

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

NORFOLK SOUTHERN RAILWAY COMPANY,)
)
 Plaintiff,)
)
 v.)
) Case No. 1:08-CV-618
 CITY OF ALEXANDRIA *et al.*,)
)
 Defendants.)
)

CITY OF ALEXANDRIA,)
)
 Counterclaim/Third Party Plaintiff,)
)
 v.)
) Case No. 1:08-CV-618
 NORFOLK SOUTHERN RAILWAY COMPANY)
 and)
)
 RSI Leasing, Inc.)
 SERVE:)
 CT Corporation System)
 4701 Cox Rd , Suite 301)
 Glen Allen, Virginia 23060-6802)
 Registered Agent)
)
)
 Counterclaim and Third Party)
 Defendants.)
)

**ANSWER TO COMPLAINT, COUNTERCLAIM AND
THIRD PARTY CLAIM**

Defendants, the City of Alexandria, Virginia and Richard Baier, in his official capacity as
Director of Transportation and Environmental Services for the City of Alexandria (collectively

“Alexandria” or “the City”), by its undersigned counsel, hereby answers and responds, upon its best information and belief, to Norfolk Southern Railway Company’s (“NSRC”) Complaint (“Complaint”) as set forth below. The City denies all allegations contained in the Complaint except to the extent that such allegations are specifically admitted in this Answer. The paragraph numbers in this Answer correspond to the paragraph numbers in the Complaint.

1. The allegations contained in paragraph 1 of the Complaint contain a description of NSRC’s lawsuit, to which no response is required. The City specifically denies the allegations described therein.

2. In response to the allegations contained in paragraph 2 of the Complaint, the City admits only that Municipal Ordinance 5-2-27 requires a haul permit for motor vehicles hauling certain materials and that the terms of the Ordinance, both before and after amendment, speak for themselves. The City specifically denies all allegations contained in paragraph 2 of the Complaint that are inconsistent with the express terms of the Ordinance.

3. In response to the allegations contained in paragraph 3 of the Complaint, the City admits only that it issued a haul permit to NSRC and that the terms of the permit, which is attached to the Complaint, speak for themselves. The City specifically denies all allegations contained in paragraph 3 of the Complaint that are inconsistent with the express terms of the permit.

4. In response to the allegations contained in paragraph 4 of the Complaint, the City admits only that NSRC took the position set forth in paragraph 4, but specifically denies that that position is a correct statement of the law and otherwise denies the allegations contained in paragraph 4 of the Complaint.

5. In response to the allegations contained in paragraph 5 of the Complaint, the City admits only that on June 10, 2008, the Ordinance was introduced on first reading, considered, and passed on first reading, and that the Ordinance was then scheduled for public hearing, second reading, and consideration for final passage on June 14, and otherwise denies the allegations contained in paragraph 5 of the Complaint.

6. In response to the allegations contained in paragraph 6 of the Complaint, the City admits only that on June 14, 2008, the Ordinance was the subject of a public hearing, and was adopted on second reading and final passage by the unanimous vote of the City Council, thereby becoming a duly enacted law of the City, and otherwise denies the allegations contained in paragraph 6 of the Complaint.

7. In response to the allegations contained in paragraph 7 of the Complaint, the City states that the terms of the Ordinance speak for themselves and denies all allegations contained in paragraph 7 inconsistent with the express terms of the Ordinance.

8. In response to the allegations contained in paragraph 8 of the Complaint, the City states that the terms of the Ordinance speak for themselves and denies all allegations contained in paragraph 8 inconsistent with the express terms of the Ordinance.

9. The allegations contained in paragraph 9 of the Complaint contain a description of NSRC's legal allegations, to which no response is required. To the extent a response is required, the City denies the allegations contained in paragraph 9 of the Complaint.

10. The City admits the allegations contained in paragraph 10 of the Complaint except to the extent that issues raised in the Complaint are encompassed by the Petition for

Declaratory Relief the City has filed with the Surface Transportation Board, over which the Surface Transportation Board has primary jurisdiction.

11. The City admits the allegations contained in paragraph 11 of the Complaint.

12. The City admits the allegations contained in paragraph 12 of the Complaint.

13. The City admits the allegations contained in paragraph 13 of the Complaint.

14. The City admits the allegations contained in paragraph 14 of the Complaint.

15. The City admits the allegations contained in paragraph 15 of the Complaint.

16. The City is without sufficient information regarding NSRC's operations to admit or deny the allegations contained in paragraph 16 of the Complaint and therefore denies those allegations.

17. With respect to the allegations contained in paragraph 17 of the Complaint, the City admits only that NSRC owns and operates the railroad yard named Van Dorn Yard, that trains use the Van Dorn yard for local delivery and that in the past the Van Dorn Yard has served for the transfer of intermodal containers from trains to trucks, but is otherwise without sufficient information or knowledge about NSRC's operations to admit or deny the allegations contained in paragraph 17 and therefore denies them.

18. The City is without sufficient information regarding NSRC's operations to admit or deny the allegations contained in paragraph 18 of the Complaint and therefore denies those allegations.

19. With respect to the allegations contained in paragraph 19 of the Complaint, the City admits only that certain improvements to the Van Dorn Yard have been made, including berms, purportedly to contain ethanol spills, and that ethanol is transferred from rail tank cars to

trucks, but is otherwise without sufficient information or knowledge about the condition or operation of the Van Dorn Yard to admit or deny the allegations contained in paragraph 19 and therefore denies them.

20. The City is without sufficient information regarding NSRC's operations to admit or deny the allegations contained in paragraph 20 of the Complaint and therefore denies those allegations.

21. The City is without sufficient information regarding NSRC's operations to admit or deny the allegations contained in paragraph 21 of the Complaint and therefore denies those allegations.

22. The City admits the allegations contained in paragraph 22 of the Complaint.

23. The City is without sufficient information regarding NSRC's operations to admit or deny the allegations contained in paragraph 23 of the Complaint and therefore denies those allegations.

24. The City admits the allegations contained in paragraph 24 of the Complaint.

25. The City admits the allegations of the first two sentences of paragraph 25 of the Complaint but denies the allegations of the third sentence of paragraph 25 of the Complaint.

26. In response to the allegations contained in paragraph 26 of the Complaint, the City admits only that the City Council held a regularly noticed and scheduled legislative session on May 27, 2008 at which the City Manager, the City Attorney and other staff discussed the ethanol transloading operation and that a complete and accurate videotape and sound recording of the session were made and are available on the City's web site. The City denies all allegations

contained in paragraph 26 of the Complaint inconsistent with the statements actually made at the May 27 City Council meeting as recorded.

27. In response to the allegations contained in paragraph 27 of the Complaint, the City admits only that it issued a T & ES Permit to NSRC, that a true and accurate copy of that permit is attached to the Complaint as Exhibit B and that the terms of the Permit speak for themselves. The City denies all allegations contained in paragraph 27 inconsistent with the express terms of the Permit.

28. The City admits the allegations contained in paragraph 28 of the Complaint, although the City denies the truth or legal validity of the positions NSRC took in the letter attached to the Complaint as Exhibit C and otherwise denies all allegations contained in paragraph 28 inconsistent with the express terms of the letter attached to the Complaint as Exhibit C.

29. The City admits the allegations contained in paragraph 29 of the Complaint, although the City denies the truth or legal validity of the positions NSRC took in the letter attached to the Complaint as Exhibit D and otherwise denies all allegations contained in paragraph 29 inconsistent with the express terms of the letter attached to the Complaint as Exhibit D.

30. In response to the allegations contained in paragraph 30 of the Complaint, the City admits only that it amended the Ordinance on June 14, that a true and accurate copy of the amended Ordinance is attached to the Complaint as Exhibit E and that the terms of the amended Ordinance speak for themselves. The City denies all allegations contained in paragraph 30 inconsistent with the express terms of the amended Ordinance.

31. In response to the allegations contained in paragraph 31 of the Complaint, the City admits only that that a true and accurate copy of the amended Ordinance is attached to the Complaint as Exhibit E and that the terms of the amended Ordinance speak for themselves. The City denies all allegations contained in paragraph 31 inconsistent with the express terms of the amended Ordinance.

32. The allegations contained in paragraph 32 of the Complaint are legal arguments to which no response is required. To the extent a response is required, the City denies the allegations contained in paragraph 32 of the Complaint.

33. The City denies the allegations contained in paragraph 33 of the Complaint and states affirmatively that the Ordinance only regulates the use of City streets by trucks; it does not regulate any railroad activity.

34. The City denies the allegations contained in paragraph 34 of the Complaint.

35. The allegations contained in paragraph 35 of the Complaint consist primarily of legal arguments regarding the meaning and scope of the Ordinance to which no response is required. To the extent a response is required, the City admits only that that the terms of the amended Ordinance speak for themselves and denies all allegations contained in paragraph 35 of the Complaint inconsistent with the express terms of the amended Ordinance.

36. The City denies the allegations contained in paragraph 36 of the Complaint.

37. The City denies the allegations contained in paragraph 37 of the Complaint.

38. In response to the allegations contained in paragraph 38 of the Complaint, the City incorporates its responses to paragraphs 1-37 of the Complaint.

39. In response to the allegations contained in paragraph 39 of the Complaint, the City admits only that it issued a T & ES Permit and that the terms of the Permit speak for themselves. The City denies all allegations contained in paragraph 39 inconsistent with the express terms of the Permit.

40. In response to the allegations contained in paragraph 40 of the Complaint, the City admits only that paragraph 40 sets forth an accurate quote of a portion of the Ordinance as it read prior to June 14 and denies the allegations contained in paragraph 40 of the Complaint inconsistent with the express terms of the complete Ordinance.

41. In response to the allegations contained in paragraph 41 of the Complaint, the City admits only that paragraph 41 sets forth an accurate quote of a portion of the Ordinance as it read prior to June 14 and denies the allegations contained in paragraph 41 of the Complaint inconsistent with the express terms of the complete Ordinance.

42. In response to the allegations contained in paragraph 42 of the Complaint, the City admits only that the terms of the Ordinance speak for themselves and denies all allegations contained in paragraph 42 inconsistent with the express terms of the Ordinance.

43. The City denies the allegations contained in paragraph 43 of the Complaint.

44. In response to the allegations contained in paragraph 44 of the Complaint, the City admits only that it considers the Permit to have continued effectiveness and applicability to the use of City streets by ethanol-filled trucks from the Van Dorn yard, and otherwise denies the allegations contained in paragraph 44 of the Complaint.

45. In response to the allegations contained in paragraph 45 of the Complaint, the City incorporates its responses to paragraphs 1-44 of the Complaint.

46. In response to the allegations contained in paragraph 46 of the Complaint, the City admits only that the terms of the Ordinance speak for themselves and denies all allegations contained in paragraph 46 inconsistent with the express terms of the Ordinance.

47. The City denies the allegations contained in paragraph 47 of the Complaint.

48. The City denies the allegations contained in paragraph 48 of the Complaint.

49. In response to the allegations contained in paragraph 49 of the Complaint, the City incorporates its responses to paragraphs 1-48 of the Complaint.

50. Paragraph 50 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 50 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

51. Paragraph 51 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 51 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

52. Paragraph 52 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 52 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

53. Paragraph 53 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the

City denies all allegations contained in paragraph 53 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

54. Paragraph 54 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 54 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

55. Paragraph 55 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 55 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

56. The City denies the allegations contained in paragraph 56 of the Complaint.

57. In response to the allegations contained in paragraph 57 of the Complaint, the City incorporates its responses to paragraphs 1-56 of the Complaint.

58. Paragraph 58 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 58 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

59. The City denies the allegations contained in paragraph 59 of the Complaint.

60. In response to the allegations contained in paragraph 60 of the Complaint, the City incorporates its responses to paragraphs 1-59 of the Complaint.

61. Paragraph 61 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the

City denies all allegations contained in paragraph 61 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

62. Paragraph 62 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 62 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

63. Paragraph 63 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 63 of the Complaint that are inconsistent with the express terms of the laws referred to therein. The City expressly denies the factual allegations contained in the second sentence of paragraph 63 of the Complaint.

64. Paragraph 64 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 64 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

65. Paragraph 65 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the City denies all allegations contained in paragraph 65 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

66. Paragraph 66 consists of a legal argument and a characterization of the meaning of a federal statute to which no response is required. To the extent a response is required; the

City denies all allegations contained in paragraph 66 of the Complaint that are inconsistent with the express terms of the laws referred to therein.

67. The City denies the allegations contained in paragraph 67 of the Complaint.

68. The City denies the allegations contained in paragraph 68 of the Complaint.

AFFIRMATIVE DEFENSES

The City, without assuming the burden of proof on issues upon which NSRC has the burden of proof, alleges for its affirmative defenses in this action as follows:

FIRST AFFIRMATIVE DEFENSE

NSRC has failed to state a cause of action upon which relief can be granted. NSRC will be unable to establish any of the causes of action for which it seeks relief.

SECOND AFFIRMATIVE DEFENSE

NSRC is barred from maintaining this action by reason of its failure to exhaust administrative remedies.

THIRD AFFIRMATIVE DEFENSE

NSRC seeks relief of types to which it is not entitled as a matter of law.

FOURTH AFFIRMATIVE DEFENSE

NSRC's claims are barred by the doctrine of primary jurisdiction.

FIFTH AFFIRMATIVE DEFENSE

NSRC lacks standing to assert these claims.

SIXTH AFFIRMATIVE DEFENSE

NSRC has failed to allege matters subject to declaratory or injunctive relief and has failed to establish that it lacks an adequate remedy at law.

SEVENTH AFFIRMATIVE DEFENSE

NSRC's claims for relief relating to City Ordinance Section 5-2-27 prior to the June 14, 2008 amendment are moot.

WHEREFORE, the City demands judgment against NSRC as follows:

1. For judgment dismissing the Complaint against it;
2. For the Court to abstain from hearing matters over which the Surface Transportation Board has primary jurisdiction;
3. For its costs of suit and other expenses and disbursements in this matter; and
4. For such other and further relief as the Court deems just and proper.

COUNTERCLAIM AND THIRD PARTY CLAIM

The City asserts the following counterclaim against NSRC and third party claim against RSI Leasing, Inc. seeking a declaration that the City has the authority to regulate the operation of ethanol tank trucks operating on City streets and alleges as follows:

INTRODUCTION

1. Beginning in approximately mid-April, 2008, Counterclaim Defendant Norfolk Southern Railway Company (“NSRC”) and/or Third Party Defendant RSI Leasing, Inc. (“RSI”) began operating an ethanol transloading facility in the City at a rail yard known as the Van Dorn Yard, near the intersection of Eisenhower Avenue and Van Dorn Street.

2. Ethanol is a flammable liquid alcohol used, among other purposes, as a fuel additive for automobiles. Train tank cars, each holding between 29,000 and 30,000 gallons of ethanol arrive at the Van Dorn Yard and are directed to a specified part of the Yard operated by RSI. That portion of the Yard has been improved specifically to accommodate the ethanol transloading operation. The ethanol is pumped from the train tank cars to tanker trucks. Each truck holds approximately 5,000 gallons of ethanol. The ethanol-filled trucks drive on City streets to Interstate 95, and then deliver the ethanol to petroleum tank farms located in the Newington area of Fairfax County and in the City of Fairfax.

3. The Van Dorn Yard is adjacent to two established residential neighborhoods, Cameron Station and Summer’s Grove. Each neighborhood contains many homes. The Cameron Station neighborhood also includes an elementary school (Samuel Tucker Elementary School) and public parks. Some of the homes in each neighborhood are located within 500 feet of the ethanol transloading facility. Tucker Elementary School is approximately 600 feet from the ethanol transloading facility. The Eisenhower Metro station, Interstate 95, which is co-

located at this point with the Capital Beltway, numerous businesses and two heavily traveled City streets, Eisenhower Avenue and Van Dorn Street, are also located within one half mile of the ethanol transloading facility; some portions of the highways and streets are much closer. A map showing the location of the ethanol transloading facility and the surrounding areas is attached as Exhibit 1.

4. The City regards the ethanol transloading facility as inherently dangerous and completely inappropriate for its location given the concentration of residential, school, commuter and other land uses in the immediate vicinity of the Van Dorn Yard.

5. In addition, the City is very concerned about the safety of ethanol-filled tank trucks using heavily trafficked City streets. To address that particular concern, and to protect the health, safety and welfare of its citizens and visitors, the City has issued a permit that limits the use of City streets by ethanol-filled trucks in three primary ways:

- a. It specifies a route, approximately ½ mile in length, for the ethanol-filled trucks to use to go from the Van Dorn Yard to the City limits, which is located virtually at the entrance to I-95.
- b. It allows a maximum of 20 trips by ethanol-filled trucks from the Yard each day.
- c. It allows ethanol-filled trucks from the Yard to operate on City streets between 7:00 a.m. – 7:00 p.m., Monday - Friday.

6. NSRC and RSI have challenged the validity of the permit and take the position that they do not have to comply with the terms and conditions of the permit, or of any subsequently issued permit. Because NSRC and RSI intend to increase the volume of ethanol transloading operations to a 24-hour a day, 7-day a week basis, and to use many more trucks than the permit allows, there is an actual controversy between the parties regarding the authority of the City to regulate the use of City streets by ethanol-filled trucks from the Van Dorn Yard.

7. The City files this counterclaim to seek declaratory and injunctive relief requiring NSRC and RSI to abide by the terms of City permits regarding the use of City streets.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because the claims asserted arise under the Constitution, laws or treaties of the United States. Specifically, the claims asserted herein arise under the Article VI, clause 2 of the United States Constitution (“Supremacy Clause”), the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-11908, the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127, and the Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20155. The Court also has jurisdiction over this case pursuant to 28 U.S.C. § 1367 because the City’s claims are so related to the claims asserted by NSRC that they form part of the same case or controversy under Article III of the United States Constitution.

9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and(c) because a substantial part of the events or omissions giving rise to these claims arose in this judicial district and (2) NSRC and RSI reside in this judicial district.

THE PARTIES

10. The City of Alexandria, Virginia is a duly organized city in the Commonwealth of Virginia pursuant to a City Charter and other authority granted by the Commonwealth.

11. Norfolk Southern Railway Company (“NSRC”) is a Virginia corporation with its principal place of business in Norfolk, Virginia. NSRC regularly conducts business in this judicial district, including the matters giving rise to this action.

12. RSI Leasing, Inc. (“RSI”) is a Michigan corporation with its principal place of business at 4131 Okemos Road, Okemos, Michigan. RSI regularly conducts business in this judicial district, including the matters giving rise to this action.

THE FACTS

BACKGROUND

13. NSRC owns and operates a rail yard in the City known as the Van Dorn Yard (“Yard”).

14. In approximately mid-April, 2008, an ethanol transloading facility began operating at the Van Dorn Yard at which rail tank cars filled with liquid ethanol are brought to a special area of the Van Dorn Yard and the ethanol is transferred to tank trucks. No storage tanks are used in the transloading operation; ethanol is off-loaded directly from rail tank cars to tank trucks. Trucks filled with ethanol then drive through the City, on streets owned and maintained by the City, to south-bound Interstate 95 and eventually to a tank farm located outside the City near Lorton, Virginia in Fairfax County.

15. On information and belief, RSI, through lease or other contract, operates the ethanol transloading operation. No NSRC employees are involved in conducting or supervising the transloading operation.

16. Ethanol is a flammable liquid alcohol. An accident involving a tank truck containing ethanol could result in a substantial explosion and/or fire that would pose a serious risk of injury to nearby residents as well as to property.

17. The Cameron Station neighborhood is located immediately north of the ethanol transloading facility. The Cameron Station neighborhood is a medium density residential community, including an elementary school (Samuel Tucker Elementary School) and public parks. Homes and neighborhood parks are located within 500 feet of the transloading facility. The elementary school is located within 600 feet of the facility. In addition, the Summer’s

Grove neighborhood is located immediately west of the transloading facility. Summer's Grove has numerous homes, as well as public areas for the use and enjoyment of its residents.

18. Immediately south of the transloading facility is an industrial/commercial area in which many people work and visit on a daily basis. Eisenhower Metro Station, a heavily used Metro station, is within one half mile of the facility. Portions of Van Dorn Street and Eisenhower Avenue, which are both heavily used commuter routes, as well as major arterial roadways for the City's residents, are also located within 500 feet of the facility.

THE CITY'S POWER TO PROTECT THE HEALTH AND SAFETY
OF ITS RESIDENTS AND TO REGULATE THE USE OF CITY STREETS

19. Pursuant to the authority conferred to the City by the Commonwealth of Virginia in its City Charter and otherwise by statute, the City possesses broad powers to enact laws and take other actions necessary and appropriate to promote the health, safety and welfare of the residents of the City. Those powers include the authority to regulate the use of City streets by ethanol-filled trucks such as those departing from the Van Dorn Yard ethanol transloading facility. As set forth in the City's Charter at Section 2.01:

The city shall have and may exercise all powers which are now or may hereafter be conferred upon or delegated to cities under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of a city government the exercise of which is not expressly prohibited by the said Constitution and laws and which in the opinion of the council are necessary or desirable to promote the general welfare of the city and the safety, health, peace, good order, comfort, convenience and morals of its inhabitants, as fully and completely as though such powers were specifically enumerated in this charter, and no enumeration of particular powers in this charter shall be held to be exclusive but shall be held to be in addition to this general grant of powers.

20. The City Charter specifically grants the City broad powers with respect to streets, roads and other City property, as provided in Charter Section 2.03:

(a) To lay out, open, extend, widen, narrow, establish or change the grade, or close, vacate, abandon, construct, pave, curb, gutter, grade, regrade, adorn with

shade trees, otherwise improve, maintain, repair, clean and light streets, including limited access or express highways, alleys, bridges, viaducts, subways and underpasses, and make and improve walkways upon streets and improve and pave alleys within the city; and the city shall have the same power and authority over any street, alley or other public place ceded or conveyed to the city or dedicated or devoted to public use as over other streets, alleys and other public places; provided, further, that whenever any ground shall have been opened to and used by the public as a street or alley for ten years it shall be considered as dedicated to the public and the city shall have the same authority and jurisdiction over and right and interest therein as it has over other streets.

...

(h) To control and regulate the use and management of all property of the city, real and personal.

21. The City Charter also confers specific additional powers on the City to regulate the use of streets and roads in the City. Specifically, Section 2.04 provides, in relevant part:

In addition to the powers granted by other sections of this charter the city shall have power to adopt ordinances, not in conflict with this charter or prohibited by the general laws of the Commonwealth, for the preservation of the safety, health, peace, good order, comfort, convenience, morals and welfare of its inhabitants. Among such powers, but not in limitation thereof, the city shall have power:

...

(d) To grant or authorize the issuance of permits under such terms and conditions as the council may impose for the use of streets, alleys and other public places of the city by railroads, street railways, buses, taxicabs, pedicabs and other vehicles for hire; prescribe the location in, under or over, and grant permits for the use of, streets, alleys, and other public places for the maintenance and operation of tracks, poles, wires, cables, pipes, conduits, bridges, subways, vaults, areas, parking places, bus stops, and cellars; require tracks, poles, wires, cables, pipes, conduits and bridges to be altered, removed or relocated either permanently or temporarily; charge and collect compensation for the privileges so granted; and prohibit such use of the streets, alleys and other public places of the city, and no such use shall be made of the streets, alleys or other public places of the city without the consent of the council.

...

(g) To regulate the operation of motor and other vehicles and exercise control over traffic in the streets of the city and provide penalties for the violation of such regulations, provided that ordinances or administrative regulations adopted by virtue of this subsection shall not be inconsistent with the provisions of the Motor Vehicle Code of Virginia. All fines imposed for the violation of such ordinances and regulations shall be paid into the city treasury.

...

(j) To regulate or prohibit the exercise of any dangerous, offensive or unhealthful business, trade or employment, and the transportation of any offensive or dangerous substance.

...

(o) To regulate or prohibit the manufacture, storage, transportation, possession and use of explosive or inflammable substances and the use and exhibition of fireworks and discharge of firearms.

22. The City by ordinance requires a permit to use City streets to haul waste, construction materials and other substances, including ethanol, pursuant to City Code Section 5-2-27. On June 14, 2008 the City Council adopted Ordinance No. 4555 in order to clarify that City Code Section 5-2-27 applies to ethanol and similar substances. Ordinance No. 4555 Section 2 provides that it is “Declaratory of existing law.” As clarified, Section 5-2-27 reads 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 to specific locations or sites, by subject to the limitation in clause (1) for each such location or site,

nor (3) to the non-commercial hauling of such materials or equipment to or from a dwelling unit, by a resident therein.

THE CITY'S REGULATION OF ETHANOL-FILLED TRUCKS

23. In order to move the ethanol from the Van Dorn Yard south to the Newington and Fairfax City tank farms, trucks filled with ethanol must travel over streets owned and maintained by the City to reach Interstate 95, which is located just beyond the City limits.

24. In approximately mid-April, 2008 NSRC and/or RSI started the ethanol transloading operation. On information and belief, approximately 16 tank trucks use the transloading facility each day, Monday – Friday. Current hours of operation are from approximately 6:00 a.m. to 7:00 p.m. NSRC and/or RSI has represented that the transloading facility could accommodate additional trains and trucks and could operate on a 24-hour, seven days a week basis and that they expect operations to expand beyond the current hours and size.

25. Among the many concerns the City had, and continues to have, about the health and safety implications of the transloading operation for the residents of the City, the City was concerned about the safety of the route used by the ethanol-filled tank trucks as they traversed City streets in order to access I-95.

26. Accordingly, on June 3, 2008, the City issued a permit, known as a T & ES Permit (the “Permit” or “Haul Route Permit”) imposing certain restrictions on the operations of ethanol-filled trucks departing the transloading facility, including (1) the route ethanol-filled trucks must take from the transloading facility to the City limits and interstate highway, (2) the times of day that ethanol-filled trucks may operate on City streets and (3) the maximum number of daily trips by ethanol-filled trucks. The Permit expires by its terms after July 3, 2008 and is without prejudice to the terms and conditions of any subsequent permit. A true and correct copy of the Permit is attached hereto as Exhibit 2.

27. By its terms, the Permit applies only to the movement of trucks over City streets. It does not regulate any railroad activity, nor does it regulate the activity of trucks or personnel on NSRC and/or RSI property. Nor does the Permit purport to regulate activity of the trucks beyond the City limits or the use of the trucks when not filled with ethanol.

28. The route specified in the Permit is the safest route from the Van Dorn Yard to the City limit and interstate highway. It is specifically designed to keep ethanol-filled trucks off of Metro Road and Van Dorn Street as much as possible. Access to Van Dorn Street directly from Metro Road involves a non-signalized intersection with a negligible merge area and is not safe for large vehicles bearing extremely inflammable material like ethanol. Moreover, Van Dorn Street near I-95 is a heavily used road by both City residents and commuters, as well as other trucks and vehicles. Accordingly, requiring the ethanol-filled trucks to use the signalized intersection at Eisenhower Avenue in order to get on Van Dorn Street is the safer option. The permit also ensures that ethanol-filled trucks will *only* use this route and thereby avoid passing through any residential areas. The total distance of the specified route is approximately one-half (0.5) miles.

29. The Permit allows up to 20 trips by ethanol-filled trucks per day. The Permit further permits ethanol-filled trucks from the Van Dorn Yard to use City streets between the hours of 7:00 a.m. and 7:00 p.m., Monday – Friday.

30. On information and belief, NSRC, RSI and/or the operators of ethanol-filled trucks from NSRC's transloading facility have complied with the terms of the Permit, although they take the position that such compliance is voluntary and that the City lacks the authority to enforce the terms of the, and compliance with the Permit has not impaired or adversely affected the operation of the ethanol transloading facility.

31. In correspondence with the City and in public statements, NSRC and RSI have taken the position that the City lacks the authority to issue the Permit or otherwise to regulate the use of City streets by ethanol-filled trucks from the Van Dorn Yard. NSRC and RSI have also represented to the City that the facility is designed to operate on a 24-hour a day, 7-day a week basis and have indicated to the City that they expect operations to expand beyond the current hours of operation and number of trucks.

32. On June 17, 2008, the City filed with the Surface Transportation Board a Petition for Declaratory Order seeking, *inter alia*, a declaration that the City's authority to regulate the ethanol transloading facility was not preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101 - 11908.

COUNT I – DECLARATORY JUDGMENT ON PREEMPTION

33. The City incorporates by reference the allegations contained in paragraph 1 – 32 above as if restated here in full.

34. There is an actual controversy between the City and NSRC and RSI regarding the power of the City to regulate the manner in which ethanol-filled trucks may use City streets. The City maintains that it has such power pursuant to its City Charter and otherwise. NSRC and RSI maintain that such power is preempted by federal law, including the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-11908, the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127, and the Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20155.

35. NSRC and RSI claim that they may disregard the City's Permit because the Permit is preempted by one or more of those federal laws. The City disputes that contention and maintains that NSRC and RSI must abide by the terms and conditions of the Permit and any

subsequently issued permit relating to the use of City streets by ethanol-filled trucks from the Van Dorn Yard.

36. The City will suffer irreparable harm if the relief requested herein is not granted.

37. The City does not have an adequate remedy at law.

COUNT II – DECLARATORY JUDGMENT THAT THE CITY HAS THE AUTHORITY TO REGULATE THE USE OF CITY STREETS BY ETHANOL-FILLED TRUCKS

38. The City incorporates by reference the allegations contained in paragraph 1 – 37 above as if restated here in full.

39. There is an actual controversy between the City and NSRC and RSI regarding the power of the City to regulate the manner in which ethanol-filled trucks may use City streets. The City maintains that it has such power pursuant to its City Charter and otherwise. NSRC and RSI maintain that the City's ordinances do not apply to the use of City streets by ethanol-filled trucks from the Van Dorn Yard and that such trucks may use City streets free of regulation by the City.

40. Although the current Permit will expire after July 3, 2008, the City expects to issue future permits and/or take other action to regulate the use of City streets by ethanol-filled trucks from the Van Dorn Yard. Thus the controversy regarding the scope of City authority to regulate such trucks is continuing and will continue after the expiration of the current Permit.

41. The City will suffer irreparable harm if the relief requested herein is not granted.

42. The City does not have an adequate remedy at law.

WHEREFORE, the City demands judgment against NSRC and RSI as follows:

1. For a declaratory judgment that the City has the regulatory authority delegated by the Commonwealth of Virginia to issue permits and otherwise regulate the use of City streets by trucks going to and coming from the ethanol transloading facility at the Van Dorn Yard.

2. For a declaratory judgment that the City's regulatory authority as delegated by the Commonwealth of Virginia is not preempted by federal law, and that the City is not thereby precluded from issuing permits and otherwise reasonably regulating the use of City streets by trucks going to and coming from the ethanol transloading facility at the Van Dorn Yard.

3. For a temporary and permanent injunction prohibiting trucks going to and coming from the ethanol transloading facility at the Van Dorn Yard from operating in a manner inconsistent with the terms and conditions of the Haul Route Permit issued by the City.

4. For its costs of suit and other expenses and disbursements in this matter; and

5. For such other and further relief as the Court deems just and proper.

Respectfully Submitted,

CITY OF ALEXANDRIA, a municipal
corporation of Virginia
By Counsel



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

Charles A. Spitulnik, VSB No. 20644
W. Eric Pilsch, VSB No. 29291
Kaplan Kirsch & Rockwell, LLP
1001 Connecticut Avenue, N.W.
Suite 905
Washington, DC 20036
(202) 955-5600
(202) 955-5616 facsimile



Norfolk Southern Ethanol Facility

Map Produced: 05-30-2008

0 270 540 810 1,080 Feet

1:3,000

N

Legend

	Site		Facility Fence		1000 FT Buffer		Half Mile Buffer		City Boundary		Railroad Line		Roads		Hydro		Buildings
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This map was produced by the GIS Division of the Department of Planning and Zoning, City of Alexandria, Virginia.
 Mapping Standard: 1:3,000 State Plane Virginia North
 Projection: Lambert Conformal Conic
 Map Scale: Feet
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CITY OF ALEXANDRIA
 Transportation and Environmental Services
 301 King Street, Suite 4130
 Alexandria, Virginia 22314
 703.838.4324



T & ES PERMIT

CASE NUMBER: TES2008-00882

ISSUED: 6/3/2008

EXPIRES: 7/3/2008

LOCATION: 1000 S VAN DORN ST	PROJECT NAME: HAULING
-------------------------------------	------------------------------

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

Primary Contact :

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

No Phone Number on Record

License Type and Policy Number:

Secondary Contact :

No Phone Number on Record

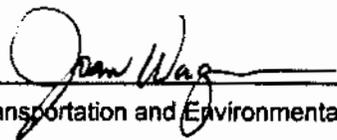
License Type and Policy Number:

START DATE: 6/4/2008	STREET EXCAVATION	INGRESS/EGRESS
END DATE: 7/3/2008	CRANE	SCAFFOLD/ LADDER
TIME: 7:00 AM - 7:00 PM	DUMPSTER	SIDEWALK CLOSING
INSURANCE:	<input checked="" type="checkbox"/> HAULING:	BLOCK PARTY
POLICY #:	CROSS CURB/ SIDEWALK	OTHER
EXPIRES:		

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

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

EXHIBIT 2

City Manager 
 By Director of Transportation and Environmental Services

If there are any questions concerning this permit, call 703.838.4324

Conditions of Approval - Permit no.: TES2008-00882

For: NORFOLK SOUTHERN RAILWAY CO

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

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

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