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EXPRESS MAIL

March 1, 2002

Secretary
Surface Transportation Board
Washington, DC 20423

Re: Finance Docket No. 34052
Green Mountain Railroad Corporation – Petition for Declaratory Order

Dear Secretary:

Enclosed for filing is the State of Vermont's Opposition to Green Mountain Railroad Corporation's Supplemental Petition.

Thank you.



Sincerely,

Jeanne Elias

Jeanne Elias
Assistant Attorney General

Enclosure
cc: Service List

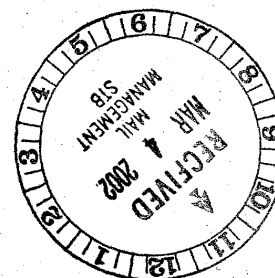
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Office of the Secretary

MAR 04 2002

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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34052



**STATE OF VERMONT'S OPPOSITION
TO GREEN MOUNTAIN RAILROAD CORPORATION'S
SUPPLEMENTAL PETITION**

ENTERED
Office of the Secretary

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Public Record

The State of Vermont opposes Green Mountain Railroad Corporation's (GMRC) supplemental petition dated February 12, 2002 asking the Surface Transportation Board to reverse its October 18, 2001 decision in this proceeding.

I. PROCEDURAL BACKGROUND

On June 6, 2001, GMRC filed an action in Vermont Federal District Court requesting relief identical to what GMRC currently requests from the Surface Transportation Board. In an order dated September 26, 2001, the Federal District Court ruled on some of the issues in the case and declined to rule on others, pending "a properly supported motion for summary judgment or after an evidentiary hearing on the merits." *Green Mountain Railroad Corporation v. State of Vermont et al.*, No. 1:01-cv-181 (D. Vt. Sept. 26, 2001) at 10. Following the Federal District Court's order, this Board issued a decision on October 18, 2001 holding this proceeding in abeyance until final disposition of the federal case. GMRC has not raised any grounds that would justify reversal of the Board's October 18, 2001 order.

**II. REVERSAL OF THE SURFACE TRANSPORTATION BOARD'S
OCTOBER 18, 2001 ORDER IS NOT WARRANTED.**

A. The Federal District Court has already ruled that the Act 250 permitting process is not preempted by the Interstate Commerce Commission Termination Act (ICCTA).

GMRC asks the Board to vacate its order staying proceedings on the railroad's initial Petition for Declaratory Order and to "find that Act 250 is preempted" by the Interstate Commerce Commission Termination Act of 1995 (ICCTA). The Vermont Federal District Court has already decided this issue against GMRC. The Court held that, "to the extent the defendants [State of Vermont] ask the Court to dismiss Green Mountain's claim that the ICCTA preempts Act 250 under all circumstances, the motion is granted. Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA. . . . 49 U.S.C. § 10501 provides the STB 'exclusive' jurisdiction over the economic activities of rail carriers. In many cases, this jurisdiction can be exercised concurrent with the state's exercise of its customary police powers." *Green Mountain Railroad Corporation v. State of Vermont et al.*, No. 1:01-cv-181 (D. Vt. Sept. 26, 2001) at 10. Thus, while certain permit conditions may on a case-by-case basis be preempted, the Act 250 permitting process is not itself preempted.

In addition, the Vermont Federal District Court rejected GMRC's argument that the Surface Transportation Board had primary jurisdiction over GMRC's Supremacy Clause claim. "[W]hether Vermont's Act 250 is preempted by the ICCTA raises constitutional issues traditionally resolved by federal courts." *Id.* at 7 (citing *Shaw v. Delta Airlines*, 463 U.S. 85, 96 n. 14 (1983); *In re Pan American Corp.*, 950 F.2d 839, 847 (2d Cir. 1991)).

GMRC's attempt to obtain a ruling from this Board, after the Federal District Court has ruled on the identical issue, is consistent with its overall duplicative approach to this case. First the Railroad filed virtually simultaneous actions before two different authorities (the Surface

Transportation Board and the Federal District Court). Now it asks this Board to rule on a matter that has already been decided by the district court. It would be improper for the Surface Transportation Board to reconsider a federal constitutional issue already decided by a Federal District Court.

The State of Vermont has, as of this date, filed a Motion for Clarification with the Federal District Court, (See attached Exhibit A) requesting specific interpretation of the Court's September 2001 rulings. To the extent that there is any ambiguity in the Court's holding, the ruling on the pending motion should eliminate any such issues. The appropriate response by this Board is to wait until such time as the District Court rules on the State's Motion for Clarification before taking any action.

At this juncture this Board has no reason to alter its initial and correct determination to stay its proceedings until the Federal District Court proceedings reach a conclusion on all issues, including final preemption determinations relating to specified past, current and proposed railroad activities and construction. To do otherwise would create the risk of confusion and inconsistent rulings and would not serve the goals of this Board or any party to this cause.

B. GMRC has not sought to advance the proceedings before the Federal District Court.

GMRC alleges that the federal district proceeding "has not progressed since the Court issued its Ruling on September 26, 2001. No procedural schedule has been ordered and no trial date has been set." Supplemental Petition, at 4. While GMRC laments that there has not been any action in the Federal District Court case since September, this is a direct result of its own failure to make any effort to advance the proceedings. It would appear, in fact, that GMRC does not want the Federal District Court proceedings to progress. As the Federal District Court made clear, the burden is on GMRC, the party who initiated the action, to move the case forward.

The Federal District Court stated that it could not issue a decision on the remaining issues until one party, or both, submitted a properly supported motion for summary judgment, or until after an evidentiary hearing on the merits. But the railroad has not filed a motion for summary judgment, nor has it filed a proposed discovery order, as required by local rule of federal procedure 26.1(b). GMRC represented to counsel for defendants that it would prepare stipulated findings, yet has not done so. GMRC cannot simultaneously ignore the Federal District Court's specific instructions on what actions must be taken to move the case forward and complain of lack of movement in the matter. If GMRC wants the Federal District Court to act on its pleadings, then it should file a motion for summary judgment, as directed by the Court. Inaction on the part of GMRC in the federal case is not a sufficient basis upon which to request this Board to resume deliberations on matters already decided, or under consideration, by the Federal District Court.

C. **GMRC's failure to apply for a state land-use permit for any of its proposed activities has created uncertainty, caused delay and rendered its request for preemption determinations premature.**

i) **By failing to apply for an Act 250 permit GMRC has created "uncertainty" about the timing and the outcome of the Act 250 process.**

GMRC filed its federal court action on June 6, 2001. In those pleadings, GMRC alleged that it "intend[ed] to construct a new facility at Riverside for the transloading of bulk cement." Complaint ¶ 27. Over seven months have passed since GMRC initially represented a desire to build a cement silo facility. GMRC has not even attempted to obtain a permit during that time. By submitting a permit application, GMRC could have resolved the "uncertainty regarding the applicability and outcome of the Act 250 process to the construction of a new cement

transloading silo." Supplemental Petition, at 5. GMRC's failure to submit a permit application leads a reasonable person to question the genuineness of GMRC's desire to service its customers.

GMRC argues that this Board has jurisdiction to resolve the preemption questions that exist between the parties on the basis that, despite a Federal Court ruling, there is sufficient "uncertainty" to warrant Board intervention. This "uncertainty", according to the railroad, is inherent in the nature of the Act 250 process. GMRC even alleges that it lost a potential customer "due to uncertainty regarding the timing and outcome of the Act 250 permitting process." Supplemental Petition, at 5. The State of Vermont, however, submits that the vast majority of the uncertainty for GMRC about how the Act 250 process would impact the railroad's future activities at Riverside has been created by its failure to apply for a permit. GMRC does not mention in its petition that it never submitted a permit application to construct a new cement silo, or to conduct any other activities, at the Riverside site. GMRC has likewise failed to submit a permit amendment to request a modification of the existing permit condition that created the 100-foot buffer zone along the Connecticut River, to which it agreed in 1997.

GMRC's failure to submit any permit applications or amendments, which would allow it to meet the needs of its potential customers, is simply inexcusable. This is particularly true, in light of assurances from the State of Vermont that, in the event the permit was denied or the permit conditions were unacceptable, GMRC could preserve its right to litigate preemption issues in federal district court. The inescapable conclusion is that the sole cause for uncertainty in the timing and outcome of the Act 250 permitting process is GMRC's own inaction. The railroad alone is responsible for its decision not to apply for permits or permit amendments for its proposed or existing activities at Riverside, and thus cannot cite the uncertainty created by this

decision as either the basis for this Board's reversal of the existing order of stay or the basis for ignoring the previous ruling of the Federal District Court in this matter.

ii) **The Railroad's assertion that it lost a potential customer due to the "uncertainty" of the timing and outcome of the Act 250 process is unsupported, based on hearsay and unreliable.**

GMRC's assertion, in its supplemental petition and the verified statement of Jerome Hebda, that uncertainty in the Act 250 process was the sole reason some unnamed potential customer chose not to utilize the services of GMRC is both self-serving and unsupported. The verified statement of Mr. Hebda is based on hearsay. No reliable information has been presented as to why this unnamed potential customer chose another railroad. Common sense and experience dictate that business decisions are invariably based on myriad and complex factors, thus making GMRC's simplistic explanation of the situation unreliable.

iii) **GMRC's allegations of delays in the Act 250 process are contradicted by their own experience.**

In its supplemental petition GMRC claims that it "has learned from its unfortunate recent experience that the railroad cannot expect to maximize its business development opportunities when faced with the uncertainties and time lags attendant to the Act 250 permitting process." Supplemental Petition at 7. GMRC's allegations concerning delays in the Act 250 process are incredible and GMRC's own experience belies this assertion. GMRC received a proposed permit for construction of its salt shed seven days after its permit application was submitted. See Notice of Application and Proposed Land Use Permit #2W0038-3B dated October 21, 1999 (attached as Exhibit B).

Most delays in the permitting process are, in fact, caused by the permittee's own failure to provide requested information to the local commissions. GMRC's experience obtaining a permit

for its salt shed is, again, a case in point.¹ The district environmental commission turned around GMRC's permit application in seven days. In the letter accompanying the proposed permit, the commission stated that the permit would become final once GMRC submitted its wastewater permit. GMRC never submitted the wastewater permit. Instead, GMRC began building its salt shed without a final permit. When the commission discovered that GMRC was building a salt shed without a permit, it requested further information. Twelve months passed and GMRC failed to provide the requested information. The commission eventually granted the permit but, due to GMRC's failure to provide the requested information, the final permit retained, in part, a description of the original proposal rather than a description of the as-built shed.

- iv) **The Verified Statement of William Schroeder claiming that there will be extensive and significant delays in the Act 250 process in this case is speculative and based on unsupported and biased opinion, making it inherently unreliable.**

GMRC claims that "an Act 250 permit request for a substantial project . . . could be expected to take not less than 24 months, and more likely three to four years." To allege that the "expected" timeframe for obtaining an Act 250 permit is four years is outright absurd. William Schroeder, whose bias in favor of his own firm's client should be obvious (he is employed by the same firm as Vermont counsel for GMRC), submits a statement that is as self-serving as it is unreliable. Mr. Schroeder is not an employee or a representative of the District Environmental Commission, or of the Environmental Board. He gives his own interpretation of how the Act 250 permit process will be applied to this case without any reference to the facts of this specific

¹ GMRC obscures the fact that the salt shed at issue in this cause, has been built and has been in use since before the filing of either the District Court or STB actions. Importantly, GMRC on its own (and not in conjunction with its former non-railroad joint venturer PMI) applied for and received the Dash 3 permit to construct the salt shed.

case. Significantly however, none of the assertions he makes with regard to the timetables for Act 250 permit determinations are supported by facts or statistics based on existing data. Thus the assertions that any specific part of the Act 250 process will take any given length of time are merely Mr. Schroeder's unsupported opinions. Mr. Schroeder has provided a statement based solely on his personal opinion to buttress an argument being made on behalf of a client of his firm. The statement inherently lacks credibility and should be disregarded in its entirety.

- v) **GMRC's failure to apply for jurisdictional opinions, permits, or permit amendments has rendered its request for preemption determinations premature, as the facts upon which such determinations are made are as yet unknown in this cause.**

The proper route for obtaining a jurisdictional opinion regarding proposed future activities is through the district environmental coordinators. 10 Vt. Stat. Ann. § 6007(c) (Supp. 2001) ("any person . . . may request a jurisdictional opinion" from a district environmental coordinator). De novo review is available from the Vermont Environmental Board, whose decisions are directly appealable to the Vermont Supreme Court. *Id.* & § 6089(b). GMRC has declined to follow this procedure for determining the extent of Act 250 jurisdiction at its Riverside site, thus leading to GMRC's uncertainty regarding the applicability of Act 250 to GMRC's proposed future activities.

GMRC's claim for a preemption determination will remain premature until an actual controversy or bona fide issues of uncertainty exist. It is unknown whether the district environmental commission would assert Act 250 jurisdiction over Green Mountain's proposed projects. See Vt. Stat Ann. § 6007(c) (jurisdictional opinion). Assuming jurisdiction, it is unknown what type of conditions, if any, the district environmental commission would place on the permit.

The district environmental commission cannot fashion appropriate permit conditions until it has received information from the permittee and other Act 250 parties. And the preemption issues cannot be decided until the district commission rules on the permit application. In re Stokes, 164 Vt. at 38, 664 A.2d at 717 (“Because there has been no showing of an inevitable conclusion between the [Environmental] Board’s order and an FAA ruling, there is nothing to prevent the [Environmental] Board from imposing an otherwise lawful condition.”)

In Soo Line Railroad Co. v. City of Minneapolis, 625 N.W.2d 834, (Minn. Ct. App. 2001) the court rejected a railroad’s attempt to obtain such an “advisory opinion” and held that:

An anticipatory determination of preemption conflicts especially with the nature of preemption decision—a fact specific examination of the alleged interference with operations created by public action premised on local law. More practically, there is no authority suggesting that the possible future burden of asserting preemption outweighs the risk of injustice in either a decision (a) that precludes all future applications of a local law to railroad property, or (b) unwisely attempts to imagine the actual circumstances of specific, future local government decisions and makes in advance a preemption decision for any or all of them. Id. at 836-7.

This Board acknowledged that certain requests for preemption determinations should be rejected as premature in Fletcher Granite Company, LLC – Petition for Declaratory Order, STB Finance Docket No. 34020 (June 25, 2001). GMRC’s attempt to distinguish this case is unconvincing. In Fletcher Granite, the applicant asserted it had “been told by local officials that resuming service would entail an environmental permitting process under state law and review by the local Conservation Commission.” Similarly GMRC alleges that the Attorney General’s Office has asserted Act 250 jurisdiction over GMRC’s proposed future activities. Supplemental Petition, at 9. In support of this assertion, GMRC cites itself. *Id.* Notwithstanding the fact that GMRC has utterly failed to support its claim, GMRC asserts that the State of Vermont has taken

“official action that would impede continuation and expansion of rail service by GMRC” Supplemental Petition at 9, but fails to state what official action this might be. In fact GMRC can cite no official action taken by the State of Vermont that would have any impact on any nominally proposed future activities at the site. Absent detailed factual information from GMRC, the State cannot even determine whether Act 250 is applicable to any proposed future project. Vermont has correctly stated that under Act 250, it has the authority to enforce the conditions of existing permits to address past and current violations of those permits. It has however taken no enforcement action against the railroad for those violations. No legal or administrative action regarding those violations has been commenced. Such a statement alone, which did not even address any proposed future activities of GMRC, is not the equivalent of the “official action” contemplated by the Board in Fletcher Granite.

GMRC pledges to “cooperate extensively with local authorities” and states that “If disagreements arise between GMRC and governmental bodies regarding the application of State and local regulations to GMRC’s operations, including truck access to Riverside, GMRC will act promptly to obtain resolution of those disputes should they fail to be resolved amicably.” Supplemental Petition at 13. Assertions that a party intends to cooperate with state and local authorities do not have a bearing on whether a matter is ripe for resolution. Nor should they be mistakenly relied upon as a substitute for the detailed factual framework needed by the appropriate authority to make the “fact bound” determination of preemption questions.

Until the railroad applies for Act 250 permits and permit amendments for its various existing and future activities at Riverside, there will be insufficient information upon which to make preemption determinations and any request for such determinations will be premature.

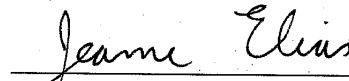
III. CONCLUSION

The Federal District Court has already ruled on the preemption questions now resubmitted to the Board by GMRC. That Court has affirmatively retained jurisdiction to make the specific fact bound preemption determinations necessary in this case and has clearly stated its intention to make these determinations upon submission of a properly supported Motion for Summary Judgment or upon a hearing on the merits. To the extent that any ambiguity exists in the Court's ruling, it should be resolved upon consideration of the pending Motion for Clarification. The State of Vermont respectfully asks the Surface Transportation Board to deny GMRC's request to reverse the Board's October 18, 2001 order.²

Dated: March 1, 2002 at Montpelier, Vermont.

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

By:



Jeanne Elias
Rebecca M. Ellis
Assistant Attorneys General

² In the event that the Board makes a determination that it should vacate its previous order, the State of Vermont seeks an opportunity to brief the merits of this cause for the Board's consideration. The arguments herein do not constitute the State's response to GMRC's substantive arguments, as stated in both its original and supplemental petitions.

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Green Mountain Railroad Corporation,
Plaintiff

v.

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

Docket No. 1:01-cv-181

**DEFENDANTS' MOTION FOR CLARIFICATION
OF THIS COURT'S SEPTEMBER 26, 2001 ORDER**

Defendants State of Vermont, Vermont Agency of Natural Resources and William H. Sorrell, as Attorney General of the State of Vermont (collectively the "State" or "Vermont") respectfully ask this Court to grant the Defendants' Motion for Clarification of this Court's September 26, 2001 Order.

LEGAL MEMORANDUM

I. PROCEDURAL BACKGROUND

On June 6, 2001, Green Mountain Railroad Corporation ("GMRC") filed a complaint in Vermont Federal District Court requesting injunctive and declaratory relief regarding the scope of preemption by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") of Vermont's state land-use law, Act 250. GMRC requested similar declaratory relief before the Surface Transportation Board in a petition filed on June 5, 2001.

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On July 12, 2001, the State of Vermont filed a "Motion to Dismiss or, In the Alternative, to Abstain" with this Court. The State asked the Court (1) to dismiss, under the Supremacy Clause, the railroad's facial claim that Act 250 was preempted by the ICCTA and (2) to dismiss the railroad's other claims for declaratory and injunctive relief on the grounds of waiver and Younger abstention, or alternatively, to abstain from ruling on these claims on the grounds of Pullman abstention.

On August 3, 2001, Green Mountain Railroad filed a "Motion to Stay Proceedings and Refer Issues to Surface Transportation Board or To Hold in Abeyance."

On September 26, 2001, this Court granted in part and denied in part the State's motion to dismiss. The Court held:

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

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

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requirements are preempted in this particular case,
that motion is denied.

9/26/01 Ruling on Pending Motions ("Ruling") (paper 21) at 10.¹

The Court denied the State's motion to dismiss or to abstain under the Younger and Pullman doctrines. The Court also denied the railroad's motion to stay proceedings and refer issues to the Surface Transportation Board.

On October 18, 2001, the Surface Transportation Board issued an order holding GMRC's petition for a declaratory ruling in abeyance until final disposition of the federal case.

Green Mountain Railroad now contends that, despite this Court's ruling, it need not apply for an Act 250 permit for future development activities at the Riverside site or for any amendments to its existing Act 250 permits. Furthermore, on February 12, 2002, Green Mountain Railroad Corporation filed a Supplemental Petition before the Surface Transportation Board, asking the Board to vacate its October 18, 2001 order and to resolve issues that defendants believe have already been decided by this Court. Specifically, GMRC requests the Board to rule that "Act 250 is preempted totally to the extent it is

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¹ In its September 26, 2001 ruling, this Court stated that Green Mountain "has constructed a new salt storage shed which the State has determined violates the 1997 Permit by impinging on the buffer zone." 9/26/01 Ruling at 4. The salt shed is not located within the buffer zone, nor does the State of Vermont allege that it is located within the buffer zone. The District 2 Environmental Coordinator issued a notice to Green Mountain Railroad Corporation alleging construction of the salt shed without a permit, not disturbance of the buffer zone. See Hensel Affidavit ¶¶ 7 & 8 (attached to State's 7/12/01 Motion to Dismiss).

interpreted and applied by the State of Vermont as a Pre-Construction Permitting Process or Requirement." GMRC's Supplemental Petition (filed with the Surface Transportation Board, 2/12/02) at 10. In addition, GMRC asks the Board to rule that the 1997 Permit Conditions "should not be applied to curtail GMRC's present use of Riverside." *Id.* at 13.

The State of Vermont believes that this Court has already decided, in whole or part, the issues that GMRC seeks to re-litigate before the Surface Transportation Board. A ruling on defendants' motion for clarification will provide guidance to the Surface Transportation Board and, to the extent that an evidentiary hearing proves necessary, will assist in narrowing the factual issues before the Court.

II. REQUEST FOR RELIEF

The State of Vermont asks this Court to clarify whether its September 26, 2001 Order answered the following four questions: (1) Does Act 250 retain viability even when it is interpreted and applied by the State of Vermont as a "pre-construction permitting process or requirement"? (2) Does Green Mountain Railroad Corporation need to apply for an Act 250 permit for its proposed cement storage silo before claiming that Act 250, as applied to the proposed cement storage silo, is preempted? (3) Does Green Mountain Railroad Corporation need to apply for an Act 250 permit for its proposed spur track before it may claim that Act 250 as applied to the proposed spur track is preempted? (4) Does Green Mountain Railroad Corporation need to apply for an amendment to its 1997 Act 250 permit, requesting modification to the 100-foot

buffer condition, before it may claim that Act 250 as applied to GMRC's proposed use of the 100-foot buffer zone is preempted?

A. Act 250 is not preempted by the ICCTA merely because it is a pre-construction permitting requirement.

This Court has already held that "Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA In many cases, this jurisdiction can be exercised concurrent with the state's exercise of its customary police powers." 9/29/01 Ruling at 10. Thus, this Court has already made it clear that the mere fact that Act 250 is a pre-construction permitting requirement does not necessarily mean that it is categorically preempted by the ICCTA.

As applied, certain Act 250 conditions may indeed be preempted by the ICCTA. For example, an Act 250 condition that prohibited a railroad from acquiring a rail line would likely be preempted. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999). However, whether or not the Act 250 process or permit conditions as applied to a particular situation would be preempted by the ICCTA cannot be determined until the landowner submits a permit application. Until then, the dispute is not ripe and there is no case or controversy. In addition, as has been often held by the Surface Transportation Board, "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."

Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer MA, 2001 WL 458685*5, STB Docket No. 33971, (April 30, 2001). The

Act 250 permitting process is designed to elicit specific and detailed information about a proposed project, which provides the factual basis upon which to determine what, if any, conditions might be imposed upon the project. Absent adequate information about an individual project and the specific conditions that would be imposed upon that project, there is neither an existing controversy nor sufficient facts upon which to make a preemption determination.

B. Green Mountain Railroad Corporation must apply for an Act 250 permit for its proposed cement storage silo before it may claim that Act 250, as applied to its proposed cement storage silo, is preempted.

Green Mountain Railroad Corporation has never submitted an application to build a cement storage silo. *See* Hensel Affidavit (attached to 7/12/01 State's Motion to Dismiss). GMRC alleges that the Act 250 process, as applied to its proposed cement storage silo, is preempted solely because the Act 250 process is a pre-construction permitting requirement. "To the extent Act 250 functions as a permitting process purporting to require GMRC to obtain

prior approval for the [cement storage silo], the Board should find that Act 250 is preempted." GMRC's Supplemental Petition, (filed with the STB 2/12/02) at 13.

In holding that "Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA," this Court has already ruled that Green Mountain Railroad Corporation must apply for a permit to build a cement storage silo before GMRC may claim that the Act 250 process, or specific permit conditions, as applied to the proposed cement storage silo are preempted.

Until GMRC submits an Act 250 permit application, and is aggrieved by either a permit denial or specific permit conditions, the dispute is not ripe and there is no case or controversy. Soo Line Railroad Co. v. City of Minneapolis, 625 N.W.2d 834, 836 (Minn. Ct. App. 2001) (declining to rule on preemption issue because it would be "unwise[] to imagine the actual circumstances of specific, future local government decisions and make[] in advance a preemption decision for any or all of them"); Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & Western Railway Corp., 1999 WL 715272 at *6, STB Finance Docket No. 33466 (Sept. 9, 1999) (declining to rule on whether a proposed 25-foot buffer requirement would be preempted by federal law because " we cannot say at this time whether such a requirement, if applied in such a way as not to discriminate against railroads, would significantly interfere with . . . railroad operations and interstate commerce."); In re Stokes, 164 Vt. 30, 38, 664 A.2d 712, 717 (1995) (rejecting airport's

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preemption claim "[b]ecause there has been no showing of an inevitable collision between the [Environmental] Board's order and an FAA ruling").

C. Green Mountain Railroad Corporation must apply for an Act 250 permit for its proposed spur track before it may claim that Act 250 as applied to the proposed spur track is preempted.

Similarly, Green Mountain Railroad Corporation has never submitted an application to build a spur track. *See* Hensel Affidavit (attached to 7/12/01 State's Motion to Dismiss). It alleges that the Act 250 process, as applied to its proposed spur track, is preempted solely because the Act 250 process is a pre-construction permitting requirement. GMRC's Supplemental Petition, (filed with the STB 2/12/02) at 13.

In holding that "Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA," this Court has already ruled that Green Mountain Railroad Corporation must apply for a permit to build a spur track before GMRC may claim that the Act 250 process or specific permit conditions as applied to the proposed spur track are preempted.

Alternatively, the Environmental Board Rules provide a mechanism by which GMRC could obtain a jurisdictional opinion from the district environmental coordinator regarding the applicability of Act 250 to the proposed spur track. Env'tl. Bd. Rule 3(C)²; 10 Vt. Stat. Ann. § 6007(c) (outlining procedure for obtaining jurisdictional opinions and declaratory rulings). If the district environmental coordinator finds that there is no Act 250 jurisdiction

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² <http://www.state.vt.us/envboard/rules.htm>.

over the proposed spur track, any alleged dispute between the parties would evaporate.

Until GMRC submits an Act 250 permit application, and is aggrieved by either a permit denial or specific permit conditions, the dispute is not ripe and there is no case or controversy. Soo Line Railroad Co., 625 N.W.2d at 836; Borough of Riverdale, 1999 WL 715272 at *6; In re Stokes, 164 Vt. at 38, 664 A.2d at 717.

D. Green Mountain Railroad Corporation must apply for an amendment to its 1997 Act 250 permit, requesting modification to the 100-foot buffer condition, before it may claim that Act 250 as applied to GMRC's proposed future use of the 100-foot buffer zone is preempted.

Green Mountain Railroad Corporation has never submitted an application to modify the 100-foot buffer zone condition contained in its 1997 dash-two permit and incorporated into its 1999 dash-three permit. *See Hensel Affidavit* (attached to 7/12/01 State's Motion to Dismiss) (summary of permits); Complaint ¶ 26 (dash-three permit obtained in 1999). In its Supplemental Petition before the Surface Transportation Board, GMRC alleges that it would like to make continued use of the buffer zone as a storage area. GMRC's Supplemental Petition, (filed with the STB 2/12/02) at 13.

The Environmental Board Rules provide a means for obtaining amendments to Act 250 permits. Env'tl. Bd. Rule 34 ("permit amendments"). This Court's September 26, 2001 holding, that "Act 250 retains viability where its provisions do not unduly interfere with the provisions and purposes of the ICCTA," requires Green Mountain Railroad Corporation to apply for a permit

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109 State Street
Montpelier, VT
05609

amendment for continued use of the buffer zone. GMRC must apply for a permit amendment before it can claim that the Act 250 process or specific permit conditions as applied to its use of the buffer zone are preempted.

Until GMRC submits an Act 250 permit amendment, and is aggrieved by a denial of that request for amendment, the dispute is not ripe and there is no case or controversy. Soo Line Railroad Co., 625 N.W.2d at 836; Borough of Riverdale, 1999 WL 715272 at *6; In re Stokes, 164 Vt. at 38, 664 A.2d at 717.

III. CONCLUSION

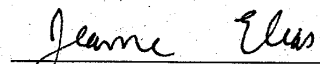
WHEREFORE, the State of Vermont respectfully requests that each of the questions presented be answered in the affirmative and that its Motion for Clarification be GRANTED.

Dated: March 1, 2002

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by:


Rebecca M. Ellis
Federal ID #000525468
Jeanne Elias
Federal ID #000500834
Assistant Attorneys General

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

EXHIBIT B

**NOTICE OF APPLICATION AND HEARING
ACT 250 MINOR APPLICATION
10 V.S.A., SECTION 6001 - 6092**

On October 14, 1999, Green Mountain Railroad, Depot Street, Bellows Falls, VT 05101, filed application #2W0038-3B for a project generally described as modifying the size, type and location of the previously permitted salt storage building. The proposed modified building will be smaller (72' X 280' instead of the previously permitted 100' X 275'), made of a fabric type material over a steel frame structure, and will be located approximately 160 feet north of the previously permitted building. The conveyer will be located south of the building. The project is located off Steamtown Road in the Town of Rockingham, Vermont.

The District 2 Environmental Commission will review this application under Environmental Board Rule 51 -- Minor Applications. A proposed permit is available at the Commission's office and has been distributed to the statutory parties. Findings of Fact and Conclusions of Law will not be prepared unless a public hearing is requested.

No hearing will be held unless, on or before **November 10, 1999**, a party notifies the District Commission of an issue or issues requiring the presentation of evidence at a hearing or the commission sets the matter for hearing on its own motion. Any hearing request shall be in writing to the address below and shall state with specificity why a hearing is required and what additional evidence will be presented. Prior to convening the hearing, the District Commission shall determine that substantive issues requiring a hearing have been raised. If the District Commission determines that a hearing is required, the hearing will be held on November 16, 1999 or as soon as possible thereafter.

Should a hearing be held on this project and you have a disability for which you are going to need accommodation, please notify us by November 10, 1999.

Parties entitled to participate are the Municipality, the Municipal Planning Commission, the Regional Planning Commission, adjoining property owners and other interested persons granted party status pursuant to Board Rule 14(B).

Dated at Springfield, Vermont this 21st day of October 1999.

By Linda Matteson
Linda Matteson
Assistant District 2 Coordinator
100 Mineral Street, Suite 305
Springfield, VT 05156
Tel: 802-885-8843



STATE OF VERMONT
Environmental Commission
100 Mineral Street, Suite 305, Springfield, VT 05156
802/885-8855
TDD 1-800-253-0191

TO: All Parties
FROM: District 2 Environmental Commission LM
DATE: October 21, 1999
RE: Land Use Permit Application #2W0038-3B - Green Mountain Railroad
Rockingham

Enclosed for your review is a copy of the proposed Land Use Permit for the above-referenced project. As indicated in the notice of Application and Hearing, this application is being processed as a "Minor" pursuant to Environmental Board Rule 34-C (As amended on September 1, 1984), and no hearing will be held unless specifically requested. Any hearing held at the request of a party would only be for the purpose of considering issues raised by the requesting party under the appropriate criteria of Act 250. Because this proposed permit has been prepared based upon consultations with only the Chairman of the District Environmental Commission, it is subject to further revision or amendment after review by the full District Environmental Commission.

The District Environmental Commission will not issue a Land Use Permit in this case until the applicant has filed a Water Supply/Wastewater Disposal Permit for this project. The 60-day deadline for issuance of a permit set forth in 10 V.S.A., § 6086(d) shall be deemed waived until such permit is filed, unless written objection is filed with the District Environmental Commission on or before November 10, 1999.

If you have any questions regarding this proposed permit or the "Minor" application procedure being used to process this application, do not hesitate to contact Linda Matteson, Assistant District 2 Coordinator at 885-8843.

/tr
Enclosure

CASE NO: 2W0038-3B
PERMITTEE: Green Mountain Railroad
ADDRESS: Depot Street
Bellows Falls, VT 05101

LAWS/REGULATIONS INVOLVED:
10 V.S.A., §§ 6001 - 6092 (Act 250)
and Vermont State Environmental
Protection Rules

District Environmental Commission #2 hereby issues Land Use Permit Amendment #2W0038-3B, pursuant to the authority vested in it by 10 V.S.A., §§ 6001-6092. This permit amendment applies to the lands identified in Book 238, Pages 544, of the land records of the Town of Rockingham, Vermont, as the subject of a deed to Green Mountain Railroad Corporation, the permittee as grantee.

This permit specifically authorizes the permittee to modify the size, type and location of the previously permitted salt storage building. The proposed modified building will be smaller (72' X 280') instead of the previously permitted 100' X 275', made of a fabric type material over a steel frame structure, and will be located approximately 160 feet north of the previously permitted building. The conveyer will be located south of the building. The project is located off Steamtown Road in the Town of Rockingham, Vermont.

The project is subject to Act 250 jurisdiction because the project is a material change to a previously permitted project. Environmental Board Rules 2(A)(5) and 2(P).

The permittee and its assigns and successors in interest, are obligated by this permit to complete, operate and maintain the project as approved by the District Environmental Commission in accordance with the following conditions:

1. The project shall be completed, operated and maintained in accordance with the plans and exhibits on file with the District Environmental Commission and the conditions of this permit.
2. No changes shall be made in the design or use of this project without the written approval of the District Coordinator or the District Environmental Commission whichever is appropriate under the Environmental Board Rules.
3. By acceptance of the conditions of this permit without appeal, the permittee confirms and agrees that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the permittee and all assigns and successors in interest.
4. The District Environmental Commission maintains continuing jurisdiction during the lifetime of the permit and may periodically require that the permit holder file an affidavit certifying that the project is being completed, operated and maintained in accordance with the terms of the permit, as provided by 10 V.S.A., Chapter 151 and the rules of the Environmental Board.
5. By acceptance of this permit, the permittee agrees to allow representatives of the State of Vermont access to the property covered by the permit, at reasonable

times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.

6. All conditions of Land Use Permit #2W0038 and amendments are in full force and effect except as amended herein.
7. This permit hereby incorporates all of the conditions of the Water Supply and Wastewater Disposal Permit #WW-2- issued on by the Regional Engineer, Wastewater Management Division, Agency of Natural Resources.
8. No further alteration and/or development shall be permitted without prior written approval from the District Environmental Commission.
9. A copy of this permit and approved plans shall be on the site at all times throughout the construction process.
10. Pursuant to 10 V.S.A. § 6090(b), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.
11. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the permittee has not commenced construction and made substantial progress toward completion within the three year period in accordance with 10 V.S.A. § 6091(b).

Construction Completion Date

12. All site work and construction shall be completed in accordance with the approved plans by October 1, 2002, unless an extension of this date is approved in writing by the District Environmental Commission.

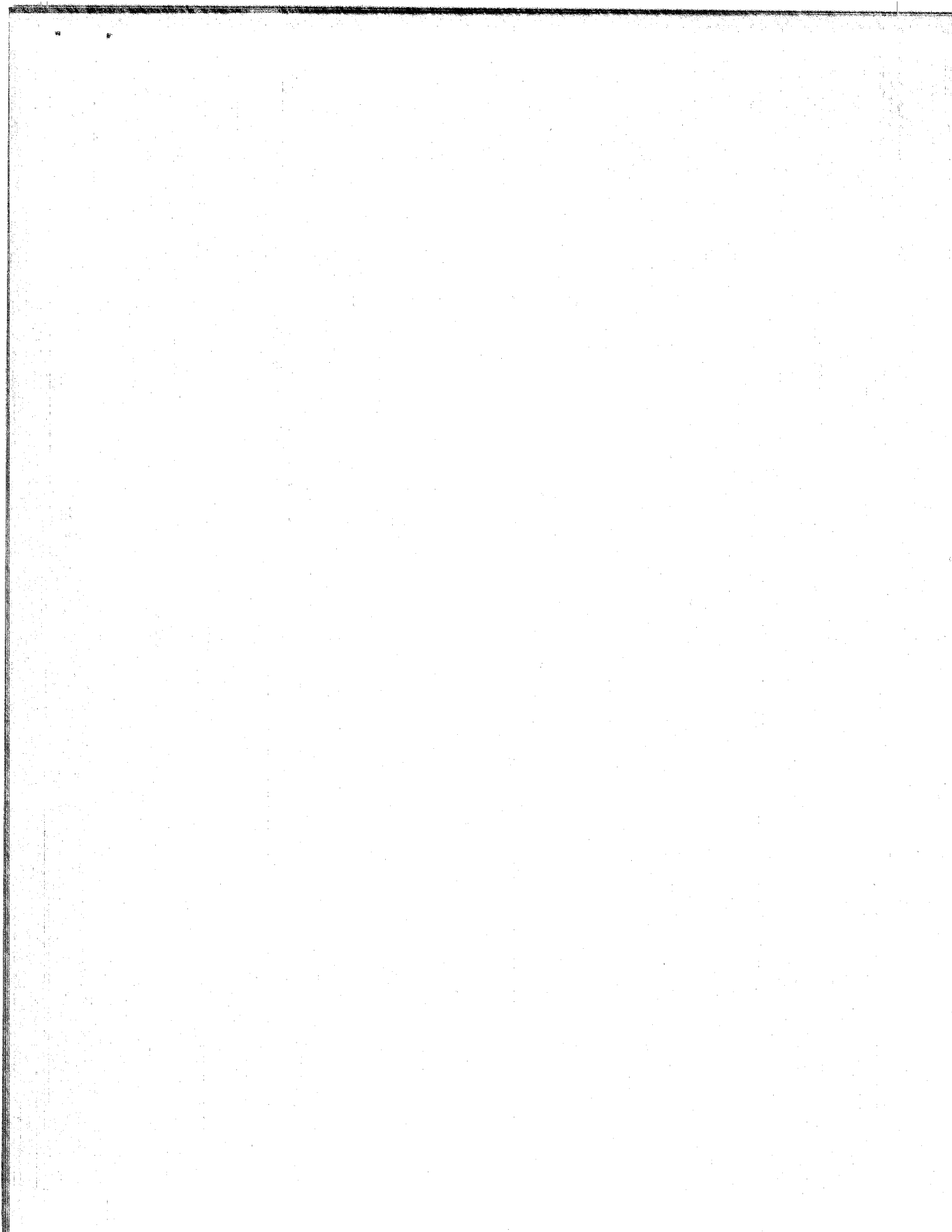
Failure to comply with all of the above conditions may be grounds for permit revocation pursuant to 10 V.S.A., § 6090(c).

Dated at Springfield, Vermont, on _____

By _____
Thomas S. Durkin, Chair
District 2 Environmental Commission
Environmental Board

Members participating in this decision: Leslie Hanafin Cota and Michael Bernhardt

The applicant or a party may file a motion to alter within 30 days from the date of this decision, pursuant to Environmental Board Rule 31. Any appeal of this decision must comply with all provisions of 10 V.S.A. § 6089 and Environmental Board Rule 40 including the submission of the original and ten copies of the following: notice of appeal, a statement of why the appellant believes the commission was in error, a statement of the issues to be addressed in the appeal, a summary of the evidence that will be presented, a preliminary list of witnesses and this decision. Decisions on minor applications may be appealed if a hearing was held by the district commission or timely requested by the appellant.



CERTIFICATE OF SERVICE

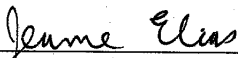
I certify that I have this day, March 1, served copies of the State of Vermont's Opposition to Green Mountain Railroad Corporation's Supplemental Petition by first-class mail, postage prepaid, upon all the parties of record in this proceeding, and all persons, entities and government agencies listed below.

Dated: March 1, 2002

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by:


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Assistant Attorney General

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Agency of Transportation
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Montpelier VT 05633

Rockingham Town Planning Commission
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Bellows Falls, VT 05101

Rockingham Selectboard
Larmont Benett, Chair
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