January 30, 2023

David Cash, Regional Administrator
U.S. Environmental Protection Agency, Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-3912

**RE: Petition for Determination that Grafton Upton Railroad's railyard located within a Zone II Water Protected area in Hopedale, Massachusetts contributes to water quality standards violations in the Mill River Watershed and requires a Clean Water Act NPDES Permit**

Dear Mr. Cash,

Public Employees for Environmental Responsibility (PEER), hereby petitions you for a determination, pursuant to 40 C.F.R §§ 122.26(f)(2)[1], that stormwater discharges from the land development activities performed by the Grafton Upton Railroad ("GURR," also referred to as "G&U"), located within a Zone II Water Protected area at 1 Fitzgerald Drive, Hopedale, Massachusetts, may contribute to violations of water quality standards and/or is a significant contributor of pollutants to the Mill River, an impaired water in Region 1 of the U.S. Environmental Protection Agency (EPA). Specifically, PEER believes GURR's activities require a National Pollutant Discharge Elimination System (NPDES) permit pursuant to Section 402(p) of the Clean Water Act (CWA). PEER is petitioning EPA to make this determination out of concern for the drinking water quality for the residents of Hopedale.[2]

It is important to note that GURR has not provided detailed plans of the completed, or planned site work, and typically denies Hopedale officials access the site, making it difficult to know if violations are occurring. However, Massachusetts Department of Environmental Protection (MADEP) Reportable Releases, as evidenced by Release Tracking Numbers (RTNs), a wetlands violation, and violations of Hopedale's regulations protecting the Zone II designation. Details of these violations and other site activities are set forth below.

[1] 40 C.F.R §§ 122.26(f)(2) states, "Any person may petition the Director to require a NPDES permit for a discharge which is composed entirely of storm water which contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."

[2] Hopedale sits partially in the Blackstone River watershed, and partially in the Charles River watershed; EPA has used its residual designation authority in the Charles, Neponset, and Mystic River Watersheds.

**Executive Summary**. Stormwater pollution is one of the greatest threats to our nation's surface waters. Lakes, ponds, rivers, and streams are used for recreation, wildlife habitat, fishing, drinking water, wildlife habitat, and they influence the quality and quantity of downstream waters. Congress gave EPA "residual designation authority" over a category of stormwater discharges that would be subject to NPDES permit requirements if EPA or a State "determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." CWA § 402(p)(2)(E). In the case at hand, we believe that GURR's continuing development activities at the Hopedale Railyard resulted in stormwater discharges that are contributing to the violation of water quality standards and/or are a significant contributor of pollutants to the Mill River. Indeed, GURR's activities over the past few years have completely transformed the landscape.

Moreover, we are concerned about the dangerous materials being transported through the site. In 2019, GURR established a fly ash transloading service, and the fly ash silos are very close to the Mill River.

**Front portion of the railyard showing fly ash storage (May 2022)**


The fly ash transloading service is of particular risk to the Town of Hopedale's water supply. The fly ash silos appear to have been constructed without permitting or oversight, and continue to operate without systematic emergency procedures. There are very few fly ash silos in the entire northeast, and none that we are aware of within a Zone II protected area.

Recently, GURR started transporting contaminated soils off the NMI Superfund site in Concord, Massachusetts. Like the fly ash, the contaminated soils transported through the Hopedale railyard began without protective measures, permits, or oversight - *and some of that material has already spilled*. The spills have triggered some temporary protective measures, but the Town of Hopedale's concerns have not been allayed.

The drastic increase of impervious surfaces, filling of a stream and associated wetlands, and presence of fly ash and contaminated soils from a Superfund site, all result in increased and potentially contaminated stormwater discharges to the Mill River.

**The Mill River**

The Mill River begins at the outlet of the North Pond/ Lake Maspenock in Hopkinton and Upton, Massachusetts, flows through the North Pond Dam, southwesterly through a forested area and a shrub land utility easement into the Peppercorn Conservation Area, south through wetlands into Fiske Mill Pond in Upton and Milford, through the Fiske Mill Dam operated by the Nipmuc Rod and Gun Club, then continues south through undeveloped forest and wetlands into Mill Pond in Milford, before emptying through the Mill Pond Dam, crossing under Route 140/West Street, and entering the property of 364 West Street. From the West Street property, this River flows southeasterly to the Hopedale Pond in Hopedale, passing through the Freedom Street Dam, where the river then passes underground of the former Draper Factory, daylighting at Fitzgerald Drive in Hopedale. Passing adjacent to the GURR railyard at the same street, before flowing under Route 16 and entering the Hopedale Waste Water Treatment Plant. From here the River passes some residential communities before becoming Spindleville Pond, emptying through the Spindleville Pond Dam operated by the Town of Hopedale, passing through the Hopedale Country Club and exiting through wetlands adjacent to a residential development, and travelling south into Mendon. Continuing through Blackstone, the river enters Harris Pond, then enters Rhode Island, where it joins the Blackstone River, continuing until it becomes the Seekonk River in Pawtucket, Rhode Island, then becoming the Providence River continuing to the Narragansett Bay, and emptying into the ocean. From the above described path, the entirety of the waterways and waterbodies listed above, and the tributaries and bordering wetlands thereof, are considered waters of the U.S.

The landscape is largely residential, with the exception of the following industrial or former industrial sites: the former Draper Factory; existing GURR Railyard; former Rosenfeld Concrete Company in Hopedale, Massachusetts; and the Kimball Sand Company property in Blackstone, Massachusetts. The rest of the entirety of the River passes through undeveloped wetlands, residential property, or water supply/waste water treatment properties.

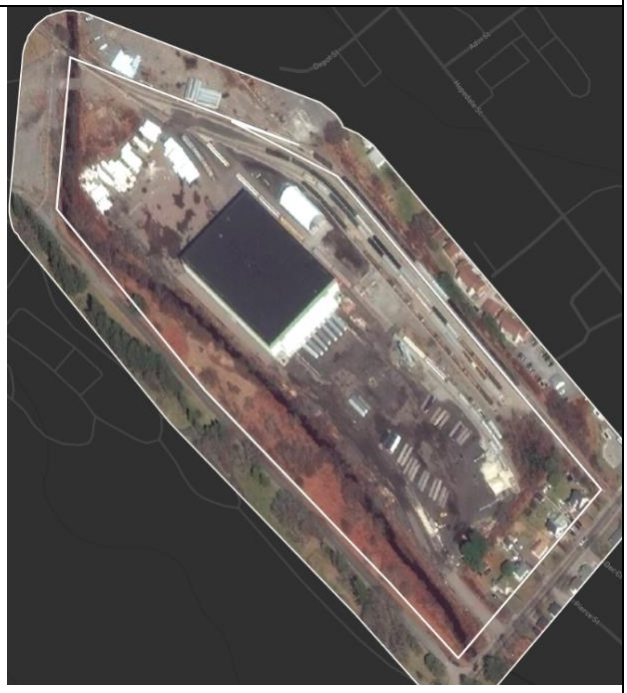
The Mill River is currently impaired for non-native plants, metals, and PCBs.

**Category 5 waters listed alphabetically by major watershed**
**The 303(d) List – "Waters requiring a TMDL"**

| Waterbody | AU_ID | Description | Size | Units | Impairment |
|---|---|---|---|---|---|
| | | | | | Turbidity |
| Mill River | MA51-35 | Headwaters, outlet North Pond, Milford/Upton to Mendon/Blackstone corporate boundary (through former 2008 segments: Fiske Millpond MA51049, Mill Pond (formerly known as Milford Street Pond) MA51102, Hopedale Pond MA51065 and Spindleville Pond MA51158) (formerly part of 2010 segment: Mill River MA51-10) | 11.80 | Miles | (Fanwort*) |
| | | | | | (Non-Native Aquatic Plants*) |
| | | | | | Aquatic Plants (Macrophytes) |
| | | | | | Metals |
| | | | | | PCBs in Fish Tissue |

**GURR Hopedale Railyard Site Details**

The location of the site in question is 1 Fitzgerald Drive, Hopedale, MA. Over the past 10+ years, GURR has transformed this mostly vacant site into approximately 17 acres of impervious working surfaces without development approvals or permitting.

| 2003 | 2022 |
| --- | --- |
|  |  |

Specifically, the site appears to have several recent environmental violations, including:

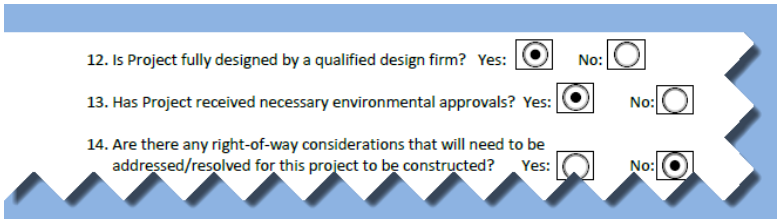
- Section IV. E of the Town of Hopedale's Board of Health Groundwater Protection Regulations *prohibits*, "Land uses that result in impervious cover of more than 15%...unless a system of artificial recharge of precipitation is provided that will not result in the degradation of groundwater quality." GURR has placed roughly 90% of the site into working areas.[3] Generally speaking, as the amount of impervious surface on a parcel increases, the volume of stormwater discharged from that property also increases, which increases the loading of pollutants to waters of the U.S.;
- There are seven (7) known Release Tracking Numbers (RTNs) in the area, with four (4) potential non-compliances (see Attachment A, below);
- Wetlands violation (see Attached letters from the Massachusetts Department of Environmental Protection (MassDEP) and U.S. Army Corps of Engineers (Corps) letters, below); and
- Extensive site work without environmental approvals or permits.

[3] The Water Department's Groundwater Protection District Bylaw contains the exact same prohibition.

Additionally, the site is located within a flood zone, between Hopedale and Spindleville Ponds, where both dams are in inoperable or semi-operable conditions.

Note that all of this work is being done on a site that has a history of contamination, discussed in more detail below. It appears that the most extensive site work was performed in the summer of 2021, based in part on the Massachusetts' Industrial Rail Access Program (IRAP) grant funding of $500,000. GURR's grant application stated "Yes" to the question "Has the project received necessary environmental approvals?" However, we are unaware of any "environmental approvals" that have been issued. Indeed, no permits have been issued by the Town of Hopedale, or, as far as we can tell, from the Commonwealth of Massachusetts or the EPA.[4]

**IRAP Grant application excerpt (August 2021)**


12. Is Project fully designed by a qualified design firm? Yes: ◉ No: ○

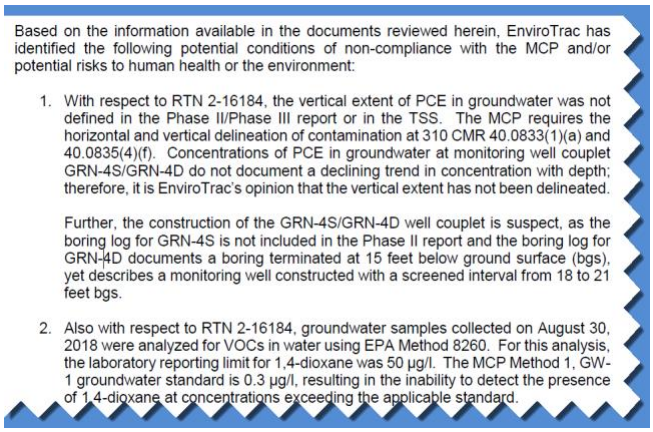
13. Has Project received necessary environmental approvals? Yes: ◉ No: ○

14. Are there any right-of-way considerations that will need to be addressed/resolved for this project to be constructed? Yes: ○ No: ◉

In fact, the entire area has a history of contamination issues related to the Draper Mill, as summarized by EnviroTrac's August 2019 report (Attachment A). Of specific concern and interest in this matter is RTN 2-16184, as highlighted by the EnviroTrac and Environmental Strategies and Management (ES&M) reports.

We do not see in MassDEP files that GURR has conducted any sampling of groundwater on the Site since 2018 to monitor what concentrations are moving toward the Mill River.

**Excerpts from EnviroTrac and ES&M reports:**


Based on the information available in the documents reviewed herein, EnviroTrac has identified the following potential conditions of non-compliance with the MCP and/or potential risks to human health or the environment:

1. With respect to RTN 2-16184, the vertical extent of PCE in groundwater was not defined in the Phase II/Phase III report or in the TSS. The MCP requires the horizontal and vertical delineation of contamination at 310 CMR 40.0833(1)(a) and 40.0835(4)(f). Concentrations of PCE in groundwater at monitoring well couplet GRN-4S/GRN-4D do not document a declining trend in concentration with depth; therefore, it is EnviroTrac's opinion that the vertical extent has not been delineated.

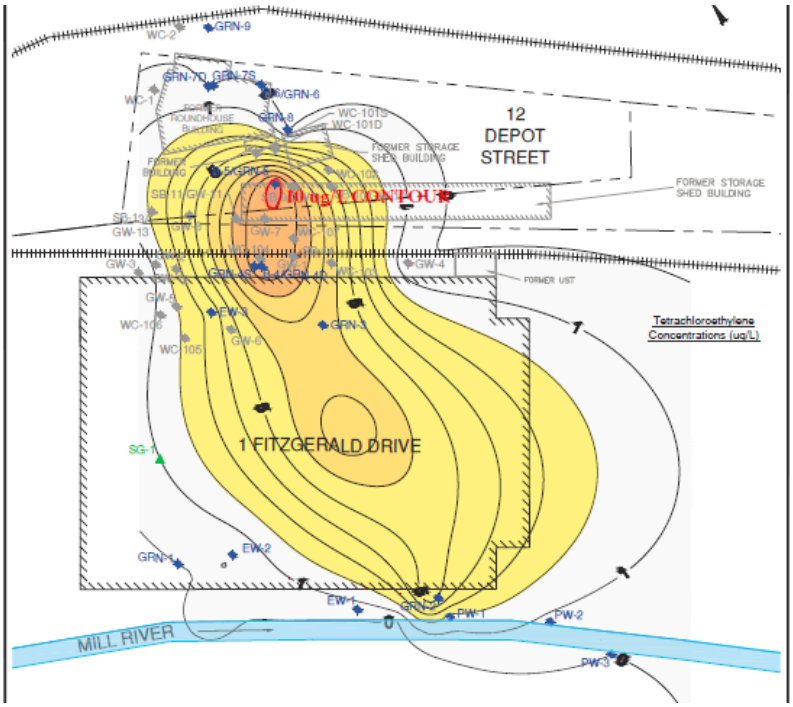
   Further, the construction of the GRN-4S/GRN-4D well couplet is suspect, as the boring log for GRN-4S is not included in the Phase II report and the boring log for GRN-4D documents a boring terminated at 15 feet below ground surface (bgs), yet describes a monitoring well constructed with a screened interval from 18 to 21 feet bgs.

2. Also with respect to RTN 2-16184, groundwater samples collected on August 30, 2018 were analyzed for VOCs in water using EPA Method 8260. For this analysis, the laboratory reporting limit for 1,4-dioxane was 50 µg/l. The MCP Method 1, GW-1 groundwater standard is 0.3 µg/l, resulting in the inability to detect the presence of 1,4-dioxane at concentrations exceeding the applicable standard.

[4] It also does not appear that GURR is eligible for any General Permits, such as a Multisector General Permit. Moreover, GURR claims that federal preemption insulates them from state and local laws, which is why they have not approached the municipality or the State for permits.

The following picture highlights the apparent migration of higher concentrations of chlorinated solvents towards the Mill River by highlighting the 10 ug/L contour on figures from the 2016 Green Environmental Report and from the 2018 ES&M Report.

**ES&M report highlighting the plume moving towards the Mill River**




Site regrading that occurred prior to the summer of 2021 was also highlighted in EnviorTrac's summary, and amplifies concerns related to the overall site development, lack of stormwater management, and the associated impact to the Mill River and downstream public water supply. Specifically, the stockpile was formed during site regrading by pushing the soil from the 1 Fitzgerald Drive property to form the stockpile. No sampling and analysis of soils outside the historic grading area on the 1 Fitzgerald Drive property was documented.

**Fly ash and contaminated soils**

Adding to the fly ash concerns, GURR recently started transporting contaminated soils from a Superfund cleanup site through the Hopedale railyard, a Zone II district, without permits, protective ground barriers or emergency procedures in place. Specifically, Hopedale officials learned that GURR was a third party contractor to transport contaminated soils from the Nuclear Metals Inc (NMI) superfund site in Concord, MA. In August of 2022, Hopedale officials met with the NMI superfund team, expressing concerns about this happening within the Zone II district that protects the Hopedale public water supply. The NMI team was not aware that GURR's Hopedale railyard was within a Zone II district.

In fact, the town of Hopedale was not even listed in the Community Disturbance section of the NMI Transportation plan dated October 21, 2021 (see Screenshot labels "5.2 Community Disturbance, below)), from the plan:

**5.2 Community Disturbance**

**5.2.1 Communities Affected by Shipment of Waste Material**

US Ecology will notify the police and fire departments in these communities two weeks prior to any waste shipment.

1. Concord, MA
2. Maynard, MA
3. North Grafton, MA
4. Upton, MA
5. Romulus, MI

With the NMI transports scheduled to begin in mid-2023, Hopedale officials continued to ask questions and express concerns, expecting that the NMI team would update the transportation plans accordingly. Unfortunately this has not happened. Starting on November 17, 2022, earlier than expected and with less than the two weeks' notice, the contaminated soils started going through the Hopedale Zone II, and Hopedale's concerns immediately became a reality. Bag splits and contaminated spoil spills starting on the very first day of deliver. A subset of the report states:

Description of Events

Waste loading began at the NMI site the morning of Thursday, November 17, 2022. Three trucks were in rotation between the NMI site and the G&U railyard. Each truck had a liner installed prior to loading waste soils. Each truck was scheduled to make (3) load and dump "turns" during a workday, resulting in (9) completed waste loads per days being transloaded into railcars at the G&U.

Of the first (6) trucks that were loaded the morning of 11/17/22, (4) liners were observed to split during transload. In all cases, liner failures occurred within the gondola railcar with a very small amount of waste soil exiting the car onto the surrounding rail track and ballast surface. Site workers captured photos and videos of the transload activities and forwarded them to the Project team for observation and analysis.

G&U staff covered the waste soil with plastic to prevent spread. US Ecology deployed an emergency response crew from our Franklin, MA office during the afternoon of 11/17/22 to recover the spilled NMI soil (and some retained water from rainwater puddles) and place them back into an adjacent railcar. A skidsteer as well as a crew of workers with

NMI's project manager, Kara Nierenberg, sent an email to Hopedale on December 8, 2022 stating:

> The issues with the IP-1 bags are a priority for the site team. de maximis and US Ecology[5] are working with the bag manufacturers to identify why many (approximately 40%) of the bags are tearing during transfer from rail to truck. Only a smaller number (16% of all bags) have resulted in a spill (5% to ground, 10% to poly).

While officials were assured that there was no danger from these spills, the lack of permits, oversight and safety precautions within the Zone II designation, is troubling. Additionally, the Spill Report states that similar transports have previously taken place though the GURR facilities: "US Ecology has performed truck to rail transloads of this type for many years, including at the G&U facility, and has not observed consistent truck liner failures of this type in the past."

Hopedale officials discovered that the BASF Superfund site in Plainville, Massachusetts did in fact transport over 2,000 tons though the Hopedale railyard in late October and early November of 2022 - but those transports were not conducted using US Ecology. If similar transports from US Ecology have taken place, it was done without the Town's knowledge or Zone II precautions. The unknowns regarding what has actually taken place, and what is planned are very concerning.

**Flood conditions.**
The area addressed by the Emergency Action Plan related to the Hopedale Pond Dam, which is just north of GURR's Hopedale railyard, includes the railyard. The Impact Area Summary states that, "After the railroad crossing, flows reach a business named G&U Logistix in which the property is expected to be completely inundated." The G&U Logistix is the Grafton Upton Railyard and the area referenced is GURR's Hopedale railyard.

It is also important to note the current condition of the dams, which is paramount to understanding the resulting concerns for increased surface water flow from the development. It is not just pollutants that are a concern, but the overall increase in surface water flow.[6]

**Conclusion.** The unpermitted stormwater discharges from this 17-acre largely impervious site are likely adversely impacting the Mill River and its associated tributaries and wetlands. Moreover, the potential from contamination from fly ash and contaminated soils is of grave concern. This petition respectfully requests the EPA to exercise its Residual Designation Authority to designate non-NPDES permitted stormwater discharges from sites in these categories for regulation under the NPDES program. In your 2022 Residual Designation for the Charles, Mystic and Neponset River watersheds, you designated for NPDES permitting certain stormwater discharges from commercial, industrial, and institutional properties with one acre or more of impervious surface, concluding that these discharges, "contribute to violations of water quality standards; [and] are significant contributors of pollutants to waters of the United States…" The same situation is occurring in Hopedale, and although it is a small site, it is one that is vitally important to the residents. We therefore request that the property owner be required to obtain a NPDES permit for its stormwater discharges.

[5] de maximus and US Ecology are consultants for GURR.
[6] The Hopedale Pond Dam Emergency Action Plan Inundation Maps are available upon request.

Thank you for your attention to this matter.  If there are any questions, please do not hesitate to contact us.

Sincerely,

*Kyla Bennett*

Kyla Bennett, PhD, JD
Director of Science Policy

**Attachment A: Excerpts from EnviroTrac's August 2019 report**



Based on the information available in the documents reviewed herein, EnviroTrac has identified the following potential conditions of non-compliance with the MCP and/or potential risks to human health or the environment:

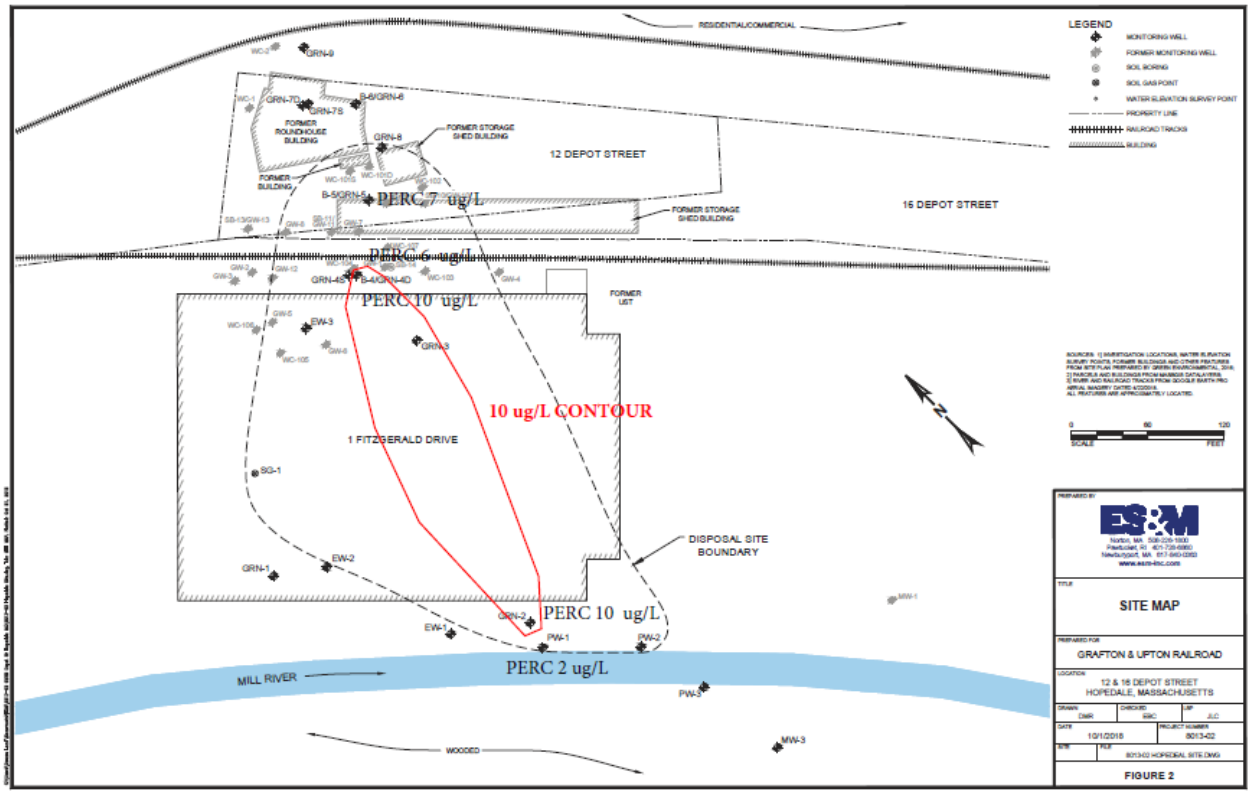
1. With respect to RTN 2-16184, the vertical extent of PCE in groundwater was not defined in the Phase II/Phase III report or in the TSS. The MCP requires the horizontal and vertical delineation of contamination at 310 CMR 40.0833(1)(a) and 40.0835(4)(f). Concentrations of PCE in groundwater at monitoring well couplet GRN-4S/GRN-4D do not document a declining trend in concentration with depth; therefore, it is EnviroTrac's opinion that the vertical extent has not been delineated.

   Further, the construction of the GRN-4S/GRN-4D well couplet is suspect, as the boring log for GRN-4S is not included in the Phase II report and the boring log for GRN-4D documents a boring terminated at 15 feet below ground surface (bgs), yet describes a monitoring well constructed with a screened interval from 18 to 21 feet bgs.

2. Also with respect to RTN 2-16184, groundwater samples collected on August 30, 2018 were analyzed for VOCs in water using EPA Method 8260. For this analysis, the laboratory reporting limit for 1,4-dioxane was 50 µg/l. The MCP Method 1, GW-1 groundwater standard is 0.3 µg/l, resulting in the inability to detect the presence of 1,4-dioxane at concentrations exceeding the applicable standard.

3. With respect to RTN 2-20112, the presence of PCB at concentrations exceeding the MCP Method 1, soil category S-1 standard of 1 mg/kg in the soil stockpile was documented. In addition, soil samples were collected and analyzed from the ground surface and the asphalt berm adjacent to the stockpile. However, as stated in Section 3.1 of the report, the stockpile was formed during site regrading and the soil was pushed from the 1 Fitzgerald Drive property to form the stockpile. No sampling and analysis of soils outside the historic grading area on the 1 Fitzgerald Drive property was documented.

4. With respect to subsurface investigations conducted on the Subject Properties, the presence of anthropogenic fill material, containing construction debris, coal, and coal ash, has been well documented within the upper several feet of ground surface. The presence of this fill, and the associated oil and/or hazardous materials, are generally considered to be "background" under the MCP and not regulated. However, the common presence of lead, arsenic and pyrogenic polycyclic aromatic hydrocarbons (PAH) in anthropogenic fill may pose a risk to human health, and human exposure should be controlled.




2018 SAMPLING REPORT

DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NEW ENGLAND DISTRICT
696 VIRGINIA ROAD
CONCORD MA 01742-2751

**CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

February 21, 2019

Regulatory Division
File No. CENAE-R-2019-00171

Jon Delli-Priscoli
42 Westboro Rd
North Grafton, Massachusetts 01536

**NOTICE OF VIOLATION**

Dear Mr. Delli-Priscoli:

This letter is in reference to work that was conducted at 1 Fitzergald Drive in Hopedale, Massachusetts. The work involved the discharge of fill material below ordinary high water within an unnamed tributary that flows to the Mill River, and in wetlands abutting this tributary. Information received in this office indicates that you are a party associated with this activity, either as a property owner or a person performing or causing the performance of this work.

These aquatic resources are regulated by the Corps of Engineers pursuant to Section 404 of the Clean Water Act (CWA). The CWA (33 USC § 1344) prohibits discharges of dredged or fill material into waters of the United States, including wetlands, without the proper authorization. Violations of Section 404 can result in civil fines of up to $37,500 per day for each violation. Injunctive relief, including restoration, is also available.

Some or all of the work undertaken at the property identified above appears to be within Corps of Engineers jurisdiction, and we have no record that you have obtained a Corps of Engineers permit. A fact sheet that includes a summary of our authority, jurisdiction, definitions and permit requirements is enclosed to this letter. Violations of the CWA can result in administrative penalties, civil penalties of up to $37,500 per day of violation, criminal fines or imprisonment. Every day unauthorized fill remains in place is a separate day of violation. In addition, restoration of the area to its pre-violation condition may be required.

No additional regulated work within our jurisdiction may be started or allowed to continue until you receive a permit signed by the District Engineer or his authorized representative. Any such future work without a permit may be considered willful, repeated, or flagrant per 33 CFR Part 326.5(a) warranting legal action.

Federal Regulation requires that we investigate any unauthorized work that has occurred in areas subject to our jurisdiction. To assist us in this investigation we request that you respond, in writing, to the following questions:

1. Provide the name of all persons or entities that have ownership interest in the parcel(s) identified above and when that ownership was attained.

2. Submit a description of the work that you have undertaken (land clearing, discharge of fill in wetlands and in named waters and unnamed tributaries) in areas subject to Federal jurisdiction (wetlands and waters below ordinary high water).

3. Identify the footprint (area in square feet or acres) of impact to each water and/or wetland. This should include those areas grubbed (removal of stumps), graded or covered with fill material, and otherwise altered through modification of drainage patterns.

4. Identify the timeframe (e.g. days, months, years) that the work was undertaken. Be as specific as possible, giving the starting and ending dates for each area or type of activity under Corps jurisdiction.

5. Identify the types of equipment used to excavate or move soil material within the wetland or waters. State the names and addresses of the owners/operator of the equipment for this work.

6. Identify where the fill/soil material was acquired from, and if this material was clean and contained no contaminants.

Please respond to our request for information within **fifteen (15) days** of the date of this letter. If you fail to respond to this notification or to provide the requested information within the specified time frame we may seek immediate legal action to halt any ongoing activity, conduct our investigation with the information available to us and take enforcement action as allowed by federal law. Our action may include referral to the U.S. Environmental Protection Agency, the U.S. Attorney's Office or the Environment and Natural Resources Division of the U.S. Department of Justice.

In summary, we request that you respond to our information request within 15 days of the date of this letter. Also, note that this letter will not foreclose our options to initiate appropriate legal action. If we determine there has been a violation of Federal law, you must either remove all work within our jurisdiction, thereby completely restoring the area to preconstruction conditions, or apply for and receive an after-the-fact permit to retain or modify the work.

Pease contact Katelyn Rainville at 978-318-8677 for information regarding restoration or a permit application.

Sincerely,

Barbara Newman
Chief, Permits & Enforcement Branch
Regulatory Division

Enclosure

cc:

Denise Child, MA DEP Central Regional Office – Wetlands, 8 New Bond Street, Worcester, Massachusetts 01606, denise.child@state.ma.us

Jackie LeClair, US EPA New England, Region I, OEP Wetland Enforcement, 5 Post Office Square - Suite 100, Boston, Massachusetts 02109-3912, Leclair.Jackie.@epa.gov

Vanessa Calabrese, Chairperson, Town of Hopedale Conservation Commission, 78 Hopedale Street, Hopedale, Massachusetts, hopedaleconcom@gmail.com

Peter Gerrity, Property Owner of 1 Fitzgerald Drive, 98 Tuttle Road, Cumberland, Maine 04021

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**January 17, 2020**

In the Matter of
Hopedale Properties, LLC

Docket No. WET-2019-013
Hopedale, MA

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

The Petitioner, Gerrity Companies, Inc. ("Gerrity"), challenges a Superseding Determination of Applicability ("SDA") that the Massachusetts Department of Environmental Protection's Central Regional Office ("MassDEP") issued to the SDA applicant, Hopedale Properties, LLC ("Applicant"). The SDA was issued pursuant to the Wetlands Protection Act, G.L. c. 131 § 40 (or "Wetlands Act" or "Act"), and the Wetlands Regulations, 310 CMR 10.00. The SDA determined that a portion of property owned by Gerrity at 1 Fitzgerald Drive, Hopedale, Massachusetts ("the Property") contains protected Resource Areas under the Wetlands Act and Wetlands Regulations that were altered approximately ten years ago by development work on the Property. The Hopedale Railyard operates on the Property, which abuts the Applicant's property. The development work at issue was purportedly first commenced in about 2008 by Gerrity's tenant, Grafton & Upton Railroad Company ("G&U"), with Gerrity's authorization.

The issue before me is the extent to which, if at all, MassDEP's regulatory actions at issue in this appeal are preempted by the United States Congress' regulation of rail carriers under 49 U.S.C. § 10501. Generally, Gerrity asserts that preemption applies, precluding MassDEP from taking any action, including issuance of the SDA. MassDEP and the Applicant contend, broadly speaking, that preemption does not apply under the circumstances of this case.

Before this appeal was transferred to me, the parties held a Pre-Hearing Conference with the Chief Presiding Officer, Salvatore Giorlandino. There, the parties agreed that the most efficient way to resolve the appeal was by way of filing cross motions for summary decision pursuant to 310 CMR 1.01(11)(f). Pre-Screening Conference Report and Order, p. 3.[1]

After reviewing the entire administrative record, I conclude that entry of summary decision is warranted and preemption does not apply to the present circumstances. Although there are numerous disputed issues of material fact concerning precisely how, when, and who performed the work at issue and the reason why it was performed, the essential facts underlying the only regulatory action at issue—MassDEP's issuance of the SDA—are not genuinely disputed. It is not genuinely disputed that when the work occurred at the Property in and after 2008 there were wetland Resource Areas located on the Property that were altered by the work. The undisputed facts demonstrate that there has been no MassDEP regulatory action that is being applied to unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. Given this undisputed absence of such restriction or burden, preemption does not apply to MassDEP's issuance of the SDA. As a consequence, I recommend that MassDEP's Commissioner issue a Final Decision: granting summary decision in favor of MassDEP and the Applicant and against Gerrity; and affirming the SDA.

[1]Although the Pre-Screening Conference Report and Order also identifies whether 49 U.S.C. § 20106 is preemptive, the parties have since agreed that that provision is not at issue in this appeal.

## STANDARD OF REVIEW

The Adjudicatory Rules, 310 CMR 1.01(11)(f), provide for the issuance of summary decision where the pleadings together with the affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. See e.g. Matter of Papp, Docket No. DEP-05-066, Recommended Final Decision, (November 8, 2005), adopted by Final Decision (December 27, 2005); Matter of Lowes Home Centers Inc., Docket No. WET-09-013, Recommended Final Decision (January 23, 2009), adopted by Final Decision (February 18, 2009). A motion for summary decision in an administrative appeal is similar to a motion for summary judgment in a civil lawsuit. See Matter of Lowe's Home Centers, Inc., supra, (citing Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 785-86 (1980)).

## WETLAND RESOURCE AREAS

The purpose of the Wetlands Act and the Wetlands Regulations is to protect wetlands and to regulate activities affecting wetlands areas in a manner that promotes the following:

(1) protection of public and private water supply;

(2) protection of ground water supply;

(3) flood control;

(4) storm damage prevention;

(5) prevention of pollution;

(6) protection of land containing shellfish;

(7) protection of fisheries; and

(8) protection of wildlife habitat.

G.L. c. 131, § 40; 310 CMR 10.01(2).

The SDA in this appeal confirmed there are a number of wetlands Resource Areas and Buffer Zone on the Property, including Bordering Vegetated Wetlands ("BVW"), Intermittent Stream and Bank, Perennial Stream or River, Riverfront Area, and Bordering Land Subject to Flooding ("BLSF"). See 310 CMR 10.02 (defining jurisdiction), 10.04 (defining stream and river), 10.57 (BLSF definition and performance standard), 10.58 (definition of stream, river, and Riverfront Area).

***River, Riverfront Area, and Stream.*** Under the Act and the Regulations, a river is defined as a natural flowing body of water that empties to any ocean, lake, or other river and which flows throughout the year. G.L. c. 131 § 40. 310 CMR 10.58(2)(a)1. Rivers include perennial streams because surface water flows within them throughout the year. Id.; 310 CMR 10.04 (definition of stream).

All perennial streams, or rivers, have a regulated Riverfront Area. Riverfront Areas generally receive special protection under the Act and the Regulations because of the environmental benefits they provide, including: protection of the water supply (including groundwater), flood control, storm damage prevention, protection of wildlife habitat (including fisheries and habitat within the Riverfront Area), and maintenance of water temperatures. They are critical to preventing water pollution by filtering contaminants before they reach the River and groundwater. See generally 310 CMR 10.58(1) (discussing in detail environmental benefits of the Riverfront Area). The Act defines the Riverfront Area as: "that area of land situated between a river's mean annual high-water line and a parallel line located two hundred feet away, measured outward horizontally from the river's mean annual high-water line." G.L. c. 131 § 40.

Intermittent Streams are different from rivers (or perennial streams), because they do not flow throughout the entire year. Nevertheless, Intermittent Streams, like Rivers, have the

Resource Areas of Land Under Water and Bank (and its associated Buffer Zone), which receive certain protections under the Act and the Regulations. See 310 CMR 10.54 and 10.56.

***BLSF.*** BLSF is "an area with low, flat topography adjacent to and inundated by flood waters rising from creeks, rivers, streams, ponds or lakes. It extends from the banks of these waterways and water bodies . . . ." 310 CMR 10.57(2)(a)1. BLSF "provides a temporary storage area for flood water which has overtopped the bank of the main channel of a creek, river or stream or the basin of a pond or lake. During periods of peak run-off, flood waters are both retained (i.e., slowly released through evaporation and percolation) and detained (slowly released through surface discharge) by Bordering Land Subject to Flooding. Over time, incremental filling of these areas causes increases in the extent and level of flooding by eliminating flood storage volume or by restricting flows, thereby causing increases in damage to public and private properties." 310 CMR 10.57(1)(a). "Certain portions of Bordering Land Subject to Flooding are also likely to be significant to the protection of wildlife habitat. These include all areas on the ten year floodplain or within 100 feet of the bank or bordering vegetated wetland (whichever is further from the water body or waterway, so long as such area is contained within the 100 year floodplain), and all vernal pool habitat on the 100 year floodplain, except for those portions of which have been so extensively altered by human activity that their important wildlife habitat functions have been effectively eliminated (such "altered" areas include paved and graveled areas, golf courses, cemeteries, playgrounds, landfills, fairgrounds, quarries, gravel pits, buildings, lawns, gardens, roadways (including median strips, areas enclosed within highway interchanges, shoulders, and embankments), railroad tracks (including ballast and embankments), and similar areas lawfully existing on November 1, 1987 and maintained as such

since that time).” 310 CMR 10.57(1)(a). The BLSF boundary is established according to 310 CMR 10.57(2)(a)3.a, b, and c,

***BVW.*** The Inland Wetlands Regulations group together the types of freshwater wetlands as "Bordering Vegetated Wetlands," or BVW, as follows: "Bordering vegetated wetlands are freshwater wetlands which border on creeks, rivers, streams, ponds and lakes. The types of freshwater wetlands are wet meadows, marshes, swamps and bogs. Bordering vegetated wetlands are areas where the soils are saturated and/or inundated such that they support a predominance of wetland indicator plants. The ground and surface water regime and the vegetational community which occur in each type of freshwater wetland are specified in M.G.L. c. 131, § 40." 310 CMR 10.55(2)(a).

"Bordering Vegetated Wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and to wildlife habitat." 310 CMR 10.55(1). "The plants and soils of Bordering Vegetated Wetlands remove or detain sediments, nutrients (such as nitrogen and phosphorous) and toxic substances (such as heavy metal compounds) that occur in run off and flood waters." Id. "Prevention of Pollution means the prevention or reduction of contamination of surface or ground water." 310 CMR 10.04 ("Prevention of Pollution"). "Significant means plays a role. A resource area is significant to an interest identified in M.G.L. c. 131, § 40 when it plays a role in the provision or protection, as appropriate, of that interest. . . ." 310 CMR 10.04 ("Significant").

***Buffer Zone.*** The Buffer Zone is that area of land extending 100 feet horizontally outward from the boundary of any Resource Areas specified in 310 CMR 10.02(1)(a). 310 CMR

10.04 (defining Buffer Zone). Here, the Buffer Zone is for the Resource Areas of BVW and Bank. See 310 CMR 10.02 and 10.04 (defining Resource Areas).

For work in the Buffer Zone there are a number of regulatory provisions and decisions dictating that the work is subject to less scrutiny than work which takes place in the Resource Areas themselves. First, Buffer Zone work is not per se regulated under the Act or the Regulations. See 310 CMR 10.02(2)(b). Instead, only that work which, in the judgment of the issuing authority, will alter a Resource Area is subject to regulation under M.G.L. c. 131, 40 and requires the filing of a Notice of Intent. Id. Thus, the Buffer Zone may generally be altered if it will not alter a Resource Area, as determined by the issuing authority. In contrast, any alteration of a Resource Area is generally subject to jurisdiction under the Act and Regulations. See 310 CMR 10.02(2)(a).

## BACKGROUND

G&U was founded in 1874 as a narrow-gauge railroad. It has evolved and grown since that time as a railroad enterprise in various modes of operation and with different owners. In approximately 2008, Gerrity, through its predecessor in interest, MT Waldo Operations, Inc., purportedly entered a Lease Agreement with G&U with respect to the Hopedale Railyard, allegedly establishing G&U as the sole tenant. Since then, G&U has operated as a railroad at the Property, with all activities allegedly being under the control and direction of G&U.

In 2008, G&U purportedly first commenced work at the Property with Gerrity's authorization. The project included: (1) culverting a 300-foot long Intermittent Stream underground, (2) filling and grading approximately 20,000 square feet of BLSF, and (3) converting more than two acres of vegetated Riverfront Area associated with the Mill River to impervious paved surfaces ("the Project"). See 310 CMR 10.02 (defining jurisdiction), 10.04

(defining stream and river), 10.57 (BLSF definition and performance standard), 10.58 (definition of stream, river, and Riverfront Area).

G&U's asserted objectives for the Project were: addressing twenty years of significant deterioration and neglect; removing twenty years of vegetative overgrowth; making the railyard safe; and updating and expanding operations. Gerrity and G&U also claim that the Project "eliminated an eyesore and environmental problem and created better water quality and water flow of the Town's drainage [in the Intermittent Stream] from its source at the northeast side of the [Property] to its discharge point at the Mill River." Gerrity Motion for Summary Decision, p. 6. They claim that the Project allegedly exceeded standards required by the Wetlands Act. G&U and Gerrity add that at all times they worked closely with the Town of Hopedale and the Town of Hopedale Conservation Commission ("Commission") for G&U to perform the work to the Town's and Commission's satisfaction.

***The Applicant's RDA.*** The Wetlands Regulations provide a simple procedure for someone to obtain a determination of applicability. Pursuant to 310 CMR 10.05(3)(a), "[a]ny person who desires a determination as to whether [the Wetlands Act] applies to land, or to work that may affect an Area Subject to Protection under M.G.L. c. 131, § 40, may submit to the conservation commission by certified mail or hand delivery a Request for a Determination of Applicability ["RDA"], Form 1." In response, and pursuant to 310 CMR 10.05(3)(a), the conservation commission is required to: "find that [the Wetlands Act] applies to the land, or a portion thereof, if it is an Area Subject to Protection under [the Wetlands Act] as defined in 310 CMR 10.02(1). The conservation commission shall find that [the Wetlands Act] applies to the work, or portion thereof, if it is an Activity Subject to Regulation under [the Wetlands Act] as defined in 310 CMR 10.02(2). The conservation commission shall identify the scope of

alternatives to be evaluated, if requested, for work within riverfront areas under 310 CMR 10.58(4)(c)2."

The "scope of a request is particularly important because [RDAs] are meant to be simple, useful devices that allow a quick determination to be made as to whether the [Act] applies to a given site or proposed work. . . . [T]he scope of a determination is limited by the scope of the request. The requestor is entitled only to an answer to the question asked." Matter of Marjorie Emery, Docket No. 2007-009, Recommended Final Decision (July 26, 2007), adopted by Final Decision (July 27, 2007).

Here, the Property is approximately 15.7 acres. The Applicant owns abutting property located at 6 Fitzgerald Drive, Parcel 11-174-1, including purported easements to the area of the Mill River abutting the Property and has deeded water rights to the Mill River.

On December 5, 2018, the Applicant filed an RDA with the Commission requesting a determination regarding: (1) whether a specified 4.5 acre area on the Property where the work occurred ("the Locus") is subject to jurisdiction under the Wetlands Protection Act and Wetlands Regulations; and (2) whether the work purportedly performed by G&U at the Locus in about 2008 and depicted in a series of photographs over a period of time is subject to the Wetlands Act and Regulations. The work was described in the RDA as "clearing of vegetation and filling of wetland resource areas to install an impervious industrial yard area adjacent to and within flood plain of the Mill River." RDA, p. 2. The RDA asserted that the work was within the following resource areas: BVW, Bank, LUW with intermittent stream, BLSF, Riverfront Area, and Buffer Zone to the preceding areas.

The Locus borders a residential development to the east. The Locus historically contained an intermittent stream that drained westerly across the Locus from a marsh area east of

the Property to the stream's outlet at the Mill River. Because the Mill River is a perennial stream, it contains a Riverfront Area, which includes the area of land two hundred feet from the river's banks. See 310 CMR 10.58.

The RDA presented evidence that between 2008 and the present approximately 4.5 acres of undeveloped and vegetated land (the Locus) was converted to an impervious commercial yard, which included the following alterations: filling of an open 300 foot long vegetated Intermittent Stream, Bank, and LUW with a culvert pipe; filling or regrading of approximately 20,000 square feet of BLSF; converting over 2.3 acres of previously vegetated Riverfront Area to impervious paved commercial use; and converting .9 acres of previously vegetated Buffer Zone to BVW to impervious commercial use. RDA, Ex. B. The RDA also noted that "commercial use [of the Locus] continues with active operations of material storage and vehicle parking with ongoing snow management that is pushing soil material into the Buffer Zone along the Mill River." RDA, Ex. B. The RDA presented additional evidence that potentially contaminated soils, which include PCBs and chlorinated solvents (tetrachloroethylene or PERC), may have been moved into wetlands Resource Areas.[2] It appears from the administrative record that MassDEP is regulating contamination from chlorinated solvents under the Massachusetts Contingency Plan, 310 CMR 40.000, but a large plume allegedly remains adjacent to the Mill River. Id.

On February 19, 2019, the Commission issued a negative determination of applicability, finding, without explanation, the Locus and work did not encompass areas subject to protection

[2] The Applicant contends that, among other things, G&U dumped excavated earth into local waters and discharged harmful substances during a railroad construction and upgrade project when it filled and altered Resource Areas, including Bank, Stream, and Riverfront Area. The Applicant also asserts that "[w]ith the extensive movement of materials during reconstruction of the Site there is reason to question whether the soils placed as fill within the wetland resource areas may have included contaminated soil moved within the Site." Applicant's Opposition to Petitioner's Motion for Summary Decision and Cross Motion for Summary Decision, p. 11, n. 3.

under the Wetlands Act and Regulations. The Applicant appealed that determination to MassDEP's Central Regional Office, requesting the SDA.

MassDEP issued a positive SDA, finding the Project took place within, and altered, several jurisdictional wetland Resource Areas. Specifically, the work included cutting trees; clearing vegetation; culverting approximately 300 feet of intermittent stream channel; and filling, grading, and paving in wetland Resource Areas. The work altered the Bank to the Intermittent Stream and the Mill River, BLSF, and Riverfront Area associated with the Mill River; and occurred in Buffer Zones to Bank and BVW. SDA, cover letter, p. 2. MassDEP therefore found that the areas described on the plans identified in the RDA are areas subject to protection under the Wetlands Act and Regulations and the work described on the referenced plans and documents is within an area subject to protection under the Wetlands Act and will remove, fill, dredge, or alter that area. SDA, p. 2.

Gerrity appealed the SDA here, to the Office of Appeals and Dispute Resolution.

## DISCUSSION

### I. MassDEP's Issuance Of The SDA Is Not Preempted

#### A. The Parties Assert Varying Preemption Arguments

Gerrity argues that MassDEP's "enforcement" of the Wetlands Regulations and the Wetlands Act via the SDA is preempted as a matter of law by 49 U.S.C. § 10501. Gerrity Motion for Summary Decision, p. 1. It argues that preemption exists because: (1) there is "no genuine issue of material fact that the Property is used for transportation by rail carrier and, therefore, it is under the exclusive jurisdiction of the Surface Transportation Board ("STB")" and (2) the Regulations and the Act interfere with a railroad's ability to "construct facilities and conduct activities." Id.

Gerrity adds that the Wetlands Act and Wetlands Regulations are preempted because, Gerrity postulates, that if it had attempted to satisfy the requirement to file a Notice of Intent prior to performing any work, that may have resulted in the "potential" prohibition on G&U moving drainage underground, which could have resulted in G&U's "potentially" not being able to utilize the railyard for "its intended purpose of supporting interstate commerce, as well as potential costs, and delay." Gerrity Motion for Summary Decision, p. 15. Gerrity contends that the Project "fell squarely under the exclusive jurisdiction of the STB" because the project "consisted of G&U [the sole tenant of the railyard] constructing an underground drainage trench to move existing drainage below ground . . . to recommence railroad operations at the site." Gerrity Motion for Summary Decision, p. 11. Gerrity therefore concludes that the Wetlands Act and Wetlands Regulations are preempted "as a matter of law." Garrity Motion for Summary Decision, p. 16.

The Applicant argues that the SDA reflects a reasonable and proper use of inherent police powers and that issuance of the SDA is not preempted. Applicant's Motion for Summary Decision, pp. 1, 12. The Applicant adds that there is no preemption here because there is no "credible" evidence showing that the work was performed by a "rail carrier" and that the work was integrally related to "transportation."[3] Applicant's Motion for Summary Decision, pp. 13-14. It also contends that G&U did not demonstrate that it operated at the Locus from 2008-2011 as a railyard or that the work was related to transportation.

[3]Requirements for preemption include that the law must seek to regulate 'transportation,'" and "second, that transportation must be conducted 'by a rail carrier.'" Padgett v. Surface Transportation Bd., 804 F.3d 103, 109 (1st Cir. 2015) (quoting Tex. Cent. Bus. Lines Corp. v. City of Midlothian, 669 F.3d 525, 530 (5th Cir. 2012); see also, e.g., Norfolk, 608 F.3d at 157-58; Fla. E. Coast Ry. Co. v. City of W. Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001). "Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact specific determination" based on a series of factors including "(1) whether the rail carrier holds out transloading as part of its business, (2) the degree of control retained by the [rail] carrier, (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing." Tex. Cent., 669 F.3d at 530-31 (internal quotation marks, citations omitted).

The Applicant also appears to make an alternative argument, suggesting that if I were to find that there is preemption, the "record here does not allow MassDEP or the Presiding Officer to make a preemption finding or determination." Applicant's Motion for Summary Decision, p. 2. It contends that "the issues raised by the Petitioner should be made to and decided by the STB, not MassDEP." Id. The Applicant adds that "railroad preemption determinations are best made by another body and in another forum; namely, the STB." Applicant's Motion for Summary Decision, p. 10. Nevertheless, the Applicant concludes that I should issue a Recommended Final Decision ruling that "the WPA and its regulations are not preempted by 49 U.S.C. 10501 and/or 49 U.S.C. 20106." Id.

MassDEP asserts that summary decision "cannot be entered concerning preemption because the record demonstrates that numerous genuine issues of material fact remain." MassDEP Motion for Summary Decision, p. 4. It contends that there are genuine issues of material fact surrounding the work that G&U purportedly completed, and that affects the preemption analysis. MassDEP Motion for Summary Decision, pp. 4-5. Simultaneously, MassDEP contends that because "the SDA itself does not rely on any of the contested facts, it is not necessary to resolve them in this forum." Id. It contends that preemption is *not at issue* because the SDA does not direct or prohibit G&U to do anything, stating: "Whether the WPA is pre-empted by 49 USC 10501 because it interferes with a railroad's ability to construct facilities and conduct economic activities is not relevant to this SDA, as it does neither. The question is not triggered by this SDA." MassDEP Motion for Summary Decision, p. 12. Despite MassDEP's position that preemption is not at issue, it adds that OADR has jurisdiction to determine the preemption question. MassDEP Motion for Summary Decision, pp. 10-11.

## B. Preemption Law

State law is preempted by federal law when: (1) the preemptive intent is "'explicitly stated in [a federal] statute's language or implicitly contained in its structure and purpose'"; (2) state law "actually conflicts with federal law"; or (3) "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977), and Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982)). The "ultimate touch-stone" of preemption analysis is congressional intent: "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks omitted). The presumption is against preemption and in support of the general rule that traditional police power regulation is not preempted. Padgett v. Surface Transportation Bd., 804 F.3d 103, 109 (1st Cir. 2015).

In 1995, Congress enacted the ICC Termination Act ("ICCTA" or "Termination Act"), which abolished the 108-year-old Interstate Commerce Commission ("ICC") and substantially deregulated the rail and motor carrier industries. Pejepscot Indus. Park v. Me. Cent. R.R. Co., 215 F.3d 195, 197 (1st Cir. 2000). In the ICC's place, the ICCTA established the United States Surface Transportation Board (STB) within the Department of Transportation. See 49 U.S.C. § 701(a); Pejepscot Indus. Park, 215 F.3d at 197.

Under 49 U.S.C. 10501(b)(2), the STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or

side tracks or facilities, even if the tracks are located, or intended to be located entirely in one State." Section 10501(b)(2) further provides that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." See City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale I) at 5. "Transportation" is expansively defined to include: "a locomotive, car, vehicle, vessel, 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(9).

Some federal courts have recognized that under certain circumstances the Termination Act preempts some pre-construction permit requirements imposed by states and localities. See, e.g., City of Auburn, 154 F.3d at 1030-31 (affirming the STB's finding that the Termination Act preempted a local environmental permitting requirement requiring a railway to submit to a permitting process before making repairs and improvements on its track line); Soo Line R.R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1101 (D. Minn. 1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings . . . that are related to the movement of property by rail is expressly preempted by the [Termination Act]."); CSX Transp., Inc. v. Georgia PSC, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996) (finding state regulation of railroad agency closing preempted by the Termination Act).

The STB has likewise ruled that some "state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they

unduly interfere with interstate commerce." Joint Petition for and Declaratory Order -- Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, 2001 WL 458685, at *5 (S.T.B. Apr. 30, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 191 F. Supp. 2d 257 (D. Mass. 2002) (affirming the Transportation Board's determination that town's pre-construction permit requirement was preempted by the Termination Act); see also Green Mountain R.R. Corp., Petition for Declaratory Order, STB Finance Docket No. 34052, 2002 WL 1058001 (S.T.B. May 24, 2002). As the agency authorized by Congress to administer the Termination Act, the STB is "'uniquely qualified to determine whether state law . . . should be preempted'" by the Termination Act. Georgia PSC, 944 F. Supp. at 1584 (quoting Medtronic, 518 U.S. at 496); Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2nd Cir. 2005).

Despite the breadth of the STB's powers, the courts have been careful not to over-extend preemption. They have stated that whether preemption exists is a factually intensive inquiry. The ultimate test is whether "the statute or regulation is being applied to 'unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce.'" Boston & Me. Corp. v. Town of Ayer, 330 F.3d 12, 17, (1st Cir. 2003); United States v. St. Mary's Ry. West, LLC, 989 F. Supp. 2d 1357, 1363 (S.D. Ga. 2013); Green Mountain R.R. Corp. v. Vermont, No. Civ.1:01-CV-00181JGM, 2003 U.S. Dist. LEXIS 23774, 2003 WL 24051562, at *8 (D. Vt. Dec. 15, 2003) (finding a local preclearance permitting process preempted while noting that compliance under applicable federal laws, such as the CWA, could still be sought), aff'd, 404 F.3d 638 (2d Cir. 2005), cert. denied, 546 U.S. 977, 126 S. Ct. 547, 163 L. Ed. 2d 460 (2005); Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000) (noting that local governments may play a role in implementing the CWA despite the Board's exclusive jurisdiction).

And even if there is preemption of state or local laws, state and local entities are not without remedies. "[W]hen a state or local regulation is preempted, decisions note that federal environmental laws are still available to fill any void." United States v. St. Mary's Ry. West, LLC, 989 F. Supp. 2d 1357, 1364, 2013 U.S. Dist. LEXIS 181015, *17, 2013 WL 6798560. For example, "nothing in section 10501(b) is intended to interfere with the role of *state and local agencies* in implementing Federal environmental statutes, such as the Clean Air Act, the CWA, and the SDWA. See Stampede Pass, 2 I.C.C.2d at 337 & n.14; Riverdale I at 7. Thus, the lack of a specific environmental remedy at the [STB] or under state and local laws (as to construction projects such as this, over which the [STB] lacks licensing power) does not mean that there are no environmental remedies under other Federal laws." Boston & Me. Corp., supra., 2001 Lexis at *19-20.

In applying the fact-bound preemption analysis, the courts have stated: "whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted." The focus is primarily on whether there is a "prior restraint" that interferes with interstate commerce and whether the regulation is being "used simply [as a pretext] to permit local communities to hold up or defeat the railroad's right to construct facilities used in railroad operations . . . ." Boston & Me. Corp., supra. Reasonable requirements or conditions for compliance with applicable environmental

laws that do not unreasonably interfere with interstate commerce are not preempted. Boston & Me. Corp., supra. Although conditions or requirements in and of themselves may be reasonable, the manner in which a railroad is subjected to the local or state permit process itself may be preempted. Boston & Me. Corp. v. Town of Ayer, 191 F. Supp. 2d 257, 262 (D. Mass. 2002) (STB found that the planning board and conservation commission's processes were preempted).

In Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) the court stated that while pre-construction permitting programs often unreasonably interfere with rail travel, less burdensome and non-discriminatory regulations would pass muster. It explained further:

> It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

404 F.3d at 643.

"The animating idea is that, while states may set health, safety, and environmental ground rules, those rules must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service." New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 254, (3rd Cir. 2007). "But such regulations may not (1) be so open-ended as to all but ensure delay and disagreement, or (2) actually be used unreasonably to delay or interfere with rail carriage. In other words, some regulations, like those at issue in the Green Mountain litigation, give too much discretion to survive a facial challenge because they invite delay. In addition, even a regulation that is definite

on its face may be challenged as-applied if unreasonably enforced or used as a pretext to carry out a policy of delay or interference. New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 254-255 (3rd Cir. 2007); United States v. St. Mary's Ry. West, LLC, 989 F. Supp. 2d 1357, 1363 (S.D. Ga. 2013).

For example, "a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or wellbeing of the local community." Fletcher Granite Co., LLC – Petitioner for Declaratory Order, Docket No. 34020, 2001 STB LEXIS 590, *10, n. 7 (June 25, 2001) (quoting Auburn and Kent, WA- Petition for Declaratory Order - Burlington N.R.R. - Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff'd, City of Auburn, supra.

### C. MassDEP's Issuance Of The SDA Is Not Preempted

The Applicant and Gerrity view this appeal too broadly. Contrary to Gerrity's argument, it is undisputed that MassDEP has not taken any enforcement action, and thus enforcement and disputed issues of fact concerning enforcement are not at issue. Likewise, the Applicant suggests that I must resolve disputed issues of fact concerning, among other things: the extent to which G&U performed or directed the Project; whether G&U was authorized to perform the work; and whether G&U has actually used the Locus as a rail carrier for transportation purposes.

However, the only regulatory action at issue is MassDEP's issuance of the SDA. That was based upon a factual basis that is not genuinely contested by the parties. The SDA relied upon uncontested evidence demonstrating that in and around 2008 the Locus contained the identified wetland Resource Areas that were altered significantly overtime by someone who executed and implemented the Project. Nothing more needs be determined as the basis for issuance of the SDA, and the parties do not contend otherwise. Therefore, whether MassDEP's issuance of the SDA is preempted is appropriate for resolution by summary decision. And because it is a regulatory action, it must be reviewed pursuant to the above preemption standard to determine whether it is preempted. Although MassDEP suggests that the preemption analysis is "not ripe" for determination unless and until MassDEP formally takes an enforcement action, it came to that conclusion by performing a preemption analysis to assert that the SDA does not "unduly burden or unreasonably interfere with interstate commerce." MassDEP's Motion for Summary Decision, pp. 9-11.

MassDEP's issuance of the SDA and the SDA easily pass muster under the ultimate preemption inquiry: whether the regulatory action is being applied to unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. The SDA does nothing more than confirm the undisputed facts that the identified wetland Resource Areas exist at the Locus and they were significantly altered beginning in about 2008, and up to the present time. There is no evidence in the administrative record concerning any other regulatory action by MassDEP, leaving only for adjudication whether the SDA and its issuance are preempted. Because the underlying material facts are not genuinely disputed the decision that there is no preemption has been appropriately adjudicated in this forum on summary decision, which should

be entered in favor of MassDEP and the Applicant, and against Gerrity, on the narrow issue whether the SDA and its issuance are preempted.

## CONCLUSION

Given the undisputed absence of a restriction or burden on G&U from conducting its operations or engaging in interstate commerce, preemption does not apply to MassDEP's issuance of the SDA. As a consequence, summary decision should be entered in favor of MassDEP and the Applicant and against Gerrity, and the SDA should be affirmed.

## NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

Date: January 17, 2020

Timothy M. Jones
Presiding Officer

## SERVICE LIST

**Petitioner:** Gerrity Companies Incorporated

**Legal representative:**
William M. Pezzoni, Esq.
Day Pitney LLP
One International Place
Boston, MA 02110
**e-mail:** wpezzoni@daypitney.com;

**Applicant:** Hopedale Properties LLC

**Legal representative:**
Robert D. Cox, Jr., Esq.
Bowditch & Dewey, LLP
311 Main Street, P.O. Box 15156
Worcester, MA 01615
**e-mail:** rcox@bowditch.com;

**Conservation Commission:**
Town of Hopedale Conservation Commission
78 Hopedale Street
P.O. Box 7
Hopedale, MA 01747
**e-mail:** conservation@hopedale-ma.gov;

**Legal representative:** None set forth in Petitioner's Appeal Notice

**The Department**:
Denise Child, Section Chief, Wetlands Program
MassDEP/Central Regional Officer
Bureau of Water Resources
8 New Bond Street
Worcester, MA 01606
**e-mail:** Denise.Child@mass.gov;

**Legal representative:**
Dana Muldoon, Senior Counsel
MassDEP/Office of General Counsel
One Winter Street
Boston, MA 02108
**e-mail:** Dana.Muldoon@mass.gov;

cc: Anne Berlin Blackman, Chief Regional Counsel
MassDEP/Central Regional Office
8 New Bond Street
Worcester, MA 01606

**e-mail:** Anne.Blackman@mass.gov;

Leslie DeFilippis, Paralegal
MassDEP/Office of General Counsel
One Winter Street
Boston, MA  02108