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DOCKET NO. FD 36399

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

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

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Sills Road Realty LLC (“SRR”), Brookhaven Terminal Operations LLC, and Brookhaven Rail Freight Services LLC (collectively, the “Sills Parties”) hereby respond to the Petition for Exemption (the “Petition”) filed in this docket by Brookhaven Rail LLC (“BHR”) on July 27, 2020. Through an individual petition pursuant to 49 U.S.C. § 10502(a), BHR seeks an exemption from Surface Transportation Board (“Board”) that would allow BHR to bypass the formal requirements of 49 U.S.C. § 10909 and the corresponding regulations at 49 C.F.R. part 1155, subpart C in obtaining a land-use-exemption-permit (“LUEP”) to construct and operate a solid waste rail transfer facility (“SWRTF”) in Brookhaven, New York. The proposed SWRTF would be an integral part of a proposed railroad line construction project that is the subject of a pending construction petition for exemption in FD 36398.

For the reasons discussed below, the Petition should be rejected as contrary to the purpose and intent of 49 U.S.C. §§ 10501(c)(2)(B), 10908 and 10909, which – (a) limit the invocation of the Board’s LUEP processes to situations where the applicant can demonstrate that the relevant state or local jurisdiction is unwilling (whether through purposeful inaction or outright denial) to permit a SWRTF under applicable zoning or similar land use permitting laws or regulations; and (b) expressly restrict both the Board’s jurisdiction over an SWRTF as well as

the Board's discretion to override state laws, regulations, orders, and other requirements affecting the siting of such a facility to permit the construction and operation of an SWRTF. At the very least, the Board should postpone action on BHR's request for an LUEP, even if BHR's substantive procedural deficiencies as discussed herein are later addressed and corrected, due to lingering, unresolved legal disputes informing whether or not BHR has, or will ever, secure the legal right to take possession of Parcel D (the parcel of land upon which the proposed waste transfer facility is to be constructed) and to develop a rail terminal operation upon it.

If the Board were to decide that the Town of Brookhaven should be relieved of its obligations to consider and approve of the proposed SWRTF in the ordinary course under the municipality's special use permit processes (which BHR indicates the Town would be willing to do), then Congressional intent requires that BHR re-present its case in keeping with the Board's LUEP application procedures. It is only through an LUEP application that the Board could make the requisite finding that the proposed facility would "not pose an unreasonable risk to public health, safety, or the environment," considering the "particular facility's potential benefits to and the adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail." 49 U.S.C. § 10909(c)(1).

BACKGROUND

This Petition arises as part of a plan to develop a parcel of land (known generally as Parcel D) located in Brookhaven, New York, into a rail terminal that would function primarily to support a waste transfer facility that BHR's owner – Winters Bros. Waste Systems of Long Island, LLC ("Winters") – plans to construct and operate at that location. The parcel of land itself, and its proposed development, is among the subjects of extensive litigation involving

BHR, the Town of Brookhaven, and the Sills Parties. About a month prior to filing the subject Petition, BHR filed for authorization to construct and operate certain lines of railroad within the confines of Parcel D. BHR indicated at the time that it would be seeking a Board-issued LUEP under a separate individual petition for exemption proceeding.

The Sills Parties responded to the railroad line construction petition, noting that Board action would be premature pending an appropriate request for an LUEP, and identifying various issues arising under related state and federal court proceedings – also pertinent here – that support deferred action on the construction petition unless or until adequately resolved in other fora. The Sills Parties also had pointed out to the Board that BHR’s railroad construction petition concealed BHR’s objective to use federal preemption leverage to overcome legal impediments to BHR’s Parcel D development aspirations – a point that BHR did not refute. Those same unresolved legal issues impeding BHR’s Parcel D development plans (and those of Winters) are equally applicable here.

Until BHR filed its railroad line construction petition in FD 36398, Parcel D was intended to be developed as integral to a railroad terminal operation known generally as the Brookhaven Rail Terminal (“BRT”), which includes Parcels A, B, C and D, as discussed in the Petition. The Sills Parties’ interest in this proceeding stems from its ownership or control of Parcels A through C, and its plans for the comprehensive development of Parcels A through D as a railroad terminal facility known as the BRT. Their collective interest also arises out of the “2016 Settlement” (discussed below) and related federal district court litigation in which it and BHR are essential parties, including the Negative Declaration issued by the Town of Brookhaven stemming from an environmental review related to the development of Parcel D as then proposed

(among other things). The Sills Parties are committed to BRT development in keeping with the 2016 Settlement, which BHR's Parcel D development plans would not accomplish.

ARGUMENT

The Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 ("CRA") was enacted specifically to restrict the jurisdiction of the Board over an SWRTF. As relevant here, the CRA amended 49 U.S.C. § 10501(c)(2), engendered the Board's corresponding regulations at 49 C.F.R. Part 1155, subpart C, and entrusts the Board with discretion in limited circumstances to override state or local land use or zoning decisions (or calculated inaction) intended to deny a railroad carrier of developing an SWRTF, provided that the agency has been able to ascertain that the proposed facility would not "pose an unreasonable risk to public health, safety, or the environment."¹ Neither the CRA nor the Board's LUEP regulations contemplate that the agency's limited authority would be used as a means to bypass ordinary state and local land use permitting processes where they can be employed without Board intervention to facilitate the construction and operation of a railroad-operated solid waste transfer facility.

This proceeding marks the *very first* attempt by a railroad carrier to obtain an LUEP of any sort, as BHR admits. Accordingly, this proceeding can and should serve as a roadmap for any future LUEP applications. It is therefore imperative that the Board assess whether BHR's Petition meets the preliminary criteria for agency action under the CRA, and, if it does, determine whether or not BHR has offered sufficient information to enable the Board to comply with the CRA's public health, safety and environment mandate. BHR's Petition fails on both counts. It is, first and foremost, an attempt to persuade the Board to commit its resources to

¹ Section 10909(a)(1) and 49 C.F.R. 1155.26(b)(1).

an LUEP process that BHR has concocted (evidently with the complicity of the Town of Brookhaven) to transfer the rigors of land use permitting from the Town of Brookhaven to the Board unnecessarily. Because the Town can, and evidently would, grant the requisite land use permit to BHR without Board involvement, the CRA mandates that Winters should apply for such relief from the Town, and that the Board should defer to local land use permitting in such an instance.

And even if the Board were to conclude that the circumstances surrounding BHR's Petition nevertheless warrant further administrative action toward a possible LUEP, the Board should reject the Petition for its failure to comply with the application procedures at Part 1155, subpart C. Again, the CRA deprived the Board of jurisdiction over an SWRTF except in situations where land use permitting/siting would block a proposed new facility or the continuation of operations at an existing SWRTF, and the statute entitles the Board to override land use permitting obstacles only where the agency has balanced the project's potential benefits and harms to the environment, safety, public health harms, interstate commerce, and transportation of solid waste by rail. The Petition, however, evades the CRA analysis by seeking to replace it with the individual exemption standards of 49 U.S.C. § 10502, which involves no such balancing test. For these reasons, the Board should reject the Petition.

I. Because the Town of Brookhaven Is Capable – And Evidently Willing – To Grant BHR A Special Use Permit To Facilitate SWRTF Construction, Board Intervention Is Unwarranted.

As a threshold matter, Section 10909 permits the Board to issue an LUEP in three separate circumstances as follows:

- (1) a proposed facility has been denied its state application for a permit that affects the siting of a facility, or received an otherwise unsatisfactory result from the state, including inordinate delay, and that facility attempts to demonstrate, as noted above, that the state is

placing an unreasonable burden on rail transportation of solid waste, or that the state is discriminating against railroad transportation of solid waste and the facility; (2) a rail carrier that owns or operates an existing facility or plans to own or operate a new facility petitions the Board for a land-use-exemption permit without first receiving an unsatisfactory result from the state; or (3) a state petitions the Board to require an existing facility to apply for a land-use-exemption permit.²

Moreover, the Board has explained that the LUEP process contemplated under Section 10909 –

[Entitles] a facility that has first applied to the appropriate state agency for those state permits affecting the siting of a facility and that has received an unsatisfactory result to apply to the Board for a land-use-exemption permit. After receiving an unsatisfactory result from the state, a solid waste rail transfer facility could apply to the Board for a land-use-exemption permit. It must, however, make at least one of two showings with regard to the state’s action or the state law: (1) the state has placed an unreasonable burden on railroad transportation of solid waste, or (2) a state law discriminates against railroad transportation of solid waste and a solid waste rail transfer facility.³

Clearly, scenarios 2 and 3 from the first of the two above-quoted passages from *Rail Transfer-1*, are inapplicable, since the proposed Parcel D development has not yet occurred and there is no existing SWRTF. Scenario 1, however, does not exist, either, and BHR as much as admits that this is true.⁴ There is no “unsatisfactory result from the state” warranting an LUEP override, and BHR has alleged no “inordinate delay” in the steps necessary to permit the proposed SWRTF under ordinary local permitting processes. BHR reports that “the Town [of Brookhaven] 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.” Petition, 3. It appears that the Town of Brookhaven is willing to amend “its zoning law that currently prevents solid waste rail transfer facilities from being constructed on Parcel D” to permit the

² *Solid Waste Rail Transfer Facilities*, EP 684 (STB served Jan. 14, 2009) (“*Rail Transfer-1*”), 10 (citing to 49 U.S.C. § 10909(a)).

³ *Id.* at 8.

⁴ “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.” Petition, 26.

construction of such a facility to move ahead. *Id.* Indeed, BHR admits to the existence of a path to local land use permitting: “The Town does have a process by which a party could seek a ‘special use permit,’ that could change the zoning designation.” Petition, 19.

BHR has invoked the LUEP procedures *despite* the absence of any insurmountable state or local land use/zoning obstacle (or purposeful foot-dragging by those who could otherwise permit the facility). The affected community allegedly would welcome the SWRTF, and it is empowered to grant a special permit or otherwise amend its local zoning ordinances to facilitate BHR’s project. As such, the essential CRA predicate for Board intervention is missing. In fact, BHR and the Town perceive the local permitting process, with its public comments and municipal leadership deliberations, as a time-consuming bother, which they hope to avoid by way of a Board-ordered shortcut of the local land use permitting processes.

BHR claims without any supporting details or an explanation for its assumptions that it is “‘highly unlikely’ that the legislative process for amending the Town of Brookhaven’s zoning law” would move more quickly than would a Board-administered LUEP process. *Id.* BHR’s resort to the LUEP process wrongly assumes that the Board is both willing and able under the CRA to short-circuit the Town’s special permit and zoning amendment process in order to facilitate the development of the SWRTF faster than state processes otherwise would allow. But the CRA does not extend to SWRTF proponents a Board-facilitated alternative to local permitting processes as a matter of convenience to permit local land use authorities to evade the sometimes difficult and dirty work of reviewing an application for and, as appropriate, conditioning the approval of the construction of a solid waste transfer facility. Where local land uses processes can work to permit the construction and operation of an SWRTF, the Board lacks statutory authority to intervene, and should not serve as a surrogate for local decision makers.

BHR suggests that it would be time consuming for the Town to make a legislative change to the applicable zoning designation for Parcel D, but fails to explain why such a change would be necessary. BHR concedes, as it must, that Winters could apply for a “special use permit” to construct and operate a waste management facility on Parcel D.⁵ Presumably, BHR is referring to an application to the Town Board pursuant to Town Code § 85-80 to change the zoning for Parcel D to “L Industrial 2” (“LI2”) combined with an application for a special use permit under Brookhaven Town Code § 85-579 which specifically permits applications for “transfer stations” in the LI2 District. Section 85-80 provides that “The Town Board may, from time to time, on its own motion, on recommendation of the Department of Planning, Environment and Management or on application, amend, change, supplement, modify or repeal the regulations, restrictions, district boundaries and provisions of this chapter, including the Zoning map, after public notice and hearing.” Brookhaven Town Code § 85-80. The Town has specific criteria for granting transfer station special use permits under Town Code § 85-581.

BHR claims, without any support, that it “understands” that the process for seeking a special use permit to change the zoning designation for Parcel D (as opposed to amending the Town’s zoning laws) “could also not be completed in time.”⁶ The Town Code, however, provides that an application for a zoning change can be made directly to the Town Board on notice to surrounding property owners, at which point the Town Board will set a public hearing. See Brookhaven Town Code §§ 85-87 (“Whenever the Town Board, on its own motion or upon recommendation of the Department of Planning, Environmental Protection, and Land Management, shall consider any change of zoning classification, the resolution setting a date for

⁵ Petition, 19. Winters would naturally need to demonstrate that it has secured title to Parcel D or is proceeding with the consent of the owner of Parcel D.

⁶ Petition, 19.

a public hearing shall contain a clause requiring that the owners of all property within the boundaries of the property proposed to be changed in zoning classification and all property owners immediately adjacent and directly opposite thereto for a distance of 500 feet from the perimeter of the property proposed to be changed in zoning classification to be notified of the proposed change, except as hereinafter provided.”). BHR has not cited any reason that a public hearing could not be scheduled forthwith particularly if the Town Board is in favor of the application as BHR suggests.

BHR’s real concern may be that the Town’s review process under the New York State Environmental Quality Review Act (“SEQR”) might be time-consuming, but it has not cited any reason why its application would be any more time-consuming than any other application considered by the Town Board. This is particularly true considering that BHR claims that it is willing to comply with “the conditions and mitigation measures outlined in the 2016 Settlement Agreement, VDEIS, and Negative Declaration.”⁷ BHR, however, has not expressed any particular concern regarding the SEQRA process in its Petition let alone explain why the process would cause undue delays warranting a Board-issued LUEP.

BHR therefore acknowledges that it or Winters could apply to the Town for a special use permit, but BHR never explains why it hasn’t, other than to repeat its unsubstantiated claims that the process could “not be completed in time.” Petition, 19. BHR states that it has been “collaborating” and “cooperating” with the Town concerning the construction of a SWRTF since at least last fall,⁸ and so BHR could have filed a change of zone application with the Town months ago, but, inexplicably, it has not. The reason why neither BHR nor Winters has applied for a local zoning change, however, is evident: Winters hopes that the STB will short-circuit the

⁷ Petition, 20.

⁸ See BHR Response, 4 (filed in the FD 36398 proceeding on August 4, 2020).

zoning process under an LEUP, and the Town, for its part, would rather avoid going through the usual zoning processes if it can be avoided. According to BHR, the Town “acknowledges the need for the Board’s intervention to preempt the Town’s zoning law and permit the construction and operation of the [waste facility] in these unique circumstances.” Petition, 20. More accurately, Board intervention is not truly necessary; it is, rather, expedient. BHR’s and the Town’s demand for expedience, however, is odd considering that BHR and Winters do not even appear to have an agreement in place with the Town to provide the waste management services which BHR claims are so urgently needed in 2024.

While stripping the Board of jurisdiction for virtually any other purposes involving solid waste transfer facilities, the CRA reserved to the Board limited discretion to permit the siting, construction and operation of such a facility where state, local, or municipal law, regulation, order, or other requirement affecting the siting of that proposed facility has effectively blocked the project. Section 10909 was never intended as an expedient shortcut for land use/siting processes that, although cumbersome, are nevertheless workable, and, accordingly, the remedy BHR seeks is unavailable here. Furthermore, because the Town of Brookhaven is evidently willing and able to amend existing zoning ordinances to permit the construction of the proposed SWRTF, resort to the Board’s LUEP regulations would unnecessarily consume Board resources. The Town of Brookhaven should do its job in keeping with its state law mandate and require BHR to submit, and then act upon, a special use permit application, just as the CRA would expect the Town to do. Because the Town of Brookhaven can and should be expected to do its job (rather than attempt to pass the task off to the Board), the Board should reject the Petition.

II. BHR Must File An Application Under 49 C.F.R. Part 1155, Subpart C, Rather Than An Individual Petition For Exemption Under 49 U.S.C. § 10502.

BHR's ineligibility to request an LUEP aside, the Petition is substantively and procedurally deficient, and should be rejected on that ground, also. At no point in its Petition has BHR offered any support for the proposition that the Board could, or should, dispense with the LUEP application regulations at Part 1155, subpart C, the procedural and substantive requirements of which the Petition comes nowhere near to satisfying. Additionally, because the Board cannot authorize the construction of a solid waste facility, but instead may only offer an exemption from local land use obstacles under narrowly-prescribed circumstances, BHR has failed to demonstrate that the CRA would permit the issuance of an LUEP under the exemption standards of Section 10502.

In 2012, the Board adopted final rules implementing the agency's limited land use exemption mandate under the CRA.⁹ Pursuant to the CRA and the corresponding Board rules, an SWRTF must comply with all applicable federal and state requirements respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, in the same manner as any similar solid waste management facility not owned or operated by or on behalf of a rail carrier, except for laws affecting the siting of the facility that are covered by the land-use exemption permit. The Board's LUEP application process assures that the Board will sweep aside local permitting processes only where the agency is assured that environmental, safety, and public health considerations are adequately presented and considered. Specifically, for a railroad to obtain an

⁹ See *Solid Waste Rail Transfer Facilities*, EP 684 (STB served Nov. 20, 2012) ("Rail Transfer-3").

LUEP preempting state and local laws and regulations affecting the siting of a railroad-operated solid waste transfer facility, it must present sufficient evidence to permit the Board to find that –

- a state, local, or municipal law, regulation, order, or other requirement affecting the siting of such facility unreasonably burdens the interstate transportation of solid waste by railroad, or discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility (49 U.S.C. § 10909(a)(1)); and
- the proposed facility would “not pose an unreasonable risk to public health, safety,” considering the “particular facility’s potential benefits to and the adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail” (49 U.S.C. § 10909(c)(1)).

BHR’s Petition, however, would bypass the Section 10909-mandated analysis entirely, calling on the Board to issue an LUEP strictly under the Section 1052 standard that requires a more limited determination of whether application of the requirements of Section 10909 are necessary to carry out the Rail Transportation Policy set forth at 49 U.S.C. § 10101; and whether issuance of the LUEP would permit a “transaction” that is of limited scope or for which Board regulation is unnecessary to protect shippers from market power abuse. That is the exact standard that would have applied had BHR’s proposed waste transfer facility fallen under the ambit of rail line construction under Section 10901 in the first place, and Congress has strictly limited the Board’s jurisdiction over an SWRTF to the potential issuance of an exemption from state and local land use provisions in certain limited situations. Accordingly, because the Board lacks discretion to authorize SWRTF construction and operation, and instead is entrusted with the limited authority to override otherwise applicable land use or siting provisions on specific showing, Section 10909 deprives the Board of the discretion to de-regulate the construction and operation of waste transfer facilities – that is, to grant an exemption to what is itself, by definition, an exemption process.

Tacitly, BHR recognizes that its Petition is deficient. It is interesting that, in the very first ever LUEP proceeding initiated before the Board, BHR claims that “unique factual circumstances” warrant dispensing with the application process required under Section 10909, and resorts to an approval process applicable to transactions such as acquisitions of control of connecting carriers, railroad line construction, and railroad line abandonments where, in each case – unlike here where the relief is limited by statute to an exemption from local land use permitting – the Board has the jurisdiction and authority to authorize the undertaking itself. Petition at 27. However, anticipating that its filing won’t “meet the requirements of § 10502(a),” BHR asks the Board to allow it to “supplement this Petition with the additional information.” *Id.* While BHR is wise to doubt the adequacy of the information it has supplied, its concern and the suggested remedy both miss the point. The problem is not simply that BHR has failed to provide adequate information to secure an LUEP, but rather that it has limited itself to an inappropriate vehicle for obtaining an LUEP, where it should have presented an application complying with the informational requirements of 49 C.F.R. § 1155.21, and the procedural requirements of 49 C.F.R. §§ 1155.20 and 1155.22.

BHR’s Petition is also peculiar for evading any meaningful discussion of the burdens of complying with any or all of the application requirements at Part 1155, subpart C, and why it would be appropriate to grant BHR relief from the applicable regulations. What, specifically in the LUEP regulations is unduly burdensome or entails the supply of unnecessary or irrelevant information? BHR does not say. Instead, BHR attempts to justify its petition for an exemption from the CRA’s land use exemption requirements in terms of its haste to build and operate a waste transfer facility – a situation that is common to virtually any project presented to the Board for its authorization. Nearly all such projects are time-sensitive, and all would benefit

from speedier authorization and implementation, so, in that regard, BHR's project is common, not unique. But in light of the ongoing development of an Environmental Impact Statement required under the pertinent regulations (49 C.F.R. § 1155.24), a departure from the subpart C requirements is exceedingly unlikely to accelerate the Board's LUEP process or result in an earlier project delivery.

BHR has failed to show why it cannot comply with the Board's LUEP regulations, why compliance would be unduly burdensome or unnecessarily regulatory, or how Congressional intent behind the CRA supports the siting and operation of solid waste facilities under application of the Section 10502 exemption standard. In fact, if BHR is eligible to seek relief under the Board's LUEP process at all – and the previous discussion demonstrates that it is not – it should comply with the requirements of subpart C. Because it is abundantly apparent that the Petition does not comply with applicable regulations, it should be rejected out-of-hand.

III. The Board Cannot Expand Its Jurisdiction Over Solid Waste Rail Transfer Facilities By Way Of Its Section 10502 Exemption Authority.

The Board's role in the case of an SWRTF is strictly limited under the CRA to the issuance of an exemption allowing a railroad to override state and local land use restrictions in certain limited circumstances. Absent a showing that state or local land use processes are being used to thwart SWRTF development or operation, the Board has no authority to impose its jurisdiction at all. The Board cannot regulate an SWRTF as it would regulate, for example, the sale, operation, or abandonment of a railroad line, as BHR would have the agency do. Moreover, BHR offers no precedent supporting the idea that the strictures of the CRA should be swept aside by Section 10502's mandate "to remove regulatory burdens and to allow the marketplace to

influence decisions in the rail industry.”¹⁰ Ultimately, however, Section 10502 does not entitle the Board to expand its jurisdiction over an SWRTF beyond the scope of the CRA’s limited mandate, and, as such, the Board cannot grant the exemption that BHR seeks.

In an analogous circumstance, the agency has recognized the limitations of its Section 10502 authority where its regulatory jurisdiction is expressly limited by another statute. For example, in 1988, the Chicago South Shore and South Bend Railroad (“CSSSB”) “requested an emergency exemption under 49 U.S.C. 10505 [since re-codified as Section 10502] from the prior approval requirements of 49 U.S.C. 10908 [since repealed and later replaced with the current CRA provision] to suspend temporarily its interstate rail passenger service operations over approximately 90 miles of rail line between South Bend, IN and Chicago, IL,” specifically seeking permission from the Interstate Commerce Commission (the “ICC”) to bypass as a matter of expedience a notice of proposed passenger service discontinuance requirement under then-Section 10908.¹¹ Under then-Section 10908, a railroad was permitted “to discontinue or change part of its service ‘notwithstanding State law, regulation, order, or proceeding,’ subject to [the ICC’s] discretionary authority to conduct a proceeding[¹²] . . . [Section] 10908 was a preemptive provision which divest[ed] a State of jurisdiction over matters covered, rather than [having required] exhaustion of original State remedies.”¹³

¹⁰ *Brae Corp. v. U.S.*, 740 F.2d 1023, 1055 (1984) (“*Brae Corp.*”)

¹¹ *Emergency Petition of Chicago South Shore and South Bend Railroad Under 49 U.S.C. 10505 for Exemption from the Provisions of 49 U.S.C. 10908*, FD 31348, 1988 WL 224898, *1 (I.C.C. decided Oct. 28, 1988) (“*Emergency Petition*”).

¹² As with the ICC’s authority under then-Section 10909, the Board has the discretion under the CRA “not to preempt a law affecting siting” of an SWRTF. *Rail Transfer-3*, 8 (emphasis in original).

¹³ *Mendocino Coast Railway, Inc. – Discontinuance of Train Service in Mendocino County, CA*, FD 30820, 1987 WL 99463, *1, n. 3.

The ICC denied CSSSB's petition, holding that the agency lacked the authority under what is now Section 10502 "to grant an exemption from [then] section 10908 here."¹⁴ The ICC explained that, "To invoke the [ICC]'s jurisdiction and thereby terminate any State jurisdiction [over passenger service discontinuances], a carrier must first file a notice of proposed discontinuance as provided by [then] section 10908 . . . For the [ICC] to assume jurisdiction here based on the filing of a petition for exemption under section 10505 would result in the [ICC]'s expanding its jurisdiction through the use of its exemption power. Such use of the exemption power would be regulatory in nature rather than deregulatory and therefore is precluded."¹⁵

In keeping with *Brae Corp.* and *Emergency Petition*, the Board must recognize that BHR's attempt to invoke Section 10502's individual petition for exemption provisions to obtain an LUEP is a proscribed re-regulatory act. Similarly, those two cases demonstrate that the Board's exercise of Section 10502 authority in the context of a request for an LUEP would impermissibly expand the regulatory discretion of the Board over the construction and operation of an SWRTF beyond the purpose and intent of the CRA. Accordingly, the Board must find that it lacks the authority under Section 10502 to permit BHR to bypass the CRA's procedural and evidentiary prerequisites to a Board-issued exemption that would preempt land use/zoning obstacles to the construction or operation of an SWRTF.

IV. The Petition Involves A Project That Is Unready For Board Consideration.

Even if the Board were inclined to consider BHR's request for issuance of an LUEP, such Board action is premature for the same reasons supplied by the Sills Parties in response to BHR's railroad line construction petition for exemption in FD 36398. Thus, Board

¹⁴ *Emergency Petition*, *3.

¹⁵ *Id.* (citing *Brae Corp.*).

action should await resolution of issues currently pending before the state court¹⁶ and the federal district court¹⁷ concerning the development of the Brookhaven Rail Terminal (“BRT”) generally, and Parcel D specifically, including, among other things, active disputes over whether Winters has, and will ever obtain, sufficient legal rights in Parcel D to allow for BHR to construct the proposed railroad line and SWRTF. The unresolved legal issues arising in other fora are discussed below, and each matter should be fully adjudicated and resolved before the Board considers acting on the merits of the subject Petition in keeping with its past practice in related proceedings and elsewhere,¹⁸ assuming that the Board does not reject the Petition for the reasons supplied in the foregoing sections of this reply.

BHR tries to convince the Board that it is not involved in the federal district court litigation, but the Sills Parties’ current application before the district court alleges in no uncertain terms that BHR’s plan to eliminate the long-planned tunnel between Parcel C and D, and to secure alternate railroad access to Parcel D by building through the conservation easement on

¹⁶ *Sills Road Realty LLC v. Winters Bros. Waste Systems of Long Island, LLC* (N.Y. Supreme Court Suffolk County Index No. 6020508/2020) (Hudson, J.) (the “state court litigation”).

¹⁷ *Town of Brookhaven v. Sills Road Realty LLC, et al* (E.D.N.Y. Case No. 14-CV-02286) (JMA) (AYS) (the “federal district court litigation”).

¹⁸ *See, e.g., Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, FD 35819 (STB served Aug. 28, 2014) (holding the declaratory order proceeding concerning the status of track proposed to be constructed in the BRT and the scope of ICCTA preemption related thereto in abeyance pending the resolution of related issues before the U.S. District Court for the Eastern District of New York in E.D.N.Y. Case No. 14-CV-02286); *The Great Walton Railroad Company – Petition for Declaratory Order*, AB 1242 (Sub-No. 1) (STB served Jun. 9, 2020) (Board action on the question of whether or not a railroad could reconstruct ancillary track on a parcel of land was premature, and thus the proceeding was held in abeyance pending the outcome of ongoing court litigation which might establish whether the railroad possessed sufficient contract rights to construct the track); *Norfolk Southern Railway Company – Petition to Set Trackage Rights Compensation – Norfolk & Portsmouth Belt Line Railroad Company*, FD 36223 (STB served Jul. 25, 2019); *Ballard Terminal Railroad Company, L.L.C. – Petition for Declaratory Order*, FD 36261 (STB served Jun. 27, 2019).

Parcel D constitutes a “substantial breach” of the 2016 Settlement Agreement. BHR’s may claim that these issues are not before the district court, but that would be incorrect, considering that BHR and its affiliates have caused these issues to become front and center in the federal action by inserting themselves into the dispute between the Sills Parties and the Town.

On or about March 27, 2020, nearly two months after the Town served its Stop Work Order (“SWO”) on the Sills Parties, BHR’s then affiliates, Oakland Transportation Holding LLC (“Oakland”) and New York Site Operations, LLC (“NYSO”), the current owner of Parcel D, sent an unsolicited letter to Sills Road Realty, LLC (“SRR”) with a copy to the Town indicating that NYSO did not intend to allow for the construction of a tunnel between Parcels C and D. This caused the Town to claim that the NYSO’s decision to eliminate the tunnel constituted “substantially changed circumstances” potentially requiring a Positive Declaration in place of the Negative Declaration previously issued for Parcel B–D. The Town also indicated that it would require a Supplemental Draft Environmental Impact Statement in order to address what the Town described as a “substantial change in the planned Railway Expansion Project” caused by NYSO’s new position on the tunnel.

The Sills Road Parties maintain that BHR’s plan for alternate access to parcel D, which the Town describes as a “substantial change” and which BHR itself describes as a “notable exception” (Petition, 10), constitutes a breach of the 2016 Settlement and is not otherwise permitted by the VDEIS or the Town’s SEQRA Negative Declaration. These issues are squarely before the district court, and BHR and its affiliates have themselves made several

submissions, seeking to, among other things, clarify their position on the tunnel and to participate in a previously scheduled hearing on April 8, 2020.¹⁹

BHR's has also participated in district court-sponsored mediation, even though it has elsewhere attempted to suggest to the Board that it has not been so involved in the federal district court litigation. Judge Azrack, the district court judge presiding over the federal district court action, ordered BHR, Oakland and NYSO to participate in the mediation over their objection.²⁰ BHR also submitted a confidential *ex parte* settlement statement and participated in the first mediation session on May 26, 2020. If Judge Arack did not intend for the issues relating to the tunnel to be mediated, he would not have ordered BHR, Oakland and NYSO to participate.

On July 30, 2020 the Sills Parties filed with the district court, seeking permission to, among other things, supplement their pending motion to seek additional injunctive and/or declaratory relief relating to, among other things, Oakland's and NYSO's statements concerning the tunnel between Parcels C and D, and concerning BHR's more recent plans to construct track through and agreed-upon recorded conservation easement on Parcel D. A copy of the Sills Parties' filing to the federal district court is attached as Exhibit B. The district court judge thereupon directed the parties to the federal action to submit a joint briefing schedule. These issues are expected to be briefed by September 24, 2020, and thereafter adjudicated by the court.

As it did in the FD 36398 railroad line construction petition for exemption, BHR continues to dance around the issue of the proposed sale of Parcel D. New York Site Operations,

¹⁹ NYSO clarified its position by indicating that it did not intend to prohibit future owners, such as Winters, from building the tunnel. NYSO probably revised its position in order to insure that Winters and BHR would still have the option to access Parcel D as provided for in the 2016 Settlement in the event that the Board were to deny the present Petition. Winters and BHR are seeking to hedge their bets in the event Board does not grant BHR the extraordinary relief it is seeking.

²⁰ A copy of Judge Azrack's May 2, 2020 Order is included as Exhibit A.

LLC (“NYSO”), which is not affiliated with Winters or BHR, owns Parcel D. Although BHR states that the sale of Parcel D to “Winters Brothers or its designated affiliate [not BHR] is expected to be consummated later in 2020” (Petition, 12), BHR insists that the Board should be satisfied that BHR need not furnish any details of the proposed transaction, when it would occur, or what circumstances or preconditions, if any, need to be met or satisfied for the proposed transaction to take place. But BHR glosses over the undisputed fact that state court litigation addressing the central issue of whether any Winters entity may acquire Parcel D remains pending, which makes BHR’s continued evasion as to the details and timing of the Parcel D sale all the more suspect.

In the subject state court litigation, Winters stands accused of breaching a February 8, 2019 Nondisclosure Agreement with SRR (the “NDA”) concerning a joint venture under which SRR and Winters planned to purchase and develop Parcel D and other railroad assets. Winters agreed, among other things, that it would not – (i) enter into a transaction to purchase the real property and other assets that were the subject of the NDA without SRR; or (ii) use confidential information that SRR provided under the NDA to SRR’s detriment. Astonishingly, BHR concedes that it conferred with representatives of the Board’s Office of Environmental Analysis (“OEA”) while the NDA was in place to discuss the development of Parcel D, a clear breach of the confidentiality provisions of the NDA. It is unclear whether BHR advised the OEA of the NDA and the restrictions contained therein, including the confidentiality provisions. SRR is currently seeking an injunction from the state court prohibiting Winters from acquiring Parcel D in breach of its commitments under the NDA, and that issue remains pending. If SRR were to prevail, then Winters would be legally unable to acquire Parcel D, and further

Board action on this Petition, or in connection with the FD 36398 proceeding, would be unwarranted.

It is possible that Winters either expects to use a favorable STB ruling on the merits of its proposed railroad line construction to try to sweep aside the Sills Parties' state contract law claims as ICCTA preempted, or it may be that Winters is reluctant to commit to purchasing the parcel unless it obtains certain preliminary, favorable merits determinations in this proceeding and in FD 36398. Regardless, what is clear is that – (1) Winters does not own Parcel D; (2) BHR remains unable to offer a specific Parcel D sale date; (3) BHR could, but has decided not to, supply the Board with the agreement under which Winters would acquire Parcel D from NYSO; (4) whether Parcel D could be transferred to Winters is a matter of as-yet-unresolved litigation (the result of which could be that Winters is barred from acquiring Parcel D); and (5) without a clear path to Winters' acquisition of Parcel D, BHR's railroad line and SWRTF plans are moot, as would be Board action on both fronts.

BHR offers no explanation concerning when or how it expects to secure New York State legislative approval to build railroad track in the conservation easement on Parcel D. New York State law plainly requires BHR or Winters, if it ever takes title to Parcel D, to secure “direct” and “specific” approval for the alienation of previously dedicated parkland.²¹ It is unclear whether BRH and Winters have even started the process, considering neither holds title to Parcel D. If BHR and Winters were unable to secure New York State legislative approval to relocate or build through the easement, BHR would likely attempt to override the easement restrictions by claiming Board-authorized ICCTA preemption, if it could.

²¹ See *Avella v. City of New York*, 29 N.Y.3d 425, 431 2017 (“The approval of the legislature in alienating parkland must be ‘plainly conferred’ through the ‘direct and specific approval of the State Legislature’”) (internal quotations and citation omitted).

Finally, BHR appears to be intent to try to sweep away the unfolding federal and state court litigation, and the complications it faces in both venues, by trying to convince the Board that the proceedings are immaterial, and that its positions in those cases are the only ones with merit. While the courts (not the Board), are the arbiters of the pending legal and contractual issues that can, and likely will, have a substantive impact upon BHR's Parcel D development plans, BHR has incorporated its highly inaccurate take on those court proceedings, the significance of the 2016 Settlement, and the questionable continuing status of the VDEIS into its dealings with the Board's Office of Environmental Analysis ("OEA"). OEA materials unwittingly borrow from BHR's misleading and inaccurate statements. Of course, the Sills Parties intend to respond fully to OEA-generated materials at the appropriate time, but they are troubled by the inaccurate content of some of the OEA-issued materials, even though these understandably reflect OEA's largely one-sided consultations to date with BHR in developing solicitation materials in the furtherance of an EIS.

V. A Conditional Land Use Exemption Permit Is Contrary To The CRA And Analogous Precedent, And, Here, Is Sought As A Subterfuge.

As it did in its railroad line construction petition for exemption, BHR requests that the Board conditionally grant BHR's request for issuance of an LUEP, subject to the completion of environmental review. BHR couches its justification of such a bifurcated process on the basis of long-ago-repudiated agency past practice involving railroad line construction projects. BHR acknowledges that its request conflicts with controlling Board precedent in railroad line construction cases. Petition, 32 (citing to *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) ("Alaska")).

BHR is correct that *Alaska* ended the practice of bifurcated railroad line construction cases some 13 years ago (which, by itself, should be enough to end this discussion), but BHR also offers nothing in support of the idea of a conditional LUEP, other than a “presumption” that the Board might be willing to entertain a request for conditional decision making. *Id.* BHR’s presumption is baseless, and runs entirely counter to both the CRA – which contemplates a Board decision only after a full evaluation of public health, safety and environmental impacts – and the Board’s LUEP rules of procedure, which specify that the Board will render a merits decision only after “a full record is developed,” which includes the completion of a final EIS and comments responsive to that document. 49 C.F.R. § 1155.26(a). A conditionally-granted LUEP undercuts the Board’s mandate under the CRA and its own rules. BHR’s request for conditional approval must therefore be rejected.

As with its construction petition, BHR’s request here for a conditional LUEP conceals ulterior motives thinly cloaked in alleged urgency, just as BHR has used the same sort of arguments to conceal that, while the Town of Brookhaven supports siting of a SWRTF on Parcel D, the Town also would rather duck the steps necessary to grant BHR the land use relief it seeks out of political expedience in the hopes that the Board will take initiative instead. But the Sills Parties need not recount here in detail BHR’s concealed motives. They have already catalogued the issues and objectives that drive BHR’s conditional grant request in detail in reply to BHR’s railroad line construction petition for exemption, and, accordingly incorporate herein by attachment pertinent elements of the Sills Parties’ Reply in FD 36398. See Exhibit C.

CONCLUSION

WHEREFORE, the Sills Parties submit that the subject Petition should be rejected. BHR is not entitled to a Board-issued LUEP; such relief constitutes an unnecessary end run around local land use permitting processes that reportedly would sanction the proposed waste transfer facility. In addition, BHR's Petition and the standard for approval upon which it relies are unsuited for Board action under the CRA. Assuming, despite the foregoing procedural and substantive infirmities, that the Board were willing to consider BHR's request for an LUEP, such action should be held in abeyance pending the results of ongoing litigation in other fora.

Respectfully submitted,

/s/ *R. A. Wimbish*

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**ATTORNEYS FOR SILLS ROAD REALTY
LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN
RAIL FREIGHT SERVICES LLC**

Dated: August 17, 2020

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36399

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

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT A

**FEDERAL DISTRICT COURT ORDER
MAY 2, 2020**

Minute Entry for proceedings held before Judge Joan M. Azrack:

CIVIL CAUSE FOR STATUS CONFERENCE (Tel).

APPEARANCES: For Plaintiff: Robert Calica, Judah Serfaty; For Defendants: Jonathan Sullivan, Carly Everhardt, Christopher DeGennaro; Interested Party PSEG: Janet DeLuca; Interested Party NY Site Operations: Carly Everhardt, Christopher DeGennaro.

Status Conference held on 5/1/2020 at 12:00 PM.

The Court hereby SO ORDERS the Second Interim Stipulation, (ECF No. [177](#)). The Court retains jurisdiction to resolve any dispute or disagreement of the parties concerning the interpretation, effect, enforcement, or breach of any provision or term of the Second Interim Stipulation.

The Court respectfully refers this case to Magistrate Judge Shields for mediation. In conjunction with that referral, the Court orders Brookhaven Rail LLC, Oakland Transportation Holdings LLC, and New York Site Operations, LLC to participate in the mediation before Judge Shields and, if Judge Shields requests, to make available representatives with settlement authority. Winter Bros. Waste Systems of Long Island, LLC is also encouraged to participate in the mediation. Judge Shields will determine the specifics of how the mediation will be conducted. The parties to the state court action are directed to inform the state court about the mediation in federal court and provide the state court with a copy of this minute entry. (Simmons, James) (Entered: 05/02/2020)

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36399

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

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT B

**SILLS PARTIES FILING WITH THE FEDERAL
DISTRICT COURT – JULY 30, 2020**



July 30, 2020

By ECF

The Honorable Joan M. Azrack
United States District Court, EDNY
100 Federal Plaza
Central Islip, New York 11722

Re: Town of Brookhaven v. Sills Road Realty LLC, et al. (Case No. 14-CV-02286)

Dear Judge Azrack:

We represent Sills Road Realty LLC, Brookhaven Terminal Operations, Sills Expressway Associates, Watral Brothers, Inc. and Pratt Brothers, Inc. (collectively “Sills Road”). The purpose of this letter is to advise the Court of recent developments relating to Sills Road’s pending application for a TRO and preliminary injunction and to request a pre-motion conference pursuant to Your Honor’s Rule IV(B) in anticipation of Sills Road supplementing its pending motion to seek injunctive and/or declaratory relief relating to (i) defendant Oakland Transportation Holding Inc.’s (“Oakland”) and non-party New York Site Operations LLC’s (“NYSO”) recent statements to the Court that NYSO, as the current owner of Parcel D, does not intend to allow the construction of a tunnel between Parcel C and D, in derogation of the March 2016 Stipulation; (ii) non-party Winters Bros. Waste Systems of Long Island, LLC’s (“Winters”), the contract vendee for Parcel D, and its affiliate defendant Brookhaven Rail LLC’s (“BHR”) recent applications to the Surface Transportation Board seeking approval for alternate railway access to Parcel D, including laying railroad track on the previously agreed upon and recorded conservation easement on Parcel D, in derogation of the March 2016 Stipulation;¹ (iii) the Town’s planned SEQRA Positive Declaration requiring Sills Road to prepare a supplemental draft environmental impact statement based on the purported elimination of the tunnel between Parcels C and D; and (iv) LIPA/PSEG’s purported objections to both a clockwise and counterclockwise track plan.²

Sills Road’s pending application for a TRO and preliminary injunction seeks, *inter alia*, an order vacating the Town’s February 7, 2020 Stop Work Order (“SWO”) purporting to require Sills Road to cease clearing and excavation at the Brookhaven Rail Terminal (the “BRT”). The Town served its SWO this past February because it was purportedly concerned that Sills Road was engaging in improper clearing and excavation on Parcels B and C. The Town’s primary complaint was that Sills Road was clearing and excavating without making sufficient progress on the installation of railroad track and the property’s development.

¹ Winters is not a party to this action but our planned application will seek relief against Oakland and its successors and assigns including NYSO and Winters.

² The Court has retained jurisdiction to hear these disputes pursuant to ¶¶ 3, 4 and 21 of the March 2016 Stipulation. *See, e.g.*, March 2016 Stipulation at ¶ 4 (retaining jurisdiction to hear disputes concerning, *inter alia*, Administrative SEQRA/Plan Review “upon application and made upon such notice, and in such manner and following such proceedings, as the Court may determine and direct.”).

Sills Road has demonstrated that all of the clearing, excavation and grading at the site is: (i) permitted by the March 2016 Stipulation and the Town's prior SEQRA Neg. Dec., and (ii) necessary in order to develop the entire site for rail service, loading and offloading areas and warehousing as contemplated by the SEQRA Neg. Dec. This is particularly true considering that the Town's own environmental consultant, VHB, carefully monitored our clients' activities at the BRT for almost two and one-half years from September 2017 to January 2020 on a bi-weekly basis without any objection by VHB or the Town.³ To be clear, Sills Road has only excavated and exported approximately 547,819,15 cubic yards of native material through July 29, 2020 even though they are permitted to excavate between 960,000 and 1,150,00 cubic yards under the SEQRA Neg. Dec.

The Town, perhaps recognizing that it cannot support the allegations set forth in its Notice of Default and SWO, adopted an entirely new position on clearing and excavation on the eve of the Court's April 1, 2020 hearing on our application. The Town now suggests that it must vacate the SEQRA Neg. Dec. – in place for almost three years – in favor of a Positive Dec. based on a letter received from Oakland on March 27, 2020 indicating that NYSO and its contract vendee, Winters, do not intend to allow the construction of a tunnel between Parcels C and D. The Town claims that Sills Road must now stop all clearing and excavation because the Town's consultant, VHB, told the Town that the whole site may need to be graded to a higher elevation if the tunnel is eliminated. The Town ignores that the parties agreed to grade the site at elevation 50 feet over four years ago in the March 2016 Stipulation for many reasons including, but not limited to, that this elevation is consistent with the surrounding area to the north and east and for engineering reasons related to track installation and loading/offloading requirements. The Town's suggestion that it must conduct a new environmental review, which could take years, is also inconsistent with the Town's purported concerns that the development has been too slow.

The Town's entire argument for a new SEQRA review fails because Oakland and NYSO cannot unilaterally change the terms of the March 2016 Stipulation, which provides for a tunnel, even if they wanted to. This is particularly true because Oakland and NYSO have changed course, essentially withdrawing their March 27th letter by stating that they are not seeking to prohibit future owners, including Winters, from building a tunnel. We suspect that Oakland's, NYSO's and Winters' true position is that they only oppose the tunnel to the extent they can secure alternate railway access to Parcel D, even though such alternate access would require them to breach the March 2016 Stipulation by laying track in the previously agreed upon and recorded conservation easement. The use of the tunnel and the track south of the tunnel (track on Parcel D) were key material elements of the consideration for Sills Road to enter into the March 2016 Stipulation. This is a substantial breach because the Town has taken the position that the elimination of the tunnel, which will facilitate the Town's and Winters' plans for a waste facility, will require Sills Road to (i) immediately stop all site preparation at the BRT, including clearing and excavation; (ii) prepare a supplemental environmental review; and (iii) potentially regrade the entire property to a higher elevation despite years of site work causing significant costs and delay. The Town's position is both absurd, because even if the tunnel is eliminated any such change would not have a negative

³ The Town's sudden objections to our clients' activities follow its recent discussions with Winters to build a waste management facility on Parcel D. The Town and Winters both admit they met on October 28, 2019 (before the Town raised any objections to our client's activities) to discuss the proposed waste facility. The Town desperately needs a new waste facility because of the imminent closure of the Town's landfill on Horseblock Road, located directly across the street from Parcel D. It appears the Town intends to solve this problem by working with Winters behind the scenes to build a facility on Parcel D even though Winters does not yet own the property, all in derogation of their obligations under the March 2016 Stipulation.

impact on the environment, and premature because Oakland, NYSO and Winters have not definitively ruled out a tunnel if they cannot secure alternate rail access to Parcel D.

The parties' dispute concerning the tunnel has become even more urgent based on BHR's recent applications to the STB seeking alternate railway access to Parcel D in order to facilitate the construction of Winters' planned waste facility. BHR's initial application to the STB, filed last month, seeks approval for alternate railway access to Parcel D and the laying of railway track in the stipulated and recorded conservation easement. BHR's most recent application, filed earlier this week, seeks broad federal preemption for the environmental review of the proposed waste facility. BHR, which is a party to the March 2016 Stipulation, claims it planned the design and construction of the waste facility to adhere "closely" to the conceptual plans provided for under the March 2016 Stipulation with, in BHR's own words, "one notable exception" – the elimination of the tunnel between parcels C and D. *See Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. § 10909 ("STB Petition")*, annexed as Exhibit A, at p. 10. BHR's application completely ignores the fact that its plan will require track to be laid in the previously agreed upon conservation easement.⁴

The Town has also recently indicated that Sills Road's planned development cannot go forward at all because LIPA/PSEG now objects to both a clockwise and counterclockwise track plan. Sills Road maintains that LIPA/PSEG has no standing to raise any such objections particularly to the extent that Sills Road is not seeking to use LIPA's property. The Town does not have any basis to object to Sills Road continuing to develop based on LIPA's purported concerns particularly because the Town appears unwilling to condemn the parcels in question, even though it is required to do so under ¶13 of the March 2016 Stipulation.

We believe that a pre-motion conference would be useful to insure that all parties are heard and that these issues are briefed in a uniform manner in accordance with the Court's instructions. We also note that the Sills Road' request for a TRO is still pending before the Court. We therefore respectfully request, in accordance with paragraph 6 of the Second Interim Stipulation, that our request for a TRO be granted while these additional issues are briefed or in the alternative that Sills Road be permitted to continue excavating at 50% of historical levels as recommended in the Court's April 10, 2020 Scheduling order and as subsequently contemplated by the Second Interim Stipulation.

Respectfully submitted,
/s/ Jonathan C. Sullivan
Jonathan C. Sullivan
For the Firm

⁴ BHR's application also states that there has been "a high level of cooperation and collaboration between BHR's affiliated companies [and] the Town" (STB Petition at p. 4) concerning the construction and operation of the waste facility, notwithstanding the Town's repeated claims to the contrary. BHR also claims that it 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 [waste facility] in these unique circumstances." STB Petition at p. 20. This coordinated effort to fast track approval of the waste facility for the benefit of the Town and Winters will require fundamental changes to the March 2016 Stipulation which are causing significant harm to our clients. Furthermore, the Town's apparent willingness to abdicate its own environmental oversight of Winters' waste facility by punting to the STB and improperly suggesting that it cannot pass legislation regarding the waste facility within three and one-half years from now blatantly belies its purported environmental concerns regarding our clients' continued excavation at the BRT, all of which was approved almost three years ago as part of a comprehensive environmental review.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 36399

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

**REPLY OF SILLS ROAD REALTY LLC, BROOKHAVEN TERMINAL
OPERATIONS LLC, AND BROOKHAVEN RAIL FREIGHT SERVICES LLC**

EXHIBIT C

**SELECTED PASSAGE FROM THE SILLS
PARTIES' REPLY FILING IN FD 36398**

acknowledges that its solid waste transfer facility is beyond the scope of the 2016 Settlement, VDEIS, and Negative Declaration, and thus will require considerable additional evaluation.

V. BHR's Concealed Opportunism Is No Basis For Bifurcated Decision Making

BHR's argument that its half-baked Petition should be considered and conditionally granted pending the completion of the Board's NEPA analysis is legally unsupported and suggests concealed BHR motivation. Allegedly, conditional approval of BHR's Petition (subject to completion of environmental review and a final decision later) would expedite project delivery, although it is unclear how or why that would be so. BHR cannot begin construction of its railroad lines and solid waste transfer facility, or know what alignments and design specifications to observe, unless or until all applicable environmental review, permits and approvals are in place. Additionally, BHR has disclosed nothing of its efforts to work with local, state and federal authorities to assure that its solid waste transfer facility meets and complies with applicable law, regulations, orders, and other requirements. BHR's under-developed efforts combined with its unsupported bifurcation request place the cart well ahead of the horse.

In any event, Board precedent has all but categorically rejected the idea of such a bifurcated process, as BHR recognizes. Not only did *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), to which BHR cites, effectively ban conditional transportation merits approval for construction cases thirteen years ago, but there has not been a single case since where the Board has found “unique or compelling circumstances”

(*id.* at 3) to exist warranting a deviation from this rule.¹¹ BHR’s business interests is not a unique or compelling circumstance to override glaring omissions in the Petition.

BHR’s requests for expedited consideration and a bifurcated review process are not really about timing anyway. Rather, they are about leverage. BHR indirectly admits this, stating that conditional approval would “greatly aid” it in “consummating the acquisition of Parcel D,” and that it would “help facilitate the discussions between NY&A, LIRR and BHR concerning the physical location of the required switch and turnout.” Petition, 18. The latter quotation is peculiar, given NY&A’s written support for the project, included as Exhibits 1 and 2 to the Verified Statement of James Newell attached to the Petition. The statements suggest that BHR’s request for an up-front transportation merits decision is intended to enable BHR to override current legal obstacles to its Parcel D development plans.

For example, how is it that conditional Board approval would aid BHR in acquiring Parcel D? BHR suggests that its acquisition of Parcel D is imminent, and that it has some sort of agreement with NYSO (Oakland) to permit for the sale of the parcel. Yet, as BHR and NYSO well know – and as discussed above – BHR is contractually precluded from acquiring

¹¹ *Six County Association of Governments – Construction and Operation Exemption – A Rail Line Between Levan and Salina, Utah*, FD 34075 (STB served Sep. 3, 2015); *California High-Speed Rail Authority – Construction Exemption – In Fresno, Kings, Tulare, and Kern Counties, Cal.*, FD 35724 (Sub-No. 1) (STB served Dec. 4, 2013), 2 (“Although the Board has sometimes made conditional grants of construction exemption authority in the past, it has not done so in several years. *It has also questioned the benefits to a construction applicant given that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin.* Therefore, in the absence of a showing of some unique or compelling circumstances, it is our policy to determine the transportation merits of a construction proposal based on a complete record, including the environmental record”) (emphasis added); *Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, Tex.*, FD 34284 (STB served Dec. 18, 2008) 2, n. 2; *cf. Texas Railway Exchange – Construction and Operation Exemption – Galveston County Tex.*, FD 36186 (STB served Jan. 17, 2020), 2 (mooting conditional grant request by granting petition after review of environmental impact).

or developing Parcel D without SRR's consent (which consent SRR has not given). One may reasonably conclude that BHR's conditional approval ploy is intended to give BHR leverage under an ICCTA preemption claim to override the state law contractual issue confronting it, in keeping with BHR's ICCTA preemption claims associated with its Operating Agreement as set forth in the correspondence attached as Exhibit A. If so, BHR's subterfuge is no reason at all for conditional approval of the Petition, and is instead reason to reject the request out-of-hand in keeping with precedent.¹²

Similarly, BHR's argument that a bifurcated Board proceeding would help BHR, LIRR and NY&A with issues surrounding the location of the turnout and switch connection makes little sense on its face, until one remembers that BHR's planned track alignment and switch connection are precluded by the 62-acre Conservation Easement. NY&A already is supportive of BHR's Parcel D plans, and there is no reason to know, or believe, that LIRR has any substantive reservation with the installation of a new switch to its main line. Additionally, the record does not suggest that NY&A or LIRR would have any issues with a modified track alignment or switch connection location if warranted. Finally, the issue of track alignment and the switch connection would be resolved as a matter under the Board's environmental analysis, not the transportation merits. As such, the only way that conditional Board approval would bear on the connecting track issue would be if BHR intends here, also, to attempt to use such a conditional merits ruling to invoke ICCTA preemption in an effort to evade its obligations under the 2016 Settlement, and to invalidate the Conservation Easement or to force its way over it. Once again, the Board should not allow its processes to be abused in that fashion.

¹² See, e.g., *US Rail Corporation – Lease and Operation Exemption – Shannon G., A New Jersey Limited Liability Company*, FD 35042 (STB served Oct. 8, 2008); *Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33980 (STB served Feb. 15, 2002).

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of August, 2020, I served copies of the foregoing Reply electronically (via email) upon each the following parties of record:

Tom Wilcox
Counsel for Brookhaven Rail LLC
twilcox@gkglaw.com

Robert D. Rosenberg
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/s/ *R. A. Wimbish*

Robert A. Wimbish