



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

Central Regional Office • 627 Main Street, Worcester MA 01608 • 508-792-7650

DEVAL L. PATRICK  
Governor

RICHARD K. SULLIVAN JR.  
Secretary

KENNETH L. KIMMELL  
Commissioner

August 23, 2013

234708  
ENTERED  
Office of Proceedings  
August 23, 2013  
Part of Public  
Record

Cynthia T. Brown, Chief  
Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

Re: Grafton & Upton Railroad Co. Petition for Declaratory Order  
Finance Docket No. 35752

Dear Ms. Brown,

The Massachusetts Department of Environmental Protection has reviewed the Petition for Declaratory Order captioned above (the "Petition") filed by the Grafton & Upton Railroad (the "Railroad") on July 23, 2013. In the Petition, the Railroad requests that the Board "clarify that a decision in favor of the applicability of preemption means that the . . . orders of the State Fire Marshal and Massachusetts DEP, to the extent that they attempt to propose preclearance or preapproval requirements, are void and unenforceable. . . ." Grafton & Upton R.R. Pet. at 24. However, as explained briefly below, any potential issue regarding the Massachusetts DEP's order has become moot.

On December 14, 2012, the Department issued a Unilateral Administrative Order (UAO-CE-12-6W008) (the "Order") to the Railroad for violations of the Massachusetts Wetlands Protection Act. On April 12, 2013, the Order became final agency action after the parties filed a settlement agreement dismissing the Railroad's appeal of the Order. Attached is a copy of the Department's Final Decision incorporating the settlement agreement and a stipulation of dismissal signed by the Parties. As both the Final Decision and the Stipulation recognize, the Railroad has complied with the UAO. Final Decision at 2 ¶ 5; Stipulation of Dismissal at 2 ¶ 1. Thus, contrary to the Railroad's assertion, *see* Grafton & Upton R.R. Pet. at 20 n.4, resolution of the Massachusetts DEP's order has not been deferred, it has been resolved.

Ms. Cynthia T. Brown

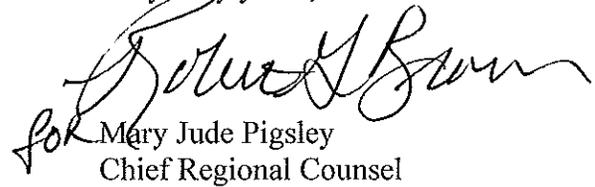
August 9, 2013

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Because no live controversy currently exists between the Department and the Railroad, the Railroad's request that the Board declare the Massachusetts DEP's order void is moot.

For the foregoing reasons, the Department respectfully requests that the Board deny the Railroad's request as it relates to the Department's order. If, for some reason, the Board decides to reach the merits of this issue despite it being moot, then the Department respectfully requests leave to address them.

Very truly yours,

  
for Mary Jude Pigsley  
Chief Regional Counsel

cc: Seth Schofield, Assistant Attorney General



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

## Department of Environmental Protection

One Winter Street Boston, MA 02108 • 617-292-5500

DEVAL L. PATRICK  
Governor

TIMOTHY P. MURRAY  
Lieutenant Governor

RICHARD K. SULLIVAN JR.  
Secretary

KENNETH L. KIMMELL  
Commissioner

### THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

April 12, 2013

\_\_\_\_\_  
In the Matter of  
Grafton & Upton Railroad Co.  
  
\_\_\_\_\_

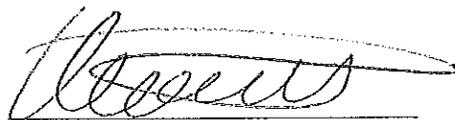
**Docket No. 2012-046**  
DEP File No. UAO-CE-12-6W008

### FINAL DECISION

I adopt the Recommended Final Decision of the Presiding Officer, and issue this Final Decision approving and incorporating the parties' joint Stipulation of Dismissal requesting the dismissal of this appeal with prejudice. In accordance with 310 CMR 1.01(11)(d)(1) which allows the parties to an appeal to "voluntarily dismiss the appeal by filing a stipulation of dismissal signed by all parties," this appeal is dismissed with prejudice upon the following terms and conditions that have been agreed upon by the parties in their joint Stipulation of Dismissal:

1. that the Petitioner owns the Property;
2. that following an inspection of the Property on December 13 and 14, 2012, the Department issued the UAO on December 14, 2012 asserting that the Petitioner had violated certain Wetlands Regulations by conducting grading and filling activities and by stockpiling soil at the Property;
3. that the UAO required the Petitioner to:

- (i) cease and desist from work or activities at the Property that could contribute to or exacerbate the amount of unstable soils at the Property;
  - (ii) take reasonable steps to prevent further violations of the MWPA and the Wetlands Regulations;
  - (iii) hire an erosion control specialist and submit to the Department and the Grafton Conservation Commission an Erosion and Sedimentation Control Plan;
  - (iv) hire a wetlands scientist/specialist to assess any impacts from the Petitioner's activities to wetland resource areas on the Property and on adjacent properties; and
  - (v) submit to the Department for review and approval a wetland restoration plan, signed and stamped by a Registered Professional Engineer, to restore all altered wetland resource areas (see UAO, ¶¶ 5A-5F);
4. that the Petitioner filed this timely appeal of the UAO on December 29, 2012;
  5. that the Department acknowledges that the Petitioner has performed the actions and has submitted the reports required by Paragraphs 5A-5F of the UAO;
  6. that the Petitioner's and the Department's joint Stipulation of Dismissal of this appeal is not intended to be, and does not constitute, an adjudication with respect to any issue raised in the appeal, including without limitation the issue of federal preemption and whether Department regulations, Massachusetts statutes, or the UAO are preempted by 49 U.S.C. 10501 or 49 U.S.C. 20106, and that each party reserves the right to advance arguments concerning preemption issues in the future; and
  7. that upon issuance of this Final Decision, the parties waive any rights they may have to further administrative review before Department and to any rights of appeal to any court.



Kenneth Kimmell  
Commissioner

**SERVICE LIST**

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In the Matter of  
Grafton & Upton Railroad Co.

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**Docket No. 2012-037**  
DEP File No. UAO-CE-12-9006-27

**Petitioner:** Grafton & Upton Railroad Co., and  
Ellis Atwood LLC

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COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF APPEALS AND DISPUTE RESOLUTION

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In the Matter of

Docket No. 2012-046

DEP File No. UAO-CE-12-6W008

Grafton & Upton Railroad Co.

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**STIPULATION OF DISMISSAL**

Now come the Massachusetts Department of Environmental Protection ("MassDEP" or the "Department") and Petitioner Grafton & Upton Railroad Co. ("Petitioner"), acting by and through their respective attorneys and, pursuant to 310 CMR 1.01(8)(c) and 310 CMR 1.01(11)(c), stipulate that the instant appeal be dismissed upon the following terms and conditions:

WHEREAS, Petitioner owns property located at 42 Westborough Road and 72 North Main Street in Grafton, Massachusetts (the "Property"); and

WHEREAS, following an inspection of the Property on December 13 and 14, 2012, MassDEP issued the above-referenced Unilateral Administrative Order (the "UAO") on December 14, 2012 asserting that Petitioner had violated the Massachusetts Wetlands Protection Act, G.L. c.131, §40 and certain Wetlands Protection Regulations at 310 CMR 10.00 by conducting grading and filling activities and by stockpiling soil at the Property; and

WHEREAS, the UAO required Petitioner to: (i) cease and desist from work or activities at the Property that could contribute to or exacerbate the amount of unstable soils at the Property; (ii) take reasonable steps to prevent further violations of the Wetlands Protection Act and Regulations; (iii) hire an erosion control specialist and submit to the Department and to the Grafton Conservation Commission an Erosion and Sedimentation Control Plan; (iv) hire a wetlands scientist/specialist to assess any impacts from Petitioner's activities to wetland resource areas on the Property and on adjacent properties; and (v) submit to the Department for review and approval a wetland restoration plan, signed and stamped by a Registered Professional Engineer, to restore all altered wetland resource areas (see UAO, ¶¶ 5A-F); and

WHEREAS, Petitioner filed a timely appeal from the UAO in the form of a "Notice of Claim for Adjudicatory Hearing" dated December 29, 2012; and

WHEREAS, Petitioner and MassDEP wish to resolve the issues relating to the UAO and the appeal in accordance with the terms and conditions of this Stipulation;

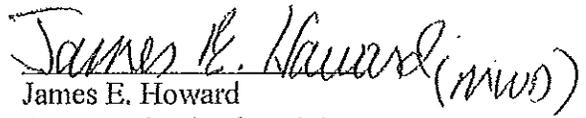
NOW, THEREFORE, the parties hereby stipulate and agree as follows:

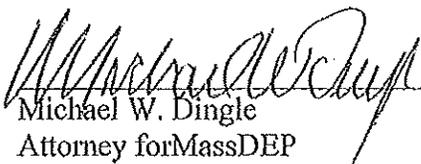
1. DEP acknowledges that Petitioner has performed the actions and has submitted the reports required by Paragraphs 5A-F of the UAO.

2. This Stipulation and the dismissal of the appeal is not intended to be, and does not constitute, an adjudication with respect to any issue raised in the appeal, including without limitation the issue of federal preemption and whether the DEP regulations, statutes or the UAO are preempted by 49 U.S.C. 10501 or 49 U.S.C. 20106. Each party reserves the right to advance arguments concerning preemption issues in the future.

3. The parties request the dismissal of the appeal with prejudice on the basis of this Stipulation, the provisions of which shall be incorporated into the order of dismissal. Upon approval of the Stipulation by the Commissioner and the incorporation of the provisions of this Stipulation in the Final Decision approving dismissal, the parties waive any rights they may have to further administrative review before DEP and to any rights of appeal to any court.

Dated:

  
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