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By E-Filing

March 15, 2011

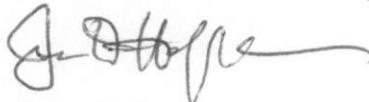
Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**RE: Finance Docket No. 35380, San Luis & Rio Grande Railroad
Petition for a Declaratory Order**

Dear Ms. Brown:

I am e-filing on behalf of the San Luis & Rio Grande Railroad ("SLRG") its Reply Comments and related exhibits due today in the above-captioned proceeding.

Respectfully submitted,



John D. Heffner

cc: All parties

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35380

**SAN LUIS & RIO GRANDE RAILROAD
PETITION FOR A DECLARATORY ORDER**

REPLY COMMENTS

Submitted by
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Due: March 15, 2011

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SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35380

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PETITION FOR A DECLARATORY ORDER**

REPLY COMMENTS

INTRODUCTION

Pursuant to an order issued by the Surface Transportation Board (“the Board”) on February 25, 2011, the San Luis & Rio Grande Railroad (“SLRG”) files these reply comments in the above-captioned proceeding. SLRG believes that the Board has given all parties ample opportunity to make their views known. SLRG has established without a doubt that the sealed bags and containers used to move the commodity at issue, contaminated dirt, constitute “original shipping containers” within the meaning of the Clean Railroads Act (“CRA”) amendment to the I.C.C. Termination Act (“ICCTA”). As such, the subject transportation falls within the original shipping container exemption under the CRA and federal law therefore preempts the application of local law, the Conejos County Land Use Code (“CCLUC”). Accordingly, SLRG requests that the Board promptly issue a

ruling granting its Petition for a Declaratory Order and finding that ICCTA's provisions preempt the CCLUC.

BACKGROUND AND STATEMENT OF FACTS

Briefly this proceeding involves the construction and operation by SLRG of a truck-to-rail transload facility ("the Facility") in Antonito, Conejos County, CO, to handle contaminated dirt generated by the cleanup of a Department of Energy ("DOE") site located at the Livermore National Laboratory in nearby New Mexico. DOE had contracted with *EnergySolutions* to undertake that work. Initially *EnergySolutions* had trucked the cargo from the remediation site to its disposal site at Clive, UT. However, *EnergySolutions* prefers to truck the cargo to SLRG's Facility at Antonito for transfer to rail cars for movement to Clive. Towards that end, *EnergySolutions* has entered into a rail transportation agreement under 49 U.S.C. 10709 with the Union Pacific Railroad ("UP") for that traffic. Because UP does not serve Antonito directly, *EnergySolutions* arranged with SLRG to transfer the cargo from truck to rail there and to move it to the SLRG/UP interchange at Walsenburg, CO, for the interstate portion of the trip.

EnergySolutions and SLRG had originally sought to begin moving the subject cargo in early 2010. SLRG arranged for a company named Alcon Construction, Inc. ("Alcon"), to provide the transload service at the Facility as SLRG's *agent* and under SLRG's complete control and direction. *EnergySolutions*

and SLRG had begun moving the subject traffic when county officials threatened to enjoin the transload operation in state court. The parties then began a series of on and off settlement discussions that almost resulted in a proposed agreement in late May 2010. However, in the face of strident local opposition, county officials declined to sign the agreement that had been negotiated at length with the participation and apparent support of the county attorney and directed him to go to court to enjoin any continued service.¹ SLRG filed this Petition for a Declaratory Order in response to that litigation.

Upon receipt of SLRG's Petition, the Board issued a decision setting deadlines for SLRG's opening statement, public comments in opposition, and SLRG's reply. The Board requested that the parties focus on issues related to the Clean Railroads Act of 2008, 49 U.S.C. §§ 10501(c)(2), 10908-10910 (the "CRA"), including whether SLRG's containers are original shipping containers under 49 U.S.C. § 10908(e)(1)(H)(i), and whether the soil SLRG plans to transload and transport is subject to the CRA. After SLRG filed its opening statement, settlement discussions briefly resumed and then failed. The Board then issued another decision setting October 12, 2010, as the revised deadline for the public parties to submit their comments and October 27, 2010, for SLRG's reply. In view of the "novel nature" of the issues presented and the inability of individual parties

¹ Case No. 2010C89, The Board of County Commissioners of Conejos County, Colorado v. San Luis & Rio Grande Railroad, Inc., Conejos County Court.

to afford to travel to Washington, the Board scheduled a field hearing for February 17, 2011, in Antonito, Conejos County, CO, directed the public parties to submit any written public comments and exhibits on or before March 1, 2011, and allowed SLRG to reply on March 15. SLRG submits these comments and testimony in response to that decision.

The Hearing

The Board staff conducting the hearing asked SLRG to lead with its presentation, followed by presentations by public bodies, and then comments from the public at large. The undersigned counsel made a brief presentation² followed by a lengthier statement from *EnergySolutions* Senior Vice President Bret Rogers. Another *EnergySolutions* representative, Colin Austin spoke later during the day. Conejos County attorney Steven Atencio followed Mr. Rogers as did one of the County Commissioners.

Conejos County's counsel implored the Board to recognize what he called the "fine line" between what the railroad did and what *EnergySolutions* did. He identified the grounds for the County's denial of *EnergySolutions*' special use application³ which SLRG notes *EnergySolutions* submitted as a matter of good faith and in a spirit of cooperation. Although Mr. Atencio conceded that the issue is "what is a sealed container," he testified that the County does not concede that if

² Attached hereto as Exhibit A.

³ Conejos County submitted the resolution stating the grounds for denial in its filing.

the CRA does not apply preemption is available and that the CRA still applies if the cargo moves in original sealed containers.

County Commissioner Sandoval spoke briefly stating that there is no mitigation plan for clean up in place and there are no contracts in place between SLRG and EnergySolutions. After criticizing SLRG's business practices, he expressed his concern that if the Board finds preemption, there'll be no regulation at all. Finally, Commissioner Sandoval allowed as to how *the railroad* [not EnergySolutions] could always reapply for another land use permit.

The Board staff then opened up the hearing to testimony from the general public.

Approximately 30 public witnesses spoke in opposition expressing their concerns about the safety of the transloading operations, the impairment of the Facility on the value of their homes and adjacent real estate, and the contamination of the water supply in the event of a mishap. Michael Trujillo questioned the safety of the railroad's track structure and bridges presenting pictures of the Line but without indicating that he or others with the community had any sort of technical qualifications. Several witnesses spoke at length about the DOE Litigation over that agency's alleged failure to prepare an environmental impact statement for the remediation of the Los Alamos National Laboratory. One witness, who identified herself as an official of the bi-state authority that owned

the Cumbres & Toltec Scenic Railroad, a steam-operated narrow gauge historic railroad operating from Antonito, CO, to Chalma, NM, decried that railroad's loss of ridership due to the competing passenger excursions that SLRG was conducting. Significantly, virtually none of the witnesses testified that the transloading involved anything other than original shipping containers. Summarizing the public comments, the following points stand out:

1. No notice was given the public, the process was not transparent, there was no mitigation plan or arrangements for first responders in the event of a spill or other incident.
2. There are no [shipping] contracts in place between ES and SLRG.
3. If STB grants preemption finding, there will be a gap in regulation with no agency responsible for regulation.
4. The public expressed significant concerns about railroad's safety practices including track condition, bridge condition, derailments, crossing accidents, and spilled perlite on right of way.
5. SLRG can always reapply for another land use permit.
6. The containers are not original and are not sealed. The bags are permeable, sitting in water, and can break if the outside temperature is below freezing.
7. This matter is not "ripe" for decision because of the DOE Litigation and the lack of any current transportation contracts.
8. NEPA not been followed here.
9. Railroad economic development assertions are questionable as only three jobs would result and they would be jobs for Alcon who is not a local citizen.
10. The Facility would have an adverse effect on adjoining land values.
11. The best mode of transportation would be by truck on a route that avoids the county.
12. Projects like the operation of the Facility disproportionately affect poor minorities like the residents of Conejos County, CO.

All-in-all, the testimony from the public opponents was high on emotion but short on specifics as to the *only* two issues relevant to the Board: (1) whether

SLRG's containers are original shipping containers under 49 U.S.C.

§ 10908(e)(1)(H)(i) and (2) whether the soil SLRG plans to transload and transport is subject to the CRA.

Two public witnesses appeared and testified for the railroad and the project. One was a local economic development official who stressed the railroad's continued presence was important for bringing and keeping job generating industry and commerce. The second was an SLRG employee who testified on his own behalf.

At the conclusion of the hearing, the Board staff announced that it would accept written comments and exhibits from members of the public filed on or before March 1.

Supplemental written comments

Just seven parties submitted supplemental written comments and exhibits. Three were nonprofit groups: Conejos County Clean Water, Inc., ("CCCW"), Concerned Citizens for Nuclear Safety ("CCNS"), and the Rocky Mountain Peace and Justice Center ("RMPJC"). Three were political subdivisions: the Board of Commissioners of Conejos County, CO, the Town of La Veta, CO, and San Miguel County, CO. One individual, Christina Gallegos, filed a one page comment. Most of the nonprofit group comments dwelled on the alleged toxic character of the commodity shipped but without providing any expert scientific or

technical testimony or literature. Several complained about DOE's failure to satisfy NEPA through the preparation of an adequate EIS. Only *one* party, Andrea Guajardo, addressed the critical question of whether the bags and containers used for shipment were "original shipping containers" under the CRA.

SLRG shall address the concerns of each of these seven parties supplemented by verified statements from EnergySolutions' Bret Rogers and SLRG General Manager Matthew Abbey attached as Exhibits B and C hereto.

Conejos County Clean Water (CCCW). This group made five separate written submissions between February 23 and February 27.⁴ Michael Trujillo, Jr., acting in his individual capacity, submitted a three page comment accompanied by numerous pictures of SLRG's track, bridges, culverts, and other structures that were apparently taken by him during an "inspection" of the railroad that he undertook without notice to or consent from the railroad. While his statement addresses in his own words the "condition of the bridges, the irrigation ditch bridges, the materials used for construction, the culverts, railroad crossings, maintenance and wetlands," the statement does not indicate that he has any background or expertise in these matters. involving railroad track, right of way, structures, and bridges. His testimony is irrelevant because it does not address

⁴ In addition to the three discussed at some length here, Javi Guajardo, presumably the child who testified at the hearing, submitted a drawing. CCCW also submitted copies of numerous letters sent to legislators.

either of the paramount issues of interest to the Board, whether the bags and containers used for transportation constitute “original shipping containers” and whether the soil to be transported is subject to the CRA.

In response SLRG offers the reply testimony and qualifications of its General Manager Matthew Abbey at Exhibit C. Mr. Abbey states that SLRG’s track, bridges, and equipment are inspected on a regular basis by the Federal Railroad Administration (“FRA”) which has reported no defects or violations. He notes that track and right of way maintenance is an ongoing endeavor so that inspection of just one segment gives an inaccurate picture of the railroad overall. In any event the railroad meets the FRA’s class two track standard and is capable of handling rail cars weighing up to 286,000 pounds safely. The railroad employs the services of Osmose, a firm well known in the railroad industry for inspecting and repairing bridges, to perform those functions. Likewise, it uses the also well-known railroad contractor, Hulcher Services, to handle derailments and other incidents such as cargo spills. Regarding derailments and crossing accidents, Mr. Abbey testifies that SLRG’s history is typical within the railroad industry. Abbey V.S. at 2, 3, and 5.

Mary Alice Trujillo, appearing on behalf of the CCCW, testified in her own words about “fear-of the unknown, fear of lenient regulation or no regulation at all.” More specifically, she averred that nothing has been done to calm this fear,

more specifically the fear about the cargo contained in the bags and the alleged lack of safety measures taken to protect people from the contents of the bags used for shipping. Among other matters, she alleged that the low level waste shipped does not indicate low level risk, that the commodities shipped here are more dangerous than PCB's and various radionuclides, that CCCW was not initially provided copies of shipping manifests indicating the nature of the cargo, that there are no studies, business plans, or mitigation measures associated with this project, that the standard for classifying waste as low level has changed since 1981 with the result that this low level waste is in the 'super' range of toxicity, that the commodity being shipped includes or consists of "DU" (depleted uranium), and that the transload facility originally contemplated was moved to closer to the San Antonio River in order to use federal stimulus funds more quickly. She attached to her submission what appears to be a power point presentation illustrating these assertions. Again as with Mr. Trujillo's statement, her submission did not address either the paramount issues before the Board or provide any sort of scientific or technical qualifications other than some footnote citations to various websites. In closing, she asserted "[u]ntil NEPA occurs, this plan is premature and not ripe for ruling."

In response, *EnergySolutions* witness Bret Rogers repudiates her allegations. He spends a significant portion of his statement explaining the lengths to which

EnergySolutions, the Department of Energy, and SLRG went to inform local officials and citizens. Rogers VS at 3 and 4. Contrary to her assertions, both DOT and the FRA will be involved in regulating this transportation and federal environmental laws will apply. Regarding risk, Mr. Rogers states that federal regulations govern and require safe management and transportation of low level radioactive waste with more stringent measures applicable to higher risk commodities. This traffic fits within the lowest level risk category (A) as defined by the US Nuclear Regulatory Commission (“NRC”). In fact, he says that the amount of radiation is so low that it poses less of a risk than that of a rail car of coal. Regarding her assertion that DOE’s standard for classifying waste has changed since 1981, he states that NRC’s rule has not changed since first promulgated in 1983. As to her allegations about the commodities shipped, Mr. Rogers adds that the waste contains soil contaminated with depleted uranium at very low concentrations and well within the limits for acceptance at EnergySolutions’ Clyde, UT, facility. Rogers VS at 5, 6, 8, and 11.

CCCW founding board member Andrea Trujillo Guajardo submitted the only statement addressing the paramount original shipping container issue, citing unexplained regulations and websites but without presenting any technical or scientific qualifications for her views. After conceding that neither the statute nor the sparse case law provides any definition of the term “original shipping

container,” she averred that the bags are neither “original” or “sealed.” She reasoned that the certificate of conformance provided by *EnergySolutions* does not require that the bags be impermeable and that *EnergySolutions* representatives have confirmed in local public hearings that the bags are not waterproof. Had Congress intended for original shipping containers to be impermeable, it could have worded the CRA accordingly but it did not do so. She also reasoned that the bags fail the “original shipping container” test because they were designed to be used as liners in conjunction with metal containers rather than by themselves. She claimed that the bags used in a test shipment in December 2009 contained radioactive, hazardous, and toxic waste, that the extensive shipping time allowed for water to seep through this waste and permeate the seams of the bags, that the contaminated water could then migrate into the nearby San Antonio River, and that the bags are susceptible to ripping in extremely cold weather. Ms. Guajardo questioned the “ripeness” of the Board ruling on SLRG’s petition claiming that SLRG did not address whether there are any [shipping] contracts in place.

In response Mr. Rogers notes first that there are executed contracts in place between his company and both UP and SLRG. *Rogers V.S.* at 10. He then refutes any notion that the sealed bags and containers are either permeable or not waterproof. *Rogers V.S.* at 2, 5, 7, 10, and 11.

In Concerned Citizens for Nuclear Safety (CCNS). Joni Arends appeared for CCNS stating that her organization fully participated in the hazardous waste permitting process for a 10-year permit for the Livermore National Laboratory which resulted in a one of the most protective storm water permits in the nation. After noting that the issues here “may not be ripe” as there are no current [shipping] contracts for the proposed transload work, she asserted without explanation that the “CRA exemptions for ‘industrial’ and ‘institutional’ waste do not apply to the [proposed Facility].”⁵ Significantly, and like most commenters, she did not address the original shipping container issue. Ms. Arends included with her presentation excerpts from a 1979 Final EIS for the Los Alamos scientific laboratory, a historical document relating to that facility dated June 1977, a report for potential release sites for the Los Alamos facility dated 1997, and storm water discharge permit application for that facility dated 2007.

In response, Mr. Rogers previously notes that there are executed contracts for the movement of the traffic. Rogers V.S. at 10. Moreover, he describes the cargo to be transported as excavated soil contaminated with very low levels of PCB’s and radioactive materials (including depleted uranium at very low

⁵ Perhaps she meant the CRA original shipping container exemption because she devoted the bulk of her presentation to a long discussion as to why *EnergySolution’s* traffic was either institutional or industrial waste and therefore subject to the CRA regardless of how it moved.

concentrations) along with construction debris such as wood, electrical cable, and masonry. Id. at 11.

The remaining commenters can be summarized briefly. Rocky Mountain Peace and Justice Center submitted a two-page letter alleging that DOE was negligent for approving and funding a site outside Antonito for transferring this waste without notifying the residents and officials in the area and complying with the National Environmental Policy Act. It alluded to the suit filed in federal court against DOE by CCCW and CCNS,⁶ among others, urging that DOE comply with the National Environmental Policy Act. Conejos County's sole submission consisted of a copy of County Resolution # C-2010-47 denying *EnergySolutions'* request for a special use permit. The Town of La Veta wrote the Board a letter expressing its concerns about the subject transportation through the town. Similarly, the San Miguel County Board of Commissioners filed an objection to the transload operation citing "unknown environmental and other impacts" from the transload operation requiring an EIS. It also noted that local firefighters, first responders, and the regional hospital lack the proper gear and training to handle radioactive, hazardous, and toxic waste spills. Finally, Ms. Christina Gallegos

⁶ 10CV02663, Conejos County Clean Water, Inc., Et Al v. U.S. Department of Energy, Et Al, U.S. District Court for the District of Colorado (hereafter "the DOE Litigation")

wrote a letter expressing concern over the potential environmental impact from a train derailment and noting the disproportionate impact on “communities of color.”

In response both Mr. Abbey and Mr. Rogers went to great lengths to describe how their respective companies would address issues such as derailments and cargo spills. Abbey V.S. at 1-2 and Rogers V.S. at 2, 6, and 8.

LEGAL ARGUMENT

As the Board has stated on several occasions, this proceeding involves “novel” issues, (1) whether SLRG’s containers are original shipping containers under 49 U.S.C. § 10908(e)(1)(H)(i), and (2) whether the soil SLRG plans to transload and transport is subject to the CRA. If the sealed containers and bags that EnergySolutions uses to move the contaminated dirt constitute “original shipping containers” under the CRA, they fall outside the coverage of those provisions. For the purposes of finding that preemption exists, containerized contaminated dirt is no different than any other commodities that railroads move. The only remaining inquiry is whether SLRG’s operation of the Facility satisfies the test established in cases such as The City of Alexandria, Virginia-Petition for Declaratory Order, STB Finance Docket No. 35157, STB slip op. served February 17, 2009 (“City of Alexandria”), and Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB FD No. 35057 (STB served Feb. 1, 2008 &

Sept. 26, 2008) (“Coastal Distribution”) as well as the recent case of Borough of Riverdale-Petition for Declaratory Order, STB Finance Docket No. 35299, STB served Aug. 5, 2010 (“Borough of Riverdale”).

Before addressing the merits of this argument, SLRG wishes to address a couple of preliminary matters. Specifically, SLRG notes that the written comments and other documents filed *pro se* by parties to this proceeding are not verified as required by the Board’s Rules of Practice at 49 CFR 1104.4(b). While SLRG could move to strike such statements as noncompliant, it will not do so as these parties are not familiar with Board procedures. Rather SLRG urges the Board to accord them the limited value given unsworn testimony. Moreover, SLRG notes that several of the commenters including Mary Alice Trujillo, Andrea Trujillo Guajardo, Michael Trujillo, and Joni Arends have submitted statements addressing technical matters without any showing of expertise. Again, the Board should treat their testimony the same way it does for other lay opinions on technical matters.

Turning to the merits, all parties to this case can agree that there is no provision in CRA or the ICCTA which defines the term “original shipping container.” SLRG has presented ample evidence of that fact in both the verified statements previously submitted by EnergySolutions’ Bret Rogers and the July 9, 2010, letter from DOE’s Donald Cook to Congressman Salazar attached to

SLRG's Opening Statement filed August 24, 2010. Moreover, the Board's now more than two years-old *interim* regulations⁷ are silent on this point and there is, as yet, no case law under those regulations or the statute. Furthermore, the legislative history does not shed any light as well. However, SLRG attaches as Exhibit D an email from William Richard, chief of staff to former Rep. James Oberstar, the long-time head of the House Committee on Transportation and Infrastructure. Mr. Richard states his understanding that the purpose of this provision was to make clear that if solid waste is in a prepackaged container and it is transferred from a truck to a train that would not trigger the provision. It would only be triggered if the contents of those packages are separately sorted.

SLRG has even reviewed the comments submitted by various parties in response to the Board's rulemaking notice and has found absolutely nothing on the meaning of this term. Nevertheless, some brief discussion of the Board's *interim* regulations is helpful as to whether or not the CCLUC governs SLRG's Facility.

On page 4 of the interim regulations, the Board stated:

“The Clean Railroads Act applies only to solid waste rail transfer facilities. See section 10908(d). A solid waste rail transfer facility is defined as including the portion of a facility: (1) that is owned or operated by or on behalf of a rail carrier; (2) where solid waste is treated as a commodity transported for a charge; (3) where the solid waste is collected, stored, separated, processed, treated, managed, disposed of, or transferred; and (4) *to the extent that solid-waste activity is conducted outside of the original shipping container*. [emphasis supplied]. See

⁷ Solid Waste Rail Transfer Facilities, Docket EP 684 (slip op., STB served Jan. 14, 2009).

section 10908(e)(1)(H)(i). The CRA does not apply to any facility or portion of a facility that does not meet all of these factors. Whether a facility would fall within the state's or the Board's jurisdiction appears to depend upon which of those criteria the facility does not meet. For example, if a facility meets all other criteria but is not owned or operated by or on behalf of a rail carrier, then the Board has no jurisdiction. If, on the other hand, a facility meets all other criteria *but the activity conducted at the facility is limited to transferring solid waste in the original shipping container, then the facility falls under the Board's general jurisdiction, not the Board's jurisdiction under the Clean Railroads Act.*" [emphasis supplied].

Equally telling is the following statement in the Preamble to the *interim* regulations:

"Prior to enactment of the Clean Railroads Act, a solid waste rail transfer facility owned by a rail carrier, in general, came within the Board's jurisdiction as part of transportation by rail carrier. Accordingly, any form of state or local permitting or preclearance (including zoning) that, by its nature, could have been used to deny a railroad its ability to construct and conduct activities involving rail transportation at a solid waste rail transfer facility was *preempted* [emphasis supplied], as were other state laws that had the effect of managing or governing rail transportation. See 49 U.S.C. 10501(b); N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Green Mountain R.R. v. Vermont, 404 F.3d 638, 641-43 (2d Cir. 2005) (Green Mountain)." *Id.* at 2.

Thus it is clear that *if* the cargo moves in its original shipping container, it *exempt* from the CRA and subject to the Board's general jurisdiction as if the commodity were coal, lumber, foodstuffs, or automobiles. Moreover, the result would still be the same regardless of which waste category of section 1155.2 (Definitions) of the *interim* regulations the contaminated dirt falls. So contrary to Conejos County's assertions in its oral remarks at the hearing, CRA does not apply if the cargo moves in original sealed containers.

Whether preemption is available in the absence of the CRA is an issue that no opponent has even addressed. Aside from Conejos County's few remarks at the hearing, no party to this proceeding has presented any evidence or argument challenging SLRG's assertions in its Petition and reiterated in comments filed on August 24 and October 27 that its operation of the Facility meets the Board's requirements for preemption under 49 U.S.C. 10901(b). *See*, discussion, Petition for A Declaratory Order at 9-14, SLRG's Opening Statement at 14-22, and SLRG's Reply Statement at 8-9.

Rather than repeat this very substantial discussion, SLRG will briefly review why the Facility is entitled to preemption from the CCLUC. The starting point for this inquiry is the Board's preemption statute at 49 U.S.C. 10501(b) which provides simply that "that the jurisdiction of the [Surface Transportation] Board over transportation by rail carriers and the remedies provided under [the ICCTA] are exclusive and preempt the remedies provided under Federal or State law." Without belaboring the point, suffice it to say that federal preemption of State or local attempts to interfere with a railroad's common carrier service and obligation is so well recognized and pervasive that one court has observed "it is difficult to image a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than Congress provided in 49 U.S.C. 10501(b). CSX Transp., Inc. v. Georgia Public Service Com'n, 944 F. Supp. 1573, 1581 (N.D. Ga.

1996). In other words, the Board’s jurisdiction over railroads and railroad facilities preempts the application of any inconsistent laws such as the CCLUC. In order for a railroad facility to be able to claim preemption, the Board has held that there are two requirements that must be met. First, the service sought to be regulated or forbidden at the local level must entail transportation and, second, that transportation must be performed under the auspices of a rail carrier. New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway- Construction, Acquisition, and Operation Exemption-In Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op., STB served July 10, 2007 at 9-10.

Unquestionably, both elements of this test are met here. The movement of containerized contaminated dirt in interstate commerce from its origin near Antonito to its destination at Clive, UT, is undoubtedly transportation. Moreover, the ownership, operation, and use of SLRG’s “Facility” at Antonito qualifies for “transportation” under 49 U.S.C. 10102(9) which defines it as “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail,” and “services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property.” The ICCTA defines the term “transportation” broadly to encompass not only rail lines but ancillary facilities used for and services related to

the movement of property by rail, expressly including “receipt, delivery,” “transfer in transit,” “storage,” and “handling” of property. 49 U.S.C. 10102(9). Thus, as the Board has held, “transportation” is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage. *Id.* at 9-10. The second part of the requirement is also met. There is no question that SLRG is a “rail carrier” which is defined as a “person providing transportation for compensation” as SLRG was authorized by the Board to acquire and operate about 149 miles of railroad track back in 2003.⁸

Recent Board precedent provides guidance as to what types of facilities and transload arrangements are or are not entitled to preemption from conflicting state or local laws. *See, e.g.,* City of Alexandria, Coastal Distribution, and Borough of Riverdale, *supra*. In that regard, SLRG very carefully used the contractual arrangements that Norfolk Southern applied in City of Alexandria as the “role model” for the Facility. The Board denied the City’s challenge and held that those arrangements qualified for preemption from local permitting requirements. The commodity involved, ethanol, presented a far more potentially dangerous threat to the public than the contaminated dirt involved here.

⁸ San Luis & Rio Grande Railroad Company–Acquisition and Operation Exemption–Union Pacific Railroad Company, STB Finance Docket No. 34352, decision served July 18, 2003.

In Borough of Riverdale,⁹ the Board identified those arrangements satisfying its criteria for finding preemption:

1. whether the rail carrier owns the transloading facility [**SLRG does**];
2. whether the rail carrier has paid for the construction and operation of the facility [**SLRG did**];
3. whether the rail carrier holds out transloading as part of its service [**SLRG does**]
4. whether the third-party loader is compensated by the carrier or the shipper [**By the carrier**];
5. the degree of control retained by the carrier over the third party [**The carrier controls**]; and
6. and the other terms of the contract between the carrier and the third party [**see explanation in footnote**].¹⁰

⁹ At 5.

¹⁰ Examining the arrangement between SLRG and Alcon, the Board will find as follows. SLRG owns the transload facility. Abbey VS, para. 3. SLRG paid for the construction and operation of the facility. *Id.* SLRG offers the transloading services as part of its rail transportation services. *Id.* Alcon neither owns nor leases the facility and pays no fees or other consideration for the use of the facility and has no right to market the facility or conduct any independent business there. Abbey VS, paras. 3,7, and 8. SLRG compensates Alcon for its transloading services. Abbey VS, para. 8. SLRG is totally in control of the arrangements between it and Alcon. For example, SLRG has the exclusive right to market the facility, contract with shippers, and set rates and charges. Only SLRG can collect fees from customers for the use of this facility. Abbey VS, paras. 3 and 8. Alcon's activities there are totally subject to SLRG's control including over such matters as safety, environmental, security, and operational aspects of the facility, the physical equipment located there, and access to the facility. Alcon does not take any operational directions from the shipper and is not liable to the shipper for damage. Abbey

Similarly, SLRG's operation of the Facility satisfies the Board's test in the City of Alexandria. See, the discussion at pages 20-21 of its Opening Statement filed August 24, 2010.

SLRG's and EnergySolutions' experiences in dealing with Conejos County's Planning Board bear remarkable similarity to those described in Green Mountain Railroad Corporation v. Vermont, 2003 U.S. Dist. LEXIS 23774 (Green Mountain) and Joint Petition for Declaratory Order-Boston And Maine Corporation And Town of Ayer, MA, STB Finance Docket No. 33971, STB served May 1, 2001 ("Town of Ayer").¹¹ Briefly, Green Mountain involved that railroad's efforts to build a salt storage shed and related facilities along its right of way for handling transload traffic. While it initially sought a building permit from the appropriate state agency, it eventually abandoned that effort and built and used

VS, paras. 10-13 and 16. Furthermore, SLRG provides such training as may be required for Alcon employees but Alcon exercises no supervisory control over SLRG employees. Abbey VS, paras. 18 and 19. See, discussion at pages 19 and 20 of SLRG's Opening Statement and Abbey VS, filed August 24, 2010.

¹¹ See also, Friends of the Aquifer, STB Finance Docket No. 33966, STB served Aug. 15, 2001. That case involved efforts by the Burlington Northern Santa Fe Railway Company [now BNSF Railway Company] to construct a locomotive fueling facility in an aquifer located along its mainline at Hauser, ID. After BNSF had tried unsuccessfully for a couple of years to obtain permission from local authorities to construct this facility, the county permitting agency overruled the hearing examiner denials and granted BNSF's requests with certain conditions. In a further attempt to stop the project, local citizens sought a declaratory ruling from the Board to halt the project as unauthorized railroad construction. The Board found that construction of this facility did not constitute construction of a line of railroad under 49 U.S.C. 10901 and could therefore proceed exempt from state and local regulation and without any Board authority.

the facility without waiting for approval. The State then issued and the railroad contested several notices of violation for noncompliance while the railroad continued to build additional facilities to handle cement and other traffic. Among others, the State alleged that the railroad's facility violated a buffer requirement needed to separate the facility from an environmentally sensitive and recreational resource, the Connecticut River.

The U.S. District Court for the District of Vermont granted the railroad's request for summary judgment holding that federal law over railroads preempts any state environmental or land use preclearance laws.¹² As relevant here, the Court ruled that applicable state law was a preclearance permitting requirement, that most zoning ordinances and local land use permit requirements applicable to railroads are preempted under the ICCTA because they interfere with a rail carrier's ability to construct facilities and conduct economic activities, and that such otherwise laudable requirements cannot stand because they have an adverse economic impact on the railroad's ability to expand its business. *Id.* at 10, 12-3,16, and 22. The Court did note, however, that the State is not without remedies as some may be available under federal law. *Id.* at 16-7.

Cited in Green Mountain, the Board's decision in Town of Ayer, involved Guilford Railroad subsidiary Boston & Maine Railroad's efforts to build an

¹² *Aff'd* at 404 F.3d 638 (2d Cir. 2005).

automobile unloading facility in an aquifer. The railroad initially sought construction approval from local authorities but frustration and delays in obtaining approvals as well as the imposition of onerous conditions led it to seek a ruling from the Board that local laws were preempted. Among other assertions, the Town claimed that the facility constituted a nuisance. Id. at 5. In what some might say was a definitive explanation on preemption, the Board ruled that the local authorities could not attempt to enforce federal environmental statutes merely as a pretext to hold up or defeat a railroad's right to construct facilities, the fact that there is no specific environmental remedies at the Board or under state or local laws does not mean there are no environmental remedies under other Federal laws. Id. at 11-13.

Conejos County's attempts to apply the CCLUC to SLRG's operation of the Facility is directly contrary to relevant case law. It represents an undue interference with interstate commerce, it mandates a time-consuming preconstruction permit allowing the local body to delay construction almost indefinitely, and it entails regulation that has been applied in a discretionary and subjective manner. Green Mountain at 642-3, *supra*, and cases cited therein.

This is not to say that SLRG is deaf to community concerns. The Board in Town of Ayer identified several examples of reasonable cooperation by railroads.¹³ These requirements are consistent with what SLRG and *EnergySolutions* have offered in the past in their abortive settlement discussions. SLRG and *EnergySolutions* stand by those prior commitments.

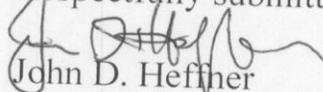
CONCLUSION

SLRG believes that the Board has given all parties ample opportunity to make their views known. There is no doubt that the sealed bags and containers used to move the commodity at issue, contaminated dirt, constitute “original shipping containers” within the meaning of the Clean Railroads Act (“CRA”) amendment to the I.C.C. Termination Act (“ICCTA”). As such, the subject transportation falls within the original shipping container exemption under the CRA and federal law therefore preempts the application of local law, the CCLUC. Accordingly, SLRG requests that the Board promptly issue a ruling granting its

¹³ Examples include conditions requiring railroads to (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.

transportation falls within the original shipping container exemption under the CRA and is not subject to the CRA, and that federal law therefore preempts the application of local law, the CCLUC. Accordingly, SLRG requests that the Board promptly issue a ruling granting its Petition for a Declaratory Order and finding that ICCTA's provisions preempt the CCLUC.

Respectfully submitted,



John D. Heffner
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1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202) 296-3334

Due: March 15, 2011

EXHIBIT A

**JOHN HEFFNER PRESENTATION
STB CONEJOS COUNTY HEARING**

My name is John Heffner and I'm the lawyer representing the San Juan & Rio Grande Railroad before the Federal Surface Transportation Board in these proceedings. I'd like to thank you for coming to this hearing and expressing your views. SLRG is a fellow citizen in the County and wants to be both a good neighbor and a key part of the area's infrastructure.

That said, I want to put what has been said here in the proper context. The issue before the Board is whether the Clean Railroads Act amendment to the ICC Termination Act applies here and that inquiry in turn depends solely on the question of whether the sealed bags and containers used to transport the contaminated dirt here constitute "original shipping containers" under that Act. If they are original shipping containers as we contend that ends the inquiry. I think even the County would concede that federal transportation law then preempts state and local laws including local permitting requirements and the cargo would be treated just like any other commodity being shipped by rail. Unfortunately, the law fails to define the term "original shipping container" but I will give you some insight into what I think Congress had in mind in enacting this provision. However, none of the public comments have shed any light on that definition either. No member of the public submitting oral or written comments to date

appears to have any scientific or technical, let alone legal or legislative, expertise on this crucial issue as well as on the definition of “contaminated dirt” or the type of bags or containers used for this transportation.

As to the legislative history...this provision was authored by New Jersey’s Senator Frank Lautenburg to address a very specific problem being experienced in certain northeastern States particularly New Jersey. He wanted to address both of the two following situations. First, some shippers and processors of waste matter, particularly hazardous waste, municipal solid waste, and construction and demolition debris, wanted to avoid onerous and frequently beneficial local regulation applicable to transportation of these commodities by trying to masquerade as common carrier railroads. In other words, they would attempt to transform a rail siding or a rail yard at their facility into a full scale railroad immune to local laws that would otherwise apply by seeking STB operating authority. In some cases I should note that the facilities were owned and operated by companies affiliated with the Mafia. The second situation that Senator Lautenburg wanted to address involved some egregious trash storage facilities operated by a couple of New Jersey shortline railroads notably the NYS&W where piles of debris that were inflammable and toxic were located near drinking water, power lines, etc. I sincerely doubt that Sen. Lautenburg had the situation here in Conejos County involving the SL&RG in mind when he wrote this amendment.

I would like to close by reminding you that SL&RG is not the “rouge” railroad some have suggested it is. It is a safe, well run, small business dedicated to serving this community. It represents jobs, industrial development, and tax revenues. I should also note that railroad transportation is not only safer than truck it is the *only* form of transportation that is “green”, environmentally friendly, energy saving, and low cost. Thank you for your attention.

EXHIBIT B



Sworn Statement

March 14, 2011

TS11-0004

John D. Heffner via Email (j.heffner@verizon.net)

John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006

Subject: Sworn Statement in Response to Public Comments Submitted to the Surface Transportation Board

Dear Mr. Heffner,

EnergySolutions has been asked to provide responses to the public comments that were submitted in conjunction with the public meeting held by the Surface Transportation Board (STB) in Conejos County, Colorado on February 17, 2011. The following sworn statement is being provided in addition to the oral public comments I made during the meeting.

I, Bret Rogers, am the Sr. Vice President of our Technical Services division at EnergySolutions. EnergySolutions mission is to protect the public and environment by managing radioactive waste from various contaminated sites throughout the country and providing safe disposal of the waste at our licensed disposal facility in Clive, Utah. I have been employed by EnergySolutions since 1999. My current responsibilities include supporting our customers with waste management services such as waste characterization, packaging, transportation, treatment, and disposal. I have a Bachelor of Science degree in Physics and a Master of Science degree in Environmental Engineering from the University of Utah.

Key Points to Consider

EnergySolutions provided comments during the STB public meeting on February 17, 2011. In addition, EnergySolutions has also provided extensive comments submitted as part of the public record via the previous SLRG filings. Below are the keys points that were presented during the meeting that also clarify the main points raised by the other public comments.

- Containers are offered for transportation in compliance with all application U.S. Department of Transportation (DOT) regulations and remain in transportation until reaching the final destination at the Clive, Utah disposal facility.

- The DOT regulations have been promulgated to ensure the safe packaging and transportation of hazardous materials from origin to destination. These shipments are in full compliance with DOT regulations including transferring containers from truck to rail conveyances at the San Luis & Rio Grande Railroad (SLRG) transload facility in Conejos County. The containers are being shipped to the Clive disposal facility by highway today in various weather conditions and remain in full compliance with DOT regulations.
- Containers are sealed prior to shipment at the point of origin and not opened at any time during transportation until reaching the Clive, Utah disposal facility. The containers are DOT compliant and are either rigid metal containers (i.e., intermodals) or soft-sided containers consisting of a dual layering of woven and coated polypropylene. The soft-sided containers are water resistant. These containers have been used for transporting hazardous materials for over 20 years. The containers are designed to not allow contamination on the external surfaces of the container.
- The regulations require anyone involved with the transportation of hazardous materials to have emergency response procedures in place in the event of a spill or leak. In fact, if a container were to be breached or opened during transportation this would result in a non-compliant situation with DOT regulations. All parties involved with the container transfer facility have the required emergency response plans.
- Colorado State Patrol and HAZMAT officials are trained and prepared to respond in the event of an accident involving hazardous materials. These individuals have been present during public meetings and have provided information about their responsibilities in the event of a HAZMAT incident.
- SLRG will be transferring shipping containers (not bulk unpackaged waste) from truck to rail conveyances.
- *EnergySolutions* and the SLRG Railroad have made every attempt to address community concerns for over a year. A Settlement Agreement was developed over several meetings with Conejos County officials and agreed to in principle but was subsequently not approved, two land use permit applications were submitted at the community's request by *EnergySolutions* and subsequently not approved, and a task force was organized by Congressman Salazar to develop a workable solution but was not successful in accomplishing this objective after several weeks of meetings in Conejos County. *EnergySolutions* remains committed to work with the community in addressing concerns.
- Shipping by rail reduces the transportation risk due to lower incident rates shipping by rail versus highway truck shipments (Source: U.S. DOT Pipeline and Hazardous Materials Safety Administration 2008).

EnergySolutions began shipping to the SLRG truck-to-rail transload facility near the end of 2009. A few shipments were made prior to community officials expressing concern regarding the operation. *EnergySolutions* chose to stop operations in order to address the community concerns. No shipments have been made from the truck-to-rail transload facility since the operation was put on hold.

EnergySolutions, SLRG, and the DOE have met several times over the last year with the local community and Conejos County officials. Open House meetings have been organized by EnergySolutions to provide additional information about the waste being shipped in containers at the truck-to-transload facility. EnergySolutions has also been involved with several public and task force meetings in an attempt to resolve concerns and help to educate the local community regarding the transportation activities.

During the first quarter of 2010, Conejos County officials insisted that EnergySolutions apply for a Special Use Review Land Use Permit to use the transload facility. The Special Use Review process, however, was not available since the County had placed a moratorium on the Special Use Review process until the end of May 2010. In addition, EnergySolutions' position is that the Special Use Permit process did not apply as discussed in more detail below.

SLRG contends that the railroad has the right under Federal law to operate the transload facility and that a Land Use Permit is not required. Due to the opposing positions regarding the authorization to operate the transload facility and in an effort to avoid the County entering into litigation, all parties agreed to negotiate in good faith a Settlement Agreement.

Over the course of several weeks, EnergySolutions, SLRG, and County officials held several meetings to discuss the conditions of the Settlement Agreement. Although the Settlement Agreement was not required due to the Railroad's authorization to operate the transload facility, the process permitted the addressing of public issues including those of the local community. Some of these conditions included:

- Development Fee per ton shipped through the transload facility
- Open book access for County to review operations
- Commitment to specific process and operational controls
- Community and agency training
- Pre- and Post-Operational Environmental baseline verification
- Continued public involvement and outreach programs

During good faith negotiations, SLRG and EnergySolutions began to implement the agreed upon conditions in order to support shipments that would resume by the end of May 2010. The County commissioners had previously authorized the County attorney to enter in to negotiations with the railroad and EnergySolutions which resulted in the Settlement Agreement. The County commissioners were also in attendance during the Settlement Agreement negotiations. During a conference call with the County commissioners on May 14, 2010, the County attorney informed EnergySolutions that they had come to an "agreement in principle" regarding the Settlement Agreement.

On May 20, 2010, a public meeting was held to brief the public of the Settlement Agreement and to put on public record the County Commissioner's approval of the agreement. The attorney representing the County, who was also part of the Settlement Agreement negotiations, detailed the background on how the Settlement Agreement approach was proposed and the basis for the

county deciding to enter into negotiations with EnergySolutions and the railroad. The county attorney also described the potential cost impacts of litigation as well as the likelihood of overturning the railroad's position. The details of the Settlement Agreement were presented by the County attorney during the public meeting. In a surprising turn of events, the County commissioners, however, voted against approving the terms and conditions of the Settlement Agreement. Additionally, the County commissioners voted to file an injunction against the railroad to prevent the operation of the transload facility.

During the following weeks, EnergySolutions continued to transport the waste from the DOE LANL site to the Clive disposal facility by truck through Colorado using the same DOT compliant packages. On August 5, 2010, Colorado Congressman John Salazar held a public meeting in Antonito, CO where he organized a task force consisting of key stakeholders in an effort to find a workable solution.

The task force met each week for several weeks discussing options on how to move forward with transload operations and addressing concerns of the local community. On September 2, 2010, EnergySolutions agreed to apply for a Special Use Review Land Use Permit at the request of the local key stakeholders represented in the task force meetings. EnergySolutions submitted the permit application on September 9, 2010 and documented the following in the application:

EnergySolutions is submitting this application, in accordance with the offer to Congressman Salazar's task force concerning use of the proposed transload facility, in order to use the Conejos County Land Use Special Use Review process to solicit / facilitate public comment. EnergySolutions contends that the transload facility is a shipping operation and as such if permitted under the jurisdiction of Conejos County should be permitted under the Administrative Review process. EnergySolutions understands that it is Conejos County's contention that the proposed operation is a Solid Waste Transfer facility and would therefore be subject to permitting under the Special Use Review process. EnergySolutions does not waive, release, or otherwise relinquish any land use right or other legal right that EnergySolutions may already have or may obtain. San Luis & Rio Grande Railroad Company (the "Railroad") delivered to the County a legal "Opinion Letter" explaining that federal law preempts local land use ordinances and allows the Railroad to conduct transloading operations at the site without consent or permits from the County. EnergySolutions does not waive its right to accept the Railroad's services in order to meet its contractual obligations. However, EnergySolutions files this Application because (a) EnergySolutions prefers to work cooperatively with local communities; (b) EnergySolutions prefers to conduct the transloading operations itself; and (c) EnergySolutions believes transloading operations managed by a direct, cooperative relationship between the County and EnergySolutions is in the best interest of EnergySolutions and the County.

To this end, EnergySolutions proposes a set of conditions, concessions that it feels addresses the concerns that the officials and public of Conejos County have raised (Attachment A). Many of these are concessions that would not otherwise be offered / required under local or federal permits or authorizations.

EnergySolutions permit application was deemed complete by the Conejos County Land Use Administrator on September 9, 2010. A public meeting with the Conejos County Planning Commission was subsequently held on September 29, 2010. During the meeting, the Planning Commission voted to recommend that the County Commissioners deny approval of the application. The Planning Commission did not provide any justification for their recommendation to deny the permit application nor did they provide any information regarding which part of the Code was not satisfied with the permit application. EnergySolutions has requested that the Planning Commission provide written justification for their recommendation to deny the application.

The County Commissioners denied the application during a public meeting held on November 4, 2010. EnergySolutions remains committed to various conditions that it offered as part of the settlement process and as part of the land use permit application. These undertakings could include such things as holding regular meetings with the public, providing additional training for the local community first responders, sharing information about the waste projects, listening to safety concerns, and appropriate mitigation measures.

Description of the Radioactive Waste

EnergySolutions is contracted by the DOE to provide packaging, transportation, and disposal services for Los Alamos National Laboratory (LANL) located in Los Alamos, New Mexico. LANL is working under a Consent Order issued by the State of New Mexico to restore several contaminated areas by 2015. Waste generated as a result of these restoration activities includes primarily contaminated soil and debris as illustrated in Figure 1. As shown in the figure, onsite personnel wear standard industrial safety clothes such as steel toed shoes, hard hats, and safety glasses when loading the contaminated dirt into the containers.



Figure 1. Excavated Soil from Remediation Activities at LANL

The radioactive waste is characterized to determine the radionuclide concentrations to ensure compliance with all applicable U.S. Department of Transportation (DOT) regulations prior to shipment. *EnergySolutions* evaluates the characterization information during the preliminary acceptance process to ensure compliance with its Radioactive Material License and Waste Acceptance Criteria.

The cargo is considered 'in transit' during its journey from LANL to its final destination in Clive, UT. The transfer from one mode of transportation to another while in transit is a common commercial practice. During this transloading operation the waste packages are never stored or staged on the ground and they do not come in contact with the ground. In addition, the containers are not opened until reaching its final destination at the disposal facility in Clive, Utah.

The materials received and handled at this site are packaged, inspected and transported under rigorous controls established by applicable state and federal regulations in order to assure the safety of personnel and the environment. The containers are designed, constructed, tested, and used to comply with the U.S. Department of Transportation (DOT) requirements. Specifically, these containers are designed and constructed to prevent the release of waste material during transportation.

Upon arrival at the transload facility, the original shipping containers are then directly loaded from the truck into railcars. The railcars are equipped with a hard fiberglass lid which is secured after the containers are loaded from the truck into the railcar. At no time are the original shipping containers opened. The railcar is then billed to the railroad for delivery to the Clive, Utah disposal facility. The typical amount of time required to safely transfer a truck load of waste packages into a rail car is on the order to 15 to 20 minutes.

The contained materials are comprised predominantly of soils with lesser quantities of intermingled construction debris such as wood, electrical cable, metals and masonry. They are lightly contaminated with very low levels of PCB's and radioactive materials. There are no liquids or gases present and the materials are neither explosive nor flammable. A typical railcar load of coal contains more radioactive material than a railcar load of this material. The low levels of PCB contaminants will not dissolve in water and do not readily evaporate in air due to the very low vapor pressure of this material. In the highly unlikely event that the integrity of a container is breached, spilled materials can be stabilized in place and easily retrieved. Any potential environmental impact would be extremely low and confined to the immediate area of the spill. *EnergySolutions* maintains the capability to mobilize trained personnel that possess the training and equipment necessary to retrieve this material and to fully remediate the affected area of all resultant contaminants.

EnergySolutions is limited by its license to only accept radioactive waste that is defined as Class A Low-Level Radioactive Waste (LLRW). The U.S. Nuclear Regulatory Commission (NRC) developed four categories or classes of radioactive waste that are defined in 10 CFR Part 61. The NRC waste classification system includes Class A, Class B, Class C, and Greater than Class C LLRW. Class A waste contains the least radioactive concentrations and is 100 times less

radioactive than Class C waste for several radionuclides. The waste being shipped to EnergySolutions disposal facility from LANL is significantly less than the Class A concentration limits. In fact, most of the shipments that have been trucked by highway to the Clive disposal facility through Colorado have been below DOT threshold limits and have been manifested as non-DOT regulated waste (refer to Attachment 1).

Original Sealed DOT Compliant Shipping Containers

EnergySolutions provides containers to LANL for packaging the soil and debris. Figure 2 illustrates the contaminated soil and debris being placed into containers at the LANL project site. These containers are designed, constructed, tested, and used to comply with DOT regulations for shipping radioactive waste in accordance with 49 CFR 173. Specifically, these containers must be designed and constructed to prevent the release of waste material during transportation. Attachment 2 provides the certification by the container vendor that the container complies with the packaging requirements and specifications prescribed in 49 CFR 173. These containers are manufactured with a coated and woven polypropylene fabric and are capable of holding up to 14,000 pounds of waste material. The containers are water resistant and are designed to withstand wind or rain during the normal course of transportation.

Each container is sealed after the waste is packaged and is not opened until reaching its final destination at the disposal facility in Clive, Utah. Each shipment is certified by a qualified shipper to comply with applicable DOT regulations. These containers have been and are



Figure 2. Loading of Contaminated Soil into Containers at LANL

currently being used by remediation contractors at other site restoration projects throughout the country to package and ship radioactive waste to the Clive disposal facility. Figure 3 illustrates a loaded bag being staged at the LANL site for shipment to the Clive disposal facility. Other DOT compliant containers such as intermodals could also be used since they are loaded at the project site and then sealed prior to transportation from origin (i.e., the LANL project site) to final

destination (i.e., the Clive disposal site). At no time during transit are the containers re-opened. To the point, DOT regulations require the original shipping container to remain sealed from origin to destination in order to avoid the waste being exposed to the environment at any time.



Figure 3. DOT Compliant Containers Awaiting Transportation at LANL

U.S. Department of Transportation Regulations

The DOT hazardous material regulations have been promulgated to protect the public and environment during transportation activities. The existing regulations establish requirements that recognize the risks presented by the specific materials being shipped. These rules and regulations bound the risks for each material type, provide for controlled response to any incident involving the specific material, and negate the need to re-address transportation risks associated with individual shipments or shipping campaigns for material covered by the regulation. Therefore, compliance with the existing regulations provides the basis of federal rights to interstate commerce. Shippers and carriers must comply with the DOT regulations when shipping radioactive waste in accordance with Title 49 of the Code of Federal Regulations (CFR). These requirements provide standards for packages and transportation carriers to limit the risk to the public and environment.

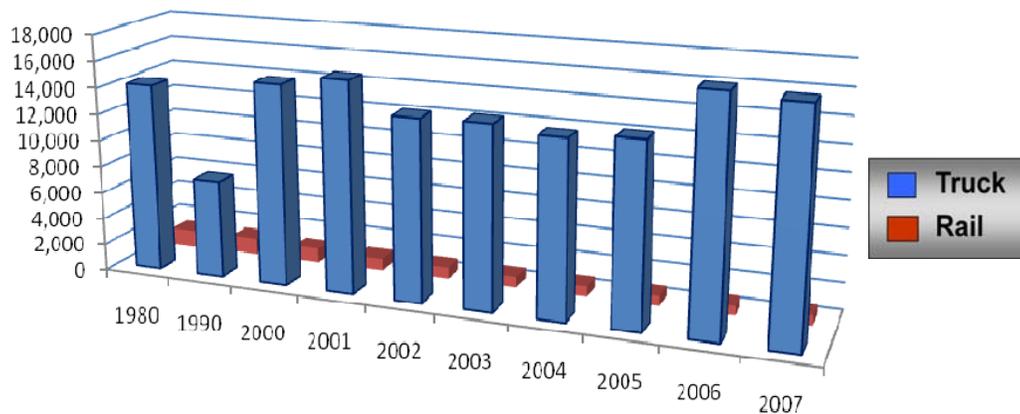
EnergySolutions contends that compliance with DOT regulations ensures the safety of the public and the environment during transportation of the sealed containers from LANL to its Clive disposal facility and that the transload operation is part of the transportation activity. In addition, DOE maintains several Orders (i.e., regulations) that govern the safe and compliant management of radioactive waste generated at DOE facilities. The transload facility is not used as a storage facility and the waste is not removed from the sealed container at any time. The same original shipping containers can and have been trucked by highway from the LANL project site to the Clive disposal facility in full compliance with DOT.

The following information details the packaging and transportation operation specifically for the LANL remediation project and the truck-to-rail transload facility located in Conejos County, Colorado.

DOE is the generator of record for the waste material being shipped from the DOE LANL site in Los Alamos, New Mexico. DOE's onsite contractor is responsible to characterize the excavated waste material and prepare it for packaging. Once the material is packaged into shipping containers that comply with all applicable DOT regulations, the container is closed and sealed to prevent release of the waste material until the waste is received at the disposal facility in Clive, Utah. Onsite personnel then inspect and survey the containers with radiation detection instruments to ensure compliance with DOT shipping requirements. The containers are then loaded onto a truck trailer to be shipped to the transload facility in Conejos County, Colorado. The original shipping containers are not re-opened at any time during transportation including at the transload facility.

Upon arrival at the transload facility, the original shipping containers are then directly loaded from the truck into railcars. The railcars are equipped with a hard fiberglass lid which is secured after the containers are loaded from the truck into the railcar. At no time are the original shipping containers opened. The railcar is then billed to the railroad for delivery to the Clive, Utah disposal facility.

Simply transloading the sealed containers from a flatbed truck into a lidded gondola railcar does not increase the transportation risk. In fact, shipping by rail reduces the transportation risk due to the lower incident rates shipping by rail versus truck as supported by the graph in Figure 4.



(Source: U.S. DOT Pipeline and Hazardous Materials Safety Administration 2008)

Figure 4. Highway Trucking versus Railroad Hazmat Transportation Incidents

EnergySolutions licensed disposal facility is served by the Union Pacific Railroad. The disposal facility is equipped with over 10 miles of onsite rail track to facilitate switching and management of railcars. EnergySolutions has been receiving radioactive soil and debris since 1988 and

receives over 70 percent of this material by rail due to the significant safety and cost advantages of rail transportation.

At the disposal facility, the railcars are emptied in a state-of-the-art railcar rotary dumping facility. The containers are opened, sampled, and then loaded onto large dump trucks and transported to the disposal embankment. The soil and debris are emptied from the dump truck onto the disposal embankment and then compacted with heavy equipment to meet compaction requirements.

The current DOE Orders and DOT regulations govern the safe and compliant management of the waste shipments to protect the public and the environment. Until *EnergySolutions* decides to resume transloading operations at the truck-to-rail transload facility under the Railroad's authorization, the waste shipments will continue to be trucked through Colorado to its Clive disposal facility in Utah. *EnergySolutions* maintains that a much safer transportation option exists by transloading the waste shipments from truck to rail at the transload facility in Conejos County, Colorado.

Before closing, I want to address very specifically some of the allegations made by members of the public and to show the STB that they are not true.

No notice was given the public, the process was not transparent. As shown in my verified statement, *EnergySolutions* made every effort to keep the public informed and involved in connection with the construction and operation of the facility. *See*, pages 2-4.

There are no mitigation plans or other arrangements for first responders in the event of a spill or other incident. Again, my statement shows this statement to be false. *See*, pages 2, 6, and 8.

There are no shipping contracts in place between ES and SLRG. False. There is an executed agreement between SLRG and *EnergySolutions* for this traffic as well as one between my company and the Union Pacific Railroad. As soon as the STB rules that federal law preempts the CCLUC, we will be ready to ship.

If the STB finds that preemption exists, there will be a gap in regulation with no agency responsible for regulation. False. Different federal agencies will be involved in regulating this transportation. The United States Department of Transportation is heavily involved in regulating various facets of the transportation and the Federal Railroad Administration is the sole agency responsible for safe operations on the railroad. Also federal environmental laws apply. *See* pages 1, 2, 5-9.

SLRG (or *EnergySolutions*) can always apply for another land use permit. My statement details my company's experiences in trying to obtain a land use permit even though we do not believe that we were required to obtain one. *See*, pages 4-5. However, the local permitting process has given me no confidence that we would be successful on the second or even the tenth time.

The containers are not original and are not sealed; the bags are permeable, sitting in water, and can break if outside temperature falls below freezing. My statement discusses these allegations

at length at pages 2, 5, and 7. The containers are designed and constructed to prevent the release of contamination during transportation. The containers would not comply with DOT regulations if they leaked radioactive material.

Low level waste does not mean low level risk. The federal regulations govern the safe management and transportation of low-level radioactive waste. The higher the hazard and subsequent risk, the more stringent the federal requirements become in managing and transporting the waste. The proposed waste to be transferred in containers from truck-to-rail at the SLRG facility are the lowest risk level (Class A) defined by the NRC. In fact, most shipments made from the LANL site during the previous shipping campaign were not even regulated by the DOT due to the extremely low radioactive concentrations in the waste.

DOE's standard for classifying waste has changed since 1981 with the result that low level waste is now in the 'super' range of toxicity. This statement is false. The NRC promulgated rules to classify waste that have not changed since the rule was first enacted in 1983.

The commodity shipped consists of "DU" (depleted uranium). The waste contains soil contaminated with depleted uranium at very low concentrations and well within the regulatory limits for acceptance at EnergySolutions Clive disposal facility.

The bags are not "original shipping containers" because they were originally designed to be used as liners in conjunction with metal containers rather than by themselves. This statement is false. The containers comply with DOT regulations and have been designed and constructed to ship radioactive waste. EnergySolutions has received thousands of these containers at our disposal facility in full compliance with DOT regulations.

The commodities shipped are "industrial" or "institutional" waste. The commodities are excavated soil that have been contaminated with very low levels of PCB's and radioactive materials along with construction debris such as wood, electrical cable, and masonry. There are no liquids or gases present and the materials are neither explosive nor flammable. See pages 5-6.

EnergySolutions is an internationally recognized nuclear waste management services company that has built its reputation on the safe and compliant cleanup of several commercial and government sites. Our safety and compliance record is the foundation of the past, current, and future success of our company.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed On: March 14, 2011



Bret Rogers
Sr. Vice President
Technical Services

**Attachment 1
Shipping Paper for Waste Shipment
"NON-REGULATED WASTE"**

FORM 540 UNIFORM LOW-LEVEL RADIOACTIVE WASTE MANIFEST SHIPPING PAPER		EnergySolutions, LLC 5. SHIPPER - NAME AND FACILITY LANS, LLC for USDOE c/o TerraStarPMC PO Box 1683 MSJ585 Los Alamos, NM 87545		SHIPPER I.D. NUMBER 81801 <input type="checkbox"/> COLLECTOR <input type="checkbox"/> PROCESSOR		7. FORM 540 AND 540A PAGE 1 OF 1 PAGE(S) FORM 541 AND 541A 1 PAGE(S) FORM 542 AND 542A None PAGE(S) ADDITIONAL INFORMATION None PAGE(S)		8. MANIFEST NUMBER (Use this number on all continuation pages) 8045-02-0116									
1. EMERGENCY TELEPHONE NUMBER (505)667-4211 (Include Area Code)		Utah Generator Site Access Permit No. 1005006060 SHIPMENT NUMBER 81801		<input checked="" type="checkbox"/> GENERATOR TYPE (Specify) 0		9. CONSIGNEE - Name and Facility EnergySolutions, LLC Clive Disposal Site Interstate 80, Exit 49 Clive, UT 84029		CONTACT Transportation Compliance TELEPHONE (435)884-0155 DATE 10/21/10									
ORGANIZATION EMAR		CONTACT Tanner Amin		TELEPHONE NUMBER (305) 231-2824		SIGNATURE - Authorized consignee acknowledging waste receipt <i>[Signature]</i>		DATE 10/21/10									
2. IS THIS AN "EXCLUSIVE USE" SHIPMENT? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		3. TOTAL NUMBER OF PACKAGES IDENTIFIED ON THIS MANIFEST 1		6. CARRIER - Name and Address Specialty Transport Inc. 2530 Mitchell Street Knoxville, TN 37817		EPA I.D. NUMBER TNR000911247		SHIPPING DATE 10-19-10									
4. DOES EPA REGULATED WASTE REQUIRING A MANIFEST ACCOMPANY THIS SHIPMENT? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		EPA MANIFEST NUMBER NA		CONTACT Dave Pemberton		TELEPHONE (885)524-9592		AUTHORIZED SIGNATURE <i>[Signature]</i>									
11. U.S. DEPARTMENT OF TRANSPORTATION DESCRIPTION (Including proper shipping name, hazard class, UN ID number, and any additional information)		12. DOT LABEL "RADIOACTIVE"		13. TRANSPORT INDEX		14. PHYSICAL AND CHEMICAL FORM		15. INDIVIDUAL RADIONUCLIDES		16. TOTAL PACKAGE ACTIVITY MBq mCi		17. LSA/SCO CLASS		18. TOTAL WEIGHT OR VOLUME (Use appropriate units)		19. IDENTIFICATION NUMBER OF PACKAGE	
NON-REGULATED WASTE		NA		NA		Solid OXIDE		Am-241 Ce-137 H-3 Pu-238 Pu-239 Pu-241 Sr-90 U-233 U-234 U-235 U-238		1.7801E+01 4.8110E-01		NA		13234 Kgs; 19.42 M3		L10215484 GFLU000108	
FOR CONSIGNEE USE ONLY <input type="checkbox"/> Record Waste Description Inadequate <input type="checkbox"/> Contamination or Leakage Detected <input type="checkbox"/> Unexpected Exposure Rates Detected <input type="checkbox"/> Labels, Markings, etc. Inadequate <input type="checkbox"/> Container Integrity Inadequate <input checked="" type="checkbox"/> Other <input checked="" type="checkbox"/> No Violations Detected on this Shipment				20. TERMS AND CONDITIONS A. HAZARDOUS MATERIALS: Generator represents & warrants that Waste Material is (or is not) a hazardous waste as defined in 40 CFR 261. Where the material is a hazardous waste, this shipment is also accompanied by a separate and completed hazardous waste manifest, along with the appropriate land-disposal restriction notice and/or certification as required by 40 CFR 268.1. B. TITLE: Upon acceptance at the disposal site by EnergySolutions, LLC, and all appropriate regulatory authorities, title to the Waste Material which conforms to Generator's representations herein shall thereupon transfer from Generator and be vested in EnergySolutions, LLC. C. WASTE MATERIAL: Generator represents and warrants that all data set forth in this (UNIFORM LOW-LEVEL RADIOACTIVE WASTE MANIFEST) are true and correct in all respects and in accordance with all applicable governmental laws, rules, regulations and EnergySolutions LLC's facility license. D. INDEMNIFICATION: Generator agrees to indemnify EnergySolutions, LLC, its officers, employees and agents against all losses and liability whatsoever if such losses or liability results from the failure of the Waste Material to conform in all material respects to the data supplied on the (UNIFORM LOW-LEVEL RADIOACTIVE WASTE MANIFEST,) or if this shipment fails to meet the standards prescribed by the Department of Transportation or any governmental agency having jurisdiction over such matters.													

FORM 540 (03-08)



P.O. Box 8069
 Clinton, LA 70722
 (800) 272 2832 Toll free
 (225) 683 8602 Local
 (225) 683 8711 Fax

Certificate Of Conformance
IP-1 Packaging

www.pactecinc.com

Date: November 6, 2009

PacTec Incorporated certifies that the Flexible Packaging System(s) being supplied to **Energy Solutions Utah** has been evaluated as meeting the packaging requirements as specified in Title 49, *Code of Federal Regulations* (CFR), Part 173.410, "General design requirements" and Industrial Packaging Type 1 (IP-1), Part 173.411, *Industrial Packagings*, section (a), *General*, and section (b)(1), *Industrial packaging certification and tests*; when loaded in accordance to PacTec loading instructions and used in the intended manner.

Contract/PO Number: 008758 Work Order #: 48435

<u>Item Number(s):</u>	<u>Quantity</u>
LP855-IP1	279

The Flexible Packaging System(s) being furnished is of good quality, as pursuant to industry standard manufacturing practices for Flexible Packaging Systems, including the materials / components used in manufacturing.

NOTE! This container is flexible packaging. The internal load and shifting of contents needs to be considered and taken into account by the shipper during transportation. If testing is conducted a uniformly distributed load is used.

Company Official: 
 Hank Spolar - VP Quality Assurance

Date: 11/6/09

EXHIBIT C

VERIFIED STATEMENT OF
MATHEW ABBEY

Mathew Abbey, being duly sworn, deposes and states as follows:

My name is Mathew Abbey. I appear here in my role as the General Manager of the San Luis & Rio Grande Railroad (SLRG”), the Petitioner in this request for a declaratory order proceeding. I have previously testified in this matter. Counsel for the railroad has asked me to respond directly to certain inaccurate assertions made in the recent oral statements and written submissions from members of the public in Conejos County. I will proceed by identifying an assertion followed by my response.

Allegation: There is no mitigation plan in place to clean up any spills.

Reality: SLRG has in place an Emergency Response Plan (ERP) that more than meets the needs of this shipment and this class of material. Furthermore, SLRG, through its parent company, maintains an open contract with Hulcher Services, a well-known and respected firm commonly used by the railroad industry to handle clean ups from derailments and cargo spills, to assist with rapid, heavy cleanup should that type of service be required. The ERP and our relationship with Hulcher were both discussed in more than one open meeting as well as during our attempts at negotiation.

Allegation: There is no arrangement with First Responders.

Reality: The first responders to a dirt spill will be the railroad operating employees, all of whom are trained according to USDOT Hazardous Material Handling standards for railroads. Emergency Services would be contacted only if there is an immediate threat to life. Our standing arrangements with first responders are more than sufficient for any dirt release related to this shipment.

Allegation:

There are problems with the track, bridges, culverts, derailments, crossing accidents, etc.

Reality:

Regarding the submittal by Conejos County Clean Water, Inc., that group provided photographic and text testimony about the condition of some SLRG bridge structures in Conejos County, CO, their material is totally irrelevant to the questions at hand. That issue simply is whether the SuperSacks constitute original shipping containers under the law and whether the County can interfere with interstate commerce.

Starting with Michael A Trujillo Sr., author of the bridge document. He is on the record at the STB public comment meeting as not being a bridge expert, not experienced in railroads or bridges, but instead is a building inspector of some 7 years. His testimony should be discounted given his lack of expertise in this area. Moreover, SLRG notes that the railroad has given no permission, expressed or implied, for him to trespass on the railroad's property for taking these pictures.

For the record, SLRG notes that it engages a well-known railroad bridge inspection company [Osmose] to perform periodic inspection of our bridges. Through the use of a contactor that is also a repair firm, we enjoy a margin of safety enabled through the separation of operations and inspection. Our bridges and track structure are also inspected at regular intervals by the Federal Railroad Administration (FRA), part of the US Department of Transportation. Our bridges and track are capable of handling 286,000 pound loads and our track meets FRA's Class 2 track standards.

As the Board knows, routine railroad track and right of way maintenance is an ongoing endeavor. As soon as one segment is rehabilitated, it is time to start work on the next segment. This cycle never ends whether on a short line or a class I carrier. Thus a picture of a small segment of a railroad gives a misleading picture.

Regarding derailments and crossing accidents, I can state with comfort that SLRG's history is typical within the industry. We have discussed this issue at length with many members of the public in Conejos County. I should note that in all cases that the driver of the vehicle was found to be at fault.

Allegation:

SLRG doesn't care about the community or the tracks because there is perlite on the right-of-way.

Reality, Pearlite:

As stated in my previous statements, this area has been used as a transload, bulk-load, railroad operations and maintenance facility for the past 100 years. Pearlite is a harmless mineral used in the production of acoustic ceiling tiles, wallboard, and related products. It is mined in northern New Mexico and transloaded into hopper cars on the SLRG, at a location immediately adjacent to the site currently under discussion. The pearlite plant has the responsibility for cleaning and preparing their cars. During this cleaning process, small amounts of pearlite have been released onto the tracks. The cleaning, site maintenance, and any release are the sole responsibility of the pearlite plant and its contractors. The plant is the largest private employer in Antonito.

Reality, Employment:

In fact, SLRG cares deeply about the community. SLRG is based in Alamosa County but its employee base from Conejos County is unusually high.

Reality, Tourism:

SLRG, through its Rio Grande Scenic RR (RGSR) excursion company, works to bring thousands of people to Conejos County and Antonito in particular each year. A quick comparison between any RGSR brochure and any Cumbres and Toltec Scenic RR (CTS) brochure makes it plainly obvious that while we actively promote Antonito and the CTS, they actively exclude the RGSR.

Reality, Business:

Conejos County businesses including the pearlite plant generate enough freight to support one (1) train per week. SLRG, at its sole expense, operates three (3) trains per week in order to keep the shippers there from having to take drastic measures with production reductions up to and including closing of the plant.

Allegation:

SLRG is unsafe, inexperienced, insolvent, etc.

Reality, safety:

The two most recent FRA inspections of SLRG dealt with mechanical and operational compliance. The operational records and compliance inspection reports came back with no defects, violations, or comments. The mechanical inspection (unescorted) report revealed a missing decal on a passenger car and some needed cleanup in the engine compartment of an F40 locomotive.

The opposition's arguments demonstrate base lack of understanding of the railroad industry. SLRG, through the Safety and Compliance Officers of our parent company, engage in regular in-depth internal auditing. We have a working program of self-reporting to the FRA even though it is not required by the FRA. We go above and beyond, routinely.

Reality, experience:

The SLRG was recently chosen to be the base of the corporation's in-house conductor and engineer training program, one of the few of its type

in the country. At SLRG we are able and willing to train new crewmembers from the ground-up. Our training program was recently featured in the local newspaper.

Our terrain is varied: Flat and tangent in Conejos County but mountainous and demanding in Huerfano County three counties away.

Our locomotive fleet is varied: SD90MAC4300's for freight. Vintage diesel and Steam locomotives for passenger operations.

Our operation is varied: Day and night freight operations. Agriculture, mining, plus hazardous materials such as fertilizer and petroleum-related products.

We also operate passenger excursions 12 months per year, with a more complete schedule of regular trains, specials, and events than any other operation in the region.

Reality, Solvency:

While our parent company is healthy, the SLRG has lost money for a few years. Most of this loss we attribute to the general state of the economy plus the (obvious) extreme difficulty in capturing and launching new initiatives. Through the support of the corporation, SLRG continues to operate and is enjoying a slight up-tick in shipments. Our company believes that the SLRG is vital to the economy of the San Luis Valley and the businesses we serve. Therefore, the company has made the conscious decision to support and grow the SLRG until better days return.

The most obvious examples are the heavy investment in the tourist/excursion services and the newer SD09MAC locomotives.

Allegation:

A test shipment was made in December 2009.

Reality:

Shipping commenced in December 2009 and was stopped, voluntarily, by EnergySolutions and the SLRG so that we could meet with local leaders and describe the operation.

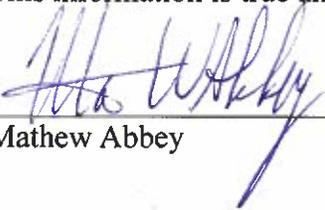
Summary:

The SLRG is not the perfect railroad (as if one even exists). We have had derailments and we have had crossing accidents, just like every other carrier. These points, although exaggerated greatly by the opposition, are not in dispute. A careful review of the arguments by CCCW and Conejos County however illustrate a common theme. Our opponents have not shown that the proposed operation does not involve the use of "original shipping containers."

Now that I think about it...if the first shipping container the material is placed into isn't the original container, what is?

March 14, 2011

This information is true and correct to the best of my knowledge.

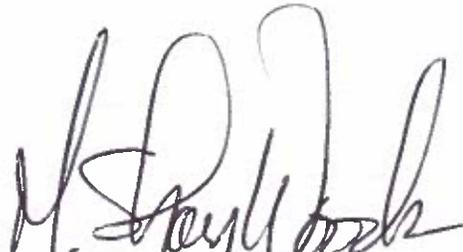


Mathew Abbey

Subscribed and affirmed, or sworn before me in the County of Alamosa, State of Colorado, this 14th day of March, 2011.

My Commission Expires: 4/6/14

M. SHAWN WOODS
NOTARY PUBLIC
STATE OF COLORADO
My commission expires 4/6/2014



Notary Public

EXHIBIT D

J.Heffner

From: Bill Richard <william.g.richard@verizon.net>
Sent: Monday, March 14, 2011 5:06 PM
To: John Heffner
Subject: RE: HR 2095 -- ' ""Rail Safety Improvement Act of 2008" --TITLE VI-CLARIFICATION OF FEDERAL JURISDICTION OVER SOLID WASTE FACILITIES



william.g.richard@verizon.net | 202.236.3717
1017 8th Street NE, Washington, DC 20002

March 14, 2011

John, in answer to your question about the meaning of the term "original shipping container" used in the Clean Railroads Act amendment to the ICC Termination Act I have done some research and here is what I've found in talking with Senate staff.

It is my understanding that this issue was discussed it at length on the Senate side, but not much in conference. I was informed that the purpose of the language was to make clear that if solid waste is in a prepackaged container and it is transferred from a truck to a train, that would not trigger the provision. It would only be triggered if the contents of those packages are separately sorted. I believe there were some facilities in the west that were concerned about that type of operation.

Bill Richard

Office of Federal Affairs, Governor Mark Dayton
1017 8th Street NE
Washington, DC 20002
William.g.richard@verizon.net
202.236.3717
877.295.8671 (fax)

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of the foregoing Reply Comments of San Luis & Rio Grande Railroad dated March 15, 2011, were sent by first-class United States and/or e-mail if known to all parties to this proceeding including:

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S.W. Atencio & Associates, P.C.
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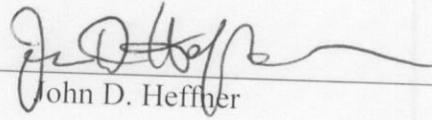
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John D. Heffner

Dated: March 15, 2011