UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

GREEN MOUNTAIN RAILROAD CORPORATION	:	
v.	:	
	:	Civil No. 1:01CV181
STATE OF VERMONT, VERMONT AGENCY OF NATURAL RESOURCES, AND WILLIAM H. SORRELL, as Attorney General of the State of Vermont	:	

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." Omya, 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 658.

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 Ayer, 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 8. 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 dispensed 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." Soo 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 ___ day of December, 2003.

_____
J. Garvan Murtha
United States District Judge