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VIA EFILING

Ms. 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 (the "Town") as Special Counsel to Brookhaven Town Attorney Annette Eaderesto, Esq.

This letter supplements the prior submissions of Town Planning Commissioner Beth A. Reilly dated July 14, 2020 and Town Principal Environmentalist Peter E. Fontaine dated July 31, 2020 (Exs. A and B hereto, exhibits thereto omitted) and respectfully advises the STB/OEA of the Town's intention to exercise its own local land-use and zoning authority concerning the proposed Solid Waste Rail Transfer Facility ("SWRTF"), including the applications of Petitioner Brookhaven Rail LLC ("BHR") for a land-use exemption under 49 U.S.C. §10909 and related relief (the "Proposed Project").

The Town's July 14, 2020 submission stated in part that "*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*". The Town now respectfully reconsiders that position.

At the time of the Town's receipt of the STB/OEA's June 25, 2020 request for *"information from [the Town] on the resources under your jurisdiction that could be affected by the Proposed Project, and identify permits and approvals that could be required of BHR"*, and in providing the Town's "preliminary response" dated July 14, 2020, the Town Board and its Supervisor Edward P. Romaine were operating under COVID-19 limitations which restricted the ability of Town Officials to fully consider the BHR Petitions and the STB/OEA request for input from the Town in the normal course.

By reason of the STB/OEA's request for the Town's accelerated response by July 25, 2020, the Town's prior submissions were provided without the accustomed opportunity of the Town Board Members and Supervisor to fully interact with staff, conduct in-person work session meetings, and otherwise devote the level of attention appropriate to consideration of an undertaking of the magnitude of the Proposed Project.

As reflected in the Town's July 31, 2020 environmental submission, the future development of the entire Brookhaven Rail Terminal Expansion (Parcels B, C and D) and the future development of Parcel D have previously been the subject of extensive environmental engagement and oversight by the Town including the review and approval of a comprehensive Voluntary Draft Environmental Impact Statement ("VDEIS") under the New York State Environmental Quality Review Act ("SEQRA") and a Town-issued Negative Declaration imposing extensive environmental mitigation requirements which remain in effect.

As the Town's accompanying formal response to the BHR Petitions notes, the exercise of local control by municipalities such as the Town of Brookhaven in performing and controlling *"traditional municipal services"* such as *"garbage processing and disposal services"* is a matter uniquely and appropriately reserved for local zoning control. See, SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Circuit 1995) and authorities therein cited including White v. Massachusetts Council of Construction Employers, 460 U.S. 204, 103 Sup. Ct. 1042 (1983). We also respectfully point out that the exercise of the Town's police powers respecting zoning, *"the home rule authority vested in municipalities to regulate land use"*, and in particular zoning control over *"the exploitation of any and all natural resources within the Town as a permitted use"* is of overriding importance under well-established New York law. See, Matter of Wallach v. Town of Dryden, 23 N.Y.3d 728 (2014). In the SSC Corp. case, the Second Circuit Court of Appeals ruled that the Town of Smithtown (in a case in which the Town of Brookhaven was an Intervenor) could exercise regulatory control over the disposal of municipal waste in the face of a Commerce Clause challenge. In the Town of Dryden case, the New York Court of Appeals ruled that a local Town could *"ban oil and gas production activities, including hydrofracking within municipal boundaries through the adoption of local zoning laws"*, rejecting the argument that such local zoning laws were superseded by New York's State-wide Oil, Gas and Solution Mining Law.

In view of the Town's primary role and jurisdiction over local land-use, zoning and its environmental control over "natural resources within the Town", should BHR and its affiliates, as Applicant, petition the Town Board for a change of zone or seek other Permits required and appropriate to authorize the Proposed Project including the SWRTF, the Town is prepared to promptly and fully review, consider and take such action concerning local approvals as may be appropriate when presented with such an Application by BHR.

We thank the STB for its courtesy and attention.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP



Robert M. Calica

RMC:ds

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

Attachments

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of September, 2020, I served copies of the foregoing Letter and enclosures electronically (via email) upon each the following parties of record:

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//s//Judah Serfaty//s//

Judah Serfaty



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

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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



Town of Brookhaven
Long Island

Edward P. Romaine, Supervisor

July 31, 2020

Diana Wood, Project Manager
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 Ms. Wood:

The Town of Brookhaven is in receipt of the June 25, 2020 letter advising of the proposed construction and operation of a rail line and solid waste rail transfer facility (SWRTF) on approximately 50 acres of an approximately 228-acre parcel, known as Parcel D, 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. In response to your notice that the Brookhaven Rail LLC (BHR) intends to file for approval from the Surface Transportation Board (STB) to construct and operate up to approximately 25,000 feet of new common carrier track and to file for a land use exemption for a solid waste rail transfer facility (SWRTF) that would connect to the line in the Town of Brookhaven, the Town respectfully reserves the right to comment on this proposed action in the future, requests to be kept informed of all actions taken pursuant to the National Environmental Policy Act (NEPA), and asks to be provided with copies of all documents concerning the environmental review by the Office of Environmental Analysis (OEA). The Town of Brookhaven would consider the proposed action as a Type I action in accordance with the New York State Environmental Quality Review Act (SEQRA). The fact that an action or project has been considered as a Type I action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require the preparation of an Environmental Impact Statement.

Pursuant to the attached March 2016 Stipulation of Settlement with the Town of Brookhaven, a Voluntary Draft Environmental Impact Statement (VDEIS) had been prepared in accordance with the State Environmental Quality Review Act (SEQRA) and its implementing regulations at 6 New York Codes, Rules and Regulations (NYCRR) Part 617 which included the subject property. The proposed action analyzed in the VDEIS included the expansion of the existing 29±-acre facility, which is licensed by the Surface Transportation Board (STB), to incorporate an additional 321± acres of generally contiguous, undeveloped, property to the east and southeast of the existing operation. Parcels A, B, and C are north of the existing LIRR mainline tracks, which serves both passenger and freight rail operations, whereas Parcel D is situated south of the LIRR tracks. Approximately 50 acres of Parcel D are the subject of the instant matter pending before the STB.

From a regulatory and permitting perspective, the March 2016 Stipulation of Settlement, among other things, provides that:

“...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.”

The March 2016 Stipulation of Settlement further states that:

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Beth Ann Reilly, Esq., Commissioner

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“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.”

The 2016 Stipulation of Settlement has specific requirements with respect to vegetation removal, excavation, grading and material removal. For example:

“The Grading Plans shall include clear delineation of any limits of disturbance (LOD) during site work to protect 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 natural vegetation areas are preserved to the maximum extent practicable.”

In this regard, the 2016 Stipulation of Settlement further states,

“...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 material. (emphasis added)”

As explained in the aforesaid VDEIS, within the 240±-acre development area, BRT proposed 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 had to acquire 2.39± acres in the southern portion of Parcel C currently owned by LIPA. If for some reason, BRT and LIPA could not come to an agreement on the sale of the LIPA parcels to BRT, BRT would implement an alternative track layout in a clockwise configuration. Since the time of the VDEIS preparation, the Town has been advised by LIPA that its approval is required even for the installation of a track in a clockwise configuration.

The Proposed Action, as defined in the VDEIS, was to consist of:

- **Establishing an Undisturbed/Conservation Easement on Parcel D**
- 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;
- **Constructing buildings and other infrastructure to support the rail terminal operations on Parcel D.**

A New York State Environmental Quality Review Act (SEQRA) Negative Declaration was adopted by the Town Board of the Town of Brookhaven in connection with the proposed Brookhaven Rail Terminal (BRT) expansion on September 12, 2017.

Since that time, aerial photographs have shown clear-cutting of substantial additional portions of the 19 plus acre Parcel B and the 73-acre Parcel C of the Brookhaven Rail Terminal of all trees, vegetation and soils. As shown on the attached Brookhaven Rail Terminal (BRT) Tracking of Removal of Excess Materials, prepared by VHB, dated July 24, 2020, the BRT has excavated, removed and sold approximately 584,318 cubic yards of additional sand from Parcels B and C between January 9, 2018 and July 15, 2020. To date, BRT has installed only an approximately 430-foot stub section of track from the operating BRT rail facility into the southwest portion of Parcel B.

With consideration of the history of the subject site, the Town of Brookhaven Division of Environmental Protection (DEP) is respectfully submitting the following suggestions and comments identifying resources of concern that may be affected by the proposed project, plans that should be developed, environmental mitigation that should be required, and issues and concerns that the DEP considers appropriate for analysis during the National Environmental Policy Act (NEPA) process.

A solid waste rail transfer facility (SWTF) was never envisioned for the site but rather a general industrial/transportation/rail transloading/industrial warehousing facility use, and the proposed action conflicts with the action studied in the aforesaid VDEIS.

Relevant commentary from the VDEIS follows:

- Page xviii Exe. Summary,
“Presently, sewage waste generation on Parcel A is handled by an onsite septic system. Based on the sewage design flow factor of 0.04 gpd for a general industrial use, it is estimated that the existing operations building on Parcel A generates approximately 80 gpd of sewage. Parcels B, C, and D are currently undeveloped and unoccupied, therefore, there is no existing sewage generation or sanitary infrastructure on those parcels.

Based on the estimated maximum of 6 million square feet of building space under the Proposed Action and using a sewage design flow factor of 0.04 gpd for a general industrial use, the Proposed Action could generate up to 240,000 gpd. However, given the nature of development associated with the Proposed Action (buildings would be primarily warehouse or other storage space), it is anticipated that sewage generation at the Subject Property, upon full implementation of the Proposed Action would be closer to the 12,568± gpd estimated for water use.”

- Page xxi Exe. Summary,
“Although the Proposed Action would be treated as a municipal development project pursuant to Section 85-894 of Chapter 85 of the Town Code and exempted from local land use control by the STB decision, the BRT expansion would comply with, to the maximum extent practicable, the special permit dimensional regulations for the L1 zoning district (as further detailed in Section 1.7.4.2 below), which are protective of potential land use-related impacts. Overall, it is not expected that the expansion of BRT facility operations onto Parcels B, C, and D would result in significant adverse land use impacts on the site and the surrounding uses, particularly given the areas of undisturbed land to remain at each of the parcels, as well as the industrial nature of the surrounding area.”
- Page xxxiii Exe. Summary:
“Upon implementation of the Proposed Action, the visual character of the Subject Property would be of a transportation/rail transloading/industrial warehousing facility. Although the BRT expansion would introduce these uses to the undeveloped parcels, it would be consistent with the existing industrial character of the properties to the east and west.”
- Page 88:
“According to the Project Sponsor, it is anticipated that there would be a maximum of 6 million square feet buildings at the Subject Property subsequent to completion of the Proposed Action. Based on the sewage design flow factor of 0.04 gpd for a general industrial use, the Proposed Action could generate up to 240,000 gpd. However, given the nature of development associated with the Proposed Action (buildings would be primarily warehouse or other storage space), it is anticipated that sewage generation at the Subject Property, upon full implementation of the Proposed Action would be closer to the 12,568±gpd estimated for water use.”
- Page 105:
“Although the Proposed Action would be treated as a municipal development project pursuant to Section 85-894 of Chapter 85 of the Town Code and exempted from local land use control by the STB decision, the BRT expansion would comply with, to the maximum extent practicable, the special permit dimensional regulations for the L1 Zoning District (as further detailed in Section 3.4.2.2), which are protective of potential land use-related impacts. Overall, it is not

expected that the expansion of BRT facility operations onto Parcels B, C, and D would result in significant adverse land use impacts on the site and the surrounding uses, particularly given the areas of undisturbed land to remain at each of the parcels, as well as the industrial nature of the surrounding area.”

- Page 175:
“The visual character of the Subject Property would be of a transportation/rail transloading/industrial warehousing facility. Although the BRT expansion would introduce these uses to the undeveloped parcels, it would be consistent with the existing industrial character of the properties to the east and west.”
- Please see the attached “Parcels B, C & D Phase 1: Overall Track Site Work & Notes Brookhaven Rail Terminal Yaphank, New York”, dated April 22, 2016, supplied with the VDEIS. It differs significantly from the received “Figure 1 Brookhaven Rail Project Location”.

The following, from the September 12, 2017 adopted SEQRA negative declaration (copy attached), should be considered in the NEPA review document:

- 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.
- 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.
- 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.
- 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.

The following should be considered in the NEPA review document:

- The property is located above the Nassau-Suffolk Sole Source aquifer indicating that significant drinking water resources exist below the property. The water resources analysis in the NEPA review document should include discussion regarding the property location within the Suffolk County Department of Health Services (SCDHS) Groundwater Management Zone VI, the Carmans River Watershed Area, and areas of groundwater contamination in the immediate area.
- The NEPA review document should include analysis of consistency with the *Carmans River Conservation and Management Plan*, the *1996 Brookhaven Comprehensive Land Use Plan*, the *Suffolk County Comprehensive Plan 2035*, the *Long Island Comprehensive Waste Treatment Plan of 1978 (208 Plan)*, the findings of the *Generic Environmental Impact Statement for Declaration as Surplus and Sale of 255 Acres of County Owned Land in Yaphank for Mixed Use Development Purposes*, and compliance with Articles 6, 7, and 12 of the Suffolk County Sanitary Code and Chapter 86 of Town Code.

- The noise and vibration study should consider the future build out of the area and loss of the vegetative areas that are still depicted in the current proposed plans.
- Air quality impacts should cumulatively consider the development of the Rosh Industrial Park, the Caithness II Electrical Generating Station, the former Grucci properties, and other reasonably foreseeable actions that may impact air quality.
- The unavoidable adverse effects section should provide an analysis of reasonably foreseeable catastrophic impacts to the environment if a liquid propane gas facility or other heavy industrial use associated with the Parcel D operations are developed on the remaining property.
- The section describing the alternatives and their impacts should provide sufficient analysis of the alternatives and not solely a justification of the preferred design proposal.
- Parcel D is within an NYS designated Archeologically Sensitive Zone and Old Town Road is historically significant in the development of the Town. The Phase I archeological study from the *Generic Environmental Impact Statement for Declaration as Surplus and Sale of 255 Acres of County Owned Land in Yaphank for Mixed Use Development Purposes* should be provided as well as some discussion regarding the historical significance of the immediate area.
- An excavation and grading plan for Parcel D should be developed consistent with the plan 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. The excavation and grading plan for Parcel D must be provided in context and consider the excavation that has already taken place and the information provided in the VDEIS. Information has also recently been provided to the Town indicates that the development of Parcel D no longer includes a tunnel, but rather a direct surface spur off the existing LIRR tracks. Based on the Town’s preliminary analysis, this would reduce the amount of material that would be removed from the overall BRT property as reported in the VDEIS and SEQRA Negative Declaration.
- A Storm Water Pollution Prevention Plan (“SWPPP”) should be developed consistent with the 2016 So Ordered Stipulation and prior Town Board approvals pursuant to that Stipulation and a requirement that the project employ permeable surfaces and pavements to enhance the stormwater drainage structure capacity, as provided for in the 2016 Stipulation.
- The proposed rail alignment encroaches on the existing conservation easement. The conservation easements on Parcel D were the result of lengthy and difficult negotiations between the Town and the BRT, are pursuant to the Stipulation of Settlement, and is intended to remain permanently undeveloped as open space/ green space in perpetuity. These conservation easements have been closed and recorded in the Suffolk County Clerk’s Office and cannot be utilized for the proposed rail alignment without approval from the Town.
- The traffic impact study associated with the VDEIS analyzed a general industrial use. Seven (7) development parcels are indicated in addition to the SWRTF. The traffic generated by the proposed SWRTF in addition to the seven (7) development parcels of unknown uses may cause significant adverse impacts to Horseblock Road and the surrounding roadways and will need to be analyzed for alternatives and mitigation measures.

The Town of Brookhaven requests that the following mitigation measures be considered during the NEPA review process.

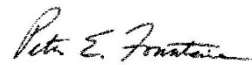
- All material should be stored, handled, unloaded, loaded and/or transferred indoors on an impervious floor surface, including the storage of containers containing recyclable or other materials.
- All toxic and hazardous materials should be prohibited.

- Periodic inspections by the Town of Brookhaven Commissioner of the Department of Recycling and Sustainable Materials Management and their designated employees should be permitted by the applicant and/or owner.
- The owner should demonstrate that adequate on-site parking is provided so vehicles waiting to load or unload will not park on public highways.
- Any structure located on the site should be a minimum distance of 750 feet from property zoned for residential use.
- The applicant should submit a route plan to indicate that traffic generated by the facility will have a minimal impact on residential streets. Said plan should state the number and frequency of trips to and from the facility.
- Outdoor use of the property should be limited, to the maximum extent practicable, to the parking and maneuvering of vehicles and the storage of empty containers. All storage areas should be suitably screened and indicated on a site plan.
- On-street parking of vehicles, containers or any other equipment or materials in any way connected with the facility should be prohibited.
- The maximum height of the facility should not exceed 40 feet.
- Storage of waste materials within the transfer station should not exceed three calendar days, including holidays, unless the Town of Brookhaven Commissioner of the Department of Recycling and Sustainable Materials Management has issued an emergency extension at the request of the owner.
- The geographic sources of the waste materials as well as the manner in which it is to be disposed must be identified.
- The owner or operator of a transfer station should not accept waste materials from, nor transfer waste materials to, any open truck, trailer or other container, unless said truck, trailer or container has a cover, tarpaulin or other device of a type and specification approved by the New York State Commissioner of Transportation which completely encloses the opening on said truck, trailer or container, so as to prevent water from mixing with the waste materials and to prevent the falling of any waste materials therefrom.
- The transfer station should be permitted only for the purpose of transferring and sorting waste materials from collection vehicles to other transportation units for movement to a solid waste management facility or for movement to a purchaser of recycled materials.
- The permittee should file quarterly reports and an annual report with the Town of Brookhaven Commissioner of the Department of Recycling and Sustainable Materials Management detailing the nature and volume of waste materials handled at the transfer station. Reports should be submitted within 30 days after each quarter and year of operation.
- If approved, conditions should be implemented such that no solid waste materials will be dumped onto the bare ground of 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.
- 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 they shall comply with applicable Town and County fire prevention, health, safety and welfare requirements
- To avoid or minimize potential impacts to the eastern box turtle, the following mitigation measures should 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.
- The required permits and approvals section and table should include compliance, permits, and/or approvals required by the New York State Department of Environmental Conservation (NYSDEC), including incidental take of endangered/threatened species permits or mined land reclamation permits. If the permitting is preempted by other Federal authority or does not meet the thresholds requiring permitting it should be explained why the proposed project would be exempt from the NYSDEC permitting requirements.
- To avoid potential adverse impacts to northern- long eared bat, no clearing or excavation activities should be conducted on Parcel D during the summer roosting period. Coordination with the NYSDEC and the US Fish and Wildlife Service (USFWS) is strongly recommended in consideration of the northern long-eared bat and other species of concern that may exist on the property.

Thank you for the opportunity to comment on 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 and feel free to contact me if you have any questions or require additional information.

Sincerely,



Peter E. Fountaine
Principal Environmental Analyst
Division of Environmental Protection
Town of Brookhaven, New York

Attachments

cc: Hon. Annette Eaderesto, Town Attorney, Town of Brookhaven
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