UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC., Plaintiff,	)	
v.	)	Civil Action No. 2:16-cv-16-wks
TOWN OF SHELBURNE and JOE COLANGELO in his capacity as Town Manager and Zoning Enforcement Officer, Defendants.	)	

DEFENDANT TOWN OF SHELBURNE'S POST-HEARING MEMORANDUM IN OPPOSITION TO PLAINTIFF VERMONT RAILWAY'S MOTION FOR PERMANENT INJUNCTION

Defendant Town of Shelburne ("Town"), by and through its attorneys, Monaghan Safar Ducham PLLC, hereby submits the following memorandum in opposition to Plaintiff Vermont Railway's ("VTR") request for permanent injunction against the Town's recently enacted "Ordinance Regulating the Storage, Handling and Distribution of Hazardous Substances" ("Ordinance"). As set forth in this memorandum, this Court should deny VTR injunctive relief because the Ordinance is a valid exercise of the Town's municipal police powers to protect the health, safety, and welfare of its citizens. The Ordinance has a gravely important governmental purpose, relates to core municipal functions—protecting water sources and vulnerable citizens from harm—and neither regulates railroad operations nor unreasonably burdens rail transportation.

I. INTRODUCTION

The Court is well aware of the facts in this case. Put simply, VTR seeks an order that would selectively—and permanently—prohibit enforcement of the Ordinance against VTR's

recently constructed salt storage and distribution facility in Shelburne. VTR seeks an injunction despite (1) the Ordinance having no effect on VTR's actual railroad operations and (2) the reasonableness of the Ordinance's restrictions, particularly in light of their important governmental purposes. This reasonableness is underscored by recent monitoring data that conclusively show that the facility is now leaching dangerous levels of chloride, a contaminant, into the groundwater roughly five times the state groundwater standards. This contaminated groundwater flows to the LaPlatte River and ultimately to Shelburne Bay, the Town's drinking water supply.

VTR charged forward with the facility's construction despite abundant case law and repeated warnings from this Court that the Town can enact post-construction environmental regulations "that can survive ICCTA preemption pursuant to the police powers exception." June 2016 Order, p. 15. The facility not only includes salt sheds with the capability of storing up to 80,000 tons of road salt but also has the potential to encompass storage and distribution of heating fuel, ammonia, crude oil, and other hazardous substances regularly transported by rail.

Moreover, as established in previous hearings, the facility is sited on a location extremely ill-suited for its purposes. The facility (1) is directly adjacent to the LaPlatte River and the LaPlatte River wetland complex[1], which empties into Shelburne Bay; (2) is close to the Lake Champlain Waldorf School and the Shelburne Community School; (3) was built on extremely porous soils; (4) contains sensitive wetland areas; (5) required the wholesale clearance of old-growth forest that had provided shelter for white tail deer; and (6) is subject to a Town-owned bike path easement, which is now rendered nearly worthless due to the location's development as a hazardous substances parking ground.

[1] This wetland complex is presently being upgraded to a "Class I" wetland and will be one of only a few having the highest category of functions and values for a wetland in Vermont.

While the inappropriateness of this site for use as a salt distribution center speaks for itself, the present issue before this Court presents discrete legal questions. In assessing VTR's request for a permanent injunction, this Court must not lose sight of three important legal principals: (1) courts must follow Congress's intent that the ICCTA promote the economic viability of the railroad industry without acting to the detriment of public health and safety or insulating railroads from all local laws; (2) courts must take a cautious approach to preemption in areas of historic police powers; and (3) if this Court finds that the Ordinance cannot be enforced, then that holding will enlarge a regulatory gap within ICCTA jurisprudence and establish a dangerous precedent that railroads may conduct certain operations without regard for any laws—whether federal, state, or local.

II. THE PERMANENT INJUNCTION STANDARD

In this iteration of the ongoing litigation between VTR and the Town, the burden of proof has now flipped: VTR must show that ICCTA preemption applies against the Ordinance. In assessing VTR's case, this Court must apply a legal standard that is extremely deferential to the Town. Under that standard, VTR must satisfy a four-factor test: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

VTR comes nowhere close to meeting the high bar set by the permanent injunction standard; all four factors must be satisfied in order to achieve an injunction. As will be discussed below, any financial hardship for VTR pales in comparison to the catastrophic risk that this

facility poses to the Town's schoolchildren and water sources, and ICCTA preemption law makes clear that the Ordinance is a valid exercise of municipal police powers.

III. MUNICIPAL REGULATIONS SURVIVE ICCTA PREEMPTION WHEN THEY ARE ENACTED PURSUANT TO A TOWN'S MUNICIPAL POLICE POWERS TO SAFEGUARD THE HEALTH, SAFETY, AND WELFARE OF ITS CITIZENS.

When Congress passed the ICCTA in 1995, it specifically advised that the law should economically boost the railroad industry without interfering with the public's health and safety. See 49 U.S.C. § 10101(8) ("In regulating the railroad industry, it is the policy of the United States Government . . . to operate transportation facilities and equipment without detriment to the public health and safety."). This advisory is particularly salient in light of the U.S. Supreme Court's repeated holdings that federal laws should not tread on the historic police powers of the States—which protect the public's health, safety, and welfare—unless preemption was Congress's clearly manifest purpose. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that where Congress has legislated in a "field which the States have traditionally occupied," courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose of Congress*." (emphasis added)); Napier v. Atl. Coast Line R. Co., 272 U.S. 605, 611 (1926) ("The intention of Congress to exclude states from exerting their police power must be *clearly manifested*." (emphasis added)).

Despite the clear intent of Congress that the ICCTA not interfere with the public's health and safety, a dangerous, ill-defined "regulatory gap" in ICCTA preemption law currently exists because federal jurisdiction is more expansive than federal regulation. As a consequence, states and municipalities are barred from legislating in certain areas of law that touch on the railroad industry, even though the federal government does not regulate those areas.

Specifically, this is so because the Surface Transportation Board's ("STB") jurisdiction is broader than its licensing authority. The ICCTA section regarding the "general jurisdiction" of the STB specifies that the STB has "exclusive" jurisdiction 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,

49 U.S.C. § 10501(b). However, the STB requires licenses only where an applicant seeks to "construct an additional railroad line"; "provide transportation over, or by means of, an extended or additional railroad line; or "acquire a railroad line or acquire or operate an extended or additional railroad line." 49 U.S.C. 10901(a).

The regulatory gap has been noted by both the STB and the courts. See United Transp. Union-Illinois Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999) (noting that while STB has exclusive jurisdiction over spur track, it has no authority to regulate spur track); CSX Transportation, Inc. – Petition for Declaratory Order, Fed. Carr. Cas. (CCH) 37186 (STB Mar. 14, 2005) ("Although the ICCTA vests jurisdiction of rail transportation exclusively with the STB, the statute also excludes the Board's regulatory authority 'over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.'"). Any holding that would expand the regulatory gap—by further eroding state and municipal legislative authority—has been viewed with extreme skepticism. See, e.g., Grasso v. Surface Transportation Board, 804 F.3d 110, 119 (1st Cir. 2015) (stating that STB's rationale below was erroneous because it would have created regulatory gap "in which state and local

regulation would be eliminated simply because the facilities were economically connected to rail transportation.").

This Court must not further expand the regulatory gap and should likewise view with skepticism VTR's argument that neither the federal government nor the Town can regulate the storage of hazardous materials near schools and waterways. In other words, a ruling in favor of VTR would effectively tell municipalities that a railroad, simply because it is a railroad, has the right to pollute its waters and endanger its citizens and the town must sit back, take a front row seat, and watch helplessly.

Congress has mandated that the ICCTA not act to the "detriment to the public health and safety," and case law establishes that the ICCTA preempts only those laws that actually *regulate* rail transportation, not all laws that merely *affect* rail transportation. See, e.g., Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) ("The ICCTA pre-emption provision does not preclude the application of all other law. Rather, express pre-emption applies only to state laws with respect to regulation of rail transportation." (quotations omitted)). In other words, the ICCTA does not preempt municipal laws governing non-economic aspects of the railroad industry, such as the Ordinance at issue.

Moreover, case law interpreting important terms like "regulation" and "transportation" further limit the scope of ICCTA preemption. First, "regulation" refers only to those laws that "may reasonably be said to have the effect of managing or governing rail transportation." Florida East Coast, 266 F.3d at 1331 (quotations omitted); see also Fayus Enterprises v. BNSF Ry. Co., 602 F.3d 444, 451 (D.C. Cir. 2010) ("[T]he core of ICCTA preemption is "economic regulation," which we take to refer to regulation of the relationship . . . of shippers and carriers."); Union Pac. R. Co. v. Chicago Transit Auth., No. 07-CV-229, 2009 WL 448897, at *6

(N.D. Ill. Feb. 23, 2009), aff'd, 647 F.3d 675 (7th Cir. 2011)("[R]egulation is the act or process of controlling by rule or restriction"). Second, "transportation" is limited to those instruments "of any kind related to the movement of passengers or property." 49 U.S.C. § 10102(9)(A)-(B); see also Grosso v. Surface Transportation Bd., 804 F.3d 110, 119 (1st Cir. 2015) ("Courts and the Board have rejected interpretations of transportation that go beyond facilitating the movement of passengers or property." (quotations omitted)); Emerson v. Kansas City S. Ry. Co., 503 F.3d 1126, 1132 (10th Cir. 2007) (rejecting argument that ICCTA definition of "transportation" preempts state prohibition on dumping of old railroad ties into wastewater drainage ditch because to find otherwise "would lead to absurd results" and railroad's desire to "dispos[e] of unneeded railroad equipment in a cost-conscious fashion" cannot in itself override state police powers).

These limitations on the scope of ICCTA preemption are particularly salient in light of the fact that both the courts and the STB recognize that municipalities have extremely limited pre-construction police powers but far broader post-construction police powers. In the pre-construction context, municipalities may not require railroads to obtain permits before constructing rail facilities or conducting rail operations because "by their nature" those permits would impose an unreasonable burden on rail transportation and therefore cause an "inherent delay and interference with interstate commerce." See Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna and Western Railway Corporation, STB Docket FD_33466_0, 9/10/1999. In contrast, in the post-construction context, municipalities have far more flexibility to adopt and apply laws that affect railroads so long as they do so pursuant to their police powers to protect the health, safety, and welfare of their citizens.

Here, this distinction directly bears on the enforceability of the Ordinance because—unlike the permitting requirements previously sought by the Town—the Ordinance was adopted pursuant to the Town's post-construction police powers. Moreover, this Court has repeatedly, and correctly, identified this distinction:

> I'm suggesting that Green Mountain should be read broadly enough to suggest *if you have a project which has a direct impact upon the community, safety concerns of the town, that they should have some vehicle by which they can object*, and that the Court has the responsibility then to try to figure out whether this is one of those functions which is not preempted, and if you take logically what you're arguing, assuming you win on preemption preconstruction, that doesn't—that doesn't resolve this case. *This case is in some ways more about what's going to happen in the future*."

May 5, 2016 Hearing Transcript at P. 408, Lines 5-15 (emphases added). The Court has likewise identified the relevant legal analysis to apply in determining whether the Ordinance is permissible under the ICCTA. This Court has repeatedly referred to Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 639 (2d Cir. 2005). In that case, the court referred to a broad, two-prong test that forms the overall standard for assessing the permissibility of a municipality's post-construction law. This test was concisely re-stated in Norfolk Southern Railway Co. v. City of Alexandria:

> In order for a state or local regulation to be a proper exercise of police power in [the ICCTA] context, the regulation must not (1) discriminate against rail carriers or (2) unreasonably burden rail carriage.

608 F.3d 150, 160 (4th Cir. 2010). Moreover, in Green Mountain the court further clarified the two-prong test with a five-prong set of guidelines:

> [T]owns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.

404 F.3d at 643. The court went on to note that municipal laws that are not preempted include "[e]lectrical, plumbing and fire codes, direct *environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements*." Id. at 643 [emphasis added]. This standard has since been applied by both courts and the STB. See, e.g., Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, MA, STB Docket FD_33971_0, 5/1/2001 (holding that ICCTA does not preempt "non-discriminatory enforcement of state and local requirements such as building and electrical codes generally," and "railroads may not deny towns access in emergencies and *for reasonable inspection of the railroad facilities*." (emphasis added)).

Four years after the Green Mountain decision, the Second Circuit revisited the issue and explained that in Green Mountain, it was "unnecessary for us to draw a line that divide[d] local regulations between those that are preempted and those that are not." Island Park, LLC v. CSX Transp., 559 F.3d 96, 106 (2d Cir. 2009). That is because the pre-construction permitting requirements at issue in Green Mountain were a per se unreasonable restraint on trade. Moreover, even if the permitting requirements were not per se unreasonable, the court indicated that the requirements would not satisfy the Green Mountain five-prong test: "federal regulation of the railroad industry trumped local concerns that were vague, time consuming, and limited only by the discretion of local officials whose provincial concerns may not appreciate the need for the railroad's proposed action." Id. In the instant case, the Ordinance is neither vague nor subject to the discretion of local officials. Instead, it fits squarely into the type of municipal police powers ordinance—an environmental, health, and safety regulation—that cannot be preempted.

IV. OTHER LAWS REGULATING HAZARDOUS SUBSTANCES IN THE RAILROAD CONTEXT ARE NOT PREEMPTED BY FEDERAL LAW.

The limits of preemption are further clarified by the federal government's interpretation of its own regulations. In one of its own decisions (def.'s Exhibit "O"), the Pipeline and Hazardous Materials Safety Administration ("PHMSA") found that 49 U.S.C. § 5101 et seq.—which concerns the transportation of hazardous materials—did not preempt California and Los Angeles County laws regulating the storage of hazardous materials by railroads. PHMSA concluded that storage of hazardous materials at the consignee's destination is not "storage incidental to movement":

> For all the reasons set forth above, PHMSA finds that that Federal hazardous material transportation law does not preempt California and Los Angeles County requirements on (1) the unloading of hazardous materials from rail tank cars by a consignee and (2) the consignee's on-site storage of hazardous materials following delivery of the hazardous materials to their destination and departure of the carrier from the consignee's premises or private track adjacent to the consignee's premises.

80 FR 70874-01.

IV. THE STANDARDS FOR 'MUST NOT DISCRIMINATE' AND 'UNREASONABLY BURDENSOME'

(a) The 'must not discriminate' prong prohibits municipalities from targeting railroads.

The 'must not discriminate' prong of the two-part test requires any municipal law to "address state concerns . . . generally, without targeting the railroad industry." Jackson, 500 F.3d at 254. This means that the law must be easy for a railroad to follow and must not surreptitiously target the railroad industry. "States retain their police powers, allowing them to create health and safety measures, but 'those rules must be clear enough that the rail carrier can follow them and . . . the state cannot easily use them as a pretext for interfering with or curtailing *rail service*.'" Adrian & Blissfield R. Co. v. Vill. of Blissfield, 550 F.3d 533, 541–42

(6th Cir. 2008) (citing Jackson, 500 F.3d at 254) [emphasis added]. The costs associated with compliance must be incidental to doing business in the community in a similar manner to how they are incidental to other firms doing business in the community. See Jackson, 500 F.3d at 254 (holding that although "costs of compliance" with state law could be high, "they are 'incidental' when they are subordinate outlays that all firms build into the cost of doing business.").

VTR presented no evidence at the hearing that the Town surreptitiously targeted VTR. Equally, no evidence was presented that the Ordinance would curtail rail service or that the Ordinance is not clear enough to follow. In fact, the evidence was entirely to the contrary: the Town enacted an Ordinance that addresses serious health, safety, and environmental concerns and that applies to all businesses in the Town seeking to store certain dangerous substances in bulk quantities or discharge those substances into the environment.

(b) The 'unreasonably burdensome' prong requires a balancing test.

To determine if a municipal law "unreasonably burdens" rail carriage, this Court must balance the goals and benefits of the law against the burdens on rail carriage. See, e.g., PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212, 221 (4th Cir. 2009) ("In the context of the Commerce Clause, whether a particular regulation imposes an "unreasonable burden" on interstate commerce depends on *whether the burden on interstate commerce imposed by the regulation outweighs the local benefits it provides.*" (emphasis added)); see also Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

The "unreasonably burdens" balancing test requires this Court to make a highly fact-specific determination. See PCS Phosphate, 559 F.3d at 221 ("[T]he determination of whether the action constitutes an 'unreasonable interference' requires a factual assessment of the effect of providing the claimed remedy."); CSX Transportation, Inc.--Petition for Declaratory Order, FIN 34662, 2005 WL 1024490, at *3 (May 3, 2005) ("For state or local actions that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation."). Above all, the facts must show that "the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion." New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 254 (3d Cir. 2007).

Evidence at the hearing demonstrated that the scales of the balancing test tip heavily in favor of the Town. As will be discussed, testimony made clear that (1) the Ordinance is a necessary environmental and safety regulation because no other law to which VTR is subject protects the community from chloride pollution to either the groundwater or the LaPlatte River; (2) the Ordinance creates a necessary buffer zone that insulates vulnerable members of the population (children) from hazardous materials that could cause a large-scale tragedy; (3) VTR's own evidence shows that the groundwater is now being contaminated and will continue to be contaminated without the Ordinance; and (4) rail transportation of the listed hazardous substances is *not* foreclosed and many other profitable commodities, such as food products, lumber, wood pellets, steel products, farm equipment, stone, and gravel (aggregate), are not impacted in any way.

V. VTR'S COST OF COMPLIANCE IS NEITHER DISCRIMINATORY NOR UNREASONABLY BURDENSOME.

ICCTA case law overwhelmingly establishes that the mere fact that a municipal law presents a financial burden to a railroad does not in and of itself indicate that the law discriminates against or unreasonably burdens that railroad. This principal is relevant in this case because VTR has repeatedly argued that enforcement of the Ordinance would yield catastrophic financial penalties and that moving its salt storage and distribution operations would also be financially onerous. See Adrian & Blissfield, 550 F.3d at 541 ("The fact that the statute may prevent the Railroad from maximizing its profits, however, does not render the statute *unreasonably* burdensome . . . state actions are not preempted merely because they reduce the profits of a railroad"); see also Emerson, 503 F.3d at 1132 (holding that railroad's desire to "dispos[e] of unneeded railroad equipment in a cost-conscious fashion" by dumping old railroad ties into wastewater drainage ditch cannot in itself override state police powers); New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 335 ("We doubt whether increased operating costs are alone sufficient to establish 'unreasonable' interference with railroad operations."); Fla. E. Coast Ry., 266 F.3d at 1338 n. 11 ("No statement of purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted.").

VI. THE EVIDENCE SUPPORTS THAT THE ORDINANCE DOES NOT DISCRIMINATE AGAINST RAIL CARRIERS AND DOES NOT UNREASONABLY BURDEN RAIL CARRIAGE.

The evidence firmly established that the Ordinance does not discriminate against rail carriers or unreasonably burden rail carriage: (1) there were long-standing concerns among the Town's Selectboard ("SB") members regarding hazardous substances passing through and being stored in the Town; (2) SB members relied on their own research, statements of the Charlotte

Assistant Fire Chief regarding emergency preparedness, their own expertise[2], scientific studies, expert input, and other municipalities' hazardous substances ordinances in their consideration of the Ordinance; (3) the process of adopting the Ordinance was identical to the normal process of adopting ordinances; (4) the Ordinance was narrowly tailored to protect schools and waterways, and was neither intended to target VTR, nor does it actually target VTR; (5) the inclusion of sodium chloride in the Ordinance is not evidence of discrimination because chloride is a known pollutant and protecting waters is a core municipal function; (6) monitoring data show that VTR has increased chloride levels in the ground and surface waters over five times the Vermont Water Quality Standards; (7) other nearby sites would be better suited, both economically and environmentally, for VTR's salt storage and distribution operations; and (8) enforcement of the Ordinance would not foreclose railroad operations at the facility.

(a) There were long-standing concerns among the SB members regarding hazardous substances passing through and being stored in the Town.

Several SB members, the current town manager, and a former SB member all testified that the SB had for years been discussing the dangers posed by hazardous substances passing through and being stored in the Town. This evidence directly undercuts VTR's contention that the Ordinance is discriminatory because it shows that the motivations behind the Ordinance predated and encompassed more than VTR's facility. The Ordinance was never intended to target the facility itself; it merely targeted the problem posed by hazardous substances.

First, Toni Supple—a former SB member and VTR's own witness—described that when she was on the SB, "[w]e were concerned about rail cars being stored" and "we talked about what had happened in Charlotte." Tr. p. 290. This was well before VTR even announced plans to develop the facility site. Specifically, at that time SB members were concerned because the

[2] In engineering (John Kerr), medicine (Colleen Parker), and law (Gary von Stange).

rail cars "were abandoned," "left on the tracks" and "in disrepair" and potentially contained "hazardous materials." Tr. p. 290. Supple testified that their concern was so great that "John Kerr actually took photographs." Tr. p. 290. Moreover, the SB even discussed key provisions—such as ensuring that hazardous substances would not be kept near schoolchildren—that ended up in the final Ordinance: "we did talk about . . . the proximity to the school and that there were hazardous materials. Tr. p. 290. If someone was to ever fire—throw a cigarette into [a rail car], what would happen. So we were very concerned." Tr. p. 290.

John Kerr, who just stepped down from the SB, reiterated these points, noting that back in 2015, the SB "had a couple of discussions about [a potential hazardous substances ordinance] just generally." Tr. p. 304. Indicating that the Ordinance has never been about targeting VTR, he noted that these discussions were "[n]ot about any particular business or entity" but rather concerned taking "some proactive steps to protect waterways, the downtown core, things like that." Tr. p. 304. This is because, back in 2015, "[w]e didn't anticipate anything happening, but we would hate to have something happen and not have something in place." Tr. p. 314.

Joe Colangelo, the town manager, testified that "[t]he general idea of this sort of ordinance has been talked about for a while with certain members of the board or others." Tr. p. 326. He further implied that these discussions arose in part because "we go through the local emergency operation plan every year." Tr. p. 323. Specifically, Colangelo accompanied the SB on a retreat just as he began his tenure as town manager in April 2014. On that retreat, the SB discussed "the need to evaluate current ordinances and potentially adopt new ones." Tr. p. 333. So a potential hazardous substances ordinance was contemplated at the retreat, and "then the topic came up from time to time since 2014." Tr. p. 334. Moreover, throughout this entire multi-year span, "the SB worked together . . . to put together its comments for the state's rail

plan" and considered concerns from Charlotte that were "known publicly through the newspapers and also that were made directly from" Charlotte Assistant Fire Chief Chris Davis. Tr. p. 338. Colleen Parker confirmed these discussions—"The very first SB retreat I participated in, and that would have been March of 2014, we talked about a number of ordinances and hazardous materials was one of them"—and so did Chairman Gary von Stange, who testified that he prepared notes for the 2014 SB retreat that included topics such as firearms and hazardous materials. Tr. pp. 496, 515.

(b) SB members relied on their own research, statements of the Charlotte Assistant Fire Chief regarding emergency preparedness, their own expertise, scientific studies, expert input, and other municipalities' hazardous substances ordinances in their consideration of the Ordinance.

As the SB finally began work on the Ordinance in July 2017, several members relied on scientific data, expert opinions, and the examples of other municipalities that had either confronted issues related to hazardous substances or promulgated their own hazardous substances ordinances. For instance, Kerr—who has a civil engineering background—testified that he conducted independent research by reviewing studies from New Hampshire and Minnesota regarding the environmental effects of road salt. Tr. p. 304. He also learned about salt runoff problems in the Lake Placid region. Tr. p. 309. In part because of this research, Kerr concluded that a restriction on the storage of large amounts of sodium chloride, "warranted being put in place and that we should go forward and do it." Tr. p. 311. Parker had also had conversations about chloride pollution from salt storage with Supple. Tr. p. 496. Equally, Parker has first-hand medical knowledge as to the local hospital's limited capacity to treat children injured in a catastrophic event such as an explosion or fire. Tr. p. 501-02. Von Stange testified that "I not only looked at other ordinances and regulations across the country, both locally Winooski and Hinesburg being examples and nationally Los Angeles, Chicago and other

communities, but I also looked at—I did look at some of the federal regulations." Tr. p. 521. He also discussed the SB's annual review of emergency preparedness plans and took note of Chris Davis's concerns about the ability to handle a catastrophic event. Tr. p. 515.

(c) The process of adopting the Ordinance was identical to the normal process of adopting ordinances.

Again indicating that there was no discrimination against VTR, the SB members explained that the Ordinance went through the exact same process as all ordinances. In Shelburne—as with most municipalities and legislative processes across the country generally—the SB generally only adopts an ordinance in response to an issue facing the town or its citizens. Von Stange explained, "Something happens in the town and the legislative body reacts." Tr. p. 509. As described by both Kerr and von Stange, three other recently adopted ordinances were passed in exactly the same way. First, with an adult entertainment ordinance, the SB adopted an ordinance because "we didn't have anything on the books that said what to do." Tr. p. 313. Second, with the heavy truck ordinance, "we had received a number of calls from town folk about large trucks traveling through the neighborhood." Tr. p. 313. And third, the food truck ordinance was the "same thing . . . [a] number of businesses in town wanted to utilize food trucks as part of parties or entertainment that they were doing and we had nothing on the books." Tr. p. 313. Others included a solar array ordinance and a telecommunications ordinance. This Ordinance was no different; it was adopted pursuant to the Town's charter (Tr. 513) after preexisting concerns percolated in the member's consciousness through current events.

Although this Ordinance was passed during ongoing litigation with VTR, the Town did not craft the Ordinance to simply circumvent this Court's holdings; the Ordinance does not seek to impose permitting requirements but instead continues to allow transloading of all materials on-site. Indeed, as von Stange explained, the construction of the salt sheds was merely the

"precipitating factor" that finally pushed the SB to take action pursuant to its charter- a state statute- on a topic that it had been mulling over for years:

> [C]learly the *precipitating factor* in this case, just like with the adult entertainment when a developer came in and wanted to put a strip club in town, when the solar developer wanted to put a solar array in a special viewscape, when the telecommunications company wanted to put a telecommunications tower in a residential area, we reacted. Certainly this litigation has impacted the passage of the hazardous materials ordinance, but *the passage of the hazardous materials ordinance followed the same exact path of every other ordinance and it was targeted towards the substances just like every other ordinance we've passed*.

Tr. p. 515 (emphases added). In other words, to find preemption here would effectively condemn the normal process for adopting Ordinances that municipalities employ. Conceivably any ordinance would then discriminate against someone merely because of the timing of the Ordinance's adoption and the issues raised by a particular land use proposal.

(d) The Ordinance was narrowly tailored to protect schools and waterways, and was neither intended to target VTR, nor does it actually target VTR.

The SB members testified that the Ordinance was narrowly drafted with precise provisions specifically to protect schools and waterways. It was never intended to target VTR, nor does it actually target VTR. Again, Kerr recollected that back in 2015, SB members were discussing a potential hazardous substances ordinance, and discussions from the beginning were "[n]ot about any particular business or entity." Tr. p. 304. Parker testified that the Ordinance applies not only to everyone in Town but also to "any future businesses that come to Town." Tr. p. 505. Von Stange reiterated this point, noting that "the Town would never target any business owner. We always target the action that we're trying to address." Tr. p. 511. Furthermore, VTR produced absolutely no evidence that the SB somehow colluded to single out VTR. Instead, it attempted to make illogical leaps based on supposition alone, and the very witnesses VTR brought forward on these issues actually—but not surprisingly—supported the Town.

(e) The inclusion of sodium chloride in the Ordinance is not evidence of discrimination because chloride is a known pollutant and protecting waters is a core municipal function.

VTR suggests that the inclusion of sodium chloride into the table of prohibited substances is alone evidence of discrimination. This suggestion is sheer nonsense and not supported by either law, science, or the evidence. It was appropriate for the SB to include sodium chloride in the Ordinance. Whether it was termed a "hazardous substance," "hazardous material," a "pollutant" or a "contaminant" is totally immaterial as to whether it should be in the Ordinance. The SB was not legally bound to some other body's definitions. Instead, the evidence is clear that modern science has concerns with chloride contamination to both the environment and humans.

The groundwater and eventually the town water supply is a major concern of the SB, and stewarding a municipal water supply is a core municipal function. In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig., 725 F.3d 65, 112 (2d Cir. 2013) (holding that protection of drinking water is "a core municipal function and implicating an unusually compelling public interest"). Indeed, this importance was even noted by David Wulfson, acknowledging that clean water was more important than his own financial interests. Tr. p. 139.

VTR's facility is adjacent to the LaPlatte River, which empties into Shelburne Bay. The drinking water intake for Shelburne, South Burlington, and Williston rests in Shelburne Bay. As Andres Torizzo explained, chloride in the contaminated groundwater will—over time—infiltrate the river and create a contaminant plume. Tr. p. 373. In addition, VTR has further designed its site to discharge chloride directly from the wet pond into the LaPlatte wetland complex. Relying on fifty-year-old science from the Love Canal days, VTR's expert, Jeff Nelson, advanced what Torizzo called a "preposterous" notion that dilution solves pollution. Tr. p. 375.

Furthermore, Torizzo testified that the site is subject to erosion because it is located directly within the LaPlatte River corridor: "it's a very active place where the river tends to want to migrate . . . how the river systems evolve is that they erode and then they cut through and they form a new channel; and so this is an ongoing active process . . . the river is going to want to go right through . . . I don't think catastrophic failure of that bank is out of the question." Tr. pp. 354-55. Torizzo explained that chloride pollution is particularly concerning in the LaPlatte River not only because the river contains endangered plant and animal species that are highly salt-intolerant but also because chloride is extremely difficult to remediate. Tr. p. 357, 363. In fact, Torizzo testified that approximately "two years ago [he] actually came in and talked [to the SB] about the concerns with chloride with the town water." Tr. p. 347.

VTR seeks to divert concern about its exceeding the Vermont Water Quality chloride standards by nearly five times—violating both acute and chronic standards. See Exhibit D(1). VTR attempts to cause a smokescreen with their Multi-Sector General Permit ("MSGP") authorization to discharge. However, as Torizzo adeptly explained, the MSGP has "no specific benchmark requirement for any kind of monitoring" and no "action level" or "benchmark effluent limits" for chloride pollution. Tr. p. 358. In effect, the stormwater permit has no teeth—zero—because it contains *no* enforcement mechanism. Until the permit expires, the law does not give the Vermont Department of Environmental Conservation ("DEC") any ability to act against VTR's pollution of ground and surface waters. Exhibit B. DEC can do nothing and in fact *has done nothing*.

Torizzo and Diego explained that chloride is a "unique pollutant" because it is "hard to remediate" and remediation is extremely costly. Tr. pp. 372, 379. Diego explained that "based on my experience you can't really remediate it . . . Cargill is working on [reverse osmosis]

technology with the State of Virginia, but in a situation where you have a surface water you're typically not going to be able to pump large volumes of water running through a reverse osmosis system." Tr. p. 429. Indeed, cleanup of chloride contamination is so onerous and costly that the chloride-polluted "water sources" that Diego was familiar with "were not remediated." Instead, "[t]hey were abandoned." Tr. p. 430.

Moreover, other chemical and impurities (and federally listed hazardous substances) are contained in road salt, such as "phosphorous, aluminum, lead, [and] magnesium." Tr. p. 419. Furthermore, according to Diego, "they also add ferrocyanide to road salt." Tr. p. 419. This serves as an "anti-caking compound" but "through certain types of bacteria and sunlight can separate and migrate with groundwater." Tr. p. 419.

Although opposing counsel attempted to obscure the full nature of Diego's deposition testimony on cross examination, while quibbling over semantics, the transcript (before it was abruptly yanked from the projector) revealed that Diego consistently believed the inclusion of sodium chloride in the Ordinance was "reasonable." Tr. p. 444. Likewise, Torizzo summed it up when he said, "It's a pollutant. . . . It's a contaminant. It's a known contaminant in my world so that's all that matters to me." Tr. p. 386. In other words, whether or not sodium chloride is labeled a "hazardous substance" is totally irrelevant because its inclusion aligns with the Ordinance's purpose: "protecting the health, safety and welfare of its citizens." Ordinance § 1.0.

(f) Monitoring data show that VTR has increased chloride levels in the ground and surface waters over five times the Vermont Water Quality Standards.

Torizzo's concerns, previously disregarded by the DEC, have now come to fruition: VTR's own monitoring data show chloride levels (evidenced also by electrical conductivity readings) five times the Vermont Water Quality Standards. Tr. p. 362. Indeed, some of the chloride readings are "twenty times what was there probably prior to the development of the site,

and so it shows that there's a contamination problem." Tr. p. 371. Torizzo testified that he was not surprised by the data because the stormwater plan is inherently faulty and lacks any treatment whatsoever for the chloride: "[t]he notion that a wet pond could serve to somehow mitigate chloride impacts by diluting some of that water—it's preposterous." Tr. p. 375.

(g) Other nearby sites would be better suited, both economically and environmentally, for VTR's salt storage and distribution operations.

One of the crucial points explained by Gary Hunter, the Town's railroad operations expert, was that other nearby sites would be better suited for the VTR's salt storage and distribution operations. Hunter testified extensively that railroads typically "are not going to do anything that's going to put themselves in any jeopardy when it comes to health and safety and welfare of the public. They want to keep themselves on very good light from a public standpoint." Tr. p. 469. With this in mind, Hunter opined that it was unusual that VTR would locate its salt transloading and distribution operations on the Shelburne site directly adjacent to the LaPlatte River and so close to schools and the downtown core because, normally, a "very detailed economic study" is necessary. Tr. p. 491.

Hunter further testified that he had scouted out other potential sites before the November hearing and he believed that they would be well suited for the salt shed facility: "What I'm suggesting is there are alternative sites. Ferrisburgh may be one. There could be some north of Shelburne." Tr. p. 490. It was also unusual that VTR did not put significant effort into scouting out other sites; in Hunter's experience, "[i]f we're looking to develop a facility, whether it be aggregate or transload facility, whatever, we would go out and seek properties as one of the criterions for developing a new facility." Tr. p. 465.

(h) Enforcement of the Ordinance would not foreclose railroad operations at the Shelburne facility.

Hunter unequivocally testified that the Ordinance will not foreclose railroad operations. Hunter explained:

> I don't feel [the Ordinance] regulates railroad operations at all. . . . The railroad operations is the movement of trains on the main line. There's yards, there's facilities involved, and that, you know, operations includes the tracks and structures, the mechanical side which is cars and locomotive, it includes the labor and personnel and includes transportation which is actually the rail operations itself. That is railroad operations.

Tr. p. 462. Moreover, the Ordinance's prohibition on long-term storage of sodium chloride and other hazardous substances would not prohibit the transloading of those substances in Shelburne. As Hunter pointed out, it is possible to move the salt out in 72 hours and VTR has several options. Tr. p. 481. Even David Wulfson himself admitted that the salt can be moved within 72 hours: "I can unload in three days." Tr. P. 137-39. Furthermore, Hunter pointed out that other commodities such as lumber, paper products, aggregate, food products, wood pellets, and steel products can be stored or easily moved through this facility. Tr. pp. 472-73. According to Hunter, it would be normal for a rail carrier to market a facility like this and they could easily generate other revenue. However, at this point, the restrictions in the Ordinance "would put the Railroad out of the salt storage business, not the Railroad business." Tr. p. 473.

VI. CONCLUSION

This Court should deny VTR's request to enjoin the Town from enforcing its Ordinance against VTR's facility. Although the ICCTA preempts transportation by rail carrier and vests jurisdiction in the STB, Congress never divested municipalities of their ability to enact regulations to protect the health, safety, and welfare of their citizens pursuant to their historic police powers. These powers have remained steadfast. In order for a regulation to be a valid exercise of police powers, it must not (1) discriminate against rail carriers or (2) unreasonably burden rail carriage. The Ordinance does neither.

VTR failed to produce any evidence whatsoever that the Ordinance discriminates against rail carriers. First, VTR produced no evidence that the Ordinance was enacted specifically to target the railway—none. Current and former SB members and the town manager all testified consistently that hazardous substances were something that the Town has been concerned about for quite some time. Torizzo even testified that he presented to the SB back in 2011 about chloride contamination from road salt. SB members discussed road salt's hazards and reviewed studies and other similar ordinances. Shelburne is not alone in this type of regulation. Towns and cities ranging in size from Winooski and Hinesburg to Chicago and Los Angeles were already regulating the storage of hazardous materials.

When enacting the Ordinance, the Town went about the process pursuant to its town charter and exactly like it did in every other ordinance. VTR produced no evidence that the process of enactment violated any procedural requirement for the valid enactment of an ordinance. In fact, there were several public meetings and readings of the Ordinance, with much public comment. The Ordinance applies town-wide and does not single VTR out anywhere in its text. VTR argues, without any proof whatsoever, that they are the only business in Shelburne that will be in violation. New business will also be impacted by the storage limitations. Nothing about this Ordinance is strictly confined to a rail carrier, but instead is an ordinance of general applicability that targets a particular land use- bulk storage- regardless of who is doing it.

Testimony from VTR itself, as well as rail expert Hunter, supported that the Ordinance does not foreclose transloading of hazardous materials—only long-term storage. Nothing in this Ordinance impacts rail operations, and Hunter testified that it was reasonable (based on Wulfson's own estimates of unloading time) to unload shipments of salt typical to the facility.

Wulfson himself even agreed. Compliance is reasonably achieved with only a stop watch, tape measure and a scale. No Town official or board makes discretionary determinations.

VTR's position leads to the absurd result that the Town must sit back and helplessly watch the railway contaminate its waters—now five times the state standards, with no recourse to protect its citizens. It would lead to the unbridled storage of dangerous fuel oils or gasses in close proximity to children. Neither the ICCTA nor any form of preemption intends this helpless consequence. Further still, such a ruling would widen an already existing and unintentional regulatory gap. Grounded in fifty-year-old science, VTR's position raises its own financial welfare as a trump card to citizens' health, safety and welfare. This reasoning leads to not only bad law but also scary policy. For all of the reasons set forth above, this Court should uphold the Ordinance as a valid exercise of police powers.

WHEREFORE, Defendant, the Town of Shelburne, respectfully requests that this Court deny Plaintiff's "Motion for Preliminary Injunction to Enjoin Enforcement of New 'Hazardous Substances' Ordinance Regulating Operation of Railroad Facilities."

Dated at Burlington, Vermont this 20th day of November, 2017.

Respectfully Submitted,
TOWN OF SHELBURNE
By and through their counsel,

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC., Plaintiff,	)	
v.	)	Civil Action No. 2:16-cv-16-wks
TOWN OF SHELBURNE and JOE COLANGELO in his capacity as Town Manager and Zoning Enforcement Officer, Defendants.	)	

CERTIFICATE OF SERVICE

I, Claudine C. Safar, Esq., attorney for the Town of Shelburne, hereby certify that on November 20, 2017, *Defendant Town of Shelburne's Post-Hearing Memorandum in Opposition to Plaintiff Vermont Railway's Motion for Permanent Injunction* was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

Dated this 20th day of November, 2017.

Respectfully Submitted,
TOWN OF SHELBURNE
By and through its counsel,

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