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VIA HAND DELIVERY

October 25, 2013

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street SW  
Washington, DC 20423

**FILED**  
OCT 25 REC'D  
SURFACE  
TRANSPORTATION BOARD

**Re: STB Finance Docket No. 35779, Grafton & Upton Railroad Company—  
Petition For Declaratory Order**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are the original and ten copies of a Petition for Declaratory Order and Request for Interim Relief of Grafton & Upton Railroad Company. Also enclosed is a disc containing the enclosed filings and a check in the amount of \$1,400 for the filing fee.

If you have any questions, please contact me.

Respectfully submitted,

Linda J. Morgan  
Attorney for Grafton & Upton Railroad Company

Enclosures

Office of Proceedings  
OCT 25 2013  
Public Record

**RECEIVED**  
OCT 25 2013  
SURFACE  
TRANSPORTATION BOARD

235010

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35779



GRAFTON & UPTON RAILROAD COMPANY --  
PETITION FOR DECLARATORY ORDER

**RECEIVED**

OCT 25 2013

TRANSPORTATION BOARD

**PETITION FOR DECLARATORY ORDER  
AND REQUEST FOR INTERIM RELIEF  
OF GRAFTON & UPTON RAILROAD COMPANY**

STATIONED  
Office of Proceedings

OCT 25 2013

Part of  
Public Record

**FILED**  
OCT 25 RECD  
SURFACE  
TRANSPORTATION BOARD

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Attorneys for Grafton &  
Upton Railroad Company

Dated: October 25, 2013

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 35779

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GRAFTON & UPTON RAILROAD COMPANY --  
PETITION FOR DECLARATORY ORDER

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**PETITION FOR DECLARATORY ORDER  
AND REQUEST FOR INTERIM RELIEF  
OF GRAFTON & UPTON RAILROAD COMPANY**

INTRODUCTION

By this Petition and Request, Grafton & Upton Railroad Company ("G&U") requests the Board to act on an expedited basis and to issue a declaratory order, pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, to the effect that state and local permitting and preclearance statutes and regulations are preempted pursuant to 49 U.S.C. 10501 in connection with the construction by G&U of additional yard and storage tracks adjacent to its main line in Grafton, Massachusetts. In addition, G&U seeks the immediate entry of an interim order authorizing G&U to continue with its construction and use of the new tracks pending a final decision on the question of preemption. As explained below, such interim relief is necessary and appropriate in order to ensure that the Town of Grafton ("Town") does not attempt to prevent G&U from providing essential transportation services.

As explained below, the construction and operation of the yard tracks are essential to support the existing and future rail operations of G&U. The Town, relying upon zoning bylaws and permitting regulations, has threatened to enjoin the construction,

either by issuance of a cease-and-desist order or resort to litigation in the Massachusetts state courts or both. Any such attempt by the town is precisely the type of interference with rail transportation that is preempted by Section 10501. Furthermore, expedited handling and an immediate interim order are required in this situation so that G&U is able to continue to meet the transportation needs of its existing and anticipated future customers.

#### FACTS AND RELATED BACKGROUND

G&U has been in continuous operation since its incorporation in 1873 on a 16.5 mile line that extends between North Grafton, Massachusetts, which is within the Town of Grafton, through the towns of Grafton, Upton, Hopedale, and Milford, Massachusetts. In North Grafton and Milford, G&U has a connection with CSX Transportation, but the G&U-CSX connection in North Grafton is the only active interchange for G&U at this time. Consequently, all of G&U's rail traffic moves through the interchange at North Grafton.

G&U has always maintained a rail yard at the site of the CSX interchange in North Grafton. The yard, which has been in active use since 1873, consists of 3 interchange tracks. In 2012, G&U began to construct a propane transloading facility on property it owns adjacent to the original yard in North Grafton.<sup>1</sup> In addition, in March, 2011 G&U acquired a parcel of property of approximately 5 acres that is contiguous to the G&U main line, the original yard and the site for the propane transloading facility.

The five-acre parcel was acquired by G&U with the recognition that the growth in G&U's business at the interchange with CSX in North Grafton required additional yard

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<sup>1</sup> As the Board is aware, the Town has tried to prevent G&U from constructing and operating the propane transloading facility, and this matter is now pending before the Board in Finance Docket No. 35752.

tracks in order to facilitate interchange operations and provide space for the placement of cars prior to interchange with CSX or after interchange and prior to delivery to customers on the G&U line. As planned, the new yard will initially have 4 tracks, comprising a total of approximately 2,300 linear feet of track, with sufficient space to build additional tracks as necessary in the future. The 4 new yard tracks will be able to accommodate 35 to 40 rail cars. G&U does not own any other property along its right-of-way where additional yard tracks could be constructed.

The dramatic increase in the traffic handled by G&U over the last several years demonstrates the need for the additional tracks. In 2010, for example, G&U interchanged approximately 200 cars with CSX. In 2013, the number of cars interchanged will amount to approximately 2,000, and it is anticipated that the business will increase to approximately 3,500 cars in 2014, not even taking into account the additional tank cars that will be handled when the propane transloading facility has been completed. By any measure, G&U's business activity has outstripped its yard and storage track capacity.

As noted above, all the rail traffic handled by G&U is interchanged with CSX at North Grafton. As a consequence, North Grafton has become a choke point that severely hampers operations and will only get worse as volume increases. The 2,000 cars that will be handled in 2013 really amount to 2,000 loaded cars moving onto the G&U line and 2,000 empty cars moving back to CSX, or 4,000 cars in total. In some weeks, G&U receives interchange service from CSX only 3 times, which means that G&U needs the ability to store up to 3 days worth of cars at North Grafton at any given time. In addition, there must be sufficient track space at North Grafton to permit the CSX inbound and

outbound trains to operate, test airbrakes and switch out any bad order cars that are identified.

Without the additional tracks planned for the five-acre parcel in North Grafton, G&U will continue to be faced with congestion, making operations less efficient and more costly. The lack of adequate yard tracks at North Grafton has also inhibited G&U's ability to have empty cars available for existing customers, which poses the risk that these customers will use other transportation alternatives. In addition, unless the additional tracks are promptly built, G&U will also be unable adequately to serve and meet the needs of new customers, which continue to grow with the transloading services provided by G&U at Upton and Hopedale.

G&U understood when it acquired the five-acre parcel that it would be necessary to remove some of the earth and grade the property in order to bring it to the level of the other adjacent G&U property and make the site usable for the construction of tracks. Consequently, G&U has undertaken the excavation and removal of earth in preparation for the construction of the tracks. Recently, in response to the increasingly urgent need for the additional tracks, the pace of the excavation and site preparation has been accelerated in order to complete the construction of the tracks prior to the onset of winter weather. If the stone base for the new track is not completed prior to the time that the ground freezes or becomes snow covered, it will be impossible to finish the track work until next spring. Consequently, it is critical to complete the excavation and site work immediately.

G&U has conducted the excavation and site work in a manner that is designed to protect nearby streams and ponds, the nearest of which is approximately 100 feet away

from the new track location. Specifically, G&U has left in place a natural 10 to 15 foot berm surrounding the area that will be used for the yard tracks and separating the tracks from any water sources. Furthermore, G&U provided the written plans for the tracks, which had been prepared by a registered land surveyor, to the Town Administrator during a site inspection in 2011. The Town Administrator never raised any questions or expressed any concerns about the plan for the construction of the yard tracks. The construction plans were also provided to and discussed with a representative of the Town's Conservation Commission, who also did not express any concerns. Given the intense scrutiny by the Town of G&U and its activities in North Grafton over the last several years, it is inconceivable that the Town could claim that it lacked knowledge of the proposed construction of yard tracks at the five-acre site.

On October 7, 2013, counsel for the Town contacted counsel for G&U to complain about the excavation work. G&U responded, through counsel, in letters dated October 7, 2013 and October 9, 2013, copies of which are attached as Exhibits A and B. As indicated in the letters, G&U assured the Town that the excavation work had nothing to do with the proposed propane facility and that the Town's building inspector would be welcome to inspect the property. In fact, such an inspection, involving G&U personnel and the Town's building inspector occurred on October 8, 2013. G&U advised the Town that even though G&U believed that the excavation and construction were subject to preemption and that G&U could not be required to obtain permits for such work, G&U volunteered to discontinue the excavation activities in response to the threat by the Town to take legal action to stop the work. No work has been performed at the site since October 8, 2013.

By letter dated October 9, 2013, a copy of which is attached as Exhibit C, the Town advised G&U that the excavation activity was not permitted because the property was within the Town's Water Supply Protection Overlay District, which the Town asserts is intended to protect the Town's aquifer, and in violation of an earth removal bylaw that requires a permit for certain excavation activities. Notwithstanding the fact that the excavation work has not been resumed, the Town sent G&U another letter, dated October 15, 2013, a copy of which is attached as Exhibit D, requesting certain additional information, including information specified in the excavation bylaw, a soil analysis, and an engineer's opinion regarding the potential impact on the Town's aquifer, and demanding that G&U test the water in the vicinity of the property and pay the costs to clean dust off of homes that were allegedly "impacted by the earth removal activities".<sup>2</sup> In a letter dated October 18, 2013, which is attached as Exhibit E, G&U further explained its position that preemption applied and that there would be no harm to the Town's water resources.

#### ARGUMENT

Counsel for the Town has indicated that the Town will either enter a cease and desist order or go to the state court in Massachusetts to seek injunctive relief, or both, if G&U does not comply with these demands. Furthermore, Town counsel has advised G&U that the Grafton Board of Selectmen voted on October 15, 2013 to proceed with litigation to block the construction of the yard. Given these circumstances, there is not only a dispute that warrants the entry of a declaratory order, but also a situation that

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<sup>2</sup> G&U denies that the excavation created any dust that may have settled on homes in the area. If any dust was created, it was solely as a result of the cease and desist order and the injunction that are the subject of the proceedings in Finance Docket No. 35752, which have prevented G&U from paving the road in the propane transloading facility. Trucks removing earth from the excavation site are required to use the unpaved road in order to move through the propane facility.

necessitates the immediate entry of an interim order permitting G&U to complete the excavation, site work and construction of its yard tracks while the merits of the preemption issue are resolved.

I. The Town's Zoning and Permitting Regulations are Preempted.

As the Board has stated, state and local statutes and regulations are categorically preempted by 49 U.S.C. 10501 when the statutes or regulations create "any permit requirement that could be used to deny a railroad the ability to conduct its operations or to proceed with activities the Board has authorized". New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption--In Wilmington and Woburn, MA, STB Finance Docket No. 34797, decision served July 10, 2007 ("New England Transrail"). See, also, Green Mountain R.R. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) ("Green Mountain") (preconstruction environmental and land use permitting requirements were preempted for a transload facility because otherwise the locality could delay the process indefinitely or deny the carrier the right to construct facilities or conduct operations); City of Auburn v. United States, 154 F.3d 1025, 1029-31 (9th Cir. 1998) ("City of Auburn") (environmental and land use permitting process was categorically preempted); Joint Petition for Declaratory Order--Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, decision served May 1, 2001 ("Town of Ayer") (state and local permitting requirements and environmental review of construction and operation of railroad intermodal facility were preempted), aff'd, Boston and Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D.Mass. 2002); Borough of Riverdale--In re New York, Susquehanna and Western Ry., 4 S.T.B. 380, 387-88 (1999) ("Riverdale") (local zoning

and land-use constraints on the railroad's maintenance, use or upgrading of its lines were preempted).

These principles articulating the contours of preemption are now well settled, and they were summarized once again in a decision by the Board recently in a proceeding involving an attempt by the Town of Winchester, Massachusetts to use its zoning regulations to prohibit rail service. In Boston and Maine Corporation and Springfield Terminal Railroad Co.--Petition for Declaratory Order, STB Finance Docket No. 35749, decision served July 19, 2013 ("Pan Am"), the Board prohibited the town from enforcing its zoning regulations to prohibit rail transportation and emphasized that 49 U.S.C. 10501 "prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, construction, and abandonment)" and "from imposing requirements that, by their nature, could be used to deny a railroad's ability to conduct rail operations." Consequently, the Board stated, "state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements, are preempted." As demonstrated below, these principles, including the appropriateness of swift action by the Board, apply to G&U's efforts to construct additional yard tracks in order to continue and facilitate its existing rail transportation services.

Preemption applies equally to rail transportation activities over which the Board has jurisdiction even though it does not exercise direct licensing authority. In particular, preemption applies to the acquisition, construction or operation of facilities, such as yards, that are ancillary or adjacent to a rail carrier's lines and therefore do not require Board authorization under 49 U.S.C. 10906 to construct and operate such yards. Such

facilities and activities are nonetheless within the jurisdiction of the Board pursuant to 49 U.S.C. 10501, and attempts by state and local agencies to require permitting or preclearance with respect to such facilities have been preempted. Riverdale; Friends of the Aquifer, STB\_Finance Docket No. 33966, decision served August 15, 2001 ("this broad statutory preemption applies to the construction of ancillary facilities under section 10906, even though we lack licensing authority over such projects"); Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp. 2nd 1186 (E.D. Wash. 2000).

## II. The Excavation and Construction Do Not Impact Public Health or Safety.

The Town is expected to assert that its concerns and attempts to prohibit G&U's construction of the yard tracks are driven by considerations of public health and safety and that, therefore, preemption should not be applied. As explained below, any such argument by the Town should be rejected. The excavation and construction activities by G&U have been undertaken with appropriate safeguards and have not had, nor will they have, any adverse impact on public health or safety.

As noted above, the Town has contended that construction is subject to 2 separate Town regulations. First, the Town has an "Earth Removal" bylaw that purports to require permits prior to certain excavation activities. Second, the Town claims, based upon a regulation referred to as the Water Supply Protection Overlay District, that the construction presents a risk to the Town's aquifer. As explained below, the activities of G&U do not create any public health or safety risks and, therefore, do not warrant the imposition of either of these regulations.

The excavation activities by G&U have not negatively impacted either the site itself or any nearby bodies of water. The berm that has been maintained adequately

protects against any potential runoff from the new yard. A representative of the Massachusetts Department of Environmental Protection visited the site last week and did not express any concern that the excavation and grading had any adverse effect on nearby water resources.

Furthermore, a hydrologist who has inspected the site and reviewed its characteristics has concluded that the area being excavated, and indeed the entire 5 acre parcel where the yard tracks will be installed, are not, contrary to the Town's assertion, within the Town's aquifer as mapped by the United States Geological Service. Furthermore, the five-acre site is not located in the Zone II watershed protection area, as asserted by the Town, and the site will be in compliance with the Town's bylaw requiring 5 feet of separation between ground water surface and the final grade of the parcel. As explained in the letter from the hydrologist, which is attached as Exhibit F, the Town's allegations concerning potential adverse impacts on nearby water or the aquifer are without foundation.

Thus, any legitimate health and safety concerns have been properly and adequately anticipated and addressed. In any event, even if there were any such concerns, they do not bear on the issues underlying the conclusion that G&U is entitled to a determination by the Board that the preclearance and preapproval regulations of the Town are preempted.

### III. Interim Relief is Warranted.

In implementing its jurisdiction, the Board has the authority under 49 U.S.C. 721 to address irreparable harm by taking whatever discretionary action may be necessary. In determining whether such equitable relief is warranted in circumstances where injunctive

relief is being sought, the Board has long followed a four-part test. Specifically, a party requesting such relief must demonstrate (1) that it is likely to prevail on the merits, (2) that it would suffer irreparable harm in the absence of equitable relief, (3) that the granting of equitable relief would not substantially harm other parties and (4) that equitable relief would be in the public interest.<sup>3</sup> Hilton v. Braunskill, 41 U.S. 770 (1987); Washington Metro Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). The interim order being requested by G&U analogous to a request for equitable relief, and therefore application of the four-part test is instructive.

A. G&U Will Prevail on the Merits.

G&U has amply demonstrated above that it is likely to succeed on the merits of its claim that a declaratory order should be issued to the effect that permitting or preclearance requirements relating to the excavation and construction of the yard tracks are preempted. G&U, a rail carrier, is constructing yard tracks that are necessary to support its existing and future transportation service. The excavation and construction are being done by a contractor at the direction and under the supervision of G&U on property owned by G&U. There could be no clearer set of facts for the application of preemption.

B. G&U Will Suffer Irreparable Harm Without Interim Relief.

G&U will be irreparably harmed absent the entry of an interim order authorizing him to continue with the construction of the tracks, and actually to use the tracks, pending a decision on the merits of the preemption issue. If G&U is not permitted to proceed immediately with the construction of the yard tracks, it risks not only the loss of existing

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<sup>3</sup> Other courts have articulated this fourth test in terms of a balancing of harms. As explained below, G&U meets this test as well.

business but also the inability to attract new business. Without the yard tracks, G&U will not only be unable to interchange cars for existing customers on a prompt and efficient basis but will also be unable to solicit new customers. Damage to the goodwill and marketplace credibility cannot be quantified or remedied by damages, but rather has been recognized as irreparable harm that warrants protection through injunctive relief. *Kmart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907 (1st Cir. 1989); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578 (3d Cir. 2002).

Courts have also recognized that damage to goodwill and potential loss of market share are inherently unquantifiable and constitute irreparable harm in situations where railroads are entitled to rely upon preemption in order to overcome state and local regulations that prevent rail operations. *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y. 2006) (delay causing the loss of potential business and customer goodwill, including advantageous arrangements, constitutes irreparable injury); *Canadian National Railway Co. v. City of Rockwood*, 2005 WL 1349077 (E.D. Michigan 2005) (a loss of goodwill from existing or potential customers is irreparable, because the potential damages are inherently speculative and too difficult to calculate); *Coastal Distribution, LLC v. Town of Babylon*, 216 Fed.Appx. 97 (2d Cir. 2007) (irreparable harm may occur where damages are difficult to measure, such as situations where an entity might lose customer relationships that account for an indeterminate amount of business).

C. No Other Party Will be Harmed by an Interim Order.

Neither the Town nor any other conceivable interested party will be injured by the issuance of an order authorizing G&U to continue the construction. Such an order would

simply enable G&U promptly to complete the construction of its much-needed yard and storage tracks. The tracks will be used only for facilitating the interchange of cars with CSX and movement of cars to and from customers on the G&U line. There are no plans for using the tracks for transloading or any other activities other than temporarily parking rail cars before or after interchange. The use of the tracks will be no different than having trains sitting on the main line. Moreover, as explained above, completion and use of the tracks will not pose any threat to the public health or safety of the Town or its citizens.

D. The Public Interest Will be Served by Interim Relief.

Finally, the public interest will be served by interim relief. Rail shippers and customers of G&U, both existing and potential, will continue to have efficient service. Absent an interim order permitting the construction to be completed and the tracks to be put into use, the public interest represented by the rail service provided by G&U will be harmed. Given the lack of any potential adverse effect on public health and safety, there is no countervailing public interest argument against the issuance of an interim order. In particular, the balance of the potential harm to G&U in the absence of such an order, compared to the alleged harm to the Town, weighs heavily in favor of granting such relief.

CONCLUSION

G&U respectfully requests the Board promptly to determine that preemption applies to the excavation of the 5 acre site in North Grafton and construction and use of yard tracks by G&U, thereby precluding the Town from requiring compliance with permitting or preapproval regulations, whether through the issuance of a cease and desist

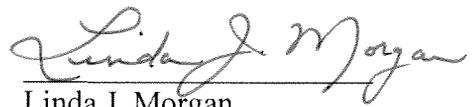
order or litigation. The facts of the situation are clear and leave no doubt concerning the applicability of preemption. G&U recognizes, however, that even though this is an obvious case for the application of preemption, the Board will want to hear from the Town and other interested parties and that a decision on the merits will, therefore, require time to review.

At the same time, G&U has demonstrated an immediate need for the additional yard tracks and has met the criteria for the immediate entry of an interim order authorizing the work to continue while the preemption question is decided. Absent the entry of such an interim order by the Board, G&U will again face delay and irreparable harm as a result of the actions of the Town. If construction stops, winter weather will prevent G&U from finishing the tracks until the spring, and rail service and customers of G&U will suffer in the meantime. Given the circumstances, G&U requests the Board not only to proceed expeditiously to a decision on the merits, as it did in the recent Pan Am case, but also to grant interim relief, pending a final decision, in the form of an order authorizing G&U to continue with its excavation, site work and construction of the tracks and permitting use of the tracks.

Respectfully submitted,

GRAFTON & UPTON  
RAILROAD COMPANY

  
James E. Howard  
70 Rancho Road  
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831-659-4112



Linda J. Morgan  
Nossaman, LLP  
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Dated: October 25, 2013

# EXHIBIT A

# Christopher, Hays, Wojcik & Mavricos, LLP

DAVID A. WOJCIK  
JOHN A. MAVRICOS  
STUART A. HAMMER\*  
ARTHUR J. GIACOMARRA  
DONALD C. KEAVANY, JR.  
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Of Counsel  
CHRISTOPHER CHRISTOPHER  
WILLIAM W. HAYS

WILLIAM C. PERRIN, JR. 1947-1997

\*Also admitted in NJ and CT  
\*\*Admitted in CT only

October 7, 2013

***By Email & First Class Mail***

Ginny Sinkel Kremer, Esq.  
Blatman, Bobrowski & Mead, LLC  
9 Damonmill Square, Suite 4A4  
Concord, MA 01742

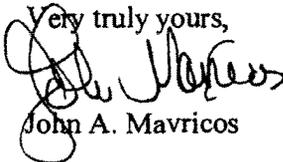
Re: Grafton & Upton Railroad and Town of Grafton

Dear Ginny:

Thank you for contacting me this morning concerning the Town of Grafton's concerns about work being done on the Grafton & Upton Railroad's property. I have spoken to the Railroad people and I am told that the excavation work being done has nothing to do with the propane terminal and, in fact, is on a rear parcel, formerly owned by Cochinski, and the work being done is simply lowering the grade of that parcel to match the existing grade to provide storage track area which, as you know, the Railroad is entitled to do. I was also informed that the propane terminal area has not been disturbed.

The Railroad is willing to allow the Town of Grafton's Building Inspector to come on the property to satisfy himself that the excavation is being done in an area unrelated to the proposed propane transloading terminal. Jon Delli Priscoli suggested that the Building Inspector contact him directly, at 508-328-2974, to make arrangements for a mutually convenient time.

If you have any additional concerns regarding this, please do not hesitate to call.

Very truly yours,  
  
John A. Mavricos

JAM:mck

cc: Grafton & Upton Railroad Company

# EXHIBIT B

# Christopher, Hays, Wojcik & Mavricos, LLP

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CHRISTOPHER CHRISTOPHER  
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WILLIAM C. PERRIN, JR. 1947-1997

\*Also admitted in NJ and CT  
\*\*Admitted in CT only

October 9, 2013

*By Email & First Class Mail*

Ginny Sinkel Kremer, Esq.  
Blatman, Bobrowski & Mead, LLC  
9 Damonmill Square, Suite 4A4  
Concord, MA 01742

Re: Grafton & Upton Railroad and Town of Grafton

Dear Ginny:

I received your October 9, 2013 letter upon my return to the office this afternoon.

When you first contacted me on October 7, 2013, you told me the Town was concerned that the Railroad was violating the Preliminary Injunction issued by the State Court because it was moving earth on the area of the proposed propane transloading terminal. I informed you that same day that no work was being done on the transloading terminal, and the Railroad volunteered to have the Building Inspector visit the site to satisfy the Town as to that fact.

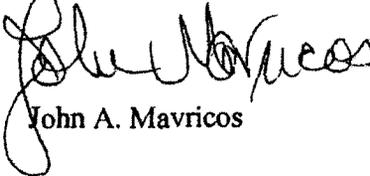
The Railroad made arrangements to have the Building Inspector visit the site the very next day, October 8, 2013. I got your letter that the Town's position today is that the Railroad is in violation of the Town's Earth Removal By Law at a different location. Notwithstanding the fact that both the Town Administrator and the Conservation Commission have been aware of this activity for over a year, today is the first time the Town has expressed any concern.

October 9, 2013  
Page 2

I am informed that the earth work being done on the Kuchinski property that is owned by the Railroad has ceased as of the end of business today.

I further understand that site work and railbed construction for the purposes of railroad operations is subject to federal preemption. I will review the contents of your letter with the Railroad and respond to you further.

Very truly yours,

A handwritten signature in black ink, appearing to read "John A. Mavricos". The signature is written in a cursive style with a large initial "J".

John A. Mavricos

JAM:mck  
cc: Grafton & Upton Railroad Company  
T:\CORR\grafa103\grafa103.043.doc

# EXHIBIT C

BLATMAN, BOBROWSKI & MEAD, LLC  
ATTORNEYS AT LAW  
Concord • Millis • Newburyport

Ginny Sinkel Kremer, Esq.

9 Damonmill Square  
Suite 4A4  
Concord, MA 01742

October 9, 2013

***By Electronic and First Class Mail***

John Mavricos, Esq.  
Christopher, Hays, Wojick & Mavricos, LLP  
446 Main Street  
Worcester, MA 01608

Dear Attorney Mavricos:

Thank you for your response to the Town's inquiry concerning the excavation work that has recently occurred on railroad property. Upon further investigation and a site visit by the building inspector, it appears that there has been excavation and removal of a significant amount of aggregate from the property. I understand from your letter dated October 7, 2013, that this is not the same parcel of property on which the railroad proposes to construct the LPG facility. However, the activity that has occurred (or is occurring) is not permitted because the property is in the Town's Water Supply Protection Overlay District. Thus, the Town has significant concerns about the illegal removal of material directly over the Town's aquifer. Additionally, this activity has occurred in violation of the Town's Earth Removal By-Law.

At this time, the Town is requesting that your client voluntarily cease all activity at the site and permit site visits by Town personnel to assess site conditions relative to its concerns about the disturbance over the aquifer and the unpermitted earth removal. Additionally, as you are aware, it is not the case that all activity at any railroad owned property is exempt from local review and permitting. Therefore, if you contend that this activity is exempt, please provide the legal basis for that claim as soon as possible.

If your client is not willing to immediately stop all activity at the site, please let me know that today. I appreciate your responsiveness to this matter.

Very truly yours,  
*Ginny S. Kremer*  
Ginny Sinkel Kremer

# EXHIBIT D

BLATMAN, BOBROWSKI & MEAD, LLC  
ATTORNEYS AT LAW  
Concord • Millis • Newburyport

Ginny Sinkel Kremer, Esq.

9 Damonmill Square  
Suite 4A4  
Concord, MA 01742

October 15, 2013

***By Electronic and First Class Mail***

John Mavricos, Esq.  
Christopher, Hays, Wojick & Mavricos, LLP  
446 Main Street  
Worcester, MA 01608

Dear Attorney Mavricos:

Thank you for your responsiveness to the concerns raised by the recent earth moving and excavation activity on property owned by the Grafton & Upton Railroad in Grafton. This letter details the information that we have as of this date. The parcel of land in question (hereafter, "the Site") has an address of 72 Rear North Main Street, and is further identified as Assessors Map #19, Lot 54. It abuts Pratt's Mill Pond and is proximate to Big Bummatt Brook. It is in a residentially zoned area, contains wetlands, and is also located in the town's Water Supply Protection Overlay District. It is surrounded by many single family homes.

On or about October 5, 2013, earth moving activity began at the Site, causing an enormous cloud of dust and dirt to engulf, and then settle upon, the area. Many truckloads full of earth and gravel were observed leaving the Site. Concerned residents contacted the Town but the Town did not have any information about the railroad's activities.

After I contacted you on October 7, 2013, you provided Mr. Delli Priscoli's cell phone number and indicated that the Building Inspector should call him to arrange a site visit. The Building Inspector visited the Site on the morning of October 8, 2013. He observed that substantial grading of the land had taken place. There was earth moving equipment as well as three piles of earth, each approximately 15-20 feet high, as well as a massive pile of rocks. It appeared that no measures had been taken to protect the abutting water resources from run-off or other impacts from the earth moving activities.

You have stated that the excavation work has nothing to do with the propane terminal; that the work being done is lowering the grade of the parcel to provide for a "storage track area;" and that the earth work ceased at the end of the business day on October 9, 2013.

As I have stated to you, the Town's concerns are as follows. First, this parcel of land is in the Water Supply Protection Overlay District, which is over the Town's aquifer that supplies residential water to a substantial percentage of Grafton's residents. Second, this work took place without compliance with the Town's earth removal by-law, which requires the filing of excavation plans and groundwater elevations, among other things, in order to acquire a permit from the Board of Selectmen.<sup>1</sup>

As you are aware, to qualify for federal preemption under section 10501(b), the activity at issue must: (1) constitute "transportation;" and (2) be performed by, or under the auspices of, a "rail carrier." In order to evaluate whether this planned activity--which you describe as "storage track area"-- is indeed subject to preemption, the Town requests more information regarding the proposed use. Additionally, although the Town may not be able to "require permits prior to construction, the Courts have found that a railroad can be required to notify the local government when it is undertaking an activity for which another entity would require a permit and to furnish its site plan to the local government." Boston and Maine Corporation and Town of Ayer, Joint Petition for Declaratory Order, STB Finance Docket No. 33971 (May 1, 2001), 2001 WL 458658 at 5, *citing Village of Ridgefield Park v. New York Susquehanna & Western Railway*, 750 A.2d 57 (N.J. 2000) (internal quotation omitted).

Because this is an environmentally sensitive area, is located over the Town's aquifer, and is surrounded by homes, the Town requests that the railroad promptly provide it with detailed information concerning its past, present, and planned future activities at the Site.

Additionally, the Town would like access to the Site in order to ascertain the impact, if any, of the earth removal on Pratt's Pond, Big Bummett Brook, and/or the aquifer. The Town also requests that the railroad provide the information required by Article 13 of the Town's Bylaws; information regarding the fill, if any, that will be added to the Site; a certified soil analysis; and an engineer's opinion stating that removal of soil will not have an adverse impact on the Town's water supply. The Town also requests voluntary testing of the water in Pratt's Pond and/or the brook and adjacent wetlands. Finally, the Town requests that the railroad agree to underwrite the cost of cleaning the dirt and dust off of the homes in the immediate area that were impacted by the earth removal activities.

Very truly yours,  
Ginny S. Kremer  
Ginny Sinkel Kremer

---

<sup>1</sup> Although upon a search of its files, the Conservation Commission did retrieve the "Topographic Plan of Land" filed over two years ago on August 24, 2011, that Plan contains extremely scant information about the railroad's plans for the site, and no information whatsoever about the impact of those plans on environmental and watershed resources.

# EXHIBIT E

# Christopher, Hays, Wojcik & Mavricos, LLP

DAVID A. WOJCIK  
JOHN A. MAVRICOS  
STUART A. HAMMER\*  
ARTHUR J. GIACOMARRA  
DONALD C. KEAVANY, JR.  
PATRICE J. MAVRICOS  
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Of Counsel  
CHRISTOPHER CHRISTOPHER  
WILLIAM W. HAYS

WILLIAM C. PERRIN, JR. 1947-1997

\*Also admitted in NJ and CT  
\*\*Admitted in CT only

October 18, 2013

*By Email & First Class Mail*  
Ginny Sinkel Kremer, Esq.  
Blatman, Bobrowski & Mead, LLC  
9 Damonmill Square, Suite 4A4  
Concord, MA 01742

Re: Grafton & Upton Railroad Company ("Railroad") and Town of Grafton ("Town")

Dear Attorney Kremer:

I was unable to respond to your October 15 letter sooner because of a pending trial scheduled for Monday, October 21, 2013, in the Superior Court.

While I wish to emphasize that we do not believe the Railroad has any legal obligation to do so, and without waiving any right to assert the preemption doctrine, the Railroad invited DEP to review the area where it is preparing the land for its rail car holding area. I am informed that DEP was satisfied that the land abutting the pond and river around this Site (as you have defined it) was stable and that there was no runoff from the Railroad's earth removal work. I further understand DEP will be confirming that in a letter next week. Again, without waiving its preemption rights or conceding any obligation to provide this information, the Railroad has engaged a hydrologist who has been to the Site and is preparing a letter to address any concerns regarding the Town's water resources. I expect to have a preliminary response from him next week. The Railroad is willing to consider a proposal to have the Town's hydrology engineer visit the Site along with the Railroad's hydrologist to evaluate the conditions.

You acknowledge in your October 15, 2013 letter that the Conservation Commission had a copy of the Topographic Plan of Land dated August 24, 2011 showing the Site. Please be aware that a copy of this Plan was also given to the Town Administrator by the Railroad before the earth work began. Neither the Conservation Agent nor the Town Administrator expressed any objections, concerns or limitations regarding the planned activities. The Railroad has been performing this leveling work for over a year and it is only in the past few weeks that anyone has raised a concern. With regard to your request for all plans concerning the Site, the August 24, 2011 plans show the area

October 18, 2013

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in which the track for rail car holding is planned. The area is designed so future expansion is possible.

You are correct that the Railroad maintains that this work is exclusively being done for transportation purposes. No other entities are involved in the operation of this rail facility. We believe the law is absolutely clear that this construction activity is preempted from permitting and preclearance requirements. The Fifth Circuit Court of Appeals spoke directly to this issue in *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012):

Similarly here, the ICCTA grants the Board exclusive jurisdiction over the “construction ... of spur, industrial, team, switching, or side tracks, or facilities,” leaving no room for local regulation. 49 U.S.C. § 10501(b)(2).

If the Board directly regulates the activity, as it does the construction of rail lines, state and local regulation is prohibited. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332 (5th Cir.2008). Thus, the ordinances that would apply to the slope or other features of the embankments for the railroad tracks themselves are expressly preempted throughout the 243 acres.

Similarly, the Second Circuit addressed this same issue in *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005):

The Termination Act expressly preempts “remedies provided under Federal or State law” and vests with the Surface Transportation Board (the “Transportation Board”), a federal agency, exclusive jurisdiction over “transportation by rail carriers” and “the construction ... of ... facilities ....” 49 U.S.C. § 10501(b). The term “transportation” includes a “warehouse ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail.” 49 U.S.C. § 10102.

While the statutes do not contain any requirement that a railroad give notice of its intention to start construction of a railroad facility, as a courtesy, the Grafton & Upton Railroad did in fact apprise both the Town's Conservation Agent as well as the Town's Administrator by bringing both to this Site on separate occasions and providing both with the Plan you have. Neither the dictum you cite, and certainly not the statutes, suggest a railroad provide anything more.

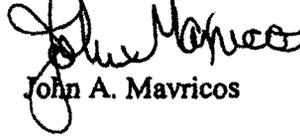
October 18, 2013

Page 3

I expect that the information that will be provided next week will satisfy the Town that the work that has been done has not caused any harm to the Town's water resources. This facility is absolutely necessary to accommodate the increased demand for the Railroad's operations.

Please call if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Mavricos". The signature is written in a cursive style with a large initial "J".

John A. Mavricos

JAM:jm

cc: Grafton & Upton Railroad Company

T:\CORR\graft103\graft103.047.wpd

# EXHIBIT F



# GeoInsight

Environmental Strategy & Engineering

October 24, 2013

GeoInsight Project 7244-000

John Mavricos, Esquire  
Christopher, Hays, Wojcik & Mavricos, LLP  
446 Main Street, Eighth Floor  
Worcester, MA 01608

RE: Grafton & Upton Railroad Kuchinski Parcel  
Grafton, MA

Dear Mr. Mavricos:

As requested, GeoInsight, Inc. (GeoInsight) reviewed available mapping, hydrogeologic references, and the boundaries of mapped water resources to assist the Grafton and Upton Railroad (the Railroad) with evaluating the local regulatory compliance status for excavation and grading of the five acre former Kuchinski parcel (the Parcel). It is our understanding that the Town of Grafton (the Town) believes that the Parcel is located within a Zone II wellhead protection area for a community supply well. Further, the Town believes that excavation activities conducted on the property to depths within five feet of the groundwater surface will be in violation of Town's Aquifer protection by-law. This letter provides our opinion regarding these two concerns raised by the Town.

Further, GeoInsight understands that the Railroad asserts certain rights under federal law that preempts the application of certain state and local laws and regulations and precludes the Town from applying such state and local laws and regulations to the activities of the Railroad. GeoInsight's findings and opinions are made without regard to any such assertions as to the law of federal preemption, about which we offer no opinion.

In order to develop our opinions, we met with Railroad representatives at the Parcel to observe existing conditions on October 18, 2013 and we reviewed mapped water resource boundaries and topographic features compiled on Massachusetts GIS mapping, the Grafton Zoning Map, and United States Geological Survey (USGS) aquifer maps. A composite of these maps is attached as Figure 1.

Furthermore, we reviewed both the existing conditions plan and the proposed final grading plan for the parcel prepared by Arthur F. Borden & Associates, Inc revised October 21, 2013 to assist in evaluating the vertical separation between proposed grades and the groundwater surface.

Mass GIS mapping shows that the parcel is not located in an existing Zone II area. The Zone II is the area of land overlying an aquifer that contributes groundwater to a well pumping its maximum approved withdrawal for 180-days without rainfall. The nearest Zone II boundary is approximately 350 feet to the southeast.

GeoInsight, Inc.  
186 Granite Street, 3<sup>rd</sup> Floor, Suite A  
Manchester, NH 03101-2643  
Tel (603) 314-0820  
Fax (603) 314-0821  
www.geoinsightinc.com

GeoInsight, Inc.  
One Monarch Drive, Suite 201  
Littleton, MA 01460-1440  
Tel (978) 679-1600  
Fax (978) 679-1601  
www.geoinsightinc.com

GeoInsight, Inc.  
200 Court Street, 2<sup>nd</sup> Floor  
Middletown, CT 06657-3341  
Tel (860) 894-1022  
Fax (860) 894-1023  
www.geoinsightinc.com



Massachusetts GIS mapping shows the Parcel to be located in an Interim Wellhead Protection Area (IWPA), but this IWPA delineation is an error and is not enforceable based on our telephone conversation with Barbara Kickham at DEP central Regional Office Division of Water Supply. The IWPA which includes the Parcel is for source code 06G which represents a community supply well installed as a replacement for a preexisting well (source code 03G) which had an approved Zone II delineation. Ms. Kickham indicated that DEP assigns a replacement well the same Zone II as the original well. The pertinent Zone II boundaries are shown on Figure 1.

The Parcel is located within the Aquifer Protection District as shown in Grafton Zoning Map, but it is not located in an aquifer area as mapped by the USGS. Aquifers are saturated sand and gravel deposits that readily transmit groundwater to wells in quantities suitable for community use. The deposits on the Parcel contain sand and gravel, but also considerable quantities of silt which does not readily transmit groundwater. Furthermore, an outcrop of potential bedrock was observed on the Parcel which suggests that bedrock may be shallow and the saturated thickness may be thin. If the parcel is not overlying an aquifer, it cannot be part of a Zone II for an existing or future well. Site specific information would be needed to more precisely characterize subsurface characteristics and aquifer potential on the Parcel.

In the absence of site specific data, the groundwater elevation at the parcel can be approximated by the surface water elevation in Pratt's Pond. The groundwater table surface is generally a subdued expression of the surface topography where groundwater flows toward surface water during most times of the year. Therefore, the groundwater elevation at the parcel is expected to be just slightly higher than the surface elevation of the pond. Arthur F. Borden & Associates plans give the elevation of Pratt's Pond at 338 +/-.

The Town's Aquifer Protection By-law allows excavation within 5 feet of the seasonal high groundwater level. The proposed grade of the Parcel is 343.5 which provides this required separation assuming that the groundwater level is at or slightly above the pond level. Site specific information on groundwater levels would be required to more accurately determine the separation distance between proposed grades and the groundwater surface.

A summary of our findings are as follows:

1. The Parcel is not mapped within an aquifer as mapped by the USGS.
2. The Parcel is not located in a Zone II protection area as documented on Mass GIS;
3. The Parcel is mapped in an IWPA but this mapping is incorrect as confirmed by Barbara Kickham at the MADEP;
4. The Parcel is located in the Town's Aquifer Protection District;
5. Based upon existing information on the pond elevation, the groundwater at the Parcel can be assumed to be at approximately 338 ft MSL.
6. With a proposed grade of 343.5 ft MSL, the plans appear to be in compliance with the Town's Aquifer Protection District by-law requiring 5 feet of separation between the groundwater surface and final Parcel grades.



If you have questions regarding this letter or any other matter, please call us at (978) 679-1600.

Sincerely,  
GEOINSIGHT, INC.

David A. Maclean, P.G., L.S.P., L.E.P.  
Senior Associate/Senior Hydrogeologist

David G. Harwood, P.G.  
Project Manager/Hydrogeologist

Enclosure

#### References

Barbara Kickham, Hydrogeologist, Massachusetts Department of Environmental Protection, Central Regional Office, Personal communication October 16, 2013.

Massachusetts GIS Zone IIs and IWPA layers updated October 7, 2013.

Topographic Plan of Land, Prepared for Grafton & Upton Railroad, Arthur F. Borden & Associates, Inc. 302 Broadway, Raynham, MA. November 10, 2010, revised October 21, 2013.

Town of Grafton Massachusetts Zoning Map, prepared by AppGeo, October 15, 2012.

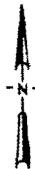
Water Resources of the Blackstone River Basin, Massachusetts, Hydrologic Atlas 682, Walker and Krejmas. United States Geological Survey, 1986.

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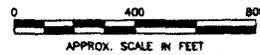
**LEGEND**

- GRAFTON GROUNDWATER PROTECTION DISTRICT
- USGS MAPPED AQUIFERS
- APPROXIMATE LOCATION OF ZONE II
- APPROXIMATE LOCATION OF PROPERTY BOUNDARIES



**NOTES:**

1. THIS FIGURE WAS BASED UPON A GOOGLE EARTH PRO IMAGE DATED SEPTEMBER 20, 2010, MASS GIS AND TOWN OF GRAFTON ZONING MAP.



CLIENT:				GRAFTON & UPTON RAILROAD			
PROJECT:				KUCHINSKI PARCEL GRAFTON, MASSACHUSETTS			
TITLE:				SITE PLAN			
DESIGNED:	DRAWN:	CHECKED:	APPROVED:				
DGH	NMT	DGH	DAM				
SCALE:	DATE:	FILE NO.:	PROJECT NO.:	FIGURE NO.:			
1" = 400'	10/22/13	7244D001	7244-000	1			

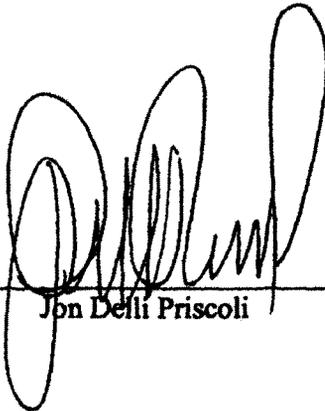


PLOT DATE: 10-22-13  
 P/E: M:\Projects\Grafton\Project\7244 Draft\mch\dwg\7244D001.dwg

VERIFICATION

I, Jon Delli Priscoli, President of Grafton & Upton Railroad Company, verify under penalty of perjury that the facts set forth in the foregoing Petition for Declaratory Order and Motion for Injunctive Relief are true and correct. Further, I certify that I am qualified and authorized to verify the foregoing document and cause it to be filed.

Executed on October 27, 2013.

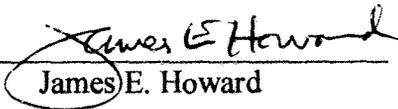


Jon Delli Priscoli

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Petition for Declaratory Order and Request for Interim Relief to be served by sending a copy by Federal Express on October 25, 2013 to the following counsel for the Town of Grafton:

Ginny Sinkel Kremer  
Blatman Bobrowski & Mead  
9 Damonmill Square  
Suite 4A4  
Concord, Massachusetts 01742

  
James E. Howard