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ENTERED
Office of Proceedings
June 23, 2014
Part of
Public Record
June 23, 2014

VIA COURIER

Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

Re: HAMP, Inc. v. CSX Transportation, Inc.

Dear Sir/Madam:

Enclosed for filing in the above referenced matter is an original and ten (10) copies of HAMP, Inc.'s Opposition to CSXT's Petition for Declaratory Order. Please return a filed stamped copy to the Courier.

Thank you for your attention to this matter. If you have any questions, please call our office at 703-790-1911. Thank you for your assistance in this matter.

Sincerely,

REES BROOME, PC

By: 

Patricia A. Rudd
Legal Assistant

Enclosures

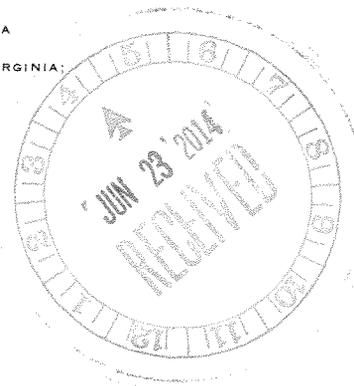
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- ALSO ADMITTED TO PATENT BAR
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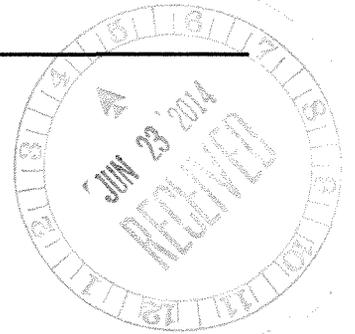
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BEFORE THE SURFACE TRANSPORTATION BOARD

**Finance Docket No. 35832
Case 236145**



**HAMP, INC.'S OPPOSITION TO CSXT'S PETITION
FOR DECLARATORY ORDER**

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BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 35832

HAMP, INC.'S OPPOSITION TO CSXT'S PETITION FOR DECLARATORY ORDER

INTRODUCTION

HAMP, Inc. (“HAMP”) filed a complaint in Prince William County, Virginia Circuit Court (“Complaint”) seeking to recover damages resulting from the failure of CSX Transportation, Inc. (“CSXT”) to maintain its culvert and berm, its unauthorized and tortious use of HAMP’s property for water impoundment and flood detention, its *de facto* creation of a flood zone, and its inverse condemnations and damaging of HAMP’s property (the “Litigation”). The Litigation is limited to state law claims involving land use, police powers of the state, and the damage to HAMP’s property resulting from Tropical Storm Lee. Neither the issues raised in the Litigation nor the relief sought by HAMP involve railroad transportation, operations or regulation.

In response to the complaint, CSXT filed this Petition for Declaratory Order (the “Petition”) essentially claiming that all CSXT actions, whether or not they relate to the operation of the railroad, are preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”) and that HAMP is preempted from pursuing the Litigation in any forum. Notwithstanding CSXT’s assertions, the ICCTA does not allow a railroad to be utterly negligent in its non-railroad activities, injure adjoining landowners, and then hide behind the preemptive force of the ICCTA.

FACTUAL BACKGROUND

HAMP is a mobile home park operating since the 1950's adjacent to the CSXT rail line. Complaint ¶ 8. In 1905, CSXT built a forty foot tall and 150 wide berm ("CSXT Berm") to support its railroad tracks. The CSXT Berm spans Marumsco Creek ("Marumsco Creek" or "Creek"), forming a man-made barrier or dam. Complaint ¶ 12.

CSXT also constructed a culvert through the CSXT Berm to permit the flow of Marumsco Creek (the "Culvert"). CSXT has not maintained the Culvert, resulting in the Culvert filling up with no less than three feet of sediment, in addition to rocks and debris. Complaint ¶ 13. Moreover, CSXT has not widened the Culvert nor has it built additional tunnels through the CSXT Berm to support the natural flow of the Creek or the increased flow which has occurred over the last 109 years. Complaint ¶ 14.

CSXT's actions, or lack thereof, are particularly egregious in light of the fact that the Creek is a major and natural conduit for storm water drainage for a substantial area of Prince William County. Without the natural flow, the water is impeded and impounded by the CSXT Berm at the Culvert, causing the water to back up and accumulate on the property of HAMP. Complaint ¶ 18.

In fact, more than half of the mobile home park sits below a 100 year, or 1% base flood level established only because of the Culvert. However, because of CSXT's actions, frequent flooding has occurred. The 100 year base flood level for HAMP is approximately twenty-eight feet mean sea level. Complaint ¶ 21. Were there no CSXT Berm, and were there a free flowing Creek, or an adequately sized Culvert, the 100 year base flood level would be fifteen feet lower and HAMP would not in be in any flood zone. Complaint ¶ 21.

On September 8 and 9, 2011, Tropical Storm Lee dumped substantial rain on Prince William County causing the Creek to flood (the “Flood”). As a result of the failure to maintain the CSXT Berm and Culvert, runoff accumulated in the Creek, and much of HAMP’s infrastructure, water and sewer pipes, concrete pad sites, as well as sixty-seven mobile homes were ultimately destroyed, leaving many families homeless. Complaint ¶ 33 and ¶ 38.

PROCEDURAL HISTORY

Because of CSXT’s multiple failures in maintaining the Culvert, HAMP instituted the Litigation in the Prince William County Circuit Court alleging Negligence, Trespass, Nuisance, Declaratory Relief, Inverse State Condemnation by Improper Actions and Injunctive Relief. A copy of the Complaint is attached as Exhibit 1.

The claims asserted in the Complaint were purely state law claims arising from CSXT’s violation of its common law duty to maintain the Culvert and clear the debris (Count 1 – Negligence), the trespass of the water upon HAMP’s property (Count 2 – Trespass), the nuisance created by CSXT’s unreasonable use of its land and its creating of a hazardous condition (Count 3 – Trespass), and CSXT’s use of HAMP for water impoundment (Count 5 – Injunction). The actions complained of and the relief sought by HAMP do not involve regulation of the railroad nor any of its operations. In essence, HAMP seeks to hold CSXT to the same standard of care as it would any other landowner in the Commonwealth of Virginia.

On April 21, 2014, CSXT filed a Motion to Stay Action Pending the Decision of the United States Surface Transportation Board on Defendant’s Petition for Declaratory Relief (“Motion to Stay”), a Demurrer seeking dismissal of the claim on various theories, and a Plea in

Bar¹ asserting that HAMP's Complaint is barred by Section 10501(b) of the ICCTA because the relief requested purportedly has the effect of "managing and governing CSXT's railroad operations and rail transportation activities." Plea in Bar at 2. Additionally, in its Plea in Bar, CSXT raises other issues with HAMP's Complaint, including a defense of the statute of repose and the statute of limitations. A copy of the Motion to Stay, Demurrer, and Plea in Bar is attached as Exhibit 2.

Even though CSXT filed its defensive pleadings in April, 2014, it did not initiate this action until June 3, 2014 requesting that the Court issue a declaratory order in this matter. For the reasons set forth below, the Board should deny CSXT's request for a declaratory order. Alternatively, if this Board enters an Order, it should find that the ICCTA does not preempt the causes of action asserted by HAMP.

ARGUMENT

I. This matter is not preempted in full or even in part under the ICCTA

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. *See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984). *See* Mark Lange – Petition for Declaratory Order, STB Finance Docket No. 35037, slip op. at 5 (S.T.B. served on Jan. 28, 2008).

¹ A demurrer tests the legal sufficiency of a pleading and is sustained if the pleading fails to allege a valid cause of action. When considering whether to grant a demurrer, a Court considers as admitted the facts alleged in the pleading and those facts which can be viewed as implied or reasonably inferred from pleading. *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 570-71, 587 S.E.2d 711, 714-15 (2003). A plea in bar is a defensive pleading that reduces litigation to a single issue, which, if proven, is a bar to Plaintiff's recovery. *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580 (2000).

Either the Board or the local courts can decide issues involving the federal preemption provision contained in 49 U.S.C. § 10501(b). CSXT Transportation, Inc., – Petition for Declaratory Order, STB Finance Docket No. 34662, slip op. at 5 (S.T.B. served Mar. 14, 2005) (holding that “The Board has discretion under 5 U.S.C. § 554(e) as to whether to grant a request for a declaratory order, and several of its rulings in declaratory order cases have noted that preemption issues involving section 10501(b) can be decided either by the Board or the courts in the first instance.”)

In this case, HAMP has raised common law property damage claims and CSXT, in turn, raised several state law defenses in its Demurrer and Plea in Bar, including defenses relating to the elements of trespass, the alleged lack of a justiciable controversy, the statute of limitations, and inverse condemnation under the Virginia state constitution.² Given that the Litigation and the defensive pleadings involve state law relating to property damage, and that the local courts have the expertise to address the state law claims, the Board should defer to Prince William County Circuit Court to determine the issues before it, including the issue of preemption. *See Allegheny Valley Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35388 (S.T.B Served Apr. 25, 2011) (denying the issuance of a declaratory order where a dispute involves the application of state property law and is before the state court for determination).

² When a state provides an “adequate procedure” for obtaining just compensation, a property owner cannot claim a violation of the federal provision “until it has used the state procedure and been denied just compensation.” *Williamson Cnty. Regional Planning Comm’n. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196 (1985); *See also Pasquotank Action v. City of Virginia Beach*, 909 F.Supp. 376 (E.D. Va. 1995).

II. Jurisdiction of the Board

However, in the event that the Court issues a declaratory order, the Board should find that the claims raised by HAMP in the Litigation are not preempted by 49 U.S.C. § 10501(b), which provides that the Board has exclusive jurisdiction only over:

(1) transportation by rail carriers, and the remedies provided in [49 USC §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

Under the express terms of 49 U.S.C. § 10501(b), the preemptive force of the ICCTA extends only to the regulation of rail “transportation.” *City of Lincoln v. Lincoln Lumber Co.*, 2006 U.S. Dist. LEXIS 34287 (D. Neb. 2006). Transportation includes, “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both...” 49 U.S.C. § 10102(9).

“Congress narrowly tailored the ICCTA pre-emption provision to displace only ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *Florida E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).³

³ See Carter H. Strickland, *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps*, Jr. 24 Ecology Law Quarterly 1148, 1152 (2007) (“The stakes are particularly high where the displacement of state law is not filled in by any corresponding federal law, thereby leaving a regulatory gap. The risks presented by gaps are significant because state and federal governments have asymmetric ability to provide or to deny remedies to the public. Where

Thus, under 49 U.S.C. § 10501(b), two categories of state regulation are categorically preempted for rail transportation by rail carriers: (1) permitting or preclearance requirements that, by their nature, could be used to deny a railroad the right to conduct rail operations or proceed with activities the Board has authorized and (2) attempts to intrude into matters that are regulated by the Board. Buddy and Holly Hatcher – Petition for Declaratory Order, STB Finance Docket No. 35581 slip op. at 4 (S.T.B. Served September 21, 2012).

In a categorical, or facial, preemption analysis, the Board considers “the act of regulation itself,” rather than the reasonableness of the state or local action. CSXT Transp., Inc., slip op. at 3. In addition to categorical preemption, the doctrine of conflict preemption applies where a private party cannot comply with both state and federal law, or where a state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* The test for ICCTA conflict preemption is whether the enforcement action unreasonably interferes with rail transportation. *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212 (4th Cir. 2009). The determination of whether an action constitutes an unreasonable interference requires a factual assessment of the effect of providing the claimed remedy. *Id.*

III. The ICCTA does not strip the local governments of their police powers

Despite the broad preemptive powers of the ICCTA, state and local regulation of a railroad is wholly permissible where the regulation does not interfere with rail operations.

Emerson v. Kan. City S. Ry. Co., 503 F.3d 1126 (10th Cir. 2007). Both the courts and the Board

state regulations are inadequate to address societal problems, the federal government can enter the field and fill any voids in government oversight ... But where federal regulation are inadequate or nonexistent, states may fill gaps only if not preempted by congressional action that triggers the Supremacy Clause ...”).

have recognized that, despite the language of the ICCTA, localities retain certain police powers to protect public health and safety. *Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34354 (S.T.B. decided Mar. 3, 2004).

Thus, where the locality acts in a field it has traditionally occupied, both the court and the Board assume that the historic police powers of the states are not superseded by federal law. *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001). In *City of West Palm Beach*, the Court held that:

Principles of federalism, including the recognition that the states are independent sovereigns in our federal system, dictate that in the absence of such clarity of intent, Congress cannot be deemed to have significantly changed the federal-state balance. Reliance on the presumption against preemption limits congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

Id.

Where the locality is not attempting to encroach upon federal legislation but rather is exercising its inherent local powers, principles of federalism and state sovereignty make both the courts and the Board reluctant to overturn the state's valid exercise of power. *Id.*

Consequently, as in this matter, localities may exercise traditional police powers over the development of railroad and adjacent property, at least to the extent that the regulations protect public health and safety. To that end, the doctrine of preemption is inapplicable to regulations involving electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements. *Emerson*, 503 F.3d 1126.

IV. **Adjacent landowners can pursue claims and remedies against a railroad when the railroad has caused flooding on an adjoining property**

Several Board and court decisions have recognized the ability of landowners to pursue claims and remedies arising from water damage to their property caused by a railroad, so long as those claims and remedies are not preempted by the ICCTA. Recently, in *Hatcher*, the Hatchers filed a complaint in state court and a petition for declaratory order with the STB arising from the railroad's blockage of a drainage system, which caused surface water to be diverted onto their property. The Hatchers' Complaint included counts for inverse condemnation, trespass, negligence and nuisance under state law. The STB found that the actions were not preempted by the ICCTA because the state court action did not intrude upon the Board's exclusive jurisdiction over rail transportation and only sought to hold the railroad accountable for damage it caused to the Hatchers' property. In that case, the Board held that, "While the claims incidentally relate to railroad tracks and property, the acts complained of by the Hatchers (or failures to act) are alleged "tortious acts...by a landowner [or tenant] who happens to be a railroad company." *Hatcher*, 503 F.3d at 110 (emphasis added).

Similarly, in *Rushing v. Kansas City S. Ry. Co.*, 194 F.Supp.2d 493 (S.D. Miss., 2001), the Court held that the plaintiffs nuisance and negligence claims relating to the erection of an earthen berm by the defendant railroad were not precluded by the ICCTA. The Court further held that the plaintiffs could seek to have defendants remedy the pooling of rainwater on plaintiffs' property. In so holding, the Court stated that the, "design/construction of the berm does not directly relate to the manner in which the Defendant conducts its switching activities. Additionally, the Court finds that an order by the Court directing the Defendant to compensate and correct drainage problems resulting from the construction of the berm would not implicate

the type of economic regulation Congress was attempting to prescribe when it enacted the ICCTA.” *Id.*

Like the plaintiffs in *Hatcher* and *Rushing*, HAMP’s state law claims and remedies do not seek to (1) prevent or unreasonably interfere with railroad operations, (2) regulate railroad transportation or (3) alter or manage the railroad operations. In fact, as detailed in Steve Jencen’s affidavit, attached hereto as Exhibit 3, adding additional culverts to allow the flow of water would have virtually no impact on railroad operations.

Significantly, CSXT fails to provide any credible support for its contention that HAMP seeks to regulate railroad activities. In fact, the affidavit of Edward Sparks, attached as an exhibit to CSXT’s Petition, confirms that railroad operations would not be impacted if CSXT were required to repair and maintain the Culvert. Mr. Sparks confirms that the only impact on CSXT would be monetary, stating, “If the Court were to award this requested relief, it would cause and require CSXT to expend significant financial and other resources that are unnecessary to CSXT’s current and anticipated railroad operations and rail transportation needs.” As discussed below, merely seeking monetary relief from a railroad is not preempted by the ICCTA.

In sum, Mr. Sparks makes no claim, nor can he, that the construction of additional drainage structures would have any impact on railroad transportation. This is in keeping with Mr. Jencen’s statement that adding additional culverts has no impact on rail operations.

V. CSXT’s claim that the damages sought by HAMP have the effect of regulating rail transportation is without merit

In its Petition, CSXT erroneously asserts that the ICCTA preempts any claim where a party seeks monetary damages because payment of a monetary damages award would have an impact on rail transportation. This argument ignores existing case law, including case law upon which CSXT relies.

Generally, courts have held that when a cause of action is preempted, state regulation can be as effectively exerted through an award of damages as through some form of preventive relief. *Maynard v. CSXT Trans., Inc.*, 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004), *Guckenberg v. Wisconsin Cent. Ltd.*, 178 F.Supp.2d 954, 958 (E.D. Wis. 2001); *See Also Friberg v. Kansas City S. Railway Co.*, 267 F.3d 439 (5th. Cir. 2001) (holding that allowing liability to accrue under state common law, where that liability arises from a railroad's economic decisions such as those pertaining to train length, speed or scheduling, is a violation of the ICCTA preemption).

However, this principle applies only when the ICCTA preempts a cause of action. In other words, merely seeking monetary damages from a railroad is not a violation of the ICCTA preemption. In *Irish v. Burlington Northern Santa Fe R. Co.*, 632 F.Supp.2d 871 (W.D. Wis. 2009), the railroad contended that the damages sought by plaintiffs amounted to regulation of rail rates, routes and services. In rejecting this argument, the Court held that the amount of damages is not a reason for preemption. The Court noted that, "[T]he Act would require federal jurisdiction for nearly all claims against railroad companies because the damages would always have the potential to affect rail rates."

Additionally, in *A&W Props.*, the Court held:

If A&W were correct, and payment of damages could somehow allow a claim to escape preemption, then no civil claim would ever be preempted. Litigants would be able to circumvent completely Congress's attempt to deregulate the railroad industry. This cannot be the law. Instead, we agree with courts that have stated that when a state requires a railroad to pay damages to a civil litigant for a claim related to the railroad's operations, that claim is the equivalent of state regulation of the railroad.

A&W Props. v. Kan. City S. Ry., 200 S.W.3d 342 (Tex. App. Dallas 2006),

Accordingly, HAMP can pursue remedies in state court and seek monetary damages so long as the ICCTA does not preempt those claims. Any contrary result would allow CSXT to escape liability for any of its actions, even actions involving contract and intellectual property matters. Such a result would be an abuse of federal preemption.

VI. HAMP's inverse condemnation claim is not preempted by the ICCTA

CSXT erroneously contends that HAMP's inverse condemnation claim is preempted by the ICCTA. As noted in *Mark Lange*, slip op. at 4, if a railroad has the authority under state law to commence condemnation proceedings, the railroad may also be sued for inverse condemnation and such claim is not preempted by the ICCTA. In *Mark Lange*, this Board held:

A corollary to a state's delegation of its condemnation authority, however, is that, just as a state must compensate persons for the taking of private property under the Fifth and Fourteenth Amendments to the United States Constitution, so must a railroad compensate the owner for the land taken when it exercises its eminent domain power. Therefore, an award of just compensation for an alleged taking of the property—assuming such compensation has not already been paid—would not unreasonably interfere with rail operations and would not be preempted.

In Virginia, CSXT has condemnation authority and, accordingly, claims for inverse condemnation are not preempted by the ICCTA.

VII. HAMP's Declaratory Judgment request is not preempted by the ICCTA

In its claim for declaratory judgment, HAMP states that CSXT's Berm is a man-made structure that requires CSXT to register the CSXT Berm and obtain an appropriate permit. In obtaining a permit, CSXT would be required to provide an emergency preparedness plan. The reason for this is simple. If CSXT did not have such a plan in place and were able to operate without taking appropriate safety precautions, lives and property would be threatened, as occurred with Tropical Storm Lee.

Because Virginia is exercising basic police powers in requiring registration and permitting, the requirement is not preempted by the ICCTA. In fact, this Board has held that Congress' intent was to preempt local permitting requirements only with respect to rail operations. Borough of Riverdale – Petition for Declaratory Order, STB Finance Docket No. 33466 (S.T.B. decided Sept. 9, 1999). Regardless of the ICCTA, railroads are required to comply with local codes for electrical, building, fire, and plumbing when building a refueling facility, unless the codes restrict the railroad from conducting its operations or unreasonably burden interstate commerce. *Id.* at 6.

Here, Virginia seeks registration of the CSXT Berm (and not any railroad structure) so that it can ensure that the railroad is taking reasonable precautions with regard to safety and to ensure that life and property are not endangered. As is evident from the results of CSXT's failure to maintain the CSXT Berm and Culvert, the permitting requirement is reasonable and is an essential exercise of police power.

CONCLUSION

For the reasons set forth herein, HAMP requests that the Board decline to issue a declaratory order and leave such a determination to the Prince William County Circuit Court. In the alternative, HAMP requests that the Board issue a declaratory order finding that the Litigation is not federally preempted and for such other relief as the Board deems appropriate.

HAMP, INC
By Counsel

REES BROOME, PC



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid and emailed to:

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this 23rd day of June, 2014.



Mariam W. Tadros

COVER SHEET FOR FILING CIVIL ACTIONS
COMMONWEALTH OF VIRGINIA

Case No. CL14-1561
(CLERK'S OFFICE USE ONLY)*

Prince William County

Circuit Court

HAMP, INC
PLAINTIFF(S)

v./In re:

CSX TRANSPORTATION INC.
DEFENDANT(S)

13721 Jefferson Davis Hwy, Woodbridge, VA 22191

4445 Corporatoin Lane, 2nd Fl, Virginia Beach, VA 23462

I, the undersigned [] plaintiff [] defendant [x] attorney for [x] plaintiff [] defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought).

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|---|---|--|
| <input type="checkbox"/> Accounting | <input type="checkbox"/> Confessed Judgment | <input type="checkbox"/> Judicial Review |
| <input type="checkbox"/> Administrative Appeal | <input type="checkbox"/> Conservator of Peace | <input type="checkbox"/> Landlord/Tenant |
| <input type="checkbox"/> Adoption | <input type="checkbox"/> Construe Will | <input type="checkbox"/> Law Enforcement Petition |
| <input type="checkbox"/> Adoption – Foreign | <input type="checkbox"/> Contract Action | <input type="checkbox"/> Mechanic's Lien |
| <input type="checkbox"/> Adult Protection | <input type="checkbox"/> Contract Specific Performance | <input type="checkbox"/> Medical Malpractice |
| <input type="checkbox"/> Aid and Guidance | <input type="checkbox"/> Correct/Erroneous State/Local Taxes | <input type="checkbox"/> Motor Vehicle Tort |
| <input type="checkbox"/> Annexation | <input type="checkbox"/> Counterclaim – Monetary Damages | <input type="checkbox"/> Name Change |
| <input type="checkbox"/> Annulment | <input type="checkbox"/> Counterclaim – No Monetary Damages | <input type="checkbox"/> Order to Sever |
| <input type="checkbox"/> Annulment – Counterclaim/ Responsive Pleading | <input type="checkbox"/> Cross Claim | <input type="checkbox"/> Partition |
| <input type="checkbox"/> Appeal Decision of ABC Board | <input type="checkbox"/> Custody/Visitation/Support/ Equitable Distribution | <input type="checkbox"/> Petition |
| <input type="checkbox"/> Appeal Decision of Board of Zoning | <input checked="" type="checkbox"/> Declaratory Judgment | <input type="checkbox"/> Product Liability |
| <input type="checkbox"/> Appeal Decision of Comp Board | <input type="checkbox"/> Declare Death | <input type="checkbox"/> Quiet Title |
| <input type="checkbox"/> Appeal Decision of Employment Commission | <input type="checkbox"/> Delinquent Taxes | <input type="checkbox"/> Referendum Elections |
| <input type="checkbox"/> Appeal Decision of Local Government | <input type="checkbox"/> Detinue | <input type="checkbox"/> Reformation of Trust |
| <input type="checkbox"/> Appeal Decision of Marine Resources Commission | <input type="checkbox"/> Divorce | <input type="checkbox"/> Reinstatement of Driving Privileges |
| <input type="checkbox"/> Appeal Decision of Voter Registration | <input type="checkbox"/> Divorce – Counterclaim/ Responsive Pleading | <input type="checkbox"/> Reinstatement (General) |
| <input type="checkbox"/> Appointment of Church Trustee, Substitute Fiduciaries | <input type="checkbox"/> Ejectment | <input type="checkbox"/> Removal |
| <input type="checkbox"/> Approval of Right to be Eligible to Vote | <input type="checkbox"/> Encumber/Sell Real Estate | <input type="checkbox"/> Separate Maintenance |
| <input type="checkbox"/> Asbestos Litigation | <input type="checkbox"/> Enforce Vendor's Lien | <input type="checkbox"/> Separate Maintenance - Counterclaim/Responsive Pleading |
| <input type="checkbox"/> Attachment | <input type="checkbox"/> Escheat | <input type="checkbox"/> Standby Guardian/ Conservator |
| <input type="checkbox"/> Bond Forfeiture Appeal | <input type="checkbox"/> Establish Boundaries | <input type="checkbox"/> Termination of Mineral Rights |
| <input type="checkbox"/> Child Abuse and Neglect – Unfounded Complaint | <input type="checkbox"/> Expunge | <input type="checkbox"/> Unlawful Detainer |
| <input type="checkbox"/> Civil Contempt | <input type="checkbox"/> Forfeiture of U.S. Currency | <input type="checkbox"/> Vehicle Confiscation |
| <input type="checkbox"/> Claim Impleading Third Party Defendant – Monetary Damages | <input type="checkbox"/> Freedom of Information | <input type="checkbox"/> Will Contested |
| <input type="checkbox"/> Claim Impleading Third Party Defendant – No Monetary Damages | <input type="checkbox"/> Garnishment | <input type="checkbox"/> Writ of Certiorari |
| <input type="checkbox"/> Complaint – (Miscellaneous) | <input type="checkbox"/> General Tort Liability (other than motor vehicle) | <input type="checkbox"/> Writ of Habeas Corpus |
| <input type="checkbox"/> Compromise Settlement | <input type="checkbox"/> Grievance Procedures | <input type="checkbox"/> Writ of Mandamus |
| <input type="checkbox"/> Condemnation | <input type="checkbox"/> Guardian/Conservator Appointment | <input type="checkbox"/> Writ of Prohibition |
| | <input type="checkbox"/> Impress/Declare a Trust | <input type="checkbox"/> Writ of Quo Warranto |
| | <input type="checkbox"/> Injunction | <input type="checkbox"/> Wrongful Death |
| | <input type="checkbox"/> Interdiction | <input type="checkbox"/> Other |
| | <input type="checkbox"/> Interrogatory | |
| | <input type="checkbox"/> Intentional Tort | |
| | <input type="checkbox"/> Judgment Lien-Bill to Enforce | |

Damages in the amount of \$ 9,606,000.00 are claimed.

February 27, 2014

DATE

PLAINTIFF

DEFENDANT

ATTORNEY FOR

PLAINTIFF
 DEFENDANT

Courtney B. Harden

PRINT NAME

Rees Broome, PC, 1900 Gallows Road, Ste. 700, Tysons Corner, VA 22182

ADDRESS OF SIGNATOR

703-790-1911

TELEPHONE NUMBER

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EMAIL ADDRESS



VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

HAMP, INC. :
13721 JEFFERSON DAVIS HWY :
Woodbridge, Virginia 22191 :

Plaintiff :

v. :

Case No. CL14- 1561

CSX TRANSPORTATION INC. :
Serve: Corporate Creations Network, Inc. :
4445 Corporation Lane, 2nd Floor :
Virginia Beach, VA 23462 :

Defendant. :

COMPLAINT
(Jury Trial Demanded)

Plaintiff, HAMP, Inc. (“HAMP”), by counsel, files this complaint for multiple causes of action, both legal and equitable and all relating to the use of land, against Defendant, CSX Transportation, Inc. (“CSX”), including negligence, nuisance and trespass by virtue of its failure to maintain and increase the size of the culvert to permit the flow of a natural stream; negligently damaging HAMP’s property and negligently endangering the people and the personal property located on HAMP’s property; taking or damaging property under Article I, Section 11 of the Virginia Constitution without compensation; inverse condemnation of property; nuisances, trespasses, and negligence in connection with the actions in the taking and damaging of the property of HAMP.

HAMP seeks monetary damages and permanent injunctive relief.

I. PARTIES

1. HAMP is a Virginia corporation, authorized to transact business in Virginia.

2. HAMP is the owner of 10.37 acres of land at 13721 Jefferson Davis Highway, Woodbridge, Virginia 22191, GPIN number of 8392-93-4437, also known as Holly Acres Mobile Home Park (the “Property” or “Holly Acres”), operating as a mobile home rental park with approximately one hundred and six (106) rental pad sites.

3. Henry Ridge (“Ridge”) is the owner and sole shareholder of HAMP.

4. CSX is a common carrier railroad company which provides both passenger and freight services and owns a corridor of property adjacent to HAMP’s property and is actively running trains on that corridor.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction to determine the issues in this matter pursuant to Article I, Section 11 of the Virginia Constitution, Va. Code Ann. §§ 8.01-184 (declaratory relief), 8.01-186 (further relief necessary), 8.01-187 (valuation for taking and damaging under inverse condemnation claim), 8.01-189 (injunctive relief), and 8.01-190 (costs).

6. Venue is proper in this judicial circuit pursuant to Va. Code Ann. § 8.01-261.

7. CSX is a Virginia corporation with its principal office located at 500 Water Street, Jacksonville, FL. CSX is a common carrier railroad which transports both commercial passengers and freight in Virginia. CSX is a public service company pursuant to Va. Code Ann. § 56-1 and has the power of eminent domain pursuant to Va. Code Ann. §§ 56-49 and 56-347.

III. FACTUAL EVENTS COMMON TO ALL COUNTS

A. The Property

8. HAMP and its predecessors have owned and operated Holly Acres in the current B-1 zone as a legal non-conforming mobile home park since the 1950s. The County has continually certified the legal non-conforming status of Holly Acres to the present.

9. HAMP rents “pad sites” to owners of mobile homes. The pad sites contain utilities. The mobile homes are normally anchored, but not permanently fixed to the pad sites. The mobile homes are considered personal property in Virginia.
10. Holly Acres abuts to the south Marumsco Creek (the “Creek”), owned and controlled by Prince William County.
11. In or about 1905 or earlier, CSX (or its predecessors) built a forty (40) foot tall, and approximately 150 foot wide berm (“CSX Berm”) to support railroad tracks. CSX actively runs trains on the rails and right of way over the CSX Berm.
12. In or about the same timeframe as the construction of the CSX Berm in 1905, CSX also constructed a culvert through the CSX Berm to permit the flow of Marumsco Creek (“Culvert”).
13. Neither the design nor the construction of the CSX Berm or the Culvert relate to the manner in which CSX conducts its railroad activities. Any alterations of the Culvert to permit more flow has no effect on the manner in which CSX conducts its railroad activities.
14. The CSX Berm spans Marumsco Creek, forming a man-made barrier or dam, and “impounding structure” pursuant to Va. Code Ann. § 10.1-604, to the natural flow of the Creek. Upon information and belief, the Culvert was originally constructed to approximately fifteen (15) feet in arched height from the base of the stream (at approximately eight (8) to ten (10) feet mean sea level (“MSL”), approximately fifteen (15) feet wide, and it cut through the entire one hundred (100) foot width of the CSX Berm. The downstream side of the CSX Berm flows eastwardly through wetlands for approximately a mile until it reaches the Potomac River.
15. CSX has not maintained the Culvert and it has filled up with no less than three (3) feet of sediment, in addition to rocks and debris. The obvious effect of the sediment is to reduce the

volume of flow through the Culvert during heavy rainstorms to create a dam and impounding structure.

16. In addition to the CSX failure to maintain the Culvert, CSX has not widened the Culvert or built additional tunnels through the CSX Berm to support either the natural flow of the Creek or the increased flow which has occurred over the last 109 years.

17. More flooding has occurred as a result of natural, climactic, or man-made increases of water to the Creek. Since 1905, development near and adjacent to the Creek has occurred, which substantially, dramatically, and critically increased the volumes of water flowing down the watershed through the Creek.

18. Frequent, regularly recurring and continuing flooding of the Creek, directly as a result of the Culvert, has affected Holly Acres, including flooding in 1976, 1985, 1996, 2001, 2006 and 2011.

19. CSX has known about the flooding for years, and has taken no action to widen or improve the Culvert. In fact, CSX has refused even to contribute to the improvement of the Culvert.

20. The Creek is a major and natural conduit for storm water drainage for a substantial area of Prince William County and both undeveloped and developed areas of Woodbridge. The Creek carries water to the low-lying wetlands of the Potomac River. Without the free natural flow, the water is impeded and impounded by the CSX Berm at the Culvert, causing the water to back up and accumulate on the property of Holly Acres. Because of the size, shape, and lack of maintenance of the Culvert, debris accumulates in the Culvert, frequently impeding or blocking it.

21. The flooding of Holly Acres is a foreseeable result of CSX's failure to maintain the Culvert and failure to permit the natural water flow of the Creek to pass through the CSX Berm.

22. The Federal Emergency Management Administration ("FEMA"), which charts flood plains and establishes flood zones and flood maps, has recognized through its flood maps that the Culvert prevents the free flow of water by having established a flood plain approximately 15 feet above the flood level of the Creek (at 28 feet MSL), whereas without the CSX Berm and the Culvert, the flood level would be the same as the downstream side of the Culvert: approximately 13 feet MSL. The FEMA flood map relevant to Holly Acres was published in 1995, decades after HAMP's purchase of Holly Acres.

23. More than half of Holly Acres sits below a 100 year, or 1% "base flood" level established only because of the Culvert — meaning that the high level of flooding should occur only once in 100 years, or has a 1% chance of occurring in any one year. However, frequent flooding has occurred. The "100 year base flood level" for Holly Acres is approximately 28 feet MSL, and the level and frequency of flooding results only because of the inadequate Culvert, and the failure of CSX to maintain and improve the Culvert.

24. The height and conditions of the 100 year base flood level affecting Holly Acres exist only because the CSX Berm without an adequate Culvert acts as a dam and impounding structure during flooding. Were there no CSX Berm, and were there a free flowing Creek without trash and debris, or an adequately sized Culvert, the 100 year base flood level would be 15 feet lower. Holly Acres would not be in any flood zone and Holly Acres would not be continually damaged.

25. Although living below a 100 year base flood level is not unusual in Virginia or the United States, the imposition by CSX of a flood zone on another's property substantially reduces the utility and its value of the property.

26. Estimated costs for fixing the problems of the Creek and the Culvert range anywhere from \$2,000,000 to \$15,000,000 and may include improvements to and reconstruction of the Culvert, the Creek, drainage in and around the Creek, slopes, and bridges. The relocation of the CSX Berm would not be necessary, nor would the repairs relate in any manner to railroad activities.

B. CSX Railroad

28. CSX is authorized to transport passengers and property as a common carrier.

29. CSX is a public service company pursuant to Va. Code Ann. § 56-1 and has the power of eminent domain pursuant to Va. Code Ann. §§ 56-49 and 56-347.

30. CSX has not properly maintained the Culvert to accommodate the natural flow of the Creek or the 109 years of development around the Creek. As a result of its failure to maintain and manage the flow of the Creek, CSX has created a dam or impounding structure at the CSX Berm, and has adversely affected the use and value of the Holly Acres property, as well as the safety of the users of the property upstream and downstream.

31. CSX is or should be aware of the dam and impounding structure it has created. Upon information and belief, CSX has remediated other dam or impounding structure situations in the Commonwealth of Virginia, as well as other states, which required similar repairs.

32. CSX is using HAMP's property as an impoundment area and flood control for the dam and CSX Berm.

33. CSX's use of the dam and CSX Berm is for a public purpose.

34. CSX has willfully and wantonly ignored the dam and impounding structure it has created.

C. The Flood

35. On September 8 and 9, 2011, Tropical Storm Lee dumped substantial rain in Prince William County, Virginia, particularly the Woodbridge area, causing the Creek to flood (“Flood”). As a result, runoff accumulated in the Creek and flowed toward the CSX Berm.

36. CSX had actual as well as constructive knowledge of the condition of the Creek and the Culvert, prior to the Flood.

37. Approximately 300 men, women and children occupied mobile homes below the “100 year base flood level” of Holly Acres prior to the Flood.

38. Because of the natural flooding, the upstream development, impervious surfaces, trash and debris, and CSX’s intentional refusal and negligent failure to maintain the Culvert, or to increase the size of the Culvert to protect safety, flooding occurred in and around Holly Acres. In the process of downstream flow, cars and a trailer were carried into the Creek and jammed the Culvert, causing water to rise like a sink. The Flood was a “100 year” or “1%” flood.

39. The Flood waters at Holly Acres rose approximately 16 feet to an elevation of 28 feet MSL. The Flood waters made contact with many of the mobile homes in Holly Acres, and lifted a number of the very low elevation mobile homes off their pad sites and damaged or destroyed them.

40. As a result of the Flood, much of HAMP’s infrastructure water and sewer pipes, concrete pad sites as well as approximately 67 mobile homes were damaged or substantially damaged. The costs of demolition and clean up were substantial.

41. Because HAMP’s legal use of the Property as a mobile home park was a grandfathered, non-conforming use under Prince William County and Virginia ordinances and regulations, HAMP has been unable to replace the mobile home units without meeting county, state, and

federal requirements, including FEMA requirements such as a “hydrology and hydraulics” (“H&H”) study. H&H studies normally require 6-12 months to complete. Once an H&H study is completed, HAMP must submit an application to FEMA to demonstrate that its replacement of the mobile homes will not impact the base flood elevation.

42. HAMP will not be able to use at least 50 lots until sometime in 2015 at the earliest.

43. HAMP has lost profits from at least 67 lots from September 9, 2011 until the present.

44. HAMP has incurred costs associated with the damage in the amount of \$1,606,000 million.

45. An award of damages for compensation and correction of the drainage problems resulting from the construction and lack of maintenance of the CSX Berm and Culvert will not implicate the type of economic regulation Congress was attempting to prescribe when it enacted the Interstate Commerce Commission Termination Act.

IV. CAUSES OF ACTION

COUNT 1. **NEGLIGENCE**

46. The foregoing paragraphs are incorporated herein by reference.

47. CSX has a common law duty to maintain and to adjust to the natural flow of the Creek through the Culvert in a reasonable manner so as to not to increase or decrease the flow of the Creek or to cause flooding and damage to upstream or downstream properties.

48. CSX has a duty to register and obtain a general permit for an impounding structure under Va. Code Ann. § 10.1-605 *et seq.*

49. CSX has not maintained the Culvert in a reasonable manner nor has it requested or obtained a permit for an impounding structure.

50. CSX is negligent because it has not cleaned the sediment and debris from the “floor” of the Culvert. The silt and debris has built up almost three (3) feet.

51. CSX is negligent because it has not increased the size of the Culvert in 109 years. Nor has CSX made any effort to account for or accommodate the increased flow of water in the Creek over the last 109 years.

52. CSX is aware that the amount of water in the Creek has increased and that the speed at which the water flows has increased.

53. CSX is aware that the Culvert frequently becomes clogged and has caused multiple instances of flooding and damage to upstream properties including, but not limited to HAMP’s Property.

54. The silt and debris clogging the Culvert is an open and obvious condition and it is readily apparent that the result of continued non-maintenance will worsen the frequency of the flooding.

55. The increased volume and flow of water is an open and obvious condition and it is readily apparent that the result of CSX’s continued refusal to increase the size of the Culvert will worsen the frequency of the flooding.

56. CSX is aware that when the Culvert becomes clogged, the flood waters rise so quickly as to endanger and damage the lives and safety of the residents in the mobile homes on HAMP’s Property, the residents’ personal property, and HAMP’s Property.

57. CSX’s actions in failing to maintain the Culvert and failing to increase the size the Culvert have breached its duty to HAMP to protect the public safety and breached its duty to HAMP not to block the natural flow of water.

58. CSX's actions are and have been negligent. In fact, the negligence of CSX has been so consistent and willful and reckless that it amounts to gross negligence justifying punitive damages.

59. CSX's negligent actions and inactions directly and proximately have caused water to back up and flood HAMP's Property, particularly on September 8 and 9, 2011.

60. CSX's negligent actions and inactions directly and proximately caused damage to HAMP's Property and to the life and safety of the residents.

61. As a result of CSX's negligent actions, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 in damages to repair and replace the infrastructure; damages to return the Property to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

62. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 for the cost to repair and replace the infrastructure that was destroyed and to put the Property back to its legal condition prior to the Flood, and \$8,000,000 for damage to the property as a result of CSX's negligence. Additionally, HAMP is claiming punitive damages in the amount of \$350,000 for CSX's willful and wanton negligence and disregard for the rights of the public, public safety, HAMP's Property, and the families living in the Holly Acres Mobile Home Park.

COUNT 2.
TRESPASS

63. The foregoing paragraphs are incorporated herein by reference.

64. CSX, by its failure to maintain the Culvert, and by failing to expand it, is blocking the natural flow of the Creek with the CSX Berm.

65. CSX has a common law duty to maintain the flow of the Creek through the Culvert in a reasonable manner so as to not cause flooding and damage to upstream or downstream properties.

66. CSX has not maintained the Culvert in a reasonable manner, nor has it properly registered or obtained a general permit.

67. CSX's actions in failing to maintain the Culvert and failing to increase the size the Culvert has directly caused water to back up and flood HAMP's Property.

68. CSX's actions and inactions have caused a trespass to occur on HAMP's Property and interfered with HAMP's exclusive use and enjoyment of the land.

69. HAMP's Property has been damaged as a result of CSX's actions and inactions.

70. As a result of CSX's negligent actions and inactions, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 damages to repair and replace the infrastructure and to put the Property back to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

71. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 for the cost to repair and replace the infrastructure that was destroyed and to return the Property to its legal condition prior to the Flood, and \$8,000,000 in damage to the property as a result of CSX's trespass. Additionally, HAMP is claiming punitive damages in the amount of

\$350,000 for CSX's willful and wanton trespass and disregard for the rights of the public, public safety, HAMP's Property, and the families living in the Holly Acres Mobile Home Park.

COUNT 3.
NUISANCE

77. The foregoing paragraphs are incorporated herein by reference.

78. The essence of nuisance under Virginia law is "Sic utere tuo ut alienum non laedas," or "Use your own property not to damage another's."

79. By the actions of CSX, it has used its Culvert and its CSX Berm proximately to damage the adjacent property of HAMP by increasing the flood level of the property, by periodically causing flooding on the property of HAMP, and by causing the flooding of the property of HAMP on September 8 and 9, 2011.

80. CSX's use of its own land is unreasonable and has created hazardous conditions which has inhibited HAMP's use and enjoyment of its land.

81. As a result, CSX has created a nuisance for which damages and remedies should flow as swiftly as the water in the Creek.

82. As a result of CSX's unreasonable actions and inactions, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 in damages to repair and replace the infrastructure and to return the Property to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

83. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 for the cost to repair and replace the infrastructure that was destroyed and to put the Property back to its legal condition prior to the Flood, and \$8,000,000 in for damage to the

property as a result of CSX's nuisance. Additionally, HAMP is claiming punitive damages in the amount of \$350,000 for CSX's willful and wanton negligence in causing the nuisance and absolute disregard for the rights of the public, public safety, HAMP's Property, and the families living in the Holly Acres Mobile Home Park.

COUNT 4.
DECLARATORY JUDGMENT VA CODE §§ 8.01-184 AND 187
DAM AND IMPOUNDING STRUCTURE

84. The foregoing paragraphs are incorporated herein by reference.

85. Va. Code Ann. § 10.1-604 provides that an "Impounding structure" means a man-made structure, whether a dam across a watercourse or other structure outside a watercourse, used ... to retain ... waters ..."

86. Further, Va. Code Ann. § 10.1-604 provides that "The term includes: (i) all dams that are twenty-five feet or greater in height and that create an impoundment capacity of fifteen acre-feet or greater ..."

87. Va. Code Ann. § 10.1-604 defines "Owner" as the "owner of the land on which a dam is situated ... and any person or entity agreeing to maintain a dam."

88. The CSX Berm is a man-made structure over twenty-five feet in height used in times of flooding to retain waters, and creates during flooding, including the Flood, an impoundment capacity of more than fifteen acre-feet of water.

89. CSX is the owner of the CSX Berm, which is a dam under the statutory definition.

90. Va. Code Ann. § 10.1-605.3 and the implementing regulations for Va. Code Ann. § 10.1-605 require that the owner register the dam, and obtain a permit for its operation.

91. CSX is required under Va. Code Ann. § 10.1-605.3(B)(3) and its implementing regulations, including but not limited to 4 VAC 50-20-30, to provide, among other things, an emergency preparedness plan.

92. Further, CSX is required to identify its dam as a Class I or Class II dam under 4 VAC 50-20-50, and under 4 VAC 50-20-120 (“Operation and maintenance certificates for existing impounding structure”) to file an application with the Virginia Soil and Water Conservation Board providing, among other things, the description of the impounding structure, the design, construction, repairs, inspections, observations of the conditions of the dam, the reservoir, and upstream and downstream areas, and recommendations for remedial work.

93. Pursuant to 4 VAC 50-20-220(A), “No owner shall have the right to maintain an impounding structure which unreasonably threatens the life or property of another person.”

94. CSX has failed to meet any of the requirements enumerated above, and has maintained an impounding structure which unreasonably has threatened the lives of the residents of Holly Acres and has damaged, and continues to threaten to damage the property of Holly Acres, as well others living upstream of the CSX Berm.

95. An actual controversy exists between HAMP and CSX regarding the interpretation of the Flood Protection and Dam Safety Act, Va. Code Ann. Ann. § 10.1-604 *et. seq.* and its applicability to the CSX Berm.

96. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands that this Court determine whether the CSX Berm is a dam or impounding structure subject to the Flood Protection and Dam Safety Act; determine whether CSX is legally required to register the CSX Berm with the Soil and Water Conservation Board;

and determine whether CSX is legally required to apply for the appropriate permits and apply for the appropriate approvals for dam and flood control.

COUNT 5.
INVERSE STATE CONDEMNATION
BY IMPROPER ACTIONS

97. The foregoing paragraphs are incorporated herein by reference.

98. Va. Code Ann. § 56-347 provides in pertinent part:

In addition to the powers conferred by Title 13.1, every corporation of this Commonwealth organized to conduct a railroad business shall have the power to acquire by the exercise of the right of eminent domain any lands or estates or interests therein, sand, earth, gravel, water or other material, structures, rights-of-way, easements or other interests in lands, including lands under water and riparian rights, of any person, which are deemed necessary for the purposes of construction, reconstruction, alteration, straightening, relocation, operation, maintenance, improvement or repair of its lines, facilities or works including depots, stations, shops, yards, industrial spurs, switches and sidetracks, terminals or additional tracks or facilities, and for all other necessary railroad purposes and purposes incidental thereto, for its use in serving the public, including permanent, temporary, continuous, periodical or future use ...

99. Article I, Section 11 of the Virginia Constitution provides:

[T]he General Assembly shall not pass ... any law whereby private property shall be taken or damaged for public uses, without just compensation, the term “public uses” to be defined by the General Assembly;

99. Va. Code Ann. § 1-219.1 (A) provides in pertinent part:

A. The right to private property being a fundamental right, the General Assembly shall not pass any law whereby private property shall be taken or damaged for public uses without just compensation. The term “public uses” mentioned in Article I, Section 11 ... is hereby defined as to embrace only the acquisition of property where: (i) the property is taken for ... the public ... ; (ii) the property is taken for construction, maintenance, or operation of public facilities ... ; (iii) the property is taken for ... functioning of any ... railroad; ... or (vi) the property taken is in a ... conservation area ...

101. Further, CSX's failure to maintain or expand the Culvert have resulted in the backup of flood waters onto the Holly Acres Property and have constituted "physical invasions."

102. CSX's creation and use of the Berm, including the continuing use of Holly Acres for water impoundment, is the equivalent of a "public use", a public facility, a functioning part of a railroad, and the de facto creation of a conservation area.

103. As a natural and intended result, CSX is using HAMP's property as an impoundment area, flood plain or flood control so that it does not need to increase the size of the Culvert or expand the flow through the CSX Berm, or to allow the Creek to flow in its natural course.

104. CSX has not provided any compensation to HAMP for the taking or damaging of Holly Acres.

105. Due to CSX's failure to maintain the Culvert, or because of its intentional desire to use the property of HAMP as a flood control device and to enhance for its public use and purposes defined under Va. Code Ann. § 1-219.1, it has taken or damaged the property of HAMP without just compensation and has violated Article I, Section 11 of the Virginia Constitution.

106. As a result of CSX's taking and damaging of HAMP's Property, HAMP has lost \$43,000 per month in damages for the loss of the 67 units; \$1,606,000 for damages to repair and replace the infrastructure and to put the Property back to its prior legal position and legal entitlements; and \$8,000,000 in damages to the value of the Property.

107. The relief requested will not place any burden on interstate commerce.

WHEREFORE, HAMP demands \$43,000 per month for the ongoing damages it suffers for the loss of use of the 67 mobile home units (from September 8, 2011 to date of judgment), \$1,606,000 the cost to repair and replace the infrastructure that was destroyed and to return the

Property to its legal condition prior to the Flood, and \$8,000,000 in for damage to the property as a result of CSX's taking and damaging.

COUNT 6.
INJUNCTION

112. The foregoing paragraphs are incorporated herein by reference.

113. CSX has a common law duty to maintain the flow of the Creek through the Culvert in such a manner as not to increase or decrease the flow of the Creek or to cause flooding and damage to upstream properties.

114. CSX is blocking the natural flow of the Creek with the CSX Berm.

115. CSX has not increased the size of the Culvert in 109 years. Nor has CSX made any effort to account for or accommodate the increased flow of water in the Creek over the last 109 years.

116. CSX is aware that the amount of water in the Creek has increased and that the speed at which the water flow has increased.

117. CSX is aware that the Culvert has become clogged and caused multiple instances of flooding and damage to upstream properties including, but not limited to HAMP's Property.

118. Further, CSX has failed to comply with its requirements, as enumerated in Count IV above, to register the CSX Berm as a dam or impounding structure, to provide the necessary information for certification, plans and other requirements, or to make changes as necessary, or to obtain a permit.

119. HAMP has no adequate remedy at law to force CSX to maintain the Culvert and increase the size of the Culvert or some other measure to alleviate the continued flooding of HAMP's Property.

120. HAMP requests an injunction to force CSX to (1) to expand and maintain the Culvert and take whatever measures are necessary to prohibit further flooding of the HAMP Property, (2)

register the CSX Berm as a dam or impounding structure, as provided above, and (3) comply with dam safety requirements of Virginia.

121. The relief requested will not place any burden on interstate commerce.

V. REMEDIAL REQUESTS

HAMP respectfully requests pursuant to the authority cited above, that in each appropriate Court, this Honorable Court:

1. Declare that CSX has a duty to maintain the Culvert in a reasonable fashion.
2. Declare that CSX has a duty to increase the size of the Culvert or flow through the Culvert to maintain a natural flow of water and so as not to dam the Creek with the CSX Berm.
3. Declare that CSX must register its CSX Berm as a dam or impounding structure with all appropriate agencies of the Commonwealth, obtain a permit, and file all plans, and make all inspections and reports.
4. Declare that HAMP has been temporarily damaged as a result of the actions by CSX of \$43,000 per month;
5. Declare that the CSX has caused a trespass on HAMP's Property.
6. Declare that the CSX Culvert, in its current condition, is a nuisance.
7. Declare that CSX is negligent in its failure to maintain the Culvert and failure to repair, replace or retrofit the Culvert so as not to create a damming or impounding effect.
8. Declare that the CSX has taken or damaged Holly Acres, partially or wholly, under Article I, Section 11 of the Virginia Constitution.
9. Declare that HAMP has been damaged in the amount of \$8 million for the taking and damaging of Holly Acres;

10. Order temporary and permanent injunctive and equitable relief, under any and all applicable Virginia law, to require CSX to maintain and fix the Culvert so it does not have a damming effect, and to register the CSX Berm as a dam or impounding structure;
11. Award to HAMP damages for the taking and the damaging of Holly Acres in the amount of \$8 million;
12. Award appropriate civil fines and penalties under the Flood Protection and Dam Safety Act.
13. Award the amount of \$43,000.00 for each month of the taking and damaging of the Property, and award punitive damages as appropriate for the Counts, I, II and III;
14. Grant such other relief, both legal and equitable, as is appropriate.

VII. DEMAND FOR JURY TRIAL

Pursuant to Va. Sup. Ct. R. 3:21(c), Plaintiff demands a jury for the determination of all issues in dispute in this matter, including factual disputes, determinations under Va. Code Ann. § 8.01-187, and such facts consistent with an advisory jury under Va. Code Ann. § 8.01- 336(E).

HAMP, INC
By Counsel


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April 21, 2014

VIA HAND-DELIVERY

Michele B. McQuigg, Clerk of Court
Circuit Court of Prince William County
9311 Lee Avenue
Manassas, VA 20110

Re: ***HAMP, Inc. v. CSX Transportation, Inc.***
Case No.: CL14-1561

Dear Ms. McQuigg:

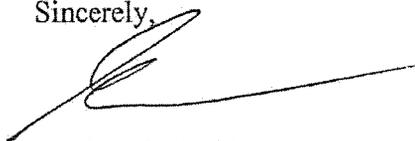
Enclosed please find the an original and one copy of the following documents for filing on behalf of the defendant, CSX Transportation, Inc. in the above-captioned matter:

1. Motion To Stay Action
2. Demurrer
3. Plea In Bar

Kindly date stamp the additional copies for return to our office by the waiting courier. Should you have any questions, please feel free to contact me.

Thank you for your cooperation.

Sincerely,



Stephen P. Mulligan

SPM/sji
Enclosures

cc: Mark A. Moorstein



VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

<hr/>)	
HAMP, INC.)	
)	
	<i>Plaintiff,</i>)	
)	Case No. CL14-1561
v.)	
)	
CSX TRANSPORTATION, INC.)	
)	
	<i>Defendant.</i>)	
<hr/>)	

**MOTION TO STAY ACTION PENDING THE DECISION
OF THE UNITED STATES SURFACE TRANSPORTATION BOARD
ON DEFENDANT’S PETITION FOR DECLARATORY ORDER**

Defendant CSX Transportation, Inc. (“CSXT”), by counsel and pursuant to the Rules of the Supreme Court of Virginia, moves this Court to stay this litigation pending a decision by the United States Surface Transportation Board (“STB”) on a petition for declaratory order concerning the preemption of Plaintiff’s state law claims pursuant to Section 10501(b) of the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (“ICCTA”). The grounds for this Motion are set forth below and will be included in the accompanying brief to be filed pursuant to Va. Sup. Ct. R. 4:15(c).

GROUND FOR MOTION

1. On February 27, 2014, Plaintiff HAMP, Inc. (also known as the Holly Acres Mobile Home Park) filed its Complaint against CSXT commencing this action.

2. The Complaint alleges CSXT’s “failure to maintain and increase the size of [its] culvert” caused flooding of Plaintiff’s property during the Tropical Storm Lee storm event and resultant “100 year” flood. *See* Compl. at p. 1 (introductory paragraph), ¶¶ 35, 38. The railroad

culvert at issue runs through a berm supporting CSXT's operating mainline railroad tracks and right-of-way, which pass through Prince William County. Compl. ¶¶ 11-12. Plaintiff concedes that CSXT "actively runs trains on the rails and right of way over" the berm and culvert. *Id.* at ¶ 11.

3. In its prayer for relief, Plaintiff requests that the Court order CSXT to "increase the size of the Culvert" and "maintain the Culvert in a reasonable fashion." Compl. ¶ V.1-2. Plaintiff further seeks an affirmative injunction that would "force" CSXT to "expand and maintain the culvert" and "take whatever measures are necessary to prohibit further flooding of the HAMP Property." *Id.* at ¶ 120.

4. CSXT is a "rail carrier" as defined in the Interstate Commerce Commission Termination Act ("ICCTA"). *See* 49 U.S.C. §10102(5).

5. Among other things, ICCTA confers jurisdiction over rail transportation on the STB, and it expressly preempts state law with respect to the "regulation of rail transportation." *See* 49 U.S.C. § 10501(b)(1).

6. The term "rail transportation" includes rail infrastructure beneath and supporting the railroad tracks, including culverts, bridges, and berms. *See A&W Props., Inc. v. Kan. City S. Ry.*, 200 S.W.3d 342, 351 (Tex. App. 2006) (ICCTA preempted plaintiffs' state law tort claims for damages and injunctive relief seeking to require railroad to widen culverts); *see also Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842-44 (E.D. Ky. 2004), *aff'd*, No. 04-5448 (6th Cir. Feb. 7, 2005) (ICCTA preempted plaintiffs' state law tort claims aimed at railroad's alleged failure to maintain drainage underneath tracks, which purportedly caused flooding on Plaintiff's property).¹

¹ *See also, e.g., Pere Marquette Hotel Partners v. United States*, No. 09-5921, 2010 U.S. Dist. LEXIS 36413, at *3, 12-13 (E.D. La. Mar. 9, 2010) (granting motion to dismiss based on ICCTA preemption); *City of Cayce v. Norfolk S.*

7. Similarly, “rail transportation” broadly includes a rail carrier’s maintenance activities on its tracks and railroad right-of-way. *See James Riffin – Pet. for Decl. Order*, STB Fin. Dkt. No. 34997, 2008 STB LEXIS 242, at *5-6, 14 (STB May 2, 2008).

8. In seeking to directly regulate CSXT’s railroad activities and demanding that CSXT increase the size and/or change the design of its culvert, Plaintiff asserts state law claims, which are expressly preempted by Section 10501(b) of ICCTA.

9. Courts routinely stay cases seeking to regulate rail transportation and involving the scope and application of ICCTA preemption. *See, e.g., Griffioen v. Cedar Rapids & Iowa City Ry.*, No. C13-0066, 2013 U.S. Dist. LEXIS 135958 (N.D. Iowa Sept. 18, 2013) (transferring case to STB, noting “strong federal statutory interest under the ICCTA in having the STB use its administrative expertise to resolve” state law claims aimed at collapsed railroad bridges, which purportedly caused flooding on plaintiffs’ property); *Pejepscot Indus. Park v. Me. Cent. R.R.*, 215 F.3d 195, 205 (1st Cir. 2000) (concluding “that the district court should stay [Plaintiff’s] ICCTA claim while referring it to the STB.”). The STB also routinely issues declaratory orders resolving such cases. *See Norfolk S. Ry., Pet for Decl. Order*, STB Fin. Dkt. No. 35701, 2013 STB LEXIS 338 (STB Nov. 4, 2013) (finding that ICCTA preempts inverse condemnation actions brought under Virginia state law in Virginia state court); *see also* 5 U.S.C. § 554(e); 49 U.S.C. § 721.

10. Accordingly, CSXT is preparing to file a petition for declaratory relief with the STB seeking a determination whether all of the state law claims in the Plaintiff’s Complaint are preempted by ICCTA.

Ry. Co., 706 S.E.2d 6, 10 (S.C. 2011) (ICCTA preempted town’s attempt to impose requirements on railroad’s maintenance of its bridges).

11. CSXT respectfully requests that this Court stay this proceeding pending a decision by the STB on CSXT's Petition for Declaratory Order, which CSXT will file forthwith.

BRIEF IN SUPPORT OF MOTION

Pursuant to Rule 4:15(c) of the Rules of Supreme Court of Virginia, CSXT will file its brief in support of this Motion, absent leave of Court, at least fourteen (14) days before the hearing scheduled for this matter.

CONCLUSION

For the foregoing reasons, CSXT requests that this Court (1) stay this litigation pending a decision by the STB on CSXT's Petition for Declaratory Order, and (2) grant CSXT such other relief it deems just and proper.

Dated: April 21, 2014

Respectfully submitted,

CSX TRANSPORTATION, INC.



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Stephen P. Mulligan (VSB # 78858)
Anastasia P. Cordova (VSB # 78936)
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acordova@mcguirewoods.com

Counsel for Defendant CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2014, I served complete copies of the

foregoing via first class mail, postage prepaid, on the following:

Mark A. Moorstein (VSB No. 21201)
Courtney B. Harden (VSB No. 65470)
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charden@reesbroome.com
Counsel for Plaintiff



Stephen P. Mulligan

56026048_5

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

HAMP, INC.

Plaintiff,

v.

CSX TRANSPORTATION, INC.

Defendant.

Case No. CL14-1561

DEMURRER BY CSX TRANSPORTATION, INC.

Defendant CSX Transportation, Inc. ("CSXT"), by counsel and pursuant to Virginia Code § 8.01-273, demurs to the Complaint filed by Plaintiff HAMP, Inc. (also known as the Holly Acres Mobile Home Park) in the above-captioned action. For the reasons set forth below and in the accompanying brief to be filed pursuant to Va. Sup. Ct. R. 3:8 and 4:15, the Court should dismiss this case with prejudice because Plaintiff has failed to state a claim upon which relief may be granted.

GROUND FOR DEMURRER

CSXT demurs¹ to Plaintiff's Complaint on the grounds that it has no duty to maintain its railway structures in such a way as to account for unforeseeable and extraordinary flood events. *See Am. Locomotive Co. v. Hoffman*, 105 Va. 343, 350 (1906). Plaintiff seeks damages sustained during a flood of such devastating proportions that Plaintiffs admit it "should only occur once in 100 years[.]" Compl. ¶¶ 23, 38. Common sense and Virginia Supreme Court precedent dictate that a

¹ CSXT submits this demurrer in conjunction with its simultaneously filed Plea in Bar and Motion to Stay Action Pending the Decision of the United States Surface Transportation Board on CSXT's Petition for Declaratory Order. For the reasons stated in the Plea in Bar and Motion to Stay, Plaintiff's Complaint should be dismissed with prejudice and without leave to amend.

once-a-century flood is an extraordinary event for which no cause of action can lie. In addition, CSXT cannot be liable as matter of law for the dramatic urbanization of Prince William County in the last century, which Plaintiff alleges contributed to the flooding of its property. *See Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 157 (2012).

CSXT also demurs on the grounds that Plaintiff failed to plead facts to support its demand for punitive damages. The claim for punitive damages is based on a single conclusory paragraph with no factual support, Compl. ¶ 58, and it cannot survive as a matter of law. *E.g., Amburgery v. Peters*, 61 Va. Cir. 266, 269 (City of Roanoke 2003).

Plaintiff further failed to allege facts to support a claim for trespass. Pleading trespass requires a plaintiff to allege “an unauthorized entry onto property which results in interference with the property owner's possessory interest therein.” *Cooper v. Horn*, 248 Va. 417, 422-423 (1994). Here, Plaintiff only alleges that CSXT impeded the flow of water, not that it caused the transfer of water from CSXT's property onto Plaintiff's land. *See generally* Compl. The alleged facts, even if true, do not constitute trespass.

CSXT demurs to Plaintiff's declaratory judgment claim for three reasons: (i) Plaintiff has failed to plead the existence of a justiciable controversy under the Virginia Flood Protection and Dam Safety Act, Va. Code § 10.1-604 *et seq.* (the “Flood Protection Act”); (ii) Plaintiff failed to exhaust its administrative remedies; and (iii) CSXT's berm is not an “impounding structure” within the meaning of the Flood Protection Act.

Finally, CSXT demurs to Plaintiff's claim for injunctive relief because it failed to plead facts to support an award of injunctive relief and an adequate remedy of law is available.

In sum, Plaintiffs have failed to plead a single cognizable claim against CSXT, and its Complaint should be dismissed in full.

BRIEF IN SUPPORT OF DEMURRER

Pursuant to Rules 3:8 and 4:15 of the Rules of Supreme Court of Virginia, CSXT will file its brief in support of this Demurrer, absent leave of Court, at least fourteen (14) days before the hearing scheduled for this Demurrer.

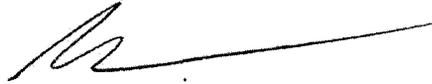
CONCLUSION

For the foregoing reasons, CSXT requests that this Court (1) sustain this Demurrer, (2) dismiss the Complaint with prejudice, and (3) grant CSXT any other relief it deems just and proper.

Dated: April 21, 2014

Respectfully submitted,

CSX TRANSPORTATION, INC.



John D. Wilburn (VSB # 41141)
Stephen P. Mulligan (VSB # 78858)
Anastasia P. Cordova (VSB # 78936)
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Counsel for Defendant CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2014, I served complete copies of the foregoing via first class mail, postage prepaid, on the following:

Mark A. Moorstein (VSB No. 21201)
Courtney B. Harden (VSB No. 65470)
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Counsel for Plaintiff



Stephen P. Mulligan

55938417_6

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

_____)	
HAMP, INC.)	
)	
<i>Plaintiff,</i>)	
)	Case No. CL14-1561
v.)	
)	
CSX TRANSPORTATION, INC.)	
)	
<i>Defendant.</i>)	
_____)	

PLEA IN BAR BY CSX TRANSPORTATION, INC.

Defendant CSX Transportation, Inc. ("CSXT"), by counsel, files this Plea in Bar in response to the Complaint filed by Plaintiff HAMP, Inc. (also known as the Holly Acres Mobile Park), in the above-captioned action. For the reasons set forth below and in the accompanying brief to be filed pursuant to Va. Sup. Ct. R. 3:8 and 4:15, the Court should dismiss this case with prejudice.

GROUND FOR PLEA IN BAR

Plaintiff's Complaint is barred in full by Section 10501(b) of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101 *et seq.* because the relief requested will have the effect of managing and governing CSXT's railroad operations and rail transportation activities. Among other things, ICCTA confers jurisdiction over rail transportation on the United States Surface Transportation Board ("STB"), and it expressly preempts state law with respect to the "regulation of rail transportation." *See* 49 U.S.C. § 10501(b)(1).

The term "rail transportation" includes rail infrastructure beneath and supporting the railroad tracks, including culverts, bridges, and berms. *See* 49 U.S.C. § 10102(6)(A)-(C)

(defining “railroad” to include: (i) a “bridge . . . used by or in connection with a railroad;” (ii) the “road used by a rail carrier . . . ;” and (iii) all “track . . . yard, and ground, used or necessary for transportation[.]”); *see also Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842-44 (E.D. Ky. 2004), *aff’d*, No. 04-5448 (6th Cir. Feb. 7, 2005) (ICCTA preempted plaintiffs’ state law tort claims aimed at railroad’s alleged failure to maintain drainage underneath tracks, which purportedly caused flooding on Plaintiff’s property); *Griffioen v. Cedar Rapids & Iowa City Ry.*, No. C13-0066, 2013 U.S. Dist. LEXIS 135958 (N.D. Iowa Sept. 18, 2013) (finding ICCTA completely preempted state law claims aimed at collapsed railroad bridges, which purportedly caused flooding on plaintiffs’ property); *A&W Props., Inc. v. Kan. City S. Ry.*, 200 S.W.3d 342, 351 (Tex. App. 2006) (ICCTA preempted plaintiffs’ state law tort claims for damages and injunctive relief seeking to require railroad to widen culverts).¹ Similarly, “rail transportation” broadly includes a rail carrier’s maintenance operations and activities on its railroad tracks and right-of-way. *James Riffin – Pet. for Decl. Order*, STB Fin. Dkt. No. 34997, 2008 STB LEXIS 242, at *5-6, 14 (STB May 2, 2008).

Here, Plaintiff alleges CSXT’s “failure to maintain and increase the size of [its] culvert” caused flooding of Plaintiff’s property during the Tropical Storm Lee storm event and resultant “100 year” flood. *See* Compl. at p. 1 (introductory paragraph), ¶¶ 35, 38. Although Plaintiff admits CSXT “actively runs trains” over the railroad culvert, its prayer for relief specifically asks the Court to order CSXT to “increase the size of the Culvert” and “maintain the Culvert in a reasonable fashion.” Compl. ¶ V.1-2. Plaintiff further seeks an affirmative injunction that would

¹ *See also, e.g., Pere Marquette Hotel Partners v. United States*, No. 09-5921, 2010 U.S. Dist. LEXIS 36413, at *3, 12-13 (E.D. La. Mar. 9, 2010) (granting motion to dismiss based on ICCTA preemption and rejecting plaintiffs’ argument that their claims were only directed at the “shell sand and gravel” beneath CSXT’s tracks); *City of Cayce v. Norfolk S. Ry.*, 706 S.E.2d 6, 10 (S.C. 2011) (ICCTA preempted town’s attempt to impose requirements on railroad’s maintenance of its bridges).

“force” CSXT to “expand and maintain the Culvert” and “take whatever measures are necessary to prohibit further flooding of the HAMP Property.” *Id.* at ¶ 120.

In other words, Plaintiff asks this Court to regulate the construction and operation of CSXT’s rail transportation infrastructure—an activity that is expressly preempted by ICCTA. ICCTA specifically preempts: (i) Plaintiff’s state law tort claims for damages and injunctive relief (Counts 1-3, 6)²; (ii) Plaintiff’s claims under the Virginia Flood Protection and Dam Safety Act (Count 4);³ and (iii) Plaintiff’s claims for inverse condemnation under state law (Count 5).⁴ Accordingly, ICCTA preempts all of Plaintiff’s claims, this Court lacks subject matter jurisdiction, and the Complaint should be dismissed with prejudice.

In addition, Plaintiff’s claims are barred by the five-year statute of repose contained in Va. Code Ann. § 8.01-250. Plaintiff admits CSXT’s culvert was constructed in 1905, Compl. ¶¶ 11-12, and thus any claim related to its alleged faulty design or construction has been time-barred for more than a century.

Finally, Plaintiff’s claims are barred by the five-year statute of limitations under the “permanent nuisance” doctrine. *See S. Ry. v. White*, 128 Va. 551, 565-69 (1920). According to the Virginia Supreme Court, man-made “obstructions which, with certainty, will cause floods, although at uncertain intervals, constitute permanent nuisances, and [the five-year] statute begins to run as to them from the time that their inadequacy is first definitely ascertained.” *Ellerson Floral Co. v. Chesapeake & Ohio Ry.*, 149 Va. 809, 813 (1928). Plaintiff alleges CSXT’s culvert has caused “regularly recurring and continuing flooding” since 1976. Compl. ¶ 18. Therefore, the statute of

² *See, e.g., Maynard*, 360 F. Supp. 2d at 842-44; *Pace v. CSXT*, 613 F.3d 1066 (11th Cir. 2010) (ICCTA preempts state nuisance action because claim for damages is a form of state regulation).

³ *See, e.g., Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010) (ICCTA preempts state permitting and pre-clearance requirements that could have the effect of delaying a railroad’s transportation activities).

⁴ *See, e.g., Norfolk So. Railway Co.*, Pet for Decl. Order, STB Fin. Dkt. No. 35701, 2013 STB LEXIS 338 (STB Nov. 4, 2013) (ICCTA preempts inverse condemnation actions brought under Virginia state law).

limitations on all claims expired five years later, and the Complaint cannot survive as a matter of law.

BRIEF IN SUPPORT OF PLEA IN BAR

Pursuant to Rules 3:8 and 4:15 of the Rules of Supreme Court of Virginia, CSXT will file its brief in support of this Plea in Bar, absent leave of Court, at least fourteen (14) days before the hearing scheduled for this Plea in Bar.

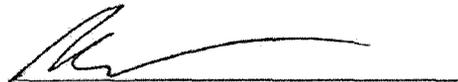
CONCLUSION

For the foregoing reasons and authorities, CSXT requests that this Court (1) sustain this Plea in Bar, (2) dismiss the Complaint with prejudice, and (3) grant CSXT such other relief it deems just and proper.

Dated: April 21, 2014

Respectfully submitted,

CSX TRANSPORTATION, INC.



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Counsel for Defendant CSX Transportation, Inc.

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I hereby certify that on the 21st day of April, 2014, I served complete copies of the foregoing via first class mail, postage prepaid, on the following:

Mark A. Moorstein (VSB No. 21201)
Courtney B. Harden (VSB No. 65470)
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Counsel for Plaintiff



Stephen P. Mulligan

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Declaration of Steve Jencen

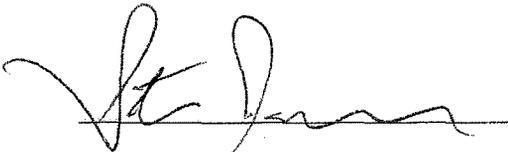
1. My name is Steve Jencen. I am an adult over the age of eighteen years and am competent to make this Declaration. Unless stated otherwise, the facts set forth herein are from my own personal knowledge being a professional engineer or from my review of information available for the CSX crossing of Marumscro Creek in Prince William County Virginia.
2. I am the engineer of record for bridge hydraulic designs in Florida, Georgia, South Carolina, North Carolina, and Connecticut and have done flood studies for FEMA nationwide. As a FEMA contractor, I served as a subject matter expert in discussing policy issues and resolution recommendations. I was also a task manager and contributing author for the update of FEMA's Guidelines and Specifications for Flood Hazard Mapping Partners. My career spans 27 years in civil engineering with a bachelor degree in Civil Engineering from the Georgia Institute of Technology in 1986.
3. I have reviewed the declaration of Edward D. Sparks II and dispute the points presented. These opinions deal with the design, maintenance, service life, performance of the culvert, and options available.
4. It is my opinion, notwithstanding Mr. Sparks' affidavit, that alternative remedies to the inadequacy of the culvert exist that do not and would not impede the operations of the railroad if the existing culvert is of sound condition as stated by CSX. These alternatives include the addition of culverts by tunneling means to provide additional conveyance to the existing culvert; the placement of fill in the Holly Acres property with either compensating fill removed elsewhere in the floodplain or a modification to the floodway delineation, purchase of the Holly Acres property, or a combination of these alternatives.
5. By way of background, the culvert allows flows under the CSX rails by imposing a great deal of backwater onto the property of others outside the limits of the CSX right-of-way. The flood study published in 1995 by FEMA had a detailed study for Marumscro creek prepared that the US Army Corp of Engineers (USACE) Norfolk District completed in 1992. The floodplain at the downstream side of the culvert is approximately 13 feet and is approximately 28 feet just upstream. Current design practices employed by most DOTs typically use a one-foot rise in the backwater for appropriate sizing of drainage structure of highways. The fifteen-foot backwater rise created by the CSX culvert would be considered excessive and an impediment to the natural floodplain both upstream and downstream of the CSX culvert at Marumscro creek.
6. The CSX culvert was constructed in 1905 (filing page 14). Mr. Sparks states that "The Culvert as presently designed and maintained fully and adequately serves CSXT's rail transportation needs...CSXT expects the Culvert, as designed, to continue serving these rail transportation needs for the foreseeable future." (Sparks V.S. ¶ 15) Design of culverts and bridges were at their infancy in 1905. Fuller is typically credited with having the first published formula involving flood frequencies in 1914 which is 9 years after the construction of the Marumscro structure (Fuller, W.E. (1914). "Flood Flows" ASCE Trans., 77, 567-617). Previous methods were various "culvert formulas" from Talbot, Fanning, and McMath of which Talbot was most widely used. The formula is $a = CA^{0.75}$ where a is the resultant required cross-sectional area of the culvert in square feet with C being a coefficient and A



the drainage area in acres. Since C was from personal judgment, there is a large amount of uncertainty in the results. Topography used to calculate drainage areas was also coarse and not widely available. A drainage area the size of Marumsco creek at the CSX crossing would have to be estimated since the detail from the USGS quadrangle mapping was not available in the scale required for an accurate delineation in 1905. Rainfall records used in today's designs weren't reliably recorded until around the 1920s and 1930s. Stream flow records from the USGS were also not available until around the 1930s and not for smaller drainage areas like the one for Marumsco creek. Therefore, the design was more of a best guess at the size needed for conveyance. The placement of the 12-foot wide culvert is of suspect design. This is further supported by the placement of an 11-foot wide arch culvert just north of the Marumsco creek crossing, which shows very little evidence of flows and flooding relief. Sound design principles do not appear to have been used in the original sizing and placement of the culverts.

7. The Virginia Department of Transportation (VDOT) is improving US Route 1 upstream of the CSX crossing. VDOT design plans include a bridge over Marumsco Creek which will be 70 feet long. The VDOT design, seven (7) times the span of the CSX culvert, is not sufficient to convey a 100 year storm. Mr. Sparks' claims that the CSX culvert (which has essentially been reduced to 11 feet with the repairs that CSX has already performed to the CSX culvert) is sufficient to carry the water flow for another 100 years. This is simply not credible.
8. Proper maintenance is required to ensure the performance of drainage structures. Mr. Sparks has said that the culvert has been well maintained. When I visited the location of the structure, evidence of repairs were visible on the inside of the culvert. In several places concrete collars were poured to most likely deal with structural issues for the culvert. These collars went from the floor on one side of the culvert along the inside and over to the other side of the culvert. By placing these collars on the inside of the culvert, the conveyance area for flood flows was reduced by approximately one foot along the sides and top of the culvert greatly reducing the conveyance from the original opening. So the culvert went from a 12-foot arch to approximately a 10-foot arch structure. Riprap was said to have been placed at the upstream opening of the culvert, but has since been washed away. A scour hole has been created at the downstream end of the culvert from excessive velocities of the discharge from the culvert. Due to the age of the culvert, continuing maintenance will be required for the structure with practices that will not impede the flows.
9. In the filing page 14 contains the following "To this day, the Culvert is in excellent structural condition and fully meets all of CSXT's rail transportation requirements. CSXT anticipates that it will continue to meet CSXT's needs for the next century." The Army Corp of Engineers generally states that concrete pipes have a design life of 70 to 100 years. Beyond this time frame continual structural and protective measures may be required to keep a structure in service. Therefore, since the culvert at Marumsco creek is 109 years old, structural fatigue, chemical decomposition of materials, and abrasion from flood flows may impede on service going forward.

Pursuant to 28 U.S.C. § 1746, I swear the above testimony is true subject to penalties of perjury.

 6/20/14
Steve Jencen