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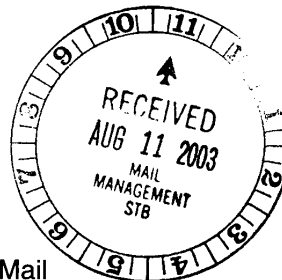
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OFFICE OF THE ATTORNEY GENERAL
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208668

August 8, 2003



Secretary
Surface Transportation Board
Washington, DC 20423

By Express Mail

Re: Finance Docket No. 34364
Vermont Railway, Inc.

Dear Secretary:

Enclosed for filing are the original and 10 copies of the State of Vermont's
Opposition to Vermont Railway's Petition for Declaratory Order.

Thank you.

Sincerely,

Jeanne Elias

Jeanne Elias
Assistant Attorney General

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cc: Service List

BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. – PETITION FOR DECLARATORY ORDER

**STATE OF VERMONT'S OPPOSITION TO
VERMONT RAILWAY'S PETITION FOR DECLARATORY ORDER**

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Dated: August 8, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364
VERMONT RAILWAY, INC. – PETITION FOR DECLARATORY ORDER



**STATE OF VERMONT'S OPPOSITION TO
VERMONT RAILWAY'S PETITION FOR DECLARATORY ORDER**

The State of Vermont ("State") submits this memorandum of law in opposition to Vermont Railway's Petition for a Declaratory Order. Vermont Railway seeks a declaration from the Surface Transportation Board that Vermont's Act 250, codified at 10 Vt. Stat. Ann. §§ 6001-6108, is preempted by the Interstate Commerce Commission Termination Act (ICCTA), 1995, Pub. L. No. 104-88, 109 Stat. 803, codified in part at 49 U.S.C. §§ 10101-11908.

The request to institute declaratory order proceedings should be denied because (1) the proceedings are barred by sovereign immunity, (2) the Federal Court for the District of Vermont has already held that Act 250 is not preempted by the Interstate Commerce Commission Termination Act (ICCTA), (3) the proposed project is beyond the regulatory authority of the Surface Transportation Board ("STB"), and (4) there is no controversy to terminate or uncertainty to be removed. Alternatively, if the STB grants the railroad's motion to institute declaratory order proceedings, then the State of Vermont requests additional time to develop the factual record.

I. INTRODUCTION

The State of Vermont learned of Vermont Railway's desire to construct a salt shed transloading facility in Wallingford, Vermont, upon the railroad's filing of this petition for a

declaratory order. Suffice it to say, Vermont Railway has not made any effort to participate in Vermont's Act 250 process. The railroad has neither sought a jurisdictional opinion from the local coordinator for the district environmental commission to determine whether the State would assert Act 250 jurisdiction over the project, nor has the railroad submitted an application for an Act 250 permit. The State has not made any attempt to assert jurisdiction over the project, nor has it attempted to institute enforcement proceedings against Vermont Railway.

In conjunction with contemporaneous proceedings¹ involving Green Mountain Railroad Corporation (GMRC), an affiliate of Vermont Railway, the State of Vermont has stipulated to allow GMRC to apply for an Act 250 permit without waiving its federal preemption arguments. *See* Exhibit 1 (Stipulation). Vermont Railway has not attempted to cooperate with the State in any such manner. While the State acknowledges Vermont Railway's prerogative to pursue an independent legal course, its chosen tack undercuts the railroad's claim that it will "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." *See* Vermont Railway's Petition for Declaratory Order at 18. Vermont Railway's failure to participate openly in the Act 250 permitting process, and its failure to cooperate with the State, raises serious questions regarding the railroad's commitment to the environmental objectives embodied in Act 250.

Vermont's land use law serves an important and legitimate governmental interest in regulating the environmental impacts of land development in this small, rural state. Enacted in 1970, Act 250 attempts to balance land development and environmental concerns. "Act 250 has

¹ Green Mountain Railroad Corporation brought suit against the State of Vermont in the summer of 2001 to enjoin enforcement of Act 250. *Green Mountain Railroad Corporation v. State of Vermont, et al.*, Docket No. 1:01-cv-181 (D. Vt.). The State of Vermont filed a motion for summary judgment in that case on July 16, 2003.

been a major feature of the Vermont legal landscape for over twenty years. Its enactment represented the culmination of an effort to create a process that would subject subdivisions and other large developments in Vermont to administrative review so as to ensure economic growth without environmental catastrophe.” *Southview Associates, Ltd., v. Bongartz*, 980 F.2d 84, 87-88 (2d Cir. 1992) (internal citations omitted).

Vermont's Act 250 mandates a statewide permitting process for commercial and large-scale land development. *See* 10 Vt. Stat. Ann. § 6001(3) (Act 250's definition of development). Under Act 250, the environmental impacts of a proposed development are assessed using ten criteria set forth in title 10, section 6086(a) of the Vermont Statutes Annotated. Landowners initiate the Act 250 process by submitting an application to the local District Environmental Commission. Decisions of the local District Environmental Commission may be appealed to Vermont's Environmental Board, *id.* § 6089(a), and an appeal from the Environmental Board is to the Vermont Supreme Court. *Id.* § 6089(b). *See generally Southview Associates, Ltd.*, 980 F.2d at 88.

The Environmental Board and District Environmental Commissions issue Act 250 permits efficiently and promptly. In an affidavit recently submitted to the Federal Court for the District of Vermont, in the pending litigation between Green Mountain Railroad and the State of Vermont, Mr. Michael Zahner, the Executive Director of the Environmental Board, averred that the average “in-house” permit processing time at the commission level for all permit applications in year 2001 was only 43.1 days. Nearly eighty percent (80%) of all Act 250 applications, including many large-scale projects, qualify for the Environmental Board's simplified review procedures, with no hearing required. In 2001, only two percent (2%), or 11 applications statewide, were denied. *See* Exhibit 2 –(Zahner affidavit). Vermont Railway's anecdotal

characterization in the Verified Statement of William Schroeder, of the delays inherent in the Act 250 process, is not supported by the facts and should be discounted accordingly.

II. THE REQUEST TO INSTITUTE DECLARATORY RULING PROCEEDINGS SHOULD BE DENIED.

Vermont Railway's petition should be denied because (1) proceedings that implicate the State of Vermont are barred by sovereign immunity, (2) the Federal Court for the District of Vermont has already held that Act 250 is not preempted by the Interstate Commerce Commission Termination Act (ICCTA), (3) the proposed project is beyond the Surface Transportation Board's ("STB") regulatory authority and (4) there is no controversy or uncertainty requiring intervention by the STB.

A. Sovereign Immunity

Vermont Railway's request for relief is barred by sovereign immunity because the State of Vermont is effectively coerced into participating in these proceedings, even though it has not consented to suit.

Pursuant to the Eleventh Amendment of the United States Constitution, "The judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI. "[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 752 (2002). Thus, its protections have been extended to shield States from suits brought by the States' own citizens; to suits brought in state courts pursuant to federal causes of action; and, most recently, to complaints filed with the Federal Maritime Commission. *Id.*

The United States Supreme Court held that proceedings before the Federal Maritime Commission bore a “strong resemblance to civil litigation in federal courts,” *id.* at 757, and thus were “the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union.” *Id.* at 756. The proceedings before the Surface Transportation Board are similarly judicial in nature. The Board has detailed rules for discovery, including procedures for depositions, 49 C.F.R. § 1114.24; written interrogatories, *id.* § 1114.26; requests for admissions, *id.* § 1114.27; and production of documents *id.* § 1114.30. The Board has rules for the sequence and timing of pleadings, *id.* § 1104; and follows rules of evidence, *id.* § 1114.1. These procedures are hallmarks of judicial adjudications. They are the type of proceedings from which the States have sovereign immunity.

The State of Vermont must participate in the STB’s proceedings or compromise its ability to defend itself at all. If the State of Vermont does not appear in the STB’s proceedings, it will likely be precluded from defending itself in future litigation. Such a fate nearly struck the City of Auburn. *See City of Auburn v. United States*, 154 F.3d 1025, 1028 n.4 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999). As noted by the Ninth Circuit, it had dismissed a previous appeal brought by the City of Auburn “because it [the City] was not a party to the [STB] proceedings below.” *Id.*

The Supreme Court rejected the suggestion that, because the Federal Maritime Commission’s orders are not self-executing, sovereign immunity should not apply.

A State seeking to contest the merits of a complaint filed against it by a private party must defend itself in front of the FMC or substantially compromise its ability to defend itself at all. For example, once the FMC issues a nonreparation order, and either the Attorney General or the injured private party seeks enforcement of that order in a federal district court, the sanctioned party is *not* permitted to litigate the merits of its position in that court. . . . Moreover, if a party fails to appear before the FMC, it may not then argue the merits of its

position in an appeal of the Commission's determination filed under 28 U.S.C. § 2342(3)(B)(iv).

Should a party choose to ignore an order issued by the FMC, the Commission may impose monetary penalties for each day of noncompliance. *See* 46 U.S.C.App. § 1712(a) (1994 ed., Supp. V). The Commission may then request that the Attorney General of the United States seek to recover the amount assessed by the Commission in federal district court, *see* § 1712(e) (1994 ed.), and a State's sovereign immunity would not extend to that action, as it is one brought by the United States. Furthermore, once the FMC issues an order assessing a civil penalty, a sanctioned party may not later contest the merits of that order in an enforcement action brought by the Attorney General in federal district court. . . .

Thus, any party, including a State, charged in a complaint by a private party with violating the Shipping Act is faced with the following options: appear before the Commission in a bid to persuade the FMC of the strength of its position or stand defenseless once enforcement of the Commission's nonreparation order or assessment of civil penalties is sought in federal district court. To conclude that this choice does not coerce a State to participate in an FMC adjudication would be to blind ourselves to reality.

Federal Maritime Commission, 535 U.S. at 762-64.

As with orders issued by the Federal Maritime Commission, the United States Attorney General can enforce orders of the Surface Transportation Board by bringing an action in district court. 28 U.S.C. §§ 2321-23; *see also Preseault v. Interstate Commerce Comm'n*, 853 F.2d 145, 148 (2d Cir.1988), *aff'd*, 494 U.S. 1 (1990). "The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49." 28 U.S.C. § 2323. Subtitle IV of title 49 authorizes, among other penalties, sanctions against persons who fail to comply with subpoenas issued by the Surface Transportation Board. 49 U.S.C. § 11905.

In the absence of sovereign immunity, the State must either appear before the Surface Transportation Board or "stand defenseless once enforcement of the Commission's . . . order or assessment of civil penalties is sought in federal district

court.” *Federal Maritime Commission*, 535 U.S. at 764. As the United States Supreme Court opined in *Federal Maritime Commission*, “if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency.” 535 U.S. at 760. For the same reasons here, the Surface Transportation Board should hold that Vermont Railway’s petition for a declaratory ruling is barred by sovereign immunity.

B. Federal Court of the District of Vermont

In its petition, Vermont Railway asks the Surface Transportation Board to address the constitutionality of Act 250, arguing that it is facially preempted by the ICCTA. Vermont Railway claims that any and all “pre-construction permitting requirements” are preempted by the ICCTA. *See* Petition at 13. The Federal Court of the District of Vermont has already decided the same precise issue in *Green Mountain Railroad Corporation v. State of Vermont, et al.*, Docket No. 1:01-cv-181, (D. Vt.). Green Mountain Railroad Corporation brought suit against the State of Vermont in the summer of 2001 to enjoin enforcement of Act 250. Green Mountain Railroad Corporation claimed that Act 250 was preempted by the ICCTA, both facially and as-applied to its rail yard operations in Rockingham, Vermont.

On September 26, 2001, the Federal Court of the District of Vermont held that Act 250 is not facially preempted by the ICCTA. In granting in part the State’s motion to dismiss, the Federal Court ruled that, “to the extent the Defendants ask the Court to dismiss Green Mountain’s claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted.” *See* Exhibit 3 (Ruling on Pending Motions, Paper 21 at 3 (Sept. 26, 2001)). “While

decisions made under Act 250 necessarily effect commercial expansion, the focus of Act 250 review is on evaluating the impact of proposed construction on the environment, not on regulating commerce.” *Id.*

The Federal District Court’s decision is persuasive authority. As the Court ruled, the federal courts are better suited than administrative agencies to decide constitutional issues. *Id.* at 7 (“[W]hether Vermont’s Act 250 is preempted by the ICCTA raises constitutional issues traditionally resolved by federal courts.”) (citing *Shaw v. Delta Airlines*, 463 U.S. 85, 96 n.14 (1983)). This Board agreed to abstain from instituting declaratory proceedings in the matter on the basis of the court’s decision and the enforcement authority of the court.

It is clear that a request for a ruling from the Board on the identical issues by Vermont Railway, an affiliate of Green Mountain Railroad Company, will create, rather than alleviate, controversy and uncertainty. The institution of declaratory ruling proceedings is also likely to waste administrative and judicial resources, while creating the risk of incomplete remedies and inconsistent adjudications. Given the persuasive authority of the Federal Court’s decision regarding the preemptive effect of the ICCTA on Vermont’s Act 250, the Surface Transportation Board should decline to institute declaratory ruling proceedings to decide the same issue.

C. Jurisdiction and Regulatory Authority

The institution of declaratory ruling proceedings would, moreover, be inappropriate because the Surface Transportation Board lacks regulatory authority over Vermont Railway’s proposed project. *See* Petition at 11. An exception to the Board’s licensing authority was created in 49 U.S.C. § 10906, which eliminated the Board’s regulatory authority “over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” Based on the representations of Vermont Railway in its petition, the

railroad intends to construct a spur track, a weigh station and a truck transfer facility for salt.

Petition at 3.

As this Board recognized in *Borough of Riverdale, Petition for Declaratory Order*:

Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track. In such cases, we can provide advice about how preemption applies, but we have no direct involvement in the process. Thus, the interpretation of the preemption provisions has evolved largely through court decisions in cases outside of our direct jurisdiction and in which we were not a party.

S.T.B. Finance Docket No. 33466, at 5 (Sept. 9, 1999) (emphasis added).

The absence of Board regulatory authority does not, however, grant railroads permission to conduct exempt construction activities without any oversight. In *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, S.T.B. Finance Docket 33971 (April 30, 2001), this Board held that “not all state and local regulation that affects railroads is preempted” and found that some of the conditions proposed by the local planning board “might be reasonable measures in and of themselves” and went on to offer “some general observations regarding the kinds of restrictions that might be reasonable in individual circumstances.” *Id.* at 11. The Board also emphasized that just because the conditions proposed by a local authority were “initially imposed as part of an impermissible permit does not mean that every one of them is preempted.” *Id.* at 11 n.31.

In order to develop such reasonable restrictions and conditions, there must be a process which includes a detailed exchange of information between parties. The Act 250 process in Vermont provides such a mechanism. Not only is the State of Vermont willing to enter into a

stipulation to allow Vermont Railway to participate in the process while preserving its preemption arguments, but the right to challenge conditions on the basis of federal preemption is already part of the process, and has been successfully used by Vermont Railway to avoid conditions which it believed were preempted.

This Board has recently clarified and limited the scope of its jurisdiction and regulatory authority in *Hi Tech Trans, LLC—Petition for Declaratory Order-Hudson County, NJ*, STB Finance Docket No. 34192 (November 20, 2002). The Board declined to institute declaratory order proceedings over the in-state truck transport of commodities to a rail site because those activities extended “beyond the *rail related activities* at the CP transloading facilities” and therefore were not within the Board’s jurisdiction. *Hi Tech Trans* at 3 (emphasis added). The description given by Vermont Railway of its salt transloading operations appears to be similar in a reverse fashion. The salt, which arrives at the site by rail is then transferred into a concrete unload pit. After unloading, the salt is either transferred from the pit to trucks or to an on-site salt shed. In either event, after the salt has been unloaded into the concrete unload pit, an argument can be made that the rail-related activities at the transloading facility have ended. According to the petition, all the salt, from that point forward, is loaded onto trucks and delivered by truck, to its eventual destination within the State of Vermont. Not enough details have been provided by Vermont Railway for a thorough understanding of the proposed facility and its operations, including the nature and extent of truck traffic that the project will create, but that the local and state authorities may have a duty and a right to regulate the truck traffic leaving the proposed facility, and that regulation of such traffic may indeed be insufficiently related to rail transportation for this Board to invoke jurisdiction is ample reason for the Board to carefully consider declining to institute declaratory rulings at this time.

"Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track. In such cases, we can provide advice about how preemption applies, but we have no direct involvement in the process. Thus, the interpretation of the preemption provisions has evolved largely through court decisions in cases outside of our direct jurisdiction and in which we were not a party."

Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & Western Railway Corp., S.T.B. Finance Docket No. 33466, 1999 WL 715272 at *4 (I.C.C.) (Sept. 9, 1999) (emphasis added).

Because the Surface Transportation Board does not have regulatory authority over Vermont Railway's planned future activities, the Board's rulings on these matters would be advisory only.² An advisory opinion would not advance resolution of the parties' dispute, and thus is not authorized under 5 U.S.C. § 554(e). Furthermore, any decision regarding preemption on such activities would clearly be best addressed not by the Board, but by a court of appropriate jurisdiction.

D. Proceedings before this Board are premature and therefore unwarranted.

To the extent that Vermont Railway objects to any specific permit conditions that may be imposed through the Act 250 process, the Petition for a Declaratory Ruling is premature for the following reasons: (1) Vermont Railway does not own the land in question; (2) uncertainty about the project cannot be resolved through Board action; (3) any uncertainty due to delay has been

² On page 11 of the Petition, Vermont Railway cites this Board's decision in *North San Diego County Transit Development Board--Petition for Declaratory Order*, STB Finance Docket No 34111 (August 19, 2002) to demonstrate that the Board has jurisdiction to decide the pending matter. However that decision relied upon and cited a previous preemption determination made by a federal court on the identical issues, appropriately deferring to the federal court's authority and expertise in making the fact bound determinations necessary to the preemption analysis.

created by Vermont Railway and not by the Act 250 process; and (4) there has been no threat of Act 250 enforcement relating to this project by the State of Vermont.

1. Vermont Railway does not yet own the land.

While the petition of Vermont Railway is silent on the issue, the Verified Statement of Jerome Hebda makes clear that Vermont Railway does not yet own the land that is the subject of its request for a ruling and that it has no contractual commitment with a commodity supplier for this site. Hebda V.S. ¶¶ 4 & 8. Institution of declaratory proceedings by this Board to determine the complex interaction between federal, state and local laws as applied to an inadequately described truck transfer project, on land not yet owned, involving commodities not yet contracted for is premature and therefore both inappropriate and unnecessary.

2. Uncertainty about the nature of the project cannot be removed through Board action.

Vermont Railway, through its failure to share any information about its potential project with the community and with the various local and state entities required by law to oversee land use in Vermont, has virtually guaranteed that no entity would even be able to take any position on the project. The description of the project contained in the three-page verified statement of Paul Craven is far too vague for the State of Vermont to make any determination as to what, if any, aspects of Act 250 might govern the project. Indeed the description of the project inspires more questions than it answers. Craven, for example, avers that the impacts on the community from operation of the transload facility “should not be any greater than those flowing from the site when it operated as a quarry”. Craven V.S. ¶ 7. But this appears to be pure conjecture, as Craven provides no factual basis for this conclusion. It is unknown what the impacts on the community were from the quarry operation, or when use of the quarry ceased, or what

development has occurred on the adjacent properties since the time that quarry operations ended. Nor has Vermont Railway demonstrated that it has made or intends to make any effort to learn from the community what those impacts were. That the spokesperson for the project can gauge its community impact based upon conjecture casts grave doubts upon the accuracy of other representations about the project as a whole. A formal or informal presentation of information about the project could eventually lead to a multilateral agreement on all aspects of the project that satisfies all interested parties. But unless or until a detailed description of the project is shared with the local and state authorities no progress toward resolution can be made. The lack however, of information about the project does not create the kind of uncertainty that this Board can resolve through institution of declaratory rulings.

3. All delays in the Project are attributable to Vermont Railway and are not a result of Act 250.

Any delays in determining the eventual outcome of this proposed project are solely attributable to the manner in which Vermont Railway has elected to proceed and thus can not be attributed to the Act 250 process, which a federal court has already declared is not preempted. Assuming it will someday purchase the property, Vermont Railway is aware of but chooses to ignore both formal and informal mechanisms available to it to address environmental concerns that the project would inevitably present. As previously stated, the allegations of delay in the Act 250 process contained in the Verified Statement of William Schroeder are inaccurate, pessimistic, over-generalizations that are contradicted by the specific statistics regarding Act 250 timelines provided in the Zahner Affidavit. Vermont Railway further alleges that based on anecdotal experience of Vermont Railway and Green Mountain Railroad Company President Jerome Hebda, that uncertainty in the Act 250 process is responsible for customer loss. In his Verified Statement, Hebda asserts that GMRC lost a cement customer due to permitting

uncertainties. Hebda V.S. ¶ 10. However, the termination letter from that customer, as well as Hebda's own deposition testimony, and that of GMRC Operations Manager Doug Lamoureux, all obtained in conjunction with discovery in the pending federal court litigation, give different non-permit related reasons for the customer's departure decision.

4. There is no threat of enforcement by the State of Vermont.

Vermont Railway alleges that a threat of enforcement against a railway creates uncertainty or controversy sufficient to invoke the Board's authority to institute declaratory ruling proceedings. The cases cited by the railroad in support of this premise are distinguishable in that the facts of this case clearly demonstrate that the State of Vermont has taken no action that could be interpreted as a threat of enforcement. Absent any knowledge about this project until the filing of this petition, Vermont had no reason to take any action.³

Vermont Railway has not communicated the full nature and extent of the railroad's new construction project in any meaningful detail to any agency of the State; thus, the environmental impact of the project has not and cannot yet be assessed. As a consequence, the State of Vermont has not taken any official action that would impede Vermont Railway's planned construction activities on the not yet acquired Wallingford property. At this early juncture therefore, the institution of declaratory proceedings by the Board would be premature.

³ Vermont Railway takes great pains in its petition to distinguish the proposed Wallingford project from the construction of a salt shed at an existing Rockingham facility, operated by the Green Mountain Railroad Company, which is the subject of pending federal court litigation. They base this distinction on the fact that the Rockingham site involved a series of existing Act 250 permits to which GMRC was an applicant where no such permits exist at the proposed Wallingford site. The suggestion therefore that a letter written in 2001 from Assistant Attorney General Ellis concerning permit enforcement at the Rockingham facility, *see* Petition at Exhibit 4, constitutes a threat of enforcement relating to the newly announced proposed project in Wallingford or to all similar projects is simply not credible.

The Board's decision in *Fletcher Granite Company, LLC – Petition for Declaratory Order*, S.T.B. Finance Docket No. 34020 (June 25, 2001) examined a matter in an identical posture and determined that no action by the Board was warranted. In *Fletcher*, the petitioner owned a sidetrack on its property that had been out of service for 35 years. After declaring its intention to resume use of the sidetrack, Fletcher sought an order from the STB declaring that any state or local regulation of the project was preempted by the ICCTA. Fletcher cited concerns that resumption of rail service on its property could be delayed or defeated by local regulation by the Town of Westford. The Board denied the request to institute proceedings on the basis that such action would have been premature.

Under the Administrative Procedure Act, "the agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. 554(e). See also 49 U.S.C. 721. It would be premature for the Board to institute a declaratory order proceeding at this point, as there is not now, and may never be, a controversy that needs to be terminated. Westford, while filing a notice of appearance, has not submitted any substantive views on this matter. Nor does Westford appear to have taken any official action that would impede the resumption of rail service over Fletcher's track. Fletcher, moreover, has indicated that it will submit work plans and act consistently with applicable environmental standards. Thus, the Board will not attempt to intervene in this matter at this time.

Id. at 2. (emphasis added). Vermont Railway cites concerns similar to those expressed by Fletcher in the above decision, namely that Vermont would impose conditions pursuant to Act 250 that will interfere with the railroad's proposed project. However, the railroad does not have a factual basis for this concern, as Vermont, like Westford, has not taken any official action on this matter.

In *Borough of Riverdale, Petition for Declaratory Order*, S.T.B. Docket No. 33466 (Feb. 23, 2001), this Board was requested to institute proceedings and did so in a matter where, in

retrospect, it appears that controversy had not yet arisen. The subsequent exchange of information about the proposed project that occurred between the parties and interested persons led to a voluntary resolution of all disputed matters. The lack of controversy eliminated the need for intervention and the Board then terminated the proceedings.

Similarly, nothing would prevent an arrangement, for example, whereby Vermont Railway and Vermont agreed that the railroad could apply for an Act 250 permit while preserving its right to argue that the Act 250 process, as well as any permit issued thereunder, is preempted by the ICCTA. An agreement of this kind would allow the development of all the facts necessary for the proper determination of the matters in dispute. This would give local and state agencies an opportunity to determine whether any reasonable conditions should be imposed on the construction to satisfy legitimate governmental health and safety goals, while preserving the legal status quo for all parties. Such an agreement would also provide any additional interested parties with a full and complete picture of the project. The lack of such an arrangement at the current time however does not create a controversy. Absent official action by Vermont that interferes with the planned activities of the railroad, there is no controversy and intervention by the Board is not warranted.

III. IF THE BOARD INSTITUTES DECLARATORY RULING PROCEEDINGS, THE STATE REQUESTS ADDITIONAL TIME TO PREPARE A FACTUAL RECORD.

The State vigorously contests many of the claims made in Vermont Railway's petition for declaratory ruling. Some examples of the inaccuracies include (1) Vermont Railway's characterization of the timeframes in which Act 250 permits are issued, (2) Vermont Railway's description of the Wallingford site, and (3) Vermont Railway's claim that it lost customers

because of Act 250. As a further example of the inaccuracies in Vermont Railway's petition, the ortho-photo appended to Paul Craven's verified statement is several years old and does not reflect recent development. At a very minimum, if these proceedings are to continue, the State of Vermont requests the opportunity to present its own evidence and to cross-examine Vermont Railway's witnesses.

Should the Board decide to institute a declaratory order proceeding, the State of Vermont requests the following discovery and pleading schedule.

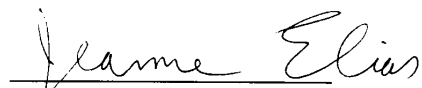
1. Discovery shall close 90 days after service of Board's decision instituting a declaratory order proceeding.
2. Vermont Railway shall file its Opening Statement within 30 days after close of discovery.
3. The State of Vermont and any other parties shall file their Opening Statement 45 days after receipt of Vermont Railway's Opening Statement.
4. Vermont Railway shall file its Rebuttal within 20 days after receipt of State's and any other party's Opening Statement.
5. The State of Vermont and any other parties shall file any responsive statement within 15 days after receipt of Vermont Railway's Rebuttal.

Wherefore the State of Vermont respectfully requests that Vermont Railway Inc.'s petition to institute declaratory ruling proceedings be denied.

Dated: August 8, 2003, at Montpelier, Vermont.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By:



Jeanne Elias
Rebecca Ellis
Assistant Attorneys General

CERTIFICATE OF SERVICE

I certify that copies of the foregoing State of Vermont's Opposition to Vermont Railway's Petition for Declaratory Order have, this 8th day of August, 2003, been served by first-class mail, postage prepaid, on the following persons:

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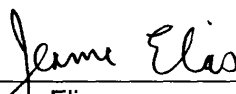
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Rutland, VT 05701-5048



Jeanne Elias

EXHIBIT 1

AGREEMENT

The undersigned, Green Mountain Railroad Corporation ("GMR") and the State of Vermont ("the State"), hereby stipulate and agree to the following:

WHEREAS:

1. GMR is a Class III railroad that operates fifty-two (52) miles of track between Rutland, Vermont and Cold River, New Hampshire, and operates a rail yard known as Riverside, located on its main line in Rockingham, Vermont.
2. GMR provides freight service which the State wants to encourage.
3. GMR wishes to construct cement silos at the Riverside yard to enable an increase in the freight traffic of cement products.
4. GMR and the State are parties to litigation to determine whether Act 250 is preempted by the Federal Interstate Commerce Commission Termination Act (ICCTA).

WHEREFORE, the parties stipulate as follows:

- A. The State agrees that if GMR requests a jurisdictional opinion on whether the proposed cement silos constitute a "development" under Section 6001(3) of Act 250, as applied to projects undertaken by a railroad, the State will not take the position in any present or future litigation proceeding or action that by doing so, GMR has voluntarily subjected itself to State jurisdiction under Act 250, unless the federal court ultimately determines following any appeals that act 250 is not preempted by federal law.
- B. The State agrees that GMR may apply for an Act 250 permit for the cement silos concurrent with seeking a jurisdictional determination and agrees that by applying for an Act 250 permit, GMR does not waive its position that the project is not a "Development" therefore not subject to Act 250 by its terms. The State further agrees that the GMR's

application can be withdrawn without penalty or prejudice at any time prior to the issuance or denial of an Act 250 permit for the cement silos if the jurisdictional ruling comes out in favor of GMR.

C. The State agrees that given the pendency of the litigation before Judge Murtha, it will not take the position that alleged past violations of Act 250 at Riverside constitute a basis for denying a permit for the cement silos.

D. The State will not argue that GMR has voluntarily subjected itself to Act 250 jurisdiction by applying for a permit for the silos unless the federal court ultimately determines following any appeals that the permitting requirements of Act 250 are not preempted by the ICCTA.

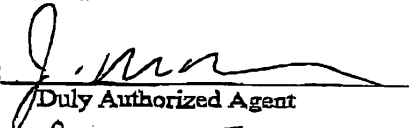
E. The State agrees that if conditions are imposed on a permit for the silos that GMR believes unduly interfere with rail activities, GMR can challenge the conditions in Federal Court on preemption grounds without exhausting State administrative procedures ^{OR} judicial appeal beyond the Environmental Board.

F. The State will not contest GMR's claim that this litigation is "capable of repetition yet evading review" even if an act 250 permit to build cement silos at the Rockingham site is granted.

G. The State agrees that if GMR does not appeal an Environmental Board finding that GMR's application is Act 250 jurisdictional, the State will not argue that GMR has voluntarily submitted to State jurisdiction.

Dated at BURLINGTON, Vermont this 16TH day of October, 2002.

GREEN MOUNTAIN RAILROAD
CORPORATION

BY: 

Duly Authorized Agent

PRESIDENT

Dated at Montpelier, Vermont this 31st day of October, 2002.

STATE OF VERMONT

BY: Jeanne Ellis
Duly Authorized Agent
Assistant Attorney General

BTW/227205.1

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Green Mountain Railroad Corporation,
Plaintiff

v.

State of Vermont, Vermont Agency of
Natural Resources, and William H.
Sorrell as Attorney General of the State
of Vermont,
Defendants

Docket No. 1:01-cv-181

AFFIDAVIT OF MICHAEL ZAHNER

Michael Zahner declares as follows:

1. I have been employed by the Environmental Board since 1981 and have served as the Board's Executive Director since 1996. I am responsible for the administration of the Act 250 program and report directly to the Chair of the Environmental Board who is appointed by the Governor.

Act 250 Statistics

2. The Environmental Board Rules allow for both initial permit applications and permit amendments. An amendment is required for any administrative change in the terms and conditions of a land use permit, as well as for any "material" or "substantial" changes in a permitted project. Environmental Board Rule 3 provides a mechanism for obtaining a

jurisdictional opinion regarding the applicability of Act 250 to a proposed project, *see also* 10 V.S.A. 6007(c) (procedure for requesting and appealing jurisdictional opinions), Environmental Board Rule 34 provides a mechanism for obtaining an amendment to an Act 250 permit, and Environmental Board Rule 51 provides a simplified review procedure for minor applications.

3. Pursuant to Environmental Board Rule 51, an application may be reviewed under the simplified procedures if the district commission finds that there is demonstrable likelihood that the project will not present significant adverse impact under any of the ten criteria under 10 V.S.A. § 6086(a). Findings of fact and conclusions of law are not prepared for a minor application unless a public hearing is requested. Statutory or permitted parties have the opportunity to request a hearing within a specified period of time, generally three weeks, for these applications.

4. Amendment applications represent the majority of all applications received and most are processed under the Board's minor application rules. However, these amendment applications often include some very large projects such as ski area expansion, commercial development in industrial parks, and substantial changes to existing development already under Act 250 jurisdiction.

5. Most minor applications are processed without a hearing. In 2002 and 2001, eighty percent (80%) of all Act 250 applications were processed as minor applications, with no hearing scheduled.

6. In 2001, the District Commissions denied 11 permit applications, a rate of 2%. This compares to a denial rate of 1.8% in 2000.

7. The average "in-house" permit processing time at the commission level for all permit applications in 2001 was 43.1 days, down slightly from 45.9 days in 2000. In 2001, 62% of all permit decisions were issued within 60 days and 81% were issued in 120 days. These percentages are nearly identical to the previous year.

8. If administrative amendments are removed from the analysis, the in-house average processing time in 2001 increases from 43 days to 49.5 days for all Act 250 permit applications.

9. In 2002, the District #2 Commission, which has jurisdiction over the area in which GMRC's Riverside site is located, received 85 applications for an estimated construction cost of \$50,532,960. Fifteen (15) of those applications were treated as major applications and went to a hearing. Fifty-three (53) were minor applications which did not require a hearing. Five (5) of the applications were simply to extend the construction completion dates for permits. Twelve (12) were treated as Administrative Amendments, with no potential for impact on the criteria of Act 250, and were issued by the Coordinator.

10. In 2001, the Vermont Environmental Board received a total of 20 appeals, 8 requests for declaratory rulings, and 6 revocation petitions, for a total of 34 active Board cases. This compares to a total of 41 cases filed in

2000 and 28 cases filed in 1999. The Board issued 39 decisions in 2001, and 35 decisions became final in that time period. Of the 35 decisions which became final in 2001, 40% of the cases were processed in less than 6 months and 49% of the cases were processed in less than 9 months. This compares to 39% and 61% respectively the previous year. To some extent, the slight slowdown in processing times can be attributed to the Environmental Board stepping up its efforts to encourage parties to settle cases. Settlement attempts take time, but have often been successful.

Declaratory Ruling Request #422

11. On December 31, 2002, Green Mountain Railroad Corporation requested an opinion from the District Environmental Coordinator as to whether the construction of a cement silo project triggered the need for an amendment to its Act 250 permit, or whether the project fell within an exception to the definition of development under 10 V.S.A. § 6001(3)(C)(iv). The District Coordinator determined that an amendment was required.

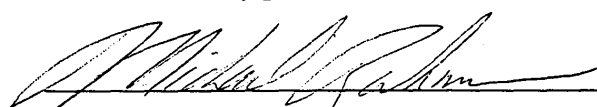
12. On February 6, 2003, and pursuant to 10 V.S.A. § 6007(c), GMRC appealed the District Coordinator's jurisdictional opinion to the Environmental Board by means of a petition for a declaratory ruling. The case has been captioned Declaratory Ruling Request #422.

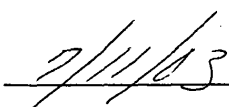
13. In a pre-hearing order issued on March 3, 2003, the Chair of the Environmental Board stated that the issues on appeal were:

1. Whether the Permit [#2W0038] applies to the Project.

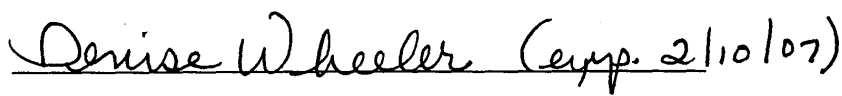
2. If the answer to issue #1 is in the affirmative, whether the Project requires a land use permit amendment pursuant to Act 250.
3. If the answer to issue #1 is in the negative, whether the Project requires a land use permit pursuant to Act 250.

14. The Environmental Board held a hearing on GMRC's declaratory ruling request on June 25, 2003. Declaratory Ruling Request #422 is currently pending before the Environmental Board.


Michael Zahner, Affiant


Date

Subscribed to and sworn before me at 11th this July day of _____, 2003.


Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

GREEN MOUNTAIN RAILROAD
CORPORATION

v.

STATE OF VERMONT, VERMONT
AGENCY OF NATURAL RESOURCES,
and WILLIAM H. SORRELL, as
Attorney General of the
State of Vermont

Civil No. 1:01CV181

RULING ON PENDING MOTIONS
(Papers 9 and 14)

I. Background

For the purpose of deciding the pending motions, the Court accepts the following allegations as true. See, e.g., Papasan v. Allain, 478 U.S. 265, 283 (1986).

Plaintiff Green Mountain Railroad Corporation (hereinafter "Green Mountain") operates 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. See Complaint (Paper 1) at para. 7. In addition, it owns and operates a facility known as "Riverside" which is located on its main rail line in Rockingham, Vermont. See Paper 1 at para. 8.

Riverside is approximately 65 acres and is bounded on the west by a state highway and Green Mountain's railroad line and on the east by the Connecticut River. Paper 1 at para. 10. Green Mountain uses Riverside as a "yard for transloading

freight between trains and trucks, and for storing freight and railroad equipment in buildings and on the ground." Green Mountain's Memorandum in Support of Motion to Stay (Paper 15) at 2.

As a rail carrier, Green Mountain is subject to the provisions of the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101-16106 (hereinafter "ICCTA"). One purpose of the ICCTA is to deregulate the rail and motor carrier industries and to foster sound economic conditions in the transportation industry. See generally 49 U.S.C. § 10101; see also In re Vermont Railway, 769 A.2d 648, 651 (Vt. 2000) (citing legislative history). Its provisions are administered by the Surface Transportation Board (hereinafter "STB"). See, e.g., 28 U.S.C. § 1336; 49 U.S.C. § 10501.

The ICCTA contains the following preemption provision:

The jurisdiction of the [STB] over-

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are

exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

In 1997, Green Mountain determined a need to expand its operations at Riverside. It obtained a Land Use Permit (the "1997 Permit") from Vermont's District 2 Environmental Commission pursuant to 10 V.S.A. Chapter 151 (hereinafter "Act 250").

Act 250 is a land use statute intended to protect Vermont's environmental resources and to preserve its public land. Southview Assoc. v. Bongartz, 980 F.2d 84, 89 (2d Cir. 1992), cert. denied, 507 U.S. 987 (1993). As such, it establishes a statewide permitting process for various forms of land development. See 10 V.S.A. §§ 6001-6108.

When implementing Act 250, the State has determined that development should be coordinated so as to provide maximum economic development with minimal environmental impact. 10 V.S.A. § 6042(6)(A). Therefore, while decisions made under Act 250 necessarily effect commercial expansion, the focus of Act 250 review is on evaluating the impact of proposed construction on the environment, not on regulating commerce. Compare 10 V.S.A. § 6086 (Act 250 review of impact on streams, wetlands, and wildlife habitat) with 49 U.S.C. § 10701 et seq. (STB reviews rail carrier rates).

The 1997 Permit "authorized the construction of an office building approximately 20 feet by 30 feet for up to five employees and the operation of a forest products distribution yard using rail and trucks, but only in accordance with the conditions of the Permit." Paper 1 at para. 12 (quotations omitted). The Permit set forth 27 "conditions," including one that requires Green Mountain to maintain a "100-foot undisturbed, naturally vegetated buffer strip . . . between the top of the bank of the Connecticut River and any undisturbed areas." Paper 1. at para. 13.

At the time the State of Vermont imposed the buffer strip requirement pursuant to Act 250, Green Mountain did not anticipate it would interfere with its operations. See Paper 1 at para. 14. However, Green Mountain again needs to expand its operations at Riverside. Specifically, Green Mountain already has constructed a new salt storage shed which the State has determined violates the 1997 Permit by impinging on the buffer zone. See Paper 1 at Exhibit 3. In addition, Green Mountain wants to build a spur track and a new facility for the transloading of bulk cement. See Paper 1 at paras. 26-27. Because Green Mountain cannot expand its operations and maintain the buffer strip, the State has threatened to initiate a lawsuit in state court which would, inter alia, require the plaintiff to comply with the 1997 Permit and to

obtain new approval under Act 250 before engaging in any further construction at Riverside.

In early June 2001, Green Mountain simultaneously filed this action and a petition with the STB. See 49 U.S.C. § 721. In both proceedings, Green Mountain seeks a declaratory ruling that Vermont's Act 250 is preempted by the ICCTA. The administrative proceeding is currently pending. In a stipulation filed with this Court in July 2001, the State has agreed not to initiate an enforcement action for alleged past violations of Green Mountain's Act 250 permit pending resolution of its Motion to Dismiss.

II. Discussion

A.

Green Mountain argues that the defendants' attempt to apply Act 250 to its proposed expansion at Riverside is prohibited by the ICCTA. The plaintiff maintains that state and local environmental regulations, such as Act 250, are preempted because they unduly interfere with interstate commerce by hindering a rail carrier's ability to construct facilities and conduct operations. See Paper 1 at 1. The plaintiff further argues that the STB provides the proper forum for initially determining its federal preemption arguments.

Citing the doctrine of "primary jurisdiction," Green Mountain asks the Court to stay this case and refer it to the STB. See Motion of Green Mountain to Stay (Paper 14). "The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight." National Communications Assoc., Inc. v. American Tel. and Tel. Co., 46 F.3d 220, 222-23 (2d Cir. 1995) (citations omitted). To determine whether an agency has primary jurisdiction, the Court should consider whether, under the regulatory scheme at issue, the issues have been placed within the special competence of an administrative agency, whether referral to the agency would secure uniformity and consistency in the regulation of the business at issue, and whether the issue involves technical questions of fact uniquely within the expertise of the agency. See, e.g., Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976). "The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings." National Communications Assoc., 46 F.3d at 223.

The issues raised by Green Mountain do not require the application of the doctrine of primary jurisdiction.

"Preemption of state and local law by federal law is required by the Supremacy Clause of the U.S. Constitution, which provides that 'the Laws of the United States . . . shall be the Supreme Law of the Land'." Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367, 1374 (S.D. Fla. 2000). Thus, whether Vermont's Act 250 is preempted by the ICCTA raises constitutional issues traditionally resolved by federal courts. See Shaw v. Delta Airlines, 463 U.S. 85, 96 n.14 (1983); see also In re Pan American Corp., 950 F.2d 839, 847 (2d Cir. 1991) (abstention is not appropriately invoked in a preemption case). Moreover, at this time there is no reason to believe the parties cannot obtain a speedy resolution of their dispute in this forum. The plaintiff's Motion to Stay these proceedings and to refer this case to the STB is DENIED.

B.

The defendants have moved to dismiss the plaintiff's facial challenge to the applicability of Act 250 for failure to state a claim upon which relief can be granted. In addition, the defendants ask the Court to abstain from making any determination regarding the State's attempts to enforce the 1997 Permit. See Defendants' Motion to Dismiss (Paper 9) at 1.

The ICCTA contains a specific preemption provision which requires case-by-case analysis. On its face, the ICCTA preempts state and local attempts to regulate the economic activities of rail and motor carriers. See CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 658 (E.D. Mich. 2000) ("Several cases have held that this section preempts state law regulation of railroads in an economic sense."); Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288, 1296 (D. Mont. 1997) ("[T]he state regulation at issue falls squarely in the preempted field of economic regulation, and it affects the policy of deregulation of railroad transportation."). However, it does not preempt state and local provisions which "are generally applicable exercises of a city's police powers to safeguard the health and safety of its citizens." Florida East Coast Ry., 110 F. Supp. 2d at 1376.

The Second Circuit recently considered the relationship between the ICCTA's "motor carrier" provisions and a city ordinance regulating certain towing practices. Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765 (2d Cir.), cert. denied, 528 U.S. 868 (1999). On its face, 49 U.S.C. § 14501(c)(1) broadly preempts state laws "related to a price, route, or service of" a motor carrier "with respect to the

transportation of property." Examining Congressional intent and the scope of preemption, the Second Circuit summarized:

On the one hand, . . . the broad "related to" language of § 14501(c)(1) generally preempts economic regulation by the states within the field of intrastate towing. On the other hand, the statutory text, Congress' aim to leave the states' residual control over safety and other local concerns intact, and the presumption against preemption of historic state police power, argue against finding preemption where only incidental economic burdens can be discerned. In the present circumstances where these competing concerns collide, we are persuaded . . . that the starting presumption against preemption of state law has not been overcome.

Id. at 774.

Likewise, this Court recently has determined that the motor carrier provisions of the ICCTA do not preempt Act 250. OMYA, Inc. v. State of Vermont, Docket No. 2:99CV180 (D. Vt. Mar. 15, 2001) (slip opinion appended as exhibit to Paper 9). Upon an analysis of 49 U.S.C. § 14501(c)(1) and court decisions rendered after examination of analogous statutory enactments, Judge Sessions stated:

This Court concludes, from the discussions in Ace Auto Body and Dump Truck, that § 14501 preempts state laws that either directly relate to prices, routes, or services of motor carriers, or that indirectly but "acutely interfere[]" with the deregulatory purposes of the FAAAA. . . . Legitimate exercises of a state's police power that create only incidental economic burdens will not be preempted. See Ace Auto Body, 171 F.3d at 774. . . .

Vermont's Act 250 does not directly relate to prices, routes, or services of motor carriers. It is a land use statute intended to "protect Vermont's

environmental resources with an eye towards . . . preserving lands, when possible, that have special values to the public." Southview Assocs. Ltd. v. Bongartz, 980 F.2d 84, 89 (2d Cir. 1992). Nor does Act 250, . . . acutely interfere with the deregulatory purposes of the FAAAA. Like the prevailing wage laws at issue in Dump Truck, 152 F.3d at 1189, the permit conditions have at most a remote and tenuous effect on the routes or services of motor carriers.

Slip op. at 19-20 (citations and quotations omitted).

By analogy, to the extent the defendants ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted. Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA. Like 49 U.S.C. § 14501(c)(1), 49 U.S.C. § 10501 provides the STB "exclusive" jurisdiction over the economic activities of rail carriers. In many cases, this jurisdiction can be exercised concurrent with the state's exercise of its customary police powers.

However, whether the defendants' effort to enforce one or more conditions in the 1997 Permit violates the ICCTA in this particular case requires further development of the record, either by a properly-supported motion for summary judgment or after an evidentiary hearing on the merits. Therefore, to the extent the defendants seek dismissal of Green Mountain's claim that Act 250 and/or the 1997 Permit requirements are preempted in this particular case, that motion is denied.

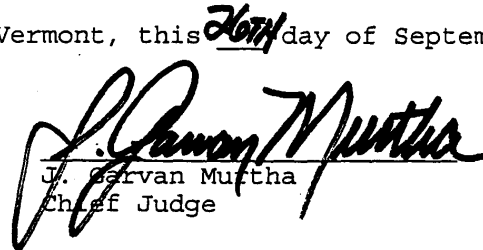
Finally, the defendants' Motion to Abstain is denied. Currently, the defendants have not initiated state proceedings; therefore, there is no pending state action. See Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) ("Absent any pending proceeding in state tribunals, . . . application by the lower courts of Younger abstention was clearly erroneous.") (emphasis omitted). Furthermore, the issue remaining, i.e., the preemptive effect of the ICCTA under the particular circumstances present in this case, presents a federal question. See In re Pan American Corp., 950 F.2d at 847 ("[I]t would be futile to abstain in deference to a state decisional body if it later should develop that it may not have jurisdiction over a dispute due to the preemptive jurisdiction of a federal body.")

III. Conclusion

The plaintiff's Motion to Stay (Paper 14) is DENIED. The defendant's Motion to Dismiss (Paper 9) is GRANTED in part and DENIED in part. The Motion to Abstain is DENIED.

SO ORDERED.

Dated at Brattleboro, Vermont, this 26th day of September, 2001.


J. Garvan Murtha
Chief Judge