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September 15, 2003

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

By Hand Delivery

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Office of Proceedings

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

Dear Secretary Williams:

Enclosed for filing please find and original and 10 copies of a Supplemental Petition in the above-referenced case. Also enclosed is a diskette with a copy of the body of the pleading, generated in this office.

Respectfully submitted,

Andrew P. Goldstein
Attorney for Vermont Railway, Inc.

cc: All Parties

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Office of Proceedings

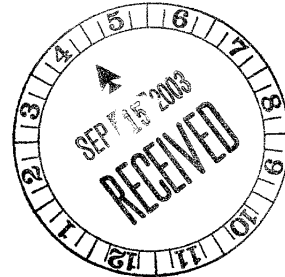
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BEFORE THE
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -- PETITION FOR DECLARATORY ORDER

SUPPLEMENTAL PETITION

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Attorneys for Petitioner

Dated: September 15, 2003

I. PRELIMINARY STATEMENT

On June 17, 2003, Petitioner, Vermont Railway, Inc. ("VTR"), filed a petition pursuant to 5 U.S.C. § 554(e) ("Administrative Procedure Act" or "APA") and 49 U.S.C. § 721 requesting the Board to institute a proceeding in which it could determine the extent to which the State of Vermont's ("Vermont" or "State") environmental permitting legislation, known as Act 250, and the zoning ordinances of the Town of Wallingford, VT ("Wallingford") are preempted by the provisions of 49 USC § 10501(b) with respect to the construction and operation by VTR of a bulk salt rail-truck transload facility and spur track necessary to serve that facility.

VTR's Declaratory Order Petition was served on various entities deemed to have a potential interest in the Petition, including representatives of the State and Wallingford, as shown on the Petition's Certificate of Service. Acting through counsel, Wallingford and the State separately replied in opposition to the Petition. No other comments have been received by VTR.

This pleading, in the form of a Supplemental Petition, is occasioned in part by the State's contention that VTR'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." The State relies on the Eleventh Amendment of the United States Constitution as recently interpreted by the Supreme Court in Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002) ("FMC"). Although the State has not elected to posit its sovereign immunity claim as a motion to dismiss, it nevertheless is a jurisdictional challenge plainly intended to nullify the Peti-

tion, at least with respect to Vermont's Act 250. VTR would be remiss were it to fail to respond to that challenge.

Wallingford has not raised any claim of sovereign immunity,¹ but both Wallingford and the State assert that there is no controversy or uncertainty sufficiently ripe to warrant the institution of a declaratory order proceeding. Alternatively, the State proposes a procedural schedule to be observed in the event the Board determines to allow this petition to go forward.

As a consequence of the Vermont and Wallingford pleadings in opposition, VTR hereby supplements and partially modifies its declaratory order request.

II. THE STATE'S SOVEREIGN IMMUNITY ARGUMENTS

A. Introduction

The Eleventh Amendment to the United States Constitution provides that "[t]he 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." In FMC the Supreme Court held for the first time that the Eleventh Amendment can be applicable to certain federal administrative adjudications.

Vermont's reliance on FMC is misplaced in this declaratory order proceeding. As established below, despite Vermont's assertion that it has been "coerced" into participating in these proceedings without its consent, Vermont fails to demonstrate that its partici-

¹ Even though the State's assertion of sovereign immunity is broadly aimed at VTR's "request for relief," sovereign immunity has not been asserted by Wallingford and no effort has been made to explain why such immunity would be available to Wallingford, which is not an agency of the State of Vermont. See, e.g., Monell v. Department of Social Servs. of the City of New York, 436 US 658 (1978); Riley v. Town of Bethlehem, 44 F.Supp. 2d 451 (N.D.N.Y., 1999). In Alden v. Maine, 527 U.S. 706, 755-57 (1999), the Supreme Court identified private suits against municipal corporations as one of several exceptions to the doctrine of sovereign immunity.

pation in this proceeding is anything but voluntary, or that Petitioner has brought "suit" against Vermont within the meaning of the Eleventh Amendment. Indeed, Vermont makes certain assertions that are flatly inconsistent with its claim to sovereign immunity protection.

Unlike Vermont and Wallingford, which clearly hope to avoid or delay a determination by the Board regarding the preemptive relationship between 49 U.S.C. § 10501 and either Vermont's Act 250 or Wallingford's zoning ordinances, VTR seeks a prompt determination by the Board of the extent to which its jurisdiction under § 10501(b) preempts the pre-permitting requirements of Act 250 and the zoning ordinances. To avoid enmeshing this proceeding in an Eleventh Amendment dispute that may divert or postpone a Board decision addressing preemption issues on the merits, VTR is modifying its declaratory order request by extending that request to a determination that named individual officers of the State of Vermont and Wallingford may not perform their duties in a manner that is preempted by the Interstate Commerce Commission Termination Act ("ICCTA").

B. The State Has Not Sustained a Claim of Sovereign Immunity

Relying on FMC, Vermont claims that it "must participate in the STB's proceedings or compromise its ability to defend itself at all," thereby compelling it to become a party to this proceeding against its wishes and without its consent. Vermont Opposition, pp. 4-7. Vermont, however, has not shown the type of compulsory participation in this case that was present at the administrative level in FMC.

Unlike this proceeding, FMC involved a complaint for injunctive relief and monetary damages in which an agency of a state was named as a defendant. A cruise ship op-

erator asserted before the Federal Maritime Commission that the South Carolina State Ports Authority ("SCSPA") violated the federal Shipping Act of 1984 when SCSPA denied the cruise line permission to berth a ship at the Port of Charleston, SC. The complainant asked the agency to direct the payment of monetary reparations by SCSPA and to enter an order requiring SCSPA to cease and desist from further violating the Shipping Act. Additionally, the complainant requested that the agency seek an injunction in United States District Court against the continuing refusal of SCSPA to allow the cruise ship to berth at the port. FMC, 535 U.S. at 748-49.

In FMC, jurisdiction was based on the agency's power to enter an order against the defendant state agency requiring it to pay monetary damages and to cease and desist from future violations of the relevant federal statute. Had SCSPA not been a party to the Federal Maritime Commission case, the relief requested by the complaining party could not have issued. Once the formal complaint was filed in FMC, the agency had no choice but to adjudicate the dispute. FMC, 535 U.S. at 764.

This declaratory order proceeding, on the other hand, is discretionary; 5 U.S.C. 554(e), states that the agency "in its sound discretion, may issue a declaratory order." The Board does not derive jurisdiction from the existence of Vermont or Wallingford as a party, but instead from the APA, authorizing the Board to terminate a controversy or remove uncertainty, and from the Board's power to determine the extent of its own preemptive jurisdiction pursuant to 49 U.S.C. § 10501(b). See North San Diego County Transit Development Board -- Petition for Declaratory Order, STB Finance Docket No. 34111 (decided August 19, 2002); Friends of the Aquifer, City of Hauser, ID, et al., STB Fi-

nance Docket No. 33966 (August 10, 2001).² Vermont was not named as a defendant by VTR, and was not served with any form of compulsory process requiring it to answer charges levied against it on pain of a default judgment. Under these circumstances, courts have held that an Eleventh Amendment argument is unavailable to a state. In re Hechinger Investment Company of Delaware, Inc., 276 B.R. 43, 46 (D. Del. 2002) ("the State was not named as a defendant, nor was it served with a summons. Instead, the bankruptcy court's jurisdiction was based on its power to interpret the bankruptcy laws as they apply to the debtors and their estates.... this action is not a suit against the state within the meaning of the Eleventh Amendment.") Similarly, an order which "did not mandate a "direct recovery from [a] state's treasury" and thus did not require a bankruptcy court to "exercise jurisdiction over the State" was not barred by sovereign immunity. In re Hechinger Investment Company of Delaware, Inc., 335 F.3d 243, 248 (3rd Cir. 2003).

Additionally, the Court in FMC recognized: "The [Federal Maritime Commission], for example, remains free to investigate alleged violations of the Shipping Act, either upon its own initiative or upon information supplied by a private party ... and to institute its own administrative proceeding against a state run port...." 535 U.S. at 768, statutory citations omitted. What VTR is asking this agency to do likewise escapes a claim of sovereign immunity, because, if the Board institutes a declaratory order proceed-

² Vermont attempts (Vermont Opposition at 11, fn. 2) to distinguish North San Diego County Transit Development as a decision that merely defers to a federal court's "authority and expertise." There is no support whatsoever in the Board's North San Diego County Transit Development decision for that claim. Other than reciting the ultimate conclusion reached by the district court, the Board's decision relies on no findings of fact or conclusions of law reached by the district court, and constitutes the Board's own, totally independent, declaratory order regarding the extent of its Section 10501(b) preemption authority. Further, although Petitioner also relies on Friends of the Aquifer for the proposition that the Board may issue a declaratory order to interpret the extent of its preemptive jurisdiction, Vermont makes no effort to distinguish that case. The Board plainly has jurisdiction to interpret the extent of its own authority.

ing, the Board would be instituting its own proceeding, subject to procedures it could craft to develop the issues it wanted to examine, and not administering a private suit against a state.³

Vermont ignores all authority that places limitations on assertions of sovereign immunity, instead relying entirely on the claim that it must participate before the Board in order to later challenge the Board's declaratory order findings, while maintaining that this "coercive" participation converts the declaratory order proceeding into a suit against the State. Yet, Vermont does not explain how its failure to participate before the Board in this case would prejudice necessarily and irrevocably its right to later challenge the Board's findings. Without explanation, Vermont's position is premised on the assumption that the issuance of a declaratory order by the Board is subject to enforcement and civil penalties of the type potentially available in FMC. Significantly, however, Vermont points to no case in which any declaratory order of the Board has ever been subject to such enforcement actions or efforts to assess and collect civil penalties and Vermont is silent regarding the critical question of what would occur were the Board to attempt to enforce directly against Vermont a declaratory order finding that the application of certain state laws are preempted by the ICCTA without expressly ordering the State to take, or refrain from taking, any specific action.

This is not the first case in which the Board has been confronted with a claim of sovereign immunity in a declaratory order preemption proceeding. In North San Diego County Transit Development, supra, a state agency asserted that because it "is not a pri-

³ This proceeding is also distinguishable in that it entails line-drawing as to the Board's exclusive jurisdiction under 49 U.S.C. § 10501, and as to federal preemption under the Supremacy and Commerce Clauses of the U.S. Constitution. In other words, this is not a case in which the Eleventh Amendment is being cited to trump a statute or agency regulation; Vermont seeks to use one provision of the Constitution to trump other Constitutional provisions.

vate entity but a political creation of the State of California ... intervention by [the Board] in this matter of state politics would violate California's constitutionally protected state sovereignty." The Board proceeded to find, however, that the exercise of its declaratory order authority was not an effort to apply or interpret California state law, but instead was an interpretation of "the reach of the federal preemption statute, 49 U.S.C. 10501(b)." North San Diego Transit Development, supra, fn. 12. The same conclusion plainly is warranted here.

Even assuming, for the sake of argument, that the Board's declaratory order process in this proceeding could not otherwise be distinguished from FMC, Vermont has advanced another argument that undercuts its reliance on sovereign immunity. Vermont asserts that, "[b]ecause 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." Vermont Opposition, p. 11. If Vermont is correct -- if the Board in this proceeding has or exercises only "advisory opinion" authority -- then a claim of sovereign immunity is unavailable. The assertion of sovereign immunity sustained in FMC was based on the adjudicatory nature of the proceeding: "the [Federal Maritime Commission] does not even have the discretion to refuse to adjudicate complaints brought by private parties." FMC, 535 U.S. at 763-64. See, also, Tennessee v. United States Department of Transportation, 326 F.3d 729, 734 (6th Cir. 2003) ("We conclude that the facts in the record clearly distinguish this case from [FMC] because the process used by the USDOT simply is not an 'adjudication,' as that term was used by the majority in [FMC].")

The unaddressed inconsistency in Vermont's position belies the sincerity of its claims. If Vermont truly believes that the Board can do nothing in this declaratory order proceeding but issue an advisory opinion, then Vermont's claim of sovereign immunity should not have been advanced and cannot prevail. Conversely, if Vermont is sincere in asserting the availability of a sovereign immunity claim, then it cannot maintain that the Board has advisory opinion power only.

As the proponent of the claim that this proceeding is barred by sovereign immunity, Vermont has the burden of sustaining that claim. It cannot conceivably meet that burden while asserting that the Board has mere advisory opinion jurisdiction in this case. VTR believes that, as indicated by the decisions in North San Diego Transit Development Board and Friends of the Aquifer, *supra*, the Board clearly has more than advisory opinion authority in this case.⁴ But Vermont cannot avail itself of the same claim, having chosen to assert that the Board can do nothing more than render an advisory opinion.

C. Additional Relief Sought

The Petition filed on June 17 requests the Board to "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." VTR is not altering that request.

However, VTR now requests the Board also to determine the extent to which the same preemption applies to certain specific officials of Vermont and Wallingford through their power to enforce Act 250 and the town's zoning ordinances, respectively. The officials with respect to whom such determinations are requested are William H. Sorrell, At-

⁴ The Board can issue a declaratory order even where, as here, the railroad's proposed construction project is excused from the certificate requirements of the ICCTA by virtue of 49 U.S.C. § 10906. North San Diego Transit Development, *supra*.

torney General of Vermont, who is authorized to enforce Act 250 on behalf of the State; Elizabeth McLain, Secretary, Vermont Agency of Natural Resources, who also is authorized to enforce certain aspects of Act 250; Patricia Moulton Powden, Chair of the Vermont Environmental Board, likewise authorized to enforce certain aspects of Act 250; and Robert Inglis, Zoning Administrator of Wallingford, who is empowered to enforce the Wallingford zoning ordinances.

In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court determined that the sovereign immunity provisions of the Eleventh Amendment do not extend to the actions of individually named state officers acting in their official capacities so long as the relief sought is prospective only and does not involve monetary damages.

Ex parte Young has been followed repeatedly by the courts, including in a recent Supreme Court decision notably rendered on May 20, 2002, just eight days before the decision in FMC. In Verizon Maryland, Inc. v. The Public Service Commission of Maryland, 535 U.S. 635 (2002), the Supreme Court held that members of a state regulatory commission are not entitled to Eleventh Amendment protection from claims of ongoing, prospective violation of a federal statute when those members are named in their official capacities as persons empowered to enforce state laws in violation of federal law. Verizon, 535 U.S. at 646. The Court also held that individual state officials named in a declaratory judgment action have no more right to a claim of sovereign immunity protection than if they were defendants in an injunction proceeding. Ibid.

The declaratory relief sought by VTR readily qualifies for treatment under Ex parte Young because it is prospective only and does not involve the transfer of any money or other property belonging to Vermont. Even were the Board to reverse its hold-

ing in North San Diego Transit Development, that the Eleventh Amendment does not bar the Board from interpreting the extent of its own jurisdiction, and accept Vermont's effort to shield itself in this case under the FMC doctrine, the Board nevertheless would not be precluded from rendering a declaratory opinion regarding the extent to which Section 10501(b) preempts the named Vermont and Wallingford officials from enforcing their respective statutes against VTR.

III. ADDITIONAL ISSUES AND PROCEDURAL ORDER

A. Additional Issues

Having supplemented and partially revised its request for declaratory relief, VTR believes it is appropriate to partially restate the basis for that relief.

The gravamen of the positions taken by both Vermont and Wallingford is that the interpretation of their respective statutes vis-à-vis any possible conflict with the ICCTA should be made by agencies of the State or by Wallingford. The underlying theory advanced by both parties is that any "fact-bound" determinations associated with resolving conflicts between Section 10501(b) preemption and either State or local land use regulations of necessity require a railroad such as VTR to invoke the respective state or town permitting processes and carry them through to their final conclusion, even if to do so requires years of litigation in state courts.

Although both Vermont and Wallingford cleverly seek to imply that recourse to the Board might thereafter be available to resolve any preemption disputes, the fact of the matter is that the course of action advocated by Wallingford and Vermont would end up depriving this Board totally of any meaningful voice on preemption issues. While Vermont and Wallingford both contend that it is "premature" for VTR to seek declaratory

relief before the Board, if given their way, Vermont and Wallingford would not allow a preemption dispute to mature into an appropriate Board proceeding. Indeed, the arguments articulated by Vermont in this proceeding disclose plainly its belief that this Board has no role to play in Section 10501 preemption determinations.

The State also believes that courts in Vermont are not inclined to view Section 10501(b) preemption issues in the same light as the Board itself. See, for example, Vermont Opposition, pp. 7-8, where the State asserts that a federal district court in Vermont has determined that Act 250 is not "facially" preempted as a matter of law by the ICCTA because Act 250 is regarded as environmental, and not economic, legislation. Act 250 is, in fact, both a land use and environmental statute. VTR Exhibit No. 3, ¶ 4. Even if it were merely an environmental statute, a claim that it is thereby free from the reach of Section 10501 ignores the overwhelming weight of precedent.⁵

VTR does not believe that the declaratory order it here seeks is inconsistent with the Court's views relied upon by Vermont, as contained in the Ruling on Pending Motions in Green Mountain Railroad Corporation v. State of Vermont, et al. appended to the Vermont Opposition. In that interlocutory ruling, the Court merely held that it would not agree on the record before it that "the ICCTA preempts Act 250 under all circumstances," and that "Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA." Slip op. at 10. One purpose of this requested declaratory order proceeding is to demonstrate on a factual record the extent to which Act 250 meets the recognized tests for state legislation that is preempted as a pre-permitting control of rail operations. Any aspects of Act 250 that do not fall into that category may

⁵ See, e.g., Auburn and Kent, WA -- Petition for Declaratory Order -- Burlington N. R.R. -- Stampede Pass Line, 2 S.T.B. 330 (1997), aff'd., City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999), holding that state environmental laws are preempted by Section 10501.

indeed escape preemption. VTR trusts that, given an opportunity to offer its proof, Vermont will point to those aspects of Act 250 that are not pre-permitting controls on rail operations.

Vermont suggests to the Board (Vermont Opposition, p. 8) that the Board has agreed to abstain from deciding preemption questions involving Act 250 in deference to federal court jurisdiction. VTR does not perceive any such determination by the Board. In Green Mountain Railroad Corporation -- Petition for Declaratory Order, STB Finance Docket No. 34052 (served May 28, 2002), the Board declined to issue a declaratory order where VTR's affiliate, Green Mountain Railroad Corporation ("GMRC"), had sought declaratory order relief before the Board on the same facts as were involved in a dispute pending in federal district court, and the court had declined to refer the issues to the Board. The Board's decision 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."⁶ There is no similar district court decision involving VTR's proposed transload facility at Wallingford and no similar reason for the Board to refrain from instituting a declaratory order proceeding in deference to any judicial desires expressed in connection with the Wallingford project.

Vermont's assertion that the Board in this case should take a hands-off position and allow any Act 250 disputes to be resolved by courts in Vermont is aimed at destroying uniformity of federal policy toward railroads, allowing the State of Vermont to con-

⁶ GMRC had sought judicial intervention as a result of proceedings threatened by Vermont against GMRC to assess penalties for alleged violations by GMRC of Act 250. Following GMRC's federal district court complaint for injunctive and declaratory relief, Vermont postponed its enforcement threats.

trol railroad construction and expansion under standards unique to Vermont and different from those recognized throughout the rest of the nation. Those goals are contrary to the intent of Congress. The goal of a uniform federal scheme for treatment of the railroad industry is made exceedingly clear by the legislative history of the ICCTA. Referring to Section 10501(b), the House Report regarding the ICCTA states:

Conforming changes are made to reflect the direct and complete preemption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spurs, industrial, team, switching, or side tracks formerly reserved for State jurisdiction.... The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retained the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

H.R. Rep. No. 311, 104 Cong., 1st Sess., 95-96 (1995) (emphasis in text).

It is not as if this proceeding presents nothing but novel, previously undecided issues. VTR seeks to construct a facility to transload salt from incoming rail cars to outgoing trucks, and to construct the related facilities necessary to implement that process, including a new spur track, a shed in which to hold that salt which is not immediately transferred from rail car to truck, a truck weigh station, so that loaded trucks do not exceed local weight limits, and related vehicular driveways. Transload facilities of that

type have been recognized to constitute railroad facilities subject to the Board's jurisdiction. Friends of the Aquifer, *supra*.⁷

Similarly, VTR's argument is not new to the Board or to courts; to the extent Act 250 and the Wallingford zoning ordinances are pre-permitting requirements, they are in conflict with the ICCTA by virtue of conferring upon the State or locality the right to delay or veto railroad construction. See, e.g., Auburn and Kent, WA, *supra*; Green Mountain Railroad Corporation, *supra*. Although Vermont argues that an order of a United States district court has determined that Act 250 is "not facially preempted by the ICCTA" and that that conclusion is binding on the Board (Vermont Opposition, pp. 7-8), the district court order referred to by Vermont, and discussed above, is interlocutory in nature. Moreover, the same Court order recognized that preemption determinations may require factual analysis, and VTR in this proceeding is asking the Board to examine in a factual context both Act 250 and the Wallingford zoning ordinances and to determine on the basis of that factual examination the extent to which each is a pre-permitting regime of the type that warrants a finding of preemption. For that reason, VTR has presented in its Exhibit No. 3, detailed, specific evidence explaining both regimes.

⁷ Vermont asserts incorrectly that VTR's proposed project is beyond the Board's "regulatory jurisdiction," inappropriately attributing such a conclusion to VTR. See Vermont Opposition, p. 8. The Board does not lack jurisdiction over such projects; the projects are simply excused from the certificate requirements of the statute pursuant to 49 U.S.C. § 10906. North San Diego Transit Development, *supra*. Once such projects are constructed, their use is subject to the Board's jurisdiction over railroad rates and practices (49 U.S.C. §§ 10701, 10702), and may be included in transactions subject to the Board's authority over rail consolidations, purchases, leases, or control (49 U.S.C. § 11323).

Vermont also suggests (Vermont Opposition at 10) that, because a state may have "a duty and a right to regulate the truck traffic leaving the proposed facility," the Board should decline to institute this declaratory order proceeding. VTR does not agree that it is possible to view an activity on railroad property consisting of rail delivery of salt, unloading of salt from rail cars by railroad employees, and the loading of trucks with the same salt, also by railroad employees, as severable into a rail component subject to STB jurisdiction and a truck component subject to state regulation. However, if there is any legitimate question about whether such activities are rail related, there is no demonstrated reason why that determination cannot or should not be made by the Board. Were the Board to decline to do so, it would be ceding its authority to determine the extent of its own jurisdiction to the State.

Act 250 is described in VTR's evidence as "a land use and environmental statute." VTR Exhibit No. 3, ¶ 4. That is why VTR's Petition expressly asks the Board to determine that 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." As indicated below, there manifestly is "uncertainty" regarding this issue, as well as controversy, within the meaning of the APA.

B. Ripeness

Vermont and Wallingford each maintain that there is no controversy or uncertainty regarding VTR's proposed facility under their respective laws and regulations that is ripe enough for declaratory order resolution. Among other things, each asserts that VTR's failure to have purchased the property in question deprives VTR of the ability to seek declaratory relief.

While neither Vermont nor Wallingford explains why a party holding an option on land cannot seek declaratory relief from the Board regarding the proposed railroad use of that land, the fact is that VTR has purchased the property, although the purchase has not yet been recorded. Attached as VTR Exhibit No. 5 is an affidavit of Lisa W. Cota, an officer of VTR.⁸ Ms. Cota's affidavit discloses that, on or about May 30, 2003, VTR made full and final payment for the 39-acre property at Wallingford on which the salt transload facility is proposed to be situated. Closing has been delayed because of title insurance issues that must be resolved prior to recordation of a deed. Exhibit No. 4, ¶ 7. Despite the absence of deed recordation, VTR plainly is the owner of the property.

⁸ VTR is numbering its exhibits consecutively, beginning with those attached to its June 17 Petition.

Vermont and Wallingford also contend that VTR's description of the transload facility and operations at the facility are too vague (Vermont Opposition, p. 12; Wallingford Opposition, p. 6). Both Vermont and Wallingford appear to have overlooked the detailed evidentiary statements and map submitted by VTR with its June 17 Petition. Two VTR statements (VTR Exhibit Nos. 1 and 2) describe and portray (1) the location of the transload facility, (2) the public streets and roads which will connect with the facility, (3) the extent and location of private roads to be built on the facility and the material with which those roads will be constructed, (4) the use of dust retardants, if necessary, on those roads, (5) the location and length of the rail spur to be built into the facility, (6) the dimensions and positioning of all structures within the site, including the rail car unload pit, conveyor system, storage area, truck loading area, and truck scale, (7) the manner of moving salt within the storage area, (8) methods that will be employed to curtail ground water contamination, (9) the composition of the storage shed floor and the color description of the storage shed exterior, (10) the number of rail cars expected to deliver salt to the facility, (11) the number of trucks expected to move salt from the facility, (12) the fact that the facility will be operated by VTR employees, (13) the hours of operation for the facility, and (14) the use of trees and ground cover to create a visual and sound barrier.

To what extent other salient information regarding the facility is necessary to apprise either Vermont or Wallingford of what VTR intends to do has not been disclosed by either party. Although Wallingford does indicate that it would like to know when the project would be completed, VTR believes that Wallingford recognizes that VTR is in no position to determine when construction would be commenced because of the very uncer-

tainties that have prompted this proceeding -- questions involving the extent to which Wallingford and Vermont can apply their laws and regulations against VTR. Moreover, no construction timetable can be established without knowledge of when during the year work can be commenced.

Significantly, Vermont does not deny that Act 250 contains a pre-permitting construction regime. Nor does Wallingford deny that its ordinances merit a similar characterization. Any attempt by them to do so would appear to be futile in light of VTR's detailed and unrebutted evidence (VTR Exhibit No. 3) of the requirements of Act 250 and the town's zoning ordinances.

Wallingford attempts to suggest (Wallingford Opposition, p. 5) that it does not oppose the project and is not unreceptive toward it, but that it cannot take a position, and thereby create a possible controversy, unless and until an application is filed under its zoning ordinances. Were the Board to accept that argument, the Board would be divested totally of any ability to interpret the reach of its own preemptive jurisdiction. VTR would have to institute and complete the entire Wallingford zoning process before becoming eligible to even request any court to consider preemption issues.⁹ It is noteworthy that Wallingford does not quarrel with VTR's testimony demonstrating that no less than several months would be consumed by the town's zoning process. Thereafter, even if VTR

⁹ The Vermont Supreme Court has held that it is not bound by Board decisions that interpret the preemptive scope of 49 U.S.C. § 10501(b). *In re Vermont Railway*, 171 VT 496, 500 (2001), a case that considered local zoning ordinances derived from the same state enabling statute that gives rise to Wallingford's ordinances. VTR Exhibit No. 3, ¶ 22. In asserting that VTR must first submit an application under Wallingford's zoning ordinances, where the appellate chain leads directly to the Vermont Supreme Court, Wallingford in essence seeks to exclude the Board altogether from rendering an opinion on preemption issues in this matter. In addition to the fact that such an approach would unravel the uniformity of federal policy toward railroad regulation desired by Congress, it also fails to satisfy the APA, under which a declaratory order can proceed without an actual "controversy," and because of "uncertainty." Wallingford's own pleading in fact asserts the existence of great uncertainty regarding VTR's proposals (Wallingford Opposition, p. 7).

were satisfied with the outcome, VTR would become subject to a state law appellate process that can be initiated by any "interested person." Nor does Wallingford contest VTR's evidence demonstrating that any such appellate process may well consume two or three years.

Wallingford complains that VTR has been remiss in failing to discuss its proposed salt transload plans with the town and in failing to provide Wallingford with any information regarding the project other than as contained in the Petition (Wallingford Opposition, pp. 6-8). Wallingford apparently believes that the process of communication between it and VTR must originate only with VTR; in the nearly three months that Wallingford has been in possession of the Petition, it has made no efforts to determine from VTR any of the project details that Wallingford claims (without disclosing their nature), it needs in order to better understand the project.

On August 27, 2003, David W. Wulfson, President of VTR, wrote to the Rutland Region Transportation Council, Rutland Regional Planning Agencies, Town of Wallingford Planning Agencies, and townspeople of Wallingford to explain VTR's Wallingford plans. His letter, attached as Exhibit No. 6, was read at an August 28 meeting of the Rutland Region Transportation Council. Mr. Wulfson's letter contains VTR's pledge that, "once all the legal issues are finally resolved by the STB, we will not put a shovel in the ground to develop this [transload facility] until we have heard from all concerned."

VTR believes that its Petition to the Board contains more than enough data regarding the proposed project than is necessary fairly to apprise Wallingford of what is contemplated, where it is contemplated, and how it would operate. As yet, Wallingford has identified no specific facts missing from VTR's project description that Wallingford

would need in order to more fully understand the project, other than the construction timetable discussed above. VTR remains fully willing to enter into discussions with Wallingford aimed at considering Wallingford's concerns, but VTR needs to know from the Board the extent to which Wallingford may and may not apply its pre-construction permitting requirements. It is unreasonable to expect VTR to make an irrevocable project financial development commitment before knowing whether VTR will be subject to what may be disproportionate costs to comply with State or local requirements.

Moreover, it does not truly appear as if Wallingford is willing to substitute a process of informal discussion for its zoning application procedures. Nor does it appear that Wallingford is willing to concede that it may not use its pre-construction zoning ordinances to either veto or delay the proposed project as described by VTR. Although Wallingford acknowledges (Wallingford Opposition, p. 5) that it cannot regulate railroad operations, citing In re Vermont Railway, *supra*, where the Vermont Supreme Court held that local zoning ordinances in Burlington, VT, cannot prohibit the construction of a transload facility, the same decision upheld restrictions imposed on the volume of truck traffic that could remove the transloaded goods.¹⁰ It appears to be Wallingford's position that VTR must nevertheless apply for zoning approval to construct the transload facility that Wallingford concedes it may not regulate directly, thereby giving Wallingford an opportunity to accomplish indirectly, through the possible imposition of restrictions that limit the volume of goods that can be moved by truck from the facility and therefore that can be moved by rail into and through the facility. (The same analysis would appear to

¹⁰ The limits imposed by Burlington under the state's zoning ordinance enabling law on trucks that could exit this transload facility were used by the municipality to refuse permission for salt deliveries during a snow emergency in the 2001-2002 winter because the emergency impacted areas other than Burlington. VTR Ex. No. 2, ¶ 5

be applicable to Vermont's assertions regarding Act 250; that is, Vermont insists that VTR should make an Act 250 application even for those construction activities that may be preempted).

It is apparent that what Wallingford wants is the right to determine whether, or to what extent, VTR's entire proposal may go forward. VTR submits that this goal is in conflict with Section 10501(b). The Petition provides sufficient information for Wallingford to identify any aspects of VTR's proposal that Wallingford does not believe are subject to Section 10501 preemption (and, for that matter, for Vermont to make a similar evaluation under Act 250). Wallingford has failed to do so. The Board can and should institute a proceeding to resolve the issues presented regarding Wallingford's ordinances, and if VTR has failed to include any relevant issues in its Petition, then VTR runs the risk that the Board's decision may not reach those issues. To the extent that VTR's Petition does describe the activities that VTR intends to pursue at Wallingford, there is no disclosed reason why Wallingford cannot tell the Board why Wallingford regards those described activities as being or not being subject to preemption.

Finally, both Vermont and Wallingford maintain that the absence of any tangible enforcement threat against VTR strips this case of the "controversy" necessary for the Board to consider declaratory order relief. Both parties rely on Fletcher Granite Company, LLC -- Petition for Declaratory Order, STB Finance Docket No. 34020 (June 25, 2001) ("Fletcher Granite").

This proceeding is distinguishable from Fletcher Granite. The Board's decision in that case contains no citation to or description of any state or local law that would have placed the moving party in any sort of jeopardy with any degree of certainty. Indeed, the

concerns expressed by the company were described by the Board in purely speculative terms: "If [the company's] proposal comes under Conservation Commission Review, it will likely 'become involved in extensive, time-consuming hearings....'" (Fletcher Granite, Slip op. at 2; emphasis supplied).

Here, VTR's evidence leaves no room to doubt that its proposed project *is* subject to Vermont's Act 250 and Wallingford's zoning ordinances. VTR's detailed testimony addressing that point (VTR Exhibit No. 3) has not been challenged or rebutted by either Vermont or Wallingford and is certainly definite enough to support the institution of a declaratory order proceeding where the parties' positions can be resolved.

Moreover, contrary to Vermont's somewhat disingenuous assertion that it "has taken no action that could be interpreted as a threat of enforcement" of Act 250 against VTR (Vermont Opposition, p. 14), Vermont indeed has made it crystal clear that it will take enforcement action and attempt to collect penalties from a railroad that does not, in the State's view, comply with Act 250. See VTR Exhibit No. 4, a notice from Vermont's Attorney General to GMRC, VTR's affiliate, that the State will seek injunctions, remediation, and civil penalties if GMRC persists in constructing a salt storage shed (part of a transload facility) in violation of Act 250. Those asserted violations against GRMC, and the State's threatened assessment of penalties for Act 250 violations, are still pending. The Board should not hesitate to conclude that this record discloses with ample certainty that Vermont's threats against GMRC represent Vermont's policy toward Act 250 and that Vermont will take enforcement action against VTR if, in Vermont's view, VTR constructs a salt transload facility at Wallingford that violates Act 250.

Although, as indicated, Wallingford claims that it has taken no position on the application of its zoning ordinances to the VTR salt transload project, Wallingford does not dispute VTR's testimony that "State law mandates that the Town [of Wallingford] 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," and that, "if the zoning administrator fails to take appropriate action, other interested parties may obtain a writ of mandamus compelling enforcement action." VTR Exhibit No. 3, ¶ 28. Thus, with statutory specificity, and far, far more certainty regarding legal obligations and consequences than were evident in Fletcher Granite, VTR has demonstrated that it stands in jeopardy if it proceeds with its proposed project without required Wallingford zoning ordinance approvals and without a preemption determination regarding those approvals. Under state law, it would appear to make no difference whether Wallingford now informally looks favorably or not on the proposed transload project; if it is commenced without a preemption determination or the required local zoning authorizations, enforcement action is a certainty. In any event, contrary to the suggestions of Wallingford and Vermont, declaratory orders resolving preemption uncertainties can be issued by the Board in the absence of an "official" state or local enforcement proceeding. See, e.g., North San Diego Transit Development, supra, Union Pacific Railroad Company -- Petition for Declaratory Order, STB Finance Docket No. 33611 (August 21, 1998).¹¹

¹¹ As Vermont points out (Vermont Opposition, pp. 15-16), a declaratory order proceeding instituted in Borough of Riverdale, Petition for Declaratory Order, STB Finance Docket No. 33466 (February 27, 2001) later was terminated without a decision on the merits because an "exchange of information about the proposed project" that occurred after the declaratory order proceeding was instituted "led to a voluntary resolution of all disputed matters." Thus, Borough of Riverdale illustrates that the institution of such a proceeding may itself be the step that leads to a voluntary resolution of differences.

In a last-ditch effort to dissuade the Board from even instituting a proceeding, Vermont argues that "nothing would prevent an arrangement ... 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" (Vermont Opposition, p. 16). However, not only has Vermont failed to offer VTR any such agreement, but Vermont's suggestion would depend entirely on VTR's consent to undergo two consecutive courses of litigation; first, the Act 250 process, with its entire appellate panoply, that can consume two years or more; next, multiple years of litigation in federal courts to resolve preemption issues. These types of delays defeat the very purpose of preemption by denying VTR timely access to new market projects. Were the Board to endorse Vermont's suggestion, the delays entailed in that process would only act to coerce a railroad such as VTR into accepting unreasonable restrictions on railroad operations imposed by the State or a locality that otherwise would be preempted.

VTR acknowledges in its Petition that certain state or local laws and regulations are not necessarily preempted by the ICCTA, as the Board has often noted. Examples of areas where preemption may not apply are electrical and mechanical codes if administered in a nondiscriminatory manner.

On the other hand, Vermont and Wallingford seem unwilling to recognize that a blanket pre-permitting regime conflicts with Section 10501(b). As is clear from the views expressed in this case by both Vermont and Wallingford, each of those bodies asserts that they may require VTR to submit to their respective jurisdiction each time a new construction project is contemplated by the railroad so that the state and local regulatory

agencies can in each instance make dispositive decisions regarding the project. And it appears to make no difference to either jurisdiction whether the exercise of their jurisdiction -- even over matters that they have conceded to be preempted -- may take years.¹²

Vermont has formally taken the position that it can regulate the "operation of a salt storage shed" that is used only in connection with rail transloading operations (VTR Exhibit No. 4). Wielding this broad assertion of jurisdiction, Vermont seeks to compel adherence to Act 250 even though its own Supreme Court has held that regulation of a salt transload shed's construction is preempted by the ICCTA. In re Vermont Railway, supra. As the Board has stated, even though preemption attaches to state or local pre-construction permitting requirements, a railroad facility must be operated in compliance with applicable federal environmental laws, such as the Clean Water Act and the Clean Air Act. If Act 250 has aspects that incorporate observance of such laws, those other laws may well be applicable to VTR's proposed transload facility. The institution of a declaratory order proceeding will enable those determinations to be made regarding both Act 250 and the Wallingford ordinances. VTR believes that the record established thus far in this proceeding demonstrates the need to go forward with a declaratory order case to resolve the uncertainties that plainly persist regarding the extent to which Section 10501(b) preemption applies to Act 250, the Wallingford ordinances, and the enforcement authority of the named state and town officials with jurisdiction over those respective laws.

¹² Vermont argues that the Act 250 process often may be completed in less time. Vermont Opposition, p. 13. However, in an August 13, 2003 deposition of Vermont's witness, Michael Zahner, taken in connection with Green Mountain Railroad Corporation v. State of Vermont, et al., pending in the United States District Court for the District of Vermont, Mr. Zahner agreed controversial construction projects normally would be considered as "major" projects under Act 250, would require a hearing, become subject to complete appellate review, and may take years to complete.

IV. PROCEDURAL SCHEDULE

Without consulting with Petitioner, Vermont has proposed a procedural schedule to apply in the event the Board determines to institute a declaratory order proceeding (Vermont Opposition, p. 16).¹³ Vermont seeks a 90-day discovery period followed by a pleading schedule that requires VTR to file its opening statement within 30 days, gives the State and other similarly aligned parties an imbalanced 45 days to reply, and thereafter provides for rebuttal by VTR and a closing response by the State.

On September 5, 2003, VTR commenced efforts to negotiate a procedural schedule with Vermont and Wallingford. No response whatsoever from Wallingford has been received. Vermont would not agree with VTR that VTR should have filing periods no shorter in length than Vermont wants for itself, or that VTR should open and close.

Inasmuch as VTR and Vermont have been unable to agree on a procedural schedule, VTR proposes two alternatives to the Board.

1. Following a 90-day discovery period, VTR shall have 45 days in which to file its opening statement; parties in opposition to VTR would have 45 days to reply, including any dispositive motions such as those challenging the Board's jurisdiction; and VTR would then have 30 days in which to respond; or, alternatively,

2. The parties simultaneously would file opening statements, including dispositive motions, within 45 days following the close of a 90-day discovery period; and simultaneous replies would be due 30 days thereafter.

¹³ This unusual step by a party opposing the institution of a declaratory order proceeding strongly suggests that Vermont recognizes that the institution of a proceeding is the best way to resolve the uncertainties over which the parties obviously disagree.

V. CONCLUSION

VTR has not asked the Board to issue a decision or order reaching final conclusions on preemption issues, but only to institute a proceeding that will allow the parties to develop an appropriate record.

The pleadings thus far filed all make clear that the State and Wallingford insist that VTR must comply with regulations that are, to some extent, pre-construction permitting requirements. The Board has the jurisdiction to determine to what extent those state and local regulations are in conflict with and preempted by the ICCTA, and VTR urges the Board to institute a proceeding for that purpose.

Respectfully submitted,



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(802) 863-2375

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement Petition has, this 15th day of September, 2003, been served by first-class mail, postage prepaid, on the following persons:

William Burke, Coordinator
District 1-Environmental Commission
(Rutland County)
440 Asa Bloomer State Office Bldg.
Rutland, VT 05701-5903

Jeanne Elias, Esq.
Assistant Attorney General
109 State Street
Montpelier, VT 05609

Patricia Moulton Powden, Chair
Vermont Environmental Board
National Life Records Center Bldg.
Drawer 20
Montpelier, VT 05620-3201

Elizabeth Lord, Esq.
ANR
103 South Main St., Ctr. Bldg.
Waterbury, VT 05671-0301

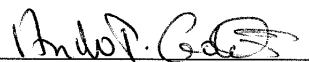
Michael Pologruto
Technical Services
Vermont Agency of Transportation
133 State Street
Montpelier, VT 05633

Bill Lohsen, Chairman
Town of Wallingford Selectboard
P. O. Box 327
Wallingford, VT 05773

Melissa Whitmore, Chair
Wallingford Planning Commission
P. O. Box 327
Wallingford, VT 05773

Rutland Regional Planning Comm.
The Opera House
67 Merchants Row
P. O. Box 965
Rutland, VT 05702

Alan B. George, Esq.
Keyser Crowley, PC
29 South Main Street
Rutland, VT 05701


Andrew P. Goldstein

**AFFIDAVIT OF LISA W. COTA
DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

NOW COMES affiant, Lisa W. Cota, Executive-Vice President and Treasurer of the Vermont Railway, Inc., a duly registered Vermont corporation, having been duly sworn by the Notary and under oath, freely and voluntarily give the following statement which is true and accurate to the best of my knowledge;

1. My name is Lisa W. Cota.
2. I am the Executive Vice-President and Treasurer of the Vermont Railway, Inc., a duly registered Vermont corporation.
3. On or about March 30, 2001, Vermont Railway, Inc. and Frank W. Whitcomb entered into an Option Contract conveying a two year option to purchase the 39 acre property in the Town of Wallingford as described in the STB Petition - Finance Docket No. 34364. A true and accurate copy of the recorded deed for said property is attached hereto as Exhibit A and hereby incorporated by reference. Said deed is of record in the Town of Wallingford Land Records at Book 33 Pages 409-411. The draft deed for the purchase by Vermont Railway, Inc. is attached hereto as Exhibit B, reflecting the subsequent Probated transfer to Frank Whitcomb, the current Optionor as recorded in the Town of Wallingford Land Records at Book 39 Pages 274-275.
4. On or about March 30, 2001, Vermont Railway, Inc. tendered to Frank W. Whitcomb in consideration of said Option Contract for the purchase of said 39 acre property in the Town of Wallingford as described in the STB Petition - Finance Docket No. 34364, the sum of \$50,000.00. See Exhibit C, a true and accurate copy of the check stub #72033 evidencing said transaction.
5. On or about March 27, 2003, Vermont Railway, Inc. tendered to Frank W. Whitcomb in consideration of an extension of said Option Contract for the purchase of said 39 acre property in the Town of Wallingford as described in the STB Petition - Finance Docket No. 34364, the sum of \$20,000.00. See Exhibit D, a true and accurate copy of the check stub #78588 evidencing said transaction.
6. On or about May 30, 2003, Vermont Railway, Inc. tendered to Frank W. Whitcomb to exercise the option in said Option Contract and made final payments to purchase in full said

39 acre property in the Town of Wallingford as described in the STB Petition - Finance Docket No. 34364, the total sum of \$65,000.00 in two checks. See Exhibit E, a true and accurate copy of the check stubs #2814 and 2815 evidencing said transaction.

7. A closing has not been scheduled because a title search has revealed title insurance related issues that must be dealt with prior to closing. Mr. Whitcomb and his counsel are working to solve these title issues and then a closing will be scheduled. At this time the full purchase has been tendered as was required by the Option Contract. No recordation of said contracts have been made at this time.

Signed: 

Lisa W. Cota

STATE OF VERMONT)
CHITTENDEN COUNTY, SS.)

Subscribed and sworn to me before on this 8th day of September, 2003, at Burlington, in Chittenden County in the State of Vermont, Lisa W. Cota, Executive Vice-President and Treasurer of the Vermont Railway, Inc., personally and on behalf of said Vermont Railway, Inc., appeared and, under oath, stated that the above statements are based upon her own knowledge, information or belief, that they are true, and, so far as they are based upon information and belief, that she believes them to be true.

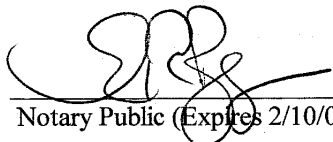

Notary Public (Expires 2/10/07)

Exhibit A

WARRANTY DEED
CAMPTON SAND & GRAVEL, INC.
TO
FRANK W. WHITCOMB

KNOW ALL MEN BY THESE PRESENTS

THAT It, Campton Sand & Gravel, Inc., a New Hampshire Corporation with its principal place of business in the Town of Campton in the County of Grafton and State of New Hampshire Grantor, in the consideration of - - One and more - - Dollars paid to its full satisfaction by Frank W. Whitcomb of Walpole in the County of Cheshire and State of New Hampshire Grantee, by these presents, do freely GIVE, GRANT, SELL, CONVEY AND CONFIRM unto the said Grantee Frank W. Whitcomb and his heirs and assigns forever, a certain piece of land in the Town of Wallingford in the County of Rutland and State of Vermont, described as follows, viz:

Being all and the same lands and premises conveyed to Campton Sand & Gravel, Inc. by deed of The Rutland Corporation dated June 23, 1967, to be recorded in Wallingford Land Records and in said deed described as follows:

"Being all and the same lands and premises conveyed to Rutland Railroad Company, a predecessor corporation of the Grantor herein, by Dwight B. and Esther F. Stafford, husband and wife, by deed dated August 11, 1927, recorded in Book 23 at Page 454, of the land records of the Town of Wallingford, Vermont, and being therein described as follows:

"Beginning at a point in the easterly right of way line of the Rutland Railroad, said point being 25 ft. east of and at right angles to the center line of the main track at chaining station 2136 plus 66.5, thence south 11° 57' east, making an angle of 154° 07' with said right of way line, 284.2 ft., thence south 42° 34' east 745.8 ft., thence south 0° 57' east 661 ft.; thence south 19° 21' west 958 ft.; thence south 60° 26' west 286.6 ft.; thence south 11° 53' west 172.6 ft.; thence continuing south 11° 53' west 675.7 ft. to the town line between Mt. Tabor and Wallingford; thence north 87° 44' west in said town line 70 ft. to the easterly right of way line of said Railroad, said point being 33 ft. easterly from and at right angles to the center of said Railroad at chaining station 2102 plus 31.1; thence northerly along said easterly right of way line about 3437 ft. to the place of beginning, containing 39.5 acres of land.

"Being a portion of the old Dwight B. Stafford farm now occupied by said grantors, and a portion of the premises this conveyed to the said Dwight B. Stafford by Jay H. Stafford, and a portion of the premises conveyed this day to the said Dwight B. Stafford by George H. Wood, to all of which deed and the record thereof, or the record when made, reference may be had.

"The northerly portion of said above described parcel is subject, however, to a certain lease to E. H. and B. W. Aldrich, dated October 18, 1897, recorded in Book 18, Page 382 of the Wallingford Land Records, to which lease and the record thereof reference is hereby made.

"Also the right to lay and maintain a water pipe in the brook from the culvert located just north of the town line and at chaining station 2102 plus 43 northwesterly to Otter Creek, and the right to locate and operate a pump with a shelter for same on the east bank of Otter Creek, the necessary piping and equipment, with the right of ingress to and egress from the same.

"The grantors reserve the farm crossing located about 450 ft. north of the town line at chaining station 2106 plus 93, together with a right of way from the same across the above described premises to the land easterly thereof.

"And the grantee shall, as a part of the consideration of this deed, relocate, at a point near the Wallingford-Mt. Tabor town line, the cattle pass now located at chaining station 2123 plus 56, which re-located pass shall cross between the former George H. Wood farm and the Jay H. Stafford meadow."

There is excluded from this conveyance all track and track materials now in place upon the above described premises, which track and track materials are the property of the State of Vermont.

With the conveyance of the above described parcel, the Grantor herein assigns to the Grantee its rights to maintain a driveway (But only insofar as such rights are assignable) leading from the northeast portion of said premises in an easterly direction to a dirt road running northerly to South Wallingford Station, so called, which agreement was entered into on May 8, 1928 between Dwight B. Stafford and wife and said Rutland Railroad Company, and recorded in Book 23 at Page 491 of the Wallingford Land Records."

TO HAVE AND TO HOLD said granted premises, with all the privileges and appurtenances thereof, to the said Grantee, Frank W. Whitcomb, his heirs and assigns, to their own use and behoof forever; And it the said Grantor for itself and its successors, does covenant with the said Grantee, his heirs and assigns, that until the ensailing of these presents it is the sole owner of the premises, and have good right and title to convey the same in manner aforesaid, that they are free from every encumbrance, except as hereinbefore set forth; and it hereby engages to WARRANT AND DEFEND the same against all lawful claims whatever, except as hereinbefore set forth.

IN WITNESS WHEREOF, it hereunto sets its hand and seal by its Agent for that purpose duly authorized this 5th day of July A.D. 1967.

In Presence of
Valerie G. Polosky
Quenia Dooby

CAMPION SAND & GRAVEL, INC.
 By: Arthur Whitcomb L.S.
 President and Agent

STATE OF NEW HAMPSHIRE } SS.
 CHESHIRE COUNTY }
 At City of Keene this 5th day of July A.D. 1967
 Arthur Whitcomb Agent of Campion Sand & Gravel, Inc.
 personally appeared, and he acknowledged this instrument, by him sealed and sub-
 scribed, to be his free act and deed, and the free act and deed of Campion Sand &
 Gravel, Inc.

Before me, Valerie G. Polosky
 Notary Public

Wallingford Town Clerk's Office July 10, 1967
 Received for record at 8:00 A.M.

Attest: Valerie G. Polosky
 Assistant Town Clerk

I hereby acknowledge and certify that the following
 described mortgage is paid in full and satisfied, viz:
 Roy H. Stafford and Mary G. Stafford, Mortgagees to
 David A. Wetherby and Emily L. Wetherby, dated November 3, 1923, and
 recorded in Book 22, Page 500, of the Wallingford Land Records;
 Assigned by said David A. and Emily L. Wetherby to The Marble Savings Bank,
 dated November 10, 1925, and recorded in said Land Records in Book 22, at Page 592;
 Further assigned by said The Marble Savings Bank to Dexter Maxham and Minnie
 Maxham, dated October 15, 1929, and recorded in said Land Records in Book 22, at
 Page 784; Minnie Maxham being deceased;
 Further assigned by Carl H. Maxham, Administrator of the Estate of Dexter A.
 Maxham to Charles B. Maxham and Myrtha Wideawake, dated October 6, 1938, and
 recorded in said Land Records in Book 24, at Page 347.

In Witness Whereof, I have hereunto set my hand and seal this 21st day of
 June, 1967.

In the Presence of:
Arthur F. Crowley, Jr.
Mary A. Cranton

Myrtha C. Wideawake L.S.

STATE OF VERMONT
 RUTLAND COUNTY, SS.

At Wallingford in said County on this 21st day of June, 1967, personally
 appeared Myrtha Wideawake, signer and sealor of the foregoing Discharge and
 acknowledged the same to be her free act and deed.

Before me, Arthur F. Crowley, Jr.
 Notary Public

Wallingford Town Clerk's Office, July 11, 1967
 Received for record at 8:00 A.M.

Attest: Valerie G. Polosky
 Assistant Town Clerk

KNOW ALL MEN BY THESE PRESENTS
 THAT We, James B. DeWitt and Joyce K. DeWitt,
 husband and wife of town of Wallingford in the
 County of Rutland and State of Vermont Grantors,
 have hereunto signed and sealed this instrument in
 the presence of James B. DeWitt, Jr. and Myrtha C. Wideawake, both of whom are
 the County of Rutland and State of Vermont Grantors, do hereby
 freely give, GRANT, SELL, CONVEY AND CONFIRM unto the said Grantees Lewis E. Marsh-
 all, Jr. and Mildred G. Marshall and their heirs and assigns forever, a certain
 piece of land in the Town of Wallingford in the County of Rutland and State of Ver-
 mont, described as follows, viz:

Exhibit B

WARRANTY DEED

Know all Men by these Presents That

FRANK W. WHITCOMB CONSTRUCTION CORPORATION, a duly organized New Hampshire corporation, with its principal place of business in the Town of Surapee, in the County of Cheshire and State of Hampshire, Grantor, in the consideration of **TEN OR MORE DOLLARS** paid to my full satisfaction by **VERMONT RAILWAY, INC.**, a duly organized Vermont railroad corporation, with its principal place of business in the City of Burlington, in the County of Chittenden State of Vermont, Grantee, by these presents, do freely **GIVE, GRANT, SELL CONVEY AND CONFIRM** unto the said Grantee, **VERMONT RAILWAY, INC.**, and its successors and assigns forever, a certain piece of land in the Town of Wallingford in the County of Rutland and State of Vermont, described as follows, viz:

Being all and the same premises conveyed to Frank W. Whitcomb Construction Corporation by Executrixes' Deed of Claire R. Whitcomb and Carol A. Whitcomb Co-Executrixes of the Estate of Frank W. Whitcomb and dated September 26, 1977, and recorded in Book 39, Page 274-275 of the Land Records of the Town of Wallingford. — of Record 10/5/77 — tax stamp. ?

Being all and the same premises conveyed to Frank W. Whitcomb by Warranty Deed of the Campton Sand & Gravel, Inc. dated July 5, 1967 and recorded at Book 33, Page 409 of the Wallingford Land Records and therein described as follows:

Beginning at a point in the easterly right of way line of the Rutland Railroad, said point being 25 feet east of and at right angles to the center line of the main track at chaining station 2136 plus 68.5; thence south 11°57' east, making an angle of 154°07' with said right way of line, 284.2 feet; thence south 42°34' east 749.8 feet; thence south 0°57' east 661 feet; thence south 19°21' west 958 feet; thence south 60°26' west 286.6 feet; thence south 11°53' west 172.6 feet; thence continuing south 11°53' west 675.7 feet to the town line between Mt. Tabor and Wallingford; thence north 87°44' west in said town line 70 feet to the easterly right of way line of said Railroad, said point being 33 feet easterly from and at right angles to the center of said Railroad at chaining station 2102 plus 31.1; thence northerly along said easterly right of way line about 3437 feet to the place of beginning, containing 39.5 acres of land.

Including also any rights the grantor may have to maintain a driveway leading from the northwest portion of said premises in an easterly direction to a dirt road running northerly to South Wallingford Station, as referred to in a deed between Dwight B. Stafford and wife and the Rutland Railroad Company, recorded in Book 23, Page 491 of the Wallingford Land Records and dated May 8, 1928.

This property is conveyed subject to the effect, if any, of a lease to E.H. and B.W. Aldrich dated October 18, 1897, recorded in Book 18, Page 382 of the Wallingford Land Records.

This property is also subject to reservation of the farm crossing located 450 feet north of the town line at chaining crossing 2106 plus 93 and a right of way from the same crossing to premises situated easterly thereof. Also excluded from this conveyance are all track and materials now in place upon the above described premises. Also conveyed is the right to lay and maintain a water pipe in the brook from the culvert located just north of the town line and at chaining station 2102 plus 43 northwesterly to Otter Creek, and the right to locate and operate a pump with a

shelter for same on the east bank of Otter Creek, the necessary piping and equipment, with a right of ingress to and egress from the same.

Reference is made to a deed of the Rutland Corporation to Campton Sand & Gravel, Inc. dated June 23 1967, for a more particular description of the premises and rights conveyed and reserved.

TO HAVE AND TO HOLD said granted premises, with all the privileges and appurtenances thereof, to the said Grantee, **VERMONT RAILWAY, INC.**, its successors and assigns, to its own use and behoof forever; And the said Grantor, **FRANK W. WHITCOMB CONSTRUCTION CORPORATION**, for itself and its successors and assigns do covenant with the said Grantee, **VERMONT RAILWAY, INC.**, its successors and assigns, that until the ensealing of these presents it is the sole owner of the premises, and have good right and title to convey the same in the manner aforesaid, that they are **FREE FROM EVERY ENCUMBRANCE**; except as aforesaid. And it hereby engages to **WARRANT AND DEFEND** the same against all lawful claims whatever, except as aforesaid.

IN WITNESS WHEREOF, I, **FRANK W. WHITCOMB**, President and duly authorized agent of the **FRANK W. WHITCOMB CONSTRUCTION CORPORATION**, hereunto set my hand and seal on behalf of said **FRANK W. WHITCOMB CONSTRUCTION CORPORATION** this ____ day of June, 2003.

IN PRESENCE OF

WITNESS

L.S.
FRANK W. WHITCOMB, President and
duly authorized agent of the **FRANK W.**
WHITCOMB CONSTRUCTION
CORPORATION

STATE OF VERMONT)
COUNTY OF CHITTENDEN) ss.

At Burlington, this ____ day of June, 2003, **FRANK W. WHITCOMB**, President and duly authorized agent of **FRANK W. WHITCOMB CONSTRUCTION CORPORATION**, personally appeared, and he acknowledged this instrument, by him sealed and subscribed, to be the free act and deed of **FRANK W. WHITCOMB CONSTRUCTION CORPORATION**.

Before me _____
Notary Public

My Commission Expires: 2/10/07

Exhibit C

ERMONT RAILWAY, INC.

72033

REFERENCE NO.	DESCRIPTION	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	AMOUNT PAID
731-1	DOWNPAYMENT FOR QUARRY				50,000.00
CHECK DATE	CHECK NO.	PAYEE		DISCOUNTS TAKEN	CHECK AMOUNT
3/27/03	72033	Frank W. Whitcomb			50,000.00

DELUXE BUSINESS FORMS 1-800-328-7205

ERMONT RAILWAY, INC.

78588

REFERENCE NO.	DESCRIPTION	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	AMOUNT PAID
	EXTENSION				20,000.00
CHECK DATE	CHECK NO.	PAYEE		DISCOUNTS TAKEN	CHECK AMOUNT
3/27/03	78588	Frank W. Whitcomb			\$20,000.00

Exhibit D

RMONT RAILWAY, INC.

72033

REFERENCE NO.	DESCRIPTION	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	AMOUNT PAID
	DOWNPAYMENT FOR QUARRY				50,000.00
3/27/03	72033	Frank W. Whitcomb			50,000.00

DELUXE BUSINESS FORMS 1-800-328-7205

RMONT RAILWAY, INC.

78588

REFERENCE NO.	DESCRIPTION	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	AMOUNT PAID
	EXTENSION				20,000.00
3/27/03	78588	Frank W. Whitcomb			\$20,000.00

Exhibit E

VERMONT RAILWAY, INC.

N 2814

REFERENCE NO.	DESCRIPTION	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	AMOUNT PAID
	PROPERTY OPTION				46,347.20
CHECK DATE	CHECK NO.	PAYEE	DISCOUNTS TAKEN	CHECK AMOUNT	
5/30/03	2814	Frank W. Whitcomb		\$46,347.20	

VERMONT RAILWAY, INC.
ONE RAILWAY LANE
BURLINGTON, VT 05401

CHITTENDEN BANK
VERMONT
58-6-116

N 2814

CHECK NO. 2814 DATE 5/30/03 AMOUNT *****\$46,347.20

Forty-Six Thousand Three Hundred Forty-Seven and 20/100 Dollars

PAY
TO THE
ORDER
OF:

Frank W. Whitcomb Construction *(LUC)*
P. O. Box 1000
Walpole, NH 03608

TWO SIGNATURES REQUIRED IF OVER \$10,000.00

(Signature 1)
(Signature 2) NP

53584

⑈002814⑈ ⑆011600062⑆ ⑆01166⑈0280⑈9⑈

VERMONT RAILWAY, INC.

N 2815

REFERENCE NO.	DESCRIPTION	INVOICE DATE	INVOICE AMOUNT	DISCOUNT TAKEN	AMOUNT PAID
	Road & Property - Road				18,652.80
CHECK DATE	CHECK NO.	PAYEE		DISCOUNTS TAKEN	CHECK AMOUNT
5/30/03	2815	Frank W. Whitcomb			\$18,652.80

VERMONT RAILWAY, INC.
ONE RAILWAY LANE
BURLINGTON, VT 05401

CHITTENDEN BANK
VERMONT
58-6-116

N 2815

CHECK NO. 2815 DATE 5/30/03 AMOUNT *****\$18,652.80

Eighteen Thousand Six Hundred Fifty-Two and 80/100 Dollars

AY
O THE
ORDER
OF:

Frank W. Whitcomb
P. O. Box 1000
Walpole, NH 03608

TWO SIGNATURES REQUIRED IF OVER \$10,000.00

[Handwritten signatures]

53584

⑈002815⑈ ⑆011600062⑆ ⑆0116600280⑈9⑈



118 Post Street, Rutland, VT 05701
Tel (802) 775-4356
Fax (802) 775-4627



August 27, 2003

Rutland Region Transportation Council
Rutland Regional Planning Agencies
Town of Wallingford Planning Agencies
Townpeople of Wallingford

Re: Proposed Salt Shed in Wallingford

Dear Sirs/Madames:

As the President of Vermont Railway (VTR) I think that it is important for all concerned to understand just what is, and what is not involved in our proposal to build a salt shed in Wallingford. The concerns of the people we serve with our railroad and Vermont's environment are of paramount concern to us. However, because we are a railroad any development that we undertake is governed by federal law that replaces or preempts both state and local regulation of our projects.

Suffice it to say that the issue of federal preemption is a very difficult one to understand, but other than Vermont, every state that has dealt with the issue has acknowledged and worked with this country's railroads to deal with the fact that the Congress in 1995 passed a law (the ICCTA) that exempts railroads from all local and state land use regulation that requires pre-permitting of its development. This does not mean that the railroad is exempt from non-discriminatory environmental, health and safety laws of the state, rather this federal law recognizes the unique and important role that railroads play in our economy and national defense and that railroads must be treated differently with respect to its development.

Because the State of Vermont has refused to acknowledge the affect of the ICCTA in our state, we have no choice, but to go to the agency that the Congress gave exclusive jurisdiction over railroads, the federal Surface Transportation Board (STB), to have the issue decided, once and for all. This issue was intensely debated by the Congress and when it passed the ICCTA it adopted a law that the courts have said is the strongest preemption language in all of federal statutory law.

The foregoing is a brief summary of the federal preemption issue. If anyone would like more information about the ICCTA and how other states have ruled on this issue, please let me know and I will make sure you receive a full packet of briefs and case law. This case law and

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briefing material explains in great detail why we have filed with the STB, but it does not address how we intend to approach this development once the STB rules that preemption applies.

Vermont Railway is a family business principally owned and run by Vermonters. In our rail system we employ over 150 Vermonters and we care deeply about our friends and neighbors and the impact our railroad operations have on their lives. It is important to us that the people of Wallingford understand that even though we are seeking to establish our legal rights as a federally regulated railroad, we have no intention of disregarding any of the legitimate concerns of our neighbors. With any project of the size of this salt shed we plan to meet with all the local planning people in order that we may take into consideration the concerns that they may raise as we review together in detail our plans.

That all being said you have our commitment that once all the legal issues are finally resolved by the STB, we will not put a shovel in the ground to develop this salt shed until we have heard from all concerned. Again we are your neighbors and we will take into account your concerns. Our goals are the same as yours, to make Vermont a better place to live. We would be happy at any time to share with you just how we are doing that. This is our dedication. If you have any questions please do not hesitate to call.

Sincerely,

David W. Wulfson
President