

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

235091

Finance Docket No. 35779

ENTERED
Office of Proceedings
November 19, 2013
Part of the Public
Record

**GRAFTON & UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER**

**REPLY OF GRAFTON & UPTON RAILROAD
COMPANY TO REQUEST TO DISMISS PETITION**

James E. Howard
70 Rancho Road
Carmel Valley, CA 93924
831-659-4112
jim@jehowardlaw.com

Linda J. Morgan
Nossaman, LLP
1666 K Street, N.W.
Suite 500
Washington, DC 20006
202-887-1400
lmorgan@nossaman.com

Attorneys for Grafton &
Upton Railroad Company

Dated: November 19, 2013

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**REPLY OF GRAFTON & UPTON RAILROAD
COMPANY TO REQUEST TO DISMISS PETITION**

On October 25, 2013, Grafton & Upton Railroad Company ("G&U") filed a Petition for Declaratory Order and Request for Interim Relief requesting the Board to act on an expedited basis and to issue a declaratory order 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 the Petition, G&U sought the entry of an interim order authorizing G&U to continue with its construction of and to use the new tracks pending a final decision on the question of preemption.

On November 7, 2013, the Town of Grafton ("Town") filed a Reply to the Petition in which the Town claimed that it was "taking no action to stop or hamper the railroad's construction". In addition, the Town requested the Board to dismiss the Petition "as moot".

The Reply of the Town is tantamount to a motion to dismiss the Petition, which entitles G&U to reply. As demonstrated below, the Board should reject the motion to dismiss and expeditiously enter a declaratory order affirming that preemption applies to

the construction of the additional yard tracks proposed by G&U. In addition, however, as explained below, G&U requests that the Board retain oversight in the event that further relief is necessary or appropriate to implement a decision that preemption applies.

Notwithstanding the Town's claim that it "is taking no action to stop or hamper the railroad's construction", the Petition and the accompanying Verified Statement of John A. Mavricos ("Mavricos VS"), G&U's local attorney, demonstrate that the Town in fact threatened to issue a cease and desist order and to seek a temporary restraining order in state court in order to enforce its local regulations and prohibit the construction of the yard tracks without local permits. As stated in the letter from Town counsel dated October 9, 2013, which was attached as Exhibit C to the Petition and as Exhibit 4 to the Mavricos VS, the excavation activity in connection with the construction of the yard tracks was, according to the Town, illegal and in violation of several Town regulations.

Based upon the Town's earlier actions in connection with G&U's plan to construct a propane transloading facility--the entry of a unilateral cease and desist order and an ex parte proceeding to obtain a temporary restraining order in state court--the recent threat was entirely credible. Moreover, contrary to the Town's contention now, it never communicated to G&U that the Town had decided not to challenge the construction of the yard tracks. Mavricos VS at ¶ 8.

While the Town may have indicated in its Reply a recognition for the time being that preemption applies, the Town and G&U are continuing to discuss the potential applicability of and compliance with other regulations that the Town argues are within the police powers of the Town to protect public health and safety. G&U has continued to cooperate with the Town, but the issues raised by the Town have not been finally

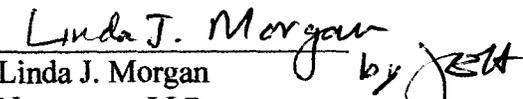
resolved. It is quite possible that the Town will eventually use health and safety regulations as a pretext to attempt to frustrate or prevent the completion of the construction of the yard tracks. See, e.g., Joint Petition for Declaratory Order--Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971.

G&U has demonstrated that it is entitled to the declaratory order and interim relief requested in the Petition. Taken at face value, the Reply of the Town confirms that it agrees that preemption applies. G&U requests, therefore, that the Board grant such relief as promptly as possible. Rather than dismissing the Petition, granting the relief requested by G&U is entirely appropriate. In addition, however, the Board should not terminate or discontinue this proceeding unless and until it is clear, based upon further developments and advice from the parties, that further relief is not necessary or appropriate.

Respectfully submitted,

GRAFTON & UPTON
RAILROAD COMPANY

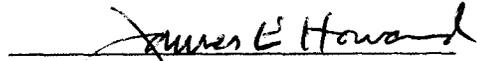

James E. Howard
70 Rancho Road
Carmel Valley, CA 93924
831-659-4112


Linda J. Morgan
Nossaman, LLP
1666 K Street, N.W.
Suite 500
Washington, DC 20006
202-887-1400

Dated: November 19, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Reply of Grafton & Upton Railroad Co. to Request for Dismissal and the accompanying Verified Statement of John A. Mavricos to be served by e-mailing copies to all parties of record as of this 19th day of November, 2013.



James E. Howard

**BEFORE THE
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**GRAFTON & UPTON RAILROAD COMPANY --
PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF JOHN A. MAVRICOS

I, John A. Mavricos, on oath depose and say as follows:

1. I am an attorney and have been licensed to practice in the Commonwealth of Massachusetts for 34 years and have personal knowledge of the facts set forth herein.

2. I have represented Grafton & Upton Railroad Company ("G&U") on certain matters relating to the Town of Grafton, Massachusetts ("Town").

3. The Town's Statement of Facts in its "Reply of the Town of Grafton, Massachusetts to the Petition for Declaratory Order" ("Reply") does not accurately set forth my communications with Town counsel and therefore does not accurately inform the Board as to the need for a decision on the G&U's petition.

4. The Town states at page 2 of its Reply, that it "was unaware of any planned activity at this site...". The town has known this is untrue since my October 9, 2013 letter (Exhibit 1 hereto) wherein I reminded it of plans provided by the G&U before work began. Indeed, the Town in its letter dated October 15, 2013 (see Exhibit 2 hereto) admitted in a footnote that the Town's Conservation Commission received a copy of the plan showing the G&U's plans for this

site. The Town also acknowledged in a November 7, 2013 letter (see Exhibit 3 hereto) that Mr. Delli Priscoli (President of the G&U) also gave a copy of the G&U's plans for this site to the Town Administrator (who reports directly to the Board of Selectmen) when the two of them walked the site, but complains that giving plans and making comments while walking the site are insufficient for this Town.

5. The Town's statement in the first paragraph of the fact section of its Reply that I was contacted about work being done at the site is misleading. While I was contacted by telephone on October 7, 2013, the thrust of the communication I had with the Town's counsel was that the Board of Selectmen accused G&U of doing earth removal work on a proposed propane transloading facility in violation of an injunction issued by the State court. I responded in writing that same day to make clear that the work was not being done on the propane facility and in order to assure Town counsel of this fact I relayed G&U's offer to have the Building Inspector visit the site the following day to satisfy himself as to my representation. See October 7, 2013 letter attached as Exhibit 3 hereto.

6. The Building Inspector met with the President of the Railroad first thing on the morning of October 8. However, following that visit the Town shifted its focus and now complained that, even though the Building Inspector was satisfied the G&U was not doing work in violation of the injunction, the earth removal activity:

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*.

See Town Counsel's October 9, 2013 letter attached as Exhibit 4. The Earth Removal By-Law states in part "No earth shall be removed from any parcel of land in the town

without a written permit from the Board [of Selectman], except as hereinafter provided."

Article 13, Section 2A.

6. While the Town's Reply accurately states that the Town requested information from G&U, it neglects to inform this Board that G&U was given a deadline of Noon, Friday, October 18, 2013 and that, according to an article in the Grafton News, the Board of Selectmen voted to direct Town counsel to file a lawsuit against G&U that afternoon for violating the earth removal statute if G&U did not satisfy the Town by that date and time. See Article attached as Exhibit 5 hereto.

7. The threat of this looming deadline beyond which a lawsuit would be filed hardly made the request for information "voluntary" as suggested by the Town in its Reply. The lawsuit approved by the Board of Selectmen was no less of a threat because Town counsel omitted reference to that vote in her letter.

8. These threats of a noontime deadline for the filing of a lawsuit over alleged violations of the Town's permitting requirements compelled G&U to file its Petition with the Board. Contrary to the allegation in the Reply, I was never informed that the Town had decided not to file a lawsuit concerning the earth removal work that had already taken place or the remaining earth removal work that was voluntarily suspended by G&U. I was told that an oral report of the Massachusetts Department of Environmental Protection inspectors, to the effect that they did not see any environmental problems at the site, had caused the Town to hold off on taking legal action on Friday, October 18, 2013. The threat of litigation by the Town was never taken off the table in any of conversations with or letters from Town counsel.

Signed under the pains and penalties of perjury this 18th day of November, 2013

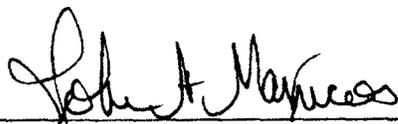

John A. Mavricos

EXHIBIT 1

Christopher, Hays, Wojcik & Mavricos, LLP

DAVID A. WOJCIK
JOHN A. MAVRICOS
STUART A. HAMMER*
ARTHUR J. GIACOMARRA
DONALD C. KEAVANY, JR.
PATRICE J. MAVRICOS
SHERRI A. SACKS-MARTIN**
JONAH M. TEMPLE

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

COUNSELLORS AT LAW
448 MAIN STREET
WORCESTER, MASSACHUSETTS 01608
TELEPHONE (508) 792-2800
FAX (508) 792-8224
www.chwmlaw.com

Of Counsel
CHRISTOPHER CHRISTOPHER
WILLIAM W. HAYS

WILLIAM C. PERRIN, JR. 1947-1997

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.

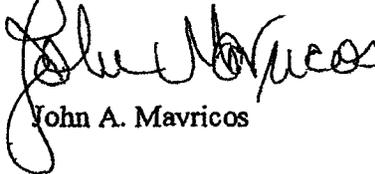
October 9, 2013

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

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EXHIBIT 2

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.¹

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 Bummatt 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 Sinkel Kremer

¹ 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 3

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

Ginny Sinkel Kremer, Esq.

9 Damonmill Square
Suite 4A4
Concord, MA 01742

November 7, 2013

By Electronic Mail

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

Dear Attorney Mavricos:

As you are aware, the Town has been seeking information from your client concerning the excavation and earth removal activities taking place at 72 Rear North Main Street beginning on or about October 5, 2013. Having no information concerning these activities other than a one page plan filed over two years ago,¹ and because the site is over the Town's aquifer and proximate to a brook and pond, the Town responsibly sought information to ensure that its resources were not threatened. As I told you during our telephone conversation on October 18, 2013, the Town accepts DEP's conclusions that the activities are not compromising the pond or the brook. The only issue that remained was the potential impact to the aquifer, which you stated was being evaluated by a scientist hired by your client.

The Town has had an opportunity to review the Geosight report dated October 23, 2013, responding to the potential threat to the aquifer, and has consulted with Northeast Geoscience, Inc. concerning that report. Attached please find a letter signed by

¹ Off-hand comments about potential plans Mr. Delli Priscoli may have made to the Town Administrator or Conservation Agent during informal walks of the property several years ago do not constitute informing the Town of the nature or scope of planned activities. These vague comments gave the Town no basis whatsoever to make reasonable determinations as to whether local laws are preempted, or whether, even assuming preemption applies, there may still be some applicable health, safety, or environmental regulations. Thus, please consider your client on notice that neither the Town Administrator nor the Conservation Agent left those walks in any way informed of the rail road's plans. If there is any other information that your client feels he communicated during those walks, please inform him that the communication was simply not received.

Joel Frisch, P.G. As I communicated yesterday, Mr. Frisch is advising the Town to take an actual measurement of the estimated seasonal high water table, a measurement that is simple and inexpensive, instead of relying on an assumption, as Geoinsight did. Because the consequences of reliance on an erroneous assumption may be quite serious, the Town requests that we arrange to have this test done as soon as possible. The Town also requests that your client provide information concerning the deep excavation on the site, including the fill, if any, that will be added thereto.

Very truly yours,

/s/ Ginny S. Kremer
Ginny Sinkel Kremer
(617) 312-2323

Encl.

EXHIBIT 4

Christopher, Hays, Wojcik & Mavricos, LLP

DAVID A. WOJCIK
JOHN A. MAVRICOS
STUART A. HAMMER*
ARTHUR J. GIACOMARRA
DONALD C. KEAVANY, JR.
PATRICE J. MAVRICOS
SHERRI A. SACKS-MARTIN**
JONAH M. TEMPLE

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

COUNSELLORS AT LAW
446 MAIN STREET
WORCESTER, MASSACHUSETTS 01608
TELEPHONE (508) 792-2800
FAX (508) 792-6224
www.chwmlew.com

Of Counsel
CHRISTOPHER CHRISTOPHER
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October 7, 2013

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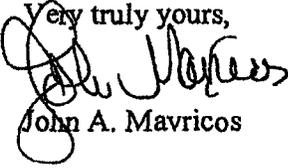
Re: Grafton & Upton Railroad and Town of Grafton

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 5

Selectmen Set Friday Deadline for Railroad

The Board of Selectmen set a noon Friday, October 18, deadline for the Grafton & Upton Railroad to respond to questions about the earth removal operations being conducted on railroad property in North Grafton.

Should the deadline pass, the Town will file a lawsuit Friday afternoon.

According to Town Ad-

ministrator Timothy McInerney at the Tuesday, October 15, Board of Selectmen's meeting, Town Counsel Ginny Sinkel Kremer sent a list of questions to the railroad that morning. The questions include why the railroad believes it is pre-empted from local regulation, the future of the property and the effect

Continued on page 17

Railroad Deadline

Continued from page 1

the earth removal would have on the water table.

McInerney said the railroad had agreed to stop the earth removal operations when he contacted them after last week's Selectmen's meeting. He thought they may have been finished.

Selectman John Carlson said he'd gone on private property, with permission of the owners, to observe the operation and thought there was much material that could still be removed. He said it looked like a "gravel-mining site."

"I don't think they're done," he said.

McInerney said he has been trying to get the Department of Environmental Protection out there with no success.

Carlson said he saw one hole with water in it below

the level of Pratt's Pond, even though it has been dry lately.

His opinion was that water going through 100 yards of gravel would filter contaminants from entering the pond.

McInerney said there had been other correspondence with the railroad but that Town Counsel's letter had gone out to the railroad that morning.

He did recall that some plan had been submitted to the Conservation Commission in 2011 but was not sure if that was this plan.

"We know who we're dealing with," said Selectman Craig Dauphinais.

"Give them until Friday at noon to let us know what he's doing, then file the lawsuit," said Selectman Brook Padgett. "We'll go down the road again."