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January 28, 2004

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

By Hand Delivery

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

Dear Secretary Williams:

Enclosed for filing are an original and 10 copies of: (a) Petition for Leave (1) to Supplement the Record with New Evidence, (2) to Respond to the State of Vermont's Erroneous Reliance on Certain Case Law, and (3) to File a Reply to the State's request for a Stay Contained in its Opposition to Vermont Railway's Supplemental Petition for Declaratory Order and (b) Reply of Vermont Railway, Inc. to the State of Vermont's Request for Stay of Proceedings and Erroneous Reliance on Certain Case Law; and Tender of Supplemental Evidence in the above referenced case. Also enclosed is a diskette with copies of the same in Microsoft Word format.

Respectfully submitted,



Andrew P. Goldstein
Attorney for Vermont Railway, Inc.

cc: All Parties

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -- PETITION FOR DECLARATORY ORDER

**REPLY OF VERMONT RAILWAY, INC. TO THE STATE OF VERMONT'S
REQUEST FOR STAY OF PROCEEDINGS AND ERRONEOUS
RELIANCE ON CERTAIN CASE LAW; AND TENDER
OF SUPPLEMENTAL EVIDENCE**

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Dated: January 28, 2003

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**REPLY OF VERMONT RAILWAY, INC. TO THE STATE OF VERMONT'S
REQUEST FOR STAY OF PROCEEDINGS AND ERRONEOUS
RELIANCE ON CERTAIN CASE LAW; AND TENDER
OF SUPPLEMENTAL EVIDENCE**

Petitioner, Vermont Railway Inc. ("VTR"), hereby (1) opposes the request of the State of Vermont ("State" or "Vermont") that the Board stay this proceeding indefinitely until final disposition of a pending federal district court case¹ and the exhaustion of all appeals resulting from that case; (2) replies to the State's erroneous representation of the holding in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) ("*Coeur d'Alene*"); and (3) tenders additional evidence unavailable when VTR filed its Petition for Declaratory Order on June 17, 2003 ("Initial Petition") and Supplemental Petition for Declaratory Order on September 15, 2003 ("Supplemental Petition").

I. BACKGROUND

On June 17, 2003, VTR filed its Initial Petition to remove uncertainty or terminate a controversy regarding the appropriate extent of the Board's preemptive jurisdiction under 49 U.S.C. § 10501(b) as related to state and local laws purporting to require VTR, a Class III railroad, to obtain permits before it can construct and operate a rail-truck salt transload facility and rail spur to serve that facility, located at Wallingford, VT. At the state level, the statute giving rise to Vermont's permitting requirements is known as Act 250. At the local level, zoning ordinances of the Town of Wallingford ("Wallingford"), implemented pursuant to state statute, are involved.

Both the State and Wallingford opposed the Initial Petition. In its Opposition to the Initial Petition ("Initial Petition Opposition"), the State raised a number of arguments, including the jurisdictional defense of sovereign immunity, based on the Eleventh

¹ *Green Mountain Railroad Corporation v. State of Vermont, et al.*, Civil No. 1:01CV181, D. Vt. ("*GMRC v. Vermont*").

Amendment to the U. S. Constitution. On September 15, 2003, VTR filed its Supplemental Petition, wherein VTR maintained, among other things, that a defense of sovereign immunity had not been shown by the State to be applicable to this proceeding. Nevertheless, in an effort to allow the Board to reach a determination on the merits without being sidetracked by the State's sovereign immunity claim, VTR stated in its Supplemental Petition that it desired to expand its declaratory order request by asking the Board to determine the extent to which certain named officials of the State and Wallingford, charged with administering Act 250 and Wallingford's zoning ordinances, respectively, are preempted by 49 U.S.C. § 10501(b) from applying those prior permitting statutes against the proposed transload facility at Wallingford. In naming specific state and local officials, VTR relied on the doctrine enunciated in *Ex parte Young*, 209 U.S. 123 (1908) ("*Ex parte Young*").

On October 16, 2003, the State replied in opposition to the Supplemental Petition ("Supplemental Petition Opposition"). Therein, the State contended, among other things, (1) that, because VTR does not hold a recorded deed to the property at Wallingford on which VTR proposes to construct and operate a rail transload facility, VTR's request for a declaratory order is premature and should be denied (Supplemental Petition Opposition at 12-13); (2) that the Board must declare itself without jurisdiction to entertain the requested Declaratory Order Petition regarding to the extent to which 49 U.S.C. § 10501(b) preempts named officials of Vermont from applying a state permitting statute to VTR's proposed construction because the Supreme Court's decision in *Coeur d'Alene* immunizes state officials from this type of proceeding whenever "a state forum is available to vindi-

cate federal interests";² and (3) that the Board in any event should stay this proceeding indefinitely pending disposition of *GMRC v. Vermont* and the exhaustion of all appeals resulting from that case.³ VTR regards the State's assertions as inappropriate and improper for the reasons set forth below.

II. ARGUMENT

A. Evidence of Land Title

VTR has obtained and recorded title to the land parcel at Wallingford on which the proposed transload facility is intended to be built and operated by VTR. Attached as Appendix A to this pleading is a Warranty Deed dated December 8, 2003 conveying title to the tract from Frank W. Whitcomb Construction Corporation to VTR. The Warranty Deed was recorded on December 23, 2003 in Book 78, Pages 327-328 of the Land Records of the Town of Wallingford. The Deed and its recordation dispose of all contention that VTR's request for a declaratory order is premature, although such assertions had no validity to begin with.

B. Misreliance on *Coeur d'Alene* To Nullify *Ex parte Young*

In its Initial Petition Opposition, the State raised the jurisdictional defense of sovereign immunity, based on the Eleventh Amendment to the Constitution of the United States, citing the decision of the Supreme Court in *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743 (2002) ("*FMC*").

On September 15, 2003, VTR filed a Supplemental Petition for Declaratory Order ("Supplemental Petition"). Therein, VTR maintained that a defense of sovereign immu-

² Supplemental Petition Opposition at 6.

³ Supplemental Petition Opposition at 11-12.

nity, under *FMC* or otherwise, had not been shown by the State to be applicable to this proceeding for various enunciated reasons. See Supplemental Petition, pp. 4-8.⁴

Nevertheless, in an effort to allow the Board to reach a determination on the merits without being sidetracked due to the State's sovereign immunity claim, VTR stated in its Supplemental Petition that it desired to expand its declaratory order request by asking the Board to determine the extent to which certain named officials of the State and Wallingford,⁵ charged with administering Act 250 and Wallingford's zoning ordinances, respectively, are preempted by 49 U.S.C. § 10501(b) from applying those statutes against the proposed salt transload facility at Wallingford. See Supplemental Petition, pp. 9-10.⁶ VTR took the position, and still does, that, in *Ex parte Young*, the Supreme Court determined that the sovereign immunity provision of the Eleventh Amendment does 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* is applicable here inasmuch as VTR seeks only prospective relief and no monetary damages.

⁴ In its Supplemental Petition Opposition, the State asserts (p. 5) that VTR concedes that sovereign immunity blocks VTR's Initial Petition. That obviously is an inaccurate claim, given the very clear and extensive reasons supplied by VTR at pages 4-8 of the Supplemental Petition to explain why the State's claim of sovereign immunity has not been shown to be applicable.

⁵ William H. Sorrell, Attorney General of Vermont, Elizabeth McLain, Secretary, Vermont Agency of Natural Resources; Patricia Moulton, Chair of the Vermont Environmental Board, and Robert Inglis, Zoning Administrator of Wallingford.

⁶ Among the arguments now raised by Vermont in its Supplemental Petition Opposition is the claim that the issuance of a declaratory order respecting named State officials in this proceeding would deprive them of due process because they have no opportunity to participate in this case. Supplemental Petition Opposition, pp. 9-10. However, there is no reason why the named officials cannot participate in this proceeding. Copies of the Supplemental Petition were served on counsel for the entities that normally represent the named officials and on the named persons individually, with one oversight discovered recently. VTR now has served a copy of the Supplemental Petition and this pleading on all such named officials. Moreover, the Board has been requested to institute a proceeding in which all interested persons can participate and has not been requested to act on the merits without providing an opportunity for participation by such individuals.

As noted, the State disputes VTR's position respecting the availability of an *Ex parte Young* exception to sovereign immunity. VTR finds it necessary to call to the Board's attention the fact that the State's reply is premised upon a significant misstatement of the case it relies upon, and VTR believes that it must seek to remove that misstatement from the record so that it does not remain available to confuse or mislead the Board or others.⁷

Relying on *Coeur d'Alene*, the State maintains in its Supplemental Petition Opposition (p. 6) that the "*Ex parte Young* doctrine does not apply ... where a state forum is available to vindicate federal interests."⁸

Coeur d'Alene involved a dispute over ownership of the submerged lands and bed of Lake Coeur d'Alene in Idaho. The Coeur d'Alene Tribe and individual Tribe members sued the State of Idaho, various state agencies, and numerous state officials in their individual capacities to establish the Tribe's entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands, a declaration of the invalidity of all Idaho statutes which purported to regulate, authorize, or affect in any way the submerged lands, and to obtain an injunction prohibiting the defendants from regulating, or taking any action in violation of, the Tribe's alleged rights and ownership interest in the submerged lands. *Id.* at 264. The defendants moved to dismiss the complaint on Eleventh Amendment sovereign immunity grounds.

⁷ VTR does not, of course, concede that the remainder of the State's Supplement Petition Opposition is well founded. In this pleading, VTR merely asserts that the Board should disregard the State's egregious misstatements of case law.

⁸ The State also asserts that the Act 250 process provides access to a state forum. *Id.* However, because the State has incorrectly derived from *Coeur d'Alene* the notion that the availability of a State forum negates the *Ex parte Young* exception to sovereign immunity, it is not necessary for VTR to dwell here on the deficiencies in the Act 250 process as a forum for the resolution of federal issues. Basically, there is no adequate state forum because the Act 250 process provides neither a plain, speedy, nor efficient remedy, as discussed below.

The case split the Supreme Court into three factions. Justice Kennedy and Chief Justice Rhenquist comprised one faction and joined in the principal opinion, ultimately concluding that the *Ex parte Young* exception to sovereign immunity was not available in this "unusual" instance. Justice O'Connor, joined by Justices Scalia and Thomas, concurred in the final judgment but could agree only partially with the reasoning and arguments in the principal opinion. The remaining four Justices dissented.

The Court's principal opinion contains a number of separately identified sections. In Section II B, 521 U.S. at 570, *et seq.*, the principal opinion focuses on *Ex parte Young*, noting that the doctrine "has special significance" where "there is no available state forum" and cites a number of instances said to represent exceptions to *Ex parte Young* based on the availability of a state forum. In Section II C, the principal opinion discusses cases where *Ex parte Young* was upheld to allow an interpretation of federal law. *Id.* at 274.

After engaging in these extensive reviews, the principal opinion ultimately concedes that neither the availability of a state forum nor the desire to achieve an interpretation of federal law alone controls a plaintiff's ability to name individual state officials in suits before the federal judiciary. The principal opinion recognizes that:

Our precedents do teach us, nevertheless, that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar.

521 U.S. at 276-277. The principal opinion continues to affirm the recognized rule that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from

suit even though individual officials are nominal defendants." *Id.* at 277 (emphasis added). (VTR seeks no monetary recovery from Vermont.)

Section III of the principal opinion contains a summary of the *Ex parte Young* views actually relied upon in the decision: "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction. However, this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." 521 U.S. at 282. The principal opinion ends up holding that *Ex parte Young* is available as an exception to a defense of sovereign immunity where prospective relief is sought against individual state officers and monetary damages are not sought, absent "unusual" circumstances.⁹ That is precisely the interpretation of *Ex parte Young* relief relied upon by VTR at pages 10-11 of its Supplemental Petition.¹⁰

Moreover, the three concurring Justices expressly reject any suggestion in the principal opinion that "the absence of an available state forum" is a necessary "rationale for applying *Young*, instead recognizing that earlier cases discussing the availability of a state remedy arose in an injunctive context, where the moving party was required to establish that it could not secure an adequate remedy *at law* in a state forum." See 521 U.S. at 291-292 (emphasis in text). (VTR is not seeking injunctive relief.) This split in the court's view results in no majority of the court upholding the State's contention in this

⁹ The quiet title aspects of *Coeur d'Alene* were regarded by the court as an effort to transfer ownership of land from the state to the Tribe and thus to impinge on the state's traditional sovereign right to own land exclusively, and was the equivalent of a "levy upon funds in [the state's] Treasury," *Id.* at 287, thus providing "unusual" circumstances. VTR does not seek to take any of Vermont's property.

¹⁰ The State makes the unfounded claim at p. 7 of its Supplemental Petition Opposition that VTR interprets *Ex parte Young* as applicable "whenever a federal question is raised." However, see Supplemental Petition at 10, where VTR makes the far more narrow and precise assertion that *Ex parte Young* is available to suits naming "state officers acting in their official capacities so long as the relief sought is prospective only and does not involve monetary damages."

case that Ex parte Young "does not apply ... where a state forum is available to vindicate federal interests."

A significant subsequent decision of the Supreme Court recognizes that Coeur d'Alene is not authority for the holding attributed to it by the State. 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. The Court held that, "[i]n determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective,'" citing Coeur d'Alene, 535 U.S. at 645. (VTR's Initial Petition and Supplemental Petition clearly allege an ongoing conflict between the ICCTA and both Act 250 and the Wallingford zoning ordinances, and seek prospective relief only.)

Other courts have reached similar results, rejecting the misguided and inaccurate interpretation of Ex parte Young advanced by the State in this case. In Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041 (9th Cir. 2000), the court rejected the interpretation of Coeur d'Alene here advanced by Vermont, stating:

We start with the principle that the Young doctrine is alive and well and that Coeur d'Alene addressed a unique, narrow exception not present here. We do not read Coeur d'Alene to bar all claims that affect state powers, or even important state sovereignty interests.

Id. at 1048. The *Agua Caliente* court specifically found that the dismissal of the case by the district court "because there existed an adequate remedy at law in state court" was erroneous, taking pains to explain that conclusion in light of *Coeur d'Alene*:

That there existed an alternate forum in state court in which the Tribe *could* raise its claims neither divested the district court of jurisdiction nor removed the case from the *Young* exception for Eleventh Amendment purposes. The Supreme Court's decision in *Coeur d'Alene* although divided, supports this conclusion. Justice Kennedy stated in the principal opinion that "[w]here there is no available state forum the *Young* rule has special significance," *id.* at 271, 117 S. Ct. 2028 and concluded that one instance in which *Young* applies is if there is "no state forum available to vindicate federal interests," *id.* at 270, 117 S. Ct. 2028. He ultimately acknowledged, however, that "[e]ven if there is a prompt and effective remedy in a state forum, a second instance in which *Young* may serve an important interest is when the case calls for the interpretation of federal law." *Id.* at 274, 117 S. Ct. 2028. Moreover, three other Justices indicated that the availability of a state forum is not a bar to the *Young* doctrine, stating that "[n]ot only do our early *Young* cases fail to rely on the absence of a state forum as a basis for jurisdiction, but we also permitted federal actions to proceed even though a state forum was open to hear the plaintiff's claims." *Id.* at 292, 117 S. Ct. 2028 (O'Connor, J., concurring in part) (emphasis added), and characterized the principal opinion as "ultimately conceded[ing]" that "in more recent cases *Young* has been applied '[e]ven if there is a prompt and effective remedy in a state forum.'" *Id.* at 293, 117 S. Ct. 2028 (quoting the principal opinion at 274). In light of these views, and given our previous holding that "[t]he viability of *Ex parte Young* as traditionally applied survives the Supreme Court's treatment of the issue in *Idaho v. Coeur d'Alene*," *Dow v. Lawrence Livermore*, 131 F.3d 839 (emphasis added), we conclude that the existence of a remedy at law in state court is not a bar to the *Young* exception. And while we agree that in evaluating a claim for injunctive or declaratory relief courts must necessarily consider the adequacy of any remedy at law before awarding equitable relief, under these circumstances this determination should be made in connection with an analysis of the merits.

223 F.3d at 1049-1050 (emphasis in text).

Similar results have been reached in the 5th Circuit, AT&T Communications v. Bellsouth Telecommunications, Inc., et al., 238 F.3d 636, 648-49 (5th Cir. 2001) ("We concur with the consensus among other courts that although the principal opinion in *Coeur d'Alene* suggests a case-by-case (rather than a rule-based) approach to the application of *Ex parte Young*, see *Coeur d'Alene*, 521 U.S. 261 ... (opinion of Kennedy, J.), this part of the opinion did not muster a majority, and a majority of the Court would continue to apply the rule of *Ex parte Young* as it has been traditionally understood," citing *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998). The opinion continues: "Accordingly, the application of *Ex parte Young* to suits against state commissioners ... remains unaffected by either *Seminole Tribe* or *Coeur d'Alene*." See also, *Dubuc v. Michigan Board of Law Examiners*, 342 F.3d 610, 617 (6th Cir. 2003) ("[The individual defendants'] reliance on *Coeur d'Alene* is unavailing because the present lawsuit is not the functional equivalent of a quiet title action that implicates a state's sovereign interest in its lands or waters. In arguing for a broader interpretation of the holding in *Coeur d'Alene*, [defendants] mistakenly cite portions of Justice Kennedy's principal opinion that were not joined by a majority of the Court").¹¹

The Second Circuit, in which federal courts within the State of Vermont are included, has recognized that *Coeur d'Alene* does not stand for the State's proposition that

¹¹ The State asserts that VTR "misrepresents the holdings in two bankruptcy cases ... cited for the proposition that sovereign immunity is not barred by a bankruptcy order that does not mandate direct recovery from a state treasury," and claims that "In Re Hechinger Investment Co. of Delaware, Inc., 335 F.3d 243, 250 (3rd Cir. 2003), *overruling* 276 B.R. 43 (D. Del. 2002), specifically declined to address the state's sovereign immunity claim because it ruled in favor of the State on substantive grounds." Supplemental Petition Opposition, fn. 2. The fact remains, however, that the decision at 276 B.R. 43 indeed held that bankruptcy court jurisdiction based on the court's power to interpret bankruptcy laws is not a suit against a state within the meaning of the Eleventh Amendment, and that such finding was undisturbed by the appellate court.

Ex parte Young is unavailable whenever there may be an adequate remedy at law in state courts. CSX Transportation, Inc. v. New York State Office of Real Property Services, et al., 306 F.3d 87, 98-99 (2nd Cir. 2002).

Not even an effort to exercise traditional state police powers has been regarded as sufficient to invoke the type of Coeur d'Alene interpretation advanced here by Vermont. Cardenas, et al. v. Anzai, et al., 331 F.3d 929, 938 (9th Cir. 2002) ("Applying the Coeur d'Alene exception to bar this action because it affects the state's interest in providing for the public health and welfare would allow the Coeur d'Alene exception to swallow the Ex parte Young rule.") Even where the availability of a state forum is a relevant consideration, the courts have remained extremely particular regarding the adequacy of the state forum. The Justices in Coeur d'Alene observed that, where the availability of a state forum is one of the matters to be considered, the state forum must offer a "prompt and effective remedy." See the Agua Caliente excerpt, *ante*. Dicta in ANR Pipeline Company v. Lafaver, et al., 150 F.3d 1178, 1192 (10th Cir. 1998) notes that "[w]hen the state has failed to provide a plain, speedy, and efficient remedy ... it may well be that the criteria for a remedy under Ex parte Young" remain available.¹² The Act 250 process, which the State desires to invoke, can hardly be described as "prompt and effective" or "plain, speedy, and efficient." See VTR Exhibit No. 3, Statement of William W. Schroeder, explaining the lengthy Act 250 criteria and its three tiers of administrative and appellate process which will, in any major case such as a railroad construction case, be likely to take years to reach a conclusion in the state courts.

¹² Agua Caliente found Ex parte Young unavailable because the suit amounted to a dispute over money damages and retroactive relief. 150 F.3d at 1191.

VTR has been unable to locate any judicial decision applying Coeur d'Alene as a blanket exclusion of Ex parte Young solely because a state forum is claimed to be available, as asserted by the State in this case. It is obviously true, as the State asserts, that reliance on Ex parte Young is not always appropriate; in Coeur d'Alene, the court held that "special sovereignty interests" consisting, in that case, of the state's historic pecuniary stake in title to land, were sufficient to invalidate reliance on Ex parte Young. Vermont has not pointed to any similar monetary interests of the State in land or otherwise which would be taken or destroyed by the construction and operation of the proposed salt transfer facility at Wallingford.

Nor is there any validity to the State's assertions that the Ex parte Young doctrine has been invalidated by Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) ("Seminole Tribe") and confined by that decision to a congressional exercise of "powers under the Fourteenth Amendment, which is a prerequisite to abrogating state immunity." Supplemental Petition Opposition, pp. 7-8. In Seminole Tribe, the court held that an express statutory effort by Congress to allow nonconsensual suits against states in a federal judicial forum was insufficient constitutionally to overcome the Eleventh Amendment, and that Ex parte Young was unavailable in that case because claims against individual state officials would conflict with and broaden certain specific statutory remedies enacted by Congress. 517 U.S. at 75-76. Contrary to the State's claim, Seminole Tribe fails to hold that the Ex parte Young doctrine requires "a clear legislative statement" of authority or the existence of a Fourteenth Amendment issue. See, also, AT&T Communications v.

Bellsouth, *supra* ("... the application of Ex parte Young to suits against state commissioners ... remains unaffected by either *Seminole Tribe* or *Coeur d'Alene*."). ¹³

It is clear that the State's representation that the "*Ex parte Young* doctrine does not apply ... where a state forum is available to vindicate federal interests" in reliance on Coeur d'Alene is a grossly overreaching and inaccurate characterization of the law that may be prejudicial to VTR if not rejected by the Board.

C. Stay Request

Because the State's stay request revolves around the pending proceedings in GMRC v. Vermont, it is necessary to describe the nature of that case and its issues.

Green Mountain Railroad Corporation ("Green Mountain") is a commonly controlled Class III affiliate of VTR, operating approximately 52 miles of track between Rutland, VT and Cold River, NH, meeting with VTR at Rutland. In connection with its rail service, Green Mountain owns and operates a facility sometimes referred to as Riverside, located on its main line in Rockingham, VT. In the mid 1990s, Green Mountain decided that it needed to expand its Riverside facility in order to attract additional business necessary to its economic health. In 1997, its then-tenant, PMI Lumber Transfer, Inc. ("PMI"), a non-carrier, and Green Mountain jointly sought and received a permit under the State of Vermont's Act 250 authorizing the construction of a small office building and the opera-

¹³ It is not possible to overlook the State's related contention that the Ex parte Young doctrine does not apply to administrative proceedings. Supplemental Petition Opposition at 8. The State reaches this conclusion largely because the Supreme Court has never so applied the doctrine. That the Supreme Court has not applied the Ex parte Young doctrine to administrative proceedings is not only entirely understandable, but dispositive of nothing whatsoever. It was not until 2002 that the Court determined for the first time that the Eleventh Amendment was available in certain administrative proceedings. (As noted in the Supplemental Petition, pp. 6-7, VTR believes that a declaratory order proceeding before the Board is distinguishable from the type of administrative proceeding found in FMC to be subject to an Eleventh Amendment claim.) However, purely as a matter of consistent legal presentation, Vermont's argument makes little sense because it amounts to the proposition that only the Eleventh Amendment, but none of its recognized exceptions, apply in administrative proceedings.

tion of a forest products distribution yard at Green Mountain's Riverside facility. Twenty-seven conditions accompanied the permit (hereinafter the "dash-2" permit). Among the restrictions imposed on the dash-2 permit was one requiring the "permittees" to maintain a 100-foot undisturbed buffer strip between the bank of the Connecticut River (which abuts the Riverside property) and the remainder of the Riverside tract. For various reasons not necessary to explain here, Green Mountain subsequently conducted certain rail-related activities within the 100-foot buffer strip.

In 1999, the State of Vermont issued an additional Act 250 permit to Green Mountain, authorizing the construction and operation of a salt storage and transload shed, rail siding, and related facilities at Riverside (the "dash-3 permit"). Twenty-four conditions accompanied this permit. Green Mountain concluded that compliance with these conditions would be economically infeasible. It determined not to construct the rectangular shed approved in the dash-3 permit, and instead to construct a Quonset-style shed.

On March 13, 2001, the Office of the Attorney General of the State of Vermont wrote to counsel for Green Mountain regarding notices of alleged violations at Riverside (also referred to occasionally as Rockingham) by Green Mountain brought about by asserted violations of the dash-2 permit, the dash-3 permit, and the "construction of a salt storage shed without an Act 250 permit." The letter pointed out that the "Office of the Attorney General has authority to seek relief for violations of Act 250.... This relief includes temporary and permanent injunctions, remediation, and civil penalties," and asserted that the State "may regulate facilities that are 'ancillary to the operations of [a] rail line ... in particular, the operation of a salt storage shed,'" citing *In Re: Appeal of Vermont Railway*, 171 Vt. 496 (2001). Green Mountain interpreted the Attorney General's

letter as a threat to commence enforcement proceedings. See Green Mountain Railroad Corporation -- Petition for Declaratory Order, STB Finance Docket No. 34052 (served May 28, 2002) ("Green Mountain Declaratory Order Petition").

As a consequence, Green Mountain took two concurrent steps: on June 5, 2001, it filed with the Board its request for a declaratory order in Finance Docket No. 34052, and on June 6 it instituted the proceeding in GMRC v. Vermont in federal district court, seeking injunctive relief against the State's threatened enforcement actions and a declaratory judgment. Shortly after GMRC v. Vermont was instituted, the State proposed to Green Mountain that the State would forebear from instituting enforcement proceedings if Green Mountain would withdraw its request for a preliminary injunction. Green Mountain agreed, and no preliminary injunctive issues were presented to the court. In September 2001, the district court in GMRC v. Vermont issued a Ruling on Pending Motions ("Ruling on Pending Motions"), a copy of which is Exhibit 3 to the State's Initial Petition Opposition. As described by the Board in Green Mountain Declaratory Order Petition, the court found in that interlocutory ruling "that, 'Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the [ICC Termination Act of 1995 ...],' but declined to make a specific determination ... without further development of the record." The district court also declined Green Mountain's request to refer preemption issues to the Board. Because of the court's determination to resolve the numerous issues before it without the assistance of the Board, the Board denied Green Mountain's petition for declaratory order.¹⁴

¹⁴ " * * * 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, [Green Mountain's] request that the agency issue a declaratory order will be denied." Green Mountain Declaratory Order Petition, slip op. at 4.

Various interested parties subsequently pursued a variety of efforts to resolve their differences over Act 250 without litigation, and undertook extended discussions of conflicts between Act 250 and the ICCTA within the context of possible state legislative action. Although such efforts ultimately slowed down the progress of litigation in GMRC v. Vermont, they bore no fruit. Discovery in GMRC v. Vermont resumed in the spring and summer of 2003, and both sides filed motions for summary judgment with the court.

On December 15, 2003, the District Court entered a Ruling on Cross Motions for Summary Judgment (“Summary Judgment Ruling”), a copy of which is attached as Appendix B hereto. Therein, the court held that, “[t]o the extent the state is applying Act 250 to Green Mountain’s plans as a preclearance permitting process, its actions are preempted by the ICCTA.” Vermont has filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit. See Appendix C hereto.

Vermont has requested the Board to stay this proceeding pending issuance of a dispositive decision by the District Court in GMRC v. Vermont and the exhaustion of all appeals therefrom. The Summary Judgment Ruling of the District Court moots the first of these two requests, since the Summary Judgment Ruling is dispositive of that case at the District Court level. However, the Summary Judgment Ruling does not appear to be sufficiently satisfactory to the State for purposes of mooted the ongoing dispute regarding preemption of Act 250. The State’s intent to continue to assert the applicability of Act 250 as a preclearance permitting process is clear from the State’s Notice of Appeal in GMRC v. Vermont. Further, the State has argued to the Board that this case is distinguishable from GMRC v. Vermont, asserting that GMRC v. Vermont involves “*proposed construction by a different entity in a different location under different circumstances at a*

different time,” and has labeled as “patently absurd” any effort to link GMRC v. Vermont and this case. Supplemental Petition Opposition, p. 17 (emphasis in text). Additionally, the State has made it clear that the State will not agree that Section 10501(b) has any preemptive effect whatsoever on Act 250. In response to a request by VTR (letter of November 13, 2003) requesting the State to identify any aspect of Act 250 which the State will acknowledge to be preempted by Section 10501(b), the State responded (letter of November 18, 2003), “that any conditions imposed on the railroad [under Act 250] would have only an incidental economic impact on railroad activities, and therefore would not be preempted.”¹⁵

Despite the existence of certain factual dissimilarities between this case and GMRC v. Vermont, VTR believes that the two proceedings have core factual issues and legal issues in common. In both cases, Vermont asserts that a railroad must comply with Act 250 prior to constructing a transload facility or spur track. The Summary Judgment Ruling in GMRC v. Vermont, holding that Act 250 is a preempted preclearance permitting process, applies not just in that case, but should apply in any other setting where Vermont asserts that a railroad must proceed under Act 250 before constructing and operating a rail-truck transload facility.

Nevertheless, until Vermont acknowledges that Act 250 is a prior permitting process preempted by the ICCTA whenever a railroad proposes to construct and operate a rail-truck transload facility, and so long as Vermont maintains that Act 250 is applicable

¹⁵ Copies of both such letters have been filed by the parties with the Board.

to such a project, as it does in this case, there is an ongoing dispute regarding the application of Act 250 to VTR's proposed Wallingford project that requires resolution.¹⁶

What remains of Vermont's stay request equates to an effort to obtain a postponement of this proceeding for an indefinite period of time while Vermont pursues its Second Circuit appeal and, perhaps, further appeals. However, there is no demonstrated justification for imposing further delay on this proceeding. VTR has explained to the Board that the status of the Wallingford tract under Act 250 and Wallingford's zoning ordinances must be resolved before VTR can proceed with its development plans. See VTR Initial Petition, Ex. No. 2, ¶ 10. In light of the District Court's Summary Judgment Ruling, holding that Act 250 is completely preempted to the extent it is applied by the State as a preclearance permitting process, Vermont's request for a stay now amounts to an effort to hold up a proceeding before the Board and the implementation of a rail project by VTR so that Vermont can pursue a legal position found to be without merit.

Granting Vermont's request for what amounts to an indefinite postponement of this case would be unfair VTR and administratively inefficient. VTR seeks a declaratory order with respect to not merely Act 250, but also regarding Wallingford's zoning ordinances. A postponement of this proceeding need to be resolved to allow Vermont to pursue its appeal of the District Court's Summary Judgment Ruling will not obviate the need for a resolution of preemption issues involving the Wallingford zoning ordinances. The effect of Vermont's stay request is to postpone consideration of Wallingford zoning ordinance issues until some future date, perhaps years away, when all litigation involving

¹⁶ Vermont and VTR have agreed to enter into discussions aimed at determining whether a resolution of the parties' differences is possible. However, those discussions are going forward without any firm timetable, and without any predictable result. They provide no basis for a further delay in this case, which would deprive VTR of the ability to make timely use of its investment in the Wallingford tract and of the ability to generate needed new rail revenue.

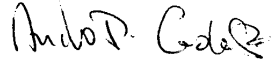
GMRC v. Vermont has been terminated. Only then would the declaratory order process resume, adding months if not years to the time when VTR might obtain a definitive ruling from the Board with respect to the applicable procedures for the use of its property.

There is no justification for the delays sought by Vermont. One purpose of Section 10501(b) preemption is to thwart delays in the development of railroad projects through the imposition of local permitting laws and regulations. Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, 2 STB 330 (1997), aff’d., City of Auburn v. United States, 155 F.3d 1025 (9th Cir. 1998), cert. denied., 527 U.S. 1022 (1999). Granting Vermont’s request for a postponement in this case would delay VTR’s use of its property no less than subjecting VTR to the State’s prior permitting process, and would allow the State and Wallingford to paralyze railroad development just as effectively as they could through the application of their local laws.

VTR needs prompt action in this proceeding to resolve its status at Wallingford one way or the other and, hopefully, to remove unwarranted permitting obstacles that stand in the way of the construction of VTR’s rail transload facility. VTR accordingly urges the Board to institute a declaratory order proceeding to determine whether Act 250 and Wallingford’s zoning ordinances are preempted by the ICCTA with respect to the proposed transload facility at Wallingford; to determine whether efforts by the above-named State and local officials to enforce Act 250 and Wallingford’s zoning ordinances

with respect to the same project are preempted; and to adopt an appropriate procedural schedule.

Respectfully submitted,



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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Vermont Railway, Inc. to the State of Vermont's Request for Stay of Proceedings has, this 28th day of January, 2004, been served by first-class mail, postage prepaid, on the following persons:

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(Rutland County)
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Rutland, VT 05701-5903

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Assistant Attorney General
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Vermont Environmental Board
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Michael Pologruto
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Town of Wallingford Selectboard
P. O. Box 327
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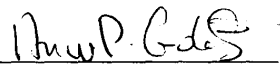
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State of Vermont
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Montpelier, VT 05609-1001


Andrew P. Goldstein

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 Walpole, 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 on October 5, 1977, in Book 39, Page 274-275 of the Land Records of the Town of Wallingford.

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, and recorded on July 3, 1967, at Book 33, Pages 401-402, of the Town of Wallingford Land Records for a more particular description of the premises and rights conveyed and reserved.

In addition also being conveyed herein is all the land and premises conveyed to Grantor, Frank W. Whitcomb Construction Corporation by Quit Claim Deed of Claire R. Whitcomb and Nicholas D. N. Harvey, Jr., Trustees of the Frank W. Whitcomb Trust, w/a/d October 23, 1956, as amended, of Walpole, in the County of Cheshire, State of New Hampshire, and Claire R. Whitcomb and Carol A. Whitcomb, Executors of the Estate of Frank W. Whitcomb, late of Bellows Falls, in the Town of Rockingham, County of Windham, State of Vermont, dated March 10, 2003, and recorded on March 12, 2003, in Book 75, Page 502-275 of the Land Records of the Town of Wallingford and therein described as follows:

Beginning at an iron pin located in the northeast corner of the Rutland R.R. gravel pit, so-called, situated in South Wallingford, Rutland County, Vermont. Said corner is also the northwest corner of the Stafford Meadow known as the "Tom Flat," thence going north forty-two (42) degrees, thirty-four (34) minutes west along a fence line two hundred fifty-one (251) feet to an iron pin in the fence line; thence turning an angle of thirty-six (36) degrees and going easterly four hundred ninety-five (495) feet to an iron pin in a stone wall on the west side of the East Road leading from South Wallingford to Mt. Tabor, town line; thence turning an angle of one hundred seventeen (117) degrees, forty-two (42) minutes and going in a southerly direction one hundred sixty-eight (168) feet along the stone wall to an iron pin set in the stone wall, this corner is the northeast corner of the aforementioned meadow; thence turning an angle of sixty-three (63) degrees and going in a westerly direction three hundred sixty-one (361) feet along the stone wall bordering the north side of the aforementioned meadow to the iron pin at the point of beginning, containing approximately 1.5 acres.

Reference is hereby made to the above-mentioned instruments, the records thereof, the references therein made and their respective records and references, all in further aid of this description.

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 8th day of December, 2003.

IN PRESENCE OF

Will Bellow
WITNESS

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

STATE OF NEW HAMPSHIRE)
COUNTY OF CHESHIRE) ss.

At Walpole, this 8th day of December, 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 Linda L. Plourde
Notary Public

My Commission Expires:

LINDA L. PLOURDE
Notary Public, State of New Hampshire
My Commission Expires July 16, 2008

TOWN CLERK'S OFFICE
WALLINGFORD, VT
Received for record the 24
day of December A.D. 20 03
at 8 o'clock 00 minutes
A M., and recorded in Book 78
Page 327-328
Julie Shann
Post Town Clerk

Appendix A
Page 4 of 4

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. 1:01-cv-181

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
2001 DEC 15 P 2:20
CLERK
BY
DEPUTY CLERK

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT
(Papers 52 and 63)

This case involves the extent to which, consistent with the Interstate Commerce Commission Termination Act of 1995 (hereinafter "ICCTA"), the State of Vermont and its Agency of Natural Resources (collectively referred to as "defendants" or the "state") may apply its environmental regulation statute, Act 250, to the Green Mountain Railroad Corporation's (hereinafter "Green Mountain") use and expansion of its facilities in Rockingham. The state argues the railroad's activities must comply with Act 250 and all permits issued thereunder. Green Mountain's position is any application of Act 250 is preempted by the ICCTA.

On July 17, 2001, the state 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. See Defendants' Motion to Dismiss or, in the Alternative, to

Abstain (Paper 9) at 1. Finding this preemption issue "requires case-by-case analysis," the Court held: "[T]o 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 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" Ruling on Pending Motions (Paper 21) at 8, 10.

Having provided the Court with a record supplemented by affidavits and discovery, the parties have filed cross motions for summary judgment. Upon review of the undisputed, material facts, the Court finds the state's efforts to enforce Act 250 in this case are preempted under the ICCTA. Therefore, for the reasons discussed below, Green Mountain's Motion for Summary Judgment is GRANTED, and the state defendants' Motion for Summary Judgment is DENIED.

I. Background

On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its motion and of identifying the absence of any genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers, Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, a

motion for summary judgment is supported by affidavits or other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue for trial. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Upon review of the record, the Court finds the following material facts undisputed. Green Mountain has 52 miles of track between Rutland, Vermont and Cold River, New Hampshire. See generally Verified Statement of Jerome Hebda (hereinafter "Hebda Statement") (appended to Paper 65 as Ex. A). It primarily operates as an interstate freight railroad, although it derives approximately 10 percent of its revenue from passengers. See Hebda Statement at para. 3.

About six years ago, in an attempt to expand its business and increase profitability, Green Mountain acquired 62 acres of land to add to its existing site in Rockingham known as "Riverside." Riverside now is approximately 66 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. Green Mountain uses Riverside as a yard for transloading freight between trains and trucks and for storing freight and railroad

equipment. See, e.g., Hebda Statement at paras. 4, 8.

The Riverside site is within the jurisdiction of Vermont's District #2 Environmental Commission (hereinafter the "District 2 Commission"). On November 12, 1997, Green Mountain and its then tenant, PMI Lumber Transfer, Inc. (hereinafter "PMI"), obtained from the District 2 Commission Permit #2W0038-2 (hereinafter the "Dash 2 Permit"). See Dash 2 Permit (appended to Paper 55, Affidavit of April Hensel, as Ex. C). The Dash 2 Permit authorized the construction of a 20-foot by 30-foot office building and the operation of a forest products distribution yard. See Dash 2 Permit at 1. It also contained 27 conditions, including: "The permittees shall maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas." Dash 2 Permit at para. 14. PMI left Riverside in 1998, and Green Mountain continued using the site for transloading activities. See Hebda Statement at para. 8.

On January 13, 1999, the District 2 Environmental Commission issued Green Mountain Permit #2W0038-3 (hereinafter the "Dash 3 Permit"), which authorized the railroad to construct a salt storage shed, conveyor pit, rail siding and truck scale at Riverside. See Dash 3 Permit (appended to Paper 55, Affidavit of April Hensel, as Ex. E) at 1. The Dash

3 Permit contained 24 conditions, including that the storage shed be rectangular, next to the rail, and either brown or dark green. See Dash 3 Permit at para. 19.

Green Mountain eventually abandoned the Dash 3 Permit project as originally proposed and, on October 14, 1999, submitted another permit application, which the District 2 Commission delineated permit application #2W0038-3B (hereinafter the "Dash 3B permit"). See Dash 3B Permit Application (appended to Paper 55, Affidavit of April Hensel, as Ex. F). The Dash 3B Permit Application included a proposal for a new salt siding project and a different salt shed to be built in a different location from the one first proposed in the Dash 3 Permit. Although no final "Dash 3B Permit" was issued, Green Mountain built its proposed salt transload and storage shed.

On January 24, 2000, the District 2 Commission issued Green Mountain a notice of alleged violation of several conditions of the Dash 2 Permit, primarily relating to the failure to maintain the 100-foot buffer zone. Specifically, the state asserts the railroad has conducted prohibited activities in the buffer zone, including storing brick, lumber and train parts, permitting the entry of vehicles in the zone, and arranging for the installation of utility poles. See Notice of Alleged Violation (appended to Paper 55, Affidavit

of April Hensel, as Ex. G). Several weeks later, on February 8, 2000, it issued a notice of violation to Green Mountain for its construction of the "Dash 3B" salt shed without a permit. See Notice of Alleged Violation (appended to Paper 55, Affidavit of April Hensel, as Ex. H).

Anticipating an unfavorable outcome in state administrative proceedings, in October 2001, and again in February 2002, Green Mountain requested a declaratory order from the Surface Transportation Board (hereinafter "STB"). Through those requests, it sought permission to continue construction at Riverside to permit it to transload bulk cement and otherwise expand its operations. According to Green Mountain, its proposed facility requires construction of a spur track within the 100-foot buffer zone. Citing this Court's enforcement authority and its intent to resolve these issues without referring the matter, the STB declined to issue the requested declaratory order. See In re Green Mountain Railroad Corp., STB Finance Docket No. 34052, 2002 WL 1058001 (ICC) (May 24, 2002) (appended to Paper 65 at Ex. S).

In December 2002, Green Mountain requested a declaratory ruling from Vermont's District Environmental Coordinator as to whether its proposed construction of cement silos and a utility building requires an amendment to its existing Act 250 permit or whether the project falls within a statutory

exception to the permit requirement. The District Coordinator determined an amendment to the permit was required, and Green Mountain appealed the jurisdictional opinion to the Environmental Board. The Environmental Board held a hearing on Green Mountain's appeal on June 25, 2003, and ultimately affirmed the District Coordinator's advisory opinion. See Declaratory Ruling #422 (appended to Paper 65 as Ex. I) at 8, sections B and C.

According to Green Mountain's president, Jerome Hebda, the expansion of Riverside that has thus far been completed has been "modestly successful." See Hebda Affidavit at para. 5 (In 1997, Green Mountain originated and terminated 416 carloads; by 2000, that number had nearly doubled). Nevertheless, Mr. Hebda maintains the state's Act 250 requirements are economically detrimental to the railroad's operations. He explains:

[T]he circumstances now faced by GMRC [Green Mountain] are not the same as those we faced in 1997, when PMI and GMRC jointly sought Act 250 authority to construct an office building and forest products distribution yard at Riverside. The expansion of GMRC's Riverside business since that time requires that GMRC utilize its property more extensively than appeared to be necessary in 1997. Ground storage of goods that have arrived by rail and await removal by truck, or which arrive by truck and await loading into rail cars, is an essential part of our business and requires more land as the business grows. Our customers have requested rate quotations from GMRC that include transloading and temporary storage of goods between rail and truck

shipments, and GMRC has provided such rates in order to attract and retain the business. . . . Moreover, storage areas must be interspersed with passageways for vehicular access and must be situated as closely as possible to rail tracks in order to minimize the distance and time consumed in the removal of shipments from railcars and the loading of shipments into railcars. . . . Electric service is needed at the site to provide electric power and illumination during short days. Depriving GMRC of the use of all land at Riverside within 100 feet of the Connecticut River would not only bring business growth to a standstill, but limit GMRC's ability to handle existing business.

Hebda Statement at para. 22.

II. Discussion

A. Act 250 as a Preclearance Statute

Act 250 is Vermont's land use statute. It was enacted to protect the state's environmental resources and to preserve its public lands. See Southview Assoc. v. Bongartz, 980 F.2d 84, 89 (2d Cir. 1992). The Act establishes a statewide permitting process for various forms of land development. See 10 V.S.A. § 6001-6108. When implementing Act 250, the state attempts to coordinate maximum economic development with minimal environmental impact. As applied, however, Act 250 establishes a preclearance permitting process; a development subject to Act 250 cannot proceed until it has received state approval and an Act 250 permit. See In re Spring Brook Farm Found., Inc., 164 Vt. 282, 285 (1995) ("Vermont's land use law,

Act 250, requires a permit prior to the commencement of any development.")

When Green Mountain and PMI, a non-railroad business, jointly operated at Riverside, the site arguably had been partially subject to Act 250 regulation, as least so far as PMI's activities were concerned. Now, as a rail carrier operating alone at Riverside, Green Mountain's activities are subject to oversight under the ICCTA, 49 U.S.C. §§ 10101 et seq., as administered by the STB, 49 U.S.C. § 10501.

The plaintiff maintains all conditions included in permits issued pursuant to Act 250 now are preempted by the ICCTA, and the state cannot enforce its permits or require a new permit for the proposed Riverside expansion. "State law is preempted by federal law only when 1) a federal statute expressly preempts state action, 2) state law is in direct conflict with federal law, or 3) federal regulation is pervasive in the field." Omva, Inc. v. Vermont, 80 F. Supp. 2d 211, 217 (D. Vt. 2000) (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)).

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).

By this provision, Congress granted the STB broadened preemptive jurisdiction over facilities that are an integral part of railroad transportation. See City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998); see also CSX Trans. Corp. v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996) (ICCTA preempts state regulatory authority over rail agency closings). When addressing the preemptive scope of 49 U.S.C. § 10501(b), courts have found most zoning ordinances and local land use permit requirements are preempted. See, e.g., Railroad Ventures, Inc. v. STB, 299 F.3d 523, 530 (6th Cir. 2002) ("if a railroad line falls within its jurisdiction, the STB's authority over abandonment is both exclusive and plenary"); CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000) ("if there is to be a limit on the amount of time that a train is

permitted to block a crossing, it must come from the federal government"), aff'd, 283 F.3d 812 (6th Cir. 2002); see also Guckenberg v. Wisconsin Cent. Ltd., 178 F. Supp. 2d 954, 959 (E.D. Wis. 2001) (common law nuisance claim is preempted where suit "seeks to proscribe activity . . . on [railway's] side track").

Specifically, courts have noted that preclearance requirements, including environmental requirements, are preempted because they necessarily interfere with a rail carrier's ability to construct facilities and conduct economic activities. "To the extent the state law is viewed as having the effect of requiring the railroad to undergo substantial capital improvements, [it] is preempted by the Interstate Commerce Commission Termination Act." CSX Transp., 92 F. Supp. 2d at 656.

Nevertheless, not all state and local regulations are preempted; local bodies retain certain police powers which protect public health and safety. See Dakota, Minnesota & Eastern R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1011 (D.S.D. 2002) (state eminent domain statute which requires railroad to provide free easement to utility companies is not preempted by ICCTA); Lavigne v. CXS Transp., Inc., 2002 WL 1424808 (Mich. App. 2002) (affirming trial court's granting of an easement by necessity over tracks for access to plaintiff's

property). For example, the Vermont Supreme Court has found certain City of Burlington zoning ordinances are not preempted by the ICCTA, including "control activities such as routing of trucks leaving the facility," and "conditions designed to avert potential contamination from the salt shed" because such regulations do not interfere with railroad operations, but rather address matters within a municipality's traditional police powers. See In re Vermont Ry., 171 Vt. 496 (2000). The parameters of ICCTA preemption have been elucidated in some STB decisions as well. As the agency charged with administering the ICCTA, the STB's interpretation of the statute and its preemptive reach is entitled to consideration. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984); In re Vermont Ry., 171 Vt. at 500.

In Joint Petition for Declaratory Order-Boston and Maine Corp. and Town of Aver, STB Finance Docket No. 33971, 2001 WL 458685 (ICC) at *5-6 (Apr. 30, 2001), the STB provided guidance as to how 49 U.S.C. § 1051(b) applies to state and local regulation of an existing facility. In part, the STB opined:

Court and agency precedent interpreting the statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations.

Thus, state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations. . . .

This does not mean that all state and local regulations that affect railroads are preempted [S]tate and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government "when it is undertaking an activity for which another entity would require a permit" and to furnish its site plan to the local government. . . . Furthermore, a town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments, and "voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." . . .

Finally, nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act. . . . Thus, the lack of a specific environmental remedy at the Board or under state and local laws (as to construction projects such as this, over which the Board lacks licensing power) does not mean that there are no environmental remedies under other Federal laws.

Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate

commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted. (citations and footnotes omitted).

Thus, local governments may require railroads such as Green Mountain, in advance of construction, to "share their plans with the community, when they are undertaking an activity for which another entity would require a permit" Id. at *7; see also 49 C.F.R. § 1105.1 et seq. (administrative rules which ensure the STB's consideration of environmental and energy factors under federal laws like NEPA). It is clear that, in cases such as this one, they may not apply a law like Act 250 so as to require pre-construction approval and permitting. Such a procedure is preempted by the ICCTA. See Cities of Auburn and Kent, Wa.-Petition for Declaratory Order-Burlington Northern Railroad Co-Stampede Pass Line, STB Finance Docket No. 33200, 1997 WL 362017 (ICC) (July 1, 1997) (state or local permitting process for prior approval of project, even an environmental review process, is preempted).

B. The Salt Shed

The state, in part, contends Green Mountain built a salt shed prior to obtaining an Act 250 permit and continues to use the salt shed without a permit. See Defendants' Reply Memorandum (Paper 66) at 13. This claim is somewhat confusing in that the Dash 3 Permit authorizes "the construction and operation of a 100-foot by 275-foot salt storage shed, conveyor pit, rail siding and truck scale." See Dash 3 Permit at 1. In any event, as discussed supra, the state cannot order Green Mountain to obtain an Act 250 permit prior to constructing a salt shed because this action would operate as a prohibited preclearance requirement.

The January 13, 1999 permit also provides, "[t]he building shall be either brown or dark green in color to mitigate the visual impact of its 300 [foot] length." Dash 3 Permit at para. 19. The Dash 3 Permit Application later proposed the building would be an "earthtone" or "sandstone" color. See Dash 3B Application at criterion 6. The state maintains the roof of the salt shed is "beige" and does not comply with the permit's requirement of being either "brown" or "dark green." See Defendants' Memorandum of Law (Paper 53; at 17 n.5.

At most, this appears to be a de minimis transgression. Green Mountain argues that, to comply with the state's "color

demand," it "would essentially have to scrap the old shed and construct a new one." Plaintiff's Memorandum of Law (Paper 64) at 23. Any order requiring substantial renovation or destruction to the salt shed because of its color would obviously unduly interfere with rail operations and thereby run afoul of the ICCTA. In any event, assuming this "color" requirement is similar to a non-discriminatorily-applied planning and zoning requirement which the STB has suggested is within local discretion, the Court concludes that the color "tan" is sufficiently "brown" or "earthtone" so as to be in compliance with the Dash 3 Permit's requirement.

C. Planned Cement Silo and Spur Track

Green Mountain also has proposed improvements at Riverside which include a rail siding, a new roadway, four 22-foot-diameter silos to hold cement, ramps, and a 12' x 20' office and utility building. If operated as planned, the cement cargo will arrive in hopper cars, be dumped into a pit, moved by a conveyor belt into a silo, and then dispersed from the silo to trucks for distribution. According to Green Mountain, this project "requires alterations to existing rail track, a truck scale, and modification of vehicular access, and - like the salt shed siding - will involve less than 10 acres of disturbed land." See Paper 64 at 14.

The cement silos Green Mountain has proposed to construct for use by a transloading customer will have a 500-ton capacity, the equivalent of five rail cars, and will approach 100 feet in height. If necessary, the railroad will employ sound barriers to diffuse undue noise. See Hebda Statement at para. 14. The Green Mountain customer which plans to use these silos will generate approximately \$180,000 per year in revenue. See Hebda Statement at para. 16. Green Mountain also explains that it plans to construct a 1000 foot spur track to enhance commercial flexibility for its customers. See Hebda Statement at para. 19.

"[W]hen section 10501(b) grants the STB exclusive jurisdiction over 'transportation by rail carriers'," it logically includes the yard, property, facilities, and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property." See Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998). While the state has the right to review these plans, it cannot, consistent with ICCTA preemption, require Green Mountain to secure Act 250 permits before commencing construction.

C. The Buffer Strip

Condition 14 of the Dash 2 Permit requires Green Mountain to maintain a 100-foot undisturbed, naturally vegetated buffer strip with no mowing or cutting of vegetation between the top of the bank of the Connecticut River and any disturbed areas. This condition was renewed in the Dash 3 Permit. It is undisputed that Green Mountain's activities and construction have disturbed portions of the strip.

According to the plaintiff, of the approximately 66 acres at the Riverside site, about 31 acres are unusable wetlands. Of the remaining 35 acres, the state-imposed buffer zone consumes approximately 19 acres, thereby severely restricting the railroad's ground storage capacity and other usable land. Green Mountain also states that its current use of the buffer zone to store materials is necessary to carry out its rail activities. See Paper 65 at para. 20. According to Green Mountain, these facts demonstrate the buffer zone's undue interference with its rail operations. See Plaintiff's Reply (Paper 69) at 4 and n.3.

It is undisputed that Riverside is located near the Connecticut River, a valuable environmental and recreational resource. According to the state, the buffer zone protects the fish habitat, prevents erosion of the stream bank, helps

maintain water quality, and provides an aesthetic benefit. Nevertheless, maintenance of this buffer zone necessarily has an economic impact on Green Mountain's ability to expand its business. Under similar circumstances, both courts and the STB have determined that state environmental regulations, however laudable, are preempted under the ICCTA. See supra at Section II A.

III. Conclusion

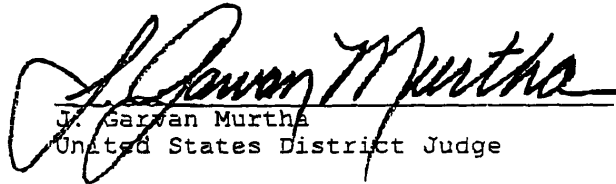
To the extent the state is applying Act 250 to Green Mountain's plans as a preclearance permitting process, its actions are preempted by the ICCTA. The state, however, is not without remedies. It may require prior notification of proposed projects and seek voluntary compliance with applicable Act 250 standards. It may also have standing to seek compliance with applicable federal laws, such as the Clean Air Act and the Clean Water Act. See Joint Petition, 2001 WL 458685 at *5 ("nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes . . .").

Green Mountain's Motion for Summary Judgment is GRANTED.

The state's Motion for Summary Judgment is DENIED.

SO ORDERED.

Dated at Brattleboro, Vermont, this 15th day of December,
2003.


J. Garvan Murtha
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Green Mountain Railroad Corporation,
Plaintiff

v.

Docket No. 1:01-cv-181

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

NOTICE OF APPEAL

Notice is hereby given that the Defendants in the above named case (State of Vermont, Vermont Agency of Natural Resources, and William H. Sorrell as Attorney General of the State of Vermont) hereby appeal to the United States Court of Appeals for the Second Circuit from a "Ruling on Cross Motions for Summary Judgment" entered in this action on December 15, 2003.

Date: January 13, 2004

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