31.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

OMYA, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Docket No. 2:99-CV-180
	:	
STATE OF VERMONT, VERMONT ENVIRONMENTAL BOARD, and John T. Ewing, John Drake, Samuel Lloyd, Rebecca M. Nawrath, Alice N. Olenick, W. William Martinez, and Arthur Gibb, in their official capacities as members of the State of Vermont Environmental Board,	:	
	:	
Defendants.	:	

OPINION AND ORDER

In this action for declaratory and injunctive relief, Plaintiff OMYA, Inc. ("OMYA") challenges the decision of the Vermont Environmental Board to limit its daily truck trips on U.S. Route 7 as a violation of numerous provisions of the United States Constitution and of federal law relating to the use of the highways. Defendants ("the State") have moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). For the reasons which follow, the State's motion (paper 26) is granted.

FACTUAL BACKGROUND

The following facts are taken as true for purposes of this motion to dismiss. OMYA owns a quarry in Middlebury, Vermont

from which it extracts calcium carbonate ore. It transports the extracted ore to its plant located in Pittsford, Vermont for processing. The ore is carried in tractor trailer trucks operated by contract motor carriers from the quarry to the processing plant via U.S. Route 7, a major two-lane north-south highway in western Vermont. U.S. Route 7, designated as part of the National Highway System, runs through the towns of Middlebury, Brandon and Pittsford, Vermont. The Village of Brandon is designated as an historic district; more than two hundred buildings are listed on the National Register of Historic Places. Many of these buildings are located along U.S. Route 7.[1]

The Vermont Environmental Board is an administrative body that has the authority under Chapter 151 of Title 10 of Vermont Statutes Annotated ("Act 250") to grant, condition or deny permits for development, as defined in Act 250 and the rules of the Environmental Board. See Vt. Stat. Ann. tit. 10, §§ 6001-6092 (1997 and Supp. 2000). Under Act 250 the state is divided into nine districts. Each district has a District Environmental Commission, which accepts applications for Act 250 permits, conducts hearings, makes findings, and issues, conditions or denies the permits. See id. § 6026, 6027, 6083. Parties

[1] The facts pertaining to the Village of Brandon are drawn from the Vermont Environmental Board's Findings of Fact, Conclusions of Law, and Order ("EB Order"), annexed to OMYA's complaint as Exhibit B.

aggrieved by a District Environmental Commission decision may appeal to the Environmental Board for a de novo hearing. See id. § 6089. Appeal from a decision of the Environmental Board is to the Vermont Supreme Court. Id.

Before granting an Act 250 permit, the District Environmental Commission or the Environmental Board must find, inter alia, that the development "[w]ill not cause unreasonable congestion or unsafe conditions with respect to use of the highways," and "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." Id. § 6086(a)(5) ("Criterion 5"), (8) ("Criterion 8"). The burden of proof with respect to Criterion 5 and Criterion 8 is on any party opposing the permit application. See id. § 6088(b).

OMYA operates its quarry and its processing plant subject to Act 250 permits. In May 1997 OMYA applied to the District Environmental Commission to amend its Act 250 permit to allow for the construction of an access road to U.S. Route 7 and for an increase in truck traffic from 85 round trips per day to 170 round trips per day. In July 1998 the District Environmental Commission issued OMYA a permit, but limited its increase in truck trips to 113 round trips per day. It found that an increase in truck trips beyond the amount permitted would not cause unreasonable traffic congestion or unsafe conditions, but

would result in an undue adverse effect on aesthetics in the downtown district of the Village of Brandon.

OMYA appealed the District Environmental Commission's decision to the Environmental Board. On May 25, 1999, the Environmental Board concluded that the 170 round trips proposed would cause unreasonable traffic congestion under Criterion 5 and an undue adverse effect on aesthetics and historic sites under Criterion 8. EB Order, Compl., Ex. B at 33-44 (paper 1).[2] As a consequence, the Environmental Board imposed a permit condition limiting the number of round trips per day to a total of 115. In its Conclusions of Law, the Environmental Board rejected challenges to its authority to limit OMYA's truck trips based on the Commerce, Equal Protection and Supremacy Clauses of the United States Constitution. Id. at 25-30.

The instant lawsuit was filed in federal court on June 23, 1999. In four counts, OMYA's complaint alleged violation of federal statute and the Supremacy Clause of the United States Constitution; violation of the Commerce Clause of the United

---

[2] The Environmental Board found as follows: "[w]ith regard to the issue of congestion, however, the Board is persuaded by the Innkeepers that there will be unreasonable congestion caused at certain side streets within the Brandon Village if OMYA is permitted to increase its number of truck trips by the requested 170 trips." EB Order, id. at 33. It also concluded that "the addition of 170 OMYA truck trips through Brandon Village would have an undue adverse effect on aesthetics under Criterion 8. . . . Similarly, . . . the Board has concluded that the addition of 170 OMYA truck trips through Brandon Village will have an undue adverse effect on historic sites." Id. at 42.

States Constitution; violation of the Equal Protection Clause of the United States Constitution; and Violation of the Due Process Clause of the United States Constitution.

On June 24, 1999, OMYA appealed to the Vermont Supreme Court from the Vermont Environmental Board's Order limiting its daily truck trips. It filed a Notice of Reservation of Federal Claims pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), with the Vermont Supreme Court on June 28, 1999.

On August 11, 1999, the State filed a Motion to Dismiss for lack of subject matter jurisdiction in the federal case. It also sought abstention under either the Younger doctrine or the Pullman doctrine. See Younger v. Harris, 401 U.S. 37 (1971); R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941). In an Opinion and Order filed January 21, 2000, the Court concluded that abstention under Pullman was appropriate, and stayed the case until the state law issues could be fully litigated in the state courts. The Court retained jurisdiction over the federal claims, noting that OMYA would be able to pursue its federal claims in the federal forum at the close of the state case, pursuant to an England reservation. OMYA, Inc. v. Vermont, 80 F. Supp. 2d 211, 217 (D. Vt. 2000).

On July 25, 2000, the Vermont Supreme Court issued its decision in OMYA, Inc. v. Town of Middlebury, 758 A.2d 777 (Vt.

2000) (entry order). It ruled that the "Board [was] fully authorized to impose permit conditions upon finding that the requested number of trips through Brandon would cause 'unreasonable congestion' and adversely affect the environment." Id. 779. It held that the permit condition was a proper exercise of police power by the Board, and that there was no violation of substantive due process under the Vermont Constitution. Id. at 780. To OMYA's argument that the Board had imposed a moratorium on development involving U.S. Route 7, the Court concluded that the assertion amounted to a facial taking claim, for which there was no basis. Id. Finally, the Vermont Supreme Court held that the permit condition did not violate the Common Benefits Clause of the Vermont Constitution, Vermont's counterpart to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Id. at 780-81. See Baker v. State, 744 A.2d 864, 870 (Vt. 1999).

On September 5, 2000, the State again moved to dismiss, on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

DISCUSSION

I. Waiver

OMYA has asserted that the State's second motion to dismiss must be denied because the State failed to raise certain of its defenses in its previous motion to dismiss. Rule 12(g) of the

Federal Rules of Civil Procedure requires consolidation of Rule 12(b) defenses in one motion, with the exception of the defenses listed in Rule 12(h)(2). Rule 12(h)(2) defenses include failure to state a claim upon which relief can be granted, one of the grounds argued by the State. A Rule 12(h)(2) defense may not only be raised in a motion to dismiss but also in a Rule 7(a) pleading, by motion for judgment on the pleadings, or at a trial on the merits. F. R. Civ. P. 12(h)(2). Lack of subject matter jurisdiction may be raised at any time. F. R. Civ. P. 12(h)(3). This does not mean that Rule 12 approves successive motions to dismiss for failure to state a claim, however.

The Court did not address the merits of the State's first motion to dismiss, with the exception that it ruled that OMYA had standing to sue. Instead it stayed the case under Pullman for the resolution of state law claims. It specified that it "did not adjudicate the merits of, or otherwise preclude or impair, any claim or defense that any party may assert in this action." March 3, 2000 Order at 1 (paper 18). Under these circumstances the Court does not consider this a successive motion, and will entertain the State's Rule 12(b)(6) arguments for dismissal as well as its claim of lack of subject matter jurisdiction. See, e.g., Thorn v. N.Y. City Dept. of Soc. Servs., 523 F. Supp. 1193, 1196 (S.D.N.Y. 1981).

II. Rule 12(b) Standards

Once challenged, the burden of proving subject matter jurisdiction is on the party asserting it, in this case OMYA. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 507 (2d Cir. 1994). Jurisdictional allegations are construed liberally, and uncontroverted factual allegations are taken as true. Id.

A party moving to dismiss under F. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted has the burden of proving that no claim has been stated. The facts alleged in the complaint are taken as true. Padavan v. United States, 82 F.3d 23, 25 (2d Cir. 1996). In ruling on a 12(b)(6) motion, a "district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Newman & Schwartz v. Asplundh Tree Expert Co., 102 F.3d 660, 662 (2d Cir. 1996). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Padavan, 82 F.3d at 26 (quoting Hughes v. Rowe, 449 U.S. 5, 10 (1980)).

III. Res Judicata

The State argues that res judicata should bar further litigation on Counts I, II and III of the complaint. OMYA's England reservation was ineffective, it claims, because OMYA had

already asserted its federal constitutional claims in state agency proceedings before it filed suit in federal court. When OMYA appealed its Act 250 land use permit to the Vermont Supreme Court, it filed a Notice of Reservation of Federal Claims under the reservation rule adopted in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Under this rule, a party who clearly reserves federal questions following Pullman abstention for state court resolution of state law issues may return to federal court for decision of the federal issues, without being subject to preclusion. The United States Supreme Court objected in England to any result in which "a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." Id. at 415.

In this case, OMYA apparently anticipated the possibility that this Court might abstain under Pullman, when it filed an England reservation in the state case after the federal case was filed, but before any abstention issue was raised. Ordinarily, in this Circuit, an England reservation "applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants who voluntarily chose to file suit in state court." Hickerson v. City of New York, 146

F.3d 99, 111 (2d Cir. 1998). This is because England's concern was with "preserv[ing] access to the federal forum for those litigants who have chosen it." Id. The issue is therefore whether OMYA, by filing suit in federal court following the Vermont Environmental Board's rejection of its federal and state law claims, but before it appealed the administrative agency's decision to the Vermont Supreme Court, has "properly invoked the jurisdiction of a Federal District Court," England, 375 U.S. at 415, and has not voluntarily litigated its federal claims in state court.

OMYA has properly invoked federal jurisdiction. "A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983). OMYA had not, at the time it filed its federal claim, voluntarily litigated its federal claims in state court. Although it is undisputable that the Environmental Board has adjudicatory authority, see, e.g., In re Taft Corners Assocs., Inc., 160 Vt. 583, 590, 632 A.2d 649, 653 (1993), it is not a state court. The Environmental Board is a part of the executive, not the judicial branch of Vermont's government. See In re Crushed Rock, Inc.,

150 Vt. 613, 622, 557 A.2d 84, 90 (1988). See also Vt. Const. ch. II, §§ 4, 5; Vt. Stat. Ann. tit. 3, §§ 2802, 2878 (1995).

England has not been extended to require litigants to inform state administrative tribunals of their intent to preserve a federal forum for their federal claims. See, e.g., Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85 (1984) (plaintiff can preserve right to federal forum for federal claims by informing state *court* of intention to return to federal court on federal claims following litigation of state claims in state *court*); Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88 (1975) (remaining federal claim may be raised in federal forum after state *courts* are given opportunity to address state-law questions); Zwickler v. Koota, 389 U.S. 241, 249 (1967) (when parties are sent to state *court* for clarification of state law, federal question may be reserved for decision by district court) (emphasis supplied). Moreover, the Vermont Supreme Court acquiesced in the reservation of federal claims, and did not address them in its opinion. And apparently the State, which sought Pullman abstention in this Court, did not, in the state court proceedings, object to OMYA's England reservation. See Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1072 (3d Cir. 1990) (England reservation effective where state honored plaintiff's reservation, and defendants did not object); Restatement (Second) of Judgments § 26(1)(a) (1982) (res judicata

does not apply if defendant has acquiesced); see also id. cmt. a, illus. 1 (failure to object is effective as acquiescence); Calderon Rosado v. Gen. Elec. Circuit Breakers, Inc., 805 F.2d 1085, 1087 (1st Cir. 1986); Kendall v. Avon Prods., Inc., 711 F. Supp. 1178, 1182 (S.D.N.Y. 1989).

Accordingly, because OMYA filed its federal suit before it sought state court adjudication, informed the Vermont Supreme Court of its intent to reserve its federal claims and ceased to pursue its federal claims in the state proceeding; and because the Vermont Supreme Court (and arguably the State) acquiesced in the reservation, this Court concludes that OMYA is not precluded from presenting its federal claims in this proceeding.

IV. Preemption

A. Standing and Private Right of Action

OMYA claims that the Act 250 permit condition limiting its truck traffic is preempted by federal transportation law and the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI. Section 14501(c) of Title 49 of the United States Code limits states' ability to enact or enforce laws related to price, route, or service of motor carriers with respect to the transportation of property. 49 U.S.C. § 14501(c).

The State argues first that OMYA lacks standing to bring a claim based on federal preemption of state laws relating to motor carrier routes because OMYA is not a motor carrier. The State

has apparently assumed that only motor carriers may seek enforcement of the preemption provisions of § 14501(c), perhaps conflating the question of OMYA's standing to litigate with the question of whether OMYA has a private cause of action under the Supremacy Clause and 49 U.S.C. § 14501(c). See, e.g., Davis v. Passman, 442 U.S. 228, 239 & n. 18 (1979).

This Court has previously considered the State's arguments, and ruled that OMYA has standing to sue. See Omya, 80 F. Supp. 2d at 214-15 (D. Vt. 2000). As stated in detail in that opinion, OMYA satisfies the three elements set forth in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992): (1) an "injury in fact;" (2) a causal connection between the injury and the conduct complained of; and (3) "redressability."

The question whether OMYA has a private cause of action derived from the federal motor carrier statutes or the Supremacy Clause has not previously been addressed by this Court, however. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." Cannon v. Univ. of Chicago, 441 U.S. 677, 688 (1979). See also Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979). Rather, courts look to four factors in determining whether Congress intended to afford a private remedy: (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member;

(2) whether the legislative history indicates an intent either to create such a remedy or to deny it; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether implying a federal remedy is inappropriate because the subject is traditionally a matter of state law concern. Cannon, 441 U.S. at 689-708 & n. 9. See also Thompson v. Thompson, 484 U.S. 174, 179 (1988); Cort v. Ash, 422 U.S. 66, 78 (1975); Conboy v. AT & T Corp., ___ F.3d ___, No. 00-7284, 2001 WL 178498 at *6 (2d Cir. Feb. 26, 2001). But see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 388 (1982) (no need to trudge through all four factors when dispositive question of legislative intent has been resolved).

In a case construing a virtually identical preemption provision of the Federal Aviation Act, 49 U.S.C. § 1305(a), the Second Circuit, citing the four factors, concluded that a private right of action was not available.[3] Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91, 97 (2d Cir. 1986). Although the application of the four factors should yield the same outcome with regard to 49 U.S.C. § 14501(c), it is unnecessary to undertake the analysis because OMYA has a right of action under

[3] Section 1305(a) was slightly revised and reenacted in 1994 as 49 U.S.C. § 41713(b)(1). The current preemption language is identical to 49 U.S.C. § 14501(c)(1). The revision was intended to make no substantive changes in the law. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 220 (1995).

the Supremacy Clause.[4]

The question of whether a private right of action may be implied from a federal statute is "fundamentally different" from the question of whether a private right of action may be implied from a provision of the United States Constitution. Davis v. Passman, 442 U.S. at 241. It is presumed that "justiciable constitutional rights are to be enforced through the courts." Id. at 242. Although the Supremacy Clause of the United States Constitution is not a source of federal rights, "it does 'secure' federal rights by according them priority whenever they come in conflict with state law." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979). See also Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 (1989).

"A claim under the Supremacy Clause that a federal law preempts a state regulation is distinct from a claim for enforcement of that federal law." Western Air Lines, Inc. v. Port Auth., 817 F.2d 222, 225 (2d Cir. 1987). Under the Supremacy Clause there is an implied right of action to enjoin state officials from enforcing an unconstitutional state law.

---

[4] The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

See Burgio and Campofelice, Inc. v. N.Y. State Dept. of Labor, 107 F.3d 1000, 1006-07 (2d Cir. 1997). See also Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983); Ex parte Young, 209 U.S. 123, 160 (1908).

Count I of OMYA's complaint seeks to enjoin the enforcement of the Environmental Board's Act 250 permit limiting OMYA's truck trips on U.S. Route 7 on the ground that the permit condition is preempted by 49 U.S.C. § 14501(c). Count I articulates a valid claim for relief.

B. Preemption Under 49 U.S.C. § 14501(c)(1)

Article VI of the United States Constitution declares that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law that conflicts with federal law is "without effect." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). "Preemption 'may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Ace Auto Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 771 (2d Cir.), cert. denied, 528 U.S. 868 (1999) (quoting Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992)).

Section 601(c) of the Federal Aviation Administration Authorization Act ("FAAAA") expressly preempts state law "related

to a price, route, or service of" a motor carrier "with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Analysis of the scope of this preemptive statute begins with its text, Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996), keeping in mind that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Congress' purpose, therefore, is the 'ultimate touchstone' of preemption analysis." Ace Auto Body, 171 F.3d at 771 (quoting Medtronic, 518 U.S. at 484).

In Ace Auto Body, a case involving a challenge by New York's tow truck industry to the City's attempt to regulate towing, the Second Circuit examined the text and history of § 14501(c) in order to ascertain Congress' purpose. It noted that the purpose behind the legislation was economic: to "free the motor carrier industry from state and local regulation and to put that industry on a playing field level with that of the air carrier industry." Ace Auto Body, 171 F.3d at 772 (citing H.R. Conf. Rep. No. 103-677 at 85, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757, 1759). It noted further that § 14501(c) was "intended to function in the exact same manner with respect to its preemptive effects as 49 U.S.C. § 41713(b)(4), which contains similar 'related to' language." Id. at 773 (citing H.R. Conf. Rep. No.

103-677 at 85, *reprinted in* 1994 U.S.C.C.A.N. 1757). It found that "the broad 'related to' language generally preempts economic regulation by the states," but that "the presumption against preemption of historic state police power[] argue[d] against finding preemption where only incidental economic burdens can be discerned." Id. at 774. Because the City's towing laws in this case were safety-oriented, they were exempted from preemption under § 14501(c)(2)(A). Id.

The Ninth Circuit discussed the preemptive scope of the "related to" language of § 14501(c)(1) in Californians for Safe and Competitive Dump Truck Transportation v. Mendonca, 152 F.3d 1184 (9th Cir. 1998), a case in which motor carriers challenged California's authority to enforce its prevailing wage law. The panel looked to the United States Supreme Court's interpretation of the Airline Deregulation Act's ("ADA") preemption provision, now codified at 49 U.S.C. § 41713(b)(4), in Morales v. Trans World Airlines, Inc., 504 U.S. at 383-84. There the Supreme Court adopted the same standard for the ADA as the similarly worded preemption provision of the Employee Retirement Income Security Act of 1974 ("ERISA"): "state [laws] having a connection with or reference to . . . 'rates, routes, or services' are preempted," although it acknowledged that some state actions may affect a carrier's fares "in too tenuous, remote, or peripheral a manner to have preemptive effect." Id.

at 384, 390.

The panel also examined two more recent cases involving the scope of ERISA's preemption provision, in which the Supreme Court held that state laws "with only an indirect economic effect" on ERISA plans were not "related to" the plans for purposes of ERISA's preemption provision, and that state laws that indirectly increased the costs of providing certain benefits bore too tenuous a relation to ERISA plans to trigger preemption. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 662 (1995); Calif. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 334 (1997). Distilling these cases, the panel concluded that the state's prevailing wage laws only indirectly affected carriers' prices or services, and were not preempted by the FAAAA. It therefore affirmed the district court's dismissal of the complaint for failure to state a claim. Dump Truck, 152 F.3d at 1186, 1189.

This Court concludes, from the discussions in Ace Auto Body and Dump Truck, that § 14501 preempts state laws that either directly relate to prices, routes, or services of motor carriers, or that indirectly but "*acutely* interfere[]" with the deregulatory purposes of the FAAAA. See Dump Truck, id. (emphasis in original) (citing Travelers, 514 U.S. at 668 (state law might produce acute, albeit indirect, economic effects that

would render it preempted by ERISA)). Legitimate exercises of a state's police power that create only incidental economic burdens will not be preempted. See Ace Auto Body, 171 F.3d at 774. See also Abdu-Brisson v. Delta Air Lines, Inc., 128 F.3d 77, 81, 86 (2d Cir. 1997) (state provision too tenuous, remote or peripheral to have an effect on price, route or service not preempted by ADA).

Vermont's Act 250 does not directly relate to prices, routes, or services of motor carriers. It is a land use statute, intended "to protect Vermont's environmental resources with an eye towards . . . preserving lands, when possible, that have special values to the public." Southview Assocs., Ltd. v. Bongartz, 980 F.2d 84, 89 (2d Cir. 1992). Nor does Act 250, or the Environmental Board's application of Criterion 5 and Criterion 8 to OMYA, acutely interfere with the deregulatory purposes of the FAAAA. Like the prevailing wage laws at issue in Dump Truck, 152 F.3d at 1189, the permit conditions have at most a remote and tenuous effect on the routes or services of motor carriers.

It is OMYA's contention, however, that the Environmental Board's limit on its intended use of the highway was not a legitimate exercise of the state's police power, but was imposed for "reasons unrelated to the State's historic police power . . . and public safety and welfare," and is therefore preempted. Opp.

at 12, 13 (paper 29). This view of the state's traditional police power is incorrect. The Environmental Board based its decision to limit OMYA's truck trips on evidence of unreasonable traffic congestion, and undue adverse effect on historic sites and aesthetics. EB Order, Compl., Ex. B at 33-44. The amelioration of traffic congestion and the protection of historic sites and scenic resources are legitimate exercises of a state's police power, as the Vermont Supreme Court recognized. See OMYA, Inc. v. Town of Middlebury, 758 A.2d 777, 780 (Vt. 2000) (entry order) (Environmental Board's truck trip limit was proper exercise of police power; findings established real and substantial relationship between limit and public welfare). See also Dolan v. City of Tigard, 512 U.S. 374, 387-88 (1994) (reduction of traffic congestion a legitimate public purpose); Agins v. City of Tiburon, 447 U.S. 255, 261 (1980) (zoning regulations designed to protect against ill effects of urbanization long recognized as legitimate); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978) (states may enact land-use restrictions to preserve character and aesthetic features of a city). The Environmental Board's application of Criterion 5 and Criterion 8 to OMYA's permit application were legitimate exercises of the State's police power.

When it enacted § 14501(c), Congress intended "to leave the states' residual control over safety *and other local concerns*

intact." Ace Auto Body, 171 F.3d at 774 (emphasis supplied). Given that the restriction on OMYA's truck trips was a legitimate exercise of state police power on matters of local concern, the presumption against preemption will prevail unless the regulation creates more than incidental economic burdens. See id.

OMYA's complaint does not allege that its permit condition creates an economic burden. Assuming, however, that a permit condition limiting OMYA's ability to convey its ore to its processing plant does constitute some economic burden, that burden is incidental. In Ace Auto Body, the City required that towing companies maintain their own storage and repair facilities, an economic burden that the Second Circuit panel described as substantial. Nevertheless, the economic burdens on interstate commerce were deemed incidental. Id. at 777. In the absence of any indication that the economic burden, if any, would exceed that of the towing companies in Ace Auto Body, the "presumption against preemption" has not been overcome. Id. at 774. Count I is dismissed for failure to state a claim upon which relief can be granted.

V. Commerce Clause

The United States Constitution grants to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has long been recognized not only as authorizing Congressional action, but as

limiting the power of the States to regulate interstate commerce. See Dennis v. Higgins, 498 U.S. 439, 446-47 (1991); Hughes v. Oklahoma, 441 U.S. 322, 326 (1979). This "'negative' or 'dormant' aspect of the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'" Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't. of Natural Res., 504 U.S. 353, 359 (1992) (quoting H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949)).

The first step in determining whether a State has exceeded its power to regulate interstate commerce is to examine whether the statute at issue affirmatively discriminates against interstate transactions or whether it burdens interstate transactions only incidentally. Maine v. Taylor, 477 U.S. 131, 138 (1986). See also Automated Salvage Transport, Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 74 (2d Cir. 1998). The application of Act 250 in OMYA's case does not affirmatively discriminate against interstate commerce. Placing a limit on the volume of truck traffic has the same effect on interstate or purely local truckers. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 (1978).

Statutes which do not affirmatively discriminate against interstate commerce will be struck down "only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits.'" Maine v. Taylor, 477 U.S. at 138 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). "Provided a state does not discriminate against non-residents, . . . it may impose incidental burdens on interstate commerce when exercising its police power to promote safety or general welfare." N.Y. State Trawlers Ass'n v. Jorling, 16 F.3d 1303, 1307 (2d Cir. 1994). As the Second Circuit recently repeated: "the incidental burdens to which Pike refers are the burdens on interstate commerce that exceed the burdens on intrastate commerce." Automated Salvage, 155 F.3d at 75 (internal quotation marks omitted). "[T]he minimum showing required to succeed in a Commerce Clause challenge to a state regulation is that it have a disparate impact on interstate commerce. The fact that it may otherwise affect commerce is not sufficient." Id. Although OMYA may claim that it engages in interstate commerce and that it is burdened, "the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." Exxon Corp., 437 U.S. at 127-28.

OMYA's Commerce Clause count fails to state a claim upon which relief can be granted. It does not claim that Act 250, or the imposition of permit conditions under Criterion 5 and

Criterion 8, facially discriminates against interstate commerce. It does not complain of differential treatment of interstate and intrastate haulers, or shippers, for that matter. It does not allege that any incidental effect on interstate commerce exceeds the burden on intrastate commerce. From a review of the allegations of the complaint, the most generous reading is that the permit condition "affects interstate shipments, but it does not discriminate against interstate commerce in either terms or effect. No disparate treatment, no disparate impact, no problem under the dormant commerce clause." Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1132 (7th Cir. 1995). Accordingly, Count II is dismissed.

VI. Equal Protection

The Fourteenth Amendment to the United States Constitution forbids a State to deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The gist of OMYA's equal protection claim is that the State has singled out OMYA for imposition of restrictions on its use of U.S. Route 7. Taking this allegation as true for purposes of this motion to dismiss, it fails to state a claim.

OMYA's equal protection claim does not challenge Act 250 itself, but contends that the statute was selectively applied in OMYA's case "for no constitutionally valid reason." Opp. at 19. See also Compl. at ¶ 62. "A claim of selective application of a

facially lawful state regulation requires a showing that: (1) the [plaintiff], compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person." FSK Drug Corp. v. Perales, 960 F.2d 6, 10 (2d Cir. 1992). See also Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995); Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1352 (2d Cir. 1994); LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980). To state a valid claim of selective application, OMYA must allege facts that, if taken as true, would satisfy both prongs of the FSK Drug test. See Zahra, 48 F.3d at 684.

OMYA's complaint fails to allege any facts that would support the second prong of the FSK Drug test. There is no allegation that OMYA's allegedly selective treatment was based on its membership in a constitutionally protected class, or resulted from its exercise of or attempt to exercise a constitutional right. There is no allegation of malicious or bad faith intent to injure OMYA. See LeClair, 627 F.2d at 610-11 (allegation of different treatment does not in itself indicate malice); ReSource N.E. of Long Island, Inc. v. Town of Babylon, 80 F. Supp. 2d 52, 59 (E.D.N.Y. 2000) (dismissing for failure to state a claim

complaint which failed to contain facts suggesting that differing treatment resulted from malicious intent).

In a case "where no invidious discrimination or interference with the exercise of other express constitutional rights has occurred, the malice/bad faith standard should be scrupulously met." LeClair, 627 F.2d at 611. Because OMYA has failed to allege any facts from which an unconstitutional or malicious motive for its allegedly differential treatment could be inferred, its equal protection claim, Count III, must be dismissed.[5]

VII. Due Process

The Fourteenth Amendment to the United States Constitution prohibits a State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. In Count IV, OMYA claims that its permit condition "infringes upon [its] right to use public facilities, engage in

---

[5] Although the Vermont Supreme Court rejected OMYA's equal protection claim under the Vermont Constitution's Common Benefits Clause, issue preclusion or collateral estoppel does not bar its equal protection claim in this litigation. The issue before the Vermont Supreme Court was apparently whether OMYA had adequately alleged a discriminatory classification. See OMYA, Inc., 758 A.2d at 780. The issue before this Court is whether OMYA was singled out for selective treatment. Furthermore, the analysis of an equal protection claim under the Vermont Constitution is fundamentally different than an equal protection analysis under the United States Constitution. See Baker, 744 A.2d at 877-78 (rejecting rigid analysis of "suspect classes" evolved in federal equal protection cases and adopting a uniform standard consistent with Article 7's guiding principle of affording protection and benefit of law to all members of Vermont community).

commerce, and pursue its business and occupation," and "constitutes a constitutionally-impermissible interference with and moratorium on the use of U.S. Route 7." Comp. at ¶ 69-70. OMYA appears to have made a substantive due process claim that the Environmental Board's permit decision was arbitrary and capricious, and did not advance a legitimate State interest. Opp. at 23. "[A] government land use decision may give rise to a substantive due process violation if the decisionmaking process is arbitrary and capricious." Southview, 980 F.2d at 96.

OMYA argued before the Vermont Supreme Court that its Act 250 permit violated its "right to substantive due process under the Vermont Constitution" and was "not a proper exercise of police power by the Board." OMYA, Inc., 758 A.2d at 779, 780. The Vermont Supreme Court's due process jurisprudence "has relied heavily on that of the United States Supreme Court." Parker v. Gorczyk, 744 A.2d 410, 415 (Vt. 1999). A substantive due process claim under the Vermont Constitution that does not concern a fundamental constitutional right or suspect class must prove that "there is no conceivable rational relation between the challenged regulation and a legitimate end of government." Id. at 419. The test is essentially the same for a substantive due process claim under the United States Constitution. See Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978) (due process claim rejected where enactment bore reasonable relation to state's

legitimate purpose); Rojas-Reyes v. I.N.S., 235 F.3d 115, 123 (2d Cir. 2000) (statute and rule rationally related to achievement of legitimate government purpose defeated substantive due process challenge); Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999) (substantive due process standards violated only by outrageously arbitrary conduct constituting gross abuse of authority).

In response to OMYA's argument, the Vermont Supreme Court wrote:

> OMYA claims that because Condition 4 does not bear a real and substantial relationship to the public health, safety, morals, or some other phase of public welfare, there is no rational relationship between the public policy objectives cited by the Board and the imposition of Condition 4. The Board found that OMYA's trucks currently account for 24% of truck traffic through downtown Brandon and that under the proposed increases, OMYA trucks would account for 40% of truck traffic through Brandon. The Board also found that present levels of truck traffic disturb guests at local inns; make sidewalk conversation difficult and unpleasant; create dust and dirt that mar historic buildings; create fumes and vibration; and impede business and personal use of property in Brandon. These findings establish a real and substantial relationship between Condition 4 and public welfare.

OMYA, Inc., 758 A.2d at 780. Thus, the Vermont Supreme Court has resolved the central issue of OMYA's substantive due process claim: whether there is a rational relationship between the condition imposed by the Vermont Environmental Board and a legitimate governmental purpose.

The Vermont Supreme Court also addressed OMYA's moratorium

claim:

> OMYA also argues that Condition 4 is an improper and invalid attempt by the Board to impose a moratorium on land use and development that depend upon Route 7 for the transportation of goods. . . . To prevail on such a challenge, plaintiff[] must show either that the regulation in question does not substantially advance a legitimate state interest or that it denies the owner an economically viable use of his land. As previously discussed, OMYA cannot prevail under the first standard. To prevail under the second alternative, plaintiff[] must show a denial of all economically beneficial use of [its] land. Plaintiff[] ha[s] made no such showing. Therefore, regardless of the claim that the condition imposes a moratorium, there is no basis to conclude that it is a taking.

Id. (citations omitted). OMYA's substantive due process and takings claims are barred by the doctrine of collateral estoppel, or issue preclusion.[6]

A federal court "'must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.'" Temple of the Lost Sheep Inc. v. Abrams, 930 F.2d 178, 183 (2d Cir. 1991) (quoting Migra, 465 U.S. at 81). Collateral estoppel "bars the relitigation of an issue . . . that was

---

[6] OMYA's England reservation does not shield it from issue preclusion. See Dodd v. Hood River County, 136 F.3d 1219, 1227 (9th Cir. 1998) (England reservation did not enable plaintiffs to avoid preclusion of federal takings issue actually litigated in state forum as takings claim under state constitution); Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1073 (3d Cir. 1990) (even litigant who makes valid reservation may not relitigate an issue fully and unreservedly litigated in state court).

actually litigated by the parties and decided in a prior case." In re Tariff Filing of Cent. Vt. Serv. Corp., No. 98-214, 2001 WL 118870, at *__, ___ A.2d ___ (Vt. Feb. 9, 2001). Under Vermont law, "[t]he elements of collateral estoppel are: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in the prior action; and (5) applying preclusion is fair. Id. "The party opposing application of collateral estoppel has the burden of showing that circumstances make it appropriate for an issue to be relitigated." Id.

The elements of collateral estoppel are satisfied here. OMYA was a party in the Vermont Supreme Court proceeding. As described above, the same issues were raised before the Vermont Supreme Court, and resolved by an affirmance on the merits of the Vermont Environmental Board's decision. OMYA has not shown that it lacked a full and fair opportunity to litigate the issues, nor that it would be unfair to apply preclusion here "to prevent repetitious litigation of the same issues." Id.

Because the facts underlying OMYA's due process claims were determined by the Vermont Supreme Court to fail to support OMYA's claim of arbitrary and capricious government

conduct, OMYA is collaterally estopped from relitigating them here. Count IV is, accordingly, dismissed.

CONCLUSION

For the reasons stated above, OMYA's complaint is **Dismissed.**

Dated at Burlington, Vermont this 15 day of March, 2001.

William K. Sessions III
United States District Court Judge