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June 8, 2021

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VIA E-FILING

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

ENTERED
Office of Proceedings
June 8, 2021
Part of
Public Record

Re: Docket No. FD No. 36398, *Brookhaven Rail LLC – Construction and Operation Exemption – Suffolk County, New York*

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

Dear Ms. Brown:

As attorneys for the Town of Brookhaven, New York (“Town”) in these proceedings, we respectfully respond to the June 2, 2021 letter of the firm of Faegre Drinker filed on behalf of the New York State Chapter of the NAACP (“NAACP New York”) [the “Faegre Firm Letter”]. The Faegre Firm Letter states that it is in furtherance of NAACP New York’s “Petition/Request for Immediate Public Disclosure on Behalf of the NAACP in Response to a Non-Public Mediation Conducted After a January 6, 2021 Surface Transportation Board’s (“STB”) Decision Issued in the Above-Referenced Docket”. Neither the Petition nor the letter has merit.

The Faegre Firm Letter takes such unjustified liberties with documented, publicly available facts and prior determinations concerning the challenging development history of the Brookhaven Rail Terminal Parcels, and so ignores the Town’s leading environmental role in protecting and preserving this protected area (while facilitating near-universal support for rail supported development in order to “*get trucks off Long Island roads*”)¹ as to border upon misleading.

¹See Newsday Editorials, articles and letters at:

<https://www.newsday.com/opinion/editorial/get-brookhaven-rail-terminal-on-track-1.10729993>

The Town rejects the superficial rhetoric contained in the Faegre Firm Letter which unfairly charges the Town with “*smoky room deals*”, “*oppression of our poorest residents and people of color*”, “*audacity*”, and lack of “*respect*” for the multiple communities served by the Town which comprises approximately 500,000 residents and approximately 500 square miles (New York’s largest Town). The Town of Brookhaven is justifiably proud of its leading role in protecting the environment. The Town of Brookhaven is justifiably proud of the fairness and transparency of its governance practices, and the unparalleled extent to which the Town conducts its affairs in a public and open manner with the broadest possible participation of all groups. The Town is justifiably proud of its long-standing tradition of fairness and justice for its disadvantaged communities, its leading role in supporting affordable housing, rehabilitation of blighted areas of the Town, its record of support for working and disadvantaged families, and should not be put in the position of apologizing for an unparalleled and respected reputation for good governance. Yet, the Faegre Firm Letter ignores all of that.

The Faegre Firm Letter ignores the decade plus that the Town has spent in the Federal Courts (since 2007) ensuring that the environmentally sensitive areas surrounding the Brookhaven Rail Terminal in Yaphank, New York and its planned expansion occurs only subject to the strictest environmental controls and mitigation conditions recommended by the Town’s outside environmental engineering firm, which were reviewed and approved only after years’ long and comprehensive environmental reviews, and were made subject to the Town’s continuing environmental oversight role.

A. The Documented History of the BRT Site

The Town’s environmentally protective role was judicially recognized and praised in the Decision Order of Hon. Gary Brown of the United States District Court for the EDNY dated June 23, 2014 attached. The Town of Brookhaven was the only governmental body which aggressively challenged the environmental devastation and massive sand mining, including excavation, removal and sale of over one million cubic yards of native sand and soils (“Native Materials”) by the operators of the Brookhaven Rail Terminal under the guise of a purported railway expansion/spur which threatened groundwater and drinking water. Despite the Rail Terminal operators’ legal contention of complete Federal preemption over any Town or DEC environmental oversight, the Town, at considerable effort and legal expense, successfully sued the BRT Operators and obtained a Federal Court injunction to halt their further sand mining and environmental devastation of these properties. The Town also obtained an Order from the NYS Department of Environmental Protection directing the BRT operators to remove 15,000 cubic yards of contaminants illegally dumped on the site.

<https://www.newsday.com/opinion/shipping-by-rail-not-the-lie-1.3219859>

<https://www.newsday.com/opinion/newsday-opinion-the-point-newsletter-1.49702506>

<https://www.newsday.com/long-island/suffolk/brookhaven-landfill-rail-project-1.50051302>

Despite the injunction the Town obtained, and with the strong encouragement of New York State officials and multiple Newsday Editorials urging an expansion of rail transport on Long Island to reduce polluting truck traffic on Long Island's roads, while at the same time preserving and asserting the Town's strict environmental oversight, the Town and the BRT Owners entered into a judicially "So-Ordered" Stipulation dated March 28, 2016 (the "2016 Stipulation"). Under the 2016 Stipulation, despite the rail operators' claims of complete Federal preemption over essentially any local control, the entire development was and remains subject to extensive environmental oversight by the Town under Environmental Laws by reason of the Town's efforts. The Town's environmental review was overseen by the pre-eminent environmental engineering firm of VHB Engineering serving as the Town's Consultant which prepared a 3,000 page Voluntary Draft Environmental Impact Statement ("VDEIS") for these properties as well as a conditioned Negative Declaration adopted by the Town Board on September 14, 2017 which subjected any planned development to extensive environmental mitigation requirements and Town oversight which continues to date. That prior 2017 environmental approval called for an estimated one million square feet of rail supported warehouse and industrial uses on Parcel D which was always zoned for such use.

Under the same judicially ordered 2016 Stipulation, and in furtherance of protecting the environment to the maximum extent feasible, the Town also insisted on obtaining acquired a 62-acre Open Space Conservation Easement on Parcel D (already zoned for L1 light industrial use) in an area which has long been approved for rail supported warehouse and industrial use.

B. The Mediation

I. The Rail Spur in Lieu of Tunnel Access

The current BRT owners, rather than excavating the environmentally vulnerable Parcels B and C for purposes of a previously planned tunnel access beneath the LIRR tracks to Parcel D, are instead proposing a short direct rail track spur directly onto Parcel D from the existing Long Island Railroad Tracks. The NAACP New York misguidedly opposes it. The NAACP New York opposition totally ignores that by accommodating the "southern turnout" Spur track from the existing LIRR tracks across a 3-acre corner of the 62-acre Conservation Easement area (in exchange for 6 added acres for a total of 65 acres) to provide rail access to Parcel D in lieu of the tunnel access, the Town's proposed Mediation agreement would require the BRT owners/operators to agree to entirely eliminate the tunnel/underpass originally planned (and approved) to connect Parcels B and C with Parcel D. This will result in the elimination of approximately 500,000 cubic yards (one-half of the authorized total) of previously planned excavation, grading and removal of native soils and materials from the environmentally vulnerable Parcels B, C and D. As a result, the permitted grades on Parcels B and C, previously authorized by the Negative Declaration as part of the extensive SEQRA process will now be materially higher (and thus more protective of the groundwater in this Hydrological III Zone) and no further excavation will occur on Parcels B and C except as required to "balance" the site using existing, onsite materials. The Town's environmental engineering consultants, VHB Engineering, strongly support this as a change that will vastly mitigate the adverse environmental

impact of further excavation and grading on Parcels B and C required to facilitate access to the tunnel.

The environmental benefits of the rail “spur” track are needed whether the approximately 300 acre Parcel D is developed only for the estimated 1,000,000 sf. of rail-supported warehouse and industrial uses already approved under the 2017 Negative Declaration, or whether Winters Bros. application before the STB to construct a 50 acre Solid Waste Rail Transfer Facility (“SWRTF”) on a portion of Parcel D is granted by the Board.

II. Federal Pre-Emption

Mindful of the potential that the STB could exercise complete Federal Pre-emption authority concerning the Solid Waste facility which an affiliate of Winters Bros. is seeking STB authorization to construct, the Town’s proposed Mediation agreement in principle would nevertheless subject Parcel D to all of the strict Environmental Mitigation measures the Town insisted on and imposed on Parcel D under the 2016 So Ordered Stipulation and its 2017 SEQRA Approvals, even in the event the STB ultimately determines to pre-empt the Town’s further environmental oversight and approval jurisdiction. Further still, the Town’s extensive and comprehensive environmental filings with the STB to assure protection of the environment are all matters of public record.

The Conservation Easement and Open Space areas will continue with the minor exception that the approximately 3-acre corner portion, which will be traversed by the spur track will be exchanged for twice the acreage in comparable open space property adjoining it. The clearing of the remainder of the 228-acre Parcel D for purposes of building rail supported structures (with protective setbacks) was already approved as a result of the extensive prior environmental review proceedings described above in 2017.

Finally, any binding Agreements, if reached by the Town with the Parcels B, C and D developers as a result of the pending STB Mediation will be public ones. There are no secrets.

D. The Confidentiality of the Pending STB Mediation

The Faegre Firm Letter is misguided in purporting to take issue with the statutory confidentiality of Mediation procedures under 49 CFR §1109. Those statutory procedures are express in providing that (a) the “*Board favors the resolution of disputes through the use of Mediation and Arbitration procedures, in lieu of formal Board proceedings whenever possible*” (id., Section 1109.1); (b) Mediation will be authorized by “*Board order issued in response to a written request of one or more parties to a matter*”; (c) “*Mediation is a confidential process*” and “*evidence of conduct or statements during Mediation is not admissible in any Board proceeding*”, (id., Section 1109.3); and (d) in the event only a “*partial resolution*” of a dispute is reached (all that is achievable here since only the Town and BHR are participating), “*the parties*

shall file any stipulations they have mutually reached and ask the Board to reactivate the procedural schedule in the underlying proceeding to decide the remaining issues”.

The Faegre Firm Letter’s allegation about some “*smoky room*” deal being reached between the Town and BHR is meritless. It ignores the express requirements of New York statutory law, including the Town Law, the Brookhaven Town Code, and the N.Y. Open Meetings Law (Public Officers Law Section 103) that the Town Board must publicly consider, before approving any “*partial resolution*” resulting from a “*partial Mediation*” between the Town and BHR, if any.

The tentative Mediation Agreement reached only “*in principle*” and which would require Public Town Board approval if ever reached has been outlined above. The positive results thus far reached in principle by this Mediation process speak for themselves.

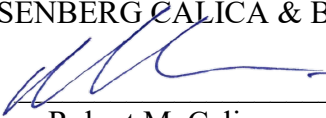
Conclusion

The Board should reject the Petition/Request of NAACP New York “*for immediate public disclosure on behalf of the NAACP in response to a non-public Mediation conducted after a January 6, 2021 [‘STB’] Decision issued in the above-referenced docket*”. It is inconsistent with both the Confidentiality Rules governing Mediation and the Public Policy behind those Rules.

The Board should give no consideration to the irresponsible rhetoric contained in the Faegre Firm Letter.

Respectfully,

ROSENBERG CALICA & BIRNEY LLP

By: 

Robert M. Calica

RMC:ds

cc: Counsel and Parties of Record

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
TOWN OF BROOKHAVEN,

Plaintiffs,

-against-

ORDER

CV 14-2286 (GRB)

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

Defendants.
-----X

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Attorney for Defendant Sills Expressway Associates

GARY R. BROWN, United States Magistrate Judge:

"What a way to run a railroad!" -cartoonist Ralph Fuller, Ballyhoo (1932)

Before the Court is a motion by plaintiff Town of Brookhaven (the "Town") seeking a preliminary injunction to prevent defendants associated with the Brookhaven Rail Terminal

(collectively “BRT”) from the continued excavation, removal and sale of sand from an environmentally sensitive, 93-acre site located in Yaphank, NY, purportedly in connection with the construction of a railroad facility. Defendants have resisted the Town’s efforts to enforce regulations that would limit sand mining at the site, claiming that these operations are incidental to grading in preparation for the installation of a railroad spur that falls exclusively under the jurisdiction of federal authorities and hence outside the realm of the Town’s regulation.

At a two-day hearing, the Town established that the anticipated removal of more than two million tons of sand from the site, which is located in a hydrologic recharge zone, presents a very real risk of contamination to Long Island’s sole source glacial aquifers. Moreover, plaintiff presented overwhelming evidence that the lucrative sand mining operation, expected to generate revenues of \$10 million or more, appears entirely independent of any plan that defendants may implement to construct railroad operations at the site, which plan has not advanced beyond a conceptual stage. As such, I find that the issuance of a preliminary injunction barring defendants from further mining, removal or sale of sand or other material from the site is appropriate for the reasons set forth herein.

PROCEDURAL HISTORY

On April 9, 2014, plaintiff filed a complaint in state court, seeking declaratory judgment, preliminary and permanent injunctive relief and damages arising out of defendants alleged violations of State and Town law as well as the “So Ordered” stipulation filed in this Court in *Sills Road Realty v. Town of Brookhaven*, CV 07-4584 (TCP) (ETB). On or about that same date, defendants filed a Notice of Removal from New York State Supreme Court.¹ See Notice of

¹ The parties consented to the removal of this action. See Notice of Removal, Ex. E, DE [1]. Defendants assert that federal jurisdiction is appropriate because plaintiff’s claim are pre-empted by federal law and because plaintiff’s amended complaint arises out of, references, incorporates, and sues upon alleged breaches of an April 22, 2010 Stipulation of Settlement arising from an earlier lawsuit between the same parties. The April 22, 2010 Stipulation of

Removal, Docket Entry (“DE”) [1]. On April 24, 2014, plaintiffs applied to the Honorable Leonard D. Wexler, for an order to show cause and a temporary restraining order (“TRO”). *See* Application for Leave to Submit Application for Leave to Submit Application for Order to Show Cause and Temporary Restraining Order Pursuant to FRCP 65 (“Appl. for TRO”), DE [12]. On April 25, 2014, plaintiffs moved for a preliminary injunction. Motion for Preliminary Injunction (“Prelim. Mot.”), DE [14].

Due to a scheduling conflict, the hearing was held by the Honorable Joseph F. Bianco on April 28, 2014. Judge Bianco reserved decision, and recommended the parties try to reach an interim agreement. *See generally* Min. Ent., Apr. 28, 2014, DE [16]. On April 30, 2014, the parties filed a letter stating they were unable to reach an agreement among themselves and once again sought the Court’s intervention. *See* Letter to Judge Bianco, Apr. 30, 2014, DE [20]. During a telephone conference, Judge Bianco set a show cause hearing for May 12, 2014, before Judge Wexler. *See generally* Min. Ent., May 1, 2014, DE [23]. At the hearing, Judge Wexler granted plaintiff’s request for a TRO and scheduled a preliminary injunction hearing for May 16, 2014. *See* Min. Ent., May 13, 2014, DE [36].

On May 19, 2014, the parties consented to the undersigned’s jurisdiction and the preliminary injunction hearing commenced. *See* Consent to Jurisdiction by US Magistrate Judge, May 19, 2014, DE [40]; Min. Ent. May, 19, 2014, DE [41]; Minute Order, May 19, 2014, DE [42]. Upon consent of the parties, the TRO was extended to July 1, 2014, pending decision on the preliminary injunction motion. *See* E-Order dated June 10, 2014.

FACTUAL BACKGROUND

Defendants’ Business Activities

Beginning in or about 2011, defendants and/or affiliated entities began operating a freight

railway facility on a 28-acre tract referred to parcel A in Yaphank, NY. Defendants' Opposition ("Defs' Opp."), Declaration of James J. Pratt, III ("Pratt Decl."), ¶¶ 4-5, DE [29-2]. Defendant Sills Road, LLC ("Sills Road"), a conglomerate created by "a producer and users of crushed stone," principally developed the terminal as a means "to meet the needs of its members for the economical transportation of stone and other construction materials." *Id.* ¶ 5. The facility abuts both the Long Island Rail Road ("LIRR") and the Long Island Expressway ("LIE"). BRT transloads freight from train cars onto trucks, which deliver the material via the LIE. By all accounts, BRT has proven successful, attracting important commercial clients, such as Home Depot and a major commercial bakery, providing freight rail transportation in a region generally underserved by such services, and offering economic benefits and reduction of traffic on crowded railways. *See* Transcript ("Tr.") of 5/19/2014 - 5/20/2014 Preliminary Injunction Hearing at 308, 355, DE [45]; *see also generally* Pratt Decl.

According to defendants, BRT has reached capacity, and they have engaged in discussions with customers about expanding their facilities. Tr. 353; Defs' Opp., Declaration of Daniel K. Miller ("Miller Decl."), ¶ 15, DE [29-3]. On June 1, 2012, defendant Sills Expressway Associates, LLC ("Sills Expressway") leased parcels B and C, totaling 93 acres, to defendant Sills Road for a 25-year period. Ex. 33. The New York State Department of Transportation provided a \$2.5 million grant to help fund that expansion. Tr. 305.

"Grading" of the site began more than two years ago. Tr. 311-12. Remarkably, this work began well before some, if not all, of the conceptual plans were drawn. Miller testified that the defendants initially were leveling the entire site—which he claimed was more efficient—but then decided to "reorient" construction after litigation began, though few details were presented regarding this reorientation. Tr. 311-12.

It appears, however, that the purported grading related mainly, if not exclusively, to defendants' sale of sand from parcels B and C. In fact, Robert Humbert, an engineer who prepared an O-track design presented by defendants, testified that the clearing, grubbing and excavation work at the site could have been done far more "surgically" to accommodate his design. Tr. 218. As Mr. Humbert lacks licensure in New York, his plan, the most developed presented by defendants, does not bear the required signature and seal of an engineer licensed to practice in New York. Tr. 200. He further explained that his design remained conceptual, and thus did not require such approval. *Id.* In designing his concept, Humbert gave no consideration to geological or environmental issues. Tr. 202. Most significantly, Humbert began working on this design in October 2013, long after defendants began clearing and excavating the parcels. Tr. 199.

Other evidence emerged that helped explain defendants rush to excavate the property. It is beyond dispute that defendants have engaged in a large-scale excavation, sifting and sale of sand from the parcels. Expert witnesses for both plaintiff and defendants observed sand screening equipment in operation at the site, and aerial views confirm the remarkable scale of the operation. Tr. 105, 210.

From the outset, the operations on parcels B and C centered on excavation and sale of sand. Indeed, in the lease agreement, Sills Road agreed to provide Sills Expressway with 600,000 tons of sand as part of the consideration for the lease. Ex. 30 at 2. In a November 2012 email between Dan Miller, the CFO of BRT, and an engineering firm, Miller obtained "sand estimates" from the firm. Accompanying that email was a "Phase 2" grading plan revealing that the entire plat was to be excavated down to 50' above sea level—a calculus that has nothing to do with any then-extant railway design, but appears designed to maximize the amount of sand

that could be mined and removed from the parcels. Tr. 284-86. Remarkably, one engineer inquired about reducing the elevation of the site to 56'; in response, one of the BRT partners advised the engineer to assume a 50' elevation. Tr. 288-290. Based on that assumption, the engineers calculated that BRT could expect to sell approximately 2.4 million cubic yards of sand (equal to more than two million tons) from parcels B and C. Tr. 292.

In at least five instances during the hearing—even in response to a question from the Court—Miller characterized the profit from the removal and sale of sand from the site as a “minor consideration.” See Tr. 281, 283, 287, 291, 293. This claim is belied both by the information that emerged during the hearing as well as the actions of Miller and others associated with defendants. By his estimation, defendants stand to profit at least \$9-10 million from the sale of sand removed from parcels B and C (with virtually no capital investment), a figure Miller readily provided. Tr. 293. Ironically, when asked by the Court about the profits from the existing railroad operation on parcel A, Miller had more difficulty producing a figure, but ultimately conceded that the current railroad operation produces approximately \$8-10 million in income following a \$40 million capital investment. *Id.*

Miller’s declaration establishes beyond any doubt that the defendants are conducting a sand mining business completely separate and apart from any railroad construction:

Harm To Sand Customers & Loss Of Sand Business

As part of the construction process, BRT has entered into business relationships with local trucking companies, landscape companies, and contractors involved in the removal of excess sand and materials for site grading. There are over 90 companies that rely upon BRT as their source for sand (the “Sand Customers”).

* * *

Even if the Sand Customers are able to obtain sand from other sources, the stoppage in sand supply will result in irreparable harm to the BRT because it will lose the Sand Customers’ business as a result of its inability to meet their

commercial needs. BRT will lose their business because the Sand Customers will no longer consider BRT to be a consistent, reliable source for sand.

Miller Decl. ¶¶28-31 (emphases added); Tr. 318 (“When you are not able to provide a consistent supply for a season, there is a lot of customers that won’t use your facility for that year”). Miller utilizes depletion allowances to account for the sand removed from the site, but reported that he was insufficiently familiar with accounting to know whether depletion is generally associated with mining operations. Tr. 284. It is. *See Internal Revenue Service, Overview of the Mining Industry* at 11(Nov. 2006), available at www.irs.gov (“Depletion allows the owner of the mine or mineral interest to recover basis in the minerals just as depreciation allows a manufacturer to recover the cost of equipment and buildings”).

Notice to and Approval from the Town

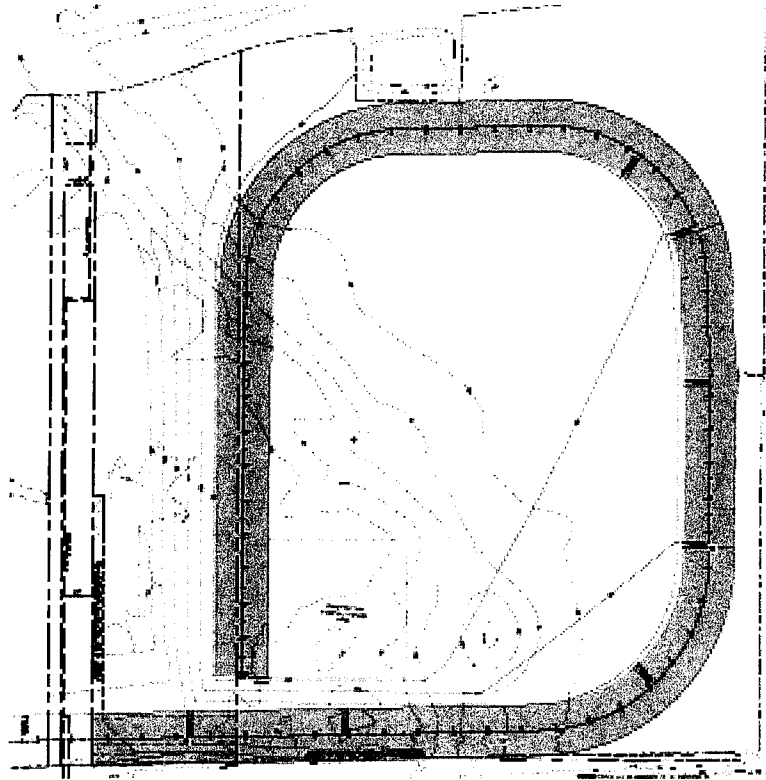
BRT provided the Town with a number of conceptual drawings for their potential expansion onto parcels B and C. Tr. 112, 121. One of those concepts involved a J-shaped track that would traverse the perimeter of the parcels. Tr. 113-15. Another illustrated a casino to be operated by the Shinnecock Indian Nation, with BRT offering a passenger spur off the LIRR, while another plan shown to Town officials involved a sports arena. Tr. 121, 126; Ex. 28. In yet another incarnation, BRT presented the Town with “preliminary” list of potential activities for the site, including a salt offloading facility. Tr. 146; Ex. U. Matthew Miner, the Town’s Commissioner of Waste Management and Chief of Operations, testified to numerous discussions with BRT about construction activities. The gravamen of those talks involved defendants clearing and grading a limited area around the intended path of the track. Tr. 116. Indeed, Miner testified that a specific agreement was reached that BRT would clear only a 150’-wide pathway along the track to allow for entry of heavy construction equipment. Tr. 116-17, 161. This

tentative approval was given subject to approval by the National Environmental Policy Act (“NEPA”) and Surface Transportation Program (“STP”), and was expressly limited to the track area, as no final plan had been presented concerning the accompanying buildings. Tr. 117-118.

While defendants contest this notion, arguing that the Town was fully informed of its grading plans, evidence submitted by defendants corroborate Miner’s account. A letter dated June 29, 2012 to Miner from BRT advises the Town that “[c]onstruction . . . will begin with clearing and grading of the track right of way and installation of track, in accordance with the proposed ‘J track’ layout.” Ex. FF. Furthermore, in his sworn declaration opposing the motion, CFO Miller makes the following statement:

As we have advised the Town repeatedly, the *only* construction activity presently occurring and planned for the foreseeable future is grading the shaded track loop area depicted in Exhibit O to the [Town’s Declaration].

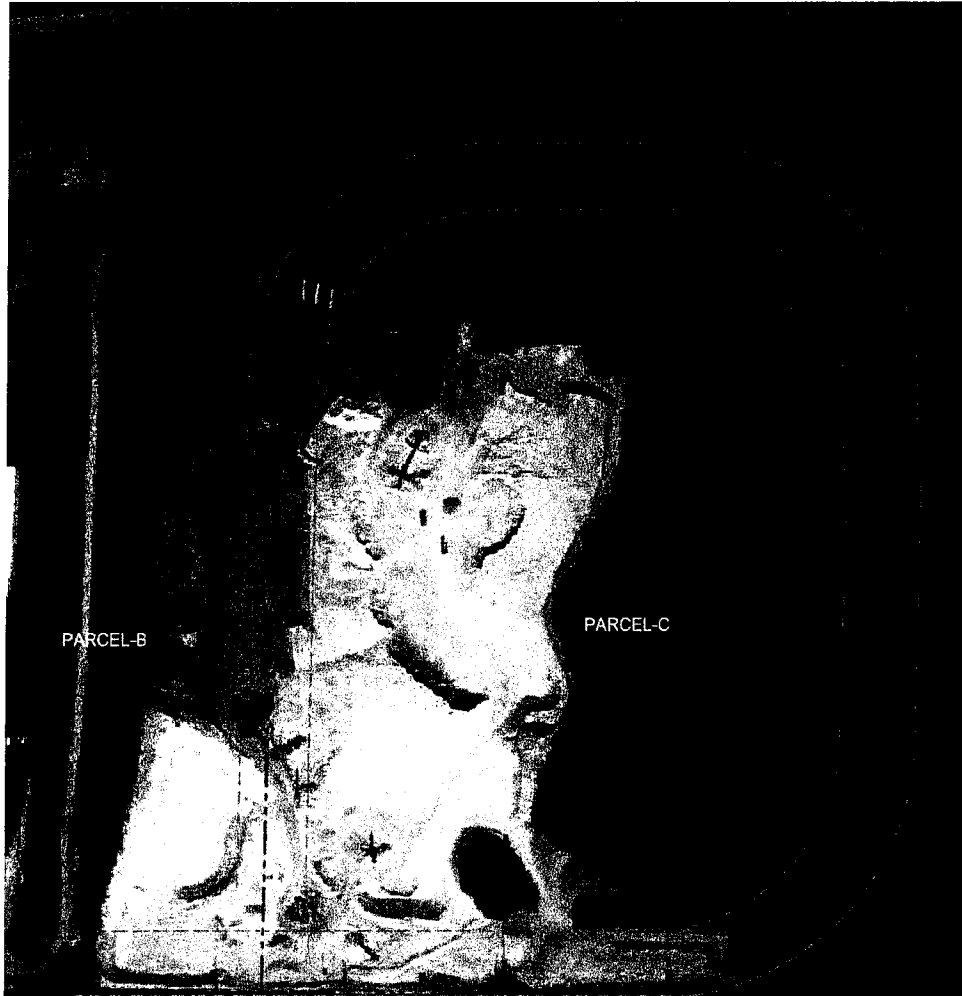
Miller Decl. ¶ 9 (emphasis in the original). That exhibit appears as follows:



Because Miller avers that defendants “advised the Town repeatedly” that grading was limited to the grey, shaded portion of the plan submitted as Exhibit O, it is plain that, as Miner testified, defendants held discussions with Town officials that grading would not exceed a small area surrounding the intended track roadbed.

Notably, Miller’s sworn statement to this Court that “the *only* construction activity presently occurring and planned for the foreseeable future is grading the shaded track loop area” was flatly untrue. An inspection of the site ordered by the Court revealed that at least 50 percent of the vegetation had been stripped from the 93-acre site as part of the defendants’ excavation of sand. Tr. 101. Indeed, an overlay of the track plan over an aerial photo of the site² reveals that defendants have excavated a huge swath of parcels B and C, with little relation to the track path:

² The photo used here reportedly was taken in October 2013—the evidence suggests that defendants have more



Prelim. Mot., Ex. B-1, DE [14-3]. Miller's representation in his declaration that grading the shaded area was the *only* construction activity at the site can only be considered a misrepresentation to this Court.

Lastly, documents were introduced that had been filed between 2010 and 2013 with the Town by an engineering firm hired by defendants regarding activities on parcels A, B, and C. Tr. 312-318; Ex. GGGG. Earlier reports—relating only to parcel A—described the work as an “Excavation and Mining Operation.” *Id.* Later reports—relating to parcels B and C—describe

extensively excavated the site in the interim.

the operation simply as “excavation ongoing.” *Id.* Despite the different nomenclature used in these reports, there were no significant differences in the mining work conducted on the three parcels. Tr. 317-8. Thus, the documents reported “excavation” to the Town on parcels B and C, when, in truth, defendants were conducting a mining operation.

Environmental Risks Presented by Defendants’ Activities

Stephanie Davis, a well-educated and experienced hydrogeologist, inspected and studied the site. Tr. 9-24. By way of context, Davis explained that Long Island is served by three glacial aquifers, which supply nearly all the drinking water for Nassau and Suffolk counties. Tr. 17-18. These aquifers, the Upper Glacial, Magothy and Lloyd, are more or less geographically coextensive and are layered at different depths underground. The Upper Glacial aquifer, closest to the surface, is the easiest to tap but the least pure and supplies half of Suffolk’s drinking water; beneath it is the purer Magothy aquifer, which supplies 100% of the water in Nassau County and the other half of Suffolk’s drinking water; and the Lloyd aquifer, the deepest of the three, requires special permits to tap and is considered the water source of last resort. Tr. 19. The subject parcels constitute part of a Deep Recharge zone—which are of the highest importance for the water supply—as infiltrating surface water creates pressure in the Upper Glacial aquifer, forcing water into the Magothy aquifer, effectively recharging the latter. Tr. 20-22. The presence of native sand in a Deep Recharge zone—which both facilitates infiltration by surface water and filters that water—proves critical to this function. Tr. 22-24.

Davis opined that the systematic, large-scale removal of native forest, vegetation, topsoil and native sand will have a detrimental effect on both infiltration and filtration of surface water, negatively impacting the quality of the drinking water in the aquifers. Tr. 24-26. She further advised, upon reviewing some of defendants’ plans, that in reducing the elevation of the site

from as much as 100 feet (or more) above sea level to fifty feet above sea level, defendants will be excavating to within fifteen feet of the Upper Glacial aquifer. Tr. 27-29. This significant reduction in the amount of sand would increase risk of contamination. Tr. 31. Similarly, removal of topsoil and vegetation, which has already occurred throughout a wide swath of the site, further decreases the filtration capacity of the site. Tr. 28-29. An environmental engineer called by the Town similarly opined that the reduced material would decrease the filtering capacity of the site, raising groundwater concerns. Tr. 251-2.

Davis further opined that the various iterations of defendants' planned expansion of their railroad operation would heighten the risk of contamination of the aquifers. She explained that compaction of the remaining sand from construction and operations would further reduce the amount of infiltration of surface and rainwater. Tr. 28. Davis also opined that contaminants discharges associated with several of the proposed uses for the property—such as petroleum products and salt—combined with the compromised filtration capacity, would present risks of contamination of the aquifer. Tr. 33-56. Contamination of this nature would compromise the potability of the water in the aquifer, which may or may not be remedial through treatment. Tr. 57. Davis's testimony went largely unrebutted by defendants.

Finally, while inspecting the site, Davis observed a large quantity—estimated at 12,000 to 15,000 cubic yards—of anthropogenic debris (commonly defined as debris originating from human activity) on parcel B and C. Tr. 59-69. This material, which included demolition remnants, tile, bone, glass, metal, pipe, china, asphalt millings and a NYC Metrocard, may reflect illegal dumping. *Id.* Such material, which clearly originated elsewhere, presents a potential risk to groundwater and requires testing to determine the nature of the contaminants present. Tr. 70. Defendants offered testimony that, in large part, this material was discovered on

parcels B and C, though some constitutes demolition debris from work on parcel A. Tr. 315-16.

As of now, defendants claim that the material is being “stockpiled” and will eventually be removed and disposed of properly. *Id.*

DISCUSSION

The Standard of Review

A party seeking preliminary injunctive relief must demonstrate

‘(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff’s favor; and (3) that the public’s interest weighs in favor of granting an injunction.’

Red Earth LLC v. United States, 657 F.3d 138, 143 (2d Cir. 2011). The Court has “wide discretion in determining whether to grant a preliminary injunction,” as it is “one of the most drastic tools in the arsenal of judicial remedies.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (citations omitted).

Irreparable Harm

“A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). In this regard, the Supreme Court has observed:

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Production Co. v. Village of Gambell, AK, 480 U.S. 531, 545 (1987); *cf. League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 13-CV-35653, 2014 WL 1814172, at *6 (9th Cir. May, 8, 2014) (“The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of

money damages can normally remedy such damage. The harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis.”)

The record here demonstrates overwhelmingly that, absent preliminary relief, irreparable harm will result from defendants’ activities. The undisputed testimony of two expert witnesses—a hydrogeologist and an environmental engineer—clearly shows that defendants’ ongoing removal of more than two million tons of native sand as well as topsoil and vegetation from parcels B and C, which comprise portions of an environmentally sensitive, hydrologic recharge zone, will significantly reduce infiltration and filtration of contaminants from groundwater. Furthermore, defendants’ decision to excavate the site to a uniform elevation of 50 feet above sea level—to within 15 feet of Long Island’s sole source aquifer—presents irreparable risks of contamination of drinking water supplies. These permanent, detrimental changes to environmentally sensitive lands represent a serious risk of irreparable injury to the public. *Environmental Defense Fund v. Tennessee Val. Authority*, 468 F.2d 1164, 1183 (6th Cir. 1972) (“activities . . . such as the cutting and burning of timber, the movement of massive amounts of earth, the construction of large earthworks, and the relocation of roads and bridges” constitute irreparable harm). In the face of such risk, injunctive relief may be warranted. *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) (“Broader injunctive relief is appropriate, of course, where substantial danger to the environment . . . is established”).

Likelihood of Success

The next issue then is whether there is a likelihood of success on the merits, or, failing that, a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff’s favor. Once the merits of this litigation are clearly defined, the issue becomes fairly straightforward. Among other things, the Town seeks a

declaratory judgment upholding its right to enforce its code as against defendants in relation to the activities on parcels B and C. The Town's code prohibits the mining of sand except as such "operations are incidental to the development of the site for residential, commercial or industrial purposes," or in the case of "industrial or commercial zoned premises," mining "shall be limited to the extent necessary to accommodate the construction of the structures or uses to be contained thereon." Brookhaven Town Code Section 53-3.

Defendants' principal, if not exclusive, response to this claim is that the Town lacks the power to enforce these regulations on parcels B and C, positing that because they intend to construct a railroad spur, their activities are governed by preemptive federal jurisdiction under the Interstate Commerce Commission ("ICC"). *See* Defendants' Post-Hearing Memorandum in Opposition ("Defs' Post-Opp.") at 9, DE [48] ("The key issue . . . is preemption"). The Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101, et seq. (the "Termination Act") "expressly preempts 'remedies provided under Federal or State law' and vests the Surface Transportation Board [the "STB"], a federal agency, with exclusive jurisdiction over 'transportation by rail carriers' and 'the construction . . . of . . . facilities . . .'" *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005). As relevant herein, the STB has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities." *Id.* at 642.

If the evidence presented showed that the operations being carried out on parcels B and C were related to one of these activities, the case might present a close question. However, the evidence established no such relation. As described above, the evidence presented indisputably demonstrates that defendants have engaged in wholesale mining of the parcels entirely independent of any rail construction or development. Defendants' evident intent and actions to

strip and sell millions of dollars' worth of sand from the property predates any serious effort to design or construct any rail facilities, beginning with the lease of the property, which includes a provision to pay some of the rent using 600,000 tons of mined sand. It was financially interested personnel at BTR, not engineering experts, who dictated the level to which the sand would be excavated. Sand mining commenced well before any significant design effort began, and to date, despite the large-scale excavation that has taken place, that design remains "conceptual." Not one foot of track or a single railroad tie has been laid. The only substantial activity reflected in the testimony and documents is the excavation, refining and sale of sand from the parcels. Because there is no showing that the activity in question—the mining of sand—constitutes "transportation by rail," such activity does not fall within the STB's exclusive jurisdiction. *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72 (2d Cir. 2011) ("Both the courts and the STB thus consistently find that to fall within the STB's exclusive jurisdiction, the facility or activity must satisfy both the 'transportation' and 'rail carrier' statutory requirements").

Plaintiff argues extensively that the contemplated railroad construction does not satisfy the statutory requisites for a railroad spur, and that at least some of the anticipated uses constitute "activities not integrally related to rail service," which do not implicate preemption. *CFNR Operating Co., Inc. v. City of Am. Canyon*, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003). Defendants counter that the issue of whether the contemplated project constitutes a spur is ultimately irrelevant, but that the question is before the STB in any event. Defs' Opp. at 17. In fact, on this record, no reasoned determination can be made regarding the whether defendants' intended plans comprise rail-related activities, as the defendants have presented divergent concepts for the parcels—including various track configurations and purposes, from a refrigerated transloading facility to a mini-passenger service for patrons of a non-existent Native

American casino. What can be said with certainty, however, is that the mining of sand from the parcels has been demonstrated to be entirely independent of any rail-related activity.

Finally, even assuming, *arguendo*, that the evidence presented some support for a *bona fide* railroad construction, given the nature of the Town's regulations, and the attenuated connection between the conceptual railroad plan and the mining activities, a serious question would remain as to the merits. As the Second Circuit has observed:

not all state and local regulations are preempted by the Termination Act; local bodies retain certain police powers which protect public health and safety. It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

Green Mountain R.R. Corp., 404 F.3d at 643. Here, the Town's regulations prohibiting sand mining and screening are intended to protect public health and safety through the conservation of natural resources and preservation of drainage patterns, which safeguard drinking water, *see* Brookhaven Town Code 53-1, appear to be clearly defined and non-discriminatory. Thus, there is, at a minimum, a serious question on the merits.

And the balance of hardships tips decidedly in plaintiff's favor: the Town's efforts are aimed at preventing environmental disaster. The only hardship articulated by defendants is the temporary loss of sand mining revenue, as their claims of construction delay, given the absence of any demonstrated effort to implement their rail expansion effort, prove unavailing. This determination is only heightened by proof that defendants made inarguable efforts to conceal their activities from the Town, which has acted with reasonable diligence under the

circumstances. Therefore, the entry of a preliminary injunction is warranted.

The Public Interest

Finally, granting a preliminary injunction, which would avoid further destruction of the site and thereby help ensure protection of a safe drinking water supply, would serve the public interest. The Second Circuit has described the protection of drinking water as “a core municipal function and implicating an unusually compelling public interest.” *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 725 F.3d 65, 112 (2d Cir. 2013); *United States v. 27.09 Acres of Land*, 760 F. Supp. 345, 354 (S.D.N.Y. 1991) (preliminary injunction issued based upon “the imperative to assure pure drinking water for eight million people”). And while the threat here may not seem as immediate as that identified in cases involving the active introduction of contaminants into the water supply,³ it is no less compelling. Thus, the public interest further weighs in favor of preliminary relief.

At the same time, the public interest would also be served by the construction of additional railroad facilities, which would bestow the economic and environmental benefits discussed earlier. To be clear, the benefits of increased railroad service, though important, pales in comparison to the interest in safeguarding the drinking water supply. *See United States v. 27.09 Acres of Land*, 760 F. Supp. at 354 (“the imperative to assure pure drinking water for eight million people trumps the convenience of better mail delivery to one million”). To some extent, however, balancing these interests may be achieved through subsequent application by defendants for relief from the injunction if and when that becomes appropriate.

Bond Requirement

Defendants urge that the Court require posting of a bond before a preliminary injunction

³ Importantly, the anthropogenic debris on the site has the potential of introducing contaminants, but more testing is required. Tr. 59-63.

may issue. Federal Rule of Civil Procedure 65(c) provides that:

The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

“Rule 65(c)’s bond requirement serves a number of functions. It assures the enjoined party that it may readily collect damages from the funds posted in the event that it was wrongfully enjoined, and that it may do so without further litigation and without regard to the possible insolvency of the plaintiff.” *Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 557 (2d Cir. 2011).

Notwithstanding the mandatory language of the Rule, a court may, under certain circumstances, dispense with the bond requirement. *See, e.g., Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012). This is particularly true “where there has been no proof of likelihood of harm.” *Doctor’s Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997). In this case, the defendants have failed to make a showing of any substantial harm that could result from granting the injunction. I do not credit the claim that the injunction would impose losses due to delay of any planned railway project, so the only articulable basis for harm would be the loss of “sand business”—yet defendants would remain in possession of the sand, which could, theoretically, be sold at a later date.

“Some courts have considered the strength of a movant’s case in analyzing the likelihood of harm to a potentially wrongfully enjoined nonmovant.” *Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp. 2d 186, 203 (E.D.N.Y. 2013) (citing cases). On this record, this factor weighs strongly in favor of the Town, and militates against the imposition of a bond. Similarly, the important public policy issues at stake weigh against imposition of a bond. *See Donohue v. Mangano*, 886 F. Supp. 2d 126, 163 (E.D.N.Y. 2012) (citing cases and waiving bond “given the

important potential constitutional issues” in the action).

Lastly, given that one of purpose of the bond requirement under Rule 65(c) is to safeguard the defendant against “possible insolvency” of plaintiff, *Nokia Corp.*, 645 F.3d at 557, a government entity may readily be excused from posting a bond to secure a preliminary injunction. Because such plaintiffs enjoy “the unlimited taxing power of a municipality,” *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981), the risk of insolvency and corresponding need for a bond, though not unimaginable, remains small.

Based on these considerations, I decline to require the posting of a bond.

CONCLUSION

Based on the foregoing:

It is hereby ORDERED, for all the reasons set forth herein, that the defendants are hereby enjoined and restrained from undertaking any further actions and activities to mine, excavate, sell, grade and/or remove native sand, minerals and vegetation from parcels B and C, during the pendency of this action and pending further order of the Court.

Further, it is ORDERED that plaintiff and its representatives, agents, employees, consultants and attorneys may, upon reasonable notice to defendants, enter the premises to inspect to ensure compliance with this Order, photograph the site for the purposes of documentation and evidentiary submission and collect samples of debris for the purposes of testing for contaminants.

SO ORDERED.

Dated: Central Islip, New York
June 23, 2014

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge