From:	Ed Burt
To:	Smith, Christopher
Cc:	Bruce Thompson; garry waldeck; Diana Schindler; Tim Watson; Hopedale Water; Nierenberg, Kara
Subject:	Re: Discuss NMI Waste Shipment Through G&U Railroad
Date:	Tuesday, August 23, 2022 8:09:04 PM

Hi Chris,

Below are notes from yesterday's conversation. Please edit, correct, add to, .. if anything is misstated or missed. And a few questions, comments regarding the Transportation plan.

Thank you all for your time and attention. We very much appreciate your understanding and help in addressing our questions/concerns.

Thanks again,

Ed

Transportation Plan comments/questions:

Please add Hopedale to the Community Disturbance and Spill Contingency sections, and highlight that GURR's Hopedale Railyard is within a Zone II Water Protected area.

As such, for the Hopedale Contingency area, can the emergency notification be an hour (instead of 24 hours) to ensure that the water supply aspects are addressed as quickly as possible?

(Or have the actual trucking route go north/west, excluding Hopedale altogether. If the train route is from Hopedale back north through Grafton and then along the CSX lines, why not truck the material directly to one of those railyards rather than to Hopedale? That would seem to be a far more direct trucking route from Concord. Sorry – had to ask..)

Regarding section 3.4.1 –

3.4.1 Grafton and Upton Railroad (G&U RR)

The Grafton and Upton Railroad will be providing the first leg of rail transportation from the G&U RR in Hopedale, MA to North Grafton, MA where the G&U will interchange with the CSX Railroad (CSXT) for further transport.

The primary contact for operations at the G&U Distribution Center located in Hopedale, MA, will be Jean Michael Mongui. Mr. Mongui's primary office number is 508-473-9600. His backup number (mobile) is 617-741-7774, with an email address of jmongui@graftonuptonrr.com.

Two notes/questions –

The 'interchange' with CSX Railroad does not involve reloading the material, that's just the train cars switching to another line for transport, right?

The G&U contact, Jean Michael is one of the principles for 2MResources, a recycling company that leases the warehouse at the Hopedale railyard from GURR. At least he was, didn't realize he is a GURR employee or that the recycling operation maybe involved. Not sure that has any relevance,

but thought I'd mention it.

8/22/2022

Meeting Notes:

Attendees: See email list

Timeframe: Although GURR has never mentioned this to the Town, this transport has been planned out for years. Not expecting to start any of the Hopedale transport until next summer. (Which is good because the rt 16 area of the Hopedale railyard is currently under construction.)

Expect six 20-Ton Trucks to cycle between Concord and Hopedale for a total of 12 to 18 routes per day, over a 4 year period. Increase in street trucking should be negligible. Increase to the railyard trucking is unknown.

Materials: 87,000 cubic yards of contaminated soils; not to the level to be classified as 'hazardous materials', sealed in bags, placed in the trucks; Rail car holds 9 bags; Is headed to a landfill in Michigan.

Transport contract is thru US Ecology. GURR is a subcontractor.

Transportation bid did not include any site specific conditions.

Hopedale concerns/comments:

GURR has not communicated any of this to the Town. Currently the Town has no insight to the railyards operations, site conditions, storm water management, etc. Especially concerning is the FlyAsh transloading services that operates with no oversight or emergency procedures and how this transport service may increase the risk to the fly-ash silos.

Per GURR's past practice, we can expect that they will not allow any oversight, or establish systematic emergency procedures unless directed to by a federal level agency.

GURR's Hopedale railyard is within a Zone II Water Restricted area, with the Mill River running along the side of the railyard.

Most of the concerns related to this transport focus on the "what if's, the accidents" and the associated contingencies. Again, any systematic preventive measures will have to be requested/required by the EPA.

Post meeting note – there is an existing sewer line easement between the elderly housing and rail tracks in the railyard. Need to ensure that any site work does not impact that easement.

On Mon, Aug 22, 2022 at 8:12 PM Smith, Christopher <Smith.Christopher@epa.gov> wrote:

> Ed and all,
>
> Thanks for taking the time to meet with us. We will be in touch moving forward.

Attached is the Transportation and Disposal Plan for the NMI Site. These plans are subject to be updated if circumstances change, but as of now, this is the plan for off-site waste shipments.

Please feel free to reach out anytime with questions.

Thanks,
Chris

Christopher Smith

EPA New England, Region I

Superfund and Emergency Management Division

5 Post Office Square

Boston, MA 02109-3912

smith.christopher@epa.gov

617-918-1339

From: Ed Burt <eburt.hd@gmail.com>
Sent: Monday, August 22, 2022 2:23 PM
To: Smith, Christopher <Smith.Christopher@epa.gov>
Cc: Bruce Thompson <brucet@demaximis.com>; garry waldeck <Garry.Waldeck@state.ma.us>; Diana Schindler <DSchindler@hopedale-ma.gov>; twatson@hopedale-ma.gov; Hopedale Water <hopedalewater@hopedale-ma.gov>
Subject: Re: Discuss NMI Waste Shipment Through G&U Railroad

Hi Chris, Bruce, Garry,

On behalf of the Hopedale community thank you very much for today's meeting and your attention to our concerns. Very much appreciated, and reassuring.

All of our emails are included in this message, with full contact info below.

If there is anything that we can help with, please do not hesitate to contact us.

Thanks again,

Ed

Diana M. Schindler
Town Administrator

Town of Hopedale

78 Hopedale St.

Hopedale, MA 01747

Off: (508) 634-2203 x213
Cell: (413) 387-9069

Tim Watson

Hopedale W&S Manager

508 294 2522 (c)

David Butler

Hopedale Water Dept Supervisor

Water Plant: (508) 478-2080

Ed Burt

Hopedale Water & Sewer Commissioner

508 259 1181 (c)

Christopher Smith

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smith.christopher@epa.gov

617-918-1339

On Wed, Aug 17, 2022 at 2:13 PM Smith, Christopher <Smith.Christopher@epa.gov> wrote:

> Hi Ed,
>
> My name is Chris Smith, I manage the Nuclear Metals (NMI) Superfund Site for EPA. We have spoken a couple of times on the phone regarding shipment of waste from NMI through Grafton and Upland Railroad in Hopedale.
>
> I know the Town has a number of ongoing issues with the railroad, and you had requested more information regarding how the waste will be managed after it is shipped from the NMI Site. I thought it would be beneficial for us to have a call to discuss with the Project Manger for the parties conducting the cleanup at the NMI Site (Bruce Thompson) and the Project Manager for MassDEP (Garry Waldeck).
>
> The three of us are currently available the following times over the next week:
>
> - 8/18: 1PM-2PM
> - 8/19: 9am-11am
> - 8/22 12pm-2PM
> - 8/23 12PM-330PM
> - 8/24 9AM-12PM or 2PM-330PM
>
> Please let me know if any of these times works for you and we can set up a call.
>
> Thanks

Chris

Christopher Smith

EPA New England, Region I

Superfund and Emergency Management Division

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smith.christopher@epa.gov

617-918-1339

TRANSPORTATION & OFF-SITE DISPOSAL PLAN

NUCLEAR METALS, INC. SUPERFUND SITE
REMEDIAL DESIGN/REMEDIAL ACTION
CONCORD, MASSACHUSETTS

Prepared by:

US ecology

Prepared for:

General Contractor:

de maximis, inc.

200 Day Hill Road, Suite 200
Windsor, CT 06095

OCTOBER 21, 2021

Table of Contents

Section 1: Introduction

On October 17, 2019, the United States Environmental Protection Agency (USEPA) lodged a Consent Decree (CD) with the United States District Court for the District of Massachusetts in connection with Civil Action No. 1-19-cv-12097-RGS. The CD was entered by the Court on December 6, 2019. The CD and its accompanying Statement of Work (SOW) describe the Remedial Design/Remedial Action (RD/RA) activities to be performed for the Nuclear Metals, Inc. (NMI) Superfund Site in Concord, Massachusetts (the NMI Site or Site). The RD/RA activities are to be undertaken by the Settling Defendants (SDs) to the CD, with funding contributions from the Settling Federal Agencies (SFAs).

The SDs have retained de maximis, inc. (*de maximis*) to serve as the Project Coordinator and Supervising Contractor (as defined in the CD), and General Contractor (GC) for the performance of all Work required by the CD. *de maximis* will execute sub-contracts with consultants, contractors, laboratories and waste transporters and disposal facilities, as necessary, to implement the Work. As the GC, *de maximis* personnel will act as the Site Project Manager and Construction Manager(s).

de maximis has retained US Ecology for the transportation and off-site disposal of approximately 130,000 tons of soil, sediment and debris from the Site.

1.1 Purpose and Scope

As the selected Transportation and Disposal contractor, US Ecology has prepared this *Transportation and Off-Site Disposal Plan* (T&D Plan) pursuant to and in accordance with the requirements set forth in the SOW Section 6.7(g) to ensure compliance with SOW Section 4.4 which outlines requirements for Off-Site Shipments. The requirements of Section 6.7(g) are designed to provide a minimal standard of content in this T&D Plan which includes:

- Proposed routes for off-site shipment of waste material
- Identification of communities affected by shipment of clean fill transported on-site and waste material transported off-site; and
- Description of plans to minimize impacts on affected communities.

This T&D Plan has been developed to satisfy these requirements and to provide supplemental information detailing the project team and their responsibilities and includes a Spill Contingency Plan provided in Appendix C. The T&D Plan has been developed to detail proposed transportation and disposal means and methods, including routes and personnel required to transport trucks and filled gondola railcars (waste containers) from the Nuclear Metals, Inc. (NMI) Site in Concord, MA to the designated US Ecology disposal facility, (US Ecology Michigan Disposal (USEM) in Belleville, MI) and the return of emptied gondola railcars to the Grafton and Upton (G&U) Railroad site in Hopedale, MA for loading.

Section 2: Responsibilities

The following sections outline the roles and responsibilities of the US Ecology staff regarding shipping and disposal of materials originating from the Site. Additional information regarding responsibilities and authority of organizations and key personnel for the project can be found in section 3.3 of the Remedial Design Work Plan (RDWP) (*de maximis, inc.,* September 2020). A copy of the NMI Project Team Organizational Chart is included as Appendix A and a US Ecology Organizational Chart is included as Appendix B.

2.1 US Ecology Onsite Waste Coordinator

The US Ecology Onsite Waste Coordinator is responsible for the following:

- Serving as a central US Ecology point-of-contact (POC) with de maximis, inc. (*de maximis)* staff and contractors at the project Site.
- Reviewing of all shipment data intended for use on shipment documentation.
- Reviewing all bills of ladings or shipping manifests and required associated shipping documents that accompany outgoing shipments of waste from the NMI Site to USEM.
- Providing the US Ecology Rail Program Manager all necessary documents required for the waybilling of loaded railcars.
- Communication with US Ecology Technical Staff on all waste acceptance and Department of Transportation issues.
- Serving as the POC with Director of Transportation, Rail Program Manager and shipping container vendors on all NMI Site transportation issues.
- Coordinating with the Rail Program Manager in Michigan for all railcars to be returned for re-loading of waste from the NMI Site.
- Confirming all required markings, if required are labeled and placarded in compliance with all federal, state, and local rules and regulations; and ensuring that all original shipping documents are forwarded to the appropriate parties.

2.2 US Ecology Director of Transportation

US Ecology's Director of Transportation is responsible for the following:

- Approving and ensuring all transporters and transportation-related subcontractors comply with SOW Section 4.4 and the facilities and subcontractors comply with Section 121(d)(3) of CERCLA, 42 U.S.C § 9621(d)(3), and 40 CFR § 300.440.
- Preparing all transportation related plans.

2.3 US Ecology Rail Program Manager

US Ecology's Rail Program Manager is responsible for the following:

- Supplying all rail transportation required for the project.
- Waybill and tracking of all loaded rail movements.
- Reviewing and approving all rail related transportation charges and invoices.

2.4 US Ecology Rail Logistics Coordinator

US Ecology's Rail Logistics Coordinator is responsible for the following:

- Supporting the Rail Program Manager with waybilling and tracking of rail movements.
- Coordinating with the Onsite Waste Coordinator, Rail Program Manager and US Ecology MA Field Services Group, as necessary to support project activities and scheduling.

2.5 US Ecology Michigan's Logistics Manager

US Ecology Michigan's Logistics Manager is responsible for the following:

- Arranging back-end dray (a truck designed to specifically transport heavy loads) transportation for all waste containers received at US Ecology's Rail Transfer Facility (RTF) located in Romulus, MI.
- Empty return of waste containers (railcars) back to G&U Railroad Site.
- Reviewing and approving all back-end dray related transportation charges and invoices.

2.6 US Ecology's Landfill Site Manager

US Ecology's Landfill Site Manager is responsible for the following:

- Arranging for off-load and disposal of material from waste containers received at USEM in Belleville, MI.
- Releasing of empty waste containers from the subtitle C landfill site.

2.7 US Ecology's Field Service Group

US Ecology's Field Service Group will be responsible for coordinating and loading all waste containers for shipment off-site.

In addition, Decontamination Decommissioning & Environmental Services, LLC (DDES) will provide radiation protection plan support, including surveying and documenting radiological conditions on all waste material containers entering and leaving the Site.

Section 3: Transportation Program

The current outlook of site progress indicates that select shipments from the NMI Site are anticipated to begin as early as the 2021 calendar year and will likely continue through the 2026, or later, construction season. Throughout the shipping duration, it is anticipated that nearly all remedial waste shipments will be completed via a combination of truck and rail transportation. Shipments are anticipated to include predominantly impacted soils with the inclusion of miscellaneous debris both identified and produced throughout the Remedial Design/Remedial Action. The following sections outline the anticipated waste containers, their methods of transfer, as well as the vendors of this equipment.

3.1 Waste Containers or Conveyances

The anticipated waste at the NMI Site will be predominantly soils, sediments, concrete debris, and other debris generated throughout remedial actions. Wastes will be loaded into trucks (likely tri-axle dump trucks), lined with a specialty liner/bag designed to fit the truck body and to provide adequate strength to contain materials during transfer between truck and rail. These bags shall be prior approved for acceptance criteria by USEM. Upon sealing the specialty bag, each conveyance is then referred to as a "package". While on site, each package will be loaded to as close to the maximum capacity (22-24 tons/package) as feasible to max-out the volume each gondola railcar can carry. Each truck will have the maximum gross vehicle weight (GVW) of 80,000lbs.

Upon arrival at the G&U Railyard, these packages will be transferred directly into gondola railcars for shipment via rail to the USEM rail facility in Romulus, MI. The gondola railcars will have a volume capacity of 101 cubic yards (~2700 cubic feet) with a maximum gross weight capacity of 286,000 pounds. Railcar gondolas will be lined with bulk railcar liners prior to being loaded with packages. The railcar liners will be properly closed and secured prior to shipment.

3.2 Transportation Methods

Shipments of waste from the NMI site to USEM will be accomplished using both truck and rail transportation. All truck shipments originating from NMI will be shipped over-road directly to the G&U Rail yard in Hopedale, MA, approximately 50 miles from the Site. The packages will be transferred to gondolas, prior to being shipped via rail cars by US Ecology, to the US Ecology's RTF in Romulus, MI; and then transported by truck to the landfill for disposal. All shipments originating from NMI will be off-loaded in Romulus, MI, under cover, using excavators and the waste materials will be placed into trucks provided by S&C transport for delivery to the landfill in Belleville, MI. All transportation routes are discussed in Section 4.

3.3 Railcar Shipment Dispatch – Empty / Loaded Cars

US Ecology's on-site Waste Coordinator will coordinate with *de maximis* and the US Ecology Rail Program Manager to schedule empty railcars for delivery to the G&U Railyard based on orders for rail cars from *de maximis*, via e-mail 30 days in advance. Loaded railcars will be directed to be pulled for transportation to USEM by the US Ecology transportation manager.

Rail service availability is expected to be Monday through Friday. Saturday shipment may be scheduled if mutually agreed upon.

3.4 Transporters

The following is a list of transporters that are proposed to be used by US Ecology on the NMI Project. All transporters, if not already part of US Ecology, will be subcontracted to US Ecology over the course of the Project.

3.4.1 Grafton and Upton Railroad (G&U RR)

The Grafton and Upton Railroad will be providing the first leg of rail transportation from the G&U RR in Hopedale, MA to North Grafton, MA where the G&U will interchange with the CSX Railroad (CSXT) for further transport.

The primary contact for operations at the G&U Distribution Center located in Hopedale, MA, will be Jean Michael Mongui. Mr. Mongui's primary office number is 508-473-9600. His backup number (mobile) is 617-741-7774, with an email address of jmongui@graftonuptonrr.com.

3.4.2 CSX Transportation (CSXT)

CSXT will be providing RR service for the project from the G&U interchange point. Loaded railcars will be interchanged in North Grafton, MA and be delivered directly to the US Ecology Romulus RTF in Romulus, MI. Empty railcars returning to the G&U Distribution Facility will be delivered to the G&U RR in North Grafton, MA.

3.4.3 S&C Transport

S&C Transport or US Ecology will provide back-end dray trucking services from the US Ecology Romulus RTF to the USEM Landfill in Belleville, MI.

Mr. Jim Vigrass – the US Ecology Romulus RTF Manager will make trucking arrangements for the back-end transportation of materials off loaded from the received railcars. Mr. Vigrass's primary office number is 734-727-5526 and his alternate contact number (mobile) is 734-576-0161, with an email address of jim.vigrass@usecology.com.

Mr. Mike McInnis is the primary contact for S&C transport. Mr. McInnis can be reached at 734-576-0384, with an email address of mike.mcinnis@sctransport.org.

3.4.4 US Ecology

The US Ecology Field Services group located in Wrentham, MA will provide over-road

transportation from the NMI Site to the G&U RR facility in Hopedale, MA.

The primary contact based out of Wrentham, MA, is Mr. Richard Blake. Mr. Blake can be reached on his mobile phone at 339-327-7309, with an email address of rich.blake@usecology.com.

The alternate contact based out of Wrentham, MA, is Ms. Kristine Sahagian. Ms. Sahagian can be reached on her mobile phone at 508-803-1218, with an email address of kristine.sahagian@usecology.com.

Section 4: Transportation Routes

The following RR and trucking routes will be utilized for shipments from the NMI site to the designated disposal facility. Railcar Tracking Reports will be provided for all railcar shipments daily to parties specified by *de maximis.*

4.1 Shipments from G&U RR to USEM

4.1.1 G&U RR to CSXT Direct Rail Routing to Romulus, MI

1. G&U RR to CSXT interchange in North Grafton, MA
2. North Grafton, MA to Selkirk, NY
3. Selkirk, NY to Willard, OH
4. Willard, OH to Romulus, MI via Detroit, MI

4.1.2 Back End Dray Trucking – Romulus, MI to Belleville, MI (Primary Route)

1. Van Born Road to Merriman Road
2. Merriman Road to I-94
3. I-94 Exit 187 to Rawsonville Road
4. Rawsonville Road to North I-94 Service Drive

4.1.3 Back End Dray Trucking – Romulus, MI to Belleville, MI (Alternate Route)

1. Van Born Road to Wayne Road
2. Wayne Road to I-94
3. I-94 Exit 187 to Rawsonville Road
4. Rawsonville Road to North I-94 Service Drive

4.2 Shipments from NMI to G&R RR in Hopedale, MA

4.2.1 Front End Trucking – Concord, MA to Hopedale, MA (Primary Route)

1. Turn Left from NMI onto Rte. 62 West
2. Rte. 62 West to Rte. 117 West
3. Rte. 117 West to Rte. 495 South
4. Rte. 495 South to exit 20 Rte. 85 South
5. Rte. 85 South to Rte. 16 West
6. Arrive at Railyard on Rte. 16 West in Hopedale, MA

4.2.2 Front End Trucking – Concord, MA to Hopedale, MA (Alternate Route)

1. Turn Right from NMI onto Rte. 62 East
2. Rte. 62 East to Rte. 2 West
3. Rte. 2 West to Rte. 495 South
4. Rte. 495 South to exit 20 Rte. 85 South
5. Rte. 85 South to Rte. 16 West
6. Arrive at Railyard on Rte. 16 West in Hopedale, MA

Note: alternative routes may be developed during the project if conditions warrant them such as avoiding road construction projects and congestions from new traffic patterns. In the event that a new traffic route is developed the project contact list (Appendix D) will be notified.

Section 5: Schedule and Operations

5.1 Shipping Schedule

The NMI Project shipments will be made Monday through Friday during normal business hours (7:00 AM and 5:00 PM). G&U RR's available service times will vary during the week to not interfere with truck-to-rail transfer operations. US Ecology shall work with the project Site and the G&U RR to schedule railcar moves on a monthly, weekly and daily basis.

Preliminary project schedule calls for a consistent average of 1,000 tons per week for 2.4 years. To accommodate the proposed schedule, it is anticipated that a railcar fleet of 50 to 60 railcars will be required to support the project needs.

The following railcar cycle times are expected:

<u>USE Michigan Shipments</u>
Transit time to Michigan - 9 to 11 days
Railcar off Load - 3 to 5 days
Transit time back to Site - 9 to 11 days

5.2 Community Disturbance

5.2.1 Communities Affected by Shipment of Waste Material

US Ecology will notify the police and fire departments in these communities two weeks prior to any waste shipment.

1. Concord, MA
2. Maynard, MA
3. North Grafton, MA
4. Upton, MA
5. Romulus, MI

5.2.3 Plans to Minimize Impacts on Affected Communities

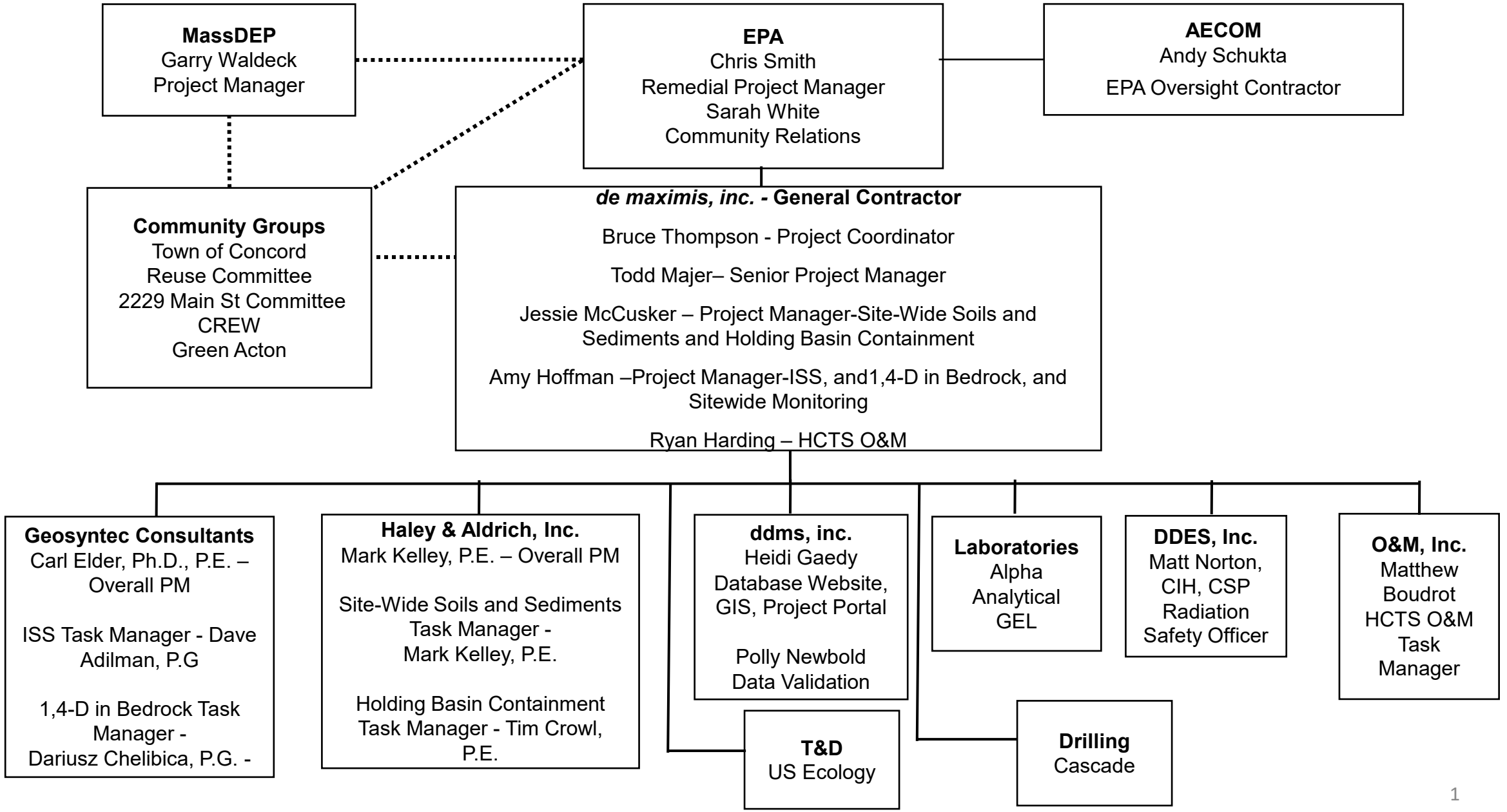
1. The established truck routes will be on state/interstate roads to avoid traffic in neighborhoods.

2. It is anticipated that a maximum of 10 to15 trucks will used per day, during normal business hours (Monday – Friday, 7:00 AM and 5:00 PM).

3. Noise abatement procedures will always be followed by transporters servicing the Site. All drivers will be informed to keep noise to a minimum while dropping or picking up waste containers. The use of air horns and compression braking (i.e., 'jake brakes') are prohibited on and around the Site at all times.

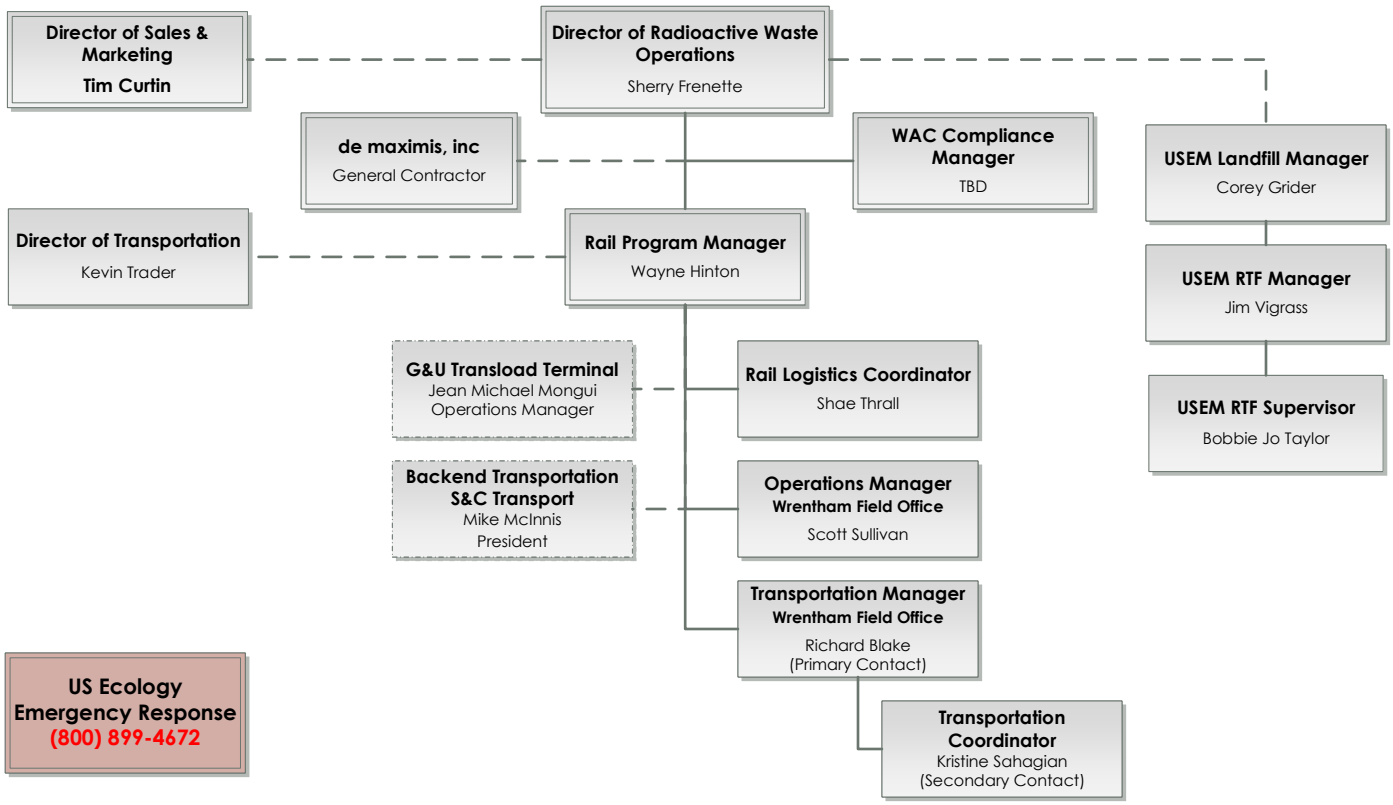
Appendix A

NMI Project Team Organization Chart



Appendix B

US Ecology Project Team Organization Chart
Transportation and Disposal



APPENDIX C
SPILL CONTINGENCY PLAN

SCOPE

The purpose of this Spill Contingency Plan is to describe possible off-normal conditions that may occur during transportation of waste via truck (back-end dray) and rail from the NMI Site in Concord, MA, to the US Ecology Michigan (USEM) disposal facility located in Belleville, MI. This Plan also discusses expected causal factors and appropriate response actions that will be undertaken by RR transportation contractor and/or US Ecology (or its agents/designees). This plan may be amended as necessary to satisfy changes to project scope, and regulatory or disposal site requirements.

This plan addresses the following Contingency Areas:

1. Railcar or train derailment occurs enroute to designated disposal facility.
2. Spill of truck contents during back-end dray to USEM.

CONTINGENCY AREAS

The following areas have been identified as requiring contingency plan analysis and corrective actions in the event they occur during waste shipments originating from the Site:

Contingency Area 1 - Railcar or train derailment occurs enroute to disposal facility.

Likely Cause(s)**:** Catastrophic rail component failure(s), Acts of God.

Immediate Response and Corrective Action(s)**:**

1. In the event of a spill enroute to US Ecology, US Ecology's emergency response center will be contacted (800-899-4672) by the servicing railroad's first responder within 24 hours. US Ecology will then notify *de maximis. de maximis* will be responsible for notifying the USEPA project manager. Please note that in some cases the railroad's first responder may also contact the generator of the waste listed on the shipping documents.

2. The railroad's HAZMAT first responder will isolate the affected railcar(s) to a secluded track, if available, or isolate the initial spill area if the railcar cannot be moved.

3. US Ecology is responsible for logging information from the first responder and will dispatch an emergency response contractor to the scene to take over from the CSXT railroad. US Ecology will remain in contact with *de maximis* during the duration of the spill and resulting clean up action. US Ecology, or our designee, will report the spill to the various entities. Reporting will be determined after the team assesses the actual volume spilled.

4. Remediation of the spill will be performed by US Ecology's emergency response contractor and all other necessary subcontractors (e.g., radiological services). All affected areas will typically be over-excavated with the contents placed in a secondary container (e.g., roll-offs, supersack bags, etc.) and loaded onto a truck or replacement railcar for final disposal. This material will be on an additional manifest referencing the original manifest.

5. US Ecology will provide a written report documenting results of the initial site assessment and any required clean-up efforts, including written notes and a photo diary compiled by their emergency response contractor. A copy of this response report will be provided to *de maximis.*

Discussion: US Ecology will coordinate response to any reported spill from the Site. Representatives from US Ecology and/or our agents may be present at the spill location to ensure all impacted areas are appropriately cleaned up.

Contingency Area 2- Spill of truck contents during front or back-end dray transport to USEM.

Likely Cause(s)**:** Truck accident and loss of gate containment.

Immediate Response and Corrective Action(s)**:**

1. In the event of a spill enroute to USEM from the Romulus transload facility, US Ecology will be contacted by the truck driver or first responder. US Ecology will report the spill to all required parties. US Ecology will then notify Bruce Thompson of *de maximis* immediately. *de maximis* will be responsible for notifying the USEPA and MADEP project managers. Please note that in some cases the first responder may also contact the generator of the waste listed on the shipping documents.

2. The HAZMAT first responder will isolate the affected container, if available, or isolate the initial spill area if the truck cannot be moved.

3. US Ecology is responsible for logging information from the first responder and will dispatch an emergency response contractor to the scene as required. US Ecology or its designated representative will make follow-up reports to designated agencies. Reporting will be determined after the team assesses the actual volume spilled.

4. Remediation of a spill in Michigan will be performed by US Ecology's emergency response contractor. All affected areas will typically be over-excavated with the contents placed in a secondary container (e.g., drums, bags, etc.) and loaded into a replacement truck or container for final disposal. This material will be on an additional manifest referencing the original manifest.

5. US Ecology will provide a written report documenting the results of the initial site assessment and any required clean-up efforts, including written notes and a photo diary compiled by their emergency response contractor. A copy of this response report will be provided to *de maximis*.

Discussion: US Ecology will coordinate response to any reported spill from the Site. Representatives from US Ecology and/or its contractors may be present at the spill location to ensure all impacted areas are appropriately cleaned up.

REFERENCE - Emergency Response Guidebook, U.S. Department of Transportation.

Appendix D
NMI Project Transportation Contact List

Name	Company	Role/Responsibility	Contact Number(s)	Email
Bruce Thompson	de maximis, inc.	NMI Project Coordinator	860-662-0526	Brucet@demaximis.com
Jessie McCusker	de maximis, inc.	NMI Project Manager	860-833-4112	Jessie@demaximis.com
Todd Majer	de maximis, inc.	NMI Project Manager	978-875-0635	tmajer@demaximis.com
Amy Hoffman	de maximis, inc.	NMI Project Manager	978-793-7163	Ahoffmann@demaximis.com
Ryan Harding	de maximis, inc.	NMI Project Manager	978-495-2539	rharding@demaximis.com
Kevin Trader	US Ecology	Director of Transportation	(m) 208-890-5841 (o) 208-319-1609	kevin.trader@usecology.com
Wayne Hinton	US Ecology	Rail Program Manager	(m) 508-954-1545 (o) 508-803-1224	wayne.hinton@usecology.com
Shae Thrall	US Ecology	Rail Logistics Coordinator	(m) 208-789-1017 (o) 208-809-2562	shae.thrall@usecology.com
Sherry Frenette	US Ecology	Director of Radioactive Waste Operations	(m) 702-912-7925	sherry.frenette@usecology.com
TBD	US Ecology	On-Site Waste Coordinator	TBD	TBD
Richard Blake	US Ecology Wrentham Field Office	Transportation Manager Primary Contact	(m) 339-327-7309	rich.blake@usecology.com
Kristine Sahagian	US Ecology Wrentham Field Office	Transportation Coordinator Secondary Contact	(m) 508-803-1218	kristine.sahagian@usecology.com
Scott Sullivan	US Ecology Wrentham Field Office	Operations Manager	(m) 774-210-9311	scott.sullican@usecology.com
Jean Michael Mongui	G&U Distribution Center	Operations Manager G&U Transload Terminal	(m) 617-741-7774 (o) 508-473-9600	jmongui@graftonuptonrr.com
Jim Vigrass	US Ecology	USE MI RTF Manager	(m) 734-576-0161 (o) 734-727-5526	jim.vigrass@usecology.com
Corey Grider	US Ecology	USE MI Landfill Manager	734-699-6213	corey.grider@usecology.com
Mike McInnis	President - S&C Transport	Back End Transportation	734-576-0384	mike.mcinnis@sctransport.org
Global Response Operations Center (GROC)	US Ecology	US Ecology Emergency Response Center	800-899-4672	groc@usecology.com

Appendix E
NMI Project Transportation Emergency Call List

Order of Notification	Name	Company	Role/ Responsibility	Contact Number	Email
1	Global Response Operations Center (GROC)	US Ecology	Emergency Response Center *(see Note)*	800-899-4672	groc@usecology.com
2	Sherry Frenette	US Ecology	Director of Radioactive Waste Operations	702-912-7925	sherry.frenette@usecology.com
3	Todd Majer	de maximis, inc.	NMI Project Manager	978-875-0635	tmajer@demaximis.com
4	Jessie McCusker	de maximis, inc.	NMI Project Manager	860-833-4112	Jessie@demaximis.com
5	Amy Hoffman	de maximis, inc.	NMI Project Manager	978-793-7163	Ahoffmann@demaximis.com
6	Ryan Harding	de maximis, inc.	NMI Project Manager	978-495-2539	rharding@demaximis.com

Note: The GROC is staffed 24/7/365 with ER Coordinators. US Ecology has approximately 16 – 18 personnel managing ER calls through the GROC.

FREE HOPEDALE FLU SHOT CLINICS

Thurs. Oct. 13, 2022

4:00 pm - 6:00 pm

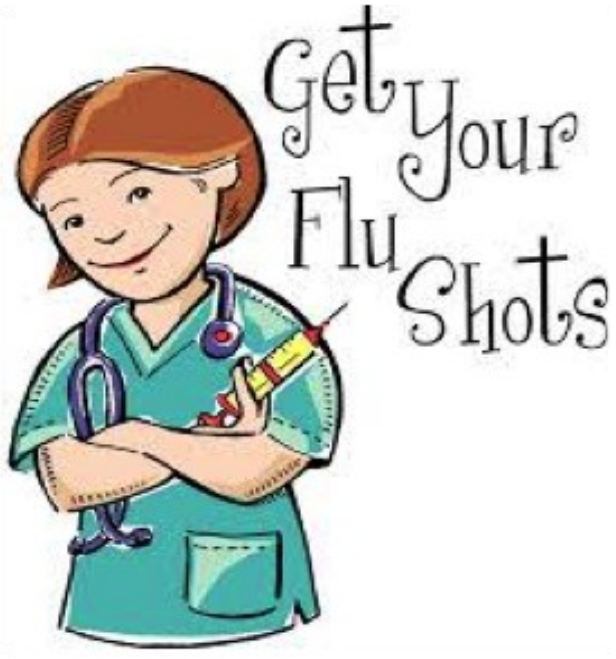
and

Thurs. Oct. 27, 2022

4:00 pm - 6:00 pm

Hopedale High School Cafeteria

- **Please bring your Health Insurance and or Medicare Cards.**
- **Wear a Short-Sleeved Top.**
- **You will be required to complete registration information at the Clinic.**
- **Pre-registration is not available.**



Vaccines are available to individuals age 9 and older.

<u>This year, the Over 65 Vaccine will also be available</u>.

Questions? Call the Hopedale Sr. Center at (508)634-2208.

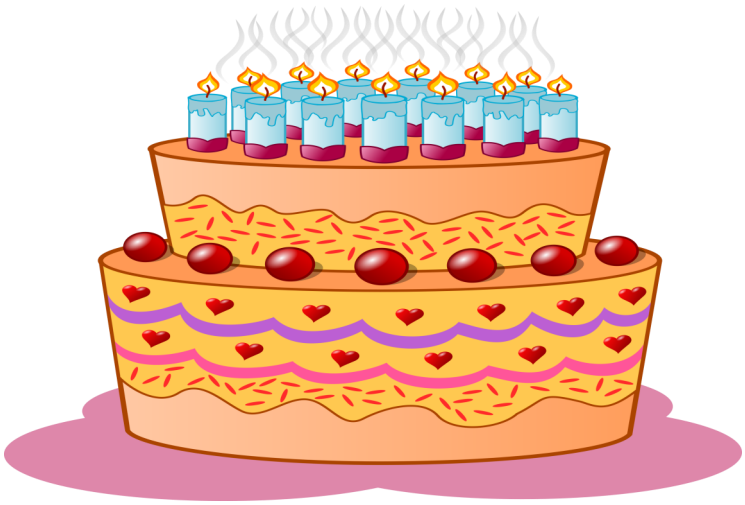
Vaccines administered by:

Milford Central Pharmacy

Happy Birthday!

Hopedale Council on Aging

51st



SAT. OCT. 1, 2022

HOPEDALE SR. CENTER

(LOCATED INSIDE THE HOPEDALE COMMUNITY HOUSE)

10:00AM- 3:00PM

43 HOPE ST.

(508)634-2208

OPEN HOUSE

CELEBRATION AND

ARTISAN FAIR

FEAUTURING ITEMS MADE BY HOPEDALE SENIOR CRAFTERS AND ARTISTS

FAIR, CAKE & FREE RAFFLES

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the Defendants Town of Hopedale (the "Town"), the Hopedale Select Board (the "Board") by and through its members, Glenda Hazard, Bernard Stock, and Brian Keyes, and the Hopedale Conservation Commission (the "Con. Comm.") by and through its members Becca Solomon, Marcia Matthews, and David Guglielmi (collectively, "Hopedale"), through their undersigned counsel, respectfully request that this Court dismiss the Verified Complaint filed by the Plaintiffs Grafton & Upton Railroad Company, Jon Delli Priscoli and Michael R. Milanoski, as Trustees of One Hundred Forty Realty Trust (the "Trust") (collectively, "GURR"). For the reasons stated in the accompanying memorandum of law, GURR fails to establish subject matter jurisdiction and fails to state a claim against Hopedale.

WHEREFORE, Hopedale requests that the Court: (1) grant this Motion, (2) dismiss Counts I-VI, and (3) grant any other further relief as the Court deems fair and just.

REQUEST FOR ORAL ARGUMENT

Hopedale respectfully requests a hearing on this Motion at the Court's earliest convenience.

CERTIFICATION PURSUANT TO L.R. 7.1(a)(1)

I, Sean Grammel, counsel for the Defendants, hereby certify that, in accordance with Local Rule 7.1(a)(2), I conferred with counsel for GURR on August 10, 2022, and have attempted in good faith to resolve or narrow the issues subject to this Motion. GURR's counsel stated that they oppose this Motion.

TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI,

By their attorneys,

/s/ Sean Grammel

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ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
617.621.6523

Dated: August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 12th day of August, 2022.

/s/ Sean Grammel
Sean Grammel

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT

The Plaintiffs Grafton & Upton Railroad Company *et al.* (collectively, "GURR") ask this Court to issue declaratory and injunctive relief against the exercise of eminent domain and environmental protection authority by the Defendants Town of Hopedale *et al.* (collectively, the "Town" or "Hopedale"). But GURR asserts these claims under a federal statute that expressly forecloses subject matter jurisdiction and that does not provide a cause of action. *See* 49 U.S.C. § 10501(b) (providing "exclusive" jurisdiction in the Surface Transportation Board ("STB")); *Bd. of Selectman of Town of Grafton v. Grafton & Upton R.R. Co.*, Case No. 12-cv-40164-TSH, 2013 WL 2285913, at *9-10 (D. Mass. May 22, 2013) (finding that § 10501 does not create an affirmative cause of action). GURR argues that it can base its claims in preemption and somehow avoid Congress's explicit language, but the Supreme Court has repeatedly rejected that

legal theory. GURR's other claims, under § 1983 and various state statutes, similarly fail under Rules 12(b)(1) and 12(b)(6). Without any jurisdictional basis or claim available to GURR, the Court should dismiss the Verified Complaint ("VC").

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a core and routine exercise of municipal authority: a town's exercise of its eminent domain powers under G.L. c. 79 to acquire land for conservation purposes. This dispute poses a wrinkle, in that the property to be acquired is purportedly *owned* by a railroad, though not yet *used* by it for railroad purposes. Located at 364 West Street in Hopedale, MA, that property was classified as forestland under G.L. c. 61 (the "Forestland"). GURR argues that the Interstate Commerce Commission Termination Act ("ICCTA") preempts Hopedale's ability to take any of the Forestland for conservation purposes. VC ¶ 96. GURR purports to hold title to the Forestland, but that ownership is currently the subject of ongoing litigation in state courts. *Town of Hopedale v. Trustees of 140 Realty Trust*, Case No. 2022-P-0433 (Mass. App. Ct.); *Reilly v. Arcudi*, Case No. 2022-P-0314 (Mass. App. Ct.); *see also* Complaint ¶¶ 37-54. GURR acquired nominal title to the Forestland through what Superior Court Judge Karen Goodwin described as a "flagrant violation" of state law. *See* Memorandum and Order on Motion to Preserve Status Quo, *Reilly v. Town of Hopedale*, Case No. 2185-cv-00238, ECF 32, Ex. A, at p. 4.

On June 21, 2022, Hopedale's Select Board met, voted to call a Special Town Meeting, and signed a warrant with one article: to seek authorization to use eminent domain to acquire the Forestland. VC ¶ 94. Specifically, the warrant sought authority for a taking of "up to 130.18 acres, more or less, located at 364 West Street," for the purpose of "land conservation," such that the acquisition was being made "to maintain and preserve said property and the forest, water, air,

and other natural resources thereon for the use of the public for conservation and recreation purposes to be managed under the control of the Hopedale Parks Commission." *See* Town of Hopedale Special Town Meeting Warrant, ECF 1-4, at p. 1; VC ¶ 65. The article explicitly limited the Board from taking title "to any portions of the Property that are currently in use by the Railroad for railroad operations purposes or transloading facilities." *Id.*

Special Town Meeting met on July 11, 2022 and overwhelmingly voted, with several hundred citizens in favor and only two against,[1] to authorize the Select Board to spend up to $3.9 million to acquire land at 364 West Street through eminent domain. VC ¶ 70. On July 14, 2022, the Select Board noticed a meeting for July 19, to consider and vote on the proposed order of taking as authorized by Special Town Meeting. *See* ECF 1-6; VC ¶ 72. Also on July 14, Hopedale's Conservation Commission ("Con. Comm."), through its Chair, sent GURR an Enforcement Order, which included a cease-and-desist order for violating state and local wetlands laws in an attempt to limit, by whatever means possible, the further destruction of the Forestland. VC ¶ 125; ECF 1-4.

On July 18, GURR filed its Verified Complaint and Emergency Motions for Temporary Restraining Order and Preliminary Injunction. ECF 1, 2, 4. On July 19, the Court (Saylor, J.) held a hearing on the Motions for Temporary Restraining Order, and granted the motion to restrain the taking but denied the motion to restrain the enforcement of the Con. Comm. Order. ECF 18. Judge Saylor did not hear argument about the Court's jurisdiction to grant this relief, or whether GURR stated a claim, which Hopedale now argues below. On August 10, the Court (Burroughs, J.) held a hearing on the Motions for Preliminary Injunction. Hopedale advanced a

[1] *See* https://townhallstreams.com/stream.php?location_id=56&id=46514.

jurisdictional argument in its Consolidated Opposition and Sur-Reply to GURR's Motions and now files a Motion to Dismiss on those same grounds.

ARGUMENT

GURR does not establish jurisdiction or state a claim for any of its six causes of action. GURR asserts in Counts I and VI that § 10501 of ICCTA preempts Hopedale's powers of eminent domain and environmental protection authority, but GURR cannot use this Court's equitable powers to establish subject matter jurisdiction or state a claim when § 10501 expressly precludes it. *See Town of Grafton*, 2013 WL 2285913, at *9-10 (finding that § 10501 vests exclusive jurisdiction in the STB and does not create an affirmative cause of action). GURR has mechanisms to assert ICCTA against the taking, either affirmatively as part of an STB proceeding under § 10501 or defensively as part of a c. 79 proceeding in state court. *See Abuzahra v. City of Cambridge*, 486 Mass. 818, 823 (2021). GURR has chosen not to avail itself of those options, but that does not mean it can create its own jurisdiction or cause of action here.

GURR next seeks relief under § 1983 either under ICCTA or the dormant Commerce Clause, but the First Circuit has already decided that ICCTA does not create rights enforceable under § 1983 and GURR has failed to allege facts that show the dormant Commerce Clause applies here. Finally, this Court should decline to exercise supplemental jurisdiction over GURR's various state law claims, and even if this Court did exercise supplemental jurisdiction, the state law claims are meritless. Without any jurisdictional basis or claim stated, this Court should dismiss the Verified Complaint.

I. Standards of Review

In evaluating a motion to dismiss under Rule 12(b)(1), the court must determine whether the facts alleged, taken at face value, support subject matter jurisdiction. *Gordo-Gonzalez v.*

United States, 873 F.3d 32, 35 (1st Cir. 2017). The plaintiff bears the burden of establishing subject matter jurisdiction over each individual claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Godin v. Schencks*, 629 F.3d 79, 83 (1st Cir. 2010). If the plaintiff fails to do so, the complaint must be dismissed. *Kersey v. Prudential Ins. Agency, LLC*, Case No. 15-14186-GAO, 2017 WL 5162006, at *6 (D. Mass. Feb. 3, 2017).

In deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all "well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *Keach v. Wheeling & Lake Erie Ry. Co.*, 888 F.3d 1, 6 (1st Cir. 2018). The complaint must allege more than "labels and conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Where there is no private cause of action to seek redress for the misconduct alleged in the complaint, the court should dismiss the complaint. *Arroyo-Torres v. Ponce Fed. Bank, F.B.S.*, 918 F.2d 276, 280 (1st Cir. 1990).

When faced with motions to dismiss under both Rule 12(b)(1) and 12(b)(6), the court should, absent good reason to do otherwise, decide the 12(b)(1) motion first. *Ne. Erectors Ass'n of the BTEA v. Sec'y of Labor, Occup'l Safety & Health Admin.*, 62 F.3d 37, 39 (1st Cir. 1995). Hopedale advances arguments under both Rules for all six claims.

II. GURR fails to establish jurisdiction over, or state a claim for, declaratory or injunctive relief in Counts I and VI.

GURR brings Counts I and VI as preemption-based causes of action under the Declaratory Judgment Act. *See* VC ¶¶ 82-104 (Count I), 123-139 (Count VI), 14-15 (jurisdictional bases, namely the Supremacy Clause and ICCTA). GURR later clarified that it was actually bringing these as preemption-based claims under the doctrine of *Ex Parte Young*. *See* ECF 40 at 1-2; *Ex Parte Young*, 209 U.S. 123 (1908). Hopedale responds to that sole

jurisdictional theory, which is unavailable to GURR because of the express language of § 10501.[2]

The Supreme Court explained the doctrine of *Ex Parte Young* in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015). Federal courts "may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Id.* at 326. This remedy does not come from the Supremacy Clause. *Id.* at 327. Instead, the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity" and is "a judge-made remedy." *Id.* Invoking this equitable doctrine creates subject matter jurisdiction under § 1331 because it involves the alleged ongoing or imminent violation of a federal statute. *See Verizon Md. Inc. v. Publ. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (allowing a preemption-based claim because the complaint alleged a violation of federal law and the statute did not "display any intent to foreclose jurisdiction under *Ex Parte Young*"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex Parte Young* to allow for preemption-based suits for injunctive relief, where the underlying statute did not limit jurisdiction or remedies in any way).

Because this doctrine is equitable in nature, it is "subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327 (citations omitted). In other words, Congress can limit a federal court's ability to fashion equitable remedies for an alleged violation of a federal statute. Courts of equity "can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Id.* at 327-28 (citation omitted); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a

[2] Hopedale explained in its Consolidated Opposition why GURR fails to establish jurisdiction under any of the theories cited in the Verified Complaint. ECF at 7-9.

particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary."). Congress decides how its laws may be enforced and parties cannot avoid that congressional decision by invoking equity. *Armstrong*, 575 U.S. at 327-28; *see Crimson Galeria Ltd. P'Ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20, 33 (D. Mass. 2018) (dismissing, under *Armstrong*, preemption-based claims because the federal statute precluded the availability of equitable relief).

In *Seminole Tribe*, the Supreme Court encountered a scenario similar to here, where a plaintiff sought to enforce a federal statute after a state actor had allegedly violated federal law. At issue in that case was the Indian Gaming Regulatory Act, which required a state to negotiate in good faith with a tribe that wanted to operate a casino on tribal land. 517 U.S. at 49. The statute contained an "elaborate remedial scheme designed to ensure the formation of a Tribal-State compact." *Id.* at 51. The Seminole Tribe sued Florida for failure to negotiate in good faith, but the Tribe did not follow the statutory remedial scheme and instead brought suit directly in federal court. *Id.* The Seminole Tribe argued that it asserted a "continuing violation of federal law," which was sufficient to establish jurisdiction under *Ex Parte Young*, a theory that the Supreme Court easily rejected. *Id.* at 74-75. The Supreme Court found that the federal statute implicitly precluded equitable relief and therefore affirmed the dismissal of the Tribe's suit for lack of jurisdiction. *Id.* The Court reasoned that if parties could sidestep the enforcement mechanism required by statute, then Congress's directions about who can enforce its laws (and where) would be "superfluous." *Id.* at 75. A plaintiff would simply file in federal court where "more complete and more immediate relief would be available under *Ex Parte Young*." *Id.*; *see Armstrong*, 575 U.S. at 327 (citing *Seminole Tribe* to find that a plaintiff could not seek injunctive relief for a state's alleged violation of Medicaid Act, when the federal statute

implicitly foreclosed equitable relief by creating a remedy through the statute and vesting enforcement discretion in an administrative agency).

Here, § 10501 of ICCTA is even clearer than the statutes in *Seminole Tribe* or *Armstrong*, because it *explicitly* forecloses equity jurisdiction. The statute is clear that the STB has "exclusive" jurisdiction over "transportation by rail carriers," which is precisely the kind of claim being made by GURR. *See* VC ¶¶ 87-95. Yet GURR did not bring this claim to the STB. Instead, it seeks to avoid the "exclusive" jurisdiction of the STB and has filed in federal court, which is the exact sidestep rejected by the Supreme Court in *Seminole Tribe*.

Section 10501 continues: "Except as otherwise provided in this part [i.e., ICCTA], the remedies provided under this part with respect to regulation of rail transportation are *exclusive and preempt the remedies provided under Federal or State law*." 49 U.S.C. § 10501(b) (emphasis added). Congress could hardly make a more explicit statutory limitation. If GURR wants to enforce § 10501, then it must follow the process required by § 10501. Congress explicitly directed parties to pursue their claims in the STB, thereby limiting federal courts' ability to fashion supplemental equitable remedies. *See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Mich. Corrs. Org. v. Mich. Dep't of Corrs.*, 774 F.3d95, 905 (6th Cir. 2014) (requiring courts to "determine whether Congress intended private parties to enforce the statute by private injunction or for that matter by a declaratory judgment. *Ex Parte Young* by itself does not create such a private right of action.").

Judge Hillman recognized that § 10501 does not provide either jurisdiction or an affirmative cause of action. *Town of Grafton*, 2013 WL 2285913, at *10; *see Pejepscot Indus.*

Park v. Maine Cent. R. Co., 215 F.3d 195, 199 (1st Cir. 2000) (reading § 10501, by itself, "to grant the STB exclusive jurisdiction over any claim involving 'transportation by rail carriers'"). Specifically, he rejected an argument that § 10501 allows for concurrent jurisdiction in both federal court and the STB. *See Town of Grafton*, 2013 WL 2285913, at *10 n.7 (citing *Pejepscot*, 215 F.3d at 198). He analyzed another section of ICCTA, § 11704(c)(1), which allows a party to file a claim in either the STB or a federal court.[3] 49 U.S.C. § 11704(c)(1). Congress's explicit language in § 11704 allowed for concurrent jurisdiction and so, Judge Hillman reasoned, the "contrapositive" must equally be true: § 10501 vests "exclusive" jurisdiction in the STB and so there cannot be concurrent jurisdiction. 2013 WL 2285913, at *10 n.7. While a party can indeed establish federal jurisdiction under § 1331 if it invokes a court's equity jurisdiction under *Ex Parte Young*, GURR fails at the first step: it cannot invoke equity jurisdiction because of the express statutory limitation in § 10501. *See Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001) ("Accordingly, the Court finds that Congress, under the ICCTA, explicitly granted the STB exclusive jurisdiction over claims involving railroad operations, except as otherwise provided under the ICCTA.").

GURR must pursue its statutory remedies, and it even has a choice: federal or state. If GURR want to use § 10501 as a sword to state an affirmative claim, it must do so in the STB. The STB has issued extensive regulations to govern any such proceedings. *See* 49 CFR § 1117.1 ("A party seeking relief [from the STB] not provided for in any other rule may file a petition for such relief."); 49 CFR § 1119.1 ("A defendant or respondent directed by the Board to do or

[3] ICCTA includes several different enforcement mechanisms, not including the complex and intricate STB process. *See, e.g.*, 49 U.S.C. § 11703 (enforcement by the Attorney General); 49 U.S.C. § 11706(d)(1) (creating federal subject matter jurisdiction for disputes over bills of lading); 49 U.S.C. § 10709(c)(2) (limiting remedies for breach of contract to a lawsuit in either state or federal court, while simultaneously limiting federal question jurisdiction).

desist from doing a particular thing must notify the Board on or before the compliance date…"); 49 CFR §§ 1114.1-1114.31 (describing the evidentiary and discovery rules available under STB proceedings). GURR could seek a declaration in the STB that ICCTA preempts the Town's taking and then seek to enforce that order in federal court, if the Town refused to comply with the STB's decision. *See* 28 U.S.C. § 1336 ("Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Surface Transportation Board…"); 5 U.S.C. § 554(e) (allowing the STB to "issue a declaratory order to terminate a controversy or remove uncertainty").

If GURR want to use § 10501 as a shield against the taking, it must do so in state court under G.L. c. 79, § 18.[4] *See Abuzahra*, 486 Mass. at 823. GURR could assert ICCTA in state court through "ordinary preemption," which is a defense to the application of state law and does not create original jurisdiction in federal court. *See Fayard*, 533 F.3d at 45; *Town of Grafton*, 2013 WL 2285916, at *5. The STB has regularly found that state courts are the proper forum for deciding issues about preemption and state property law. *See, e.g.*, *Eastside Community Rail, LLC*, Acquisition and Operation Exemption, Docket No. FD 35692, 2022 WL 696819, at *3 (STB Mar. 7, 2022) (holding that a railroad was "clearly incorrect" when it argued that state courts cannot decide preemption issues, when the STB has "consistently held that disputes concerning state contract and property law should be decided by the appropriate courts with expertise in those matters, rather than" the STB); *Grafton & Upton R.R. Co.*, Petition for Declaratory Order, Docket No. FD 36518, 2021 WL 5122255, at *2 (STB Nov. 3, 2021) ("As the Board has explained, a court is typically the more appropriate forum for interpreting

[4] GURR could request that its case be "heard and determined with as little delay as possible." *See* G.L. c. 79, § 34.

contracts and resolving state property law disputes.").

GURR cannot mix and match its rights and remedies; it seeks to enforce a legal right through equity, despite having a legal remedy available to it. *Infusaid Corp. v. Intermedis Infusaid, Inc.*, 738 F.3d 661, 668 (1st Cir. 1984) ("Of course, the general rule is that if there is an adequate remedy at law, equitable relief is unavailable."). When Congress has made its statutory intent clear, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (requiring courts to "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"). Fashioning an equitable remedy "may be a proper function for common-law courts, but not for federal tribunals." *Alexander*, 532 U.S. at 287 (quotation and citation omitted). This Court simply does not have the ability to enter the relief that GURR seeks and so Counts I and VI should be dismissed.

III. GURR cannot use § 1983 to enforce ICCTA.

The Court should dismiss GURR's claim under § 1983 (Count II), because it fails under Rules 12(b)(1) and 12(b)(6). Section 1983, by itself, does not create federal jurisdiction. *See Cervoni v. Sec'y of Health, Educ. and Welfare*, 581 F.2d 1010, 1029 (1st Cir. 1978). The underlying statute, § 10501, also does not create subject matter jurisdiction. *See Town of Grafton*, 2013 WL 2285913, at *10 n.7. Count II fails under Rule 12(b)(1).

This claim also fails under Rule 12(b)(6). Section 1983 does not create a substantive cause of action by itself and so GURR must show the ICCTA "creates an individually enforceable right." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). The First Circuit has already decided that ICCTA does no such thing: "nothing suggests that Congress

intended to create rights for railroads apart from the Surface Transportation Board statutory scheme." *Boston and Me. Corp. v. Town of Ayer*, 330 F.3d 12, 18 (1st Cir. 2003) (rejecting the enforcement of rights created by ICCTA through § 1983). Moreover, Congress has, through § 10501, explicitly precluded other remedies available under federal law. This alone precludes enforcement of ICCTA through § 1983. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009) ("If Congress intended a statute's remedial scheme to be the exclusive avenue through which a plaintiff may assert the claims, the § 1983 claims are precluded."); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (cautioning that when a statute expressly provides for a particular remedy, "a court must be chary of readings others into it").

The Verified Complaint is unclear, but GURR may be asserting a claim under the dormant Commerce Clause through § 1983. The Verified Complaint is devoid of any specific factual allegations about how the taking would affect the interstate rail transportation network. *See* VC ¶¶ 99-104. And, in fact, GURR would maintain its tracks and any portions of the Forestland that are currently in use for railroad operations and transloading facilities. VC ¶ 65. Without sufficient factual allegations, this claim would fail under Rule 12(b)(6).

"The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies," which means that "if local legislation leaves all comers with equal access to the local market, it does not offend the dormant Commerce Clause." *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999). Where, like here, the local regulation has only an indirect effect on interstate commerce, the regulation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The plaintiff cannot just allege that it alone will suffer "devastating economic consequences" from some regulation, but instead must allege facts that the interstate market at large will suffer. *See Pharm. Research and Mfrs. of America v. Concannon*, 249 F.3d 66, 84 (1st Cir. 2001). GURR fails to make any specific factual allegations that connect Hopedale's planned taking to the nation's rail transportation system. GURR simply alleges that it has a right to participate in interstate commerce and that the taking would unreasonably interfere with that right. VC ¶¶ 100-104. Any business subject to a taking (or any other regulation) could make this claim, underscoring that these allegations are simply insufficient to state a claim under the dormant Commerce Clause. GURR's claim under § 1983 (Count II) fails under Rules 12(b)(1) and 12(b)(6), and must be dismissed.

IV. This Court should decline to exercise supplemental jurisdiction over GURR's state law claims, which fail under Rules 12(b)(1) and 12(b)(6) in any event.

The Court "may decline to exercise supplemental jurisdiction" over any remaining state law claims once the federal claims are dismissed. 28 U.S.C. § 1367(c)(3). In deciding whether to decline supplemental jurisdiction, courts consider several factors, including fairness, judicial economy, convenience, and comity. *Desjardins v. Willard*, 777 F.3d 43, 45 (1st Cir. 2015). At this stage of a case, the balance of those factors typically "will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *McInnis-Misenor v. Me. Med'l Ctr.*, 319 F.3d 63, 73-74 (1st Cir. 2003) ("When federal claims are dismissed before trial, state claims are normally dismissed as well.")

Even if this Court did exercise supplemental jurisdiction, no claim survives Rule 12(b)(6). First, Massachusetts law is clear that G.L. c. 79 provides an "exclusive statutory remedy for takings made thereunder." *Whitehouse v. Town of Sherborn*, 11 Mass. App. Ct. 668, 673 (1981) (quoting *Wine v. Commonwealth*, 301 Mass. 451, 455-56 (1938)); *see Abuzahra*, 486

Mass. at 823. Any state-law challenge to the validity of the taking must be part of a c. 79 proceeding and so none of these claims states a cause of action available under Massachusetts law.

Second, each claim fails on its own merits. For Count III, GURR misreads c. 160, § 7, and argues that it "authorizes only the Commonwealth to take a railroad corporation's property by eminent domain." VC ¶ 106. Not so. Section 7 of c. 160 provides that the Commonwealth may, after one year's notice to a railroad, "take its railroad, franchise and other property by eminent domain" under c. 79. Nowhere does this statute limit any other party's ability to exercise eminent domain rights, including property of a railroad. Instead, it allows the Commonwealth to take the railroad itself, among other property, after sufficient notice. That grant of discretionary power to the Commonwealth does not somehow implicitly overrule other entities' eminent domain authority.

For Count IV, GURR again ignores the requirement to bring challenges about validity under Chapter 79 and instead tries to make these arguments through a Declaratory Judgment action. GURR asserts that Hopedale has not complied with certain technical requirements before voting to acquire the Site. VC ¶¶ 110-117. Notably, GURR does not allege that non-compliance with any of these statutes would invalidate the taking. In any event, GURR must pursue such a challenge under G.L. c. 79, not a federal Declaratory Judgment action. *See* G.L. c. 79, § 18; *Whitehouse*, 11 Mass. App. Ct. at 673.

Finally, Count V asserts that Hopedale cannot take the Forestland for a public purpose (conservation) because GURR already uses it for a public purpose (rail transportation). VC ¶¶ 119-122. One of the elements for a claim under the prior public use doctrine is that the property has been devoted "to only one public use." *See Town of Sudbury v. Mass. Bay Transp. Auth.*,

485 Mass. 774, 783 (2020) (citation omitted). GURR must have acquired the Forestland for a "particular use or purpose" and have limited the property to that particular use. *See Muir v. City of Leominster*, 2 Mass. App. Ct. 587, 591-92 (1974) (rejecting application of doctrine to property that the city had used as a playground because the deed did not limit its purpose to that one particular use). GURR does not, and cannot, allege that it had acquired the property for just "one public use." When the prior owner of the property held title to the land, these same 130.18 acres were preserved as forestland under c. 61 and left undeveloped. VC ¶¶ 25-27. GURR later bought the beneficial interest of the Trust and thereby purportedly acquired title. *Id.* ¶ 27. Under GURR's own version of events, the Forestland was not (and still is not) solely dedicated to railroad operations and so the prior public use doctrine does not apply. GURR may allege that it uses the land for a public purpose now, VC ¶ 120, but the Appeals Court rejected exactly this argument in *Muir*. 2 Mass. App. Ct. at 591-92. GURR does not, and cannot, allege facts that would support a claim for Count V.

All of GURR's state law claims fail under Rules 12(b)(1) and 12(b)(6), and must be dismissed.

CONCLUSION

GURR has failed to establish jurisdiction or state a claim, so this Court should dismiss the Verified Complaint.

TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI,

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Dated: August 12, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 12th day of August, 2022.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI and MICHAEL R. MILANOSKI, as Trustees of ONE HUNDRED FORTY REALTY TRUST, Plaintiffs	)	
vs.	)	Case No. 4:22-cv-40080-ADB
TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, by and through its members, GLENDA HAZARD, BERNARD STOCK, and BRIAN KEYES and THE HOPEDALE CONSERVATION COMMISSION by and through its members, BECCA SOLOMON, MARCIA MATTHEWS and DAVID GUGLIELMI Defendants	)	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Section 10501 of the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq. (the "ICA"), explicitly preempts state and local regulation of rail transportation, including intended future rail transportation. Despite being well aware of the preemptive effect of the ICA, the Town of Hopedale ("Town") defendants chose to ignore it and to plow forward with a wholesale taking of 130.18 acres of plaintiff, Grafton & Upton Railroad Company's ("GURR"), property and with an effort to enforce a state wetland permitting law. Defendants took these actions to prevent GURR from completing the development of its rail transloading facility. They now argue that this Court lacks jurisdiction to determine that the eminent domain taking and the wetland permitting law are preempted because the ICA vests exclusive jurisdiction over rail transportation with the Surface Transportation Board ("STB"). This argument ignores the overwhelming precedent of the federal courts and of the STB, which itself acknowledges that that "issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be decided either by the Board or

the courts in the first instance, as both the Board and courts have concurrent jurisdiction to determine preemption." Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order, Docket No. FD 35819, at *8 (STB Aug. 26, 2014). This Court has jurisdiction to hear GURR's claims that the Town's threatened eminent domain taking and wetlands enforcement action (1) seek to regulate an area within the exclusive jurisdiction of the STB, and (2) therefore are preempted by Section 10501 and without effect.

The Motion to Dismiss also is logically incoherent because it relies on the STB's exclusive jurisdiction over rail transportation to avoid injunctive relief so that the Town can proceed to use state law to regulate rail transportation. Following the Town's logic, it could take GURR's actual rail track which would force GURR to cease its rail operations until it prevailed after the fact, either on a Petition to the STB or under state law which requires no judicial process prior to a taking and only authorizes post-taking relief. The Town's illogical interpretation of Section 10501 would allow municipalities free reign to impede rail transportation. This is against the manifest Congressional intent of the ICA to reduce regulation of rail transportation and eliminate local regulation that interferes with rail transportation.

The Town primarily relies on an unpublished case from this Court discussing removal jurisdiction over state law claims brought against a rail carrier. Bd. of Selectman of Town of Grafton v. Grafton & Upton R.R. Co., No. 12-cv-40164-TSH, 2013 U.S. Dist. LEXIS 70384 (D. Mass. May 22, 2013). In relying on this irrelevant precedent the Town ignores the myriad cases in which federal courts (including in the First Circuit) exercised jurisdiction over an affirmative claim by a rail carrier to enjoin threatened imminent state action as preempted by the ICA. These cases establish that this Court has subject matter jurisdiction over Counts I and VI to enjoin the taking and wetlands enforcement order, respectively. Count II further states a federal claim under

42 U.S.C § 1983. The Court has federal question jurisdiction over these claims and supplemental jurisdiction over Counts III, IV and V. The Town's Motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

GURR is a short-line rail carrier and is part of the national rail system. Verified Complaint ("VC"), ¶¶2, 17-18. Its main track bisects 364 West Street, an industrial zoned property in Hopedale. Id., ¶17. GURR acquired 364 West Street to develop and operate a rail transloading center. Id., ¶ 28. GURR now owns an assemblage of 198 acres of land at 364 West Street. Id., ¶ 29. GURR has been clearing the land and preparing it for construction of transloading facilities, sidetracks, and yard space.

On June 21, 2022, a newly constituted Town Selectboard emerged from an illegal executive session to announce that it intended to pursue an eminent domain taking of GURR's property. Id., ¶¶60-67.[1] It scheduled a Special Town Meeting (STM) for July 11, 2022 to vote on a taking. Id., ¶63. The board rushed to proceed with the July 11 STM despite not obtaining a completed appraisal of GURR's property and not identifying the exact land it intended to take. Id., ¶¶60-69. The article to authorize the Selectboard to take GURR's property was approved at the July 11 STM. Id., ¶70. The Selectboard scheduled a meeting for July 19, at which it intended to vote on an order of taking of GURR's property, which it could immediately record after a favorable vote. Id., ¶72. Coincidentally, the defendant Hopedale Conservation Commission scheduled a meeting for the same day to vote on an Enforcement Order against GURR which was served on July 14 for alleged violations of the Massachusetts Wetlands Protection Act. Id., ¶125. The Enforcement Order asserted that GURR conducted work without a permit and

[1] This action came approximately 16 months after the Town settled and dismissed its Land Court lawsuit wherein it alleged that it possessed a right of first refusal to acquire the very same 130.18 acres that is subject to the eminent domain taking. VC, ¶¶37-54.

demanded, under threat of civil and criminal penalties, that GURR cease and desist and reverse that work. Id., ¶¶125-127.

The Selectboard voted on an order of taking on August 1, 2022. Counsel for the Town stated that the Town could record the order of taking "in short order" if the Court lifts the Temporary Restraining Order which issued on July 19.[2] If the order of taking is recorded, GURR will be immediately divested of title to 130 acres of its property at 364 West Street. The taking would suspend and impede GURR's ongoing rail transportation development. The purpose and effect of the Town's intended taking is to eliminate GURR's ability to conduct rail transportation activities at 364 West Street and to prevent GURR from maintaining and expanding its current rail transportation activities to meet customer demand at this location.

On July 18, the Court (Saylor, CJ.) issued a temporary restraining order enjoining the Town from recording a notice of taking. ECF No. 18. On August 10, 2022, this Court heard GURR's Motions for Preliminary Injunction. At that hearing, the Town urged the Court to lift the TRO so that the "status quo" could be maintained, but indicated that it would record the order of taking if given the opportunity. After the hearing, GURR submitted a Proposed Order asking this Court to direct GURR to file a Petition for Declaratory Order with the STB to terminate the controversy or remove uncertainty with respect to the Town's proposed eminent domain taking and the Town's July 14 Enforcement Order, and to retain jurisdiction and issue a preliminary injunction but otherwise stay the matter pending the STB's determination. The Town submitted its own proposed order which did not request referral to the STB.

[2] Upon information and belief, the Selectboard is meeting on August 24 to vote again to take GURR's property, evidencing its unambiguous intent to immediately record the Order of Taking should GURR's request for preliminary injunction be denied. Pursuant to G.L. c 79 § 3, the Town is required to record an Order of Taking within 30 days of a favorable taking vote. Apparently, the Town is concerned that it will not be able to record the Order of Taking within 30 days of its August 1 vote, so it is voting again on August 24 to start a new 30-day clock.

ARGUMENT

I. Standard of Review.

Defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction, and Rule 12(b)(6) for failure to state a claim. Dismissal pursuant to Rule 12(b)(1) is appropriate only when the facts alleged in the complaint, taken as true, do not justify the exercise of subject matter jurisdiction. Muniz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2003). The Court draws all reasonable inferences in the plaintiffs' favor. Id., citing Valentin v. Hosp. Bella Vista, 254 F.3d 358, 365 (1st Cir. 2001). The Plaintiff carries the burden of demonstrating the existence of federal jurisdiction. Viqueira v. First Bank, 140 F.3d 12, 16 (1st Cir. 1998).

The Court has jurisdiction if GURR's right to recover under its "'complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" Puerto Rico Tel. Co. v. Sprintcom, Inc., 662 F.3d 74, 86 (1st Cir. 2011), quoting Verizon Md., Inc. v. Pub. Serv. Comm'n of Md. (Verizon Md.), 535 U.S. 635, 643 (2002).

Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) also requires the Court to accept plaintiffs' well-pleaded allegations as true and to draw all reasonable inferences in plaintiffs' favor. Plaintiffs' claims survive if they "state a plausible, not merely conceivable, case for relief." Sepúlveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 29 (1st Cir. 2010).

II. Necessity of Filing Before the Taking.

Before addressing the merits, it is important to consider GURR's filing in context of the Town's warp speed non-judicial eminent domain taking efforts. The Selectboard announced for the first time on June 21 that it was advocating to take GURR's property. VC ¶¶59-64. Less than

three weeks later, it convinced the voters at the STM to vote in favor of the taking article even though it had no idea what the fair market value of the property was and had not even identified the scope of the taking. VC ¶70. On July 14, the Selectboard scheduled a meeting for July 19 to vote to approve the taking without a completed appraisal. VC, ¶71. The Town does not dispute these facts.[3] It fully intended to record a notice of taking, and thereby divest GURR of title to 364 West Street as soon as it possibly could. GURR's only option to stave off the Town's unlawful taking was to file suit to enjoin it. Had GURR petitioned the STB for a declaratory order, or waited to bring a state law claim, it would have been divested of 130 acres of its property on July 19 or July 20. The Selectboard cancelled the July 19 meeting only after this Court entered a temporary restraining order enjoining any recording of a taking, but later met on August 1 and voted 2-1 to take GURR's property. At the hearing on GURR's Motion for Preliminary Injunction, the Town cagily asserted that it wants to "maintain the status quo" but signaled that it would record the taking as soon as possible if the temporary restraining order is lifted. Of course, recording the taking would divest GURR of title and allow the Town to eject GURR from the land, which cannot be reconciled with "maintaining the status quo."

"Giving effect to the condemnation authority of municipalities over railroad property conflicts with Congress' purpose in enacting the [ICA]." Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1015 (W.D. Wis. 2000). The Town desperately wishes to evade ICA review of its planned taking long enough to record it, and thereby subject GURR to a

[3] Rather the Town blames GURR for moving quickly with its development. GURR has worked quickly to make up for time lost by prior injunctions, all of which were dissolved when GURR prevailed on all claims against it. GURR's development of this industrial zoned land is entirely lawful. Additionally, there is no title dispute with respect to this land and any statements to the contrary are demonstrably false. The Town asserted its right of first refusal claim in Land Court and dismissed that claim with prejudice in February 2021. The Town has no pending claim to ownership of 364 West Street. The Town would not attempt this last-ditch taking if it genuinely believed that GURR is not the rightful owner of the property.

state court proceeding which will cause months or years of delay of completion of its rail transloading facility. This Court has jurisdiction and should enjoin the taking until it or the STB decides the merits of GURR's claim that the taking is preempted.

III. The Court has Subject Matter Jurisdiction Over GURR's ICA Claims.

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiffs' claims in Count I and Count VI arise under the preemption provision of the ICA, 49 U.S.C. § 10501(b), and seek a declaration and corresponding injunctive relief that the Town's efforts to regulate GURR's rail transportation activities, including its construction of a state-of-the-art transloading facility at the subject property, are preempted and without effect. There is "no doubt that federal courts have jurisdiction under [28 U.S.C.] § 1331" over an action seeking injunctive and declaratory relief against state officials on the grounds that a state regulation was preempted by federal law. Medicaid & Medicare Advantage Prods. Ass'n of P.R., Inc. v. Hernández, No. 20-1760 (DRD), 2022 U.S. Dist. LEXIS 54406, at *19 (D.P.R. Mar. 25, 2022) (Hernández), quoting Verizon Md., 535 U.S. at 642.

Section 10501 of the ICA confers in the STB exclusive jurisdiction over "transportation by rail carriers." It further includes an express preemption provision which states that the ICA's remedies "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The First Circuit in Pejepscot Indus. Park v. Me Cent R.R. Co., 215 F. 3d 195 (1st Cir. 2000) discussed the legislative history of § 10501. It noted "that in establishing the STB's jurisdiction under the ICCTA, Congress intended only to preempt state law and remedies, not to give the STB exclusive jurisdiction over ICCTA claims." 215 F.3d at 204. The Court continued:

> First, under the heading "Remedies are exclusive," the section-by-section analysis found in the House Report on the ICCTA states: "The bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the [previous regime of] optional delegation of administrative authority to State agencies to enforce Federal standards . . . ." H.R. Rep. No. 104-311, at 95, *reprinted in* 1995 U.S.C.C.A.N. 793, 807. Second, under the heading "General jurisdiction," the Report states that changes were made to the jurisdictional provision to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include *extending exclusive Federal jurisdiction* to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction . . . . The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. *Id.* at 95-96, *reprinted in* 1995 U.S.C.C.A.N. at 807-08. The thrust of the statute is to federalize these disputes, not to deprive the federal courts of jurisdiction.

215 F. 3d. at 204-205 (emphasis in last sentence supplied).

A. Federal Courts and the STB Each have Jurisdiction to Determine Preemption Issues Under the ICA.

Defendants contend that the preemption provision of Section 10501 precludes this Court from exercising jurisdiction over GURR's claim that the Town's attempt to regulate rail transportation is preempted. This contention is against the overwhelming weight of STB and federal court precedent in similar cases.[4]

The Town simply misconstrues Section 10501. Section 10501 is not a remedy under the ICA, it is the ICA's preemption provision. Federal courts can, and routinely do, examine Section 10501 to determine if a state or local regulation is preempted under the ICA. See Or. Coast Scenic R.R., LLC v. Or. Dep't of State Lands, 841 F.3d 1069, 1076 (9th Cir. 2016) (concluding state law preempted by ICCTA and therefore regulated activities were within STB's exclusive jurisdiction; remanding for consideration of railroad's injunction motion). The STB itself holds that "issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b) can be

[4] Although Defendants request dismissal of all claims pursuant to Rules 12(b)(1) and 12(b)(6), they make no arguments for dismissal under Rule 12(b)(6) with respect to GURR's ICA preemption claims.

decided either by the Board or the courts in the first instance." Jie Ao and Jin Zhou – Petition for Declaratory Order, STB No. FD 35539 (June 6, 2012). In Brookhaven Rail Terminal and Brookhaven Rail, LLC, supra, at *8,the STB repeated this sentiment and stated that both "the Board and courts have concurrent jurisdiction to determine preemption." See also, Green Mountain Railroad Company – Petition for Declaratory Order, STB No. 34052 (May 28, 2002) (STB declined to exercise its discretion under 5 U.S.C. 544(e) and 49 U.S.C. 721[5] to issue a declaratory order because the "District Court, which has enforcement authority, has made clear its desire to resolve the issues raised without referring the matter to the Board"); 14500 Limited LLC – Petition for Declaratory Order, STB No. FD 35788 (June 5, 2014) (denying petition where "referring court properly held that [petitioner]'s claims are preempted"); Elam v. Kan. City S. Ry., 635 F.3d 796, 811 (2011) ("We will not presume Congress intended § 10501(b) to withdraw original federal jurisdiction over claims arising under the ICCTA…").

Courts often decide preemption issues in the first instance especially where, as here, a rail carrier's transportation activities are immediately threatened by state or local regulation. In a very similar case, Buffalo S. R.R. v. Village of Croton-On-Hudson, a railroad filed an action directly in the Southern District of New York challenging an imminent eminent domain taking. 434 F. Supp. 2d 241 (S.D.N.Y. 2006). The court enjoined the taking, stating that "[o]nly intervention by a court early in the condemnation process can stave off a taking that the [Town] is determined to make." Id. Similarly, the Seventh Circuit in Union Pac. R.R. v. Chicago Transit Authority upheld the issuance of a permanent injunction sought by a railroad directly in federal court to "halt [a] condemnation" proceeding by a city transit authority. 647 F.3d 675, 677-678 (7th Cir. 2011). In Burlington Northern & Santa Fe Ry. v. City of Moore, the court denied a

[5] This section was renumbered in 2015 to Section 1321 of Chapter 49 of the United States Code.

city's motion to dismiss a rail carrier's claim that 49 U.S.C. 10501(b) preempted a condemnation, noting that the condemnation "is preempted if the requested remedy will, in the words of the STB's governing test, 'impede rail operations or pose undue safety risks.'" 2020 U.S. Dist. LEXIS 257612, No. CIV-20-714-J, at *3 (W.D. OK 2020).

Courts also take this approach in cases challenging local permitting regulations like the Enforcement Order. For example, in Coastal Distrib., LLC v. Town of Babylon, the court upheld an injunction[6] enjoining enforcement of a town's stop work order where "the very basis for federal jurisdiction here was the appellees' assertion that the Town and its ZBA were preempted by federal law from taking any action to regulate [the rail line]'s activities." 216 Fed. Appx. 97 (2d Cir. 2007); see also Vermont Ry. v. Town of Shelburne, 918 F.3d 82 (2d Cir. 2019) (upholding injunction in favor of a rail line which enjoined enforcement of a town ordinance). In New York Susquehanna & W.Ry. Corp. v. Jackson, the Third Circuit remanded the case back to federal district court "for consideration of whether each [state environmental] regulation is preempted." 500 F.3d 238, 257 (3rd Cir. 2007). The Court also noted that upon remand, if the district court found that a civil penalty was based in part or in whole on preempted regulations, it "should enjoin its enforcement." Id., at n. 12.; see also Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 U.S. Dist. LEXIS 40131, No. 04-40323 (E.D. Mich. 2005) (granting rail carrier's motion for preliminary injunction finding that it was likely to succeed on claims that zoning regulations were preempted by 49 U.S.C. 10501 and further that the rail carrier had established irreparable harm through loss of goodwill from existing and prospective customers).[7]

[6] The Second Circuit modified the injunction to allow the parties to petition the STB to determine the preemption issue. GURR submits that this Court may and should take that approach in this case.

[7] See further, e.g., Am. Rocky Mountaineer v. Grand Cty., 568 F. Supp. 3d 1231, 1240 (D. Ut. 2021) (determining in first instance that "preclearance requirements are always preempted"); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) (upholding declaratory judgment that state

At least two reported cases from this Court are consistent with this approach. In Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 240 (D. Mass. 2004), the court issued a preliminary injunction against a town after finding that a local zoning bylaw likely was preempted by the ICA. The court retained jurisdiction and referred the matter to the STB to determine the "precise scope of that preemption." Id. (The STB subsequently found that the subject transportation activity was not preempted because it would not be performed by a rail carrier.) Similarly in Boston & Me. Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass. 2002) the court referred the dispute to the STB at the summary judgment stage but retained jurisdiction. The First Circuit later reversed the court's subsequent fee award, but took no issue with the exercise or retention of jurisdiction by the district court. See Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12 (1st Cir. 2003).

GURR cited many of the above cases in its Reply to the Defendants' Consolidated Opposition to GURR's Motion for Preliminary Injunction. ECF No. 40. The Town does not engage with them here even though they are directly on point. However, in its earlier Sur Reply, the Town hand-waved these cases away by asserting that they "do not contain any federal question jurisdiction analysis and there is no indication the parties in those cases raised the issue at all." ECF No. 45, p. 4. This gets the Town nowhere as federal courts "have an obligation to inquire into [their] jurisdiction sua sponte." One & Ken Valley Hous. Group v. Me. State Hous. Auth., 716 F.3d 218, 224 (1st Cir. 2013). It is implausible that in all of these cases – all of which quote the "exclusive jurisdiction" language in Section 10501 – the various federal courts of appeal and district courts, including Judge Tauro and Judge Gorton, simply overlooked the limits of their jurisdiction. It is beyond dispute that this Court has subject matter jurisdiction to

environmental land use statute was preempted); Florida E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (finding no preemption but noting that issue created federal question jurisdiction).

determine whether the actions threatened by the Town against GURR (i.e., the state laws and state remedies) are preempted by the ICA. If they are, it is the Town's actions, not GURR's preemption claim, which are within the exclusive jurisdiction of the STB. The Court may decide the matter on the merits or retain jurisdiction and refer the preemption issues to the STB.

B. The ICA Claims Invoke the Court's Equity Jurisdiction.

As set forth above, Counts I and VI of GURR's Verified Complaint present a straightforward federal question which is sufficient to establish original subject matter jurisdiction. However, the Court's jurisdiction over these claims also is grounded in equity.

Longstanding precedent of the United States Supreme Court holds that "a plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." Shaw v. Delta Air Lines, 463 U.S. 85, 96, n. 14 (1983). "We have no doubt that federal courts have jurisdiction under § 1331 to entertain" a suit seeking declaratory and injunctive relief to enjoin an order from a state commission which the plaintiff alleged was preempted by federal law. Verizon Md. Inc. at 642. The First Circuit cited Shaw and Verizon Md. in Local Union No. 12004, USW v. Massachusetts when it determined that a union could bring suit to enjoin a state administrative proceeding on the ground that it was preempted by the National Labor Relations Act. 377 F.3d 64, 72 (1st Cir. 2004). The Court stated that in "that context, a claim of preemption – though ultimately 'defensive' in the sense that it seeks to prevent harms threatened by state officials – does constitute a federal question under [28 U.S.C.] § 1331." Id. at 74 (emphasis in original). This year, the District of Puerto Rico in Hernández, supra, cited Shaw, Verizon Md. and Local Union No. 12004, USW, in a case in which plaintiff health plan entities sought relief

from local law based on preemption by the federal Medicare and ERISA statutes. The plaintiffs in Hernández alleged that the local law imposed health care and payment criteria on them, and that these criteria infringed upon the criteria imposed by the comprehensive federal statutes. Id. at **3-5. The court found this action sufficient to meet the subject matter jurisdictional requirements and that it "need go no further" with the jurisdictional inquiry. Id. at *19.

The Town contends that this Court should look not to Shaw and Verizon Md., but to Armstrong v. Exceptional Child Care Center, Inc., 575 U.S. 320 (2015), and Crimson Galeria Ltd. P'Ship v. Healthy Pharms, Inc., 337 F. Supp. 3d 20 (D. Mass. 2018), two cases in which federal question jurisdiction was determined to be lacking. The Town's analysis of these two cases is surface-level and misses the crucial distinction between them and Shaw, Verizon Md. and Local Union No. 12004, USW. In Armstrong and Crimson Galeria, the plaintiffs sought to enforce federal law. See Armstrong, 575 U.S. at 323-324 (plaintiff habilitation service providers sought to privately enforce Medicaid statute to compel state officials to increase reimbursement rates); Crimson Galeria (plaintiff neighbors sought to enforce federal Controlled Substances Act to enjoin operation of state-approved cannabis dispensary). In contrast, in the Shaw line of cases, the plaintiffs sought to prevent federally preempted state laws from being unlawfully enforced against them. See Shaw, 463 U.S. 85 (employers sued to declare state disability discrimination statute preempted by federal ERISA statute); Verizon Md., 535 U.S. 635 (telecommunications carrier sued to enjoin state order requiring it to pay "reciprocal compensation" as preempted by federal law); Local Union No. 12004, USW, 377 F.3d 64 (union sued to declare state discrimination proceeding involving it as preempted by the federal NLRA).

GURR's claim is governed by the Shaw line of cases because GURR does not attempt to enforce the ICA. Rather, GURR asserts that the ICA preempts and prohibits the Town's attempt

to enforce state eminent domain taking against it. This unmistakable distinction is illustrated by a comparison of Armstrong and Hernández. In Armstrong there was no subject matter jurisdiction for care providers to enforce the Medicaid statute and compel state officials to increase reimbursements to them. In Hernández, there was subject matter jurisdiction over care providers' claim that federal insurance statutes preempted the application of state insurance claim standards against them. GURR's claim here clearly is the latter.

The Town also discusses at length Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). Contrary to the Town's characterization of Seminole Tribe, the Supreme Court did not encounter a scenario similar to the claims asserted by GURR here. Seminole Tribe makes no mention of preemption; it concerned another attempt to enforce federal law. A plaintiff tribe sought to enforce an obligation of the State of Florida to negotiate toward the formation of a gaming compact as required by the Indian Gaming Regulatory Act. Initially, the Court ruled on sovereign immunity grounds that the statutory enforcement provision was unconstitutional. Id., at 73. The Court then addressed the alternative equitable claim asserted by the plaintiff and noted that it "often [has] found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to end a continuing violation of federal law. The situation presented here however, is sufficiently different from that giving rise to the traditional Ex parte Young action so as to preclude the availability of that doctrine." Id. at 73. The situation in Seminole Tribe was sufficiently different because it was clear that Congress intended the IGRA be enforced only by an action brought under a particular section, 25 U.S.C. § 2710(c)(7), which provides a detailed remedial scheme for enforcement through a mediation process and petition to the Secretary of the Interior. The Court however noted the limits of its holding stating that "we do not hold that Congress cannot authorize federal jurisdiction under Ex parte Young

over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the [IGRA].” Id., at 75, n. 17 (emphasis in original).

Unlike the IGRA, the ICA does not contain a detailed remedial enforcement scheme which governs GURR’s claim.[8] Section 10501 is not an enforcement provision at all; it is an express preemption provision. As detailed above, the STB and courts both have jurisdiction to determine if municipal regulation is preempted. A finding of preemption confirms the exclusive jurisdiction of the STB over the areas in which the municipality seeks to regulate, and renders the regulation without effect.

C. The Complete Preemption Doctrine is Inapplicable.

To the extent the Town’s brief addresses ICA precedent rather than general jurisdictional principles, it does so in support of its assertion that if “GURR want[s] to use § 10501 as a shield against the taking, it must do so in state court under G.L. c. 79, § 18.” ECF No. 52, p. 10. This assertion is disingenuous – G.L. c. 79 does not provide for a “shield” against a taking. It provides a mechanism to invalidate a taking after the fact. Forcing GURR to litigate in state court to recover its property at some point in the indefinite future is not a “shield.” It also goes against the express purpose of the ICA to prohibit states and towns from interfering with or delaying rail transportation operations. Requiring GURR to cease development and fight to recover its land is not what Congress intended when it enacted the ICA.

The Town heavily relies on this Court’s unreported decision in Town of Grafton, 2013 U.S. Dist. LEXIS 70384 (Hillman, J.). Although GURR disagrees with some of the reasoning in

[8] At most, the ICA provides only a limited remedial scheme. The only statutory remedy available to GURR before the STB would be to petition for a Declaratory Order under 5 U.S.C. §544(e) and 49 U.S.C. §1321, which the STB “in its sound discretion, may issue.” Green Mountain Railroad Company – Petition for Declaratory Order, STB No. 34052. This is hardly the detailed remedial scheme at issue in Seminole Tribe. Moreover, the Town had this very option available to it but instead chose to avoid the STB and proceed with its lightning-fast attempt to take GURR’s property by eminent domain.

Town of Grafton,[9] these issues are academic because the case simply is not applicable to the matter before the Court. Town of Grafton concerned removal jurisdiction. The town filed suit in state court to enforce its zoning bylaws, and GURR sought to remove the case to federal court. Id. at *1-2. The issue before Judge Hillman was whether the Town's state law claims were removable under the doctrine of "complete preemption." Complete preemption is a jurisdictional doctrine and a narrow exception to the "well-pleaded complaint" rule. Id. at **13-14. It allows state law claims to be removed if they are necessarily federal in character. Id. A requirement for removal under this doctrine is that the state law cause of action have a corollary or substitute cause of action under federal law. Id. at *27. In Town of Grafton, Judge Hillman determined that the ICA did not afford the town a substitute federal claim through which the Town could seek enforcement of its zoning bylaws. Accordingly, the case was remanded to state court. Id. at *50.[10]

Town of Grafton is inapplicable because this is not a removal case which implicates the complete preemption doctrine. There is no state law cause of action to analyze against the ICA because the Town has not brought any state law claims against GURR. Rather the Town decided to ignore ICA preemption and proceed with a non-judicial taking of GURR's property. The only avenue for GURR to prevent the unlawful taking (rather than try to reverse it months or years after the fact) was to file suit to enjoin it as federally preempted. The overwhelming authority cited at pp. 8-12, supra, demonstrates that GURR's claim invokes this Court's jurisdiction.

[9] E.g., the decision cites Green Mountain R.R. Corp. and Town of Milford for the proposition that the STB's jurisdiction is exclusive and that the STB determines whether it has jurisdiction. However, the courts in both of those cases exercised subject matter jurisdiction over ICA preemption claims.

[10] The dispute ultimately ended up at the STB, which determined that the Town's zoning bylaws were preempted. See Padgett v. STB, 804 F.3d 103 (1st Cir. 2015).

IV. The Court has Original Subject Matter Jurisdiction Over GURR's § 1983 Claim.

Count II of plaintiffs' Verified Complaint presents a federal question and invokes this Court's subject matter jurisdiction because it arises under 42 U.S.C. § 1983. See Local Union No. 12004, USW, 377 F.3d at 75 ("Almost by definition, a claim under § 1983 arises under federal law and will support federal-question jurisdiction so long as it does not 'clearly appear[] to be immaterial and made solely for the purpose of obtaining jurisdiction'") (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)).

Count II not only invokes this Court's jurisdiction but also states a claim upon which relief may be granted. GURR seeks relief pursuant to Section 1983 because the Town defendants are interfering with GURR's federal right to participate in interstate commerce by rail free from unreasonable interference by local regulation. VC ¶¶100-101. GURR alleges in its Verified Complaint that these federal rights are secured by the ICA and by the Commerce Clause (art. I, § 8, cl. 3) of the United States Constitution. A Commerce Clause violation may be redressed via a § 1983 claim. See Dennis v. Higgins, 498 U.S. 439, 442 (1991).[11]

GURR's claim that the Town is pursuing a taking of this property to prevent GURR's development of the transloading facility plausibly alleges that the Town violated the Commerce Clause. The Commerce Clause is not only an affirmative grant of authority to Congress to regulate interstate commerce but also a negative, "self-executing limitation on the power of the

[11] Defendants contend that Town of Ayer "precludes enforcement of ICCTA through § 1983." ECF No. 52, p. 12. The First Circuit in Town of Ayer reversed a fee award which had been awarded to a railroad that partially prevailed on a claim pursuant to 28 U.S.C. 1336 to enforce an order of the STB. The Court noted that for procedural reasons, the railroad's preemption claim was not reached, and that "the district court's judgment was entered based on the STB order under § 1336, not under the Commerce Clause." Town of Ayer does not preclude a § 1983 action based on the Commerce Clause. GURR submits that it leaves open ICCTA-related claims other than those brought to enforce an order of the STB, particularly a claim to prevent a wholesale taking intended to prohibit ongoing rail transportation development. Cf. id. at 19 (noting that town had some environmental responsibilities under federal law and should not be punished for an "error in judgment" over its jurisdiction).

[s]tates to enact laws [that place] substantial burdens on [interstate] commerce." Northeast Patients Group v. United Cannabis Patients & Caregivers of Me., Nos. 21-1719, 21-1759, 2022 U.S. App. LEXIS 22848, at *5-6 (1st Cir. Aug. 17, 2022), quoting S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984). That limitation "is referred to as the dormant commerce clause, and it precludes states and municipalities from erecting obstacles to interstate commerce even where Congress has not regulated." BNSF Ry. Co. v. Town of Cicero, No. 21-cv-3072, 2022 U.S. Dist. LEXIS 49575, at *28 (N.D. Ill. Mar. 21, 2022).

In Town of Cicero, the town passed an ordinance that increased a railroad's sewer tax bill by over 1,000%. The ordinance only applied to railroads. The railroad sued and alleged that the ordinance was preempted by Section 10501 of the ICA and that it violated the dormant commerce clause. The district court denied the town's motion to dismiss and allowed the commerce clause claim to proceed. Id. at *33; see also East W. Resort Transp., LLC v. Binz, 494 F. Supp. 2d 1197, 1198 (D. Colo. 2007) (entering summary judgment for railroad on claim that state effort to regulate rail rates violated Commerce Clause); CSX Transp., Inc. v. City of Plymouth, 92 F. Supp. 2d 643, 661-662 (E.D. Mich. 2000) (blocked crossing statute would unreasonably burden interstate commerce and would violate Commerce Clause).

There is a long history of case law holding that unreasonable state and local regulation of interstate rail travel may violate the Commerce Clause. See Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). Defendants generally do not dispute this. They limit their Commerce Clause argument to an assertion that "GURR fails to make any specific factual allegations that connect Hopedale's planned taking to the nation's rail transportation system." ECF No. 52, p. 13. Defendants cite only paragraphs 100-104 of the Verified Complaint – i.e., those paragraphs specifically under the Count II heading – to support this assertion. Only in this context does the

Town's argument make the slightest sense. The body of the Verified Complaint sets forth a litany of facts connecting the taking to the national rail system. To cite only a few:

> VC, ¶ 18: GURR is part of the national rail system that is critical to Massachusetts' economy and the efficient movement of goods by rail throughout North America.[...] GURR fulfills a national and state public purpose by being part of the flow of goods and materials necessary as a critical backbone of the national supply chain…
>
> VC, ¶ 19: …GURR…serve[s] a substantial demand for transloading services for commodities that are shipped to Eastern Massachusetts by rail....
>
> VC, ¶ 21: GURR anticipates continued steady growth in its business, and this projection is consistent with the expectations and estimates of Massachusetts. A 2018 State Rail Plan produced by the Massachusetts Department of Transportation projected that by 2040 the rail system in Massachusetts will need to accommodate approximately 19 million more tons of originating freight per year, 25 million more tons of terminating freight and 34 million more tons of rail freight traffic moving within Massachusetts.
>
> VC, ¶ 33: GURR's anticipated transloading and logistics center […] will have a positive impact on national supply chain issues that have been adversely affecting the local, state and national economy over the past few years.
>
> VC, ¶ 79: 364 West Street[…] provides the opportunity for an integral hub in the supply chain for propane, lumber, sand, stone and gravel, metals, chemicals and other commodities…

These facts sufficiently and plausibly allege that GURR is part of the interstate rail system, that its 364 West Street will help meet the growing national demand for freight transloading, and that the Town's taking of this property will affect interstate commerce. Since this is the only issue raised by the defendants, the motion to dismiss GURR's 1983 claim should be denied.

V. GURR's State Law Claims in Counts III – V Should Not be Dismissed.

Because the Court has original subject matter jurisdiction over Counts I, II and VI, it may exercise supplemental jurisdiction over GURR's state law claim in Counts III – V. See 28 U.S.C. § 1367(a). These claims also survive the Town's Rule 12(b)(6) motion to dismiss.

Count III requests a declaratory judgment that the Town lacks authority to take railroad property because the Massachusetts Legislature reserved that power to itself in G.L. c. 160, § 7. The Town argues that this "grant of discretionary power to the Commonwealth does not

somehow implicitly overrule other entities' eminent domain authority." However eminent domain is "a power that resides in the Legislature and passes to municipalities only by explicit delegation." Lichoulas v. City of Lowell, 78 Mass. App. Ct. 271, 276 (2010) (collecting cases). The Legislature passed authority to Towns pursuant to G.L. c. 40, § 14, which authorizes takings "for any municipal purpose for which the purchase or taking of land, easement or right therein is not otherwise authorized or directed by statute." Since the Legislature reserved the authority to take railroad property to itself by G.L. c. 160, the Town has no authority to take GURR's land. The Town cites no authority to the contrary. Count V similarly states a claim that Legislative, not municipal, authority is required to take GURR's property because railroad use falls within the prior public use doctrine. See Attorney General v. Boston & A. R. Co., 160 Mass. 62, 86-87 (1893) (property of railroad corporations is property devoted to a public use). Finally, Count IV states a claim that the Town has failed to comply with a condition precedent to take GURR's property and therefore lacks authority to complete the taking. See Town of Dedham v. Gobbi, 6 Mass. App. Ct. 883 (1978).

VI. Conclusion.

The Court has subject matter jurisdiction over plaintiffs' Verified Complaint, each count of which states a claim upon which relief may be granted. Defendants' Motion to Dismiss should be denied.

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI, AND MICHAEL MILANOSKI, as Trustees of the ONE HUNDRED FORTY REALTY TRUST,

By Their Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to counsel of record for all parties on this 24th day of August 2022.

/s/ Andrew P. DiCenzo

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAFTON & UPTON RAILROAD COMPANY, JON DELLI PRISCOLI AND MICHAEL R. MILANOSKI, AS TRUSTEES OF ONE HUNDRED FORTY REALTY TRUST, Plaintiffs, v. TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI, Defendants.	Civil Action No. 4:22-cv-40080-ADB Leave to file granted on September 1, 2022

HOPEDALE'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

The Plaintiffs Grafton & Upton Railroad Company *et al.* ("GURR") repeatedly point out that § 10501 of the Interstate Commerce Commission Termination Act ("ICCTA") is a preemption provision. That is true, but it also does not provide GURR the jurisdictional basis it needs to sustain this action. Preemption is not, by itself, a jurisdictional basis or a private right of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (explaining that the Supremacy Clause "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so," and it "certainly does not create a cause of action"). GURR cannot point to any provision in ICCTA by which Congress has conferred jurisdiction on federal courts or created a private right of action for this kind of dispute. In fact, Judge Hillman has already scrutinized § 10501 and found against GURR on both accounts. Equity jurisdiction

under *Ex parte Young*, 209 U.S. 123 (1908), is similarly unavailing to GURR, because ICCTA vests exclusive jurisdiction in the Surface Transportation Board ("STB"), 49 U.S.C. § 10501, and directs GURR to bring its claims through the STB administrative scheme. Without a jurisdictional basis or cause of action, GURR's preemption-based claims in Counts I and VI fail.

In Count II, GURR failed to allege sufficient facts for a Commerce Clause claim. At best, they allege that the taking by the Defendants Town of Hopedale *et al.* ("Hopedale") would affect interstate commerce. That does not satisfy the *Pike* test under the dormant Commerce Clause, which requires that GURR allege the taking would impose a burden on interstate commerce that is "clearly excessive to the putative local benefits." GURR alleged no such thing and so Count II fails under Rule 12(b)(6). Without any federal claims, the Court should decline to exercise supplemental jurisdiction over GURR's state law claims (Counts III-V), and dismiss the Verified Complaint.

I. GURR's preemption-based claims fail under Rules 12(b)(1) and 12(b)(6).

GURR argues that it has established jurisdiction and stated a claim under both § 10501 and this Court's equity powers. Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Opposition"), ECF 53, at 7. Neither is correct. GURR does not cite to any statutory language or case law that § 10501 creates federal question jurisdiction or a cause of action. And GURR's novel application of *Ex parte Young* falls shorts because ICCTA provides a remedial scheme that forecloses equity jurisdiction and a private right of action. GURR's claims fail under Rules 12(b)(1) and 12(b)(6).[1]

[1] Contrary to GURR's claims, Hopedale argued under Rule 12(b)(6) in its Motion. Memorandum in Support of Defendants' Motion to Dismiss, ECF 52, at 9-10 (showing why GURR has no federal claim and must assert preemption affirmatively in the STB or defensively in state court); *id.* at 11 (explaining why equity does not create a claim).

A. GURR cannot establish federal question jurisdiction for its preemption claims.

1. Section 10501 does not provide jurisdiction for preemption claims.

At best, § 10501 is exactly what GURR says it is: a "preemption provision." Opposition at 7. Preemption is merely a "rule of decision" for courts to use "when state and federal law clash." *Armstrong*, 575 U.S. at 324. It does not create subject matter jurisdiction. *Id.* at 324-25. To the contrary, § 10501 vests "exclusive jurisdiction" in the STB.

Judge Hillman analyzed § 10501 and explicitly found that it did not create concurrent jurisdiction in both the STB and federal courts. *Bd. of Selectmen of Town of Grafton v. Grafton & Upton R.R. Co.*, Case No. 12-cv-40164-TSH, 2013 WL 2285913, at *10 n.7 (D. Mass. May 22, 2013). He contrasted § 10501 with § 11704 of ICCTA, which the First Circuit had previously analyzed.[2] Section 11704 provides that a plaintiff can sue in *either* the STB *or* federal courts, therefore providing "concurrent jurisdiction." *Id.* Judge Hillman then found that "logically the contrapositive is equally true: if a section of the ICCTA provides the STB with 'exclusive' jurisdiction, then the district courts' jurisdiction *cannot* be concurrent." *Id.* (emphasis original). This sound logic applies with equal force here. GURR does not even attempt to grapple with this analysis, instead dismissing it as an "unpublished case." Opposition at 2. This characterization shortchanges Judge Hillman, who recognized that the dispute in *Town of Grafton* presented "a unique opportunity to clarify the jurisdictional bounds and preemptive effect under the ICCTA" in the District of Massachusetts. *Id.* at *2.

[2] GURR quotes this First Circuit case, *Pejepscot*, at length. Opposition at 8; *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 202-05 (1st Cir. 2000). That case does not apply here. *Pejepscot* involved a track spur and so the First Circuit referenced legislative history about federalizing "matters relating to spur, industrial, team, switching or side tracks," which were "formerly reserved for State jurisdiction." *Id.* at 204-05. More importantly, the plaintiff established jurisdiction under § 11704, which explicitly provides for federal court jurisdiction, not § 10501. *Id.* at 200.

GURR spends most of its Opposition citing cases that assumed there was jurisdiction over similar claims, but did not actually analyze subject matter jurisdiction. Opposition at 8-12; *see, e.g.*, *Grafton & Upton R.R. Co. v. Town of Milford*, 337 F. Supp. 2d 233, 237-38 (D. Mass. 2004) (discussing the merits of GURR's preemption claim without any discussion of subject matter jurisdiction). GURR argues that courts have an obligation to inquire into jurisdiction and so these cases show GURR's jurisdictional basis is "beyond dispute." Opposition at 11. The First Circuit recently rejected this exact argument. *See Woo v. Spackman*, 988 F.3d 47, 54 (1st Cir. 2021). In *Woo*, the plaintiff argued that it must have established jurisdiction because there were more than 70 similar cases in the District of Massachusetts alone. *Id.* The First Circuit easily rejected this argument because there was "no indication that jurisdiction was contested in any of those cases and, thus, they have no precedential force." *Id.* So too here. Without any jurisdictional analysis, GURR's cited authorities are "of no consequence." *Id.*

2. GURR cannot establish jurisdiction through equity when § 10501 directs disputes to the STB.

ICCTA does not provide jurisdiction and so GURR tries to rely on equity under *Shaw*, *Verizon Maryland*, and *Local Union No. 12004*. Opposition at 12-15. A plaintiff can establish equity jurisdiction by bringing a suit for injunctive relief against "state officers who are violating, or planning to violate, federal law." *Armstrong*, 575 U.S. at 326. However, this doctrine is "the creation of courts of equity" and therefore "subject to express and implied statutory limitations." *Id.* at 327; *Crimson Galeria Ltd. P'Ship v. Healthy Pharms., Inc.*, 337 F. Supp. 3d 20, 33 (D. Mass. 2018) (citing *Armstrong* for the rule that courts of equity cannot disregard statutory and constitutional requirements). There is one key difference between the cases that found jurisdiction and those that did not. Plaintiffs established equity jurisdiction where a federal statute simply preempted state law (*Shaw*, *Verizon*, *Local Union No. 12004*), but

not where Congress also specified how to enforce the preemptive statute (*Armstrong*, *Seminole Tribe*, and *Crimson Galeria*). Unfortunately for GURR, this dispute falls into the latter category.[3]

GURR attempts to distinguish *Armstrong* and *Crimson Galeria* because the plaintiffs in those cases sought to "enforce federal law," whereas the plaintiffs in *Shaw*, *Verizon Maryland*, and *Local Union No. 12004* sought to prevent federally preempted state laws from being enforced. Opposition at 13. This is a semantic distinction without a difference, because the plaintiffs in all five cases wanted federal law to preempt state or local regulation. In *Shaw*, the plaintiff airline wanted ERISA to control what employee benefits it must provide, rather than the more generous requirements of New York law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 92 (1983). In *Verizon Maryland*, the plaintiff telephone operator sought to use the Telecommunications Act to define whether it needed to pay reciprocal compensation to a competitor, despite an order from a state commission. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 640 (2002). In *Local Union No. 12004*, the plaintiff union sought to use the National Labor Relations Act against a state discrimination proceeding. *Local Union No. 12004 v. Massachusetts*, 377 F.3d 64, 71 (1st Cir. 2004). In *Armstrong*, the plaintiff wanted the Medicaid reimbursement rates provided by federal law, which were higher than state law. 575 U.S. at 323-24. And in *Crimson Galeria*, the plaintiff neighbors wanted the Controlled Substances Act to prevent a marijuana dispensary from opening as allowed by Massachusetts law. 337 F. Supp. 3d at 28-29. Each of these plaintiffs sought to enforce the supremacy of

[3] GURR cites a recent decision from the District of Puerto Rico, in which the defendants argued there was no jurisdiction because the federal statute did not preempt the local laws at all. *See Medicaid & Medicare Prods. Ass'n of P.R., Inc. v. Hernandez*, Case No. 20-1760(DRD), 2022 WL 889473, at *5 (D.P.R. Mar. 25, 2022). The court did not engage with an argument similar to Hopedale's (or a statute similar to ICCTA), and so the decision provides GURR little support.

federal law against a state law that allegedly created some harm. Jurisdiction depended not on whether the plaintiffs sought to enforce federal law (which was true in every case), but rather on whether federal law provided a specific enforcement mechanism.

On this point, GURR argues that *Seminole Tribe* is inapplicable because "it was clear that Congress intended the IGRA be enforced only by an action brought under a particular section," which provides a "detailed remedial scheme for enforcement." Opposition at 14-15. GURR further asserts that, unlike the statute in *Seminole Tribe*, "the ICA does not contain a detailed remedial enforcement scheme which governs GURR's claim." Opposition at 15. This argument forgets what the Supreme Court made clear in *Armstrong*: equity jurisdiction can be precluded either explicitly or implicitly. 575 U.S. at 327. Whereas the detailed remedial scheme in *Seminole Tribe* implicitly precluded a claim, § 10501 of ICCTA does so *explicitly*, which makes this an even easier case. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 75-76 (1996).

For that matter, Congress has provided GURR with a detailed remedial scheme to enforce the rights created by ICCTA. *See* 49 C.F.R. §§ 1001-1399. For example, GURR alleges that it had to sue in federal court because it could not receive preliminary relief anywhere else. As an initial matter, Congress decides how its laws may be enforced and the lack of a desired remedy does not somehow create federal jurisdiction. *Armstrong*, 575 U.S. at 331 (rejecting an argument by the dissent that the plaintiff was left "with no resort" and there should therefore be jurisdiction). More importantly, the STB may, "when necessary to prevent irreparable harm, issue an appropriate order." 49 U.S.C. § 1321(b)(4). In other words, the STB can issue preliminary relief. In fact, the STB can, "in its sound discretion," issue a declaratory order "to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). This pre-dispute resolution power exceeds that of federal district courts, which can only decide ripe cases and controversies.

McInnis-Misenor v. Me. Med'l Ctr., 319 F.3d 63, 67 (1st Cir. 2003). GURR cannot meet its burden to establish subject matter jurisdiction and so Counts I and VI fail under Rule 12(b)(1).

B. GURR does not have a cause of action for its preemption-based claims.

GURR lacks a private right of action for Counts I and VI and so those claims fail under Rule 12(b)(6). ICCTA itself does not create a claim for GURR to bring. Without a statutory basis, GURR turns to this Court's equity powers to fashion a preemption-based claim, but GURR cannot circumvent Congress's intent and create claims to enforce a statutory provision that instead directs litigant to an administrative enforcement scheme. Without a cause of action, Counts I and VI fail under Rule 12(b)(6).

GURR again points to the "preemption provision" of ICCTA, but preemption does not create a private right of action. *Armstrong*, 575 U.S 324-25 ("It is equally apparent that the Supremacy Clause is not the source of any federal rights and certainly does not create a cause of action." (quotation and citations omitted)). The text of § 10501 does not provide a federal claim, in contrast to other provisions in ICCTA. *See, e.g.*, 49 U.S.C. § 11704(b) (creating a cause of action for "damages sustained by a person as a result of an act or omission" of a rail carrier in violation of ICCTA); 49 U.S.C. § 11706(a)-(b) (creating a cause of action under ICCTA related to bills of lading). Judge Hillman examined § 10501 for a private right of action as part of his analysis under the complete preemption doctrine. 2013 WL 2285913, at *7. He was unequivocal in finding any claim lacking: "this Court has been unable to formulate a single scenario where § 10501(b) would provide an actionable cause of action giving rise to complete preemption." *Id*. GURR points to no provision of ICCTA that provides a claim, whereas the STB's administrative scheme expressly gives it a right to bring a petition. 49 C.F.R. § 1117.1 ("A party seeking relief not provided for in any other rule may file a petition for such relief.").

Because § 10501 is devoid of a cause of action, GURR must invoke equity to fashion a federal claim, but that doctrine is similarly fruitless. A plaintiff cannot circumvent congressional intent about how to enforce federal law by invoking equity. *Armstrong*, 575 U.S. at 327; *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). Court cannot "supplement" a remedial scheme created by Congress with an equitable one that would render the statutory scheme "superfluous." *Seminole Tribe*, at 74-75. If that were the case, parties would sidestep the statutory enforcement mechanism and do what GURR did here: run into federal court where "more complete and more immediate relief would be available under *Ex parte Young*." *Id.* at 75. When Congress has made its statutory intent clear, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander*, 532 U.S. at 286-87. GURR's claims would run directly contrary to *Seminole Tribe* and *Alexander*.

II. GURR's Commerce Clause claim fails under Rule 12(b)(6).

GURR has failed to plead facts that show a violation of the dormant Commerce Clause[4] and so its § 1983 claim fails under Rule 12(b)(6).[5] GURR argues in its Opposition that it is "part of the interstate rail system, that its 364 West Street [sic] will help met growing national demand for freight transloading, and that the Town's taking of this property will affect interstate

[4] In a footnote, GURR argues that ICCTA creates a claim under § 1983. Opposition at 17 n.11. The First Circuit was crystal clear in rejecting enforcement of ICCTA through § 1983: "nothing suggests that Congress intended to create rights for railroads apart from the Surface Transportation Board statutory scheme." *Boston & Me. Corp. v. Town of Ayer*, 330 F.3d 12, 18 (1st Cir. 2003). GURR flat out ignores this language, but it is nevertheless controlling here.

[5] GURR's pending Motions for Preliminary Injunction do not rely on its Commerce Clause claims but only on its jurisdictionally baseless ICCTA claims. Even if the Commerce Clause claim survives, there is no jurisdiction for a preliminary injunction.

commerce." Opposition at 19. These allegations fail to state a Commerce Clause claim even according to the cases cited by GURR. Those decisions note that it is "not enough that a state or municipal law affects interstate commerce in some way." *BNSF Ry. Co. v. Town of Cicero, Ill.*, Case No. 21-cv-3072, 2022 WL 832661, at *11 (N.D. Ill. Mar. 31, 2022) (emphasis original, citation omitted); *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 659 (E.D. Mich. 2000) ("Some state laws are valid, even though they impact interstate commerce."). GURR must instead plead facts that the taking imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). At best, GURR alleges that its proposed logistics center would have a "positive impact" on "national supply chain issues." That simply fails to state a claim.

GURR focuses its Complaint more on the effect that the taking would have on GURR. *See* Verified Complaint ¶¶ 21-22, 36, 78-80, 100-104. But it is not enough for GURR to allege that it alone will suffer "devastating economic consequences." *See Pharm. Research & Mfrs. of Am. v Concannon*, 249 F.3d 66, 84 (1st Cir. 2001). The focus must be on how the taking affects the interstate commerce system, not one railroad's projections and profits.

Not only do GURR's cases provide legal support to Hopedale, but the facts are dissimilar from those alleged here. In *Town of Cicero*, the defendant town increased sewer rates by 1,000% only for railroads, after which the town argued that the dormant Commerce Clause simply does not exist, that the railway failed to allege the town lacked a rational basis for the sewer rate, and the town was acting as a market participant. 2022 WL 832661, at *1, 11. Likewise in *City of Plymouth*, the railroad challenged a law that limited idling times, which was a regulation that "directly regulates trains on their tracks," thereby implicating a higher standard of review under the Commerce Clause. 92 F. Supp. 2d at 659-60. None of these facts or legal arguments fit

GURR's dispute with Hopedale. GURR's last remaining case, *East-West Resort Transport*, involves motor carriers and stands for the unremarkable proposition that there "is no question that rights under the Commerce Clause may be enforced under § 1983." *East West Resort Transp., LLC v. Binz*, 494 F. Supp. 2d 1197, 1208 (D. Colo. 2007). The best GURR could muster in its Opposition was a series of cases with law that supports Hopedale and facts that differ significantly. GURR failed to plead sufficient facts for a Commerce Clause claim, so Count II should be dismissed under Rule 12(b)(6).

CONCLUSION

GURR's claims for preemption under § 10501 (Counts I and VI) fail under both Rules 12(b)(1) and 12(b)(6). GURR's claim under § 1983 (Count II) fails under Rule 12(b)(6). With these claims dismissed, the Court should decline supplemental jurisdiction over GURR's state law claims (Counts III-V), which are meritless in any event. The Court should dismiss the Verified Complaint in its entirety.

TOWN OF HOPEDALE, THE HOPEDALE SELECT BOARD, BY AND THROUGH ITS MEMBERS, GLENDA HAZARD, BERNARD STOCK, AND BRIAN KEYES, AND THE HOPEDALE CONSERVATION COMMISSION, BY AND THROUGH ITS MEMBERS, BECCA SOLOMON, MARCIA MATTHEWS, AND DAVID GUGLIELMI,

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Dated: September 7, 2022

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system was sent electronically to counsel of record for all parties on this 7th day of September, 2022.

/s/ Sean Grammel
Sean Grammel