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July 27, 2020

**By E-Filing**

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

Re: FD No. 36399, *Brookhaven Rail LLC – Petition for Exemption  
from Requirements of 49 U.S.C. §10909*

Dear Ms. Brown:

Accompanying this letter is a Petition for Exemption filed in the referenced docket on behalf of Brookhaven Rail LLC, seeking an exemption from the requirements of 49 U.S.C. § 10909 and the Board's regulations governing "land use exemption permits." Please note that required filing fee for this Petition is being paid electronically pursuant to the Board's procedures.

Please do not hesitate to call me if you have any questions.

FILED  
July 27, 2020  
SURFACE  
TRANSPORTATION BOARD

FEE RECEIVED  
July 27, 2020  
SURFACE  
TRANSPORTATION BOARD

Sincerely,

A handwritten signature in blue ink that reads "Thomas W. Wilcox".

Thomas W. Wilcox  
*Attorney for Brookhaven Rail LLC*

Enclosures

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 36399**

**BROOKHAVEN RAIL LLC - PETITION FOR EXEMPTION FROM  
REQUIREMENTS OF 49 U.S.C. §10909**

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**PETITION FOR EXEMPTION**

Pursuant to 49 U.S.C. §10502(a) and 49 C.F.R. Part 1121, Brookhaven Rail LLC (“BHR”), a Class III rail carrier, hereby petitions the Surface Transportation Board (“Board” or “STB”) for an exemption from the full requirements of 49 U.S.C. §10909 and the Board’s regulations at 49 CFR Part 1155 subpart C governing applications by rail carriers for a “land-use-exemption-permit”<sup>1</sup> in conjunction with the construction, ownership and operation of a “solid waste rail transfer facility,”<sup>2</sup> as more fully described herein (the “Facility”), on approximately 50 acres of an approximately 228 acre parcel of land located in the Town of Brookhaven, Suffolk County, Hamlet of Yaphank, New York (the “Town”). The parcel of land on which the Facility would be constructed is one of four parcels of land that together make up the 350-acre Brookhaven Rail Terminal Site (“BRT”). This parcel (“Parcel D” as explained herein) is under contract for purchase by a BHR affiliated company, who would lease to BHR the property needed for the

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<sup>1</sup> Defined at 49 C.F.R. §1155.2(b) as “the authorization issued by the Board pursuant to the authority of 49 U.S.C. §10909(a) and includes the term “siting permit” in 49 U.S.C. §10909(e).”

<sup>2</sup> Defined at 49 U.S.C. §10908 (e)(1)(H) as “the portion of a facility owned or operated by a rail carrier . . . where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place out of original shipping containers . . . .”

Facility. The Facility would be constructed and owned by BHR, and the rail and other operations at the Facility would be coordinated between BHR and another affiliate of BHR, Winters Brothers Waste Systems of Long Island LLC (“Winters Bros.”), pursuant to an operating contract. This Petition is being filed in conjunction with a Petition for Exemption that was filed by BHR in Docket No. FD 36388 on June 25, 2020, seeking an exemption from the full requirements of 49 U.S.C. §10901 and the Board’s regulations at 49 C.F.R. Part 1150 subparts A and B governing an application for approval for BHR to construct and operate 23,680 feet of new rail line on Parcel D for the purpose of holding out to provide common carrier service to the new facility, and to other entities that locate on Parcel D and request freight rail service as it is developed into a rail-served industrial park (“Construction Exemption Petition”).

## **I. INTRODUCTION AND FACTUAL BACKGROUND**

By this Petition BHR seeks a relatively limited legal determination by the Board that would facilitate the construction and BHR’s ownership of a solid waste rail transfer facility on Long Island, New York that is badly needed to help address a severe lack of landfill and other capacity to handle the approximately 7,100 tons per day of solid waste produced by the Island’s inhabitants. Specifically, BHR seeks a determination pursuant to 49 U.S.C. §10909(a) that a zoning law enacted by the Town that would otherwise prohibit the construction of this facility on this parcel constitutes a “State, local, or municipal law . . . affecting the siting [that] unreasonably burdens the interstate transportation of solid waste by railroad, [and] discriminates against the railroad transportation of solid waste and a rail transfer facility . . . .”<sup>3</sup> Moreover, BHR demonstrates herein that the unique history and circumstances of this particular site and its planned development,

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<sup>3</sup> 49 U.S.C. §10909(a)(1).

combined with the information provided by this Petition and being collected by the ongoing environmental review of the proposed project being conducted by the Board's Office of Environmental Analysis ("OEA"), all provide the Board with ample information with which to determine that a land use exemption under §10909 is necessary because the "proposed location does not pose an unreasonable risk to public health, safety, or the environment." 49 U.S.C. §10909(c)(1).

As demonstrated by this Petition and the attached exhibits and supporting verified statements of James Newell, former President of BHR ("Newell V.S.") and William Flower, Vice President for Corporate and Public Affairs for Winters Bros. ("Flower V.S."), BHR asserts that in addition to meeting all of the requirements of 49 U.S.C. §10502(a), an exemption from the requirements of §10909 and the full requirements for obtaining a "land use exemption permit" set forth in 49 C.F.R. Part 1155 is warranted in this particular case for two general reasons. First, there is already inadequate waste disposal capacity on Long Island. This lack of capacity will turn into a crisis as the Town currently operates one of only two landfills on Long Island and that landfill is scheduled to close in 2024. The Town supports the construction of a solid waste rail transfer facility within its borders to replace some of the capacity of its landfill, favoring rail transport over truck transport. However, the Town also has informed Petitioner and this Board that it is "highly unlikely" that the legislative process for amending its zoning law that currently prevents solid waste rail transfer facilities from being constructed on Parcel D could be completed in time to alleviate the capacity crisis.<sup>4</sup>

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<sup>4</sup> Letter dated July 14, 2020 from Beth A Reilly, Planning Commissioner of the Town of Brookhaven to Victoria Rutson, Director of OEA, attached hereto as Exhibit A, at 2.

Second, an exemption from the full requirements of §10909 and Part 1155 is supported by the fact that the development of the BRT over the past 13 years has been accompanied by years of litigation, negotiations, and extensive review of the environmental and social impacts of the planned development of Parcel D for rail-served industries, including truck-to-rail transfer facilities, but *not* expressly for solid waste rail transfer facilities. This extensive prior activity has resulted in agreements with commitments regarding compliance with applicable state and local laws and regulations, and the adoption of numerous social and environmental mitigation measures that will generally apply to the construction of the Facility and development of Parcel D, supplemented by any additional mitigation requirements imposed by the Board. There is also no question that BHR must comply with all applicable New York laws and regulations governing the construction and operation of solid waste rail transfer facilities. The overall process has also involved a high level of cooperation and collaboration between BHR's affiliated companies, the Town and other affected parties and state entities.<sup>5</sup> Accordingly, subjecting BHR to the full requirements of §10909 and Part 1155 is not necessary because this Petition and the exhibits attached hereto, combined with the OEA's review of the proposed project, will provide the Board with sufficient information to evaluate and rule on BHR's narrow request for an exemption from the zoning law that prevents the facility from being sited on Parcel D.

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<sup>5</sup> The glaring exception to the collaboration and transparency regarding the proposed development of Parcel D by BHR and Winters Bros. has been the opposition of Sills Road Realty, LLC ("LLC") which alone or through affiliated companies owns Parcels A, B, and C of BRT. For several years Sills has been engaged in litigation in federal and state court, and also before this Board, on a variety of matters related to the potential expansion of the BRT beyond the freight rail operations on Parcel A. This litigation has primarily focused on the activities of Sills and other related parties on Parcels B and C. Most recently, on July 15, 2020 Sills and several of its affiliated companies submitted a Reply to the Construction Exemption Petition in Docket No. FD 36388 which raised a number of baseless objections to the proposed rail construction project and to some extent the development of rail served industry on Parcel D. BHR intends to respond to Sills' Reply in that docket.

Finally, BHR seeks expedited consideration of this Petition and a grant of the requested preemption ruling pending completion of the OEA's environmental review. As explained below, the new solid waste rail transfer facility is badly needed to alleviate an acute lack of capacity on Long Island, N.Y. to process and dispose of solid waste. That capacity will be even further constrained in 2024 when the landfill owned and operated by the Town is scheduled to close. The Board's expeditious granting of the requested land use exemption is necessary for BHR to move forward and meet certain timelines for designing and executing the plans for construction to (1) meet current demand for processing and disposal of municipal solid waste ("MSW") and construction and demolition debris ("C&D"); and (2) increased volumes of such waste, particularly C&D, beginning in 2024.

**A. Identity and Description of the BRT, BHR<sup>6</sup> and Winters Bros.**

BHR is a Class III rail carrier that provides common carrier freight service to shippers located at the BRT. The BRT includes four parcels of land totaling 350 acres which have been historically referred to as Parcels "A", "B," "C," and "D."<sup>7</sup> A Map showing the four parcels of the BRT is attached as Exhibit B to this Petition. The BRT parcels are adjacent to the mainline of the Long Island Rail Road ("LIRR") which runs in a generally east-west direction from New York City to Greenport, Suffolk County, New York. The New York & Atlantic Railway ("NY&A") is LIRR's designated operator of this line for freight rail services. BHR presently provides common carrier rail services to shippers located on Parcel A, which is approximately 28 acres in size and located north of the LIRR main line. BHR's services to shippers on Parcel A have primarily consisted of interchanging empty and loaded railcars with NY&A via switch connection and

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<sup>6</sup> A more complete description of BHR and the BRT is included at pages 2 to 5 of the Construction Exemption Petition.

<sup>7</sup> Newell V.S. at 1.

interchange constructed on the LIRR tracks.<sup>8</sup> BHR also provides rail carrier and transloading services on the BRT, and the marshalling and receipt of freight rolling stock on the BRT for transportation by NY&A over the rail lines of the LIRR.<sup>9</sup>

Effective May 11, 2020, all of the membership shares of BHR were acquired by Shamrock Rail, LLC, a non-carrier affiliate of Winters Bros.<sup>10</sup> Winters Bros. is the largest solid waste management company providing services to private and municipal customers on Long Island.<sup>11</sup> Winters Bros. and its predecessor family-owned and operated companies have provided waste disposal and recycling services on Long Island for over 60 years.<sup>12</sup> Its operations presently include collection, processing, recycling, truck transport and disposal of MSW, C&D, recyclables and document destruction (shredding/recycling).<sup>13</sup> Winters Bros. owns and operates solid waste management facilities that include eight transfer facilities and six recycling facilities, some of which are operated for and on behalf of municipalities, including: the Town of Brookhaven Materials Recovery Facility, the Town of Babylon Commercial Garbage District, the Town of Oyster Bay transfer station and the City of Glen Cove transfer station.<sup>14</sup> Winters Bros. also

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<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> *Id.* As shown on Exhibit B, Parcels B (approximately 20 acres), and C (approximately 73 acres) are contiguous tracts that are also located north of the LIRR main line. Parcel A and Parcel B are separated by a tract of land owned by the Long Island Power Authority (“LIPA”). Approximately 90 linear feet of track extend from Parcel A over the LIPA land and approximately another 50 feet of track extend onto Parcel B. *Id.* at 2-3. There is currently no rail track on Parcel C. Parcel D (approximately 228 acres), which is discussed in greater detail in this Petition, is located south of the LIRR main line, which physically separates Parcel D from the other three parcels to the north. This section of the BRT includes a 62-acre Conservation Easement in favor of the Town of Brookhaven. *Id.* There is presently no rail infrastructure on Parcel D of the BRT.

<sup>10</sup> Flower V.S. at 2.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.*

provides recycling services to the Town of Islip, the Town of Smithtown and numerous villages across Long Island.<sup>15</sup> Winters Bros. has contracted with the owner of Parcel D for Winters Bros., Shamrock, or another affiliate to purchase Parcel D, which sale is expected to be completed later in 2020.

**B. The Need for the Facility and its Proposed Structure and Operations**

**1. The Facility is Needed to Address an Impending Solid Waste Disposal Crisis on Long Island**

The Facility will provide a desperately needed solution to a rapidly growing solid waste crisis on Long Island. Long Island, consisting of Nassau and Suffolk Counties, has a population of approximately 2.8 million people who collectively generate around 7,100 tons of MSW and C&D each day.<sup>16</sup> This amounts to approximately 2.6 million tons of MSW and C&D each year. As a result of laws and regulations to protect Long Island's sole source aquifer drinking water supply, there are no landfills on Long Island that accept putrescible MSW (waste subject to putrefaction or decay) for disposal.<sup>17</sup> This means that all putrescible MSW generated on Long Island must either be incinerated or trucked off Long Island for disposal in landfills in New Jersey, Pennsylvania, Ohio, Virginia, West Virginia, and upstate New York. Everyday, trucks haul thousands of tons of MSW and other waste (C&D, yard waste, etc...) off Long Island for disposal.<sup>18</sup>

Some C&D is already shipped off the Island by rail, but the two-existing waste transload facilities shipping that waste are operating at capacity.<sup>19</sup> There are only two landfills on Long

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 4.

Island that accept C&D for disposal. One is the Town's municipal landfill which is located directly across Horseblock Road from the southern boundary of Parcel D in Yaphank.<sup>20</sup> The Town's landfill is scheduled to permanently close in 2024 and a new landfill for C&D will not be created to replace it. Each year, the Brookhaven Landfill accepts approximately 2,000 tons of dredge spoil, 24,000 tons of street-sweeping refuse, 350,000 tons of incinerator ash, and more than 720,000 tons of C&D waste generated throughout the region, from New York City to Montauk.<sup>21</sup> The imminent closure of the Brookhaven Landfill necessitates that Long Island must quickly develop a means to efficiently process and dispose of that waste. Trucking has been the primary mode of hauling waste off Long Island since the 1980s. However, a single truck is only capable of hauling between 20 and 24 tons of waste at a time. The thousands of trucks that are needed to haul MSW and C&D waste off of Long Island make existing highway congestion worse, accelerate the deterioration of road and bridge infrastructure, and severely impact air quality in an already non-attainment region. Trucking alone is simply not an efficient and environmentally acceptable means of managing the huge volumes of Long Island's waste long term.<sup>22</sup>

On the other hand, a single railcar can carry 100 to 105 tons of waste. As a result, whereas it would take approximately 44,000 truckloads to transport one million tons of MSW and C&D waste, the same amount of waste could be transported in only 9,523 railcars while freeing up highway infrastructure and capacity. Thus, the use of railroads to move waste off Long Island is more efficient, and environmentally friendly as it would reduce truck traffic and greenhouse gas

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<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* See also, "Final Point" section of: <https://www.newsday.com/opinion/newday-opinion-the-point-newsletter-1.46948236>

<sup>22</sup> Flower V.S. at 5

emissions.<sup>23</sup> The proposed Facility is a critical piece of environmental infrastructure needed for Long Island at the earliest possible time.

## **2. General Description of the Proposed Facility**

The Facility will be constructed on approximately 50 acres of land at the southern end of Parcel D, with access to Horseblock Road, directly across the road from the Town's present solid waste management facility.<sup>24</sup> As explained by Mr. Newell, BHR will oversee construction of the Facility with the assistance of Winters Bros., and BHR will own the Facility.<sup>25</sup> BHR will provide the rail service to the Facility via the newly constructed lines of railroad proposed in the Construction Exemption Petition, and it will be the owner of the tracks, buildings, and other structures and permanent fixtures comprising the Facility.<sup>26</sup> Winters Bros. will be the operator of the Facility pursuant to an operation and maintenance contract with BHR. The current plans call for Winters Bros. to manage both operational requirements and contractual arrangements for the acceptance of inbound waste commodities delivered by truck, as well as making all necessary arrangements for the rail shipment of processed MSW, C&D and marketable recyclables from the Facility.<sup>27</sup> BHR will coordinate with Winters Bros. to provide rail services in conjunction with the loading of and movement of railcars within the Facility.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 5.

<sup>25</sup> Newell V.S. at 2.

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> *Id.* at 3; Flower V.S. at 2. Winters Bros. would arrange for rail transportation of wastes and recyclable materials pursuant to terms provided by NY&A and BHR. Thus, this will be a situation where "a rail carrier builds and owns a truck-to-rail transloading facility, and holds it out to the public as its own facility, but chooses to have a contract operator," which presumably, would qualify as transportation by rail carrier." *New York Susquehanna and Western Railway Corporation, v. Jackson*, 500 F.3d 238, 249 (3<sup>rd</sup> Cir 2007), citing STB Finance Docket No. 34192, *Hi Tech Trans LLC – Petition for Declaratory Order – Newark, N.J.* (served August 14, 2003) at 7, note 13.

As an initial matter, and as explained in more detail in Section I.C. below, with one notable exception the design and construction of the Facility and related railroad track on Parcel D have been planned so as to adhere closely to the conceptual development plans for the construction and operation of railroad tracks and rail transloading facilities on Parcel D that were the subject of a “So-Ordered 2016 Stipulation and Settlement” issued by the United States Federal District Court for the Eastern District of NY on March 17, 2016 (“2016 Settlement”).<sup>28</sup> These conceptual plans were expanded upon and further memorialized in a (1) Voluntary Draft Environmental Impact Statement (“VDEIS”) mandated by the 2016 Settlement and prepared pursuant to the New York State Environmental Quality Review Act (“SEQR”)<sup>29</sup>; and (2) a Negative Declaration and Notice of Determination of Significance Finding (“Negative Declaration”) issued on September 14, 2017 by the Town as Lead Agency for the VDEIS under SEQR, by which the Town concluded that the planned expansion of the BRT, including the planned future development of Parcel D for railroad and rail transloading activities, would have no significant effect on the environment as conditioned by the 2016 Settlement and the VDEIS’s mitigation measures.<sup>30</sup>

The exception to the conceptual plans considered in the 2016 Agreement and related documents is the elimination by BHR of a track to connect tracks on Parcel D with tracks on Parcel

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<sup>28</sup> *Town of Brookhaven v. Sills Road Realty, LLC, Brookhaven Rail LLC f/k/a U.S. Rail New York, LLC, Brookhaven Terminal Operations, Oakland Transportation Holdings, LLC, Sills Expressway Associates, Watral Brothers, Inc. and Pratt Brothers, Inc.*, Docket No. 14-cv-02286, U.S. District Court for the Eastern District of New York.

<sup>29</sup> NYS Environmental Quality Review Act (“SEQR”), NYS ECL Article 8-0101; 6 NYCRR Part 617.

<sup>30</sup> All of these documents were previously supplied to the STB’s Office of Environmental Analysis to assist in its review. Copies of the 2016 Settlement and Negative Declaration are attached as Exhibits C and D to this Petition, respectively, for the Board’s convenience. The VDEIS is not attached because it is too voluminous.

C by means of the construction of an underpass and tunnel under the tracks of the LIRR.<sup>31</sup> For a number of reasons, including the fact that no tracks have ever been constructed on Parcel C and it is unknown when and if such construction will occur, BHR and Winters Bros. determined that a more efficient configuration would be to have the new tracks on Parcel D come directly off of the LIRR tracks via a turnout and interchange. This change in the original configuration is also considerably better from an environmental impact standpoint, since it would eliminate the need for the enormous excavation of earth and sand to allow for the construction of the underpass.

As for the specifics of the Facility, Mr. Newell explains at pages 3-5 of his verified statement it will consist of a waste transfer building, an administrative and maintenance building, associated roads, scales and scale house, parking for inbound and outbound trucks, and several hundred feet of associated rail tracks and other transloading infrastructure.<sup>32</sup> The Facility will have the capacity to accept C&D, MSW and recyclables, provide sorting and processing, then compaction of the waste which comes in by truck to be transload on to railcars and shipped out to off-Island permitted disposal facilities. These materials will be weighed, inspected and classified upon entering the facility. Each of the materials will then be unloaded onto an area of the tipping floor designated for the particular material being delivered within the waste tipping, processing and transloading building of the Facility. Movement of the materials on the tipping floor will be by payloaders and skid steer loaders. Recyclable materials will be extracted from the C&D recyclable material. The C&D waste for disposal will be loaded into gondola railcars and covered in accordance with receiver or line haul railroad requirements. Recyclables will be sorted and separated by commodity and then be baled and loaded onto gondola railcars or trucks. Depending

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<sup>31</sup> See Exhibit B to Exhibit C.

<sup>32</sup> Newell V.S. at 3. A diagram of the proposed Facility and the associated structures is Exhibit E to this Petition.

on the type of railcar and containerization required by the receiver of the waste or a participating line haul railroad, the MSW will either be loaded into shipping containers and put on flat bed railcars or baled and loaded into gondola railcars. In summary, all waste materials arriving by truck will be processed and loaded into railcars for transportation off Long Island for disposal, and recyclable commodities will be transported by either rail or truck depending on the market in which they are sold.

The loading of all railcars will take place at the transloading section within the waste handling building. Empty railcars will be delivered by NY&A off the LIRR main line to an interchange with BHR, and then all movement of railcars to and at the Facility will be performed by BHR. Empty railcars will be moved by BHR to railcar storage track locations and then to the track passing through the waste handling building as needed. The actual process and equipment used in loading the railcars will vary depending on the material and the type of railcar being loaded. MSW in containers will be loaded onto flatbed railcars using cables connected to a crane. Baled MSW and recyclables will be lifted into gondola railcars with a bale-clamp connected to a crane. C&D will be loaded into gondola railcars using a grapple connected to an excavator.<sup>33</sup> Once the railcars are loaded they will be covered as required and then be moved by BHR from the solid waste rail transfer Facility to the interchange with NY&A where they will be removed by NY&A out onto the LIRR main line.

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<sup>33</sup> As part of the transfer process, a scale house operation with at least two (2) truck scales will be used to track and record the weight of all material delivered to the solid waste rail transfer station. Weighing material will permit accurate tracking and charging for the processing and disposal of waste commodities and recyclables delivered to the Facility. The Facility will also have two (2) railcar scales to assure the loaded railcars are the proper weight before leaving the Facility.

The project will be implemented in three phases. The first phase will involve approximately 2,000 tons per day of mostly C&D, and within five years of operation expand to 6,000 tons per day of C&D as well as MSW.<sup>34</sup> The facility will handle waste from Winters Bros. and its customers and have significant capacity to serve other private waste collectors and municipalities.<sup>35</sup> Most importantly, this Facility will not only provide needed transport and disposal capacity for Long Island, the use of freight rail to ship waste off Island presents a far more efficient and environmentally sound means of transport as compared to tractor trailer trucks. BHR and Winters Bros. anticipate each railcar will take four to five trucks off the severely congested highways on Long Island and over the New York City metropolitan region and the aging and overburdened roads and bridges.<sup>36</sup>

### **3. Hours of Operation and Anticipated Traffic Volumes**

BHR and Winters Bros. expect the Facility will operate to receive material from truck delivery 14 hours per day (4 am to 6 pm), Monday through Friday during its regular hours of operation and on Saturday for up to 8 hours.<sup>37</sup> The Facility will not routinely operate on Sundays or holidays. However, the Facility will have the capability to process and transload material 24 hours per day, as may be required by the tonnage of incoming material. The movement of railcars on-site will be determined by the tonnage of material processed and to be transloaded. Movement of railcars off-site will be determined by service provided by the NY&A. Current estimates are that in the first year of operations 133 trucks will deliver approximately 2,000 tons of waste and/or recyclables each day to be processed, and that this number will increase to 400 trucks per day

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<sup>34</sup> Flower V.S. at 5; Newell V.S. at 4-5.

<sup>35</sup> Flower V.S. at 5.

<sup>36</sup> *Id.*

<sup>37</sup> See Newell V.S. at 4.

delivering up to 6,000 tons of materials per day by the 5th year of operation. Loaded railcars would be assembled by BHR into blocks of up to 32 cars for delivery to the NY&A interchange. The expectation is for one to two trains per day in years one and two, rising to a constant two trains per day by the end of year two of operations. These numbers are subject to change if the Town landfill closes sooner than anticipated.<sup>38</sup>

#### **4. Non-Railroad Operations**

The Facility will also consist of ancillary structures and facilities to support the solid waste rail transfer operations. These will include trucking operations for the collection of waste and recyclables which will be delivered to facility for processing and loading into railcars. The Facility will also include a waste container repair and fabrication shop and container storage area located within the maintenance building shown on Exhibit E, as well as a truck maintenance and repair facility. BHR will own the physical assets of these ancillary operations, while Winters Bros. will perform the operations, as well as own and operate the vehicles and other moveable equipment.

#### **C. Relevant Court and Agency Action and Environmental Review of Parcel D Development**

As stated above, the potential development of Parcel D for truck-to-rail and rail-to-truck transfer facilities other than solid waste rail transfer facilities has already been the subject of extensive prior environmental review, engineering design, and other analysis. This review was prompted by the aforementioned 2016 settlement of litigation over controversy relating to activities on Parcels B and C of the BRT by the owners of those parcels in connection with the planned expansion of the BRT. The 2016 Settlement also incorporated potential expansion plans for Parcel D. Included among the settlement terms was the submission by the operator of Parcel

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<sup>38</sup> *Id.*

A of the BRT and BHR to the Town and its consultant of a proposed “Parcel D Conceptual Track Plan”<sup>39</sup> and certain other “Additional Plans” for Parcel D described in the document. These Additional Plans included (1) a Stormwater Pollution Prevention Plan; (2) Proposed Grading Plans; and (3) “proposed criteria, applicable standards and systems for stormwater and wastewater management of the Railway Expansion.”<sup>40</sup>

The VDEIS required by the 2016 Settlement included an assessment of the potential environmental impacts of the Parcel D Conceptual Track Plan, Additional Plans, and certain other potential rail-served development on Parcel D anticipated to occur during what was deemed “Phase 2” of the planned BRT expansion. The potential future development of Parcel D reviewed by the VDEIS included the following facilities in addition to the Parcel D Conceptual Track Plan: warehouse and exterior storage and unloading facilities, materials lay-down and storage areas, access roads, and parking areas.<sup>41</sup> In terms of activities, the VDEIS presumed development on Parcel D “would largely support rail-to-truck and truck-to-rail operations”<sup>42</sup> The impacts of temporary drainage reserve areas and two permanent recharge basins on Parcel D to address potential surface runoff issues were also reviewed, among other such measures.

Moreover, in order “[t]o ensure a comprehensive review in accordance with SEQRA and its implementing regulations at 6 NYCRR Part 617, a maximum total build-out development of six million square feet of building floor area has been identified,” which was the maximum development BRT indicated would occur on all four parcels.<sup>43</sup> The VDEIS also assumed “a mix

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<sup>39</sup> See 2016 Settlement, Exhibit B.

<sup>40</sup> *Id.* at Paragraph 2, pages 7-8.

<sup>41</sup> VDEIS, Section 1.4.6, at page xvi.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

of transloading and non-transloading facilities,” (but not facilities expressly for the purpose of transloading MSW, C&D, and other solid waste) and conservatively (“for the purposes of comprehensive environmental review”)<sup>44</sup> presumed 50 percent of the development of Parcel D would be rail related Support Structures,<sup>45</sup> while the remaining 50 percent would be non-rail related.<sup>46</sup> In terms of rail traffic, the VDEIS assumed the expanded BRT would support two freight deliveries of up to 100 carloads per day, increasing to three freight deliveries of up to 150 carloads per day within five years.<sup>47</sup>

The submission of the VDEIS to the Town as Lead Agency under SEQRA was followed on September 14, 2017 by the issuance by the Town of the Negative Declaration by which the Town determined that the proposed expansion of the BRT, including the potential development of Parcel D for truck-to-rail transload activities (again, transload activities other than MSW, C&D, and other solid waste) “will not have a significant effect on the environment.”<sup>48</sup> The finding of no significant impact was supported by the extensive analysis in the VDEIS, and concluded that “[p]otential significant adverse impacts associated with implementation of the proposed action have been evaluated and mitigation measures have been provide for impacts identified and adverse and alternatives to the proposed action have been evaluated.”<sup>49</sup>

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<sup>44</sup> VDEIS at Section 2.4, page 52.

<sup>45</sup> Defined in the 2016 Settlement as “any buildings and structural improvements for the Railway Expansion [that] are purely railway support structures such as fueling, servicing, repair or transloading buildings.” 2016 Settlement, paragraph 16.c., page 15.

<sup>46</sup> *Id.*

<sup>47</sup> The VDEIS also reviewed the impacts of the construction of the earlier planned pre-cast underpass beneath the LIRR tracks to connect Parcel D rail tracks to tracks on Parcels B and C, vegetative clearing, grading, and excavation of Parcel D in preparation for its development, as well as “the southward extension of the spur track system by approximately 25,000 track feet from the eastern side of Parcel C, beneath the existing LIRR tracks, to Parcel D.”

<sup>48</sup> Negative Declaration at 1.

<sup>49</sup> *Id.* at 3.

#### **D. Discussions with the Board's Office of Environmental Analysis**

Discussions with the Board's staff and members of the OEA about possibility of Winters Bros. or an affiliate of Winters Bros. acquiring the membership shares of BHR as well as purchasing Parcel D, and the planned rail construction and development of Parcel D, commenced in the Fall of 2019. An initial meeting was held on October 23, 2019 with the STB's Office of Public Assistance, Governmental Affairs, and Compliance ("OPAGAC") to generally discuss the proposed rail construction project and how it related to the prior history of the BRT set forth above. This meeting was followed by another meeting on January 24, 2020 with the Director of the OEA and other members of OEA and OPAGAC to discuss both the rail construction project and the proposed solid waste rail transfer facility. On May 14, 2020 BHR submitted a letter to OEA requesting a waiver of the 6-month prefiling notice for rail construction petitions and petitions pursuant to 49 U.S.C. § 10909 required by 49 C.F.R. §1105.10(a)(1). By letter dated May 26, 2020 OEA granted the waiver request. The environmental review of both the proposed rail construction project and the proposed Facility commenced shortly thereafter, and BHR is coordinating with OEA and its Third Party Consultant as requested.<sup>50</sup>

#### **E. The Zoning Law BHR Requires an Exemption From**

Parcel D is land that is located in the Town's "L1" and "A1" Zoning Districts. The vast majority of Parcel D is L1, or "Light Industrial."<sup>51</sup> The proposed Facility would be constructed

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<sup>50</sup> With the approval of the OEA BHR retained ICF to be the Third-Party Consultant to work with OEA to prepare the appropriate environmental review documents.

<sup>51</sup> "§ 85-558 L Industrial 1 District (Light Industry).

§ 85-559 Purpose.

The related uses purpose of this district is to provide for a wide range of light industrial and which can meet a high level of performance standards.

§ 85-560 Permitted uses.

on L1 zoned land.<sup>52</sup> Neither of these designations permit the construction of a solid waste rail transfer facility. In the 2016 Settlement the Town agreed that the components of the BRT expansion into Parcel D that comprise purely railway “Support Structures” would not be required to comply with existing bulk and dimensional requirements or other Town zoning regulations of the L1 and A1 Zoning Districts.<sup>53</sup> These “Support Structures” were broadly defined as “fueling, servicing, repair, or transloading buildings.”<sup>54</sup> More specifically, the VDEIS explained that

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In an L Industrial 1 District, no building, structure or premises shall be used or occupied and no building or part thereof shall be so erected or altered, except for one or more of the following purposes:

- A. Agricultural or nursery use, including the retail sale of products raised on the premises
- B. Assembly and social recreation hall.
- C. Bank.
- D. Commercial laundry establishment.
- E. Convent or monastery.
- F. Day-care facility.
- G. Health club.
- H. Lodge.
- I. Lumberyard.
- J. Manufacturing, only within a building.
- K. Motor vehicle rental.
- L. Nonmotorized recreational activities.
- M. Nursery/Garden center.
- N. Office.
- O. Places of worship, parish house or rectory.
- P. Printing plants.
- Q. Research and development facility.
- R. Stone and mason supply.
- S. Veterinarian, provided that all activities take place within the building.
- T. Warehouse.
- U. All uses identified as incentive uses within the Transitional Area Overlay District established in connection with the Montauk Highway Corridor Study Land Use Plan for Mastic and Shirley Phase II.”

<sup>52</sup> “85-197 A Residence 1 District. A. Permitted uses are as follows: (1) All principal uses, accessory uses and uses authorized by special permit which are permitted in the A Residence District.(2) All uses identified as incentive uses within the Transitional Area Overlay District established in connection with the Montauk Highway Corridor Study Land Use Plan for Mastic and Shirley Phase II.”

<sup>53</sup> Newell V.S. at 5

<sup>54</sup> 2016 Settlement at Section 16.c.

“development and implementation of the components of the Proposed Action that comprise purely railway support structures would be treated as a municipal development project pursuant to Section 85-894 of the Town Code, and are not required to comply with existing Zoning District regulations.”<sup>55</sup> However, the Town’s agreement as part of the comprehensive 2016 Settlement to waive compliance with its zoning laws for railway Support Structures was based on the understanding of all the parties to the settlement that “from a zoning perspective, BRT anticipates that the vast majority of future development on the subject property would be railway support structures, similar to the existing uses on Parcel A.”<sup>56</sup> Those existing uses consist of rail-to-truck and truck-to-rail transloading and related services for commodities other than solid waste. Accordingly, the railway Support Structures of the proposed Facility are not expressly within the scope of the 2016 Settlement terms and the Town’s agreement vis-à-vis its zoning rules.<sup>57</sup>

As stated previously, the Town has informed the OEA that it is “highly unlikely that a legislative change to the applicable zoning law required to permit a SWRTF could be made in time to enable the proposed Facility to be a potential recipient of the volumes of waste that will have to be disposed elsewhere due to the closure” of the Town’s landfill in 2024.<sup>58</sup> The Town does have a process by which a party could seek a “special use permit,” that could change the zoning designation. However, BHR understands that this process could also not be completed in time to ensure the Facility is in place when the nearby Town landfill closes and an alternative is required.<sup>59</sup>

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<sup>55</sup> VDEIS at Section 3.4.2.2., Zoning, at 175.

<sup>56</sup> *Id* at 177.

<sup>57</sup> As for structures other than Support Structures, “Non-rail support structures would be subject to the jurisdiction of the Town of Brookhaven’s zoning regulations.” *Id.* at 53. Further, any non-rail support structures developed on the Subject Property would conform to the prevailing zoning district regulations and special permit dimensional criteria and other special permit criteria, as applicable.”

<sup>58</sup> Exhibit A at 2.

<sup>59</sup> Newell V.S. at 6.

Because of the extensive prior litigation, the 2016 Settlement, VDEIS, and the Negative Declaration, and the understanding that BHR would comply with all applicable state laws governing construction and operation of the Facility, all other local and state laws have been accounted for and BHR is aware of no other local laws at issue that would prevent the siting, construction, and operation of the Facility.

**F. Discussions and Coordination between Winters, BHR, and the Town Preceding this Petition**

Finally, Winters Bros. was not involved in any of the prior litigation that produced the 2016 Settlement, the VDEIS and the Negative Declaration. Moreover, Shamrock did not purchase the membership shares of BHR until May 11, 2020, and Shamrock or another affiliate of BHR will not own Parcel D until the pending contract for purchase is consummated later in 2020. However, as stated previously, it is the goal of Winters Bros. and BHR to expeditiously develop a sorely needed solid waste rail transfer facility on Parcel D while adhering to and complying with the conditions and mitigation measures outlined in the 2016 Settlement Agreement, VDEIS, and Negative Declaration (other than eliminating the prior plans to connect track in Parcels C and D through a tunnel). To that end, Winters Bros. has engaged in an active and ongoing dialogue with affected parties, most significantly the Town, which acknowledges the need for the Board's intervention to preempt the Town's zoning law and permit the construction and operation of the Facility in these unique circumstances. Winters Bros. and BHR have also engaged with other affected state and local entities, including the New York State Department of Environmental Conservation and Suffolk County Department of Health Services in order to gather feedback, consensus and support for the project.

### **III. ARGUMENT**

#### **A. This Petition Meets the Requirements of 49 U.S.C. §10502(a)**

Under § 10502(a), the Board must exempt a transaction or service from regulation when it finds that: (1) regulation is not necessary to carry out the rail transportation policy (“RTP”) of 49 U.S.C. § 10101; and (2) either (a) the proposal is of limited scope, or (b) regulation is not needed to protect shippers from an abuse of market power. This is the first instance of a rail carrier seeking to invoke the Board’s authority under 49 U.S.C. §10909 to grant a “a land use exemption” for a “solid waste rail transfer facility” proposed to be operated by or on behalf of a rail carrier.<sup>60</sup> This statutory provision and regulations promulgated by the Board establish a complicated and detailed process by which a rail carrier may obtain a land use exemption ruling by applying for a “land use exemption permit.” However, BHR asserts that the unique circumstances of this case qualify for an exemption under §10502(a) from the formal application procedures of §10909 and the Board’s regulations implementing that provision. As demonstrated hereinbelow, it should not be necessary for BHR to comply with all of the formal application requirements for a land use exemption permit to meet the requirements for the Board finding a state or local law is preempted because (1) the only law “affecting the siting” of the Facility for which an exemption is being sought is a local zoning restriction against solid waste rail transfer facilities enacted by the Town; (2) the Town does not object to the STB’s preemption of its zoning law in order to facilitate the construction of this facility in its boundaries to replace the landfill capacity disappearing in 2024 and otherwise addressing the solid waste disposal crisis on Long Island; and (3) the extensive environmental and other review of development of Parcel D for rail transloading activities over the past five years

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<sup>60</sup> 49 U.S.C. §10909(a).

and the current environmental review of the project by the OEA under NEPA will provide the Board with sufficient information to determine that issuing the land use exemption is proper because the proposed Facility meets the requirement of §10909(c)(1) that it “does not pose an unreasonable risk to public health, safety, or the environment.”

**1. Applying the Full Requirements of §10909 and Part 1155 are Not  
Necessary to Carry Out the Rail Transportation Policy of 49 U.S.C.  
§10101**

The Clean Railroads Act of 2008 (“CRA”), P.L. 110-432, 122 Stat 4848, was passed for the purpose of limiting the STB’s jurisdiction over solid waste transfer facilities except for the authority to preempt state and local laws and regulations “affecting the siting” of such facilities.<sup>61</sup> Prior to the CRA’s passage the Board’s broad preemptive jurisdiction over “transportation by rail carriers,” including facilities constructed and/or operated by rail carriers, extended to all “state permitting or preclearance requirements (including environmental, zoning, and often land-use requirements) that by their very nature, could be used to deny a railroad the right to conduct operations or proceed with transportation activities at rail transfer facilities, including solid waste rail transfer facilities.”<sup>62</sup> Due to abuse of the preemptive effect of §10501(b) by some parties in order to avoid the application of state, local and federal laws, including environmental laws, to construction and operation of solid waste rail transfer facilities, the CRA removed the STB’s preemptive authority over nearly all state and local laws and regulations applicable to solid waste rail transfer facilities respecting pollution prevention and abatement, environmental protection, and restoration, and protection of public health and safety. Post-CRA, the Board may only exempt a facility from compliance with state laws, regulations, orders, or other requirements “affecting

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<sup>61</sup> 49 U.S.C. §§10501(c)(2)(B) and 10909(f).

<sup>62</sup> Docket No. EP 684, *Solid Waste Rail Transfer Facilities – Final Rules* (served November 20, 2012) at 2.

the siting of a facility.”<sup>63</sup> It may do so if determines [1] the law, regulation, etc. “unreasonably burdens the interstate transportation of solid waste by railroad,” [2] “discriminates against the railroad transportation of solid waste and a solid waste transfer facility” “*or*” [3] a rail carrier that owns or operates such a facility petitions the Board for such an exemption.”<sup>64</sup> Moreover, the Board may only “issue” a land use exemption “if it determines that the facility at the existing or proposed location does not pose an unreasonable risk to public health, safety or the environment.”<sup>65</sup> However, if the Board grants a land-use exemption “*all* State laws, regulations, orders or other requirements affecting the siting of a facility are preempted with regard to that facility.”<sup>66</sup>

Granting the requested exemption pursuant to §10502(a) in these circumstances would advance the RTP of §10101(2) to “minimize the need for Federal control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.” It would also advance the RTP of §10101(4) “to ensure the development and continuation of a sound rail transportation system . . . to meet the needs of the public . . .” in this case the inhabitants of Long Island and surrounding areas. The exemption would also advance the RTP of §10101(5) “to foster sound economic conditions in transportation and . . . ensure coordination between rail carriers and other modes,” in this case NY&A, BHR, and commercial trucks. Furthermore, permitting BHR to obtain the necessary land-use exemption ruling via §10502(a) would advance to RTP of §10101(7) “to reduce regulatory barriers to entry into and exit from the industry.” In addition, the Facility, by facilitating the removal of thousands of large

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<sup>63</sup> 49 U.S.C. §10909(f).

<sup>64</sup> *Id.* at §10909(a)(1)(emphasis supplied).

<sup>65</sup> 49 U.S.C. §10909(c).

<sup>66</sup> *Id.* at §10909(f)(emphasis added).

trucks hauling solid waste from removed from the highways on Long Island, would clearly advance the RTP of §10101(14) “to encourage and promote energy conservation” and would otherwise be environmentally beneficial. Finally, granting this exemption petition would “provide for the expeditious handling and resolution” of this matter, thereby advancing the RTP of §10101(15). Other aspects of the rail transportation policy would not be adversely affected by granting this Petition.

**a. The Zoning Law at Issue Unreasonably Burdens the Interstate Transportation of Solid Waste by Railroad and Discriminates Against the Railroad Transportation of Solid Waste and a Solid Waste Rail Transfer Facility**

Applying the full requirements of Section 10909 and Part 1155 is also not necessary under the RTP appropriate because the zoning law for which BHR seeks an exemption indisputably prohibits the construction of a solid waste rail transfer facility on Parcel D, which BHR intends to lease from its affiliate for the purpose constructing and owning the Facility, and providing freight rail services to it. The Town zoning law therefore by its terms “unreasonably burdens the interstate transportation of solid waste by railroad” and it “discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility.”<sup>67</sup> This is consistent with precedent holding that zoning ordinances and land use permitting requirements that impermissibly interfere with railroad operations are preempted.<sup>68</sup> Section §10909(a)(1) explicitly states that the Board “may issue a land-use exemption for a solid waste rail transfer facility” if it makes such a finding.

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<sup>67</sup> §10909(a)(1).

<sup>68</sup> STB Finance Docket No. 33466, *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation* (served September 9, 1999) at 7.

**b. The Proposed Facility Does not Pose an Unreasonable Risk to Public Health, Safety, or the Environment**

The plain language of §10909(a)(1) states that the Board may grant a land-use exemption for a solid waste rail transfer facility in two ways: if as above, the Board finds that a law or regulation, etc. unreasonably burdens the interstate transportation of solid waste by rail or discriminates against the railroad transportation of solid waste, “or a rail carrier that owns or operates such a facility petitions the Board for such an exemption.” However, the Board’s regulations can be read to require a carrier – unless exempted pursuant to §10502(a) - that will own or operate a proposed facility to submit petition for a “land-use exemption permit” in either event. Section §10909(c) does not mention a permit requirement, and states the Board “may only issue a land-use exemption if it determines that the facility . . . does not pose an unreasonable risk to the public health, safety, or environment.” The Board has set forth in 49 CFR Part 1155 an extensive process to facilitate its determinations under §10909(c). However, requiring BHR to comply with the full requirements of Part 1155 is not necessary to carry out the rail transportation policy of §10101 because nearly all of those requirements have already been fulfilled or will be fulfilled through this Petition and the extensive prior analysis and review of the development of rail-to-truck and truck-to-rail transloading activities and related structures of on Parcel D and their environmental impacts, which culminated in the Negative Declaration.<sup>69</sup> The solid waste rail transfer facility proposed by BHR and Winters has many of the same characteristics of a

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<sup>69</sup> For example, BHR notes that many of the notice requirements of §10909 and Part 1155 have already been met or will be fulfilled in this proceeding. For example, OEA has already provide notice of the project to numerous parties through its consultation process, and although not required by the Board’s rules governing petitions for exemption, BHR is serving copies of this petition on many of the same state and local entities, including the Governor of New York; LIRR; NY&A; the Town; New York State Department of Environmental Conservation.

transloading facility for other commodities. The primary difference are the commodities being processed, and the impacts of this change are being reviewed by the OEA and Third Party Contractor through the NEPA process. Moreover, the development of this Facility is supported by the Town in which Parcel D resides. Thus, the primary reason for passage of the CRA and the Board's rules in Part 1155 – prevention of parties seeking to use STB preemption to construct unwanted solid waste rail transfer facilities without any scrutiny under state and local laws - is not at issue with this project.

**2. Requiring BHR to Comply with the Formal Application Processes for a Land-Use-Exemption Permit is Also Not Necessary to Protect Shippers from an Abuse of Market Power.**

There is no need in this proceeding for the Board to protect any rail shipper from an abuse of market power. On the contrary, the Facility will fulfill an acute and pressing need for the rail transportation and disposal of MSW and C&D on Long Island, thereby increasing opportunities to ship by rail. Further development of Parcel D into a rail-served section of the overall BRT is also anticipated in the future, which will provide additional new opportunities for rail shippers who decide to locate there and ask BHR for it.

**3. The Proposed Project and Facility are Also Limited in Scope**

Finally, while not necessary to meet the requirements of §10502(a) if there is a showing that regulation is not necessary to protect shippers from an abuse of market power, an exemption is also warranted because the project is limited in scope. The Facility will be located on only 50 acres of the full 228-acre site. While it is extremely needed and important for the communities of Long Island, its planned rail operations of one to two trains of up to 32 cars per day in years one and two, rising to two trains per day by the end of year two of operations, is relatively limited.

**B. Should the Board Disagree that §10502(a) Applies the Proper Approach Would be for Petitioner to Supplement this Petition as Requested by the Board**

As stated previously, this Petition is the first request by a rail carrier for the Board to preempt a state or local siting law through a “land use exemption” under §10909(a). For all the reasons set out above BHR believes under the unique factual circumstances of this matter that the requested land use exemption may and should be granted by the Board pursuant to §10502(a). However, if for some reason the Board concludes after compiling the administrative record in this proceeding, including the environmental documentation being prepared by OEA, that this Petition does not meet the requirements of §10502(a) for an exemption from the requirements of §10909 and 49 C.F.R. Part 1155, BHR respectfully submits that the most appropriate and efficient action to take in response to that determination would be to couple the Board’s ruling with an order directing BHR to supplement this Petition with the additional information the Board determines it needs to render a decision, as opposed to requiring BHR to prepare and submit a new “petition for land-use exemption permit” under Part 1155.

**C. The Board Should Clarify that Recycling Activities are Included Within the Definition of “Solid Waste Rail Transfer Facility” and May Therefore be Encompassed within a Land Use Exemption**

BHR submits that because this Petition is the first attempt by a rail carrier to obtain a “land use exemption” from the Board pursuant to §10909 it raises an issue of first impression for the Board, namely reconciling certain language and the overall intent of 49 U.S.C. §§10908 and 10909 with Board precedent pre-dating the CRA that at least implies that recycling of solid waste is not within the scope of the Board’s jurisdiction over “transportation” by a “carrier” under 49 U.S.C. §10501(b)(1). The CRA expressly defined a “solid waste rail transfer facility” to be a facility where solid waste “is collected, stored, *separated, processed, treated*, managed, disposed of, or

transferred, when the activity takes place outside of original shipping containers”<sup>70</sup> Such terms arguably include the recycling of MSW and C&D waste, a common and necessary feature of solid waste rail transfer facilities. However, there is agency precedent which could be interpreted to hold that recycling of MSW and C&D debris at a solid waste rail transfer facility might not be “transportation” by a “rail carrier,” and therefore state and local laws prohibiting the siting of recycling operations at such a facility could not be preempted by §10908 and §10909. BHR asserts that the Board should take the opportunity presented by this Petition to clarify that the CRA expressly includes the recycling of solid waste at a solid waste rail transfer facility within the activities that are “transportation” that fall within the scope of a land use exemption granted pursuant to §10909. The issue, and the reasons the Board should provide this clarification are summarized as follows:

Under §10501(b)(1) the Board has broad preemptive authority over nearly all state and local laws and regulations that affect the “transportation by rail carrier.”<sup>71</sup> Prior to passage of the CRA this preemption extended to all rail transload facilities, including solid waste rail transfer facilities, that were constructed and operated by a rail carrier or on the rail carrier’s behalf. The scope of the STB’s jurisdiction over “transportation” under §10501(b) is very broad but not unlimited. The Board has applied and interpreted the definition in cases involving various rail served facilities that had rail and non-rail activities and components. In those cases the Board has

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<sup>70</sup> §10908(e)(1)(H)(emphasis supplied).

<sup>71</sup> The intent of BHR is for all of the activities that would fall under the Board’s jurisdiction under §10501(b)(1) and the CRA would be conducted by a “rail carrier,” whether by BHR directly or by Winters Bros. as contract operator acting “under the auspices of” BHR. BHR believes the project has been structured properly to achieve this desired result. If necessary, BHR will adjust the parties’ contractual relationship and their responsibilities to accommodate any Board concerns that the arrangement would lead to some activities not being conducted by or under the auspices of a rail carrier and therefore not under the Board’s jurisdiction.

held “the term ‘transportation’ has been defined broadly to include all of the related facilities used and service related to the movement of property by rail, including ‘receipt’, ‘delivery’, ‘transfer in transit’, ‘storage’, and ‘handling’ of the property.”<sup>72</sup> Activities the Board has found to be encompassed by the definition include, but are not limited to (1) transloading and temporary storage; (2) C&D storage and extraction of materials from waste piles; (3) transloading C&D from rail to truck; and (4) unloading rail cars of brick and stone, storing them on the ground, and then loading them into customer and common carrier trucks.

On the other hand, the Board’s decisions have also identified a general category of activities that it considers to be “manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service . . .” and are therefore outside of the definition of “transportation.”<sup>73</sup> By manufacturing, the Board generally means the creation of a new product for sale to customers. Other “commercial transactions” found to fall outside of the definition of “transportation” have included: stockpiling and organizing aggregate by type at rail yard after rail transport occurs and before loading it into trucks; cutting and welding steel after rail transport occurs but before loading steel into trucks; providing for display and sale of perishable produce delivered by rail; and truck to truck transloading of C&D prior to being shipped by rail.<sup>74</sup>

*NE Transrail*, which involved a pre-CRA proposed solid waste rail transfer facility, is the only case where the question of whether recycling of MSW and C&D waste falls under the

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<sup>72</sup> *New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA*, Finance Docket No. 34797 (served July 10, 2007)(“*NE Transrail*”) at 10; citing to numerous prior decisions.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

definition of “transportation” has been before the Board, albeit indirectly. As explained below, the Board did not specifically hold that recycling of MSW and C&D was not full outside the definition of “transportation,” but the decision implied that the Board concluded this to be the case. As background, the petitioner in *NE Transrail* did not list recycling of any C&D or MSW as one of the functions of the proposed facility, and steadfastly denied that its plan to shred C&D was really a recycling operation. The petitioner also claimed it was not “processing” MSW and C&D, but rather “preparing and packaging” MSW and C&D for rail transportation. However, the Board appeared skeptical of the petitioner’s statements that its planned shredding of C&D was not for the purpose of separating out “metal, wood, and other valuable materials” and reselling them, because the Board concluded they had “considerable value.”<sup>75</sup> While not specifically calling shredding recycling, the Board concluded that “shredding is a common practice in the landfill and waste management businesses and often facilitates recycling.”<sup>76</sup> Based on these conclusions the Board determined that the shredding activities did not fall under the definition of “transportation” and that if the petitioner chose to conduct shredding activities, “[the shredding component of the operations] would be subject to the full panoply of state and local regulation.”<sup>77</sup> This aspect of *NE Transrail* could be interpreted to mean that pre-CRA the STB seemed inclined to determine that the recycling of MSW and C&D waste was not integrally related to the provision of “transportation” by a “rail carrier” and that therefore state and local laws and regulations of those specific activities were not preempted.

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<sup>75</sup> *Id.* at 15.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* The petitioner in *NE Transrail* removed the solid waste rail transfer facility component of the project after the Board’s ruling.

The CRA did not amend the Board’s jurisdiction over “transportation by rail carrier” under §10501(b)(1) but added new §10501(c)(2), which states in pertinent part that “Except as provided in paragraph (3), the Board does not have jurisdiction under this part over— . . . (B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.” Section 10908 broadly defines “solid waste” to include MSW and C&D, among other solid wastes. BHR has located no discussion in the legislative history of the CRA about the definition of a solid waste rail transfer facility, and so there appears to be no guidance on what Congress intended when it included the words “separated,” “processed,” and “treated” in the term. However, there are a number of reasons for including recycling of MSW and C&D in the definition of a solid waste rail transfer facility, meaning that the STB’s preemption of a law affecting the siting of such a facility would permit the recycling of MSW and C&D that the local siting law would otherwise prohibit.

First, *NE Transrail* is the only case where the question of whether recycling of C&D and MSW associated with a rail transfer facility is “transportation” within the Board’s jurisdiction. Pre-CRA the primary legal concern was that preemption of such activities under §10501(b)(1) would mean a proponent of a solid waste rail transfer facility could circumvent *all* state and local laws that govern and control the recycling of MSW and C&D. This is no longer an issue under CRA, which specifically limits the STB’s preemption to state or local siting laws, and all other laws apply. In this case, the state of New York’s solid waste rail transfer facilities laws will apply to the Facility and they specifically include recycling activities. Second, as the Board noted in *NE Transrail*, recycling of MSW and C&D waste is a common and desirable feature of a typical solid waste rail transfer facility. Therefore, it is reasonable to conclude that the inclusion of the terms “separated,” “processed,” and “treated” in the definition of solid waste rail transfer facility all

contemplate actions where “raw” inbound solid waste is processed and changed into something else, which includes recycling it. Third, by including “separated” and “processed” into the definition, the CRA statutorily expanded (or simply recognized) the categories of activities that are integral to the rail transportation associated with such a facility to include recycling of MSW and C&D. Finally, interpreting the CRA to include recycling at solid waste rail transfer facilities within the Board’s jurisdiction is in the public interest because recycling of solid waste is a socially desirable practice. It would make no sense from a policy standpoint to exclude recycling activities from the definition of a solid waste rail transfer facility and also from the scope of the Board’s jurisdiction over “transportation by rail carrier,” because the outcome would be that a state or local siting law preventing such activities would prevent them from occurring at a solid waste rail transfer facility despite the Board preempting the siting law as to other activities that fall within the scope of §10501(b) and §10908(e)(1)(H). The Board should clarify that recycling of MSW and C&D are included within the activities covered by the preemption of the Town zoning law.

**D. The Board Should Conditionally Grant the Requested Exemption Subject to the Completion of the Board’s Environmental Review Process**

BHR requests that the Board conditionally approve this Petition subject to the completion of the OEA’s environmental review process. BHR recognizes that the Board’s general policy is to decide the transportation merits of a rail construction proposal based on a complete record that includes environmental review, absent “unique or compelling circumstances,”<sup>78</sup> and BHR presumes the Board would apply the same rule to solid waste rail transfer facilities. BHR submits such

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<sup>78</sup> *Alaska R.R.—Constr. & Operation Exemption—Rail Line Between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), Alaska*, FD 34658 (STB served Oct. 4, 2007) at 3.

circumstances are present here. The Facility must be constructed and operational prior to the Town's landfill's anticipated closure in 2024 in order to provide replacement capacity for some of the thousands of tons of waste each day that would otherwise be disposed of there. Given this deadline, consummating the acquisition of Parcel D, completing the design of the rail tracks to serve the proposed Facility in compliance with various conditions on that design and construction contained in the 2016 Settlement, VDEIS, and Negative Declaration, and any additional mitigation measures that are an outcome of the Board's NEPA process within that finite timeframe, would be greatly aided by a conditional ruling on the merits of the Petition pending completion of that process.<sup>79</sup>

## **V. CONCLUSION**

For all the reasons set forth above, BHR requests the Board to issue a decision that (1) exempts Petitioner from the full requirements of 49 U.S.C. §10909 and 49 CFR Part 1155 for obtaining a "land-use exemption for a solid waste rail transfer facility that is or is proposed to be operated by on behalf of a rail carrier" (§10909(a)); and (2) rule that the Town zoning law described herein is preempted with regard to the construction, ownership, and operation of the Facility as described herein (§10909(f)). Further, for the reasons set forth hereinabove, there are unique and compelling circumstances in this particular case that warrant the Board conditionally

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<sup>79</sup> Conditional approval of this Petition would also be consistent with the "Executive Order on Regulatory Relief to Support Economic Recovery," issued on May 19, 2020. Under that order agencies are directed, in part, to address the economic emergency caused by the COVID-19 pandemic "by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility." <https://www.whitehouse.gov/presidential-actions/executive-order-regulatory-relief-support-economic-recovery/>

approving this Petition subject to completion of the environmental review process by OEA.

Respectfully submitted,



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*Attorneys for Brookhaven Rail LLC*

July 27, 2020

**DOCKET NO. FD 36399**

**EXHIBIT A**

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\*ALSO ADMITTED MD  
\*ALSO ADMITTED NJ

July 17, 2020

**VIA FEDERAL EXPRESS**

Victoria Rutson, Director  
Office of Environmental Analysis  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Re: FD No. 36398, Brookhaven Rail, LLC - Construction and Operation Exemption -  
In Suffolk County, New York; and FD No. 36399, Brookhaven Rail, LLC -  
Petition for Exemption from the Requirements of 49 U.S.C. 10909

Dear Director Rutson:

We are attorneys for the Town of Brookhaven, New York, as Special County to Brookhaven Town Attorney Annette Eaderesto, Esq. (the "Town").

We respectfully enclose the July 14, 2020 letter of Town of Brookhaven Planning Commissioner, Beth A. Reilly which contains the Town's preliminary response to your office's June 25, 2020 letter addressed to Brookhaven Council Member Michael Loguercio in this proceeding.

As noted in Planning Commissioner Reilly's letter, it is respectfully requested that all future communications and correspondence be addressed to my office and to Brookhaven Town Attorney Annette Eaderesto, Esq. as we are jointly representing the interests of the Town of Brookhaven, New York in this matter.

Thank you for your cooperation and courtesy.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP

Robert M. Calica

RMC:ds

{00344364-1}

ROSENBERG CALICA & BIRNEY LLP

Victoria Rutson, Director

July 17, 2020

Page 2

cc: Beth A. Reilly, Planning Commissioner  
Town of Brookhaven (*via email*)  
Annette Eaderesto, Town Attorney  
Town of Brookhaven (*via email*)

Enclosure



## Town of Brookhaven Long Island

Edward P. Romaine, Supervisor

July 14, 2020

Victoria Rutson, Director  
Office of Environmental Analysis  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423

Re: FD No. 36398, *Brookhaven Rail, LLC – Construction and Operation Exemption – In Suffolk County, New York*; and FD No. 36399, *Brookhaven Rail, LLC – Petition for Exemption from the Requirements of 49 U.S.C. 10909*

Dear Director Rutson:

As the Planning Commissioner of the Town of Brookhaven, New York (the “Town”), I provide this letter as the Town’s preliminary response to your June 25, 2020 letter addressed to Brookhaven Council Member, Michael Loguercio, advising the Town that petitioner Brookhaven Rail, LLC (“BHR”):

“intends to file for approval from the Surface Transportation Board (Board) to construct and operate up to approximately 25,000 feet of new common carrier track (the Line) and to file for a land-use exemption for a solid waste rail transfer facility (SWRTF) (together, the Proposed Project) that would connect to the Line in the Town of Brookhaven, Suffolk County, New York. As part of its licensing process, the Board, through its Office of Environmental Analysis (OEA), will conduct an environmental review of the Proposed Project in compliance with the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act (NHPA) and the Board’s environmental rules at 49 C.F.R. Part 1105. OEA will evaluate the potential environmental impacts of the Proposed Project as well as any other reasonable and feasible alternatives that may be identified during project planning (the “STB/OEA Letter”).

Planning, Environment and Land Management  
Beth Ann Reilly, Esq., Commissioner

One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6400 • Fax (631) 451-6419  
[www.brookhavenny.gov](http://www.brookhavenny.gov)

It is respectfully requested that further communications from the STB/OEA be directed to the undersigned, as the Town's Planning Commissioner, with copies to Brookhaven Town Attorney, Annette Eaderesto, Esq., and Robert M. Calica, Esq. of Rosenberg Calica & Birney LLP, the Town's Special Counsel, who are copied. Mr. Calica participated in the preparation of this response.

The STB/OEA Letter describes the Proposed Project, and its purpose as follows:

"The Proposed Project would be constructed on approximately 50 acres of an approximately 228-acre parcel that is under contract to be purchased by Winters Bros. Recycling of Long Island (Winters) or a party to be designated by Winters. The 228-acre parcel, known as Parcel D, is one of four contiguous parcels that comprise the 335-acre Brookhaven Rail Terminal (BRT), located near the Long Island Railroad (LIRR) in the Town of Brookhaven, Suffolk County, New York (see attached map).

The SWRTF would handle incoming and outgoing municipal solid waste (MSW), construction and demolition waste (C&D), and recyclable commodities generated in the Long Island region. According to BHR, the Proposed Project would fill a need in Long Island because the Brookhaven Landfill is scheduled to close in 2024, and there are no plans for a replacement."

The Town recognizes the jurisdiction of the STB/OEA to review the Proposed Project and acknowledges the advice of the STB/OEA that in considering BHR's petition for the approval, the STB/OEA will conduct an environmental review under the NEPA, under NHPA, and pursuant to the STB's environmental rules, including evaluating "the potential environmental impacts of the Proposed Project as well as any other reasonable and feasible alternatives that may be identified during the Project planning".

The Town is also informed of the STB's jurisdiction under 49 U.S.C. §10909 to preempt the Town's local zoning code, in a proper case. The Town itself takes no position as to whether the Proposed Project involving a SWRTF to transfer Municipal Solid Waste ("MSW") and Construction and Demolition Debris ("C&D") generated on Long Island to railcars for disposal is such a case, which is to be determined by the STB. However, the STB/OEA Letter itself notes the Town's landfill is closing in 2024 and it is highly unlikely that a legislative change to the applicable zoning law required to permit a SWRTF could be made in time to enable the proposed facility to be a potential recipient of the volumes of waste that will have to be disposed of elsewhere due to the closure. Moreover, a solid waste rail transfer facility at this location would permit large volumes of MSW and C&D to be transported off of Long Island by railroad instead of the thousands of trucks that otherwise would be necessary to transport such waste.

The STB/OEA Letter acknowledges that the property where the Proposed Project is to be constructed is already the subject of prior Town environmental determinations rendered pursuant to a judicially "So Ordered" Stipulation dated March 28, 2016 in certain litigation between the Town and the owners entitled "Town of Brookhaven v. Sills Road Realty LLC, Brookhaven Rail LLC etc., et al.," EDNY Docket No. 14-CV-02286 (the "2016 Stipulation"). The 2016

Stipulation anticipated the STBs potential exercise of jurisdiction over rail facilities to be developed on the 228-acre Parcel D as follows:

“The Town further acknowledges and does not object that BRT may immediately upon the entry by the Court of this Stipulation of Settlement request that the District Court issue an appropriate inquiry, letter, and/or Order, in a form to be agreed upon by the parties, referring the issue of whether the track area, only, of BRT’s short branch line expansion of its rail carrier services of the Operating Railway Terminal on Parcels B, C, and/or D, as depicted in the Proposed New BRT Track Plans (as may ultimately be modified by BRT and the Town in accordance with the planning, engineering and environmental review process set forth herein), falls under 49 U.S.C. § 10906. Notwithstanding the foregoing, the Administrative SEQRA/Plan Review process shall commence upon entry by the Court of this Stipulation of Settlement, and the construction and operation of all buildings and other structural improvements on Parcels B, C and D, including any site plans, building permits and Certificates and Occupancy, shall be governed by the provisions of this Stipulation of Settlement, and the classification of the track under 49 U.S.C. § 10906 shall not in any way limit or abrogate the Town’s rights, remedies, and authority under Paragraph 16(c) below.” (id., para. 5). (Emphasis supplied).

The cited paragraph 16(c) of the 2016 Stipulation reads:

“The BRT Defendants shall apply for all required site plan approval, building permits and obtain all required certificates of occupancy for any and all non-rail buildings and structural improvements to be constructed on Parcels B, C and D, which are not “Support Structures” as defined herein. To the extent any buildings and structural improvements for the Railway Expansion are purely railway support structures such as fueling, servicing, repair or transloading buildings (the “Support Structures”), such Support Structures shall comply with applicable Town, County, or other fire prevention, health, safety and welfare requirements and, without limitation, all such Support Structures shall comply with all of the construction and fire and safety procedures as provided for in the 2010 Stipulation with respect to the Referenced Site Plan on Parcel A”. (Emphasis supplied).

The Town’s position regarding both the §10909 exemption application and NEPA review is that any approvals should include appropriate conditions comporting with the development conditions expressly imposed by the 2016 Stipulation. See 49 U.S.C. § 10909 (an exemption granted by the STB preempting all State siting laws for a solid waste transfer facility “may require compliance with such State laws, regulations, orders, or other requirements”). The STB/OEA letter itself notes that “After the environmental review process [under NEPA] is

complete, the Board will then decide whether to approve, approve with conditions (which could include conditions designed to mitigate potential impacts on the environment), or deny approval for the Proposed Project described above.”

The Town will formally delineate the proposed conditions in connection with the NEPA review, but these will include:

- a. An excavation and grading plan for Parcel D which is consistent with the one approved by the Town Board in accordance with the 2016 So Ordered Stipulation, with a requirement that any soils excavated and removed be strictly limited to what is needed for grading and development of rail facilities so as to avoid “sand mining” of the site. In this regard, para. 16(a) of the 2016 Stipulation provides:

*“All excavation, grading, removal of vegetation, sand and/or gravel shall be undertaken and performed solely as may actually be required to implement the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans as approved by the Town in accord with the Administrative SEQRA/Plan Review process and procedure and in accord and consistent with the Applicable Town Code Provision. (emphasis supplied)”;*

Further, para. 16(d) reads:

*“The BRT Defendants will commence the installation, construction or laying of track (the “Track Installation”) as regrading, excavation, filling or site preparation thereof progresses in accordance with a schedule to be established by the BRT Defendants and VHB (the “Track Installation Schedule”) in accord with the Administrative SEQRA/Plan Review and Town approval.” (emphasis supplied)*

Further still, para. 2(b) reads:

*“The grading process will re-use native soil onsite for fill purposes to the maximum extent feasible, with the goal of minimizing the need to export native sand or import fill materials (emphasis supplied)”.*

- b. A Storm Water Pollution Prevention Plan (“SWPPP”) consistent with the 2016 So Ordered Stipulation and prior Town Board approvals pursuant to that Stipulation (Stipulation ¶¶2a and c);

- c. A requirement that the project employ permeable surfaces and pavements to enhance the stormwater drainage structure capacity, as provided for in the 2016 Stipulation (Stipulation ¶11);

d. Conditions that no solid waste materials will be dumped onto the property, that any storage of materials include measures to ensure they do not contaminate the soil, and requirements that all solid waste materials be handled in accordance with New York State environmental regulations (Stipulation *passim*);

e. To the extent any buildings and structural improvements for the Railway Expansion are purely railway support structures such as fueling, servicing, repair or transloading buildings (the "Support Structures"), such Support Structures shall comply with applicable Town, County, or other fire prevention, health, safety and welfare requirements and, without limitation, all such Support Structures shall comply with all of the construction and fire and safety procedures as provided for in the 2010 Stipulation with respect to the Referenced Site Plan on Parcel A (Stipulation ¶16c); and

f. Other conditions which the Town's environmental staff will propose in connection with NEPA review once the plans are reviewed in detail.

Finally, in the event the STB grants BHR's petition, the Town will then proceed and decide on any further actions required on the part of the Town under applicable State or Town laws.

We thank you for this outreach and look forward to further communications with you and your staff in this matter.

Respectfully,



Beth A. Reilly  
Planning Commissioner  
of the Town of Brookhaven, New York

cc: Hon. Annette Eaderesto, Town Attorney  
Town Attorney, Town of Brookhaven  
One Independence Hill  
Farmingville, New York 11738

Robert M. Calica, Esq.  
Rosenberg Calica & Birney LLP  
100 Garden City Plaza, Suite 408  
Garden City, New York 11530

**DOCKET NO. FD 36399**

**EXHIBIT B**



Line of Long Island Railroad



- |                                                                       |                                                                         |
|-----------------------------------------------------------------------|-------------------------------------------------------------------------|
| <span style="border: 1px solid red; padding: 2px;"> </span> Parcel A  | <span style="border: 1px solid green; padding: 2px;"> </span> Parcel C  |
| <span style="border: 1px solid blue; padding: 2px;"> </span> Parcel B | <span style="border: 1px solid orange; padding: 2px;"> </span> Parcel D |

### Site Location Map | Yaphank, NY

Brookhaven Rail Terminal Expansion  
South Side of Expressway Drive South  
and East Side of Sills Road

VHB Ref. 29771.00

Source: 2016 NYS Digital Ortho-imagery, NYSITS, 2016.

**DOCKET NO. FD 36399**

**EXHIBIT C**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
TOWN OF BROOKHAVEN,

Plaintiff,

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN  
RAIL LLC f/k/a U S RAIL NEW YORK LLC,  
BROOKHAVEN TERMINAL OPERATIONS,  
OAKLAND TRANSPORTATION HOLDINGS  
LLC, SILLS EXPRESSWAY ASSOCIATES,  
WATRAL BROTHERS, INC., and PRATT  
BROTHERS, INC.,

Defendants.  
-----X

Index No.: 14-CV-02286 (GRB)  
(and Related Case Docket  
No. 07-CV-4584)

**SO-ORDERED STIPULATION  
OF SETTLEMENT**

**RECITALS:**

WHEREAS:

A. Defendants Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations ("Brookhaven Rail"), Oakland Transportation Holdings LLC, Watral Brothers, Inc., and Pratt Brothers, Inc. are the owners, developers, operators or contractors of the rail terminal located on an approximately 30 acre parcel at 205 Sills Road, Yaphank, New York ("Parcel A") now operating as a railway terminal and transloading facility (the "Operating Railway Terminal") under the jurisdiction of the United States Surface Transportation Board ("STB").

B. Prior disputes between plaintiff Town of Brookhaven ("Town") and certain of the Defendants or their predecessors, as the owners, former owners, developers, operators and/or contractors of the then-proposed Operating Railway Terminal resulted in prior litigation before this Court under Docket No. 07-CV-4587, which disputes were resolved pursuant to a certain So-

Ordered Stipulation dated April 22, 2010, which applies solely to the Operating Railway Terminal (the "2010 Stipulation").

C. Certain of the Defendants, including defendant Sills Expressway Associates (collectively, the "BRT Defendants"), acquired an approximately 93 acre tract of land located to the east of the Operating Railway Terminal, including an approximately 20 acre portion ("Parcel B" owned by Sills Expressway Associates) to the east and immediately abutting a parcel owned by the Long Island Power Authority ("LIPA") and an approximately 73 acre portion ("Parcel C") located immediately to the east of Parcel B (the "Parcels B and C"). Oakland Transportation Holdings, LLC became the fee simple owner of a certain parcel of land located to the south of Parcels B and C of approximately 228 acres ("Parcel D" and together with the Operating Railway Terminal and Parcels B and C, the "Rail Facility") on May 20, 2013 and conveyed Parcel D on that same date to New York Site Operations, LLC.

D. The BRT Defendants previously have conducted site development activities on Parcels B and C, contending that such activities were preparatory to construction of an expansion of the Operating Railway Terminal and further contending that this expansion was pursuant to 49 U.S.C. 10906 and therefore exempt from STB licensing and economic regulation, and not subject to state and local permitting and preclearance requirements due to Federal preemption.

E. As a result and thereafter, the Town:

i. Commenced an action against the BRT Defendants in the Supreme Court of the State of New York, County of Suffolk (Suffolk County Clerk's Index No. 2014-061613), which proceeding subsequently was removed by the parties to the United States District Court for the Eastern District of New York under case number 14-CV-02286 (GRB) (the "Federal Action"), seeking, *inter alia*, to enjoin the site development activities of the BRT Defendants on

Parcels B and C, to compel restoration of Parcels B and C, to obtain monetary damages, and for other relief; and

ii. Issued a certain Stop Work Order (the "SWO") and a misdemeanor information and violation information, which are currently pending in *People v. Sills Expressway Associates*, Suffolk County District Court, Docket No. 571-14 (the "Suffolk District Court Action"), respecting the development plans and work undertaken on Parcel B; and

iii. Filed a petition to intervene before the STB to reopen earlier proceedings and obtain certain relief from the STB regarding the Operating Railway Terminal under STB Finance Docket No. 35141; and also filed an opposition to Brookhaven Rail's petition for a declaratory order regarding status of the track on Parcels B and C, under STB Finance Docket No. 35819 (collectively, the "STB Proceedings").

F. Following expedited evidentiary proceedings in the Federal Action before the District Court, the Town obtained a preliminary injunction in the Federal Action by Order dated June 23, 2014 (Hon. Gary R. Brown, United States Magistrate Judge) inter alia, enjoining and restraining the BRT Defendants, "...from undertaking any further actions and activities to mine, excavate, sell, grade and/or remove native sand, minerals and vegetation from Parcels B and C, during the pendency of this action and pending further order of the Court" (the "Injunction").

G. By Order in the Federal Action dated May 6, 2015, the Court (Hon. Gary R. Brown, Magistrate Judge), with the BRT Defendants' concurrence, referred the issue of identifying and if necessary removing certain non-native materials on Parcels B and C to the New York State Department of Environmental Conservation ("DEC").

H. By Order on Consent dated July 28, 2015, the DEC and the BRT Defendants acknowledged and agreed that certain of the non-native materials required removal and disposal

pursuant to DEC regulations, which removal and disposal was undertaken and concluded by the BRT Defendants.

I. The Town has moved for partial summary judgment upon certain of its claims in the Federal Action and the BRT Defendants have opposed the motion which is pending decision before the Court.

J. By Order dated September 9, 2015, the Court in the Federal Action directed that the parties to the Federal Action (the "Parties," and each individually, a "Party") participate in a Settlement Conference, which Settlement Conference was conducted by the Parties before the Court (Hon. Gary R. Brown, United States Magistrate Judge) on November 13, 2015 (the "Settlement Conference").

K. In connection with the Settlement Conference, the Parties prepared a certain "Confidential Settlement Document" outlining a "Proposed Settlement Framework" to resolve all claims of the Town against the BRT Defendants in respect to the Rail Facility (the "Settlement Framework").

L. In furtherance of the Settlement Framework, BRT's engineers, AECOM, have prepared and BRT has provided to the Town, *inter alia*, a document entitled, "BROOKHAVEN RAIL TERMINAL PROPOSED TRACK FROM PARCEL A TO PARCELS B AND C AND FUTURE LEAD TRACK TO PARCEL D," dated 2/23/2016, as a current engineering proposed track plan for Parcels B and C, depicting the connection of the rail from the Operating Railway Terminal on Parcel A to Parcels B and C, as well as elevations associated with two alternative proposed track plans presented for Parcels B and C (the "Proposed New BRT Track Plans") and a further document prepared by AECOM entitled, "BROOKHAVEN RAIL TERMINAL – PARCEL D – GREEN SPACE" dated 2/23/2016 ("Parcel D Conceptual Track Plan"), which

presents a conceptual track plan for Parcel D together with an overlay of areas labeled "GREEN AREA – UNDISTURBED" marked as area "A" (47.55 acres) and area "B" (14.45 acres) for a total of 62 acres of Parcel D (the "Undisturbed/Conservation Easement Area") as well as certain LIPA easements/assets. See Exhibits A and B annexed hereto.

M. Pursuant to the Settlement Framework, the Proposed New BRT Track Plans and the Parcel D Conceptual Track Plan, the BRT Defendants propose to execute and file a Conservation Easement, encompassing the 62 acre Undisturbed/Conservation Easement Area on Parcel D, such that it will remain permanently undeveloped and as open space/green space in perpetuity, with the exception of the existing LIPA easements/assets as identified on the Parcel D Conceptual Track Plan, and notwithstanding any development, further development or redevelopment of Parcels A, B, C and/or D. The Town agrees that the BRT Defendants shall retain all development rights with respect to the Undisturbed/Conservation Easement Area on Parcel D and may transfer or re-allocate such development rights including, but not limited to, sanitary credits at the BRT Defendants' sole discretion within Parcels B, C and/or D.

N. By Resolution adopted on November 19, 2015 at a public hearing of the Town Board of the Town, the Town Board resolved as follows:

"RESOLVED, that the Town Board hereby authorizes Annette Eaderesto, Esq., Town Attorney to continue to negotiate with the BRT Defendants and their counsel to arrive at a final and binding settlement of all claims of the Town asserted in the Federal Action and before the STB in respect of the Rail Terminal and Parcels A, B, C and D, incorporating all appropriate and necessary environmental conditions and protections in consultation with the Town's Environmental Consultant, upon terms to be [reviewed] by, and approved by the Town Board at a future Executive Session."

NOW, IT IS HEREBY STIPULATED AND AGREED BY AND AMONG the Parties by their counsel of record herein as follows:

1. The Injunction shall be lifted but no further clearing of vegetation, excavation, grading or removal of sand or gravel shall occur on Parcels B and C or upon Parcel D until such time as: (a) the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans (as outlined in Paragraph 2 herein below) have been reviewed by VHB Engineering, Surveying, and Landscape Architecture P.C. (VHB") as provided for herein; (b) comments, changes or revisions required by VHB have been made to or incorporated into the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans; and (c) the Proposed New BRT Track Plans, the Additional Plans and the Lot D Conceptual Track Plan have been approved by the Brookhaven Town Board in accord with the New York State Environmental Quality Review Act (NY ECL 8-0101 *et seq.*, and its implementing Regulations at 6 NYCRR Part 617 referred to as "SEQRA"), but to be reviewed and considered by the Town Board upon the recommendations of VHB and the Commissioner of the Town Department of Planning, Environment and Land Management pursuant to the expedited/administrative procedure (the "Administrative SEQRA/Plan Review") to be conducted by the Town with the services of VHB as provided for herein in accord and consistent with applicable and agreed upon review and approval process whereby the Town agrees to apply and consider the Railway Expansion pursuant to the provisions of Section 85-894 of Chapter 85 of the Town Code ("Applicable Town Code Provision") and without public hearings. The Applicable Town Code Provision shall apply solely to the review and approval process and the Railway Expansion shall not be considered a public use for real property tax assessment purposes. The BRT Defendants reserve the right to submit the Proposed New BRT Track Plans and the Parcel D Conceptual Track Plan, along with the respective Additional Plans for each, in a phased approach whereby the Proposed New BRT Track Plans' review and approval may

proceed and be completed prior to the review and approval of the Lot D Conceptual Track Plan. While the Proposed New BRT Track Plans are both subject to the Administrative SEQRA/Plan Review process set forth in Paragraphs 1-5 of this Stipulation of Settlement, Alternate No. 2 of the Proposed New BRT Track Plans dated 3/14/2016 is attached to this Stipulation of Settlement as a conceptual track plan which shall not in any manner be deemed to constitute an approval by the Town of Alternate No. 2 in terms of removal of material, grading, or the precise location of the portion of the track situated on Parcel B, all of which shall be finally determined during the Administrative SEQRA/Plan Review process.

2. In conjunction with the Administrative SEQRA/Plan Review, upon entry by the Court of this Stipulation of Settlement, the BRT Defendants shall promptly cause their engineers (whether AECOM, Sidney B. Bowne LLP, or another duly licensed engineer or engineering firm licensed and qualified in New York) to prepare and provide VHB and the Town with the following additional plans (the "Additional Plans") to be reviewed in accord with the established and agreed process:

a. A preliminary Stormwater Pollution Prevention Plan (SWPPP) for the Operating Railway Terminal expansion onto Parcels B, C and D (the "Railway Expansion") which addresses stormwater management during and after property development on each of the respective Parcels B, C and D as and when the case may be, in accord with all applicable regulatory requirements.

b. Proposed Grading Plans for the Railway Expansion that include a cut-and-fill analysis. The Grading Plans to implement the Proposed New BRT Track Plans and Lot D Conceptual Track Plan will provide information on all areas to be disturbed/removed for construction including materials to be removed/replaced under the track alignment for

construction (load-bearing purposes). The grading process will re-use native soil onsite for fill purposes to the maximum extent feasible, with the goal of minimizing the need to export native sand or import fill materials. Any fill materials proposed to be imported are to be specified in the Grading Plans and shall not include any solid waste or contaminate as defined by the DEC and prohibited for such use by the DEC. The Grading Plans shall include clear delineation of any limits of disturbance (LOD) during site work to protect the native vegetation outside of the LOD, restoration of any areas outside the LOD that become damaged, any areas of natural vegetation that will remain undisturbed including a calculation of the size of each such area and a demonstration that the natural vegetation areas are preserved to the maximum extent practicable. The LOD shall otherwise conform with paragraph "10" herein below. The Grading Plans shall reflect the location and volume of any removal of native materials from Parcels B, C and D. To the extent that any imported and/or engineered fill is required with respect to the development of Parcels B, C or D, the BRT Defendants will adhere to applicable DEC rules, regulations and guidelines governing the management of such materials.

c. Proposed criteria, applicable standards and systems for stormwater and wastewater management for the Railway Expansion.

3. The Town shall engage the services of VHB to provide engineering, consulting and technical services to the Town in conjunction with the Administrative SEQRA/Plan Review of the Proposed New BRT Track Plans, the Additional Plans, and the Lot D Conceptual Track Plan relating to the Railway Expansion in accordance with and consistent with the Applicable Town Code Provision and to prepare and present findings and recommendations to the Town Board respecting the environmental assessment and site plan review in connection with the Railway Expansion to include: the development of the Proposed New BRT Track Plans,

associated Additional Plans and future site development on Parcels B and C; the Lot D Conceptual Track Plan, associated Additional Plans and future site development on Parcel D; the establishment and management of the Undisturbed/Conservative Easement Area on Parcel D; and, following approval of same by the Town Board, to monitor and supervise compliance with such approval during the development and construction of the Railway Expansion. The BRT Defendants shall be solely responsible for compensating VHB for its services, shall provide the Town with an initial escrow sum and sign an escrow agreement in a form reasonably required by the Town to cover the anticipated costs of VHB's review and supervision, and shall deliver any reasonable additional advance escrow amounts to cover future monitoring and compliance review expenses as may reasonably be required. VHB shall be permitted to access Parcels B, C and D upon reasonable advance notice, without restriction, and as needed to fulfill its duties. The review and approval process for the Railway Expansion shall proceed before the Town Board on an expedited basis under an established and agreed upon process and procedure complying with the Administrative SEQRA/Plan Review process and the Applicable Town Code Provision applicable to resolution of litigated environmental matters, and without public hearings. The Town acknowledges that the BRT Defendants dispute the applicability of Town zoning laws and certain other Town laws and ordinances to the Railway Expansion, and the Town contends that its zoning laws, other Town laws and applicable provisions of other State and local laws, including SEQRA or the National Environmental Policy Act are applicable to the Railway Expansion (the "Environmental Preemption Disputes"). The Town therefore acknowledges and agrees that it is resolving the Environmental Preemption Disputes pursuant to the provisions of this Stipulation and that when approved by the Town Board and "so-ordered" by the District Court, the Parties have agreed to apply, as to the Railway Expansion, only those local laws and

SEQRA requirements and plan review processes which are specifically provided for in this Stipulation as a settlement and resolution of the Environmental Preemption Disputes pursuant to the review and approval process and procedure herein. At the conclusion of the referenced process the Town will approve, disapprove, or specify modifications or additions to the Proposed New BRT Track Plans, the Additional Plans and the Parcel D Conceptual Track Plan and the subsequent site development plans which have been reviewed by VHB and for which VHB has prepared findings and recommendations to the Town. The Parties agree that the resolution of any dispute which may arise in connection with the review and approval process before the Town Board as provided for herein shall remain subject to the jurisdiction and determination of the District Court.

4. No further site development activities for the Railway Expansion shall proceed until such time as the Administrative SEQRA/Plan Review with the findings and recommendations prepared by VHB, is complete, reviewed and approved by the Town Board pursuant to the expedited process and procedure set forth above or, in the event of any dispute among the Parties concerning such Administrative SEQRA/Plan Review and approval and application of the Applicable Town Code Provision, upon determination of any such dispute by the Court in this action, upon application and made upon such notice, and in such manner and following such proceedings, as the Court may determine and direct.

5. Upon completion of the Administrative SEQRA/Plan Review and plan approval the Town will promptly (i) execute and file a Stipulation of Discontinuance of this lawsuit in the form annexed hereto as Exhibit C; (ii) execute and deliver a letter, in the form of Exhibit D annexed hereto, to the STB, withdrawing the Town's October 27, 2015 reply and objection to BRT's Motion to Close the Proceeding in STB Finance Docket No. 35141; (iii) withdraw the

SWO and (iv) will dismiss the Suffolk District Court Action. The Town further acknowledges and does not object that BRT may immediately upon the entry by the Court of this Stipulation of Settlement request that the District Court issue an appropriate inquiry, letter, and/or Order, in a form to be agreed upon by the parties, referring the issue of whether the track area, only, of BRT's short branch line expansion of its rail carrier services of the Operating Railway Terminal on Parcels B, C, and/or D, as depicted in the Proposed New BRT Track Plans (as may ultimately be modified by BRT and the Town in accordance with the planning, engineering and environmental review process set forth herein), falls under 49 U.S.C. § 10906. Notwithstanding the foregoing, the Administrative SEQRA/Plan Review process shall commence upon entry by the Court of this Stipulation of Settlement, and the construction and operation of all buildings and other structural improvements on Parcels B, C and D, including any site plans, building permits and Certificates and Occupancy, shall be governed by the provisions of this Stipulation of Settlement, and the classification of the track under 49 U.S.C. § 10906 shall not in any way limit or abrogate the Town's rights, remedies, and authority under Paragraph 16(c) below.

6. The BRT Defendants shall, at the same time the Town delivers the items set forth in Paragraph 5 above, execute and deliver to the Town a Conservation Easement encompassing the 62 acre Undisturbed/Conservation Area in the form reasonably required by the Town such that it shall remain permanently undeveloped and as open space/green space in perpetuity, with the exception of the existing LIPA easements/assets as identified on the Parcel D Conceptual Track Plan; however, BRT Defendants shall retain all the development rights from the Conservation Easement, including, but not limited to the sanitary credits, which may be utilized in the development and construction of the Railway Expansion at the sole discretion of the BRT Defendants. The BRT Defendants shall pay all title fees and recording fees for the Town

respecting the Conservation Easement and provide surveys of the easement area guaranteed to the Town and Chicago Title Company. The BRT Defendants also agree to install a right of way fence, as approved by the Town, along the north/south line of the eastern boundary of the area of greenspace labeled "A" on the Parcel D Conceptual Track Plan; and along the north/south line of the western boundary of the area of greenspace labeled "B" on the Parcel D Conceptual Track Plan at the time of track installation, as well as along the east/west line of the southern boundary of the area of greenspace labeled "B" on the Parcel D Conceptual Track Plan at the time of development of Lot D. The BRT Defendants shall also, at the same time the Town delivers the items set forth in Paragraph 5 above, execute and deliver to the Town a non-exclusive Easement located on the eastern boundary of Parcel D in the form reasonably required by the Town solely such that the Town can locate, construct and maintain a leachate pipe running to the existing Suffolk County sewage treatment plant, as shown on the Parcel D Conceptual Track Plan (the "Leachate Easement"); however, BRT Defendants shall retain all the development rights from the Leachate Easement, including, but not limited to the sanitary credits, which may be utilized in the development and construction of the Railway Expansion at the sole discretion of the BRT Defendants. The Town shall pay all title fees and recording fees respecting the Leachate Easement. The BRT Defendants shall provide surveys of the Leachate Easement area guaranteed to the Town and Chicago Title Company.

7. The BRT Defendants shall pay the Town the sum of \$500,000.00 by December 31, 2016 in full settlement of any monetary claims that the Town sought or could have sought in this proceeding. Should the BRT Defendants fail to pay this amount within the prescribed time, the Town may apply to the District Court for entry of a monetary judgment for any unpaid

amount due and owing and for reinstatement of the Injunction, which the BRT Defendants acknowledge shall be an appropriate remedy for such non-payment.

8. Upon the termination of the pending judicial proceedings as set forth in Paragraph 5, the BRT Defendants immediately may resume grading, excavation, construction and development activities on Parcels B, C and D of the Rail Facility as approved by the Town Board. The BRT Defendants represent, and the Town agrees that so long as performed in accordance with the Administrative SEQRA/Plan Review and Applicable Town Code Provision and resulting approvals, the grading and excavation activities are being undertaken in connection with the Railway Expansion. The Parties further agree and the BRT Defendants acknowledge and agree that any violation of the terms of this Stipulation of Settlement shall entitle the Town to apply to the District Court for reinstatement of the Injunction, subject to the notice and opportunity to cure provision set forth in Paragraph 21 herein below.

9. VHB shall be present during the grading and excavation of the areas on Parcels B and C where Super Storm Sandy-damaged cars were formerly temporarily stored in order to assure the proper environmental evaluation pursuant to applicable DEC regulations.

10. The BRT Defendants shall provide for a 75' buffer on the easterly border of Parcel C, such buffer to include the LOD area. Defendants will re-vegetate to Town specifications any disturbed area of the buffer.

11. To the greatest extent practicable, the BRT Defendants will employ permeable surfaces and pavements to enhance the stormwater drainage structure capacity of Parcels B, C and D in accord with the VHB review, and provide maximum separation between the discharge surface and the water table as required by applicable law and regulations.

12. The BRT Defendants shall prepare and file all old filed map and paper street abandonment petitions on the Rail Facility with the Town at the BRT Defendants' sole cost and expense. The Town agrees, to the greatest extent feasible, to expedite and give priority to the abandonment of such filed maps and paper streets for the Rail Facility.

13. The Town will enter into a Condemnation Agreement with the BRT Defendants. Such Agreement shall provide that the BRT Defendants shall deposit escrow for all costs to condemn parcels of land on Parcels B and C unowned by the BRT Defendants. The Town will expedite condemnation proceedings concerning the privately-owned parcels on Parcels B and C.

14. The Town and the BRT Defendants shall in good faith enter into a settlement or resolution of all pending certiorari proceedings filed to grieve real estate taxes on the Rail Facility simultaneously with the execution of this Stipulation.

15. To the extent the BRT Defendants intend to resume the transloading of used oil at the Operating Railway Terminal on Parcel A, they shall apply for and obtain any and all appropriate permits as may be required from the DEC and/or the Suffolk County Department of Health Services as a condition thereof.

16. Notwithstanding any contrary provision of this Stipulation of Settlement set forth above, the following "Milestones" and other requirements shall be adhered to by the BRT Defendants at all times in connection with the development and construction on Parcels B, C and D to implement the Railway Expansion, including any excavation, regrading, filling, or removal of native sand or gravel, or importation of material to these parcels:

a. All excavation, grading, removal of vegetation, sand and/or gravel shall be undertaken and performed solely as may actually be required to implement the Proposed New BRT Track Plans, the Parcel D Conceptual Track Plan and the Additional Plans as approved by

the Town in accord with the Administrative SEQRA/ Plan Review process and procedure and in accord and consistent with the Applicable Town Code Provision.

b. The BRT Defendants will adhere to all applicable DEC rules, regulations and guidelines to the extent that any imported and/or engineered fill is required with respect to the development of Parcels B, C and D;

c. The BRT Defendants shall apply for all required site plan approval, building permits and obtain all required certificates of occupancy for any and all non-rail buildings and structural improvements to be constructed on Parcels B, C and D, which are not "Support Structures" as defined herein. To the extent any buildings and structural improvements for the Railway Expansion are purely railway support structures such as fueling, servicing, repair or transloading buildings (the "Support Structures"), such Support Structures shall comply with applicable Town, County, or other fire prevention, health, safety and welfare requirements and, without limitation, all such Support Structures shall comply with all of the construction and fire and safety procedures as provided for in the 2010 Stipulation with respect to the Referenced Site Plan on Parcel A; and

d. The BRT Defendants will commence the installation, construction or laying of track (the "Track Installation") as regrading, excavation, filling or site preparation thereof progresses in accordance with a schedule to be established by the BRT Defendants and VHB (the "Track Installation Schedule") in accord with the Administrative SEQRA/Plan Review and Town approval.

17. The Parties shall be entitled to both mandatory and prohibitory injunctive relief to enforce this Stipulation or to enjoin any material violation of the Stipulation.

Miscellaneous Matters

18. The "Effective Date" of this Stipulation shall be the date of entry of this Stipulation of Settlement by the District Court.

19. All notices hereunder shall be transmitted via email and first-class mail to the email and mailing addresses designated for the Parties' counsel below.

20. The Parties represent and acknowledge that, in entering into this Stipulation, they do not rely upon and have not relied upon any representations or statements beyond those contained in this Stipulation. This Stipulation and the 2010 Stipulation constitute the entire agreement and understanding between the Parties with respect to the matters contained herein and therein, and there are no prior oral or written promises, representations, warranties, conditions, provisions, or terms related thereto other than those set forth in this Stipulation and the 2010 Stipulation. This Stipulation is not intended to replace the 2010 Stipulation, which shall remain in full force and effect, or the authority or jurisdiction of the STB with regard to matters which are not the subject of this Stipulation. To the extent the provisions of this Stipulation expressly modify or conflict with any of the provisions of the 2010 Stipulation, the provisions of this Stipulation shall govern.

21. The District Court shall retain jurisdiction to resolve any dispute under this Stipulation and the 2010 Stipulation, and to enforce any of the provisions thereof. The Party seeking to make such an application shall provide the other Parties with reasonably detailed written notice of any alleged breach(es) and/or violation(s), and the receiving Party or Parties shall have thirty (30) days to cure such alleged breach(es) and/or violation(s) (the "Notice to Cure"). Notwithstanding the Notice to Cure, either party may apply to the District Court for

injunctive or other relief under this paragraph 21 upon such shorter notice as the District Court may entertain upon a good faith showing of exigent circumstances.

22. This Stipulation may not be changed or modified except by the execution of a writing signed by all of the Parties.

23. This Stipulation is intended to, and shall, bind and inure to the benefit of the Parties, and their respective successors, assigns, heirs, and legal representatives.

24. This Stipulation may be executed in counterparts and by telecopier, fax or email, each of which shall be deemed to constitute a duplicate original hereof.

25. All counsel represent that they are authorized to enter into this Stipulation on behalf of the clients for whom they have appeared, and to bind such Parties to the provisions hereof, subject only to the terms hereof.

26. This Stipulation shall be construed in accordance with the laws of the State of New York without regard to its conflicts of laws principles.

27. This Stipulation is a compromise of disputed claims and has been entered into to avoid the time, expense, uncertainty, and inconvenience of contested litigation. This Stipulation does not constitute an adjudication or finding on the merits of any of the Parties' allegations.

28. The Parties hereto participated jointly in the preparation of this Stipulation and each Party has had the opportunity to review, comment upon and revise this Stipulation. Accordingly, it is agreed that no rule of construction shall apply against any Party or in favor of any Party and any uncertainty and ambiguity shall not be interpreted against any party in favor of the other.

29. The Parties shall cooperate to effectuate the purposes of this Stipulation and shall execute reasonable and customary documents and take reasonable and customary actions that may be necessary or appropriate to give full force and effect to the terms of this Stipulation.

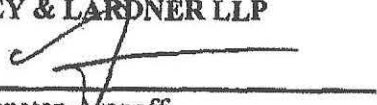
30. Each counsel executing this Stipulation represents his, her or its authority to bind such counsel's clients, as the Parties to this action, to the terms, provisions, conditions and obligations of this Stipulation to the same extent as though individually executed by each of them.

31. Each Party to this Stipulation shall execute an additional counterpart thereof within ten (10) business days following the execution of this Stipulation by counsel for the Parties.

32. This Stipulation shall be submitted to Honorable Gary R. Brown, Magistrate Judge to be "So Ordered". It is a condition to the binding effect of this Stipulation that it be "So Ordered" by the Court. In the event the Court declines for any reason, following due application, to "So Order" this Stipulation, then it shall be null, void, and of no further force and effect and all rights created, modified or waived hereby shall be immediately restored as they existed upon the day prior to the date upon which this Stipulation has been executed, unless otherwise agreed to by all Parties and counsel in a subsequent Stipulation or other written agreement.

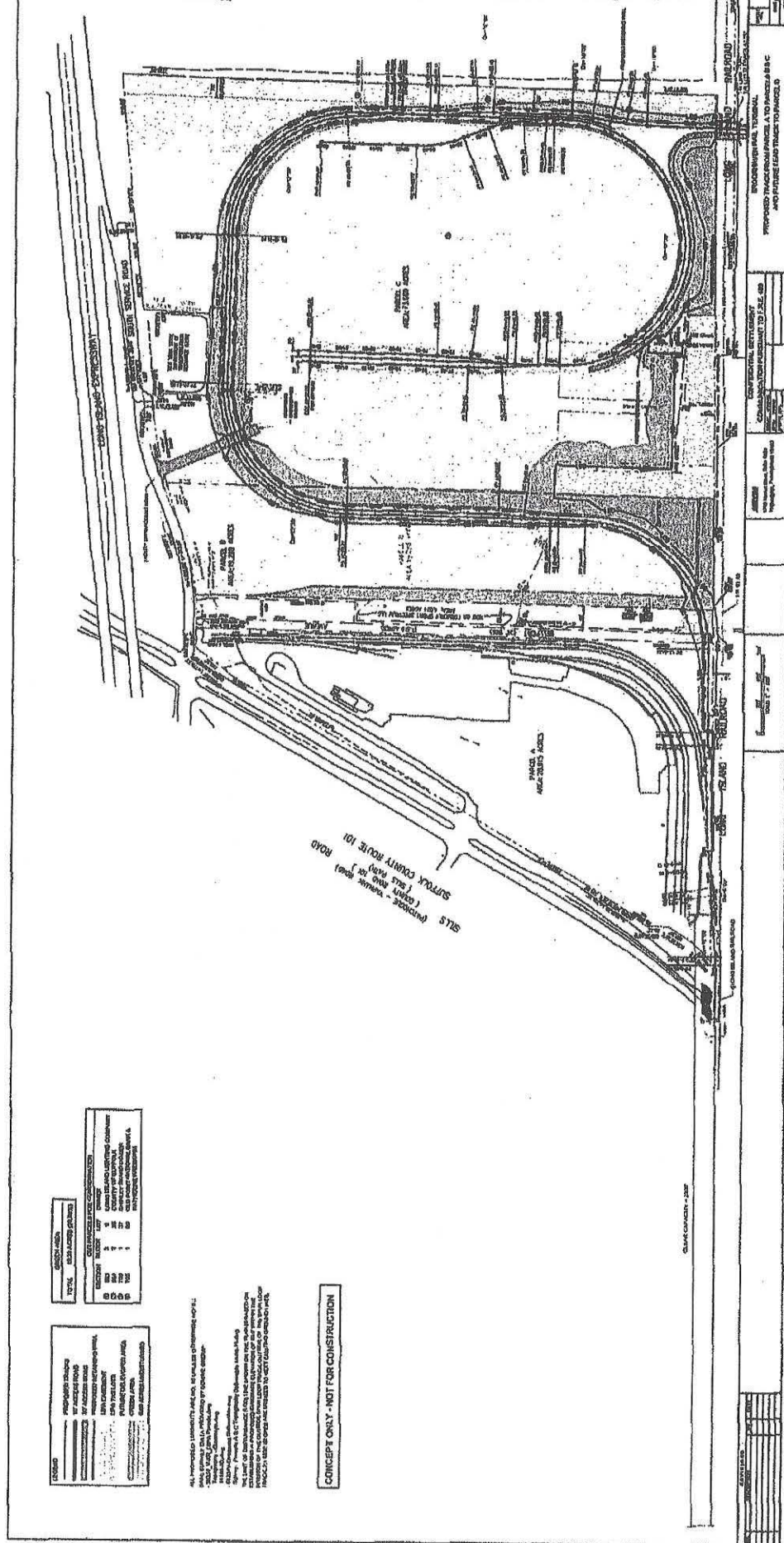
Date: March 17, 2016

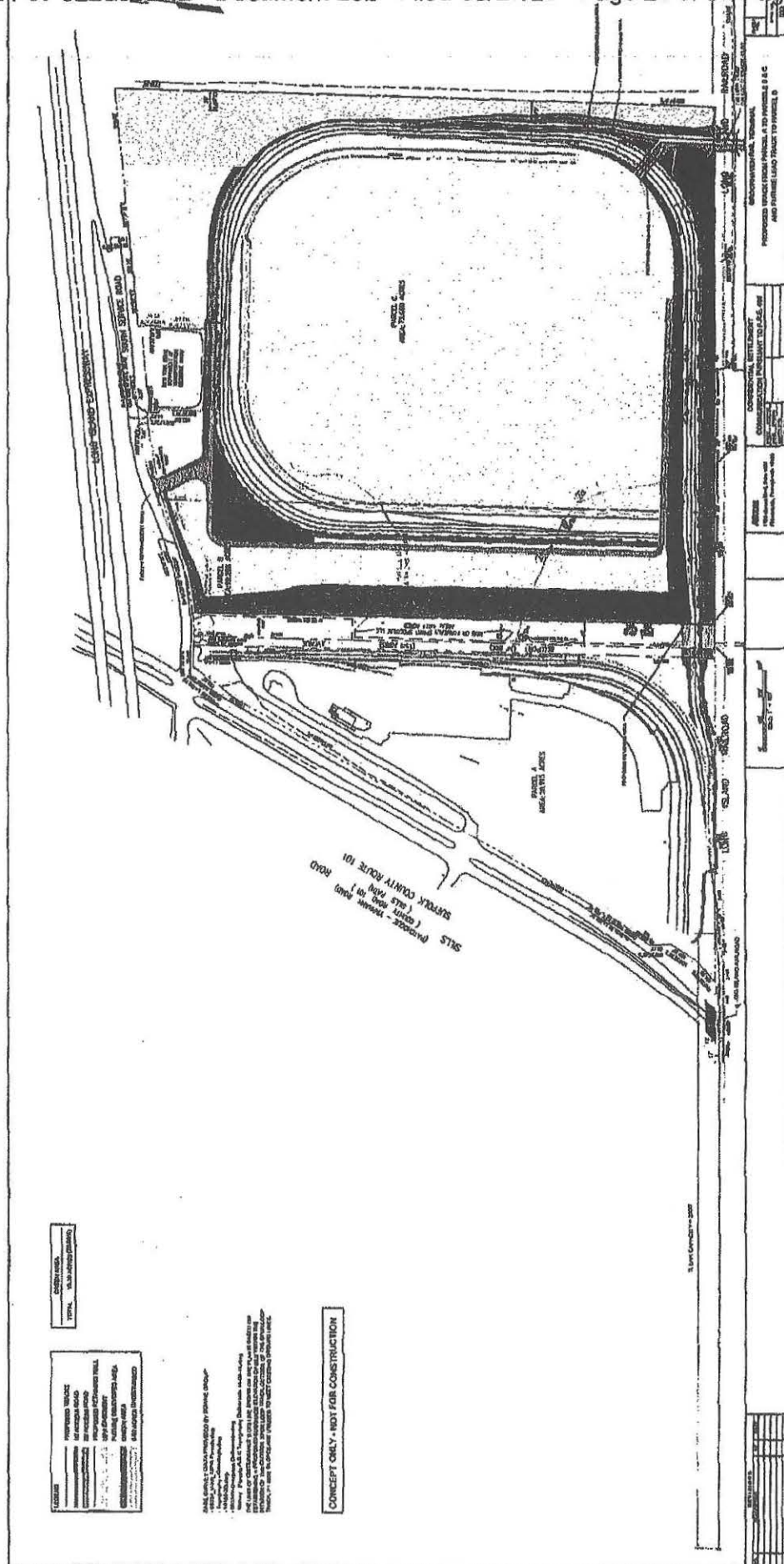
FOLEY & LARDNER LLP

By: 

Yonaton Aronoff  
90 Park Avenue  
New York, NY 10016-1314  
212-682-7474 (Telephone)  
yaronoff@foley.com

## EXHIBIT A





## EXHIBIT B



## EXHIBIT C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
TOWN OF BROOKHAVEN,

Plaintiff,

-against-

SILLS ROAD REALTY LLC, BROOKHAVEN RAIL  
LLC f/k/a U S RAIL NEW YORK LLC, BROOKHAVEN  
TERMINAL OPERATIONS, OAKLAND  
TRANSPORTATION HOLDINGS LLC, SILLS  
EXPRESSWAY ASSOCIATES, WATRAL  
BROTHERS, INC., and PRATT BROTHERS, INC.,

Defendants.  
-----X

**STIPULATION OF  
VOLUNTARY DISMISSAL  
PURSUANT TO F.R.C.P.  
41(a)(1)(A)(ii)**

Case No. 14-CV-02286 (GRB)

IT IS HEREBY STIPULATED AND AGREED by and between the parties and/or their respective counsel(s) that the above-captioned action, including all claims and counterclaims, is voluntarily dismissed, with prejudice, in accordance with and subject to the So Ordered Stipulation of Settlement of the parties, pursuant to the Federal Rules of Civil Procedure 41(a)(1)(A)(ii), except that the Court retains jurisdiction to enforce the Stipulation of Settlement pursuant to its terms.

Date: March \_\_\_\_, 2016

**FOLEY & LARDNER LLP**

By: \_\_\_\_\_  
Yonaton Aronoff  
90 Park Avenue  
New York, NY 10016-1314  
212-682-7474 (Telephone)  
yaronoff@foley.com

*Counsel for Sils Road Realty LLC,  
Brookhaven Rail LLC f/k/a U S Rail New  
York LLC, Brookhaven Terminal  
Operations, Oakland Transportation  
Holdings LLC, Watral Brothers, Inc., and  
Pratt Brothers, Inc.*

Date: March \_\_, 2016

**FARRELL FRITZ, P.C.**

By: \_\_\_\_\_  
Kevin P. Mulry  
1320 RXR Plaza  
Uniondale, NY 11556-1320  
516-227-0620 (Telephone)  
kmulry@farrellfritz.com

Counsel for Sills Expressway Associates

Date: March \_\_, 2016

**ROSENBERG CALICA & BIRNEY LLP**

By: \_\_\_\_\_  
Robert M. Calica  
Judah Serfaty  
100 Garden City Plaza  
Garden City, NY 11530  
516-747-7400 (Telephone)  
rob@rcblaw.com

*Special Counsel to Brookhaven Town  
Attorney Annette Eaderesto, Esq., Counsel  
for Town of Brookhaven*

## EXHIBIT D

March 17, 2016

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

Re: **Finance Docket Nos. 35819 & 35141: Withdrawal of  
Oppositions to BRT in Finance Docket Nos. 35819 & 35141**

Dear Ms. Brown:

We represent the Town of Brookhaven, New York (the "Town"). We write on behalf of the Town to withdraw our "Objections of Town of Brookhaven, New York" filed on October 27, 2015, in opposition to BRT's "Notification of Compliance with Board's Remaining Environmental Condition and Motion to Close the Proceeding" filed on October 9, 2015 in Finance Docket No. 35141.

Please contact us if you have any questions.

Respectfully submitted,  
ROSENBERG CALICA & BIRNEY LLP  
By:

Robert M. Calica  
Judah Serfaty

BOSTON  
BRUSSELS  
CHICAGO  
DETROIT

JACKSONVILLE  
LOS ANGELES  
MADISON  
MIAMI

MILWAUKEE  
NEW YORK  
ORLANDO  
SACRAMENTO

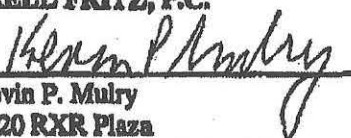
SAN DIEGO  
SAN FRANCISCO  
SHANGHAI  
SILICON VALLEY

TALLAHASSEE  
TAMPA  
TOKYO  
WASHINGTON, D.C.

*Counsel for Sills Road Realty LLC,  
Brookhaven Rail LLC f/k/a U S Rail New York  
LLC, Brookhaven Terminal Operations,  
Oakland Transportation Holdings LLC,  
Watral Brothers, Inc., and Pratt Brothers, Inc.*

Date: March 17, 2016

**FARRELL FRITZ, P.C.**

By: 

Kevin P. Mulry  
1320 RXR Plaza  
Uniondale, NY 11556-1320  
516-227-0620 (Telephone)  
kmulry@farrellfritz.com

*Counsel for Sills Expressway Associates*

Date: March     , 2016

**ROSENBERG CALICA & BURNEY LLP**

By: 

Robert M. Calica  
100 Garden City Plaza  
Garden City, NY 11530  
516-747-7400 (Telephone)  
rob@rcblaw.com

*Special Counsel to Brookhaven Town Attorney  
Annette Eaderesto, Esq.*

Date: March 17, 2016

**ANNETTE EADERESTO, ESQ.**

*Brookhaven Town Attorney*

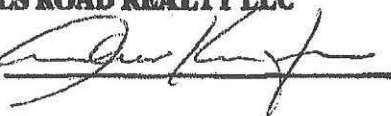
Date: March 18, 2016

**TOWN OF BROOKHAVEN**

By: \_\_\_\_\_

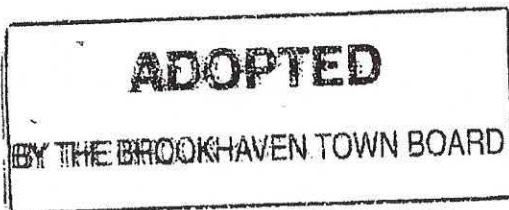
Date: March 18, 2016

**SILLS ROAD REALTY LLC**

By: 

**DOCKET NO. FD 36399**

**EXHIBIT D**



RESOLUTION NO. 2017-0709  
MEETING: SEPTEMBER 14, 2017

ADOPTION OF THE SEQRA NEGATIVE  
DECLARATION IN CONNECTION  
WITH THE PROPOSED BROOKHAVEN  
RAIL TERMINAL (BRT) EXPANSION

WHEREAS, the Town of Brookhaven, pursuant to the State Environmental Quality Review Act (SEQRA) is the Lead Agency for the proposed Action; and

WHEREAS, pursuant to a So-Ordered Stipulation of Settlement dated March 17, 2016, between the Town of Brookhaven and Sills Road Realty, LLC., et al., a Voluntary Draft Environmental Impact Statement (VDEIS) has been prepared and submitted in connection with the proposed Brookhaven Rail Terminal (BRT) Expansion; and

WHEREAS, pursuant to 6 NYCRR §617.6(a)(4), the Lead Agency may waive the requirement for an Environmental Assessment Form (EAF) if a draft EIS is prepared. The draft EIS may be treated as an EAF for the purpose of determining significance; and

WHEREAS, the Division of Environmental Protection has reviewed the VDEIS and has submitted recommendations to the Town Board for its consideration and review;

NOW, THEREFORE, BE IT RESOLVED, by the Town Board of the Town of Brookhaven that based upon the Town Board's examination of the Voluntary Draft Environmental Impact Statement (VDEIS) and recommendations, and the appropriate criteria for determination of significance, the proposed action is a Type I which will not have a "significant impact" on the environment; and be it further

RESOLVED that this resolution constitutes a "negative declaration" pursuant to SEQRA and that this Board's Findings and Notice of this determination (as set forth in the notice of determination attached hereto) shall be filed to the extent required by the State Environmental Quality Review Act or as deemed necessary by this Town Board.

**SEQR  
NEGATIVE DECLARATION  
NOTICE OF DETERMINATION OF SIGNIFICANCE**

**Lead Agency:** The Town Board of the Town of Brookhaven  
One Independence Hill  
Farmingville, NY 11738

**Title of Action:** Proposed Brookhaven Rail Terminal (BRT) Expansion

**Applicant:** Brookhaven Rail LLC f/k/a U.S. Rail New York LLC  
Brookhaven Terminal Operations  
205 Sills Road  
Yaphank, New York 11980

**SEQRA Status:** Type I

**Project:** Administrative SEQRA/Plan Review  
in accordance with the March 17,  
2016 Stipulation of Settlement

**Location:** 350± acres situated at 205 Sills Road, on the east side of Sills Road and south side of the Long Island Expressway South Service Road, Yaphank, Town of Brookhaven, Suffolk County, New York

**SCTM #:** Numerous tax parcels on the Suffolk County Tax Map Section 663, 664, 704, 705, 741, 778, 815, and 845, and is bounded on the north by the LIE South Service Road and on the south by Horseblock Road

This notice is issued pursuant to Part 617 of the implementing regulations pertaining to Article 8 (State Environmental Quality Review) of the Environmental Conservation Law.

The Lead Agency has determined that the proposed action described above will not have a significant effect on the environment.

This determination has been made in consideration of the criteria for determining environmental significance outlined in SEQR Part 617.7 using the information available and comparing it with thresholds set forth in section 617.4 and 617.5.

**Description of Action:**

The overall subject property is approximately 350 acres, of which, approximately 29 acres, identified as Parcel A, are currently developed and utilized. The proposed action involves the expansion of the existing Brookhaven Rail Terminal (BRT) facility onto approximately 321 acres of currently undeveloped property immediately east and southeast of the existing operations, known as Parcels B, C, and D.

Within the approximate 240-acre potential development area, BRT is proposing to extend the existing spur track system from Parcel A with approximately 25,000 additional track feet, generally parallel to the LIRR tracks, across the southern portion of Parcels B and C, and then creating a generally circular track in a counterclockwise direction. To accomplish this counterclockwise track configuration, BRT would have to acquire approximately 2.39 acres in the southern portion of Parcel C currently owned by LIPA. If for some reason, BRT and LIPA

cannot come to an agreement on the sale of the LIPA parcels to BRT, BRT will implement an alternative track layout in a clockwise configuration.

The Proposed Action consists of:

- Establishing an Undisturbed/Conservation Easement consisting of two (2) parcels, known as Parcel A, consisting of approximately 47.55 acres and Parcel B, consisting of 14.45 acres to be bisected by the proposed railway;
- Preparing Parcels B and C for development;
- Constructing buildings and other infrastructure to support the rail terminal operations on Parcels B and C;
- Clearing and grading of Parcel D;
- Constructing an underpass beneath the LIRR tracks between Parcels C and D;
- Extending the track onto Parcel D;
- Constructing new access ways and on-site roads;
- Pursuant to the 2016 Stipulation of Settlement, right-of-way fencing would be installed around portions of the 62 acre Undisturbed/Conservation Easement on Parcel D that would be established at the onset of the Phase 1; and
- Constructing buildings and other infrastructure to support the rail terminal operations on Parcel D.
- The existing facility on Parcel A would not be altered as part of the Proposed Action.

Pursuant to the 2016 Stipulation of Settlement,

“The [SEQRA] review and approval process for the Railway Expansion shall proceed before the Town Board on an expedited basis under an established and agreed upon process and procedure complying with the Administrative SEQRA/Plan Review process and Applicable Town Code Provision application to resolution of litigated environmental matters, and without public hearings.”

The existing operation is currently subject to a Stipulation of Settlement with the New York State Department of Environmental Conservation (NYSDEC), dated June 26, 2013. The SEQRA compliance for the proposed action has been conducted as an Administrative SEQRA/Plan Review in accordance with the March 17, 2016 Stipulation of Settlement with the Town of Brookhaven.

#### **Reasons Supporting Determination:**

Pursuant to a March 17, 2016 Stipulation of Settlement with the Town of Brookhaven, a Voluntary Draft Environmental Impact Statement (VDEIS) has been prepared for the above-mentioned action and submitted to the Town for review on December 19, 2016. In accordance with the with the State Environmental Quality Review Act (SEQRA) and its implementing regulations at 6 New York Codes, Rules and Regulations (NYCRR) Part 617, the VDEIS was prepared in accordance with 6 NYCRR §617.6(a)(4), which states, “[a]n agency may waive the requirement for an EAF [Environmental Assessment Form] if a draft EIS is prepared or submitted. The draft EIS may be treated as an EAF for the purpose of determining significance.”

The action was considered a Type I action and coordinated to interested and involved agencies on January 9, 2017 to satisfy the SEQRA requirements for the establishment of Lead Agency.

Comments were received from the NYSDEC, Suffolk County Department of Public Works, PSEG Long Island, and the Town and a meeting was held at the NYSDEC on June 19, 2017 that resulted in additional mitigation measures and subsequent changes to the plan and therefore the VDEIS/EAF. The revised VDEIS/EAF was resubmitted on August 31, 2017.

Potential significant adverse impacts associated with implementation of the proposed action have been evaluated and mitigation measures have been provided for impacts identified as significant and adverse and alternatives to the proposed action have been evaluated. Two alternatives to the Proposed Action were examined, as follows:

- SEQRA-Mandated No-Action Alternative (the Subject Property would remain as it currently exists)
- Alternative Track and Site Design

Since variations between the Proposed Action and the Alternative Track and Site Design would be minimal, many of the associated impacts would be similar, as all other aspects of this alternative would be the same as those associated with implementation of the proposed action (i.e., ecological resources; water resources; land use and zoning; transportation; socioeconomics; noise and vibration; air quality; and aesthetics, community character, and cultural resources).

To minimize potential adverse impacts to land use and zoning, any non-rail support structures/uses would be required to comply with Town land use and zoning regulations.

The following ecological resource mitigation measures are proposed as part of the proposed action and would support minimization and/or avoidance of adverse impacts to ensure the proposed action would not have a significant adverse impact on ecological resources:

- 62 acres of the facility expansion area would be established as an Undisturbed/Conservation Easement on Parcel D and would remain permanently undeveloped as open space/green space in perpetuity. The Undisturbed/Conservation Easement will consist of two parcels, identified as Conservation Parcel A (43.9 acres) and Conservation Parcel B (18.1 acres) to be bisected by the proposed railway, resulting in a non-contiguous conservation easement. The conservation easement comprises two Pitch Pine-Oak Forest habitat blocks, separated by the proposed Parcel D spur track, that would be contiguous with adjoining Pitch Pine Oak Forest communities to the east and west of Parcel D. The 62 acres of coniferous and mixed-deciduous forest to be preserved represent habitat for the existing wildlife fauna that currently occurs within these on-site communities.
- Preservation of Pitch Pine Oak Forest would occur as part of the establishment of 19.39± acres of green areas at portions of Parcels B and C, including preservation of existing forest along the eastern portion of Parcel C. The green areas would occur primarily in areas adjacent to the spur track extension, along the eastern boundary of Parcel C, and along the southern boundary of Parcels B and C.
- The two proposed drainage reserve areas at Parcels B and C and the two recharge basins proposed for Parcel D would be planted with and/or be colonized by herbaceous plants and shrubs representative of the ECNYS Successional Old Field community, providing additional vegetated habitat at the Subject Property.

- To avoid or minimize potential impacts to the eastern box turtle, the following mitigation measures would be employed prior to clearing, excavation, and development activities on the Subject Property:
  - Conducting wildlife sweeps by trained personnel prior to clearing activities, to identify the most likely habitat areas. If any observed eastern box turtles are found within the targeted areas would be relocated to safe areas.
  - Erosion control barriers containing plastic or wire mesh have been documented as ensnaring turtles and other reptiles. Thus, non-mesh silt fencing would be used to minimize the potential for turtle mortality.
  - Removing of erosion control barriers as soon as work is complete or once stabilization has occurred on the Subject Property, so as not to impede turtle movement.
- To avoid potential adverse impacts to northern-long eared bat, no clearing or excavation activities would be conducted on Parcel D during the summer roosting period. Clearing and/or excavation on Parcel D would take place between November 1 and March 31.
- The periodic maintenance of wild indigo along LIPA property, assets and easements will likely be beneficial to the success of wild indigo and the Persius duskywings' necessary habitat type. Moreover, as the north-south LIPA property located between Conservation Parcels A and B would not be relocated, and the LIPA corridors on Parcel D would not be disturbed, no impacts to the multiple occurrences of wild indigo observed within the LIPA property, assets, or easements would occur because of the proposed action.

The analysis of water resources focused on groundwater, water supply, sewage generation, stormwater management, and wetlands and waterbodies. The following mitigation measures will be employed to ensure that potential impacts to water resources would be avoided and/or minimized.

- Pursuant to the 2016 Stipulation of Settlement, drainage plans have been prepared by BRT to manage stormwater on the subject property. The proposed stormwater management plans prepared by BRT include the construction of multiple drainage reserve areas and recharge basins, which would necessitate the removal of material. As users are identified for the subject property, specific site drainage will be designed for those uses.
- BRT had previously received a Storm Water Pollution Prevention Plan (SWPPP) waiver from the Town for the development of Parcel A. BRT has indicated that it would seek similar relief for Parcels B, C and D to that granted for Parcel A. Notwithstanding this, the 2016 Stipulation of Settlement requires that a preliminary SWPPP be prepared for Parcels B, C and D. Drainage and erosion and sedimentation control plans have been prepared to address this requirement; BRT will implement these protective stormwater management measures to protect groundwater resources and facilitate stormwater recharge.
- As feasible given ultimate end users on the site, BRT will install permeable pavement and maintain permeable surfaces to facilitate infiltration of runoff.
- To ensure the protection of groundwater associated with the installation and operation of on-site sanitary systems, BRT will comply with the applicable requirements of Article 6 of the Suffolk County Sanitary Code.

- To further protect groundwater impacts associated with sanitary discharge, Parcel D will connect to the Suffolk County Yaphank County Center Sewage Treatment Plant (Yaphank Sewage Treatment Plant). As feasible, given available capacity, the uses developed on Parcels B and C may ultimately be connected to the municipal treatment system.
- As end users have not yet been determined, it is not possible to calculate precise future water use. As users are identified, BRT will consult with the Suffolk County Water Authority (SCWA) to ensure water availability.
- If any future uses on the site will have cause to store or handle hazardous materials, BRT would comply with applicable regulations, such as Articles 7 and 12 of the Suffolk County Sanitary Code, Chemical and/or Petroleum Bulk Storage regulations of the NYSDEC, and any other state or federal requirements.
- Given documented groundwater contamination with VOCs from an off-site source, soil vapor testing should be conducted on Parcel D to ensure that there are no health and safety concerns for workers or ultimate site occupants. If soil vapors are detected, then proper measures should be developed and employed to protect health and safety.

Overall, implementation of the Proposed Action is not expected to result in significant adverse impacts on the traffic flow or operations on the surrounding roadway network. Although, at the time that Parcel D is developed and operational, the intersection of CR 21 and Glover Drive will be evaluated to determine the need for a traffic signal, based on actual operations at Parcel D and the other facilities that use Glover Drive at CR 21. According to NYSDEC guidelines, there would be no significant noise impact at residences on Yaphank Road and no need for mitigation due to potential increases in traffic noise.

With respect to passenger and freight operations, the following measures would be employed as part of the Proposed Action to minimize and/or avoid potential impacts:

- NYA and BRT would work closely with LIRR and maintain consistent lines of communication to minimize any potential impacts.
- Construction of the underpass to connect Parcels C and D would take place in off-peak passenger operation hours, minimizing or potentially eliminating any disruption to service on the LIRR system.

It is anticipated that the proposed action would have no significant adverse impacts on community services and facilities. In total, upon implementation of the Proposed Action, BRT would generate approximately \$5,912,030 in annual property taxes (approximately \$5,084,611 more than under current conditions) to all the taxing jurisdictions, which would benefit those jurisdictions and likely assist in off-setting the cost associated with any potential increased need for services from the various providers. In addition, the following measures would further reduce potential for adverse impacts to community services:

- On-site security would be provided during and after construction, to include one or more of the following.
  - CCTV cameras
  - Security offices constructed at all access points to the Subject Property.

- A security guard would be stationed at each security office 24 hours a day, 7 days a week. Starting at 6:00 p.m. at least one additional security guard would patrol the subject property until 6:00 a.m.
- Security rovers to patrol the subject property during the evenings and overnight hours.
- Exterior lighting would be provided throughout the subject property to allow adequate visibility and increase security on the subject property.
- Future buildings would be constructed to the latest National Fire Protection Association Codes and Standards.
- BRT would consult with the Yaphank Fire Department prior to additional construction as part of the Proposed Action to ensure that suitable fire hydrants are installed to protect the subject property in the event of a fire.
- With respect to access to the subject property, the proposed action includes three additional access points/driveways: one along LIE South Service Road (for Parcels B and C), one along Horseblock Road (for Parcel D), and one from Glover Road (for Parcel D). An easement along the northern portion of the LIPA property (east of Parcel A) would be established to allow circulation among Parcels A, B, and C. This would provide multiple access options in the case of a situation where emergency vehicles would need to enter the site.
- As potential development projects (e.g., the current proposals for relocation/expansion of the rebar transloading and preparation facility, and a fuel cell project) are confirmed and finalized, BRT will contact the SCWA to confirm water availability for each new development on the subject property.
- Parcel D would be connected to Suffolk County's Yaphank Sewage Treatment Plant, pursuant to the 2012 Agreement of Sale for Parcel D. If capacity is available, Parcels B and C could be connected to the municipal system in the future.
- On-site sanitary systems would be installed in accordance with Article 6 of the Suffolk County Sanitary Code.

From a regional perspective, it is anticipated that the proposed action may benefit regional air quality as it has the potential to replace less efficient truck deliveries with rail transportation. To ensure that no significant adverse localized air quality impacts result from implementation of the proposed action, the following mitigation measures will be employed:

- Maintain use of anti-freeze in locomotives to reduce idling on cold days
- Continue use of an environmentally friendly switching locomotive to move cars efficiently
- Ensure proper emission controls for construction vehicles, including, as appropriate, proper maintenance of all motor vehicles, machinery, and equipment associated with construction activities, maintenance of manufacturer's muffler equipment or other regulatory required emissions control devices
- Limit idling of construction vehicles and equipment on site

- Employ appropriate methods of dust control, including, as necessary, the application of water, the use of stone in construction entrances and roads, and regular sweeping of the pavement and adjacent roadway surfaces during construction.
- Based on the noise and vibration impact assessment, there would be no significant adverse noise impact, and no mitigation measures are required to reduce noise or vibration.

While the Proposed Action is not expected to result in significant adverse impacts on visual resources or cultural resources, the eastern boundary of Parcel C will contain a 75-foot wide vegetated buffer between the construction and the western boundary of the Suffolk County farm fields, creating a physical and visual buffer between the farm and proposed construction and allowing for the continuation of the tree lines that currently mark the fields' outer boundaries.

Implementation of the proposed action will require cut and fill of existing soils, thus altering topography at the subject property. However, with implementation of the following measures potential impacts will be minimized.

- Clearing, excavation and grading of the subject property would occur in phases to reduce the level and intensity of impacts as compared to grading the entire subject property all at once.
- Native soils excavated from the Subject Property would be reused on-site to the maximum extent practicable. This will be achieved by using excavated soils as on site fill material, both for initial grading purposes in Phase 1 (Parcels B and C) and Phase 2 (Parcel D) and for additional grading in Phase 2 associated with the development of buildings, roads, etc. on the subject property.
- Exported soils will be removed from the subject property using a combination of rail and truck transport to reduce potential traffic impacts associated with removal of soils only by trucks.
- The grading concept proposed by BRT, which would require removal of over 3.9 million CY of material, will be redesigned in accordance with the grading concepts presented in the VDEIS and documented in the VHB memorandum, Brookhaven Rail Terminal Expansion Grading Analysis, August 2, 2017, and contained as Appendix X of the VDEIS. This will result in a significant reduction in the amount of material removal from the subject property, such that approximately 960,000 to 1,150,000 CY of material would be removed, thereby reducing the quantity of net export by approximately 2.7 to 2.9 million CY.
- To the extent practicable, pervious materials shall be installed to facilitate stormwater recharge.
- Pursuant to the 2016 Stipulation of Settlement, when excavation and grading activities are conducted in the area where Superstorm Sandy-damaged cars were stored, this area shall be monitored by VHB. If visual or olfactory evidence of contamination is noted, soil sampling must be performed in accordance with applicable requirements.
- The Undisturbed/Conservation Easement on Parcel D will preserve soils and topography in this area, ensuring soils in this area remain undisturbed and stabilized.

- In total, 19.39± acres of green space would be provided on Parcels B and C, including 6.6 acres of currently vegetated land along the eastern border of Parcel C, which would be undisturbed. This will maintain existing topography along the eastern border of Parcel C and help stabilize soils on Parcels B and C.
- Construction activities will adhere to the erosion control plan established for the Proposed Action, including,
  - Limits of clearing and grading will be established and construction fencing will be installed along the limits. Existing vegetation to remain will be protected and remain undisturbed during construction. The limits of the 62- acre Undisturbed/Conservation easement will be fenced pursuant to the 2016 Stipulation of Settlement as part of Phase 2 of development. Fencing types and locations are depicted on the erosion control plan.
  - Sediment barriers (silt fences and stockpiles) will be installed in critical areas for erosion control purposes.
  - In addition to the erosion control measures listed above, Best Management Practices would be implemented to further reduce the potential for erosion and sedimentation due to construction activity, including:
    - A stabilized construction entrance will be maintained to prevent soil and loose debris from being tracked onto adjacent roadways. The construction entrance will be maintained until the subject property is permanently stabilized.
    - Clearing and grading will be scheduled to minimize the size of exposed areas and the length of time areas are exposed. Cleared areas and stockpiles will be kept stabilized.
    - Dust control will be instituted to prevent surface and air movement of dust from disturbed soil surfaces.
    - Drainage inlets will be protected using sediment barriers and traps as required.
    - Sediment barriers and other erosion control measures will remain in place until disturbed areas are permanently stabilized.
- Documented groundwater plumes exist that are contaminated with VOCs in the area of Parcel D, and soil vapor associated with this contamination is a concern for the onsite workers, both during site redevelopment excavation activities and post development within enclosed structures. Accordingly, soil vapor sampling should be conducted after the clearing of Parcel D, but prior to excavation activities. If soil vapor impacts are detected, appropriate health and safety precautions for on-site construction workers should be developed and implemented. Further, appropriate building designs (e.g., soil vapor barriers, sub-slab depressurization systems, etc.) should be provided to mitigate VOC concerns within occupied structures, if necessary.
- Although no significant on-site soil concerns were identified during the review of the prior environmental assessments, scattered non-hazardous debris typical of illegal dumping at undeveloped parcels and illegal trespassing and discharges of shotguns were reported. The reported non-hazardous debris should be segregated from cleared trees, brush and soils, and disposed separately.

The Proposed Action would result in a net positive impact for the numerous taxing districts, including Suffolk County, the Town of Brookhaven, Longwood Central School District, and South Country Central School District. The proposed action is anticipated to generate a combined total of \$5,912,030 in annual property taxes, which is more than \$5 million greater than

the current taxes generated by development of the proposed action. The proposed action is expected to create approximately 650 new permanent jobs, as well as 579 short-term jobs per year during construction. Furthermore, the proposed action is anticipated to result in indirect economic growth to the surrounding area.

The industrial-nature of the proposed action will be consistent with various other development near the subject property, as well as the zoning for the majority of the subject property. The proposed action will also be consistent with various Comprehensive Plans and other planning documents, and in many cases, will help to achieve planning goals such as, the increased use of freight rail, reduction of traffic and emissions from 40,000 trucks annually, industrial development along the LIE, economic growth, and sustainable transportation. The proposed action is not expected to have a significant adverse impact on socioeconomics or significant cumulative impacts from the BRT expansion and other pending projects in the immediate area.

While environmental impacts will occur as a result of the proposed activity, no significant impact is expected to occur to: air, land, aesthetics, ground water, surface water, wetlands, cultural, open space, recreational, transportation or energy resources.

The Town Board of the Town of Brookhaven, as Lead Agency for the action contemplated herein, and after due deliberation, review and analysis of the so-ordered stipulation of settlement, the VDEIS/EAF, supporting information, recommendations and conclusions of Comprehensive Plans and other planning documents, and the criteria set forth in 6 NYCRR § 617.7 determines that the proposed action will not result in significant impacts to the environment.

Review Agency: The Town Board of the Town of Brookhaven  
Contact Person: Peter E. Fountaine, Division of Environmental Protection  
Address: One Independence Hill, Farmingville, NY 11738  
Phone: (631) 451-6455

**Copies of this notice sent to:**

ENB

Sheref Fathi, P.E., Regional Environmental Manager, New York State Department of Transportation

Mark Carrara, Deputy Permit Administrator, New York State Department of Environmental Conservation

DJ Evans, Director, New York State Department of Environmental Conservation, New York Natural Heritage Program

Michelle Gibbons, Regional Wildlife Manager, New York State Department of Environmental Conservation

Ruth L. Pierpont, Director, New York State Office of Parks, Recreation, and Historical Preservation

Andrew P. Freleng, Chief Planner, Suffolk County Department of Planning

Gilbert Anderson, P.E., Commissioner, Suffolk County Department of Public Works

James L. Tomarken, MD, Commissioner, Suffolk County Department of Health Services

Sarah Lansdale, Director, Suffolk County Farmland Committee

Veronica King, Stormwater Manager, Town of Brookhaven Highway Department

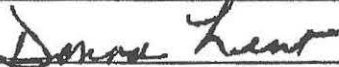
John Lessler, Town of Brookhaven, Division of Land Management/Open Space and Farmland Acquisition Advisory Committee

Keith Williams, Fire Marshal, Town of Brookhaven Division of Fire Prevention

Germaine Ortiz, Assistant Town Engineer, Town of Brookhaven Division of Engineering

Vincent E. Pascale, Chairperson, Town of Brookhaven Planning Board  
Allen Logalbo, Deputy Director of Acquisition and Leasing, MTA, Long Island Railroad  
Ralph V. Suozzi, Chairman, Long Island Power Authority Board of Trustees  
David M. Daly, President and COO, PSEG Long Island  
Judith Enck, Regional Administrator, U.S. Environmental Protection Agency, Region 2 Office  
Applicant: Brookhaven Rail LLC f/k/a U.S. Rail New York LLC  
Brookhaven Terminal Operations  
205 Sills Road  
Yaphank, New York 11980

**This determination is not authorized and complete until signed and dated as follows:**

  
\_\_\_\_\_  
Donna Lent, Brookhaven Town Clerk

Date Resolution Adopted: 9-14-17



**Department of  
Environmental  
Conservation**

## **ENB - Region 1 Notices 9/27/2017**

### **Negative Declaration**

**Suffolk County** - The Town of Brookhaven Town Board, as lead agency, has determined that the proposed Brookhaven Rail Terminal (BRT) Expansion will not have a significant adverse environmental impact. The action involves an overall property of approximately 350 acres, of which, approximately 29 acres, identified as Parcel A, are currently developed and utilized. The proposed action involves the expansion of the existing Brookhaven Rail Terminal (BRT) facility onto approximately 321 acres of currently undeveloped property immediately east and southeast of the existing operations, known as Parcels B, C, and D.

The Proposed Action consists of establishing an Undisturbed/Conservation Easement consisting of two (2) parcels, known as Parcel A, consisting of approximately 47.55 acres and Parcel B, consisting of 14.45 acres to be bisected by the proposed railway, preparing Parcels B and C for development, constructing buildings and other infrastructure to support the rail terminal operations on Parcels B and C, clearing and grading of Parcel D, constructing an underpass beneath the LIRR tracks between Parcels C and D, extending the track onto Parcel D, constructing new access ways and on-site roads, and constructing buildings and other infrastructure to support the rail terminal operations on Parcel D. The existing facility on Parcel A would not be altered as part of the Proposed Action.

The existing operation is currently subject to a Stipulation of Settlement with the New York State Department of Environmental Conservation (NYS DEC), dated June 26, 2013. The SEQRA compliance for the proposed action has been conducted as an Administrative SEQRA/Plan Review in accordance with the March 17, 2016, United States District Court Eastern District of New York, Case Number 2:14-cv-02286, Stipulation of Settlement with the Town of Brookhaven.

The project is located at 205 Sills Road, on the east side of Sills Road and south side of the Long Island Expressway South Service Road, Yaphank, Town of Brookhaven, New York.

**Contact:** Peter E. Fountaine, Town of Brookhaven, One Independence Hill, Farmingville, NY 11738, Phone: (631) 451-6455, E-mail: pfountaine@brookhavenny.gov.

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**DOCKET NO. FD 36399**

**EXHIBIT E**



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 36399**

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**BROOKHAVEN RAIL LLC – PETITION FOR EXEMPTION FROM  
REQUIREMENTS OF 49 U.S.C. §10909**

**VERIFIED STATEMENT OF JAMES NEWELL**

My name is James Newell. I am the former President of Brookhaven Rail LLC (“BHR”), a Class III railroad. I held that position from 2012 to May 11, 2020, when I formally resigned as President of BHR and was re-hired by the railroad as a consultant, maintaining my prior duties under the new President of BHR. I have been employed in the railroad industry since 1965, including positions with CSX Transportation and its predecessors. A copy of my resume is attached to this Verified Statement. I first began working for BHR in May 2011 when it was named U.S. Rail – New York (“USR-NY”). USR-NY in turn was the successor to U.S. Rail Corporation, which in 2010 received authority from the Surface Transportation Board (“STB” or “Board”) to construct and operate 18,000 feet of track on “Parcel A” of the Brookhaven Rail Terminal site (“BRT”), a 355-acre site which includes four parcels of land in Suffolk County, Town of Brookhaven, Hamlet of Yaphank, New York denominated Parcels “A,” “B,” “C,” and “D”. BHR’s services to shippers on Parcel A have primarily consisted of interchanging empty and loaded railcars with NY&A via switch connection and interchange constructed on the LIRR

tracks. BHR also provides rail carrier and transloading services on the BRT, and the marshalling and receipt of freight rolling stock on the BRT for transportation by NY&A over the rail lines of the LIRR.

This Verified Statement is offered in support of the Petition for Exemption filed by BHR in Docket No. FD 36399 for an exemption from a zoning law of the Town of Brookhaven in order to enable BHR to construct and own a solid waste rail transfer facility on “Parcel D” of the BRT (the Facility). In addition to owning the new facility, BHR would provide rail operations to it and other industries that are located on Parcel D as it is developed as a freight rail served industrial park. To that end, BHR has also filed a Petition for Exemption in Docket No. FD 36388 for authority to construct and operate approximately 23,680 feet of rail line subject to the Board’s jurisdiction that would in part serve the new facility.

On May 11, 2020, the membership shares of BHR were sold by Oakland Transportation Holdings LLC to Shamrock Rail, LLC (“Shamrock”), a non-carrier subsidiary affiliate of Winters Brothers Waste Systems of Long Island, LLC (“Winters Bros.”). Thus, while BHR is and will continue to be an independently operated Class III rail carrier, its membership shares are owned by its affiliate Shamrock. Winters Bros. is a premier solid waste and recycling company located on Long Island, New York. Winters Bros. and its predecessor family-owned and operated companies have provided waste disposal and recycling services on Long Island for over 60 years.

Winters Bros. has contracted for either it, Shamrock, or another designated affiliate to purchase Parcel D from Oakland’s affiliate New York Site Operations LLC. It is intended that upon the consummation of that purchase later in 2020, that land sufficient to support construction and operation of the necessary track and the Facility would be leased to BHR under a long term ground lease. Winters Bros. also intends to work collaboratively BHR to construct railroad tracks

and infrastructure to establish rail-served industries on the remaining acreage of Parcel D. Under the current plans for Parcel D, once its acquisition is consummated and the Facility is constructed by BHR, Winters Bros. would be the contract operator of the Facility under the auspices of BHR. As BHR's contract operator of the Facility, Winters Bros. will manage both operational requirements and contractual arrangements for the acceptance of inbound waste commodities delivered by truck, as well as making all necessary arrangements for the rail shipment of processed MSW, C&D and marketable recyclables from the Facility. BHR will coordinate with Winters Bros. to provide rail services in conjunction with the loading of and movement of railcars within the Facility.

This Facility is much needed by the Town of Brookhaven and Long Island communities generally due to the impending closure of the Town's landfill and the lack of adequate waste transport and disposal capacity on Long Island generally. As for the specifics of the Facility, as currently designed it will consist of a waste transfer building, an administrative and maintenance building, associated roads, scales and scale house, parking for inbound and outbound trucks, and several hundred feet of associated rail tracks and other transloading infrastructure. The Facility will have the capacity to accept construction and demolition debris (C&D), municipal solid waste (MSW) and recyclables, provide sorting and processing, then compaction of the waste which comes in by truck to be transloaded onto railcars and shipped out to off-Island permitted disposal facilities. These materials will be delivered to the transfer station building of the Facility, then weighed, inspected, and classified and unloaded onto the appropriate area of the tipping floor. Movement of the materials on the tipping floor will be by payloaders and skid steer loaders. The C&D will be processed to extract recyclable material using sorting and separation equipment. The C&D waste for disposal will be loaded into gondola railcars and covered in accordance with

receiver or line haul railroad requirements. Recyclables will be sorted and separated by commodity and then be baled and loaded onto gondola railcars or trucks. Depending on the type of railcar and containerization required by the receiver of the waste or a participating line haul railroad, the MSW will either be loaded into shipping containers and put on flat bed railcars or baled and loaded into gondola railcars. In summary, all waste materials arriving by truck will be processed and loaded into railcars for transportation off Long Island for disposal, and recyclable commodities will be transported by either rail or truck depending on the market in which they are sold.

The loading of all railcars will take place at the transloading section within the waste transfer building. Empty railcars will be delivered by NY&A off the LIRR main line to an interchange with BHR, and then all movement of railcars to and from, and while at the Facility will be performed by BHR. Empty railcars will be moved by BHR to railcar storage track locations and then to the track passing through the waste handling building as needed. The actual process and equipment used in loading the railcars will vary depending on the material and the type of railcar being loaded. MSW in containers will be loaded onto flatbed railcars using cables connected to a crane. Baled MSW and recyclables will be lifted into gondola railcars with a bale-clamp connected to a crane. C&D will be loaded into gondola railcars using a grapple connected to an excavator. As part of the transfer process, a scale house operation with at least two (2) truck scales will be used to track and record the weight of all material delivered to the solid waste rail transfer station. Weighing material will permit accurate tracking and charging for the processing and disposal of waste commodities and recyclables delivered to the facility. The facility will also have two (2) railcar scales to assure the loaded railcars are the proper weight before leaving the facility. Once the railcars are loaded, they will be moved by BHR from the solid waste rail transfer

facility to the interchange with NY&A where they will be removed by NY&A out onto the LIRR main line.

The solid waste rail transfer facility is expected to receive material from truck delivery 14 hours per day (4 am to 6 pm) during the week, and up to 8 hours on Saturdays. The facility will not routinely operate on Sundays or holidays. The facility will have the capability to process and transload material 24 hours per day, as may be required by the tonnage of incoming material. However, the actual movement of railcars on-site will be determined by the tonnage of material processed and to be transloaded, and movement of railcars off-site will be determined by service provided by the NY&A. Current estimates are that in the first year of operations 133 trucks will deliver approximately 2,000 tons of waste and/or recyclables each day to be processed, and that this number will increase to 400 trucks per day delivering up to 6,000 tons of materials by the 5th year of operation. Loaded railcars would be assembled by the BHR into 32-car blocks for delivery to the NY&A interchange. The expectation is for 1 to 2 trains per day in years 1 and 2, rising to a constant 2 trains per day by the end of year 2 of operations. These numbers are all subject to change if the Town of Brookhaven landfill closes sooner than anticipated in 2024.

Construction and ownership of the proposed solid waste rail transfer facility is presently prevented by the Town's zoning law which has designated the land making up Parcel D as being within the Town's "L1" and "A1" Zoning Districts. The majority of Parcel D is L1, or "Light Industrial." The proposed Facility would be constructed on L1 zoned land. The remainder of Parcel D is zoned A1, which is one of several "Residence Districts." Neither of these designations permit the construction of a solid waste rail transfer facility on the affected property.

In the 2016 settlement agreement that came out of litigation before the Eastern District of New York, the Town agreed that the components of the planned BRT expansion into Parcel D

that comprise purely railway “Support Structures” would not be required to comply with existing bulk and dimensional requirements or other Town zoning regulations of the L1 and A1 Zoning Districts. However, it is BHR’s understanding that the Town’s waiver of its zoning laws did not extend to the construction of a solid waste rail transfer facility. Rather, it was based on the understanding of BHR and other parties to the settlement that future development of railroad operations on Parcel D would be similar to the rail-to-truck and truck-to-rail transloading and related services on Parcel A for commodities other than MSW and C&D. Consequently, the waiver does not extend to rail structures comprising a solid waste rail transfer facility, and the L1 and A1 zoning restrictions would prohibit such construction despite the presence of the 2016 settlement. It is my understanding that changing the zoning laws would require legislation, and that the Town does not believe it could be enacted in time for the closure of the Town’s landfill in 2024. It is also my understanding that the Town has a process by which a party could seek a special use permit that could change the zoning designation but that this process also could not be completed in time.

**James R. Newell**  
121 Kingfisher Drive  
Ponte Vedra Beach, Fl. 32082

Cell Phone 646-302-1432

EMAIL: [jnewell@oaklandtransportation.net](mailto:jnewell@oaklandtransportation.net)

**SUMMARY:** Over 54 years of Transportation Operations including all phases of Budgets, Cost Analysis, Logistics, Asset Utilization, Supply Chain Management, Manpower, Safety, Engineering, Mechanical, Labor Relations, and Network train movements. Directed and maintained measurements to ensure all objectives and company goals were being attained. Has expert skill in crisis management, disaster recovery, and technical improvements of rail operations. Directed and managed reroutes of train operations interacting with all other Class 1's, Regional Railroad's and Short Line Railroads. Managed and developed new entity of Brookhaven Rail Terminal on Long Island New York including long term strategy, business development, Safety, and Operational issues. Owned and operated two other personal business entities.

**EXCEPTIONAL ACOMPLISHMENTS:** Transportation Manager for the first successful Business Unit on CSX Transportation. Designed and implemented two new divisions of CSX in Nashville, Tennessee and Cumberland, Maryland. Designed and implemented the operating plan that opened the traffic flows from the acquisition of Conrail by CSX and NS in 2000/2001. Designed the plan and implemented the "Engineering Jamboree" on CSX resulting in \$3,500,000.00 savings in the first year. Designed, directed, and implement train operations, security, and logistics in Atlanta, Georgia during the 1994 Olympic Games receiving high accolades from the President and CEO of CSX. Directed train operations during B&O Double track project. Owned and operated First Cartage Services bringing the company from the beginning of bankruptcy at 3% of business to handling 99% of the business in two years.

#### EXPERIENCE

|               |                                                                                                   |
|---------------|---------------------------------------------------------------------------------------------------|
| 05/20-Present | Rail Consltant to Winters Brothers Waste and Brookhaven Rail                                      |
| 2011-05/20    | President, Brookhaven Rail, LLC and Chief Operating Officer, Oakland Transportation Holdings, LLC |
| 2004-2011     | President TLA Rail Logistics                                                                      |
| 2003-2004     | General Mgr Network Operations CSX, Jacksonville, Florida                                         |
| 2002-2003     | Division Manager Atlanta, Ga.                                                                     |
| 2001-2002     | General Manager Network Operations, CSX, Jacksonville, Florida                                    |
| 2000-2001     | General Manger Cumberland Division, CSX, Cumberland, Maryland                                     |
| 1998-2000     | General Manager Network Operations, Jacksonville, Florida                                         |
| 1997-1998     | Superintendent-Operations, B&O Double Track Project, Jacksonville, Florida                        |
| 1996-1997     | Superintendent-Transportation, Atlanta Service Lane, Jacksonville, Florida                        |
| 1994-1996     | Division Superintendent Nashville and Atlanta Divisions                                           |
| 1992-1994     | Asst. Division Superintendent, Atlanta Division, Atlanta, Georgia                                 |
| 1991-1992     | Superintendent Operations, Fertilizer Business Unit, Tampa, Florida                               |
| 1990-1991     | Terminal Superintendent, Tampa Division, Mulberry, Florida                                        |
| 1978-1990     | Trainmaster, Tampa Division including Phosphate Territory of Bone Valley                          |

#### EDUCATION

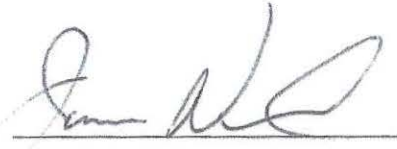
|      |                                                          |
|------|----------------------------------------------------------|
| 1997 | Jacksonville University, Masters Business Administration |
|------|----------------------------------------------------------|

### Verification

I, James Newell, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed: July ~~24~~<sup>26</sup>, 2020

A handwritten signature in dark ink, appearing to read 'James Newell', is written over a horizontal line.

James Newell

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD 36399**

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**BROOKHAVEN RAIL LLC – PETITION FOR EXEMPTION FROM  
REQUIREMENTS OF 49 U.S.C. §10909**

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**VERIFIED STATEMENT OF WILLIAM FLOWER**

My name is William Flower. I am the Vice President for Corporate and Public Affairs for Winters Brothers Waste Systems of Long Island (“Winters Bros.”). Winters Bros. is a privately held family owned and operated premier solid waste management and recycling company based in West Babylon, New York. Winters Bros. and its predecessor family-owned and operated companies have been providing solid waste collection, recycling, transport and disposal services on Long Island since 1950. I have held this position since March 1, 2015. I have worked in the solid waste management industry for more than 36 years, which have included holding various positions at national waste management companies. Prior to my work in the private sector, I served at the Illinois Environmental Protection Agency (“IEPA”). I worked at the IEPA for 7 years in the Director’s Office as a Public Information Officer. A copy of my resume is attached to this statement.

In addition to this work experience, I am a member of the Solid Waste Association of North America, and also represent Winters Bros. in the National Waste and Recycling Association, which provides me with the opportunity to follow developments in the industry as well as regulatory initiatives. Through this work and service experience I have become very familiar with solid waste management operations, regulations and policy.

This Verified Statement is offered in support of the Petition for Exemption of Brookhaven Rail LLC (“BHR”) in Docket No. FD 36399 seeking a ruling from the Board that BHR should be exempted from a zoning law of the Town of Brookhaven that would otherwise prevent the construction of a solid waste rail transfer facility (the “Facility”) to be owned by BHR and operated by Winters Bros. as BHR’s contract operator. On May 11, 2020 the membership shares in BHR were acquired by Shamrock Rail, LLC (“Shamrock”), a non-railroad affiliate of Winters Bros. However, BHR’s status as an independent Class III short line railroad was unchanged. Winters Bros. has also contracted with the owner of Parcel D of the Brookhaven Rail Terminal Site (“BRT”) for Shamrock or another Winters Bros. affiliate to acquire Parcel D for rail development. The purchase of Parcel D is expected to be consummated later in 2020. Upon Shamrock or another affiliate acquiring Parcel D, it will lease to BHR the approximately 50 acres of land on the southern end of the Parcel D required to construct the Facility, as well as the land necessary to construct the associated railroad tracks leading from a connection with the Long Island Rail Road (“LIRR”) on the north end of Parcel D southward to the Facility.

I have been and remain directly involved in all facets of the planning, design and implementation of the Facility in conjunction with BHR. As planned, BHR will construct and own the Facility and will conduct all rail operations to and from the Facility. BHR will also coordinate rail operations at the Facility with Winters Bros., who would be BHR’s contract

operator of the Facility for purposes of handling incoming waste, processing it, and loading into railcars or trucks. Winters Bros. is the largest solid waste management company providing services to private and municipal customers on Long Island. Our operations presently include collection, processing, recycling, truck transport and disposal of municipal solid waste ("MSW"), putrescible waste, construction and demolition debris ("C&D"), recyclables and document destruction (shredding/recycling). Winters Bros. owns and operates solid waste management facilities that include eight transfer facilities and six recycling facilities. Winters Bros. operates these solid waste facilities for and on behalf of municipalities, including: the Town of Brookhaven Materials Recovery Facility, the Town of Babylon Commercial Garbage District, the Town of Oyster Bay transfer station and the City of Glen Cove transfer station. Winters Bros. also provides recycling services to the Town of Islip, the Town of Smithtown and numerous villages across Long Island.

In regards to the proposed Facility, the need for it, and its planned operations, I am a founding member of the Long Island Solid Waste Leadership Council ("LISWLC"), which is now working under the direction of the Long Island Regional Planning Council to devise solutions to Long Island's solid waste management crisis, which is the acute lack of adequate solid waste transport and disposal capacity on Long Island. The goal of the LISWLC has been to identify the issues, present action items to address the issues, and take actions to implement solutions in a collaborative approach of industry and municipalities. Resolving the waste transport and capacity crisis is a top priority of the LISWLC.

More specifically, Long Island, consisting of Nassau and Suffolk Counties, has a population of approximately 2.8 million people who generate around 7,100 tons of municipal solid MSW and C&D each day. This amounts to approximately 2.6 million tons of MSW and C&D

each year. As a result of law and regulations to protect Long Island's sole source aquifer water supply, there are no landfills on Long Island that accept putrescible MSW (waste subject to putrefaction or decay) for disposal. MSW generated on Long Island is either incinerated in one of the four energy from waste facilities on Long Island or transported off the Island by truck for disposal in landfills in New Jersey, Pennsylvania, Ohio, Virginia, West Virginia, and upstate New York. Everyday thousands of tons of waste is transported off the Island by truck. Some C&D is already shipped off the Island by rail, but the two-existing waste transload facilities shipping that waste are operating at capacity. Each day hundreds of 20-24 ton trucks haul thousands of tons of solid waste and other waste (C&D, recyclables, yard waste, etc...) off of Long Island for disposal.

There are only two landfills on Long Island that accept C&D for disposal. One is the Town of Brookhaven's municipal landfill, which is also located approximately one mile from the BRT in Yaphank. The Town's landfill is scheduled to permanently close in 2024 and a new landfill will not be created to replace it. Each year, the Brookhaven Landfill accepts approximately 2,000 tons of dredge spoil, 24,000 tons of street-sweeping refuse, 350,000 tons of incinerator ash, and more than 700,000 tons of C&D waste generated throughout the region, from New York City to Montauk. The imminent closure of the Brookhaven Landfill necessitates that Long Island must quickly develop a means to efficiently process and dispose of that waste. Trucking has been the primary mode of hauling waste off Long Island since the 1980s. However, a single truck is only capable of hauling between 20 and 24 tons of waste at a time. The thousands of trucks that are needed to haul MSW and C&D waste off of Long Island make existing highway congestion worse, accelerate the deterioration of road and bridge infrastructure, and severely impact air quality in an already non-attainment region. Trucking alone is simply not an efficient and environmentally acceptable means of managing the huge volumes of Long Island's waste long term.

On the other hand, a single railcar can carry 100 to 105 tons of waste; whereas it would take approximately 44,000 truckloads to transport one million tons of MSW and C&D waste, the same amount of waste could be transported in only 9,523 railcars while freeing up highway infrastructure and capacity. As a result, the use of railroads to move waste off Long Island is more efficient, and environmentally friendly as it would reduce truck traffic and greenhouse gas emissions. The proposed solid waste rail transfer facility would therefore provide long overdue railroad transport and disposal capacity for the MSW, C&D, and other waste produced by the inhabitants of Long Island.

The facility will be constructed on approximately 50 acres of land at the southern end of Parcel D, with access to Horseblock Road, directly across the road from the present Town of Brookhaven solid waste management complex. The facility will have the capacity to accept C&D, MSW and recyclables, provide sorting and processing, then compaction of the waste which comes in by truck to be transloaded into railcars and shipped out to off Island permitted disposal facilities. The first of three planned phases will involve approximately 2,000 tons per day of mostly C&D, and within five years of operation expand to 6,000 tons per day of C&D as well as MSW. The facility will have significant capacity to serve a wide range of private waste collectors and municipalities. Most importantly this facility will not only provide needed transport and disposal capacity for Long Island, the use of freight rail to ship waste off Island presents a far more efficient and environmentally sound means of transport as compared to tractor trailer trucks. We anticipate each railcar will take four to five trucks off the severely congested highways on Long Island and over the New York City metropolitan region and the aging and overburdened roads and bridges. The proposed facility is therefore a critical piece of environmental infrastructure needed for Long Island at the earliest possible time.

Finally, Winters Bros. has engaged in an active and ongoing dialogue with affected parties, most significantly the Town of Brookhaven, which supports the Board's intervention to preempt the Town's zoning law and permit the construction and operation of the facility in these unique circumstances. Winters Bros. has also engaged with other affected state and local entities, including the New York State Department of Environmental Conservation, in order to gather feedback, consensus and support for the project.

# Will Flower

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## Career Summary

Executive leader with excellent leadership, managerial and communication skills. Expertise in operations, strategic business development including M&A, project management, marketing, crisis management, legislative affairs, internal and external communications, and administration.

## Professional Experience

### 2015 - Current                      Winters Bros. Waste Systems

Vice President – Corporate and Public Affairs (2015 to current)

- Serve as a member of the senior management team that is focused on successfully growing the business by providing the highest quality of customer services and satisfaction.
- Create a culture of safety throughout the organization.
- Accountable for the image and reputation of the Company on Long Island with State and local governments, civic and environmental organizations, and the business community.
- Represent the company before large and high-profile customers to promote the positive image of the organization.
- Manage government and regulatory affairs for operations on Long Island including compliance within the waste collection, recycling and transfer station operations.
- Ensure proper policies are in place and maintain compliance with laws and regulations.
- Work to improve operational efficiency and provide leadership, direction and motivation to staff.

### 2013 - 2015                      Green Stream Recycling, LLC.

President

- Develop the vision and growth strategy while being accountable for the overall financial management and the operating activities of the company.
- Establish and monitor key performance indicators against milestones and goals.
- Provide regular updates to the Board of Directors on company progress in executing the company's strategic plan.
- Ensure proper policies and programs are in place and maintain compliance with laws and regulations.
- Plan and budget for day-to-day operations and capital expenditures.

### 1999 - 2013                      Republic Services, Inc.

Senior Vice President – Communication (2011-2012)

Executive Vice President – Communication (2008-2011)

Vice President – Communication (2000-2008)

- Serve as the chief communications officer at the Company's corporate office in Phoenix, Arizona.
- Managed special projects including the Annual Report, Annual Stockholders' Meeting, and quarterly earnings conference calls with analysts. Oversaw

development of sustainability reports and coordinated development projects including controversial landfill expansion efforts and Greenfield development projects.

- Managed external and internal communications, regulatory relations, image enhancement, crisis management, community relations and philanthropic programs. Required the use of a variety of communication tools including media relations, press releases, speech writing, letter writing and the development of message points, fact sheets and newsletters.
- Developed marketing strategies and produced printed and electronic material including marketing brochures, customer and employee newsletters, videos, informational kits, news releases, web sites, social media and print advertising.

#### General Manager - Republic Services of New York (1999-2000)

- Manage the overall operations and financial reporting for a transfer station generating approximately \$35 million in annual revenue.
- Oversee supervisor staff on a day-to-day basis operating a 24 hour per day, six day a week, transfer station with average throughput of 2,400 tons per day transfer station.
- Maintain compliance with all applicable rules, permits and regulations.
- Interact with local and state regulators including New York City Department of Sanitation, New York City Trade Waste Commission, New York City Department of Environmental Protection and New York State Department of Environmental Conservation.
- Manage labor relations including contract negotiations, arbitration and issue resolution.
- Review facility logistics including transportation issues (rail and truck), negotiate trucking agreements and review billing/invoices prior to payment.
- Review purchasing decisions.
- Oversee maintenance operations to ensure the cost effective and reliable operation of fixed equipment and rolling stock.
- Review daily reports on facility operations including volume, income, expenses and transportation costs.

#### Manager Business Development - Republic Services of New York

- Introduced Republic Services in the New York City marketplace using advertising, municipal marketing and select meetings with local and State officials, regulators and business people and organizations.
- Responded to requests for proposals and bids from potential customers and governmental entities including the New York City Department of Sanitation.
- Increased commercial waste volume at transfer station by 304 percent and successfully raised tip fees.
- Assisted with acquisition activities and company integration following acquisitions.
- Negotiated transportation via truck and rail to internalize the flow of waste to Company landfills.

1990 - 1998

Waste Management, Inc.

#### Division Manager - Waste Management of Long Island (1998)

- Selected to lead the acquisition and operation of one of the largest waste-hauling firms on Long Island with approximately \$20 million in annual revenue and 64 employees.
- Implemented controls and procedures at four facilities including a transfer station, construction and demolition facility, compost operation and wood

processing facility. Also implemented compliance program for OSHA regulations.

- Oversaw design, construction and permitting of a new \$2,000,000 transfer station and numerous site improvements including new scales, traffic flow and material processing. Project completed on time and within budget.
- Negotiated with local government officials to establish, permit and open a new 40-acre yard waste management facility in Riverhead, New York.

Vice President – Communications and Community Relations (1996–1998)

- Developed and managed the communication and business strategy for market entry and growth of the company in New York City. Implemented business plan that increased annual revenue from \$135 million to \$200 million during the first 12 months of operation.
- Testified before the New York City Council and at numerous public hearings regarding solid waste, recycling, business growth and other industry matters.
- Managed external and internal communications, regulatory relations, image enhancement, crisis management and philanthropic programs.
- Developed advertising and marketing strategies and produced printed material including business brochures, customer and employee newsletters, informational kits, news releases and print advertising.
- Represented the company at national, regional and local conferences, hearings and events presenting platform speaking, round table discussions and written and oral testimony.
- Worked on major business development projects involving the closure of the Fresh Kills Landfill resulting in the successful award of two contracts from the NYC-DOS valued at \$88 million and \$133 million.

Director of Community Relations – Midwest Group (1990 – 1996)

- Directed all community relations and public affairs activities for a ten-state region with annual revenue exceeding \$1.4 billion.
- Served as the region's chief communications officer working with national, regional and local news media.
- Conducted public meetings and hearings and testified on regulatory and business issues including the siting of landfills, transfer stations and compost facilities.
- Conducted training for managers on reputation issues in an effort to enhance and protect the company's image among customers and regulators.
- Oversaw the development of numerous publications including internal newsletters, external brochures, fact sheets and other printed material.

#### 1983 – 1990                      Illinois Environmental Protection Agency

Public Information Officer - Director's Office (1985-1990)

- Promoted statewide environmental program through the development of news media relations, writing news releases, scheduling and hosting press conferences and extensive public speaking.
- Assisted senior staff in developing, implementing and evaluating Illinois' air pollution control program. Monitored air quality and issued public advisories during periods of excessive air pollution.
- Acted as the media and community contact for emergency response and chemical safety. Responded to spills, train derailments and industrial accidents involving hazardous materials.
- Served as the State contact for the federal Community Right-to-Know program and other key regulatory initiatives including vehicle emission testing,

emergency response, legal enforcement, household hazardous waste collection projects and air pollution control.

Graduate Public Service Intern (1983-1985)

- Served as an intern at the IEPA working on a variety of programs and projects in the divisions of air, land and water and the departments of public information, emergency response and community involvement.

**Education**

1983 - 1987                      University of Illinois at Springfield

Master of Public Administration

1979 - 1983                      Bradley University, Peoria, IL

Bachelor of Science

**Professional &  
Philanthropic**

Solid Waste Agency of North America

- Member of the International Board of Directors (2004 – 2018)
- Recipient Lifetime Membership Award (2018)

American Red Cross – Grand Canyon Chapter

- Board Member (2008 – 2012)
- Vice Chairman of the Board (2011-2012).

Keep Phoenix Beautiful

- Board Member (2008 to 2012)
- Chairman of the Board (2011 - 2012)

Waste Advantage Magazine

- Editorial Advisory Board (2011 – Current)
- Contributing writer (Safety Series) – Monthly article about safety in the solid waste and recycling industry.

Waste 360 – On line

- Contributing writer – Regular column entitled the Waste Advisor which provides insights on all aspects of recycling (2013 – 2016)

Bayville Fire Company

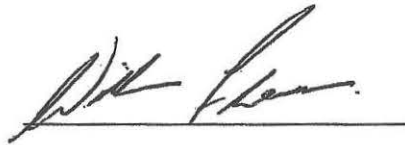
- Volunteer Firefighter – Certified Class A Interior Firefighter
- Lieutenant – Responsible for strategic response, execution of orders, and hands-on operations during emergencies. Also responsible for fire ground safety, crew training, emergency response preparation, and the readiness of fire apparatus.
- Trustee (2017 to 2019) – Served on the Board of Trustees, which oversees the administration, business and finances of the fire department.

### Verification

I, William Flower, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed: July 22, 2020

A handwritten signature in black ink, appearing to read "William Flower", is written over a horizontal line.

William Flower

## **CERTIFICATE OF SERVICE**

I hereby certify that, on this 27th day of July 2020, a copy of the foregoing Petition for Exemption was served by email on all parties on the official Service List for this Proceeding, and by email on the following additional persons:

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Perry B. Duryea State Office Building  
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Thomas W. Wilcox