

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

FILED

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CLERK US DISTRICT COURT  
ALEXANDRIA, VIRGINIA

NORFOLK SOUTHERN  
RAILWAY COMPANY,

Plaintiff,

v.

Case No. 1:08CV618

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.

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COMPLAINT

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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 (e) 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(b) and, as a result, the application is of no effect;

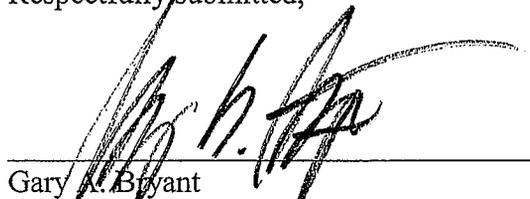
(6) declaring that City Ordinance No. 5-2-27, in either its original or amended form, as it has been applied by the hauler permit issued by Alexandria to the Facility, is preempted by the preemptive provision of the Hazardous Materials Transportation Act, 49 U.S.C. Section 5125 and, as a result, the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



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[fred@jfsinclairlaw.com](mailto:fred@jfsinclairlaw.com)

I-820848.3  
06/13/2008 2:50 PM

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

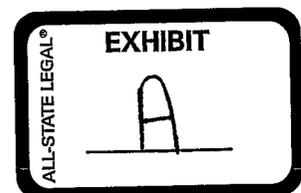
(a) Hauling waste materials of any type, building or construction supplies, materials or equipment of any type, or dirt, debris or fill of any type is prohibited on all streets within the city, except pursuant to a permit issued under subsection (b) of this section, or pursuant to an exemption under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

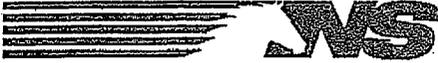




**Conditions of Approval - Permit no.: TES2008-00882**

**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) 533-4872  
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

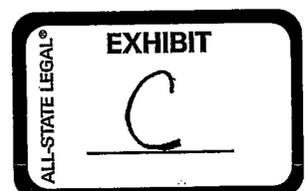
Re: T&ES Permit No. TES2008-00882

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

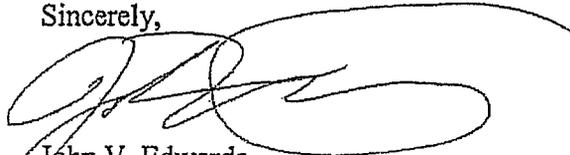


Joan Wagner  
June 4, 2008  
Page 2

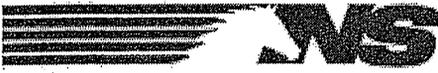
loaded at the Van Dorn Street facility and cannot guarantee that they will follow our request, but we believe that most of them will do so.

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,



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:

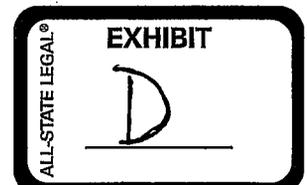
This letter is in reference to your request for the timeline of events and communications between Norfolk Southern and the City of Alexandria officials as it relates to the development of the ethanol transfer facility.

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 25<sup>th</sup> 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

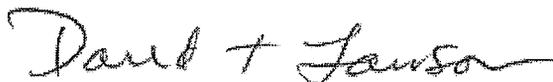
June 2, 2008 – Chuck Wehrmeister (Vice President – Safety and Environmental), Doug McNeil, other NS representatives, and I attended the Summer's Grove Civic Association meeting.

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,



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

-----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: rthrobin@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



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

William A. Galanko  
Vice President/Law

Writer's Direct Dial Number  
(757) 623-2374  
(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 Internodal 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.

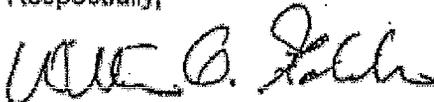
Mr. Josephson  
Page 2  
September 18, 2008

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 (9<sup>th</sup> 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

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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) 533-4943 (FAX)  
E-mail: [william.galanko@nscorp.com](mailto: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,



William A. Galanko  
Vice President - Law

cc: David Lawson

Attachment D

**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](http://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](mailto: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)

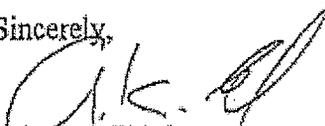
During our meeting, T&ES staff raised two issues: 1) the requirement for bulk tank trucks leaving the facility to obtain haul permits from T&ES; and 2) the need for a stormwater pollution and prevention plan as required by the state Department of Environmental Quality (DEQ).

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](mailto: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  
Faroll 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.)*



Operating Subsidiary Norfolk Southern Railway Company

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, those 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 (1640 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.

Mr. Adam K. Thiel

May 7, 2008

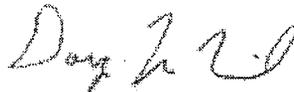
Page 2

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. ("TTCT") 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 F450 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 Hamer, 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

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.

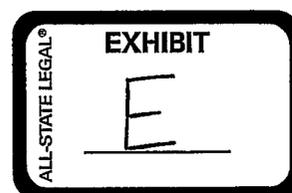
(a) Hauling waste materials of any type, building or construction supplies of any type, bulk materials or commodities of any type, heavy vehicles or equipment of any type not licensed for street use, or dirt, debris or fill of any type is prohibited on all streets within the City, except pursuant to 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  
10 WILLIAM D. EUILLE  
11 Mayor

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

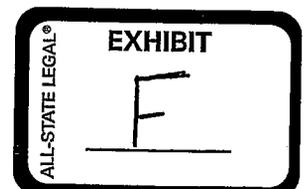
HISTORICAL AND STATUTORY NOTES

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



\*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--

(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,

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.

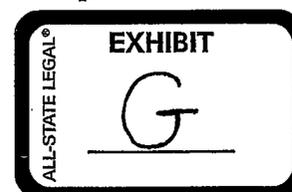
(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(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.

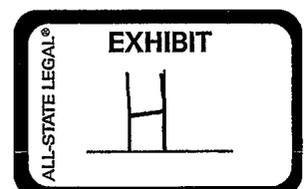
**(D)** the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

\*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.

**(e) 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

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**§ 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--

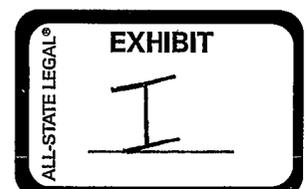
(i) the designation, limitation, or requirement is agreed to by the other State or tribe within a reasonable period or is approved by the Secretary under subsection (d) of this section; and

(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.

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- (vii) terrain considerations;
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\*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).