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**Testimony of U.S.Rep. James P. Moran
Before the**

**Surface Transportation Board
Regarding Railroad-Owned Solid Ethanol Transloading Facilities**

Good morning Chairman Nottingham and Members of the Board. My name is Jim Moran, and I am a Member of Congress from Northern Virginia. I appreciate the opportunity to present my testimony to address how reasonable state, local, and federal health, safety, and environmental safeguards for ethanol transloading facilities might be implemented and imposed.

As you have testified, Mr. Chairman, "One of the most difficult issues facing the Board this year is how to improve the Board's ability to ensure effective regulation of rail operations involving solid waste; to protect public safety, health and the environment; to enable commerce to use the interstate rail network freely; and to take trucks that would otherwise transport these materials off local roads." In my testimony, I am not discussing solid waste, but rather ethanol, a substance on which there are not just environmental, but, perhaps more importantly, substantial public safety issues warranting the Board's initiative and guidance.

Because the Board has taken a number of initiatives to do what it can under the law to allow for effective regulation in the case of solid waste, I am asking today for similar initiatives with regard to ethanol, so that the nation can benefit from a more understandable and balanced state, local, and federal health, public safety, and environmental standards safeguards for rail transloading facilities for ethanol. That is, I am urging the Board to create a mechanism, similar to its actions a year ago, so that a transloading facility would not be allowed to enter the rail business until extensive environmental, public safety, public health, and other public interest considerations were fully addressed. While I understand and respect the difficulty of balancing all the interests involved, I believe that the very significant increase of such facilities throughout our country make it important and timely for the Board to work hard and swiftly to identify and implement administrative and regulatory strategies that improve our ability to ensure effective regulation in this emerging arena.

According to the Department of Agriculture, U.S. ethanol production climbed to almost 5 billion gallons in 2006, up nearly 1 billion gallons from 2005. Despite the speed and magnitude of this increase, the industry is stepping up the pace of expansion, with production expected to top 10 billion gallons by 2009. That figure, if global oil prices remain in their current range, could triple within a decade.

Because most ethanol is produced in the Midwest and must be transported by rail and truck, we can anticipate there will be a significant increase in rail carriers seeking to construct transloading facilities—and, presumably, in areas in close proximity to urban areas, so that the transport time, risk, and cost for tank truckers is shorter.

Therefore, even while I concur that this might be a situation(s) where a federal preemption applies, I recognize and appreciate the Board's clarification that there are limits to such preemption. Moreover, I appreciate that the Board has never interpreted the statute to mean that it preempts all other laws, but rather recognizes that "where there are overlapping Federal statutes, they are to be harmonized, with each statute given effect to the extent possible." Certainly in the instance of the transloading facility in Northern Virginia, there are overlapping Homeland Security, Environmental Protection Agency, and other, appropriate concerns.

While the Board and the courts have found that certain types of actions are necessarily preempted, including any form of permitting or preclearance requirements – such as zoning and environmental and land use permitting – that could be used to deny or defeat a railroad's ability to conduct its operations, and while local governments may not regulate matters directly regulated by the Board, such as railroad rates or service or the construction, operation, and abandonment of rail lines; the Board has determined that state and local laws are preempted "only if the particular action would prevent or unreasonably interfere with rail transportation." Therefore, not all state and local regulation affecting rail carriers is preempted, but rather, retain certain police powers to protect public health and safety, such as local fire, electrical, and building codes. These permit a local government to inspect their facilities. They provide for direction to railroads to share their plans with the community when they are undertaking an activity for which a non-railroad entity would require a permit.

I am concerned, nevertheless, that under your governing statute, some activities, although part of rail transportation, may, nevertheless, not be subject to STB licensing, such as transloading facilities, where materials are transferred between truck and rail – at existing railroad locations, to better serve the needs of a railroad's service territory. I would appreciate and welcome the Board's recommendations with regard to legislation to amend the 49 U.S.C. 10906 to expand the Board's licensing authority to encompass this activity. I am concerned because, under current law, no Board license is required in the rapidly expanding issue of transload facilities. That means there is no trigger for the STB to conduct a formal environmental or public safety review, nor to impose specific public safety or homeland security, much less environmental conditions prior to putting these facilities into operation. It seems to me that as the number of these facilities expands to accommodate the rapid increase in ethanol distribution, there would be a critical public benefit to such a trigger to ensure the public that specific steps—in concert with affected local communities and neighborhoods—have been taken prior to the operation of these facilities. Certainly, at the very least, where an elementary or preprimary school is close by, there ought to be an agreed upon evacuation plan, a full information session with the railroad, and some certainty that the equipment and training to ensure the capacity and ability to respond to a catastrophic event was in place prior to operational status.

I believe this is also important, because while the Board has earlier concluded that activities – such as loading, unloading, handling and storing – that are defined in federal statute as being part of “transportation” – would fall within the Board's exclusive jurisdiction, it has emphasized that even as to those activities, its decision “does not entirely limit the application of state and police powers and that federal environmental laws would continue to apply.” That is an important clarification, but leaves unclear just where those lines are drawn. If the STB were able to provide, in effect, a check list of items that were a prerequisite before an ethanol transloading facility could begin service, I believe it would significantly reduce the danger in urban areas, especially to the most vulnerable populations.

For instance, in the NET case, the Board barred NET from entering the rail business until extensive environmental, safety, public health, and other public interest considerations were fully addressed. In that instance, the Board insisted upon completion by the United States Environmental Protection Agency of an ongoing remedial investigation and feasibility study

of the site on which NET proposes to operate; a thorough environmental review pursuant to NEPA, including the imposition of any appropriate environmental or other conditions, which, the Board said, could include specific monitoring, inspection, and oversight by the Board or on the Board's behalf by federal, state and/or local agencies; and a statement that its staff and resources were available to facilitate negotiations between NET, the Commonwealth, and local agencies to reach a mutually acceptable environmental mitigation plan.

Indeed, I note that the Board last year began a number of initiatives to do what it can under the law to allow for effective regulation in this type of case. When, as the Chairman testified, a solid waste facility was involved in a proposal that involved building a new line into a new service area, the Board's existing environmental review processes were sufficient to allow full consideration of the environmental and other issues that could be presented as part of the rail licensing process.

Yet, as even the Board has found, even in the solid waste arena, the summary class exemption procedure under which most acquisition cases involving a solid waste facility are currently handled has not always provided enough information about the proposal to allow the Board to effectively and responsibly handle its regulatory responsibilities. Rather, the Board has determined on a number of occasions it needed to withhold the green light in order to provide for a more careful and thorough inquiry and to consider further evidence, so that the Board would have the benefit of a more complete record before permitting a proposed action to proceed. Last year, for example, the Board held up the proposal of Ashland Railroad to lease and operate approximately 1.5 miles of currently unused track in Frehold, New Jersey and to develop a transload facility on the track so that the Board could obtain additional information. In fact, the hold was without prejudice, but rather to ensure it fully understood potential impacts to wetlands and water supply. Certainly, in the case of ethanol, a catastrophic fire in an urban neighborhood could have significant public safety and environmental impacts, especially if operational before some reasonable certainty that response capacity and evacuation procedures were fully in effect.

In fact, I applaud the Board for its efforts to attempt to be proactive in instances where environmental concerns are brought to the Board's attention in those cases where the federal preemption applies, but where there is no

requirement for a Board license and, therefore, no opportunity for a NEPA review. In such cases, STB staff has conducted site visits to rail facilities and advised the parties that federal environmental laws continue to apply. Staff has also made clear that local police powers are not preempted entirely and encouraged rail carriers to work with localities to reach reasonable accommodations. The Board has considerable expertise and experience, as do rail carriers. Few cities have either when they are confronted by ethanol transloading facilities for the first time, and the affected neighborhood and civic associations clearly are ill-equipped to even know the most important rights available to them, much less what steps to take.

I note, Mr. Chairman, with appreciation that you personally visited Freehold, New Jersey to meet with the local community to inform them of the Board's denial of Ashland Railroad's request for authority for a rail transload operation there, and to discuss ideas for improving STB communications with local stakeholders. Certainly, I know the citizens in my community would be grateful for such a visit.

The Board confronts a difficult balancing act in determining how to balance reasonable state, local, and federal health, public safety, and environmental safeguards for this emerging type of rail transloading facilities. We are at the beginning of a national issue, so the Board is uniquely situated, in my view, to be innovative in helping to protect the complex public interests and public policy considerations. You are in the best position to determine the minimal public safety protections that must be available to a community as a prerequisite to operations.

I appreciate the difficult challenge that presents, but at the same time, I hope you recognize its urgency.