No. _____

In The
Supreme Court of the United States

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE,

Petitioners,

v.

CENTRAL MAINE POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine

PETITION FOR WRIT OF CERTIORARI

WILLIAM B. MOST
Counsel of Record
DAVID J. LANSER
MOST & ASSOCIATES
201 St. Charles Avenue
Ste. 114, # 101
New Orleans, LA 70170
(504) 509-5023
williammost@gmail.com

BRUCE M. MERRILL
LAW OFFICES OF
BRUCE M. MERRILL, P.A.
225 Commercial Street
Ste. 501
Portland, ME 04101
(207) 775-3333
mainelaw@maine.rr.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether the issuance of a non-binding "No Hazard Determination" by the Federal Aviation Administration preempts the application of state law, despite the Determination's text stating it "does not relieve" an entity from compliance with state law.

PARTIES TO THE PROCEEDING

Petitioners Friends of Merrymeeting Bay ("FOMB"), Kathleen McGee, Ed Friedman, and Colleen Moore were the plaintiffs in the Superior Court proceedings and appellants in the appellate proceeding. Respondent Central Maine Power Company was the defendant in the Superior Court proceedings and appellee in the appellate proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Friends of Merrymeeting Bay is a nonprofit corporation incorporated in the State of Maine. It has no parent company or publicly held company owning 10% or more of its stock.

RELATED CASES

- Originally filed as *Friends of Merrymeeting Bay, et al. v. Central Maine Power Company*, No. CV-20-19, Sagadahoc County Superior Court for the State of Maine. Transferred to the Maine Business and Consumer Court.
- *Friends of Merrymeeting Bay, et al. v. Central Maine Power Company*, No. BCD-CV-20-36, Business and Consumer Court of Cumberland County for the State of Maine. Judgment entered January 15, 2021, included as Appendix B, unreported.

RELATED CASES – Continued

- *Friends of Merrymeeting Bay, et al. v. Central Maine Power Company*, No. BCD-21-43, State of Main Supreme Judicial Court Sitting as the Law Court. Judgment entered January 11, 2022, included as Appendix A, unreported.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari from a judgment of the Supreme Judicial Court of Maine.

In a four-sentence opinion, the Supreme Judicial Court – intentionally or not – damaged the structure of the Federal Aviation Act. The Maine court did so by applying federal preemption to a "No Hazard Determination" ("NHD") – a non-binding guidance document issued by the Federal Aviation Administration. The court so held despite the text of the NHD which states that it "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." The Supreme Judicial Court's ruling puts it squarely at odds with federal precedent from multiple Circuit courts that NHDs "have 'no enforceable legal effect.' "[1]

The decision below grants any federal agency the new power to preempt Maine state law with an otherwise unenforceable guidance document. That substantially expands the power of federal administrative agencies to the detriment of states.

And because NHDs are non-binding, the Federal Aviation Act previously relied on "cooperative federalism" to carry out its goals. That is to say, the Act relied

---

[1] *Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011), *citing BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also Michigan Chrome and Chemical Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) ("The hazard/no hazard determination by the FAA encourages voluntary cooperation with the regulatory framework and is legally unenforceable.").

on state and local law to effectuate the recommendations of an NHD. That cooperative federalism has been lost due to Maine's application of preemption. Now, no government entity can effectuate an NHD's advice in Maine.

This is problematic as the NHD functions only to ensure the FAA's minimum guidelines are met, thus their issuance as *recommendations* rather than requirements. Therefore, if an appropriate alternative exists which would both conform with state law and satisfy the federal agency's hazard guidelines, property owners and states are left without a remedy to obtain such an alternative.

Without action by this Court, property owners will be denied a remedy, significant damage will be done to a federal statute, and federal agencies will gain more power at the expense of states.

OPINIONS BELOW

The opinion of the Maine trial court and Supreme Judicial Court are unpublished, but are provided in the Appendix at pages App. 1-22.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on January 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1257(a), The Federal Aviation Act (49 U.S.C. §§ 1301 et seq.) and The Supremacy Clause of the United States Constitution (U.S. Const. art. VI, § 2, cl. 2) are set forth in the appendix (App. 29-34).

INTRODUCTION AND STATEMENT OF THE CASE

Petitioners are four owners of property in the vicinity of Merrymeeting Bay, Maine. They filed this lawsuit in 2020, seeking to hold Defendant Central Maine Power Company ("CMP") liable under Maine's law of nuisance. The basis for Petitioners' claim was that CMP installed an unnecessary, high-powered system of ten lights on two electrical towers located at an entrance to the Bay. The ten lights each flash 60 times per minute when active, and are visible over an area of nearly four thousand square miles. (And because the ten lights do not flash in synch, the effective flash rate is much higher than sixty per second, often causing a strobe-like effect.) The flashing lights are more than a mere annoyance – they adversely impact Petitioners'

businesses; decrease the value of Petitioners' property; and interfere with Petitioners' enjoyment of their property.

Although the lights were new, towers in that location were not; two towers, supporting a power line crossing, had stood at the Chops Passage of the Kennebec River at Merrymeeting Bay, Maine, for more than eight decades. In 2018, CMP replaced and extended the towers by 23%, to a height of 240 feet. (That is still 160 feet shorter than the height that would trigger mandatory lighting of the towers.)

Around the same time, CMP attached ten high-powered, flashing lights to the towers. The lights, when active, flash 60 times per minute. No public hearings were held prior to the light installation, even though flashing lights are forbidden by local zoning codes.

Petitioners proposed alternative, less impactful, sets of air safety measures for the towers. CMP declined to adopt those alternative measures.

And, significantly for the legal question of this petition, CMP contacted the Federal Aviation Administration ("FAA") before installing the lights. The FAA issued a "No Hazard Determination" (NHD) regarding the towers. App. 23-28. NHDs are guidance documents that "have 'no enforceable legal effect.' " *Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011), *citing BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also Michigan Chrome and Chemical Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) ("The hazard/no hazard determination by the FAA encourages

voluntary cooperation with the regulatory framework and is legally unenforceable").[2]

In the NHD regarding the Chops Point Towers, the FAA recommended – but did not require – that CMP install the CMP-proposed lights on the towers. The FAA only issued a non-binding recommendation because the towers do not meet the criteria for mandatory lighting under FAA regulations. (This is undisputed: CMP's expert agreed that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport.")

The NHD was explicit, however, that it should not impact CMP's compliance with state or local laws. On its face, the NHD says that it "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." App. 26. Despite that, CMP installed the lights without complying with state law and in disregard of local zoning ordinances.

Because the lights were unnecessary, not mandated by the FAA, not in compliance with state and local law, and damaging to their interests, Petitioners brought a lawsuit for nuisance to protect their property rights.

---

[2] Because NHDs are only "advisory in nature," they are categorically excluded from NEPA review. FAA Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2.

CMP responded by filing a Motion to Dismiss Plaintiffs' Complaint on September 15, 2020. In that motion, CMP argued that Plaintiff's claims were barred by federal preemption pursuant to the Federal Aviation Act. (This was the point at which CMP raised the federal questions for which Petitioners seek this Court's review.)

The Maine trial court agreed with CMP, holding that the Federal Aviation Act preempted Plaintiffs' state law claims on the reasoning that the FAA's unenforceable recommendations carry the same preemptive effect as an agency order. App. 16-17. The Court acknowledged that "Plaintiffs are correct that the FAA's determinations are phrased as *recommendations*, and that the FAA does not claim enforcement authority for its 'no hazard' determinations." App. 16. (emphasis in original). Nevertheless, the trial court concluded that "a common law action brought in state court is subject to conflict preemption when the injury described is a defendant's adherence to FAA guidance." App. 17.[3]

[3] The trial court also dismissed the aspects of Petitioners' claim regarding a radar system CMP installed on the towers. The trial court held that these aspects were preempted by the Telecommunications Act of 1996. App. 17-21. Petitioners did not appeal this part of the trial court's ruling, and so it is not before the Court here.

Petitioners appealed the trial court ruling to Maine's Supreme Judicial Court.[4] They pointed out that the trial court's order overstated the FAA's authority, was internally inconsistent regarding preemption, and relied explicitly on "intuition" not supported by logic. App. 13.

On January 11, 2022, Maine's Supreme Judicial Court issued a decision. In four sentences, the Supreme Judicial Court concluded that the trial court "did not err in concluding that FOMB's state law claims are preempted because they are based on CMP's compliance with FAA standards that occupy the field of aviation safety." App. 1.

The Supreme Judicial Court cited two cases for its conclusion, *Bieneman v. City of Chicago*, 864 F.2d 463, 471-73 (7th Cir. 1988) and *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 488-89 (2013). Neither case addresses NHDs. And *Bieneman* concluded that the state law claims at issue were *not* preempted by the Federal Aviation Act.

The Supreme Judicial Court did not explain how its preemption conclusion can be reconciled with the NHD's explicit statement that it "does not" exempt an entity from "compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body." *See id.*

---

[4] Maine has no intermediate court of appeals. Most trial court decisions are appealed directly to Maine's highest court, the Maine Supreme Judicial Court.

Petitioners now ask this Court to review that decision.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Harms the "Cooperative Federalism" Structure of the Federal Aviation Act.

The Supremacy Clause of the United States Constitution creates a clear rule that federal law "shall be the supreme Law of the Land." U.S. Const. art. VI, § 2, cl. 2. That principle is constrained, however, by the central constitutional framework of federalism, which ensures that both federal and state governments operate with sovereignty. *See*, *e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Here, neither the Federal Aviation Act (49 U.S.C. §§ 1301 et seq.) nor any other federal law relevant to this lawsuit includes a clause expressly preempting state law. And so, the Maine state laws at issue will only be preempted if such preemption is "implicitly contained in the [Act's] structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). That "implicit" preemption could take the form of field or conflict preemption.[5]

Field preemption applies only when "federal law so thoroughly occupies a legislative field 'as to make

[5] The Maine Supreme Judicial Court ruled based only on field preemption, not conflict preemption. [App. 1-2.]

reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992), *quoting Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). In other words, in order to preempt state law, the federal law must "provide a full set of standards" that not only impose their own obligations under federal law, "but also confer a federal right to be free from any other" obligations. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481, 200 L.Ed.2d 854 (2018).

The Maine Supreme Judicial Court concluded that the trial court "did not err" in finding that the issuance of an NHD preempts Petitioners' claims because they "are based on CMP's compliance with FAA standards that occupy the field of aviation safety." App. 1-2.

Unfortunately, that decision directly undermines the structure and functioning of the Federal Aviation Act by making it impossible for *any* governmental entity to implement certain aeronautical recommendations in Maine.

That result flows from the fact that an NHD reflects the FAA's *recommendation*, not an enforceable order.[6] An NHD's value, therefore, lay in the fact that it did *not* entirely preempt state-law regulation. Instead, it invited a dialogue between a project sponsor, the state, municipalities, and the FAA. This has been

---

[6] *See* Trial Court Order at App. 16. *See also Town of Barnstable Mass. v. FAA, supra*, 659 F.3d at 31 (D.C. Cir. 2011) (NHDs are guidance documents that "have 'no enforceable legal effect' ").

described as "cooperative federalism," and such cooperation was Congress' plan for the Federal Aviation Act. *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019). *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (congressional intent, as determined by the "structure and purpose of the statute as a whole" is the "ultimate touchstone" for preemption). Indeed, what Petitioners seek is to initiate that dialogue in order to find an alternative safety system that would adhere to both FAA regulations *and* state and local laws.

That is why the text of an NHD explicitly states that it does not interfere with the law of any "State, or local government body." App. 26; *see Carroll, supra*, 27 N.W.2d at 653 (an NHD "expressly warned the Danners that they still must comply with state and local laws."). As CMP noted in its brief below, the function of NHDs was that they had "real, practical effects," including whether "local authorities will issue permits, and so forth."

That *was* the function of NHDs. No longer, at least in Maine. Now that the Supreme Judicial Court has found NHDs trigger federal preemption, local authorities no longer have the ability to withhold permits, and state law has no impact. The cooperative federalism structure Congress intended has been done away with, because now the FAA cannot enforce the recommendations of an NHD, and state and local governments cannot have any say in either enforcement or the tailoring of suitable site-specific solutions.

And because the Supreme Judicial Court is the court of last resort in Maine, that cooperative federalism structure will be lost unless this Court addresses the issue.

B. The Decision Below Gives Any Federal Agency the Power to Preempt State Law With a Guidance Document.

It is undisputed that an NHD is a non-enforceable guidance document provided by the FAA.[7]

Thus, when the Supreme Judicial Court found federal preemption based on an NHD, it reached a new and radical conclusion: that a document containing unenforceable federal guidance triggers federal preemption and displaces a state's right to manage its own territory.

Such a holding, if allowed to remain in place, dramatically increases the power of federal agencies over states, expanding the federal administrative regime at the cost of federalism.[8]

---

[7] *See* Trial Court Order at App. 16. *See also Town of Barnstable Mass. v. FAA, supra*, 659 F.3d at 31 (D.C. Cir. 2011) (NHDs are guidance documents that "have 'no enforceable legal effect' ").

[8] The decision below suggests that the State of Maine can no longer regulate broad swathes of activity, such as food safety (because the CDC recommends washing hands before preparing food), traffic enforcement (because the NHTSA recommends that passengers buckle up), or recreational fishing (because NOAA recommends the use of circle or barbless hooks). *See*, *e.g.*, *When and How to Wash Your Hands*, Centers for Disease Control and Prevention (Jun. 10, 2021); *Seat Belts*, National Highway Traffic

Such a precedent creates great uncertainty if allowed to stand, and calls for this Court's intervention.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

WILLIAM B. MOST
Counsel of Record
DAVID J. LANSER
MOST & ASSOCIATES
201 St. Charles Avenue
Ste. 114, # 101
New Orleans, LA 70170
(504) 509-5023
williammost@gmail.com

BRUCE M. MERRILL
LAW OFFICES OF
BRUCE M. MERRILL, P.A.
225 Commercial Street
Ste. 501
Portland, ME 04101
(207) 775-3333
mainelaw@maine.rr.com

Counsel for Petitioners

Safety Administration (July 15, 2021); and *Catch and Release Best Practices*, National Oceanic and Atmospheric Administration (Oct. 23, 2020).

APPENDIX A

MAINE SUPREME JUDICIAL COURT
Reporter of Decisions
Decision No. Mem 22-4
Docket No, BCD-21-43

FRIENDS OF MERRYMEETING BAY et al.

v.

CENTRAL MAINE POWER COMPANY

Argued October 6, 2021
Decided January 11, 2022

Panel: STANFILL, C.J., and MEAD, GORMAN, JABAR, HUMPHREY, and HORTON, JJ.

MEMORANDUM OF DECISION

Friends of Merrymeeting Bay, Kathleen McGee, Ed Friedman, and Colleen Moore (collectively, FOMB) appeal from a judgment entered by the Business and Consumer Docket (*Murphy, J.*) dismissing their nuisance claims against Central Maine Power Company (CMP) based on its conclusion that the claims were preempted by federal law. FOMB asserts that lighting installed on CMP's utility towers in Bath and Woolwich in compliance with Federal Aviation Administration (FAA) standards constitutes an actionable nuisance under Maine's common law and 17 M.R.S. § 2701 (2021). Contrary to FOMB's contentions, the court did not err in concluding that FOMB's state law claims are preempted because they are based on CMP's compliance with FAA standards that occupy the field of

aviation safety.[1] *See*, *e.g.*, *Bieneman v. City of Chicago*, 864 F.2d 463, 471-73 (7th Cir. 1988) (concluding that state law tort remedies are available for claims asserting a violation of FAA standards occupying the field of aviation safety but are not available for claims based on compliance with such standards); *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 488-89 (2013).

The entry is:

judgment affirmed.

Bruce M. Merrill, Esq., Law Offices of Bruce M. Merrill, Portland; and William Most, Esq. (orally), and David Lanser, Esq., Law Office of William Most, New Orleans, Louisiana, for appellants Friends of Merrymeeting Bay et al.

Gavin G. McCarthy, Esq. (orally), and Matthew Altieri, Esq., Pierce Atwood LLP, Portland, for appellee Central Maine Power Company

Business and Consumer Court docket number CV-2020-36
FOR CLERK REFERENCE ONLY

---

[1] We are not persuaded by FOMB's argument that its allegations concerning the rate at which the lights flash are sufficient to assert a separately-actionable nuisance claim based on noncompliance with FAA standards. *Cf. Leppla v. Sprintcom, Inc.*, 806 N.E.2d 1019, 1023-25, 1023 n.1 (Ohio Ct. App. 2004).

APPENDIX B

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
DOCKET NO. BCD-CV-2020-36

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE Plaintiffs, v. CENTRAL MAINE POWER COMPANY Defendant.	**COMBINED ORDER ON THE ENVIRONMENTAL HEALTH TRUST'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND DEFENDANT'S MOTION TO DISMISS**

Before the Court are the Environmental Health Trust's (the "EHT's") motion for leave to file an *amicus curiae* brief, and Defendant Central Maine Power Company's ("CMP's") motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted in accordance with M. R. Civ. P. 12(b)(6).

In its motion for leave to file an *amicus curiae* brief, the EHT asserts that neither the Maine Rules of Civil Procedure, nor the Business and Consumer Docket Procedure Rules prohibit the filing of an amicus brief by a non-party. For this reason, and because the EHT asserts it has a substantial and compelling interest in the case, it requests leave from the Court to file its brief. The Court denies EHT's motion.

Separately, CMP moves to dismiss the Plaintiffs' complaint asserting that the nuisance claim is preempted by both Federal Aviation Administration ("FAA") and Federal Communications Commission ("FCC") regulations. Conversely, Plaintiffs assert that the FAA's guidance to CMP constitutes a legally unenforceable recommendation rather than a set of requirements, and that the FCC regulations cited by CMP are inapplicable to the facts of this case. The Court finds Plaintiffs' nuisance claims subject to preemption, and thus grants CMP's motion to dismiss in its entirety. Plaintiffs are represented by Attorneys Bruce Merrill, William Most, and David Lamer. CMP is represented by Attorneys Gavin McCarthy and Matthew Altieri. The Environmental Heath Trust is represented by Attorney Scott Sells.

FACTUAL BACKGROUND

In 2019, CMP replaced two utility towers that support power lines across the Chops Passage of the Kennebec River as the river flows into Merrymeeting Bay. While the old towers were 195-feet-tall, the new towers reach approximately 240-feet-tall. The towers are outfitted with flashing safety lights, aimed at alerting aircraft of their presence. Additionally, in response to concerns from Plaintiffs and other members of the public about the frequency of flashing lights, the towers will include an Active Aircraft Detection Lighting System (the "Radar System") that uses radar to trigger the flashing lights when aircraft are detected within approximately 3.5 miles of the towers.

In accordance with FAA regulations, CMP filed public notice of the proposed tower construction with the Secretary of the FAA. In response, the FAA issued a "determination of no hazard to air navigation" with respect to the towers on March 12, 2018. (Pl.'s Ex. A). The no hazard determination explained that the FAA had conducted an aeronautical study, which "revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation, provided certain conditions are met. *Id.* The FAA's determination was conditioned on the structure being "marked/lighted in accordance with an FAA Advisory Circular.[1]

On March 25, 2020, in response to a revised submission by CMP to cover the use of the Radar System, the FAA issued a new determination of no hazard, again conditioned on the marking of the towers and utilization of a lighting system. In issuing its determination, the FAA provided that the towers are subject to the licensing authority of the FCC. Next, on July 21, 2020 the FCC issued CMP a radio station authorization permitting the towers to broadcast using frequencies of 9.2-9.5 GHz. Plaintiffs requested the FCC conduct an environmental assessment, but the FCC declined, apparently finding that the Radar System did not cause RF exposure exceeding the FCC's safety standards. *See* 47 C.F.R. § 1.1306(c)(2) & 1.1307.

---

[1] See FAA Circular 70/746001 L Change 1, Obstruction Marking and Lighting, a med-dual system—Chapters 4, 8,(M-Dual),&12" ("The FAA Safety Lighting Standards")

LEGAL STANDARD

Two motions are before the Court in this matter: 1) the EHT's motion for leave to file *amicus curiae*, and 2) CMP's motion to dismiss the complaint for failure to state a claim under M. R. Civ. P. 12(b)(6).

First, the term *amicus curiae* implies "the friendly intervention of counsel to remind the Court of some matter of law which might otherwise escape its notice and in regard to which it might go wrong." *Hamlin v. "Perticuler Baptist Meeting House"*, 103 Me. 343, 69 A. 315, 318 (Me. 1907). Unlike appeals, the Maine Rules of Civil Procedure neither authorize nor prohibit the filing of an amicus brief by a non-party in the Business and Consumer Court when it serves as a trial court. Though not applicable at the trial court level, the Rules of Appellate Procedure permit *amicus curiae* briefs to be filed if parties to the appellate proceeding consent, "or by leave of the Law Court." M.R. App. P. 7A(e)(1)(A).

Maine Trial Courts have previously considered *amicus* filings under limited circumstances. *See e.g. United States Bank NA. v. Cozzone, 2019 Me. Super. LEXIS 109, *4.* However, the First Circuit Court of Appeals has urged caution with respect to the federal trial courts: "We believe that a district court lacking joint consent of the parties should go slow in accepting" an amicus brief. *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).[2] As such, the Court will grant

[2] The First Circuit has also noted that "the prime if not sole, purpose of an amicus curiae brief is what its name implies,

an *amicus curiae* brief only where there is good reason to believe it can assist the Court reach a correct legal conclusion.

Second, when reviewing a motion to dismiss under Rule 12(b)(6), the Court "consider^] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, If 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that [it] might prove in support of [its] claim." *Id.*

DISCUSSION

I. EHT's Motion for Leave to File an *Amicus Curiae* Brief

In support of its motion for leave to fde an *amicus curiae* brief, EHT asserts that it has a substantial and compelling interest in the case, and can aid the Court in addressing the unique and significant harm suffered by those who cannot seek relief from federal agencies. Specifically, EHT describes the light and radio frequencies emitted from the Towers as "needless" and believes

---

namely, to assist the court on matters of law." *Banjeree v. Bd. Of Trustees*, 648 F.2d 61,65 n.9 (1st Cir. 1981).

there is a likelihood of harmful health and environmental effects stemming therefrom. "As a leader in state-of-the art scientific research into the areas of harm alleged," EHT asserts it can ensure a "complete and plenary" presentation of the issues before the Court, (EHT's Mot. at 4).

While the Court does not question EHT's substantive experience researching the alleged harms at issue, it is unclear what *legal* aid EHT hopes to provide the Court. It is clear EHT feels well-positioned to weigh in on "difficult and complex technical issues." However, EHT does not allege that Plaintiffs failed to address any specific legal arguments, or that they cannot represent the relevant issues in this matter. Instead, EHT repeats the exact harms alleged in Plaintiffs' complaint, and further expanded on in their opposition to CMP's motion to dismiss.

At the motion to dismiss stage, the Court is not being asked to make factual evaluations, nor to balance competing policy views. Instead, CMP's motion to dismiss contends that Congress has exclusively delegated such determinations to the FAA and FCC, and for that reason Plaintiffs' claims are preempted. The Court's role is to determine, in the light most favorable to the plaintiff, whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. EHT has failed to demonstrate how it can aid the Court in making a correct legal determination. Accordingly, EHT's motion for leave to file an *amicus curiae* brief is denied.

II. CMP's Motion to Dismiss

According to the Supremacy Clause of the United States Constitution, federal law "shall be the supreme Law of the land; and the Judges in every state shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding." U.S. Const, art. VI, cl. 2. "Congress has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Preemption applies equally to all forms of state law, including civil actions based on state tort law. *See*, *e.g. Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001). There are three categories of preemption: 1) express preemption; 2) field preemption; and 3) conflict preemption. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985),

Field preemption occurs where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 567 U.S. at 399. Courts may infer Congress's intent to occupy a field to the exclusion of state law "where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose. *French v. Pan Am. Exp., Inc.*, 869 F.2d 1, 2 (1st Cir. 1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Conflict preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt.*, 589 F.3d 458, 472-73 (1st Cir. 2009). Analysis of conflict preemption requires Courts to examine "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 527 (1977). This analysis is a two-step process of first ascertaining the construction of the [state and federal laws] and then determining the constitutional question whether they are in conflict." *Chicago &N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Courts consider the nature of the activities states seek to regulate, rather than on the method of regulation adopted. *Id.* Courts in the First Circuit have taken a "functional approach" to preemption, focusing "on the effect which the challenged enactment will have on the federal plan," *French*, 869 F,2d at 2.

A. FAA Hazard Determination and Regulation of Light System

According to the complaint, the operation of the Lighting System has negatively impacted Plaintiffs' enjoyment, and the economic value of properties in Merrymeeting Bay. However, in its motion to dismiss, CMP contends that Plaintiffs' nuisance claim is preempted by the Federal Aviation Act ("The Act"). According to the Act, the United States Government has

exclusive sovereignty of airspace of the United States. 49 U.S.C, § 40103. The Secretary of Transportation is authorized to review "structures interfering with air commerce." 49 U.S.C. § 44718. The Secretary's review begins by requiring adequate public notice, in the form and way the Secretary prescribes, of the proposed construction of structures when said notice will promote "(1) safety in air commerce; and (2) the efficient use and preservation of the navigable airspace." ZJ. § 44718(a).

After receiving public notice, the Secretary determines whether the proposed structure "may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace. *Id.* § 44718(b)(1). If so, the Secretary must "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment." *Id.* The Secretary must then issue a report disclosing any adverse impacts on the "safe and efficient use" of the airspace resulting from the construction of the structure, subject to an aeronautical study. *Id.* § 44718(b)(2).

The FAA's statutory obstruction standards "are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration." 14 C.F.R. § 77.25(c). One such supplementation is the FAA Safety Lighting Standards, which set forth standards for marking and lighting obstructions that have been deemed to be a hazard to air navigation. *See* FAA Lighting Standards at i. The FAA Lighting Standards recommend

minimum standards "in the interest of safety, economy, and related concerns." *Id. §* 2.3. "To provide an adequate level of safety, obstruction lighting systems should be installed, operated, and maintained in accordance with the recommend standards." *Id.*

Case law at the federal level has consistently held that the Act preempts the field of airspace safety. In *City of Burbank v. Lockheed Air Terminal*, the United States Supreme Court found a municipal ordinance assigning curfew to airplane takeoffs and landings was preempted by the Act because it had an impact on airspace congestion and therefore safety. 411 U.S. 624, 633 (1973). Likewise, the 1st, 2nd, 3rd, 6th, and 10th circuits have all indicated that the FAA has exclusive authority over the airspace of the United States.[3]

---

[3] *See French v. Pan Am Express Inc.*, 869 F.2d 1, 3 (1st Cir. 1989); *Airline Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2nd Cir. 1960)(explaining that the Federal Aviation Act "was passed by Congress for the purpose of centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nations airspace.") *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 371 (3rd Cir. 1999) ("Because the legislative history of the FAA and its judicial interpretation indicate that Congress's intent was to federally regulate aviation safety, we find that any state or territorial standards of care relating to aviation safety are federally preempted."); *Greene v. B.F. Goodrich Avionics Sys., Inc*, 409 F.3d 784, 795 (6th Cir. 2005); *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318,1327 (10th Cir. 2010) (collecting cases and concluding "that the comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively.

In light of the FAA's regulatory framework, read alongside numerous Supreme Court and Circuit Court holdings, the Court fords that Plaintiffs' state law nuisance action is subject to both field and conflict preemption. As previously stated, field preemption occurs where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona*, 567 U.S. at 399. The comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively. *U.S. Airways, Inc.*, 627 F.3d at 1327 (10th Cir. 2010). The FAA has been granted exclusive regulatory authority over the airspace of the United States. According to the FAA's regulations, when a company like CMP wants to build towers, it must file public notice with the FAA. Under certain circumstances the FAA must conduct an aeronautical study. The resulting report is issued to determine whether the structure being built will be an obstruction, or hazard to air safety. In this case, the report determined the towers were not hazardous, *under the condition* the towers are outfitted according to the FAA's Lighting Standards. Intuitively, one would read the no-hazard determination's conditional language to mean that, absent lights meeting the FAA standard, the towers could qualify as a hazard to air navigation. It would be not only counterintuitive, but directly in conflict with the FAA's regulatory scheme to negate the agency's safety recommendations. For this reason,

the Court also finds Plaintiffs' nuisance claim subject to conflict preemption. To punish a party for following the FAA's safety standards and explicit recommendations surely creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

Plaintiffs concede that generally, the Act, enforced by the FAA, preempts state regulation of airspace safety. However, Plaintiffs contend that the FAA lacks authority over the towers, and that because the FAA Lighting Standards take the form of "recommendations", the FAA is not empowered to sue to enforce non-compliance with its determinations. For these reasons, Plaintiffs also contend their state tort claim is not preempted.

Plaintiffs point out that while certain structures, including CMP's towers, require notice to be given to the FAA, because CMP's towers do not in fact interfere with air commerce, the FAA lacks jurisdiction over the safety of the towers. Therefore, Plaintiffs' contend that the Act does not apply beyond the notice requirement. Plaintiffs argument here rests on two related assertions: 1) the Chops Passage where CMP build the towers is not a navigable airway; and 2) the towers are not an "obstruction to air navigation" according to 14 C.F.R. § 77.17.

Plaintiffs first assert that Chops Passage fails to qualify as navigable airspace because navigable airspace exists "only at and above minimum flight

altitudes . . . " 49 U.S.C. § 40102. The minimum safe altitude for aircraft over a city, town, or settlement is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet, and over open water, no aircraft may be operated closer than 500 feet to any person, vessel, vehicle, or structure. 49 U.S.C. § 91.119. Because Chops Passage is only 790' wide, it has been previously labeled by the FAA as a "No Traverseway", and Plaintiff asserts that it fails to qualify as navigable airspace. Relatedly, Plaintiffs also assert that the towers fail to qualify as an obstruction to air navigation. According to 14 C.F.R. § 77.17, objects under 499 feet (like the towers at issue) are only presumptively obstructions within certain distance of airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under §§ 77.19, 77.21, or 77.23." Plaintiffs assert that the towers do not fall within the required distance of a takeoff or landing area of an airport or any imaginary structure defined by the regulations. Thus, Plaintiffs argue that because the towers do not intersect navigable airspace, the FAA's regulatory authority fails to reach CMP's towers.

Plaintiffs' arguments are, however, inconsistent with the Court's interpretation of the regulatory framework. The FAA has authority over all airspace, not just navigable airspace. 49 U.S.C. § 40103. CMP was therefore required to provide public notice of the construction and did so. The FAA was then required to conduct an aeronautical study to assess the safety of the towers and did so. 14 C.F.R. § 77.25(a). Then, the

FAA was required to determine, based on that study, whether the tower was a safety hazard. The FAA concluded that it was not, conditioned on CMP's compliance with the Lighting Standards. (Pl.'s Ex. A). In addition to CMP's compliance with the FAA's regulatory scheme, the Court notes that the definition of navigable airspace is relative to the "highest obstacle" or nearest "structure", and therefore this structure could never actually be in "navigable airspace" as defined. For this reason, it appears that the regulations presume that structures existing below navigable airspace could be a hazard to air navigation and establish a process for determining whether they are and providing safety standards. Congress has granted the FAA discretion to determine whether structures qualify as hazards to air navigation or obstructions. The FAA has a codified process for making such a determination, and in this case the FAA's recommendations follow directly from that process.

Plaintiffs also assert that because the FAA's determination included *recommendations* rather than a legally enforceable *order*, state court action is not preempted. Plaintiffs are correct that the FAA's determinations are phrased as *recommendations*, and that the FAA does not claim enforcement authority for its "no hazard" determinations. Instead of issuing enforceable orders, the FAA relies on other means to obtain compliance, and the federal statutory and regulatory scheme for managing air safety maintains its preclusive effect. For instance, a party could seek a common law remedy in state court for a defendant's

noncompliance with FAA regulations and recommendations. However, the Court concludes that a common law action brought in state court is subject to conflict preemption when the injury described is a defendant's adherence to FAA guidance. A holding to the contrary would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Thus, the Court grants CMP's motion to dismiss Plaintiffs nuisance claim relating to the Lighting System.

B. FCC Regulations and Telecommunications Act Preemption of Nuisance Claim Regarding the Tower's Radar System

CMP also moves to dismiss Plaintiffs' nuisance claim regarding the tower's radar system. In their complaint, Plaintiffs contend that installation of the proposed Radar System would create a potentially injurious impact on the residents of Merrymeeting Bay and the Bay's special environment. CMP contends that, like Plaintiffs' nuisance claim relating to the lighting system, a nuisance claim aimed at preventing the installation of the Radar System is preempted by the FCC regulatory authority.

The United States government has for over a century, maintained control "over all the channels of radio transmission." 47 U.S.C. § 301. Pursuant to this authority, any person seeking to transmit signals by radio must first obtain a license from the FCC. *See Id.* The Federal Communications Act ("FCA") directs the FCC

to regulate, among other things, the "kind of apparatus to be used with respect to its external effects and the purity and shaipness of the emissions from each station and from the apparatus therein. *Id.* § 303(e). The FCC also has broad authority to develop regulations as needed to implement the FCA. *Id.* §§ 154(i), 201(b), and 303(r).

Pursuant to the FCC's authority under the FCA and its obligations under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-35, the FCC began evaluating the potential biological effects of radiofrequency ("RF") emissions in the early 1980's and adopted standards for RF exposure in 1985. *See In re Responsibility of the FCC to Consider Bio. Effects of Radiofrequency Radiation*, 100 F.C.C.2d 543, ¶¶ 2-3, 24 (1985). The FCC has since engaged in formal rulemaking to determine whether it should revise its standards regarding RF emissions, and has adopted RF testing, certification, and emission standards to "protect the public health with respect to RF radiation from FCC-regulated transmitters," *In re Guidelines for Evaluating the Envt. Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, 15127, ¶ 10 (1996). The FCC reported that the standards "represent a consensus view of the federal agencies responsible for matters relating to public safety and health," *Id.* at 51 2. In 2019 the FCC reviewed these standards and concluded that no changes were necessary in light of the existing science. As such, the FCC's standards regarding limits on permissible absorption rates of RF emissions are published at 47 C.F.R. § 1.1310, falling under the subpart

"Procedures for Implementing the National Environmental Policy Act of 1969." The FCC requires a person obtaining a license to operate a radio transmitter to complete an environmental assessment unless the absorption standards of Section 1.1310 are met. See 47 C.F.R. § 1.1307.

Federal Courts have consistently held that state law efforts to regulate the health and environmental health effects of RF emissions are preempted. For instance, in *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315 (6th Cir. 2017), the plaintiffs sought to enjoin the construction of a cell-phone tower by filing state law tort claims against the telephone service provider. *Id.* at 318. The plaintiffs claimed the cellular tower would endanger public health and safety. *Id.* However, the trial corn! dismissed the state-law tort claims because federal law "impliedly preempts claims based on RF emissions that comply with Federal Communications Commission (`FCC') standards." *Id.* at 319. The Sixth Circuit surveyed the law of conflict preemption and determined that permitting "RF-emissions based tort suits" would create an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* Other circuits have come to similar conclusions. *See Farina v. Nokia, Inc.*, 625 F.3d 97, 126 (3d Cir. 2010) (holding that "a jury determination that cell phones in compliance with the FCC's . . . guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion on how to balance its objectives). In summary, Congress lias granted the FCC authority under the

FCA and NEPA to regulate RF-emissions stemming from the transmission of radio signals. Likewise, federal case law has consistently held that RF-emissions based tort suits are preempted by the FCC's regulatory scheme.

Conversely, Plaintiffs contend that their state-law nuisance claim is not preempted because, while the Telecommunications Act of 1996 ("TCA") (the law governing cell-phone towers) contains a preemption clause, the broader FCA governing radar systems does not. Plaintiffs' argument is unavailing. CMP does not rely on the preemption provision in the TCA. Instead, CMP asserts that preemption occurs because the state tort action interferes with the FCC's regulation of RF-exposure. The FCC's RF-exposure limits were not issued as part of the TCA and are instead "procedures implementing the National Environmental Policy Act of 1969." *See* 47 C.F.R. § 1.301, *etseq*. As CMP points out in their Reply Brief, the FCC has been regulating RF emissions since 1985, more than a decade before the TCA was even passed. In a similar vein, Plaintiffs assert that the federal cases cited above deal entirely with cell-phone regulation rather than radar systems. However, neither of the cases cited above rely on the TCA's express preemption, and instead turned on regulation applicable to all radio transmissions.

Plaintiffs' nuisance claim seeks to prevent the installation of the Radar System to prevent injuiy to the residents of Merrymeeting Bay, as well as the surrounding environment. (Compl. ¶¶ 147-161). However, CMP was required to get a license from the FCC to

operate the radio transmitter at issue, the tower is within FCC jurisdiction, and thus the FCC's RF exposure limits apply to it. Inherent to regulating RF-emissions, the FCC engaged in a balancing of interests, considering impacts on public health and the ability of radio frequencies to reach consumers, leading to the established safety standards. The level of RF-exposure in the towers at issue exists within the range determined safe by the FCC. For this Court to enjoin CMP from installing the Radar System, it would be required to substitute its assessment of potential RF-emission related harms in place of the "consensus view of the federal agencies responsible for matters relating to public safety and health", including the FCC. Likewise, Plaintiffs' nuisance claim is of the exact type already held preempted by federal courts. Were the Court to hold otherwise, it would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Thus, conflict preemption also bars Plaintiffs' state law nuisance action with relation to the Radar System. Therefore, CMP's motion to dismiss is granted in its entirety.

CONCLUSION

For the reasons stated above, the Court denies EHT's motion for leave to file an *amicus curiae* brief. Because Congress has delegated authority to the FAA and FCC to regulate the Lighting and Radar Systems, the Court finds Plaintiffs' nuisance claims subject to preemption. Accordingly, the Court grants CMP's motion to dismiss in its entirety.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

1/15/2021	/s/ Justice Michaela Murphy
DATE	**SUPERIOR COURT JUSTICE**

Entered on the Docket: 1/15/2021
Copies sent via Mail Electronically ✓

APPENDIX C

[SEAL] Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2018-ANE-1643-OE
Prior Study No.
2016-ANE-707-OE

Issued Date: 03/12/2018

Benjamin Shepard
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Tower Section 77 & 277
Location:	Woolwich, ME
Latitude:	43-58-59.59N NAD 83
Longitude:	69-49-41.33W
Heights:	47 feet site elevation (SE)
	240 feet above ground level (AGL)
	287 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system – Chapters 4,8(MDual),&12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

___ At least 10 days prior to start of construction (7460-2, Part 1)

_X_ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

See attachment for additional condition(s) or information. This determination expires on 09/12/2019 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.

(b) extended, revised, or terminated by the issuing office.

(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA. This

determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-4525, or david.maddox@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2018-ANE-1643-OE.

Signature Control No: 357417092-359408333 (DNE)
David Maddox
Specialist

Attachment(s)
Additional Information
Case Description
Map(s)

cc: FCC

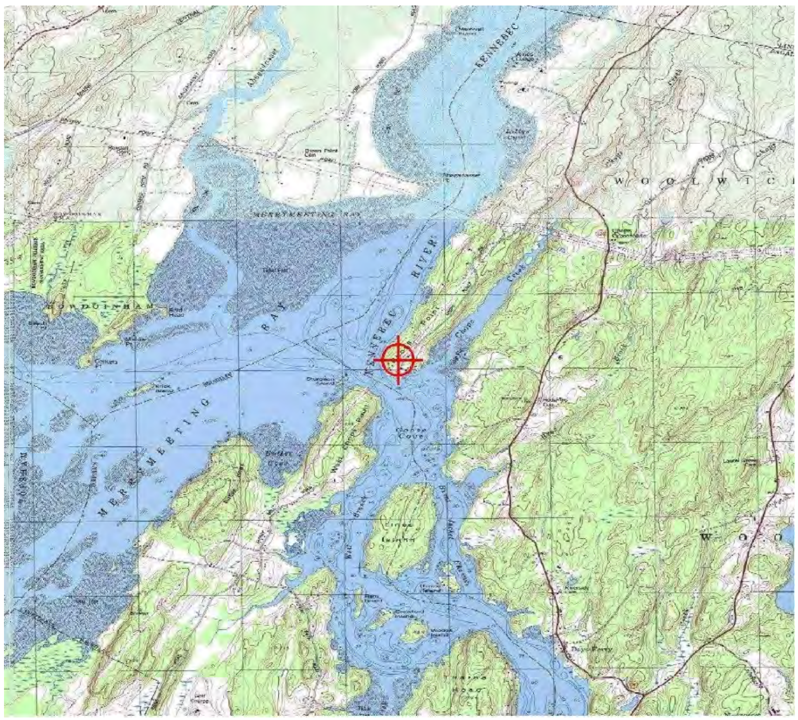
Additional information for ASN 2018-ANE-1643-OE

In addition to marking and lighting condition above, Spherical markers approved.

Case Description for ASN 2018-ANE-1643-OE

Replace existing electrical transmission tower, adjacent to the existing tower with a new lattice tower 240' tall.

TOPO Map for ASN 2018-ANE-1643-OE



APPENDIX D

§1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, ch. 646, 62 Stat. 929 ; Pub. L. 91-358, title I, §172(a)(1), July 29, 1970, 84 Stat. 590 ; Pub. L. 100-352, §3, June 27, 1988, 102 Stat. 662 .)

APPENDIX E

49 USC 1301: Establishment of Board Text contains those laws in effect on March 21, 2022
From Title 49-TRANSPORTATIONSUBTITLE II-OTHER GOVERNMENT AGENCIESCHAPTER 13-SURFACE TRANSPORTATION BOARDSUBCHAPTER I-ESTABLISHMENT
Jump To: Source CreditMiscellaneousAmendmentsEffective DateSavings ProvisionConstruction

§1301. Establishment of Board

(a) Establishment.-The Surface Transportation Board is an independent establishment of the United States Government.

(b) Membership.-(1) The Board shall consist of 5 members, to be appointed by the President, by and with the advice and consent of the Senate. Not more than 3 members may be appointed from the same political party.

(2) At all times-

(A) at least 3 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of transportation, transportation regulation, or economic regulation; and

(B) at least 2 members shall be individuals with professional or business experience (including agriculture) in the private sector.

(3) The term of each member of the Board shall be 5 years and shall begin when the term of the predecessor

of that member ends. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, shall be appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified, but for a period not to exceed one year. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

(4) No individual may serve as a member of the Board for more than 2 terms. In the case of an individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, such individual may not be appointed for more than one additional term.

(5) A member of the Board may not have a pecuniary interest in, hold an official relation to, or own stock in or bonds of, a carrier providing transportation by any mode and may not engage in another business, vocation, or employment.

(6) A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board. The Board may designate a member to act as Chairman during any period in which there is no Chairman designated by the President.

(c) Chairman.-(1) There shall be at the head of the Board a Chairman, who shall be designated by the President from among the members of the Board. The Chairman shall receive compensation at the rate

prescribed for level III of the Executive Schedule under section 5314 of title 5.

(2) Subject to the general policies, decisions, findings, and determinations of the Board, the Chairman shall be responsible for administering the Board. The Chairman may delegate the powers granted under this paragraph to an officer, employee, or office of the Board. The Chairman shall-

(A) appoint and supervise, other than regular and full-time employees in the immediate offices of another member, the officers and employees of the Board, including attorneys to provide legal aid and service to the Board and its members, and to represent the Board in any case in court;

(B) appoint the heads of offices with the approval of the Board;

(C) distribute Board business among officers and employees and offices of the Board;

(D) prepare requests for appropriations for the Board and submit those requests to the President and Congress with the prior approval of the Board; and

(E) supervise the expenditure of funds allocated by the Board for major programs and purposes.

(Added Pub. L. 104-88, title II, §201(a), Dec. 29, 1995, 109 Stat. 932, §701; amended Pub. L. 104-287, §5(5), Oct. 11, 1996, 110 Stat. 3389 ; renumbered §1301 and

amended Pub. L. 114-110, §§3(a)(3), (b), 4, Dec. 18, 2015, 129 Stat. 2228, 2229.)

APPENDIX F

CONSTITUTION OF THE UNITED STATES

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.