transload facility are not "transportation by rail carrier," because IWG is not transporting by rail, but by truck, and IWG is not a rail carrier, but a refusal hauler. 49 U.S.C. § 10501(a). Defendants also maintain that the regulations at issue are not preempted by the ICCTA because they are environmental regulations that do not prevent the operation of the transload facility and are a valid exercise of Defendants' police power to protect the health and safety of the community. Finally, Defendants argue that any preemption of Defendants' regulations by the ICCTA would be unconstitutional.

II. ANALYSIS

When ruling on a motion for a preliminary [*6] injunction, a district court must consider and balance four factors:

- (1) whether the movant has a strong likelihood of success on the merits,
- (2) whether the movant would suffer irreparable injury without the temporary restraining order,
- (3) whether issuance of the temporary restraining order would cause substantial harm to others, and
- (4) whether the public interest would be served by issuance of the temporary restraining order.

Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 460 (6th Cir. 1999), *Blue Cross & Blue Shield Mutual of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997), *In re De Lorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). These four considerations "are factors to be balanced, not prerequisites that must be met." *DeLorean*, 755 F.2d at 1229. A district court must make specific findings concerning each of the four factors unless fewer are dispositive of the issue. *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). As will be explained below, the balance of the factors favors [*7] granting the preliminary injunction.

A. Whether CN and GTW have a strong likelihood of success on the merits.

Congress enacted the ICCTA as a means of reducing the regulation of the railroad industry. The hope was to foster railroad transportation as a safe, effective, competitive, and reasonable mode of transportation. See 49 U.S.C. § 10101.

To this end, the ICCTA created the Surface Transportation Board ("STB") and expressly granted it exclusive jurisdiction over-

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers, and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State

49 U S C § 10501(b) The remedies provided by the ICCTA "with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State [*8] law " Id The jurisdiction of the STB, however, is limited to "transportation by rail carrier " *49 U S C § 10501(a)* By definition, "transportation" includes

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use, and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property

49 U S C § 10102(9) "Rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." *49 U S C § 10102(5)* Finally, included in the definition of "railroad" are.

(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad,

(B) the road used by a rail carrier and owned by it or operated under an agreement, and

(C) a switch, spur, track, terminal, terminal facility, [*9] and a freight depot, yard, and ground, used or necessary for transportation

49 U S C § 10102(6) If activities meet this definition of transportation by rail carrier, the STB has exclusive jurisdiction *49 U S C 10501(b)* Generally, any state and local laws or regulations that intrude upon this jurisdiction are preempted. *Railroad Ventures, Inc v Surface Transp Bd*, 299 F 3d 523, 561-63 (6th Cir 2002). "To come within the preemptive scope of *49 U S C 10501(b)*, these activities must be both. (1) transportation, and (2) performed by, or under the auspices of, a rail carrier." *Hi Tech Trans., LLC, Petition for Declaratory Order*, S T B Finance Docket No 34191, at 5 (Aug 14, 2003) (Slip Op.) Under this standard, activities occurring at CN's transload facility appear to meet the definition of "transportation by rail carrier," which would cause Defendants' regulations to be preempted

Defendants argue that this is not the case because the activities do not meet the ICCTA's definition of "transportation " This Court, though, agrees with the decision of other courts and of the [*10] STB, which have held that the activities which take place at such transload facilities are considered "transportation" by the ICCTA See *Green Mt R R Corp v Vermont*, 404 F 3d 638, 644 (2d Cir 2005) ("[The Railroad] serves industries that rely on trucks to transport goods from the rail site for processing, so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over 'rail transportation'"), *Grafton & Upton R R Co v Town of Milford*, 337 F Supp 2d 233, 239 (D Mass 2004) ("Although the [railroad] Yard will clearly have a trucking component, an examination of the analogous scenarios discussed in the cited caselaw demonstrates that such a non-rail component is still subject to the preemptive effect of the ICCTA "), *Norfolk Southern Ry Co v City of Austell*, 1997 U S Dist LEXIS 17236, 1997 WL 1113647, *6 (N D Ga 1997) ("Based upon

the clear and unambiguous language of the ICCIA, the court concludes that the instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carriers' over which the STB is [*11] given exclusive jurisdiction under 49 U.S.C. § 10501(b)(1). It is uncontroverted that intermodal facilities are facilities that are operated in order to transfer containers or trailers of cargo being shipped in interstate and foreign commerce between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers.") See also See *Hi Tech Trans*, STB Finance Docket No. 24192 (Slip Op. at 5-6) ("There is no dispute that Hi Tech's transloading activities are within the broad definition of transportation. The Board has consistently found such activities to be transportation under 49 U.S.C. 10102(9). See *Green Mountain Railroad Corporation - Petition for Declaratory Order*, STB Finance Docket No. 34052 (STB served May 28, 2002) (*Green Mountain*) (cement transloading facility), Joint Petition for Declaratory Order - *Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (STB served May 1, 2001) (*Ayer*) (automobile unloading facility) ")

Defendants further argue that the facility's activities are not "transportation by rail [*12] carrier" because IWG, the facility's operator, is not a rail carrier. Defendants rely on precedent which held that certain bulk distribution centers operated by third-parties on land leased from the railroad were not subject to STB's jurisdiction or federal preemption. See *CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003) (holding that the city's regulations were focused on "non-railroad business activities"), *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1329 (11th Cir. 2001) (holding that the city's ordinances did "not constitute 'regulation of rail transportation'"), *Growers Marketing Co. v. Pere Marquette Ry.*, 248 U.S. 215, 226-27 (1941) ("Facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation.") These cases are distinguishable by the fact the businesses which leased land from the railroads for their distribution centers were not common carriers, nor were they involved in transportation per se. They were customers of the railroads, i.e. shippers or [*13] receivers, who wished to locate their distribution centers as close to the point of delivery as possible. For example, in *CFNR Operating Company*, the operator of the bulk distribution center contracted with the railroad to deliver pumice and cement to the distribution center. The operator would then haul the goods from the distribution center to customers who had ordered it from the operator. *CFNR Operating Co.*, 282 F. Supp. 2d at 1118. Locating the distribution center on railroad property did not transform the activities taking place into rail-road business or "transportation." *Id.* at 1118-19.

The situation in another case relied on by Defendants, *Hi Tech Trans, LLC, v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), was more subtle. In that case, Hi Tech, the operator of a transload facility nearly identical to that at issue here, brought an action against New Jersey seeking declaratory relief similar to that requested here. The Third Circuit ruled that the transload facility, which loaded CDD from trucks onto rail cars for transportation by rail, did not involve "transportation by rail carrier," such that the ICCTA preempted New Jersey's [*14] waste disposal regulations. *Id.* at 308, 49 U.S.C. § 10501(a). The Sixth Circuit's conclusion was based on the fact that the railroad had virtually no involvement or control over the operation of the facility.

Hi Tech operates its facility under a License Agreement with [the railroad]. Pursuant to the terms of that license agreement, Hi Tech is permitted to use a portion of [the rail yard] for transloading. Hi Tech is responsible for constructing and maintaining the facility and [the railroad] disclaims any liability for Hi Tech's operations. Thus, the License Agreement essentially eliminates [the railroad's] involvement in, and responsibility for, the operation of Hi Tech's facility. Hi Tech does not claim that there is any agency or employment relationship between it and [the railroad] or that [the railroad] sets or charges a fee to those who bring C&D debris to Hi Tech's transloading facility.

Id. at 308 (citations omitted). The Third Circuit assumed, arguendo, that the transload facility met the statutory definition of "transportation" and "railroad," but because Hi Tech was not a rail [*15] carrier, the activities occurring at the facility did not amount to "transportation by rail carrier," but rather "transportation to rail carrier." *Id.* at 308-309.

Accordingly, it is clear that Hi Tech simply uses [the railroad's] property to load C&D debris into/onto CPR's railcars. The mere fact that [the railroad] ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier."

Id. at 309. Since Hi Tech was not a rail carrier, New Jersey's regulations were not preempted by the ICCTA. *Id.* at 310.

Prior to the Third Circuit's decision, H1 Tech had filed a petition for declaratory relief with the STB seeking a determination that the STB had exclusive jurisdiction over H1 Tech's transload facility. See H1 Tech Trans, STB Finance Docket No. 24192. The STB declined to issue the requested declaratory order because "it is clear that the Board does not have jurisdiction over truck-to-rail transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services." [*16] "H1 Tech, STB Finance Docket No. 24192, at 5 (Slip Op.)" (emphasis added). The STB held that "there is no dispute that H1 Tech's transloading activities are within the broad definition of transportation. The Board has consistently found such activities to be transportation under 49 U.S.C. 10102(9)." Id. at 5-6. Nevertheless, the STB found that H1 Tech's activities did not meet the second half of the statutory equation, that being that the transportation must be performed by a rail carrier. The STB came to this conclusion partly because the license agreement between H1 Tech and the railroad virtually eliminated any involvement in, or liability for, the operation of the facility on the part of the railroad, but also because the transportation agreement between the two made H1 Tech nothing more than a shipper. Id. at 6-7. The transportation agreement provided that

H1 Tech is solely responsible for loading C&D debris onto rail cars at its own expense. [The railroad] does not hold itself out to provide C&D debris transloading service, quote rates for such services, or charge customers for it. [The railroad] is responsible only for transporting [*17] the loaded rail cars

* * *

The facts of this case establish that H1 Tech's relationship with [the railroad] is that of a shipper with a carrier. H1 Tech brings cargo and loads it onto rail cars, and [the railroad], under the Transportation Agreement, hauls it to a destination designated by H1 Tech. There is no evidence that [the railroad] quotes rates or charges compensation for use of H1 Tech's transloading facility.

Id. at 3, 6-7. Even though H1 Tech's activities were transportation, H1 Tech's position was that of the operators in CFNR Operating Company and Florida East Coast Railway Company, a customer of the railroad. It was H1 Tech who was offering the CDD shipping service to the public, not the railroad. Although H1 Tech contracted with the railroad to carry the CDD, the actual shipping service was not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services." H1 Tech, STB Finance Docket No. 24192, at 5 (Slip Op.). Consequently, the STB concluded that it did not have jurisdiction over H1 Tech's activities because those activities were not "an integral part of [the railroad's] [*18] provision of transportation by rail carrier." Id. at 7.

Here, the relationship of IWG to CN is not one of a shipper to a carrier, but one of a contractor working "under the auspices of a rail carrier." Id. at 5. IWG is not CN's customer. Rather, IWG provides transloading services so that CN may complete its obligations under CN's transportation agreements with its shippers. It is CN, the railroad, who is holding itself out as providing the CDD transloading services. CN interacts with the shippers, quotes rates, contracts, bills and collects. Thus, the CDD transloading services occurring at CN's transload facility are "performed . . . under the auspices of a rail carrier holding itself out as providing those services." H1 Tech, STB Finance Docket No. 24192, at 5 (Slip Op.). For this reason, the activities occurring at the Rockwood transload facility appear to be "integrally related to the provision of interstate rail service," and are therefore subject to the STB's jurisdiction and federal preemption. *Borough of Riverdale, Petition for Declaratory Order*, STB Finance Docket 33466, 4 S.T.B. 380, 1999 STB LEXIS 531 (Sept. 9, 1999) (Slip Op. at 9).

Defendants also [*19] argue that the state and local regulations at issue are not preempted because they are environmental regulations that do not prevent the operation of the transload facility and are a valid exercise of Defendants' police powers to protect the health and safety of the community. See *Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12, 16-17 (1st Cir. 2003) ("The STB found state and local regulation to be permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety" (Quotation omitted)), *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000). While the ICCTA does not preempt a local authority's traditional police powers and environmental regulations enacted in accordance with those powers, the ICCTA does preempt such regulations that stand as an obstacle to a carrier's ability to construct facilities or conduct operations. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *Green Mt. R.R. Corp.*, 404 F.3d at 643-44.

It appears to the Court that the regulations imposed by Defendants [*20] are preempted See *City of Auburn*, 154 F 3d 1030-31; *Green Mt R R Corp*, 404 F 3d at 642, *Soo Line R R Co v City of Minneapolis*, 38 F Supp 2d 1096, 1101 (D Minn 1998) As for Defendant Wayne County's Soil Erosion and Sedimentation Control Ordinance and Solid Waste Ordinance, it appears to the Court that these environmental regulations are preempted insofar as they would require CN to make substantial capital improvements, thereby necessarily interfering with CN's ability to carry out its operations See *CSX Transp. Inc v City of Plymouth*, 92 F Supp 2d 643, 659 (E D Mich 2000) (Edmunds, J), *Green Mt R R Corp*, 404 F 3d at 644

Finally, Defendants argue that any preemption of Defendants' regulations would be an unconstitutional use of Congress's commerce power Defendants' argument is twofold First, Defendants characterize their regulations not as regulations focused on the transload facility, but as regulations focused on the effect the facility has on the environment Using this characterization, Defendants then argue that instead of regulating an instrumentality of interstate commerce, [*21] they are regulating an activity that affects interstate commerce, and since the effect is incidental, the *Commerce Clause* does not permit of preemption See *United States v Lopez*, 514 US 549, 115 S Ct 1624, 131 L Ed 2d 626 (1995) Second, Defendants argue that the regulations at issue are not the type that demand a national, uniform rule, and that only diverse rules can meet the local necessities involved See *Cooley v Bd of Wardens*, 53 US 299, 13 L Ed 996 (1851)

Defendants first argument relies on the three permissible categories of *Commerce Clause* regulation enunciated in *United States v Lopez* 1) "the use of the channels of interstate commerce," 2) "the instrumentalities of interstate commerce," and 3) "those activities that substantially affect interstate commerce" *Lopez*, 514 US at 558-59 If a regulation is of the third type, then the regulated activity must actually have a substantial effect on interstate commerce, not just an incidental one *Id* at 557-59 However, "where a statute regulates the 'instrumentalities of interstate commerce,' the law need not address conduct having a substantial effect on interstate commerce in order to survive [*22] a constitutional challenge Rather, the mere character of the activities covered under the statute make them properly the subject of federal regulation" *United States v Owens*, 159 F 3d 221, 226 (6th Cir 1998)

Defendants contend that their regulations fall into the third category because they regulate environmental impact, not the railroads They further argue that because the regulated activity's impact on interstate commerce is only incidental, the regulations are beyond the preemptive power of the *Commerce Clause* Defendants' characterization, however, is inaccurate The railroads are one of the archetypical "instrumentalities of interstate commerce," and as such any regulation of them by Congress need not be aimed at "conduct having a substantial effect on interstate commerce in order to survive a constitutional challenge." *Id* ; see *Overstreet v North Shore Corp*, 318 US 125, 130, 63 S Ct 494, 87 L Ed 656 (1943) (analogizing roads to railroad tracks in order to declare them instrumentalities of interstate commerce)

Defendants' alternative argument relies on *Cooley v Bd of Wardens*, which upheld a state law that required ships to employ a local pilot to navigate [*23] the Port of Philadelphia, and *Ray v. Atlantic Richfield Co*, 435 US 151, 98 S Ct 988, 55 L Ed 2d 179 (1978), which upheld another state law that required certain ships be escorted by tugboats within the Puget Sound In each case, the Supreme Court upheld the local regulation because the local necessities involved in navigation demanded specialized rules, not one national, uniform rule. *Cooley*, 53 US at 319, *Ray*, 435 US at 179-80 Defendants argue that local land use regulations similarly require diverse and specialized rules in order to take into account local necessities.

Yet, one need only to look to the extensive federal land use regulations enacted for the protection of the environment and compiled in Title 40 of the Code of Federal Regulations to know that this is not always the case Furthermore, the opinions in *Cooley* and *Ray* dealt with the limitations on state regulation of interstate commerce imposed by the dormant *Commerce Clause*, which "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce" and "limits the power of the States to erect barriers against [*24] interstate trade" in areas where Congress has not legislated. *Cooley*, 53 US at 318-19, *Ray*, 435 US at 178; *South-Central Timber Dev, Inc v Wunnicke*, 467 US 82, 87, 104 S Ct 2237, 81 L Ed 2d 71 (1984); *Lewis v Bl Inv Managers*, 447 US 27, 35, 100 S Ct 2009, 64 L Ed 2d 702 (1980) Whereas, the regulations at issue here are not limited through Congress's inaction, but through Congress's express action, i e, the ICCTA expressly preempts such regulations, and ICCTA is an affirmative exercise of the *Commerce Clause*. "Because of the plenary nature of the commerce power and because of the primacy accorded federal law by the *supremacy clause*, the balance of interests between the federal and state governments is an inappropriate consideration in determining whether a federal act is a valid exercise of the commerce power" *Texas v United States*, 730 F 2d 339, 351 (5th Cir 1984) (footnote omitted) Thus, both of Defendants' constitutional arguments are unpersuasive

CN has shown a strong likelihood of success on the merits of its case. The Defendants' regulations appear to interfere with CN's operations. The state and local regulations at issue appear to [*25] be both within the jurisdiction of the STB and preempted by the ICC/TA.

B. Whether CN will suffer irreparable injury without the preliminary injunction.

CN has alleged that if Defendants' regulations are enforced and it is prevented from operating the transload facility, then CN will suffer the loss of its current contract for transportation of CDD, as well as the loss of future contracts and customer goodwill. The Sixth Circuit has noted that "a plaintiff's harm is not irreparable if it is fully compensable by money damages." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). If the "nature of plaintiff's loss would make damages difficult to calculate," then an injury is not "fully compensable by money damages." *Id.* (emphasis added). This does not mean that whenever monetary damages are difficult to calculate that the injury is irreparable. Rather, the very "nature" of the loss must be inherently difficult to calculate. The loss of goodwill from existing customers has also been held to be irreparable by the Sixth Circuit, as well as the loss of goodwill from prospective customers. *Id.* at 512 ("The loss of customer goodwill [*26] often amounts to irreparable injury because the damages flowing from such losses are difficult to compute"), *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001).

With this in mind, the loss of CN's current contract is not irreparable, because it is compensable by easily calculated money damages. However, the loss of goodwill from CN's existing customers is irreparable, as is the loss of goodwill from prospective customers. The loss of future contracts and the loss of the opportunity to enter a market, here the market for transportation of CDD, are inherently speculative, making damages too difficult to calculate. Hence, these losses are also irreparable. Cf. *CNFR Operating Co.*, 282 F.Supp.2d at 1119. Consequently, based on the loss of goodwill, future contracts and market opportunities, the Court concludes that CN will suffer irreparable injury without the preliminary injunction.

C. Whether issuing the preliminary injunction order would not cause substantial harm to others.

Defendants allege that they will suffer substantial injury if an injunction is issued, because operation of the transload facility will result in environmental [*27] pollution. On the contrary, there is nothing in the record to indicate that CN's facility will cause substantial harm if allowed to operate as intended. Federal environmental statutes and regulations will still be in force to address continuing environmental concerns. See *Grafton & Upton R.R. Co.*, 337 F.Supp.2d at 239. Moreover, the services agreement between CN and IWG provides additional protections. Also, according to CN, CDD is both non-hazardous and non-putrescent. Pl. Br. at n 1. Therefore, the issuance of the preliminary injunction would not cause substantial harm to others.

D. Whether the public interest would be served by issuance of the injunction

While the issuance of the preliminary injunction would serve the public interest insofar as it would promote industry in the region, the record does not demonstrate that the shipment of CDD would be a significant industry. Though, the benefit of additional industry, when coupled with the protection offered by federal environmental regulations, does balance against the potential harm such an industry might have to the public interest. As it stands, this factor militates neither for, nor against, the [*28] issuance of an injunction.

E. Balancing the four factors for a preliminary injunction

Three of the four factors, including the most important factor of a strong likelihood of success, favor the granting of the preliminary injunction. The fourth factor neither favors nor disfavors the it. The Court will therefore grant the preliminary injunction.

F. Posting of a Bond

Finally, *Rule 65 of the Federal Rules of Civil Procedure* also requires that,

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c) (emphasis added) Application of *Rule 65(c)* has been construed by the Sixth Circuit as being within the sound discretion of the trial judge. *Urbain v. Knupp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1954). Failure to consider the question of security has been considered error by the Sixth [*29] Circuit. *Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626, 629 (6th Cir. 1979).

The sum posted on bond should reflect the limit that may be recovered by a wrongfully enjoined party, because a party later found to have been enjoined wrongfully will be limited to that amount. Since it appears at this time that Defendant might suffer only minimal loss or damage by reason of the issuance of this preliminary injunction, a bond of \$ 10,000 is required of Plaintiff.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiffs' motion for a preliminary injunction [docket entry 5, erroneously refiled as docket entry 20] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' motion for a temporary restraining order [docket entry 5, erroneously refiled as docket entry 20] is **DENIED**.

IT IS FURTHER ORDERED that Defendant City of Rockwood's motion for leave to file a supplemental response [docket entry 21] is **GRANTED**.

SO ORDERED.

Dated: June 1, 2005

HONORABLE PAUL V. GADOLA

UNITED STATES DISTRICT JUDGE