STATE OF VERMONT
SUPERIOR COURT - ENVIRONMENTAL DIVISION

In Re: North East Materials Group, Amended Act 250 Permit — **DOCKET NO. 35-3-13 Vtec**

NEIGHBORS' RESPONSE TO NEMG'S POST-TRIAL MEMORANDUM REGARDING TRUCK NOISE REGULATION IN ACT 250 PROCEEDINGS

NEMG'S post-trial Memorandum missed the fundamental point: the federal Noise Control Act does not preempt Act 250 because Act 250 regulates land use, not truck noise. Act 250's aesthetics criterion addresses whether a proposed development fits with and causes undue impacts to its surroundings, and Congress did not preempt this inquiry from including consideration of truck noise.[1]

I. The Noise Control Act Does Not Preempt Land Use Laws That Consider Truck Noise.

A. Preemption Must Be The Clear And Manifest Purpose Of The Federal Statute.

Congressional intent is the touchstone of any preemption inquiry. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("'the purpose of Congress is the ultimate touchstone in every pre-emption case'") (citation omitted). This intent may be either express or implied. With express preemption, Congress' intent is "explicitly stated in the statute's language." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516–17 (1992). With implied preemption, Congress legislates so comprehensively that it occupies an entire field and leaves no room to the states (field preemption). *Nw. Cent. Pipeline v. State Corp. Comm'n of*

[1] The Court does not need to reach the preemption question. Correctly, NEMG does not attempt to argue that Act 250 establishes decibel limits for trucks on its face, so Act 250 is not facially preempted. Any preemption would have to be as applied, but the Court need not apply noise considerations at all here: NEMG's permit can and should be denied solely on the basis of asphalt fumes and odor (aesthetics and air pollution). However, as explained in this Response, the Court is free to consider the excessive truck noise associated with the asphalt plant in deciding whether the plant has been properly sited.

Kansas, 489 U.S. 493, 509 (1989) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Last, if it is physically impossible to comply with both a state and federal law, or if a state law stands as an obstacle to the full objectives of Congress, the state law is impliedly preempted (conflict preemption). *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

Where, as here, the federal law contains an express preemption provision, courts are reluctant to find that Congress intended to impliedly preempt state law. *Cipollone*, 505 U.S. at 517 (stating that, where Congress includes an express preemption provision, there is "'no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation'") (citation omitted); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (explaining that, while express preemption clause does not "entirely foreclose[]" possibility of conflict preemption, it "supports a reasonable inference that Congress did not intend to pre-empt other matters").

Whichever type of preemption analysis applies, the starting point is a presumption against preemption. *Altria Grp.*, 555 U.S. at 77. Courts are, and should be, reluctant to find that a federal statute preempts state law that regulates a subject traditionally reserved to the states. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). And, where the federal statute has more than one plausible reading, courts are bound to "accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005). Therefore, state laws that regulate within the states' traditional police powers are preempted only where such preemption is "the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230.

In this case, there is neither a clear nor a manifest purpose of the Noise Control Act to preempt state land use laws that consider truck noise as part of siting determinations.

B. The Noise Control Act Does Not Preempt Consideration Of Truck Noise Under Criterion 8.

The Noise Control Act (NCA) contains an express preemption provision, which provides:

> [N]otwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any motor carrier engaged in interstate commerce, no State or political subdivision thereof may adopt or enforce any standard applicable to the same operation of such motor carrier, unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

42 U.S.C. § 4917(c)(1)(2012).[2]

This is a statute of "limited reach" that plainly does not remove all state or local control over truck noise. *N.H. Motor Transp. Ass'n v. Town of Plaistow*, 67 F.3d 326, 332 (1st Cir. 1995). The relevant language of the provision—"any standard applicable to the same operation"—does not even apply to state laws that contemplate noise but do not set decibel standards. *See id.* ("it would stretch the words beyond their ordinary meaning to strike down a local curfew order based on a range of concerns where federal law regulates only the decibel levels of the equipment"); *accord*, *Am. Aggregates Corp. v. Highland Township*, 390 N.W.2d 192, 197 (Mich. Ct. App. 1986) (local zoning ordinance that did not "directly regulate" noise level from trucks was not preempted). Rather, this preemption clause means only that, once the United States Environmental Protection Agency has set maximum decibel levels for trucks, "no

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[2] Though NEMG touches on field preemption in its discussion of the Federal Aviation Act— which is entirely inapplicable here—NEMG does not appear to argue that the Noise Control Act impliedly preempts Act 250. NEMG agrees that "[i]n the Noise Control Act, it is clear that some local regulation was not only contemplated by Congress, it was specifically acknowledged as primary in some areas." Memorandum at 10. And, as mentioned above, the existence of an express preemption provision generally means that Congress did not intend to impliedly preempt state law. *See Cipollone,* 505 U.S. at 517; *see also Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 511 n.19 (5th Cir. 1999), *superseded by statute on other grounds* ("Any claim that the NCA occupies the field of noise regulation is unfounded."). Thus, there is no dispute that the express preemption provision is the only potential source of preemption here.

state or town may set different decibel levels." *Plaistow*, 67 F.3d at 332. In addition, as with the local ordinance in *Plaistow*, truck noise is but one element of the analysis in this case. *See id.* ("noise levels [are] one element of the equation that also include[s] odors, dust, smoke, [etc.]") (internal quotation marks omitted).[3]

In addition to the limited language of the NCA's express preemption provision, Congress made it doubly clear that the NCA has limited import when it comes to the federal/state relationship: "[P]rimary responsibility for control of noise rests with State and local governments." 42 U.S.C. § 4901(a)(3); *see Plaistow,* 67 F.3d at 332 ("[t]he federal noise regulations . . . do nothing more than set minimum and maximum decibel levels").

In sum, the Noise Control Act regulates only the decibel levels from the trucks and does not preempt Act 250 siting decisions. The language of the federal statute, the presumption against preemption, and the Court's obligation to accept a reading that does not favor preemption all compel the conclusion that the NCA does not preempt Act 250.

C. Neither Criterion 8 Nor Act 250 Impose Decibel Limits On Trucks.

NEMG does not point to any provision of Act 250 that imposes decibel limits on trucks, because there is none. Contrary to NEMG's assertions, Vermont case law interpreting Act 250 also does not impose decibel limits on trucks.

Act 250's aesthetics criterion has two elements: first, whether the new development will adversely affect aesthetics; second, whether that adverse impact is undue. 10 V.S.A. § 6086(a)(8) (2014); *Re Quechee Lakes Corp.*, Permit Nos. 3W0411-EB & 3W0439-EB,

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[3] In contrast, the ordinance at issue in *Keck v. Kentucky*, 998 S.W.2d 13, 14 (Ky. Ct. App. 1999), directly regulated trucks, rather than land use. Similarly, *Bigler v. Ohio Valley Coal Co.*, No. 60848, 1992 WL 189550, at *3,*12 (Ohio Ct. App. 1992) (not reported in N.E.2d), involved a nuisance claim for truck operation, rather than a siting decision under a state land use planning statute. Neither case is apposite, and neither case is controlling on this Court.

Findings of Fact, Concl. of Law & Order, at 19-20 (Vt. Envtl. Bd. Nov. 4, 1985). Though NEMG fixates on *Barre Granite*'s 55 and 70 dBA guidelines, those guidelines only help to determine the first part of the *Quechee* test: whether a project's noise has an adverse impact and requires further consideration. *In re Lathrop*, 2015 VT 49, ¶¶ 80-81 (explaining that noise can be "adverse" if it exceeds certain dBA). And, they are just guidelines—even if a project's noise exceeds 55 or 70 dBA, there is no automatic "adverse impact" finding. *See In re Chaves*, 2014 VT 5, ¶ 33, 195 Vt. 467, 481, 93 A.3d 69, 79 (holding that, where noise levels would generally be below 55 dBA, noise in excess of 55 dBA would not create adverse impact because "character of the area already included significant traffic noise" at similar, higher levels).

Further, not all adverse impacts are undue, and whether a noise impact *is* undue does not turn rigidly on Lmax levels, but on noise impacts as they relate to the context and setting of a project. *See In re Bickford*, No. 5W1186-EB, Findings of Fact, Concl. of Law, & Order, at 33–34 (Vt. Envtl. Bd. May 22, 1995) (finding that heavy trucks generating noise in excess of 85 dBA caused adverse impact on rural area, and that impact was undue because it was "out of character with the surrounding land uses and rural environment").

Thus, the *Barre Granite* guidelines are one of several factors that a Court considers when deciding whether a noise impact in a particular location is adverse or undue. These guidelines do not impose decibel limits on trucks.

D. The Railway Section Of The Noise Control Act Does Not Support Preemption.

The train noise cases cited in NEMG's Memorandum are inapposite. Two of the train cases involved nuisance claims seeking damages for excessive train noise levels. *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 502 (5th Cir. 1999), *superseded by statute on other grounds*; *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1058 (Cal. Ct. App. 2000). In

contrast, Act 250 is a land use regulation that considers truck noise levels as one element in a multi-criteria analysis that is, ultimately, about location; it does not attempt to "enforce noise limits stricter than those" in the NCA. *Rushing,* 185 F.3d at 511. The other train case cited in NEMG's Memorandum was vacated by the United States Supreme Court in favor of a more limited approach to preemption under the NCA. *See Oberly v. Baltimore & Ohio R.R. Co.*, 479 U.S. 980 (1986) (per curiam) (vacating Third Circuit decision); *Baltimore & Ohio R.R. Co. v. Oberly*, 837 F.2d 108, 112-16 (3d Cir. 1988) (on remand, holding that NCA did not preempt Delaware law regarding certain types of train noise, either facially or as applied). If this case is relevant at all, it cuts against NEMG.

II. Preemption Under The Federal Aviation Act Is Not Relevant.

NEMG's Memorandum emphasized cases that addressed preemption of Act 250 in the context of aircraft noise. Memorandum at 8-10. Those cases are irrelevant because they involved the Federal Aviation Act (FAA), not the Noise Control Act. Although the FAA does not have an express preemption provision, the Supreme Court has held that the FAA occupies the field of aircraft noise. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-40 (1973). Accordingly, the Vermont Supreme Court has held that Act 250 could not be used to impose restrictions that would mitigate the effects of aircraft noise at an airport. *In re Request for Jurisdictional Op. re: Changes in Physical Structure & Use at Burlington Int'l Airport for F-35A*, 2015 VT 41, ¶ 28. In contrast, the Noise Control Act does not occupy any field. It preempts states from setting decibel levels different from the federal levels, but does not preempt state land use statutes that consider noise in the appropriate siting of developments. *See Plaistow*, 67 F.3d at 332.

CONCLUSION

NEMG's Memorandum missed the point of Act 250 and misconstrued the Noise Control Act and the *Plaistow* case. The truck provisions of the Noise Control Act do not preempt Act 250, and specifically do not preempt consideration of truck noise under Criterion 8.

Respectfully submitted this 5th day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Neighbors for Health Communities' *Proposed Findings of Fact and Conclusions of Law*, on this 5th day of June, 2015, via electronic mail, to the following:

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