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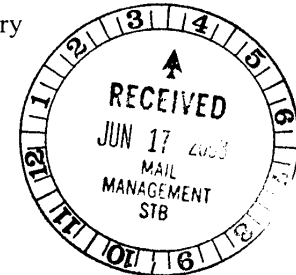
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DID # 0102196001

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Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

By Hand Delivery



Re: STB Finance Docket No. 34364
Vermont Railway Inc., -- Petition for Declaratory Order

Dear Secretary Williams:

Enclosed for filing are a signed original and 10 copies of a Petition for Declaratory Order in the above-referenced case. Also enclosed is a check in the amount of \$1,400.00 as filing fee for the same.

Petitioner is requesting the Board to expedite consideration of this matter to the fullest extent possible and to adopt special processing procedures as set forth in the last paragraph of the Petition.

Respectfully submitted,

FEE RECEIVED

JUN 17 2003

SURFACE
TRANSPORTATION BOARD

Andrew P. Goldstein

Andrew P. Goldstein
Attorney for Petitioner

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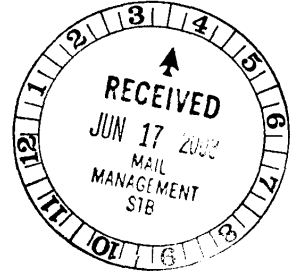
JUN 17 2003

TRANSPORTATION BOARD

ORIGINAL

EXHIBITS IN COLOR INCLUDED

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -- PETITION FOR DECLARATORY ORDER

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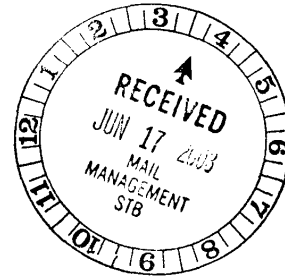
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Dated: June 17, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -- PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

Pursuant to 5 U.S.C. § 554(e), 49 U.S.C. § 721, and 49 C.F.R. § 1117.1, Vermont Railway, Inc. ("VTR") hereby requests the Board to institute an expedited proceeding for the purpose of removing uncertainty or terminating controversy regarding the appropriate extent of (a) Board jurisdiction and (b) preempted state and local requirements as related to state and local laws and regulations purporting to require VTR to obtain preclearance before it can construct and operate a rail spur and a rail-truck salt transload facility.

The relief sought by VTR is supported by the attached Verified Statements of Paul Craven (Exhibit No. 1), Jerome M. Hebda (Exhibit No. 2), and William W. Schroeder (Exhibit No. 3).

II. BACKGROUND

VTR is a Class III carrier operating approximately 130 miles of rail line extending generally between Bennington, VT, on the south and Burlington, VT, on the north pursuant to authority granted by the Interstate Commerce Commission ("ICC") in Finance Docket No. 22830, State

of VT and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 330 (1963), and various supplemental decisions therein. VTR is operated under common control with four other Class III carriers, including Green Mountain Railroad Corporation ("GMRC"). Hebda V.S., ¶¶ 1, 2.

VTR has undertaken discussions with a supplier of highway salt to explore the supplier's interest in utilizing a rail-truck salt transload facility that VTR will build and operate near Wallingford, VT. The proposed new facility will in part replace older, less efficient salt transload facilities served elsewhere in Vermont by VTR or its affiliates, and will provide VTR with an opportunity to increase its traffic and revenue by offering the salt supplier a transload point closer to the ultimate use destinations for the highway salt, thereby reducing the length of truck movements that otherwise would transfer the salt from alternative rail transload points to local salt distribution sheds and making the Wallingford site more competitive. Hebda V.S., ¶¶ 4, 8.

VTR's proposed salt transload facility will be located on a 39-acre tract near Wallingford, on which a rock quarry formerly was operated. Craven V.S., ¶ 2.

The salt transload facility will require active use of between 10 and 11 acres of the 39-acre site. Ibid., ¶ 3. VTR will construct a 1,700-foot spur from its main line to a point within the site and will construct various transload facilities within the site, including a concrete unload pit into which bulk salt from rail cars will be dumped, a 100 by 300 feet salt holding or storage shed with asphalt flooring and a height not to exceed 40 feet, a truck scale and adjacent administration building, loading positions for trucks, truck turning areas, and an access road between the site and adjacent Homer Stone Road. All of these facilities are described more fully at Craven V.S., ¶¶ 3-5 and are depicted on the map attached as Appendix A to Exhibit No. 1.

The transload site will be located in an area that is mainly rural and agricultural. It does not abut any dense population centers. Craven V.S., ¶ 7. The facility will be available for trans-

load operations (e.g., the arrival and unloading of rail cars and the loading of trucks as described in the attached verified statements) during normal work hours, between 7:00 a.m. and 6:00 p.m., five days a week, although the facility will not operate continuously during those periods. If weather conditions produce increased immediate demand for highway salt, the facility may have to operate longer than normal hours. Hebda V.S., ¶ 11.

Salt arriving by rail at the facility is expected to originate in western New York State, arriving largely in shipments of 8 to 12 cars. Once salt is dumped from the cars, the salt will either be loaded directly into 25-ton trucks for movement to regional salt storage sheds, or will be temporarily stored in VTR's salt shed for later truck movement to local salt storage sheds. When operating at capacity in response to anticipated demand, the transload facility is expected to attract approximately 800 rail cars per year and to generate approximately 3,200 truck trips to transfer salt from the site to local salt sheds. Hebda V.S., ¶¶ 12-14. The volume of salt moving through this facility is expected to partially displace volumes of salt presently moving longer distances over Vermont highways from alternate transload sites. Hebda V.S., ¶ 8.

VTR will operate the salt transload facility itself, utilizing its own personnel to unload arriving rail cars, to transfer salt into the storage shed if necessary, and to load highway trucks. VTR believes that its control over the transload operations will maximize the fluidity of those operations and enhance the efficiency and competitiveness with which the site functions to transfer salt arriving by rail. The site will not function adequately as a transload facility if there are any impediments to the movement of salt from rail cars into highway trucks that exit the facility enroute to customers of the salt supplier that will utilize the site. Hebda V.S., ¶¶ 11, 14. VTR's rail transportation rate with the salt supplier will include all of the transload facility service supplied by VTR. Hebda V.S., ¶ 11.

Even though it is anticipated that the arrival and unloading of rail cars at the site should not have any greater impacts on the surrounding community than when the site was maintained as a rock quarry, VTR nevertheless plans several steps to mitigate the site's potential environmental consequences. A salt storage shed will be constructed using exterior colors in earth tones. Trees will be planted at locations along the perimeter of the site and ground cover will be laid to help retard dust. These improvements will serve as visual and sound barriers for the benefit of the local community. To curtail the possibility of ground water contamination from salt spillage or storage, storm water swales throughout the site will be deposit water into a retention pond. Craven V.S., ¶ 7. All structures placed on the site by VTR will be constructed in accordance with applicable building codes, which VTR assumes will be applied in a reasonable manner.

III. STATE AND LOCAL LAWS REQUIRING SITE USE AND CONSTRUCTION APPROVAL

Vermont has two tiers of laws that purport to require pre-clearance approval before VTR can construct and use the proposed salt transload facility: the State's environmental permitting statute, known as Act 250; and Wallingford's land use ordinances, derived from authority of State law. Schroeder V.S., *passim*.

Wallingford Ordinances.

Acting pursuant to a State enabling statute requiring the issuance of a zoning permit for certain construction projects, Wallingford has adopted a series of Town Zoning Regulations ("Zoning Regulations"). The Zoning Regulations require two separate permits before a project can be constructed: use approval and site plan approval. Schroeder V.S. ¶¶ 15, 16.

The proposed salt transload facility would be viewed under the Zoning Regulations as qualifying for a "conditional use" classification. Schroeder V.S. ¶ 21. To obtain approval under

that classification, the applicant must demonstrate that the proposed facility will not adversely affect (a) the capacity of existing or planned community facilities, (b) the character of the area affected, (c) traffic on roads and highways in the vicinity, and (d) zoning by-laws then in effect. Vermont's Enabling Act empowers Wallingford, like other towns in the state, to make its "conditional use" permits subject to restrictions, including restrictions on hours of operation and volume of truck traffic to or from the subject facility. Although VTR has not before sought approval under the Wallingford Zoning Regulations, the same provisions of state law as govern Wallingford's "conditional use" permits were applied by the City of Burlington to impose restrictions on the hours during which a VTR salt transload facility could be operated and the number of truck trips available to VTR for the movement of salt from the facility, thus effectively placing a limit on the total volume of salt that could be moved by rail to and through the facility. Schroeder V.S. ¶ 22.

As indicated above, a "use" permit is not the only type of pre-construction approval required by Wallingford. A site plan must also be filed and approved as a prerequisite to issuance of a Zoning Permit for any use other than certain residential dwellings. Schroeder V.S. ¶ 24.

Site plan approval, like conditional use approval, is subject to issuance with restrictions. Although VTR has not previously sought site plan approval in Wallingford, planning commissions in other towns, acting under the same State Enabling Act as governs Wallingford, have imposed restrictions on the volume, hours of operation, and routes used by truck traffic associated with warehouse and rail-truck transloading facilities. Schroeder V.S. ¶ 26.

The time necessary to process a land use proposal under Wallingford's Zoning Regulations is approximately 120 days under optimal conditions. A site plan application can be processed in as little as 45-60 days, although complete initial processing often takes longer. Schroe-

der V.S. ¶ 25. A use proposal and a site plan are not processed simultaneously. The use request goes first. Schroeder V.S. ¶ 24. Accordingly, the proper way to calculate the total amount of time necessary for compliance with Wallingford's Zoning Regulations is to add the time necessary for use compliance to the time necessary for site plan compliance, bringing the total to the 4-6 month range before any appeals are instituted.

If an appeal is deemed necessary by any "interested person," and not just the applicant, the first appellate tier can be expected to take between 9 and 18 months. A further appeal to the Vermont Supreme Court will consume an additional one to two years. Schroeder V.S. ¶¶ 30, 31.

A person that constructs or operates a facility requiring use or site plan approval and that does not have such approval is subject to fines and injunctive process. State law mandates each town's zoning administrator to take appropriate legal action to "prevent, restrain, correct or abate" the construction or use of a building or improvement by a person who has not first obtained the required local zoning authorizations. If the zoning administrator fails to take appropriate action, other interested parties may obtain a writ of mandamus compelling enforcement action. Schroeder V.S. ¶ 28.

Vermont's Act 250

Vermont's Act 250 is an environmental and land use statute. It applies to land development consisting of construction for commercial or industrial purposes on a site of more than 10 acres. If no consideration is given to federal preemption issues, VTR's proposed salt transload facility, including the new spur line to the facility, is subject to Act 250 jurisdiction. Schroeder V.S. ¶¶ 4, 5.

A development subject to Act 250 cannot proceed without an Act 250 permit. Act 250 contains 10 criteria that must be satisfied prior to the issuance of such a permit, including con-

sideration of traffic congestion and the ability of the community to accommodate the project. Schroeder V.S. ¶ 6. Projects subject to Act 250 can either be denied because the proposed development will interfere with the public's use or enjoyment of a highway or restricted as to hours of operation or the number of trucks that can enter or leave the facility. Ibid.

A request for an Act 250 permits begins with an application to one of the State's District Environmental Commissions. Proceedings before that Commission can be expected to take a minimum of four to six months where the project involves the construction of a new rail side track and transload facility. Schroeder V.S. ¶¶ 7, 8. If the District Environmental Commission denies the request or imposes restrictions that the applicant deems unacceptable, an appeal to an Environmental Board may be taken, where the process can be expected to consume more than a year. Schroeder V.S. ¶ 9. Following the Environmental Board's decision, an appeal is available to the Vermont Supreme Court, another multi-year process. Schroeder V.S. ¶ 10.

Consecutive Nature of Vermont Permitting Requirements

As noted, the "use" and "site plan" requirements of the Wallingford Zoning Regulations are approached consecutively, and may be expected to consume approximately six months prior to any appeals. Although there is no statutory requirement that the town Zoning Regulation process be completed before an Act 250 application is filed, as a practical matter, compliance with town Zoning Regulations almost always precedes an Act 250 application. A principal reason for this sequence is that the issuance of permits under town Zoning Regulations provides evidence needed to satisfy Act 250 standards. Schroeder V.S. ¶ 35.

As a consequence of the sequence in which Vermont's various permitting regimes must be approached, it is realistic and appropriate to regard the timeframes consecutively, so that the town's zoning process timetable of 4-6 months should be added to the Act 250 timetable of 4-6

months, resulting in a minimum of 8-12 months to meet State and local permitting requirements for a railroad construction and transload project, even assuming that no appeals of the initial town and Act 250 decisions are taken. Any appeals instituted will turn the permitting process into a multi-year undertaking.

IV. INSTITUTION OF A PROCEEDING IS WARRANTED

The Board has discretion to institute a declaratory order proceeding to terminate a controversy or remove uncertainty pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e) ("APA"). See, also, 49 U.S.C. 721. The Board may exercise that jurisdiction "regarding the applicability of 49 U.S.C. 10501(b)." North San Diego County Transit Development Board -- Petition for Declaratory Order, STB Finance Docket No. 34111 (decided August 19, 2002).

The provisions of 49 U.S.C. 10501(b) provide that "[t]he jurisdiction of the Board over --

- (1) transportation by rail carriers.... And
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely within one State,

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

There is controversy and uncertainty regarding the applicability of Section 10501(b) to the exercise of jurisdiction in the State of Vermont under both local Zoning Regulations and Act 250.

Compliance with the Town of Wallingford's Zoning Regulations would require VTR to invest an initial 4 to 6 months in the application process and considerably longer if any interested persons pursue their appellate rights following the town's initial decision. The Zoning Regula-

tions empower the town to curtail the volume of salt that may be put through the facility by controlling hours of operation and the extent to which truck transportation will be available to remove salt from the transload site either directly upon unloading from rail cars or after transitory storage.

Although VTR has not had occasion to seek approval from the Town of Wallingford for the construction or operation of railroad facilities, VTR has been a co-applicant for similar approval from the City of Burlington under the same State Enabling Law that governs Wallingford.¹ Utilizing that statute, the City of Burlington imposed restrictions on transload hours of operation and limited the number of truck trips that could remove salt from the facility. *Schroeder V.S.* ¶¶ 22, 26. The Burlington restrictions on the use of VTR's salt transload facility have impeded the use of that facility to its full and intended capacity. *Hebda V.S.* ¶ 5. A similar exercise of permitting authority by Wallingford would have a like impact on VTR.

If VTR were to attempt to ignore the time-consuming and potentially restrictive Wallingford Zoning Regulations and simply proceed with the construction of the proposed spur track and salt transload facility, VTR would be subject to mandatory enforcement proceedings by either the Town or any other interested party, resulting in fines or injunctive relief. *Schroeder V.S.* ¶ 28.

These facts support the Board's declaratory order jurisdiction on two grounds. First, a threat of State prosecution has been held by the Interstate Commerce Commission ("ICC") and the courts to provide a sound justification for the elimination of controversy or the removal of uncertainty under the APA. *Merchants Fast Motor Lines, Inc., et al. v. Interstate Commerce*

¹ VTR was a co-applicant with non-carriers, which may have made Section 10501(b) preemption arguments unavailable to VTR in those circumstances. No non-carriers are potential co-applicants with respect to the subject salt transload facility.

Commission, et al., 5 F.3d 911 (5th Cir. 1993); Central Freight Lines v. Interstate Commerce Commission, 899 F.2d 413 (5th Cir. 1990).

Second, the assertion of permitting jurisdiction by the Town of Wallingford under its Zoning Regulations tests the limits of Section 10501(b). Assertions of local jurisdiction under State law to require permits for the construction of railroad track or facilities create a potential clash with those provisions of Section 10501(b) preempting State regulation of transportation subject to the Board's jurisdiction. North San Diego County Transit Development Board, supra. Despite the fact that, because of the provisions of 49 U.S.C. § 10906, VTR may not require a certificate of public convenience and necessity under 49 U.S.C. § 10901 to construct the proposed spur track or transload facilities, the "broad statutory preemption" provisions of Section 10501 apply "to the construction of ancillary facilities under Section 10906, even though [the Board lacks] licensing authority over such projects." Friends of the Aquifer, City of Hauser, ID, et al., STB Finance Docket No. 33966 (decided August 10, 2001). The Board can issue a declaratory order even if it determines that the railroad's proposed construction project is excused from the certificate requirements by virtue of Section 10906. North San Diego County Transit Development Board, supra.

A strong case for the institution of a declaratory order to resolve a preemption conflict between Section 10501(b) and the application of Vermont Act 250 likewise is present. The State of Vermont has taken the position that the construction of a salt transload shed by a railroad -- more specifically, by GMRC, an affiliate of VTR -- may be regulated by the State under Act 250. See Exhibit No. 4, letter of March 13, 2001 from the Office of the Attorney General of Vermont to counsel for GMRC asserting that construction and "operation" of a "salt storage shed" (used as part of GMRC's salt transload operations) is subject to Act 250 and to "regulation" by the

State. The State of Vermont takes the position that, not only is an Act 250 permit required for the construction of a salt transload facility shed, but that the permit also is required for the construction and operation of a spur track to serve the facility. See Supplemental Petition of GMRC; p.2, dated February 12, 2002, in STB Finance Docket No. 34052, Green Mountain Railroad Corporation-Petition For Declaratory Order. The State has threatened enforcement actions for such violations. See Exhibit No. 4. The State's threats of prosecution provide a clear basis for declaratory order relief. Merchants Fast Motor Lines, Inc., *supra*; Central Freight Lines, *supra*.

In its decision in Green Mountain Railroad Corporation -- Petition for a Declaratory Order, *supra* (decided May 24, 2002), the Board declined to institute a declaratory order proceeding involving an Act 250 dispute between the State of Vermont and GMRC because of the pending federal district court case in Green Mountain Railroad Corporation v. State of Vermont, et al., *supra*. However, the Board's declination to proceed under the APA in the case of GMRC was narrowly defined. The Board stated: "GMRC has also sought judicial relief, and the District Court, which has enforcement authority, has made clear its desire to resolve the issues raised without referring the matter to the Board. Given these circumstances, GMRC's request that the agency issue a declaratory order will be denied."

There is no pending proceeding, in federal or state court, involving the construction and operation by VTR of a spur track and salt transload facility at Wallingford. There is no issue in the GMRC District Court case regarding the application of any town zoning ordinances, to the construction and operation of a rail spur and salt transload facility. Moreover, the State asserts in the GMRC District Court proceeding that GMRC has violated Act 250 not merely by constructing a salt transload shed without a permit, in alleged violation of Act 250; but also that GMRC is

using its salt transload facility, and intends to construct a spur track, in violation of an existing Act 250 permit that allegedly restricted GMRC's use of its Riverside property. See Exhibit No. 4. In contrast, this case involves no questions stemming from any prior Act 250 permits. Thus, the issues in the District Court case are different in several respects from those involved here, where there is presented pure and simple a question of whether, and to what extent if at all, Vermont Act 250 and Wallingford's town ordinances are prior permitting regimes that can regulate VTR's construction of a spur track and transload facility without colliding impermissibly with the preemption provisions of Section 10501(b).

V. THE NATURE OF THE DECLARATORY RELIEF REQUESTED

The Board should conclude that both Act 250 and the Wallingford ordinances are preempted to the extent they are pre-construction permitting requirements applicable to the spur line and salt transload facilities that VTR proposes to construct and operate. See North San Diego County Transit Development Board, supra, and Friends of the Aquifer, supra.

There is room for no doubt that to the extent Act 250 and the Wallingford ordinances are pre-construction permitting regimes, they will interfere impermissibly with the exercise by VTR of its common carrier franchise as a railroad engaged in interstate operations, threatening its ability to develop and enjoy rail business in a timely manner.²

Under each regime, but for preemption, VTR would be required to seek and obtain prior approval before constructing or operating either a facility to transload salt from rail cars into trucks (including incidental storage capacity for the salt) or a spur line to reach the facility. The local and State permitting processes together will delay the project by a minimum of 8-12

² See Borough of Riverdale-Petition For Declaratory Order-The New York, Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (September 10, 1999) ("[r]ailroads are required to provide adequate facilities for their traffic" and "interfering with such activities could interfere with a railroad's right to operate its lines.")

months and for years if any appeals are taken. The State and Wallingford each reserve the right to deny the permit altogether or to grant it with reservations, including restrictions on hours of operation, the number of trucks that can exit the transload site with the transloaded product, and, accordingly, on the volume of traffic which the railroad can handle over its spur and through its transload facility. The untimelines and uncertainties of the State's prior permitting requirements have caused VTR's affiliate, GMRC, to lose prospective new transload rail business. *Hebda V.S.* ¶ 10.

Where, as in this instance, a state or local permitting process can be used to delay, frustrate or defeat a railroad activity subject to the Board's jurisdiction -- even in situations where, as here, no new license is required by VTR to expand facilities to assist it in providing its existing operations to better serve existing markets -- a finding of preemption is warranted. Cities of Auburn and Kent, WA -- Petition for Declaratory Order -- Burlington Northern Railroad Company - Stampede Pass Line, 2 S.T.B. 330 (1997), *aff'd.*, City of Auburn v. United States, 155 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999); North San Diego County Transit Development Board, supra, Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000). The fact that Act 250 purports to be an environmental statute does not deter from the preemptive reach of Section 10501(b). Green Mountain Railroad Corporation -- Petition for Declaratory Order, supra; Flynn v. Burlington N. Santa Fe Corp., supra; Joint Petition for Declaratory Order -- Boston & Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (served May 1, 2001), *aff'd.*, Boston & Maine Corporation v. Town of Ayer, 106 F. Supp. 2d 128 (D. MA., 2002); Friends of the Aquifer, supra. The legislative history of the Interstate Commerce Commission Termination Act indicates in strong terms that Congress specifi-

cally intended to shield railroads engaged in interstate commerce from being subjected to a hodgepodge of state laws, even those state laws involving environmental issues.

Although States retain the police powers reserved by the Constitution, the Federal scheme ... is intended to address and encompass all such regulation and be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal schedule of minimal regulation for this intrinsically interstate form of transportation.

H.R. Rep. No. 104-311, 104th Cong., 1st Sess. 95 (1995) (emphasis in text).

There should be no dispute regarding the fact that the transload facility proposed to be constructed by VTR is an integral part of its rail operations and well within the reach of the Board's Section 10501(a) "jurisdiction over transportation by rail carrier." The term "transportation" is defined in the Interstate Commerce Commission Termination Act ("ICCTA") to include -

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

49 U.S.C. § 10102(9). Salt transloading, in the form of the movement by rail of bulk salt to an unloading point and the unloading of the salt into highway delivery trucks with or without temporary storage, involves the use of a "car ... warehouse, property, facility ... or equipment" "related to the movement of ... property ... by rail" and "services" in the form of "elevation, transfer in transit ... storage, handling ... of ... property." They thus are "transportation" within the meaning of Section 10501(a) service.

Each element of the transload service package proposed by VTR is a logical and integral part of VTR's ability to market bulk salt transportation by rail to attract and retain shippers of bulk salt as customers. VTR accordingly requests the Board to find that preemption under Section 10501(b) extends not only to construction of the spur track necessary to reach the transload facility, but also to the construction of the transload facility itself, as described herein, including the unloading of rail cars, the loading of trucks, and the storage of salt, if necessary, between the time of inbound rail movement and outbound truck movement.

VTR recognizes the numerous instances in which the Board has stated that preemption does not necessarily reach certain state and local regulations, such as non-discriminatory enforcement of state and local building and electrical codes. Green Mountain Railroad Corporation -- Petition for Declaratory, supra, and cases cited therein. VTR has every intention of constructing its salt transload facilities in compliance with such local regulations.

VTR likewise is aware of the Board's views regarding the extent of its jurisdiction over certain motor carrier activities related to rail service. In High Tech Trans, LLC-Petition for Declaratory Order-Hudson County, NJ, STB Finance Docket No. 34192 (November 20, 2002), a claim of Section 10501 (b) preemption was asserted by the operator of a truck-to-rail transload facility for construction and demolition debris ("C&D"). A county solid waste management plan required all C&D to be delivered to a single facility designated by the county, from which the trucked-in C&D would be removed by truck after processing. Fines and penalties applied to transporters delivering C&D to any facility not designated by the county to receive such waste. The transload petitioner contended that the county's rules added an unnecessary and burdensome cost to the transportation of those materials, rendering rail transportation "noncompetitive" if conducted legally under the county's rules. The Board held, however, that the county's regula-

tions pertained to activities “not integrally related to rail transportation services” because the “impact of [the county’s], truck-to-truck facility designation for the processing of C&D debris is on truck shipments within the state, not on interstate rail shipments.”

The High-Tech decision does not remove the proposed transload operations of VTR from the preemptive reach of Section 10501. Here, no local law with an exclusive impact on a truck-to-truck facility is involved. Act 250 and the Wallingford ordinances require the issuance of permits before a rail spur and the facilities to handle traffic over that spur can be constructed or operated. In each case, the regulatory process allows denial of the permit entirely or approval subject to conditions, including restrictions on the amount of salt that can be removed from the facility or when the salt can be moved, with the consequent potential to curtail rail operations wholly or partially. The impact of the state and local laws involved in this case falls directly on rail service.

In High-Tech, the Board recognized that preemption can “extend to certain activities and facets of rail transloading facilities” if they are “closely related to providing direct rail service.” The transload activities that VTR requests the Board to regard as preempted from State and local pre-permitting regulation manifestly are “closely related to providing direct rail service.” Those activities -- the unloading of bulk salt from rail cars, the loading of the salt into trucks, and the holding of salt in transitory storage if necessary between rail arrival and truck departure -- are essential to the fluid, economical operation of the transload facility, and to the ability of the facility to attract and retain rail traffic. *Hebda V.S.*, ¶¶ 11,12, 14. If the provisions of Act 250 or the Wallingford ordinances are applied, as they can be and have been in other demonstrated instances, to limit access to bulk salt at the transload facility or to the volume of salt that can be trucked from the facility, the direct result will be a reduction in the volume of rail traffic to be

handled by VTR. Bulk salt transloading cannot by definition occur without trucks, and it is an impossibility to match incoming rail cars with outgoing trucks on a one-for-one basis, so that some salt storage at the transload facility is integral to the transload service. All elements of the proposed transload service accordingly are directly related to rail service and state or local laws requiring prior permit approval for the construction or operation of those facilities or of connecting spur track should be found to be preempted.

VTR does not take the position that the State totally lacks jurisdiction over any and all activities related to the construction and operation of the transload facility. The Board has stated on numerous occasions that State and local regulations that do not interfere unreasonably with rail operations, including non-discriminatory enforcement of requirements such as building and electrical codes, generally are not preempted. Green Mountain Railroad Corporation, supra. VTR intends to construct the proposed transload facility in accordance with that edict.

Similarly, VTR recognizes that there are State and local laws pertaining to the operation of trucks on State highways and town roads. Schroeder, V.S. ¶¶ 38-41. VTR does not here seek a declaration from the Board that such laws are preempted by the ICCTA.

In its Supplemental Petition filed in Finance Docket No 34052 on February 12, 2002, GMRC, VTR's affiliate, advised the Board that even where Section 10501(b) preemption is deemed applicable, GMRC would continue to recognize its responsibilities to the State and local communities by advising them beforehand of proposed construction projects and by making efforts to accommodate where possible expressed concerns of the community with respect to those projects. VTR makes the same representation to the Board. If the Board concludes that preemption attaches to State and local laws requiring prior approval for the construction and operation of the proposed spur and transload facility, VTR nevertheless will consider concerns of

the State and the Town and endeavor to accommodate them to the fullest extent possible. Also, copies of this petition are being served on representatives of the State and the town of Wallingford.

VTR desires to move forward with its salt transload construction plans at the Wallingford site. It requests and urges the Board to respond promptly to this petition for a declaratory order in the hope that a decision by the Board will remove uncertainty regarding State and local jurisdiction over the project and will enable VTR to finalize agreements with a salt shipper.

Service of the Petition is being made on representatives of the State and of the Town of Wallingford, as well as upon other parties that VTR believes may have an interest in this request. VTR believes that it has submitted information sufficient to enable the Board not only to institute a proceeding, but to issue a decision on the merits as well. However, VTR proposes that, if any person indicates to the Board and VTR a desire to oppose the relief sought, the Board allow such persons no more than 30 days to do so on the merits, and thereafter allow VTR up to 20 days in

which to reply. If no such requests are received by the Board, VTR requests the Board to both institute a proceeding and a dispositive decision as soon as possible.

Respectfully submitted,



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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition has, this 17th day of June, 2003,
been served by first-class mail, postage prepaid, on the following persons:

William Burke, Coordinator
District 1-Environmental Commission
(Rutland County)
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Rutland Regional Planning Commission
The Opera House
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Andrew P. Goldstein

VERIFIED STATEMENT

OF

PAUL CRAVEN

1. My name is Paul Craven. I am a consulting project manager to Vermont Railway, Inc. and President of Craven Management Services. On behalf of Vermont Railway, Inc. ("VTR"), I supervised the preparation of a site plan for a salt transload facility adjacent to VTR's rail line at Wallingford, VT. I have been requested to explain that site plan, and do so in this statement.

2. VTR is purchasing approximately 39 acres of land within the town boundaries of Wallingford. This property, formerly a rock quarry, is adjacent to VTR's main line and within 400 feet of U.S. Route 7, the principal north-south road in western Vermont. Appendix A hereto shows the location of the 39-acre site in relation to VTR's line, U.S. Route 7, and certain other points in Vermont.

3. Within the 39-acre tract, VTR proposes to construct a salt transload facility to be served by a 1,700 foot spur track that VTR will build from its main line. The salt transload facility and spur will require alteration to more than 10 acres within the 39-acre tract, as shown below.

Transload Site Areas of Operation

Storage Shed (100' x 300') + site build out	80,000 sq. ft.
Administration Building/Truck scale + site build out	8,000 sq. ft.
Rail Spur (30' x 1700') + site build out	255,000 sq. ft.
Truck maintenance area, roads, Turnaround, parking + build out	58,500 sq. ft.
Green area	73,400 sq. ft.
TOTAL	474,804 sq. ft.; 10.9 acres

Appendix A shows the location of the transload facility and spur line within the 39-acre tract, as well as actual property use.

4. To provide truck and vehicular access to the transload facility, VTR will construct an asphalt road, truck parking apron, and a truck turn-around, as well as a road linking the facility to Homer Stone Road, which also is shown on Appendix B. Homer Stone Road provides access to U.S. Route 7 and other roads that would be followed by trucks moving salt from the transload facility to local salt sheds in the area or returning empty to the transload facility.

5. Appendix A also shows the location and nature of the actual transload equipment and storage facilities that will be built at the site. The new 1700-foot spur track into the site will be capable of holding up to 20 cars of 65 feet each (a total length of 1300 feet). Although VTR doubts that 20 cars normally will be delivered at one time for unloading, a holding track of that length will accommodate a larger train consist when demand so dictates. Cars arriving with salt will be positioned one-at-a-time over a 12 foot by 12 foot concrete unload pit. As salt is unloaded from rail cars into the unload pit, a conveyor will deliver the salt into the shed for storage or immediate loading into highway delivery trucks. Stored salt likewise will be loaded into highway delivery trucks, with an average net capacity of 25 tons, for movement to local area salt storage sheds to be held there for loading into spreader trucks. The salt shed, with asphalt flooring, will be constructed adjacent to the spur track. The shed will be approximately 100 by 300 feet and up to 40 feet high. Salt will be conveyed throughout the shed by a system of overhead pusher arms. It will remain in those piles until loaded into highway trucks by use of payloaders.

6. Trucks arriving to receive salt from the shed for transport to outlying, local salt sheds will initially stop in the entranceway of the storage shed for loading. As the amount of salt in the shed is reduced the trucks will back directly into the shed for loading. After loading, the trucks will proceed to a truck scale, located next to the 30 foot by 40 foot administration building

to be constructed near the salt shed, as shown on Appendix A. Once weighed, the trucks will exit the site and proceed to their destinations.

7. The proposed transload facility site is not located in a densely populated area; in fact, the character of the area is mainly rural and agricultural. The proposed transload facility, however, will not despoil a virgin site because of the preexisting rock quarry, and the impacts on the community from operation of the transload facility should not be any greater than those flowing from the site when it was operated as a quarry. Nevertheless, in deference to the anticipated concerns of the community, the storage shed will be constructed using exterior colors in earth tones. Trees will be planted at locations along the perimeter of the transload site and ground cover will be laid to help create a visual barrier. These improvements will serve as visual and sound barriers for the benefit of the local community. The roadways will be asphalt; however, if dust occurs a dust retardant will be used on the site. To curtail the possibility of ground water contamination from salt spillage or storage, stormwater swales throughout the site will deposit water into a detention pond, the location of which is shown on Appendix A.

8. Operation of the transload facility will not require the use of any town water supplies. No historic sites will be disturbed. The site will not require the construction or enlargement of any public streets or roads, as all truck traffic (the anticipated volume of which is addressed in Mr. Hebda's statement) to and from the facility will utilize existing streets and roads. Overall, salt truck traffic on Vermont highways should be reduced by the transload facility, since the site will enable rail cars to terminate more salt closer to its ultimate points of consumption than does the use of existing transload facilities from which salt is trucked into the Wallingford-Bennington-Rutland area, thereby reducing total salt truck miles in the state.

I, Paul Craven, do hereby state under penalty of perjury that the foregoing statement is true and that I am authorized to make the same.

Paul Craven
Paul Craven

6-11-2003
Date

**VERIFIED STATEMENT
OF
JEROME M. HEBDA**

1. My name is Jerome M. Hebda. I am Vice President of Vermont Railway, Inc. ("VTR"). VTR, a Class III railroad, is operated under common control with several other Class III carriers.¹ The lines of VTR, CLP, GMRC, and WACR lie primarily within the borders of the State of Vermont, and those of NYOG are in the State of New York, as shown on Appendix A to this statement. The five carriers collectively operate slightly more than 300 miles of rail line.

2. VTR operates some 130 miles of rail line, extending generally between Bennington, VT, on the south, and Burlington, VT, on the north. I am primarily responsible for the marketing of VTR's services and the services of the other carriers operated under common control with VTR. I have been a marketing official with GMRC and VTR for 15 years, and I am familiar with the needs of present and potential customers for rail service offered by VTR.

3. Rail service in the territory served by VTR consists primarily of terminating freight. Because Vermont is not a heavy manufacturing area, terminating rail traffic consists largely of useable goods, including construction materials, heating oil, farm supplies, and bulk salt for highway use. VTR and its affiliates target such commodities for new business development.

¹ Clarendon & Pittsford Railroad Company ("CLP"), Green Mountain Railroad Corporation ("GMRC"), Washington County Railroad Company ("WACR"), and The New York and Ogdensburg Railway Company, Inc. ("NYOG").

4. VTR and its affiliates presently handle shipments of bulk salt intended for highway use. VTR serves salt transload facilities at Burlington and Rutland, and GMRC serves one at Rockingham, VT and another at North Clarendon, VT. Other railroads in New York State serve competitive salt transload facilities situated approximately 50 miles west of VTR's lines. Salt from all such rail transload facilities is moved by 18-wheel, 25-ton payload trucks to local state and town salt storage sheds in Vermont, from which points salt is distributed as needed by local spreader trucks. As a result of discussions with a potential supplier, VTR believes that there is an opportunity to establish a new salt transload facility in Vermont that could attract business away from transload facilities in New York State or could replace, in whole or in part, the VTR and GMRC salt transload operations at Burlington, Rutland, Rockingham, and North Clarendon, respectively. VTR has taken steps to acquire a new site for this purpose, as explained below.

5. VTR has concluded that a partial alternative to the Burlington salt transload facility is necessary because of certain restrictions placed on the use of that facility by the City of Burlington pursuant to city permitting ordinances when the transload shed was built at Burlington. At that time, the City of Burlington imposed permit use conditions which, among other things, limited the number of salt trucks exiting the facility on a daily basis and the hours during which trucking is allowed at the facility, subject to relief upon request in the event of a "snow emergency." In the winter of 2001-2002, counsel for VTR requested the City of Burlington to waive its truck operating restrictions on account of a snow emergency requiring additional salt at points outside of the Burlington city limits. The request was denied by the City on the grounds that the "snow emergency" did not impact the City itself. As a consequence of the City's restrictions on truck

movements of salt from the facility, the facility cannot reach its maximum use potential and the ability of VTR to obtain salt business to that point has been curtailed.

6. The future of GMRC's salt transload facility at Rockingham has been questioned due to the fact that the State has alleged that that facility, which conducts activities in addition to salt transload, was constructed and is being operated without appropriate permits issued pursuant to Vermont's Act 250. The State has taken the position that the shed used at Rockingham to hold salt that is in transition between rail cars and trucks is a "storage shed" subject to Act 250's provisions. The State's allegations are the subject of pending litigation in Federal court. While VTR believes its position will be vindicated, it is not known how long it will take before a final resolution of that matter is reached.

7. The salt transload facilities served by VTR and GMRC at Rutland and North Clarendon, respectively, have impediments that make them unsuitable for efficient operation or future expansion. The Rutland facility has a capacity of only 3,000 tons of salt, or about 15 percent of the capacity of the shed to be constructed at Wallingford. Moreover, it is an inefficient facility because rail yard congestion at Rutland limits the number of salt cars that can be placed for unloading at one time to just one or two cars. The salt transload facility served by GMRC at North Clarendon is even smaller than the Rutland facility, with a capacity of only 1500 tons. That facility is not owned by GMRC, which has no control over its expansion.

8. VTR is in the process of acquiring a 39-acre site that abuts its rail line in the town of Wallingford, VT, a point approximately 11 miles south of Rutland. We have held preliminary discussions with a salt company that has expressed interest in utilizing a

salt transload facility at that site. A salt transload facility at Wallingford would reduce the number of truck-miles incurred by the 18-wheel, 25-ton dump trucks that operate between current rail transload points in New York State, Burlington, or Rockingham, on the one hand, and State or town salt sheds in the Rutland-Bennington area, on the other, thereby having a positive environmental impact while simultaneously improving the economic efficiency of bulk salt distribution. That, in turn, will increase the competitiveness of VTR's rail service.

9. There are two tiers of permitting requirements with which VTR must comply prior to constructing and utilizing a salt transload facility at Wallingford, unless those permitting requirements are deemed preempted by Federal law. One tier consists of zoning ordinances of the Town of Wallingford. The second tier consists of Vermont's environmental statute, known as Act 250. The requirements of both sets of laws are discussed in the Verified Statement of William W. Schroeder, which is Exhibit No. 3 to this Petition. Mr. Schroeder, a real estate permit specialist whose firm frequently acts as VTR's counsel, estimates that a salt transload project of the type being contemplated by VTR at Wallingford is likely to take a minimum of four to six months, and possibly as much as two years, to wend its way through the Act 250 process. If, as is expected by Mr. Schroeder, VTR will be viewed by the State as requiring a conditional use permit in addition to approval of a site plan, another four to six months will be entailed, and far longer if any appeals are taken by VTR or by opponents of VTR. Local zoning process ultimately may result in denial or in approval subject to use conditions that the railroad or its customer would regard as impractical, inefficient, and unacceptable. In any event,

State and local preclearance permitting requirements will consume eight months to a year under the best of circumstances, according to Mr. Schroeder.

10. In my opinion, VTR will have no success in attracting a salt supplier to the Wallingford site until the uncertainties and delays attendant to the two tiers of state and local permitting are resolved. It has been my experience that potential customers will choose to use other facilities, rather than making marketing plans that are subject to cancellation through state or local permit denials, or are subject to conditions which may unacceptably limit the use of the facility, or which will take prolonged or unknown lengths of time to resolve. In fact, VTR's affiliate, GMRC, recently lost an important transload customer at GMRC's Riverside facility for precisely those reasons. For years, GMRC operated a bulk cement transload facility at Riverside. When the cement customer indicated its desire to expand transload capacity and improve speed through use of a significantly larger cement transload silo, and GMRC advised the customer that the State of Vermont regarded such an expansion as subject to the Act 250 permitting process, the customer decided to totally relocate its cement transloading activities to a site in New Hampshire served by another short line railroad. GMRC not only lost the opportunity for additional business, but lost its then-existing cement transload business as well. I do not believe that VTR will be able to conclude arrangements with a salt shipper for the rail transportation of salt to the proposed Wallingford site until VTR's right to construct and operate the transload facility at that site has been confirmed; and I believe that our prospective salt customer for that site is unwilling to subject itself to the possibility of a multiyear permitting process before its ability to plan on using that site is known. In my experienced opinion, from the point of view of VTR and, a salt shipper, the prospect of

limitations on the flow of salt through the facility is an unacceptable condition that is likely to doom the project and deprive VTR of needed rail revenue.

11. VTR intends to operate the Wallingford salt transload facility itself, using its own personnel to unload arriving rail cars, to transfer salt into the salt shed, and to load trucks designated to remove the salt, as all three steps are necessary to put bulk salt through the facility and thus to develop VTR's rail business. A breakdown in any one of these functions will impair the facility's operation and ultimately cut back on rail service, which is why it is preferable for all of them to be under VTR's control. The rail transportation rate that VTR will negotiate with the owner of the salt will include these services. Trucks removing salt from the transload shed will be hired by VTR when that arrangement is so requested by the salt shipper; trucks otherwise will be supplied by the salt purchasers. VTR will control the hours during which the transload facility operates, including truck loadings. The facility is expected to operate during normal work hours, 7:00 a.m. to 6:00 p.m., five days a week, except when weather conditions produce increased immediate demand for salt, on which occasions the facility may have to operate longer hours. VTR has a direct interest in controlling the entire transload process, because we will not obtain and maximize the rail business unless the salt can move fluidly through the facility from the time it arrives by rail until it exits the facility by truck.

12. Salt arriving by rail at the Wallingford transload site is expected to originate in western New York State. The number of cars per shipment of course will vary, depending on demand and available storage space. The 1700 foot siding that VTR will construct from its main line into the transload facility will be capable of holding 20 cars, although I anticipate that most shipments will consist of 8 to 12 cars. There will be no

increase in the number of VTR trains necessary to handle this volume, as VTR trains operating over the main line serving Wallingford can accommodate 8-12 additional cars or more, if necessary. The site will contain a 12 foot by 12 foot concrete unload pit. Each car, in turn, will be positioned over the pit so that salt can exit through the car's outlet gates into the pit. Railroad employees will position the cars through use of a pulley or trackmobile and will open the cars' outlet gates. Salt entering the unload pit will be elevated by a conveyor either directly into highway trucks for movement to local salt sheds, or placed in dump trucks that will drive a short distance into the transload salt shed, there discharging the salt onto the ground. That shed will be approximately 100 feet by 300 feet (30,000 square feet) and will be a maximum of 40 feet high. VTR will attempt to use construction materials in earth tones so that the shed does not contrast harshly with its surroundings. In the shed, a system of overhead pusher arms will move the salt into large piles, where it will remain until loaded into highway trucks by use of payloaders. The extent to which salt will be loaded directly into highway trucks from the salt pit conveyor, or instead held temporarily in the storage shed, will depend on weather conditions and the needs of the salt purchasers. Bringing salt to the site in 8 to 12 car quantities, some of which is likely to be held in the salt shed until removed by truck, will ensure an adequate supply of salt on hand at all times (which would not be the case if only single car shipments were handled direct from rail to truck) and will enable VTR to operate more efficiently, offer a better rate, and handle more business.

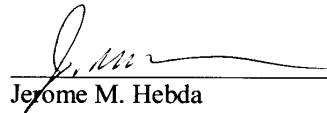
13. The total volume of salt expected to be put through the Wallingford transload facility in any given year will vary according to weather conditions, demand, and the relative costs to salt purchasers of using the Wallingford facility or acquiring salt from

competitive transload facilities. Although it is expected that more salt will arrive in the fall and winter months than in the spring and summer months, it is not unusual for salt shipments to be made year-round, inasmuch as local jurisdictions like to approach the winter with a full salt shed. On average, it is anticipated by VTR that approximately 800 cars per year, each carrying 100 tons of salt, will arrive at the Wallingford site if it is operating to full potential.

14. VTR can unload up to 20 cars within an eight-hour shift. VTR expects the Wallingford storage shed, which will be able to hold approximately 20,000 tons of salt, to be turned four times in a year, representing a through-put of 80,000 tons. At that level, the facility will require approximately 3,200 truck trips to transfer salt from the transload site to local salt sheds. Were this volume of trucks to be distributed evenly over the course of 365 days, it would amount to slightly under 9 trucks per day. However, one of the advantages of a 20,000-ton salt shed is that it can supply salt to a variety of local sites as needed to meet winter road conditions. To fulfill this function and thereby produce the level of rail revenue necessary to justify VTR's investment in the facility, there must be truck access on an as-needed basis, with no standing restrictions on the number of trips allowed per day or on when the salt can be distributed. Without such unrestricted truck ingress and egress, the transload facility will fail to meet the needs of the marketplace, may not attract a salt supplier as a VTR customer, and at a minimum will cause VTR to forego traffic volume that otherwise would move.

s:\mcd\ Hebda Verified Statement

I, Jerome M. Hebda, do hereby state under penalty of perjury that the foregoing statement is true and that I am authorized to make the same.


Jerome M. Hebda

6-11-2003
Date

Exhibit No. 3

**VERIFIED STATEMENT
OF
WILLIAM W. SCHROEDER**

1. My name is William W. Schroeder. I am a member in the Burlington, Vermont office of the law firm of Downs Rachlin Martin PLLC. I have been a member of the Vermont bar since 1981. My practice focuses partly on Vermont land use law, which includes the Vermont environmental statutes commonly known as Act 250 and local zoning regulations. My firm represents Vermont Railway, Inc. ("VTR") and other railroads with which it is affiliated.

2. In this statement, I describe the scope of Vermont's Act 250, Act 250 permitting procedures, Act 250 appellate procedures, Town of Wallingford zoning regulations, and Vermont laws regulating use of public roads, as I deem those issues applicable to the Petition of VTR for a declaratory order.

Act 250

3. Act 250 became law in 1970. It has since been amended and my description of its provisions reflects the Act as amended. The provisions of Act 250 can be found at 10 V.S.A. § 6001 et seq.

4. Act 250 is a land use and environmental statute. When it was passed, the Vermont Legislature declared that: "It is necessary to regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which

will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development and are suitable to the demands and needs of the people of this State.” Findings and Declarations of Intent, Vermont Land Use and Development Law, Title 10, Chapter 151.

5. Act 250 generally applies to land development consisting of construction for commercial or industrial purposes on a site of more than ten acres owned or controlled by a person (except for farming or forestry), or on more than one acre if the site is located in a municipality that does not have both permanent zoning and subdivision by-laws. In determining the acreage of the site, Act 250 generally counts the “involved land,” which consists of the entire tract of contiguous land owned by the owner of the project site, and any non-contiguous tracts of land related to the project. The general rule would count the entire right of way owned or operated by a railroad, and every project would be jurisdictional. However, Act 250 has two special jurisdictional rules for railroads. First, where the “development” consists of a rail line extension or rail siding, only the area of actual railroad line or right-of-way to be physically altered is considered in determining if the project exceeds 10 acres. Second, where the project is undertaken by a “railroad,” no portion of the railroad line or railroad right-of-way that is not physically altered is considered in determining if the project exceeds 10 acres. I have reviewed VTR’s site plan for construction of a bulk salt truck-rail transload facility on a 39-acre site in the Town of Wallingford and the statement of Paul Craven explaining the site plan, and am of the opinion that this project falls within Act 250 jurisdiction (questions of federal preemption aside) because more than ten acres will be developed as a result of the

addition of spur line and the construction of transload facilities, including access roads, not within VTR's right-of-way.

6. A development subject to Act 250 cannot proceed without an Act 250 permit. Act 250 contains ten criteria that must be satisfied prior to the issuance of an Act 250 permit. These "Criteria" address the following issues:

- (1) Water and air pollution, including impacts on floodways, streams, shorelines and wetlands.
- (2) Water supply.
- (3) Impact on existing water supplies.
- (4) Soil erosion.
- (5) Traffic congestion and safety. This Criterion applies to both rail and truck traffic, including highway traffic volumes, and requires a finding that the project will not cause unreasonable congestion or unsafe conditions. A permit cannot be denied under this criterion, but can be conditioned (e.g., a limit placed on the hours during which the rail facility can be operated or on the number of trucks, and therefore the volume, that can enter or leave the facility).
- (6) Educational services.
- (7) Municipal or government services.
- (8) Scenic and natural beauty, aesthetics, natural areas, historic sites.
- (9) Conformance with capability and development plan, consisting of Subcriteria (A) through (L). Subcriterion 9(A) requires a finding that the town and the region have the financial capacity to accommodate growth, caused by the project and otherwise expected, without undue burden from the project. Transportation projects have

been denied under this Subcriterion. Subcriterion 9(K) requires a finding that a development affecting traffic on a nearby highway will not unreasonably endanger public investment in the highway or materially jeopardize or interfere with the function, efficiency or safety of, or the public's use or enjoyment of the highway. Although a permit may not be denied under Criterion 5 because a proposed project would cause unreasonable congestion or unsafe conditions, a permit may be denied under Subcriterion 9(K) for a project that causes congestion on nearby highways.

(10) Local and regional plans. Criterion 10 requires compliance with all the policies and goals in the municipal and regional plans governing the project. An applicant generally proves compliance with the municipal plans through local zoning and planning approval.

I have highlighted the Act 250 Criteria and Subcriteria under which a railroad project is most likely to receive scrutiny. Other Criteria and Subcriteria protecting natural resources such as wetlands, water resources, historic and archeological sites, and primary and secondary agricultural soils, may also apply to a transportation project.

7. The Act 250 permitting process has three tiers of review. Permitting begins with an application filed with one of the State's nine District Environmental Commissions. If an applicant or a project opponent is dissatisfied with the decision made or the conditions imposed by the District Environmental Commission, an appeal to the State's Environmental Board is available. Decisions of the Environmental Board are reviewable by the Vermont Supreme Court.

8. The timetable for this process varies from application to application. The State maintains that approximately 70% of Act 250 permits are issued by the District

Commissions in less than 60 days from filing. Most of these “60-day” projects are approved under a simplified minor amendment or administrative amendment procedure. The State also acknowledges that more complex projects may take longer to complete. A railroad construction project, such as a new track and salt transload facility, is likely to require both a pre-hearing conference and full merits hearing, and will take a minimum of four to six months. Any project to which there is any competent opposition also will receive full review.

9. Act 250 provides that an appeal to the Environmental Board from the District Environmental Commission decision may be taken within 30 days. Environmental Board procedures then provide for a de novo review of the issues under appeal, based on prefiled written testimony. It has been my experience that an Environmental Board appeal consumes between six and twelve months in a typical case, from filing to decision. My most recent Environmental Board case, which involved issues under only one of the Act 250 Criteria, ran more than sixteen months from filing of the appeal to issuance of a final decision. In re Hannaford Bros. Co., No. 4C0238-5-EB (Altered) (Env’tl Bd. November 27, 2002).

10. If an appeal from the Environmental Board to the Vermont Supreme Court is necessary, my own personal experience, and that of our firm, which regularly litigates before the Vermont Supreme Court, is that a minimum of twelve months is likely to expire between the date when the Environmental Board issues its decision and the date when the Supreme Court issues a decision responding to the appeal. Many cases, of course, take longer. For example, the Supreme Court issued its decision in a recent case almost three years after the filing of the appeal. In re White, 172 Vt. 335 (2001)

11. Under optimal conditions, an Act 250 permit request for a substantial project that is considered at the District Environmental Commission, Environmental Board, and Supreme Court tiers of the Act 250 process can be expected to take not less than 24 months. The more likely timeframe for such a contested case is three to four years.

12. As noted above, an Act 250 application is commenced before a District Environmental Commission. One of the first crossroads in the Act 250 process may occur prior to submission of an application, if the staff person for the District Environmental Commission, known as the “District Coordinator,” is called upon to determine whether the proposed project is Act 250-jurisdictional. In that event, the District Coordinator issues a Jurisdictional Opinion.

13. If the District Coordinator issues a Jurisdictional Opinion ruling that the proposed development will be required to obtain an Act 250 permit, and the applicant fails to appeal that finding, the District Coordinator’s ruling becomes binding and the applicant is regarded by the State as having submitted to the jurisdiction of the Act 250 process. See 10 V.S.A. § 6007(c); Environmental Board Rule 3(C); Green Mountain Railroad, No. 2W0038-3B-EB (Env’tl Bd. March 22, 2002). Thus, for any proposed development where the applicant perceives the need to question Act 250 jurisdiction (as, for example, where there is some uncertainty regarding the measurement of land necessary for Act 250 jurisdiction), an effort by the applicant to resolve that uncertainty through normal Act 250 procedures may result in a claim by the State that the applicant has made an irrevocable election to subject itself to Act 250 jurisdiction and to forgo any recourse to other forms for resolution of jurisdictional issues. Of course, if a railroad simply files an Act 250 application without seeking a jurisdictional opinion, the railroad may be con-

ceding Act 250 jurisdiction, or may be estopped from contesting jurisdiction. P&H Senesac, Inc., DR No. 376, Dismissal Order at 4 (Env'tl Bd. June 22, 2000) (voluntary filing of Act 250 application and acceptance of permit without appeal concedes jurisdiction); see also In re Barlow, 160 Vt. 513, 520 (August 13, 1993) (the Vermont Attorney General, acting as counsel to the Vermont Environmental Board, asserted that an applicant who obtained a permit was estopped from challenging Act 250 jurisdiction). In either case, the State may take the position that a railroad loses its right to claim federal preemption when it commences the Act 250 process. Given this risk, it clearly is prudent for a railroad to first seek to resolve the federal preemption issues before the Surface Transportation Board.

Town of Wallingford Ordinances

14. The Town of Wallingford, Vermont (the "Town" or "Wallingford") first adopted Zoning Regulations on March 2, 1971. The initial Regulations were subsequently amended and readopted on September 12, 1972 and December 12, 1989 (as amended, the "Zoning Regulations"). The Zoning Regulations incorporate Town Zoning Map No. 1, dated February 1, 1971.

15. The Town adopted the Zoning Regulations pursuant to Vermont's zoning enabling statute, the Vermont Planning and Development Act, 24 V.S.A. § 4301 et seq.

16. The State zoning enabling statute requires the issuance of a zoning permit prior to commencement of construction of the proposed bulk salt rail-truck transload facility. 24 V.S.A. § 4443 (a)(1). The Town Zoning Regulations impose two preconditions to issuance of a zoning permit for the proposed facility: use approval and site plan approval.

17. If a proposed development project is a “permitted use” in the applicable zoning district under the Zoning Regulations, the developer may obtain use approval through issuance of a zoning permit by the Town Zoning Administrator. If the proposed development project is a “conditional use” in the applicable zoning district under the Zoning Regulations, the project developer must obtain conditional use approval from the Town Zoning Board of Adjustment. If the proposed land use project is neither a “permitted use” nor a “conditional use,” the project developer must obtain a use variance from the Town Zoning Board of Adjustment.

18. The proposed bulk salt transload facility would be located on the site of a former stone quarry. The site appears to lie in the Agricultural and Rural Residential zoning district designated under the Town's Zoning Regulations.

19. The categories of permitted use for a site that lies in the “Agricultural and Rural Residential” zoning district do not include any uses that cover the entirety of a bulk salt rail-truck transload facility, or even, in my opinion, any part of the project being considered by VTR.

20. With no permitted use available to allow construction of the bulk salt transload facility, it is next necessary to determine if the proposed bulk salt transload facility would qualify as a conditional use in the “Agricultural and Rural Residential” zoning district. The authorized categories of conditional use in this district include “light manufacturing,” “public utility,” “gravel pit,” and other uses of the same general character; i.e., the conditional use need not be specified in the Zoning Regulations, but may be a use of the same general character as those which are specified. In my judgment, the Town Zoning Board of Adjustment would be likely to treat the proposed salt transfer fa-

cility as a conditional use because it has characteristics that resemble those of the enumerated categories of conditional use and because the purpose of the facility is to provide salt for use on public roads, which is a quasi-public function akin to that of a public utility.

21. Because I believe that the proposed bulk salt transload facility would be likely to qualify for a “conditional use” classification, it is not necessary for me to discuss a use variance in any detail. However, I should observe that a use variance would be very difficult to obtain. The provisions of the State zoning enabling act require that an applicant for a variance meet five standards. 24 V.S.A. § 4468. The first standard requires a demonstration that the project site has unique physical conditions that impose unnecessary hardship on development of the site in accordance with zoning requirements. The second standard requires a demonstration that there is no possibility that the property involved can be developed for any purpose other than the one for which a variance is sought. Given that the site involved has been used as a stone quarry and clearly could be used for other commercial purposes, it is my view that this property would not qualify for a use variance.

22. Section 8.6 of the Zoning Regulations requires that, in order to obtain conditional use approval, the applicant must demonstrate that the proposed facility will not adversely affect (a) the capacity of existing or planned community facilities, (b) the character of the area affected, (c) traffic on roads and highways in the vicinity, and (d) zoning by-laws then in effect. The State zoning enabling act authorizes the Zoning Board of Adjustment to impose reasonable safeguards and conditions to ensure compliance with these standards. 24 V.S.A. § 4407 (2). In my experience, zoning boards in other Ver-

mont towns, acting under the same State enabling law, have imposed restrictions on the volume, hours of operation and routes used by truck traffic associated with quarry, manufacturing, warehouse and even rail-truck transload facilities. E.g., In re Appeal of Vermont Railway, Inc., Docket Nos. 6-1-98, 126-7/98 and 224-12-98, Decision and Order on Cross-Motions for Partial Summary Judgment at 4-5 (Vt. Env'tl Ct. May 26, 1999); aff'd 171 Vt. 496 (Vt. Supreme Ct. December 8, 2000).

23. The timetable for securing a conditional use approval is not easy to predict with absolute certainty. Under the State zoning enabling statute, the Zoning Board of Adjustment has 60 days in which to render a decision once a complete application is presented to it. 24 V.S.A. § 4407 (2). However, as a practical matter, conditional use applications often are not acted upon within 60 days, as the Town Zoning Administrator may request additional information from the applicant before presenting the application to the Board. I would say that 90 to 120 days is more often the norm for processing a conditional use application.

24. If a project developer were able to obtain conditional use approval from the Board of Adjustment, it would then apply for site plan approval from the Town Planning Commission. The State zoning enabling act authorizes zoning regulations that require site plan approval as a prerequisite to issuance of a zoning permit for any use other than one- and two-family dwellings. 24 V.S.A. §4407 (5). The Wallingford Zoning Regulations include a site plan approval requirement. Under Section 8.7 of the Zoning Regulations, for all development in the Town of Wallingford other than one and two-family dwellings, the applicant must obtain "Site Development Plan Approval" from the Town Planning Commission prior to issuance of a zoning permit.

25. The State zoning enabling statute requires that the appropriate municipal board act to approve or disapprove a site plan application within 60 days after the date received; the site plan is deemed approved if there is a failure to act with this period. 24 V.S.A. § 4407 (5). Section 8.8 of the Wallington Zoning Regulations requires approval or denial of a site plan by Planning Commission within 45 days of receipt, with a deemed approval for a failure to act. In my experience, however, local Vermont planning and zoning officials often delay the commencement of the “deemed approved” deadline by imposing prerequisites on the filing of site plan applications, or by rejecting site plan approval applications as incomplete.

26. Sections 8.7 and 8.8 of the Wallingford Zoning Regulations do not specify the standards that must be considered by the Planning Commission in granting or denying site plan approval. The State zoning enabling statute authorizes a planning commission, in reviewing a site plan, to impose conditions with respect to the adequacy of traffic access, circulation and parking; landscaping and screening; the protection of renewable energy resources; and other factors specified by the local zoning bylaws. 24 V.S.A. § 4407 (5). In my experience, planning commissions in other towns (acting under the same State enabling law) have imposed restrictions on the volume, hours of operation and routes used by truck traffic associated with quarry, manufacturing, warehouse and trans-loading facilities. E.g., In re Appeal of Vermont Railway, Inc., Docket Nos. 6-1-98, 126-7/98 and 224-12-98, Decision and Order on Cross-Motions for Partial Summary Judgment at 4-5 (Vt. Env’tl Ct. May 26, 1999); aff’d 171 Vt. 496 (Vt. Supreme Ct. December 8, 2000).

27. The Vermont Supreme Court has ruled that, even if a proposed project complies with all of the detailed zoning requirements, a municipal review board will still have general discretion to reject the proposed project on the grounds that it has an adverse effect on public health, safety or welfare. “Compliance with all of the standards required for a zoning permit does not necessarily mean that the denial of the permit is arbitrary and unreasonable.” Terino v. Hartford Zoning Board, 148 Vt. 610, 614.

28. If VTR were to proceed with the construction or operation of the proposed bulk salt rail-truck transload facility without meeting Wallingford's use and site plan requirements, the Town of Wallingford could seek to apply an array of enforcement tools available under State law, including fines and injunctive relief. 24 V.S.A § 4444; 4445. State law mandates that the Town zoning administrator take appropriate action to “prevent, restrain, correct or abate” the construction or use of a building or improvement by a person who has not first obtained the required local zoning authorizations; if the zoning administrator fails to take appropriate action, other interested parties may obtain a writ of mandamus compelling enforcement action. In re Fairchild, 159 Vt. 125 (1992).

29. An “interested person,” including the applicant, may appeal a conditional use, variance or site plan decision by the local boards to the Vermont Environmental Court. The Vermont Environmental Court conducts a de novo hearing on the application, unless the municipality has affirmatively elected to provide for on the record appeals. Decisions of the Environmental Court are reviewable by the Vermont Supreme Court.

30. As with appeals of Act 250 decisions, the time required to complete an Environmental Court appeal of a local zoning decision varies widely, depending on the opposition to the project. The Environmental Court is staffed by a single judge for the

entire State of Vermont, and at times the Court's docket has been overburdened. The Environmental Court occasionally disposes of an appeal on a motion for summary judgment; these cases run nine to twelve months from filing of the case to the decision. Cases with contested facts requiring a full hearing take more time. My firm has represented applicants with cases pending before the Environmental Court for as long as eighteen months.

31. A Supreme Court appeal of an Environmental Court decision will involve the same amount of time as an appeal of an Environmental Board decision in an Act 250 case, that is, approximately one to two years.

32. If a proposed project has substantial opposition, it's likely that the full appeals process for a conditional use, variance or site plan decision will require at least two to three years.

Relationship between Act 250 and Local Zoning

33. Act 250 and local zoning permit requirements are separate, independent, and in many cases, redundant. "The permit required under section 6081 of this title [Act 250] shall not supersede or replace the requirements for a permit of any other state agency or municipal government." 10 V.S.A. § 6082.

34. Vermont law does not require the issuance of the local zoning permits and approvals as a prerequisite to issuance of the Act 250 permit, or vice versa. Theoretically, the local zoning and Act 250 permit applications may proceed simultaneously. In practice, however, an applicant almost always completes some or all of the local zoning process before filing an Act 250 application.

35. One reason for undertaking at least part of the local zoning process first is that the local permits and approvals provide evidence needed to satisfy Act 250 standards. For example, Criterion 7 of Act 250 addresses the burden that the proposed project would impose on municipal services, and Criterion 10 of Act 250 addresses the compliance of the proposed project with the municipal development plan. The issuance of local zoning permits and approvals for a proposed project provides evidence (in some cases, conclusive evidence) with respect to these Criteria. In re Molgano, 163 Vt. 25 (1994); 24 V.S.A. § 4449.

36. Another reason for undertaking the local zoning process first is that the local Act 250 Commission is likely to view a project more favorably if it has been approved by, and has at least the tacit support of, the local planning and zoning bodies.

37. In over twenty years in practice, I have only been involved in one or two projects where a major Act 250 application was filed before the issuance of the key local zoning approvals. When considering how much time will be required to complete both the local zoning and Act 250 processes, one should assume that the applications will proceed consecutively, rather than in parallel. This means, for example, that even if there are no appeals, one must add the four to six months expected for the local zoning process to the four to six months expected for a full Act 250 review, in order to predict the total amount of time needed to obtain the basic local and State land use permits.

38. It's also possible that local zoning and Act 250 authorities may issue permits and approvals with conflicting requirements. I was recently involved in a Vermont Supreme Court appeal where the Zoning Board of Adjustment and Planning Commission, respectively, imposed conflicting curbcut requirements in their conditional use and site

plan decisions (one local body required two curbcuts, the other required one curbcut). The same kinds of conflicts arise occasionally between Act 250 and local zoning authorities. The only solution is to return to one or the other with an amendment application seeking to reconcile the conflict, which will add at least another two to three months to the time required for the approval process.

Regulation of Public Roads

38. In addition to regulation under Act 250 and the Town Zoning Regulations, truck traffic from the proposed bulk salt transload facility will also be subject to regulation under other Vermont laws.

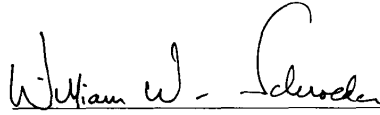
39. A development project involving construction or alteration of a driveway entrance to a Town or State road must have a highway permit. 19 V.S.A. § 1111. Since the proposed bulk salt transload facility will have a driveway entrance on a Wallingford Town road, the Wallingford Board of Selectmen will be responsible for issuing the highway permit. The Board of Selectmen may issue the permit only after determining that the proposed facility complies with, among other requirements, all local zoning and road ordinances, and the regional and municipal land use plans. The permit may impose conditions to assure compliance with applicable requirements.

40. Vermont law regulates the weight and size of trucks using State and Town roads. 23 V.S.A. Subchapter 15.

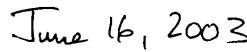
41. The Town Board of Selectmen also has general authority under State law to regulate the use of Town roads by trucks. 23 V.S.A. § 1008. The Selectboard may

prohibit the use of particular Town roads by trucks, and may impose special weight and speed limits for trucks. 23 V.S.A. § 1042, 1396, 1007.

I, William W. Schroeder, do hereby state under penalty of perjury that the foregoing statement is true and that I am authorized to make the same.



William W. Schroeder



Date

WILLIAM H. SORRELL
ATTORNEY GENERAL
J. WALLACE MALLEY, JR.
DEPUTY ATTORNEY GENERAL
WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL



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CIVIL RIGHTS: (802) 828-3657

March 13, 2001

BY CERTIFIED MAIL

Mr. Eric Benson, Esq.
444 So. Union Street, Suit 2S
Burlington VT 05401-4859

Re: Green Mountain Railroad Site in Rockingham, VT

Dear Mr. Benson:

I am writing to you about two notices of alleged violation issued to Green Mountain Railroad Corporation on January 24, 2000 and February 8, 2000. The notices allege:

- multiple violations of the 100-foot buffer zone contained in land use permit #2W0038-2,
- the discharge of material into an injection well in violation of 10 V.S.A. § 1259(a), and
- the construction of a salt storage shed without an Act 250 permit.

In addition, this Office has received information regarding:

- releases of petroleum onto the lands of the site in violation of 10 V.S.A. § 6616, and
- the construction of a salt storage shed in violation of land use permit #2W0038-3A.

The enforcement of these alleged violations has been referred to the Attorney General's Office.

Letter to Eric Benson, Esq.
March 13, 2001
Page 2 of 2

Pursuant to 10 V.S.A. Chapter 211, the Office of the Attorney General has authority to seek relief for violations of Act 250, § 1259(a) and § 6616. This relief includes temporary and permanent injunctions, remediation, and civil penalties. In addition, the Vermont Supreme Court's recent decision in *In re: Appeal of Vermont Railway*, Docket No. 99-350 (Dec. 8, 2000), makes it clear that the State may regulate facilities that are "ancillary to the operations of [a] rail line," *id.* slip. op. at 6., and in particular, the operation of a salt storage shed.

I suggest that we resolve this case through pleadings by agreement. If you would like to discuss settlement possibilities, please contact me no later than March 30, 2001. If I do not hear from you before that date, I will assume that you are not interested in a settlement. My direct phone number is (802)828-5621. I look forward to hearing from you.

Sincerely,



Rebecca Ellis
Assistant Attorney General

Cc: Linda Matteson, District 2 Assistant Coordinator
Tim McNamara, Environmental Enforcement Officer

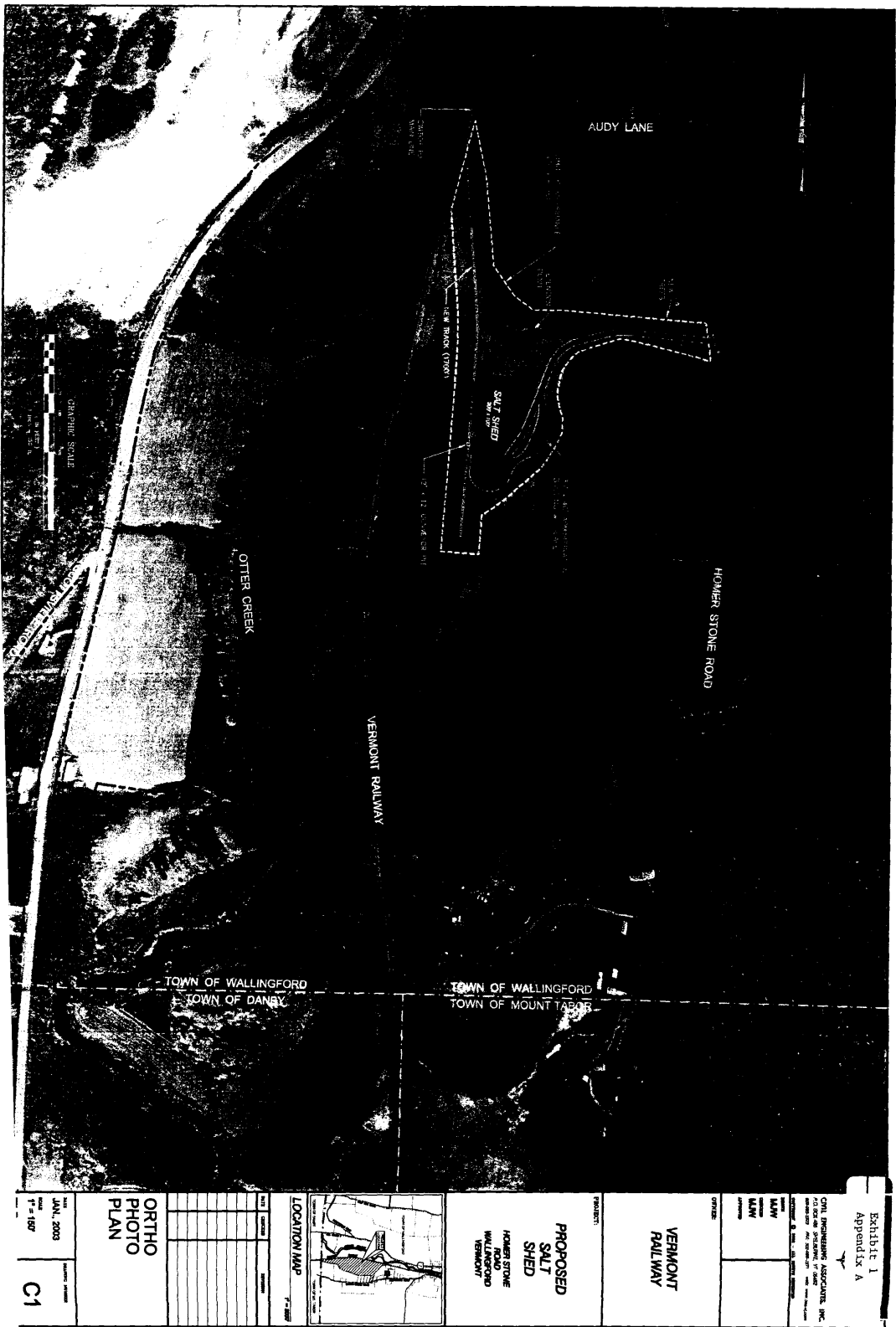


Exhibit 1
Appendix A

Civil Engineering Associates, Inc.

1000 North Main Street, Suite 200
Wallingford, Vermont 05641
Tel: (802) 253-1111 Fax: (802) 253-1112

Project No. 03-010

Scale: 1" = 100'

DATE: JAN. 2003

BY: [Signature]

CHECKED: [Signature]

APPROVED: [Signature]

OTHERS:

VERMONT RAILWAY

PROJECT:

PROPOSED SALT SHED

HOMER STONE ROAD WALLINGFORD VERMONT

LOCATION MAP

SCALE: 1" = 100'

DATE: JAN. 2003

BY: [Signature]

CHECKED: [Signature]

APPROVED: [Signature]

OTHERS:

VERMONT RAILWAY

PROJECT:

PROPOSED SALT SHED

HOMER STONE ROAD WALLINGFORD VERMONT

LOCATION MAP

SCALE: 1" = 100'

DATE: JAN. 2003

BY: [Signature]

CHECKED: [Signature]

APPROVED: [Signature]

OTHERS:

VERMONT RAILWAY

PROJECT:

PROPOSED SALT SHED

HOMER STONE ROAD WALLINGFORD VERMONT

LOCATION MAP

SCALE: 1" = 100'

DATE: JAN. 2003

BY: [Signature]

CHECKED: [Signature]

APPROVED: [Signature]

OTHERS:

VERMONT RAILWAY

PROJECT:

PROPOSED SALT SHED

HOMER STONE ROAD WALLINGFORD VERMONT

LOCATION MAP

SCALE: 1" = 100'

DATE: JAN. 2003

BY: [Signature]

CHECKED: [Signature]

C1

Exhibit 2
Appendix A

