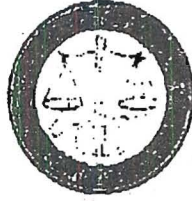


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State of Connecticut

RICHARD BLUMENTHAL  
ATTORNEY GENERAL



Hartford

January 8, 2010

Attorney Anne Peters, Chair  
Newtown Inland Wetlands Commission  
10 Erin Lane  
Newtown, CT 06470

**RE: Housatonic Railroad Company, Hawleyville Operation**

Dear Chair Peters:

I understand that the Newtown Inland Wetlands Commission is considering an application made by Housatonic Railroad ("the Railroad") related to the extension of a sidetrack at its Hawleyville facility. I write to reiterate my view that the Commission is not preempted from regulating the construction of this extension. I will support the Commission if it decides to enforce the provisions of its wetlands regulations.

As you know, the Railroad has taken the position that federal law preempts your jurisdiction over the rail construction activities otherwise in your jurisdiction. However, it is submitting to your jurisdiction without waiving its right to make a preemption claim in the future.

On October 2, 2009, I wrote the Railroad's counsel stating my position that the Railroad is required to comply with the Inland Wetlands and Watercourses Act, including the requirement that the Railroad submit to your permitting jurisdiction for the activities that are the subject of the application. I have attached a copy of that letter for your review. I want to assure you that my position has not changed. It is my view that your Commission is not preempted from regulating the construction of a rail line within your jurisdiction that will be used in connection with its solid waste rail transfer activities.

As you may know, Congress passed the Clean Railroads Act of 2008 ("the Act"), which significantly modified existing law. 49 USC § 10908, *et seq.* Prior to the Act, many state and local laws and regulations regarding railroads were preempted by Congress. With the passage of the Act, Congress removed from federal jurisdiction and returned to the states their authority to regulate "all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste" for solid waste rail transfer facilities. 49 USC § 10908(a). (emphasis added)

Under the Act, "State requirements" include state laws expressly delegated to political subdivisions of the state. 49 USC § 10908(e)(3). The Inland Wetlands and Watercourses Act (Wetlands Act), Conn. Gen. Stat. Sec. 22a-37 *et seq.*, is a state law expressly delegated to municipalities to "carry out and effectuate." Conn. Gen. Stat. Sec. 22a-42. Without a doubt, the Wetlands Act, and your authority pursuant to the Wetlands Act, is a "State requirement" pursuant to the Act.

The Railroad takes the position that you have no jurisdiction over "the portion of a [solid waste rail transfer] facility to the extent that the activities taking place at such portion are comprised solely of the railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car...." 49 U.S.C. 10908(e)(1)(H)(2008). According to the Railroad, because the construction activity taking place within your jurisdiction is for the purpose of building a track to transport solid waste after the solid waste is loaded for shipment, the construction activity is preempted by the Act. <sup>1</sup>

The Railroad's argument ignores the plain language of the Act and attempts to unduly restrict the state's power. Federal preemption of matters traditionally governed by states does not lie unless preemption is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Under the Act, Congress made clear that the only activities that are not within the state's environmental jurisdiction are activities that are "*solely* of the railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car." (Emphasis added). The *construction* of a rail line to be used at a solid waste rail transfer station is not railroad *transportation* of the waste. Therefore, Congress' intention is clear -- the only activity that Congress did not intend for the states to regulate is the *transportation* of solid waste. The construction of a portion of the facility necessary for solid waste handling that is within your regulatory jurisdiction is not preempted.

I am fully prepared to support your exercise of jurisdiction. I hope you find this information helpful.

Very truly yours,

  
RICHARD BLUMENTHAL

RB/pas

c: Edward J. Rodriguez, Esq.  
Housatonic Railroad Company  
8 Davis Road  
Old Lyme, CT 06371

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<sup>1</sup> The Railroad also asserts that other commodities will be transported on the rail after constructed