

El-7565

Law Offices

of

Mark A. Cuthbertson

Of Counsel
Thomas L. Costa
Michelle M. Pfeifferberger

April 21, 2008

Mr. Troy Brady
Section of Environmental Analysis
United States Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

Re: STB Docket No.: _____
U.S. Rail Corporation, Petition for Waiver Under
49 CFR 1105.10(a)

Dear Mr. Brady:

I am outside counsel to the Town of Brookhaven ("Brookhaven") in New York. I am writing in response to the letter sent to you by John D. Heffner dated March 26, 2008 ("March 26 Letter"), which was sent on behalf of U.S. Rail Corporation ("U.S. Rail") an existing Class III short line railroad that alleges it is going to construct and operate a new rail-served facility, the Brookhaven Rail Terminal ("BRT"). U.S. Rail proposes to locate a rail facility at a property located on Sills Road in the hamlet of Yaphank ("Property") in the Town of Brookhaven.

After reviewing the March 26 Letter, Brookhaven respectfully submits that a waiver of six-month advance notice requirement is not consistent with the regulations of the Section of Energy and Environmental ("SEA") and the Board's policies.

Executive Summary

In the March 26 Letter, U.S. Rail indicates that the waiver provisions of the Board's environmental rules require a party to describe as completely the environmental effects and timing of the proposed action and to show that all or part of the six-month lead period is not appropriate.

First, as set forth below, Brookhaven maintains that U.S. Rail has not completely described the environmental effects of the proposed action. Among the myriad omissions from U.S. Rail's description of the environmental effects of its proposal is the fact that U.S. Rail failed to mention that 18 acres of the Property have already been clear-cut of trees and tens of thousands of cubic yards of sand and material have been mined from the Property.

Second, U.S. Rail's claim that it is going to "construct and operate" BRT is open to serious question. Brookhaven bases this statement on the litigation record that was developed during a preliminary injunction hearing in December, 2007 involving, among others, Brookhaven and U.S. Rail. In that hearing it was revealed that U.S. Rail's involvement at the Property is a mere subterfuge by which the owners of the Property and other related parties are seeking to cloak themselves in federal preemption to avoid state and local oversight of their true business venture — a lucrative sand mining operation.

Lastly, and as also set forth below, there has been a significant question as to whether U.S. Rail and the other parties affiliated with the Property intend to transport Construction and Demolition Debris ("C&D") from the Property. As you are no doubt aware Congress has mandated in the Consolidated Appropriations Act, 2008 Pub. L. No. 110-116, 121 Stat. 1844 ("Act") that no funds appropriated to the Board can be used to take any action to allow any activity involving the collection, storage, or transfer of solid waste. C&D fits within the definition of solid waste. As such, no Board review or action should take place on this application if it will involve the transport of solid waste.

I. U.S. Rail Has Not Completely Described the Environmental Effects of its Proposal

For the reason set forth below, Brookhaven believes that U.S. Rail has not presented a complete description of the environmental effects of its proposal.

A. U.S. Rail Omitted Any Mention Of The Environmental Impacts Of Its Actions Prior To Being Ordered To Cease Construction By The Board.

The Board was required to intervene in the finance docket matter involving the Property and issued a decision dated October 12, 2007 ordering U.S. Rail to cease and desist from construction at the site because rail construction might be occurring or contemplated at the Property and because no party had sought authority from the Board to construct a rail facility at the site. The Board's decision relied in part on a letter from Brookhaven that it received on October 2, 2007 and a news article appearing in *Newsday* on October 2, 2007. A copy of that letter and article are annexed as Exhibit "A." The *Newsday* article noted that an estimated 30,000 cubic yards of sand had been mined and 18 acres of land had been cleared.

In order to give your office a full understanding of the significant environmental impacts of this unauthorized clear cutting and sand mining operation, I have attached as Exhibit "B" an array of photos taken at the site after construction was commenced.

While Brookhaven understands that a more extensive discussion of the environmental impacts of this proposal will take place as the environmental review process unfolds, it is incumbent on U.S. Rail to adequately describe the environmental impacts to secure a waiver of the six-month rule.

Among the many items missing from the description provided by U.S. Rail in the March 26 Letter is the fact that significant grading will take place if U.S. Rail is permitted to construct BRT. A representative for U.S. Rail testified at the preliminary injunction hearing that there is a grade change of 12 to 13 feet from the railroad line adjoining the Property. Exhibit "D", p. 24. He further testified that "it is impossible to operate a rail line with that kind of a short grade like that so it will have to be brought down." Exhibit "D", p. 24. The environmental impact of changing the grade of a portion of a 28-acre site 12 to 13 feet will be very significant, yet U.S. Rail omitted any mention of this fact to the Board.

B. U.S. Rail Failed To Provide The Board With The Environmental Analysis To Which It Referred In The March 28 Letter

U.S. Rail indicates in the March 28 Letter that the Property has been previously analyzed in connection with a proposal to build a gas-fired electric power plant and, based on that analysis states that a number of conclusions can be drawn. In so doing, U.S. Rail has chosen to "cherry-pick" those conclusions that suit its needs and failed to provide your office with the complete analysis of proposed power plant. This past week Brookhaven obtained a copy of a preliminary Scoping Statement ("Scoping Statement") for a power plant at the Property dated March 24, 2000 (Exhibit "C"). In providing the Scoping Statement to your office, Brookhaven is by no means suggesting that this analysis is adequate or should serve as a substitute for a full environmental analysis that should be required for BRT. Among many other things and as noted above, the BRT would involve the significant required change of grade to the Property and there is no indication that such measures were required for the construction of a power plant. In addition, at this juncture, Brookhaven has only been able to obtain the Scoping Statement for the power plant. Presumably there were other analysis and submissions that further discussed and possibly critiqued this initial scoping document.

While Brookhaven has only been able to conduct a cursory review of the Scoping Statement, it notes that:

- Prior to being clear-cut, the site was characterized by a "mixed deciduous forest" dominated by oaks and pines. Exhibit "C", p. 2-2 and 15-1.¹
- While all of Long Island is within an EPA-designated sole source aquifer, the Property is within a "deep recharge area" as defined by state and local law. Exhibit "C", p. 2-2.
- The Town code classifies the Property as being within a Hydrogeologically Sensitive Zone ("HSZ"). As such, there is a presumption under the Town Code that the project would require an Environmental Impact Statement under the New York State Environmental Quality Review Act ("SEQRA") (the New York State counterpart to NEPA). However, in the case of the Scoping Statement, since power plants were exempted from SEQRA under New York State law, an Environmental Impact Statement under SEQRA was not required.
- The Property is located in an area of "severe non attainment for ozone."

C. Based On Its Prior Conduct, U.S. Rail's Representatives Should be Closely Scrutinized

The pattern of bad faith and misrepresentations exhibited by U.S. Rail and affiliated parties is well documented in the record before the STB. Ultimately, the Board found in its decision dated October 12, 2007, that contrary to prior representations by U.S. Rail and its affiliates, construction was taking place at the Property that might require Board approval. Based on this pattern of conduct, Brookhaven believes that the representation of U.S. Rail should be closely scrutinized.

¹ Page references are to the Preliminary Scoping Statement under Article X of the Public Service Law submitted by Brookhaven Energy Limited Partnership and dated March 24, 2007 which is submitted herewith as Exhibit "C."

II. U.S. Rail's Claim that it is Constructing the BRT is Seriously in Question Based on the Evidence Submitted at the Preliminary Injunction Hearing

In order for your office to undertake a review of the BRT, it should be satisfied that what is being proposed at the facility is truly construction that is going to be undertaken by a rail carrier. Given U. S. Rail's previous omissions, which are well documented in the Board's prior decisions involving the finance docket matter, a healthy dose of suspicion about its motivations and representations is warranted. The preliminary injunction hearing was held in the United States District Court for the Eastern District of New York before United States Magistrate Boyle on December 5-6, 2007. A transcript of that hearing is enclosed as Exhibit "D." Brookhaven's argument that U.S. Rail's involvement is a sham to avoid local land use and zoning regulations is summarized at Pages 19-21 of Brookhaven's post-trial submission of Findings of Fact and Conclusions of Law, which is annexed as Exhibit "E."

In the pending action in the Eastern District, U.S. Rail and the owner of the Property, Sills Road Realty ("Sills") sought to enjoin the Brookhaven from enforcing its local zoning code with respect to the activities that had taken place at the Property. While a decision in that matter, has not yet been issued, the testimony and evidence from that hearing is closed and the parties have submitted post-trial briefs. Brookhaven argues in its post-trial brief that US Rail's involvement at the Property is a mere subterfuge by which US Rail and the parties that have an interest in the Property are seeking to cloak themselves in federal preemption to avoid state and local oversight of their true business venture—a lucrative sand-mining operation.

Brookhaven believes that the following three documents that were introduced into evidence at the hearing demonstrate US Rail's involvement in a sand-mining scheme: (a) a "Railroad Operating Agreement and Property Lease" ("Lease") (Exhibit "F" herewith); (b) an Excavation Agreement (Exhibit "G" herewith); and (c) an unsigned Proposal for construction at the Property (Exhibit "H" herewith). The first document is the Lease, which is for a 28-acre industrial site. The term of the Lease is 30 years and the annual rent is \$1,000. Under the terms of the Lease, US Rail has no obligation to pay property taxes and was paid a signing bonus of \$10,000. The second document, the Excavation Agreement, allows Adjo Contracting Corp. ("Adjo") (a general contractor for the BRT and partner in Sills) is able to sell sand it excavates from the Property and be paid from the proceeds of the sale of the sand up to \$3,000,000 plus a 25% fee or all of its costs. For its part, Sills gets up to \$6,000,000 plus a 50% fee. The third document, The Proposal, is an unsigned document that contains specifications for a rail construction and indicates that it is a "Bid To: Sills Road Realty" (annexed as Exhibit "H").

At the hearing US Rail claimed that the Proposal has been incorporated into the Excavation Agreement even though neither document contains any reference to the other and further claim that these documents evidence US Rail's obligation to construct a rail facility. Exhibit D, p. 39. US Rail's President and CEO, Gabriel Hall ("Hall") testified that he was making payments to Adjo for rail construction but produced no proof of these payments at the hearing. (Exhibit D, p. 42). Hall was so ignorant of the details of the transactions occurring at the Property that he initially testified he was unaware of the provisions of the Excavation Agreement by which Adjo was paid from the proceeds of the materials that were mined from the Property. (Exhibit D, p. 42). When presented with the text of the Excavation Agreement, Hall acknowledged that it appeared that payments were being made for sand mining but could not confirm that this was the payment arrangement. (Exhibit D, p. 44).

Hall's testimony and the three documents Plaintiffs offered into evidence present a very clear picture: US Rail, the STB-certified Class III rail carrier, which is allegedly constructing a rail facility

thereby affording the parties the protection of federal preemption, has only a nominal role in the Property as evidenced by a sham agreement under which it pays \$1,000 a year to rent 28 acres of prime industrial land with no obligation to pay property taxes. In submitting these documents to the court at the hearing, US Rail was asking the court to believe that it would obligate itself to pay for the \$5,450,000 of rail construction improvements and equipment in the Proposal even though its lease for the Property could be terminated on 90 days notice and there is no express provision for repayment of the \$5,450,000 in construction improvements and equipment. (Exhibit H, ¶3(b)).

While the Agreement, appears not to make economic sense, when you consider the very lucrative arrangements that Sills and Adjo (a partner in Sills) have negotiated based on their ability to sand-mine at the Property without any state or local oversight, this arrangement makes complete sense. A more detailed analysis is set forth in the post-trial submission that has been enclosed as Exhibit E. Brookhaven believes that the testimony and evidence at the hearing call into question whether US Rail is truly obligated to construct the BRT. Brookhaven respectfully requests that US Rail be required to establish that it is truly the party that will be constructing and operating the BRT before it is given the requested waiver.

III. US Rail Should Be Required To Establish That It Will Not Be Transporting C&D Materials

On December 26, 2007, the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007) ("Act"), was enacted into law. Among other things, the Act provides the Board with funding for fiscal year 2008. As pertinent here, section 193 of the Act provides:

- (a) None of the funds appropriated or otherwise made available under this Act to the Surface Transportation Board of the Department of Transportation may be used to take any action to allow any activity described in subsection (b) in a case, matter, or declaratory order involving a railroad, or an entity claiming or seeking authority to operate as a railroad, unless the Board receives written assurance from the Governor, or the Governor's designee, of the State in which such activity will occur that such railroad or entity has agreed to comply with State and local regulations that establish public health, safety, and environmental standards for the activities described in subsection (b), other than zoning laws or regulations.
- (b) Activities referred to in subsection (a) are activities that occur at a solid waste rail transfer facility involving—
 - (1) the collection, storage, or transfer of solid waste (as defined in section 1004 of the Solid Waste Disposal Act (42 U.S.C. 6903)) outside of original shipping containers; or
 - (2) the separation or processing of solid waste (including baling, crushing, compacting, and shredding).

Consequently, no Board decision issued during the period covered by the Act can authorize any of the aforementioned activities prior to receipt of the written assurance referenced in the Act from the governor of the state (or governor's designee) where such activities are proposed.

A newspaper account in *Newsday* on October 5, 2007 (annexed as Exhibit "I") explains the close ties that the parties affiliated with the Property have to the garbage industry and also reveals that

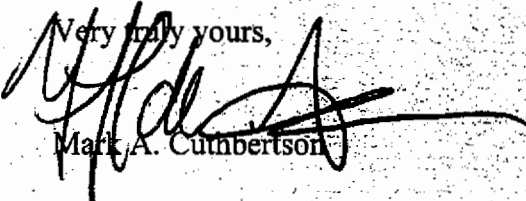
US Rail has stated to the Board in a letter dated January 25, 2006 (annexed as Exhibit "J") in the *New England Transrail* case² that indicates that US Rail "generates a large part of its revenue from hauling solid waste materials" and further states that its research indicates that solid waste in the Northeast region of the United States is that region's major outbound component for export. It made these statements through its attorney who wrote a letter in support of the application of New England Transrail, which was seeking approval for its solid waste transload facility.

As further proof of this, I submit to you as Exhibit "K" a letter I received from counsel for Sills on October 5, 2007 indicating that it previously advised the Town that the Property will be used for an "intermodal transportation center that will incorporate switching and a railroad siding from existing Long Island Railroad tracks located on the property's southern boundary as well as freight transfer areas" and further states that no municipal solid waste will be processed at the site. Counsel offered on behalf of Sills to enter into an agreement to that effect. Conspicuously absent from the letter from Sills' counsel is any representation that it would not process construction and demolition solid waste at the site.

Based on the foregoing, Brookhaven respectfully submits that US Rail should be required to provide binding representations to the Board that transportation of solid waste will not be involved at the BRT in order to assure compliance with the Act.

We appreciate your consideration of Brookhaven's concerns about the March 28 Letter and look forward to your response and working with you on this matter.

Very truly yours,


Mark A. Cuthbertson

² New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Rwy.—Constr., Acquisition & Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797 at 9 (STB served July 12, 2007).

EXHIBIT B

(ORIGINAL PHOTOS TO BE SENT VIA MAIL)

EXHIBIT A



Town of Brookhaven Long Island

Brian X. Foley, Supervisor

October 2, 2007

Surface Transportation Board
Attention: Nancy Beiter, Esq.
395 E Street, S.W.
Washington, DC 20423-001

Re: U.S. Rail Corporation Facility/Yaphank, New York

Dear Ms. Beiter:

The Town of Brookhaven, New York has been in communication with representatives of U.S. Rail Corporation ("U.S. Rail") concerning a proposed rail facility on property that they have leased in Yaphank, Town of Brookhaven, New York. U.S. Rail has alleged that as a common carrier railroad, their construction and operation of this "Rail Yard" is governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board. They, therefore, claim that local laws, rules and regulations have no applicability to this project. A copy of identical letters from their counsel, John D. Heffner, one faxed July 12, 2007 and the other received by mail on July 27, 2007 are attached.

Although representatives of the Town have demanded proof of that authority, such as a copy of any documents or exemptions, U.S. Rail has not provided them. They appear to be relying on their authority to act because they are an authorized rail corporation.

Without obtaining the necessary permits under New York State and Town of Brookhaven laws, rules and regulations, representatives of U.S. Rail have commenced clearing and possibly sand mining on the premises. We are particularly disturbed that apparently no environmental review under either NEPA or New York State's SEQRA was undertaken.

Department of Law

Robert F. Quinlan, Town Attorney

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Surface Transportation Board
Attention: Nancy Beiter, Esq.
October 2, 2007
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Re: US Rail Corporation Facility/Yaphank, New York

The Town realizes that if U.S. Rail is acting under the authority of the Surface Transportation Board, than their actions may be justified. As we have not received adequate documentation from U.S. Rail or their counsel to prove their authority, the Town of Brookhaven will be filing a formal petition for a declaratory order with the Surface Transportation Board shortly.

The purpose of this letter is to advise you of that intended action as well as to ascertain if there is any existing process initiated by U.S. Rail on this action.

Very truly yours,



Robert F. Quinlan
Town Attorney

RFQ:dah
Enclosures

newsday.com/news/local/ny-lirail0927,0,3592796.story

Newsday.com

Work started for Yaphank rail site without approvals

BY JENNIFER SMITH AND ERIK GERMAN

jennifer.smith@newsday.com

erik.german@newsday.com

10:59 PM EDT, October 1, 2007

An Ohio rail company working with Long Island asphalt plant owners has cleared 18 acres in Yaphank and excavated mountains of sand in preparation for building a rail-to-truck transfer site -- without having sought any government approvals.

The state Department of Environmental Conservation has issued citations for mining without a permit to Watral Bros., the Bay Shore subcontractor preparing the site, and to the owner of the land -- Sills Road Realty, a consortium of local asphalt plant and construction business owners with offices in Syosset.

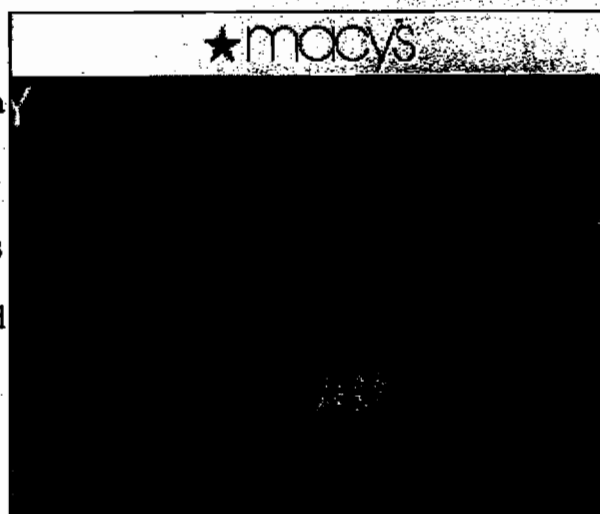
Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any environmental review," Scully said last week.

Federal defense

The railroad involved -- U.S. Rail Corp. of Toledo, Ohio, which has signed a 30-year lease with Sills Road Realty -- says federal law allows railroads to undertake such projects without state and local permits. Earlier this year, the same landowners attempted to set up their own railroad to operate a rail spur at the site only to abandon the tack when the process became "unduly complex and complicated," said Gerard Drumm, the chief financial officer and council for Sills Road Realty. And this summer, the state rejected the company's bid for rail bond funding in part because the Department of Transportation didn't have evidence that Sills Road Realty or U.S. Rail were authorized to operate as rail companies in the state.

The DEC visited the Yaphank site Monday to make sure work had not resumed, said Scully. Drumm and U.S. Rail president Gabriel Hall said their companies are "in discussions" with the DEC about the citations, which could lead to an administrative hearing if the parties cannot resolve their differences.

A big haul



Brookhaven town spokesman Tom Burke said a town inspector estimated about 1,000 cubic yards of sand was being removed from the site each day. "Judging by the size of the hole it could have been going on for six weeks," Burke said. At that rate, at current prices, the sand could sell for \$330,000 to \$750,000.

"We're not a sand-mining operation," said Drumm. "We're excavating for a construction project... under state law that isn't mining." Drumm said Friday the sand was being sold.

Residents say they first learned of the project in late August, when they saw machinery toppling trees at the site, which is about a mile from homes.

"We had no clue who, when, where, what was going on," said Fran Hurley, president of the Yaphank Taxpayers and Civic Association. Hurley said residents are concerned about the traffic from the project, and whether the excavation could affect groundwater resources deep below the site.

Representatives of U.S. Rail and Sills Road Realty say they have communicated a number of times with the town and that they are working to address residents' concerns.

Drumm said the industrially zoned site is suited for their facility because it is close to the LIE. He added that it also lies within the town's Empire Zone -- an area where businesses get state tax credits for ventures that attract capital and create jobs. He also said the facility would reduce local truck traffic.

Sills Road Realty first discussed the project with Brookhaven officials in January. They then met with the Suffolk planning department, Drumm said. Town and county officials characterized the discussions as preliminary.

Quite a surprise

County public works department's chief engineer William Hillman said his department had no idea that work had started until late August, when they saw bulldozers in action. Hurley said the company only met with her group after she contacted them herself.

Brookhaven town spokesman Burke said the town exercised "due diligence" and recommended that the railroad contact local civic groups.

U.S. Rail told Brookhaven officials in a July 12 letter that they intended to start work in the next 30 days. On July 20, town officials met with a project backer, who they said repeated that they could bypass local and state controls because railroads are overseen by the federal Surface Transportation Board. Said Burke: "It is arguable whether the town should have demanded to see the exemption, but it certainly exists in law and... we presumed they qualified for the exemption," Burke said.

Earlier this year Sills Road Realty had tried to set up its own short-line rail company under the name Suffolk and Southern Rail Road. In May, Suffolk and Southern filed a notice of exemption with the Surface Transportation Board seeking federal authority for the project. But the board indicated that the project would require Board authorization -- as well as an environmental review.

Fall into disfavor

That's when Suffolk and Southern withdrew its application. The board's decision in the matter, released last week, said that it would "view with disfavor any future request for authority to commence rail operations of trackage at this location unless the construction of that trackage has first been authorized

by the Board."

U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U.S. Rail is already recognized by the Board as a common carrier in Ohio.

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of Monday, nobody had formally done so.

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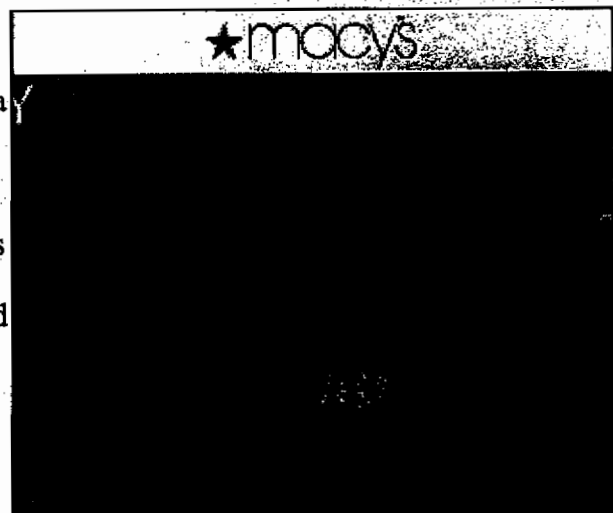
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U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U.S. Rail is already recognized by the Board as a common carrier in Ohio.

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of Monday, nobody had formally done so.

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EXHIBIT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

SILLS ROAD REALTY, LLC, US RAIL CORPORATION,
WATRAL BROTHERS, INC., PRATT BROTHERS, INC.,
ADJO CONTRACTING CORP. AND SUFFOLK &
SOUTHERN RAIL ROAD LLC,

07-CV-4584 (TCP) (ETB)

Plaintiffs,

-against-

THE TOWN OF BROOKHAVEN,

Defendant.

X

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
SUBMITTED BY DEFENDANT TOWN OF BROOKHAVEN**

Law Offices of Mark A. Cuthbertson
Attorney for Defendant Town of Brookhaven
434 New York Avenue
Huntington, New York 11743
(631) 351-3501

PRELIMINARY STATEMENT

Defendant Town of Brookhaven ("Brookhaven") submits the within findings of fact and conclusions of law in opposition to the application for a preliminary injunction by Plaintiffs Sills Road Realty, LLC ("Sills"), US Rail Corporation ("US Rail"), Watral Brothers, Inc. ("Watral"), Pratt Brothers, Inc. ("Pratt"), Adjo Contracting Corp. ("Adjo"), and Suffolk & Southern Rail Road LLC ("Suffolk") (hereinafter collectively referred to as "Plaintiffs"). Plaintiffs argue that the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") preempts the Town of Brookhaven ("Town") from enforcing its local zoning regulations. As set forth below, these arguments are without any legal merit.

PROPOSED FINDINGS OF FACT

Brookhaven respectfully submits the following proposed findings of fact with regard to the issues raised at the preliminary injunction hearing held on December 5-6, 2007.

The Plaintiffs

1. Sills Road Realty, LLC ("Sills") is a New York limited liability corporation that owns the real property ("Property") on which the proposed rail terminal ("Rail Terminal") is to be located. (Tr. 52). US Rail Corporation ("US Rail") is an Ohio corporation with a place of business in Toledo, Ohio and is also an existing Class III short line railroad authorized to operate by the United States Surface Transportation Board ("STB"). (Tr. 15). Adjo is a New York corporation that is the general contractor for the construction of the Rail Terminal. (Tr. 25). Watral and Pratt are New York corporations and subcontractors of Adjo for the construction of the Rail Facility. (Tr. 66). Suffolk is a partner in Sills and was initially formed to become a common carrier but never received such status. (Tr. 59).

2. Sills was formed by strategic partners who include AD Collins, a large upstate quarry company, Suffolk, Adjo and two unnamed individuals who are in the asphalt business and have a significant need for stone in the production of asphalt. (Tr. 58-59).

History before the STB

3. Prior to commencing this action, Plaintiffs made several filings with the STB which are set forth in detail at Joint Exhibit 1 (hereinafter "JE-1"). Those proceedings culminated in a decision by the STB dated October 12, 2007 ("October 12 Decision"), which directed US Rail, Suffolk, Sills, or any other related entity conducting rail construction at the Property to immediately cease from such activity and either obtain authority from the STB or an STB decision finding that such activity does not require STB approval. (JE-1, Tab 1, Exhibit A).

4. The history of the proceedings is summarized below and at length in a subsequent STB decision, which denied Plaintiffs' request for a stay of the October 12 Decision. (JE-1, Tab 6, Exhibit B).

5. On May 18, 2007, Suffolk filed a verified notice of exemption from construction authority pursuant to 49 USC §10901 and 49 CFR §1150.31 and indicated that Suffolk has reached an agreement with Sills for the lease and operation of railroad trackage and facilities currently being constructed at the Property. (JE-1, Tab 6, Exhibit B, p. 1).

6. On June 1, 2007, the STB issued a decision indicating that, based on Suffolk's intent to provide for-hire service over trackage, it appears that Sills was constructing a "line of railroad" subject to the STB's jurisdiction. *Id.* It noted that under 49 USC §10901, STB authority is required to construct a line of railroad and that Sills has not sought STB authority for this construction. *Id.* Suffolk was directed to file supplemental information by June 21, 2007 describing its construction activities on the trackage. *Id.*

7. On June 15, 2007 Suffolk informed the STB that due to a change in circumstance, it had decided to withdraw its Notice of Exemption. (JE-1, Tab 6, Exhibit B, p. 2).

8. On July 12, 2007 and July 25, 2007, an attorney for US Rail advised the Defendant, in letters to the Town Attorney, that he represented US Rail, an Ohio based company and common carrier short line railroad operating pursuant to authority granted by the former ICC now the STB. (JE-1, Tab 7, Exhibit A, Exhibits C&D). The letter stated that US Rail has leased the Property and intended to construct and operate an "exempt spur" within the meaning of 49 USC §10906. *Id.*

9. On August 13, 2007, the STB issued a decision denying Suffolk's request to terminate the proceeding and directed Suffolk to file the information required by its June 1' decision. (JE-1, Tab 6, Exhibit D). The STB's decision explained that if for-hire service was intended for the trackage being constructed, STB authorization for the construction is required under 49 U.S.C. 10901 as well as an environmental review under the National Environmental Policy Act. *Id.*

10. In its August 13, 2007 decision the STB warned:

The STB increasingly has grown concerned that persons using the notice of exemption procedures to obtain authority for the lease or other acquisition and operation of a railroad line may not be making a thorough review of their circumstances prior to filing a verified statement that a proposal should be exempted from environmental and historic reporting because the thresholds will not be met. Suffolk filed such a statement, but failed to provide any explanation in its notice of exemption as to why the anticipated movements of intermodal containers and up to 500,000 tons of construction aggregates would not meet or exceed the STB's 3 train per day threshold for environmental documentation. Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the STB's thresholds.

Id.

11. On August 23, 2007 Suffolk filed a response and stated that Suffolk and Sills never concluded an agreement or other relationship with respect to the lease, construction, or operation of the rail facility and Sills never undertook any construction of rail facilities at the location. (JE-1, Tab 6, Exhibit B, p. 1) (emphasis added).

12. Thereafter, the STB, in a decision dated September 25, 2007, allowed Suffolk to withdraw its Notice for Exemption "because Suffolk had stated that neither it nor Sills had undertaken

any construction of rail facilities at the Sills Road location or consummated any agreement with Sills Road to lease or operate over the proposed trackage.” (JE-1, Tab 6, Exhibit B, pp. 1-2).

13. On October 2, 2007, the STB received a letter from the Defendant concerning a proposed rail facility being constructed on the Property. (JE-1, Tab 1, Exhibit C, p. 2). This followed a newspaper account indicating that Plaintiffs had cleared 18 acres of land and excavated mountains of sand (estimated at approximately 30,000 cubic yards of sand with a value of between \$330,000 and \$750,000) at the Property. (JE-1, Tab 1, Exhibit D, Exhibit B).

14. Based on the new evidence that rail construction might be occurring or contemplated on this property, and because no party had sought construction authority, the STB issued the October 12 Decision ordering the parties to cease all construction activities and made US Rail a party to the proceeding pending before it. (JE-1, Tab 1, Exhibit C, p. 2).

15. US Rail and Suffolk filed petitions asking for a stay and administrative reconsideration¹ of the October 12 Decision on October 18, 2007 and October 26, 2007, respectively.

16. In a decision dated November 16, 2007, the STB denied the petition for a stay, explaining that the petitioners had failed to make a strong showing with respect to the factors to be considered in issuing a stay, which include: (1) whether there is a strong likelihood that petitioners will prevail on the merits; (2) whether petitioners will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. (JE-1, Tab 6, Exhibit B).

The STB and Second Circuit Deny Plaintiffs’ Stay Request

¹ The petition for reconsideration was ultimately denied in a decision dated December 20, 2007, based on grounds nearly identical to those articulated to deny the request for a stay. *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC*. STB Finance Docket No. 35036, WL 4466696 (STB December 20, 2007).

17. The STB's decision denying a stay indicated that petitioners were unlikely to succeed on the merits of their argument that no STB authority or NEPA review was required. (JE-1, Tab 6, Exhibit B, pp. 4-6).

18. In analyzing the irreparable harm argument advanced in the petition, the STB commented that "[p]etitioners' claim of opportunity costs and construction costs are strictly monetary in nature. Alleged monetary damages, even if proven do not constitute irreparable harm." (JE-1, Tab 6, Exhibit B, p. 6) (citations omitted).

19. In evaluating the "public interest" criteria required for a stay, the STB noted that "[w]hile petitioners cite the need for more freight facilities on Long Island, the October 12 Decision does not prevent the facility from being constructed once appropriate approvals are obtained. Thus, any potential public benefit could still be realized. Instead, the public interest is better served by precluding the potential evasion or misuse of the Board's processes that could result from allowing the construction and operations proposed here to proceed without the license and NEPA review that appear to be required." (JE-1, Tab 6, Exhibit B, p. 7).

20. On November 9, 2007, with the petition for reconsideration still pending with the STB, Sills, Suffolk and US Rail filed a petition for judicial review of the October 12 Decision in the United States Court of Appeals for the Second Circuit, requesting a temporary restraining order and a preliminary injunction to allow construction activities to continue. The Second Circuit denied the request for a temporary restraining order on November 13, 2007 and thereafter dismissed the petition for judicial review, on the grounds that the October 12 Decision was not final. (JE-1, Tab 10)

Plaintiffs' Request for a Preliminary Injunction

21. Plaintiffs commenced this action seeking to preliminarily enjoin the Town from taking any action to prosecute appearance tickets it issued to Plaintiffs on October 4, 2007 ("Tickets") or from issuing further tickets. Plaintiffs also sought to enjoin the Town from "taking any other action to interfere with or obstruct Plaintiffs' construction and operation of' the Rail Terminal. Order to Show

Cause, p. 2. In seeking this preliminary injunction, Plaintiffs alleged that “[p]rosecution of the Appearance Tickets and/or imposing a requirement that the Brookhaven Rail Terminal submit to Defendant’s permitting processes have resulted in delays to the construction of the Brookhaven Rail Terminal with attendant damages – all of which are irreparable. Order to Show Cause, Affidavit of Gerard Drumm ¶29.

Plaintiffs’ Evidence of “Rail Construction”

22. US Rail claims that it is obligated to construct and operate a rail facility at the Property pursuant to a document entitled “Railroad Operating Agreement and Property Lease” (“Agreement”). (Exhibit 7) (Tr. 20).

23. Under Paragraph 3(b) of the Agreement, US Rail “will pay annual rent in the amount of one thousand dollars (\$1,000) per year during the term of this lease, including any renewal periods.” (Exhibit 7, ¶3(b)).

24. Under Paragraph 3(c) of the Agreement, in the event of early termination, Sills will pay all of US Rail’s reasonable costs of termination, including costs of moving US Rail’s equipment from the Premises. (Exhibit 7, ¶3(c)).

25. Under Paragraph 4 of the Agreement, Sills will pay US Rail ten thousand dollars (\$10,000.00) upon execution of the Agreement. (Exhibit 7, ¶4).

26. Under Paragraph 9 of the Agreement, Sills shall pay when due all taxes imposed with respect to the Leased Assets during the term of the Lease, other than US Rail’s income taxes. (Exhibit 7, ¶9).

27. US Rail also alleges that an Excavation Agreement dated August 7, 2007 (“Excavation Agreement”) (Exhibit 8) and a “proposal” for construction (“Proposal”) (Exhibit 10) evidence its obligation to construct a rail facility at the Property.

28. The Proposal, which allegedly delineates the construction work and improvements to be performed by Adjo has a total price tag of \$5,450,000. (Exhibit 10).

29. The Excavation Agreement is between US Rail, Adjo as "Contractor" and Sills as "Owner" and provides in the first and second "Whereas" clauses, that the US Rail has contracted with the Contractor, Adjo, for the improvement of the subject properties and the installation of the Rail Terminal. (Exhibit 8, p. 1).

30. Paragraph 1 of the Excavation Agreement also provides that:

"US Rail agrees to retain Contractor, on the terms and conditions set forth in this Agreement, to excavate in, on, and under the Subject Properties and to remove all materials, and any products derived from such materials (collectively, "Bank Run"), from the Subject Properties. Contractor shall use its best efforts to conform its operations on the Subject Properties during the Term hereof and to perform its obligation hereunder in compliance with the excavation and site preparation plan in effect from time to time (the "Excavation Plan"). For all excavation and site preparation work hereunder, Contractor shall be entitled to recover, from the proceeds of the sale of Bank Run the greater of (i) \$ 3,000,000 plus ten percent (10%) thereof for overhead, ten percent (10%) thereof for profit and five percent (5%) thereof for management (collectively, the "25% Allowance") or (ii) all of Contractor's Costs, as hereinafter defined, plus the 25% Allowance; provided, however, that, with respect to Contractor's Costs that are subcontractor costs, the 25% Allowance shall be ten percent (10%)."

Exhibit 8, ¶1.

31. Paragraph 4 of the Excavation Agreement provides as follows:

"(a) For all Bank Run, Contractor agrees to pay, or provide payment, to Owner (i) Six Million Dollars (\$6,000,000) (the "Base Payment") plus (ii) fifty percent (50%) of the excess (the "Excess Payment"), if any, of all Revenues (as hereinafter defined) over Contractor's Expenses (as hereinafter defined). The Base Payment shall be paid in installments as set forth in Exhibit B hereto. The Excess Payment shall be paid within sixty (60) days following the end of the Term or earlier termination of this Agreement. Quantities of Bank Run extracted from the Subject Properties shall be determined using Owner's scales installed on the Subject Properties. (b) For the purposes of this Agreement, (i) "Revenues" shall mean the gross revenues derived from the sale of Bank Run and all other gross revenues derived from the excavation and site preparation of the Subject Properties and (ii) "Contractor's Expenses" shall mean all documented costs of Contractor in performing its obligations under this Agreement ("Costs"), an allowance equal to twenty five percent (25%) of Costs and the Base Payment actually paid to Owner. Owner shall have the right from time to time to inspect Contractor's books and records to confirm any determination of Revenues or Contractor's Expenses. (c) Owner agrees to allow Contractor to remove an indeterminate quantity of Bank Run from the Subject Properties, with no annual or cumulative maximum quantities, limited only by the requirements of the

Excavation Plan and the depletion of Bank Run reserves on the Subject Properties.”

Exhibit 8, ¶ 4.

32. Gabriel Hall (“Hall”), President and CEO of US Rail initially testified that US Rail was doing the construction at the Property via its hiring of contractors. (Tr. 38). Mr. Hall produced the Proposal (Exhibit 10) for construction work at the Rail Terminal to be performed by Adjo and claimed that the Proposal was adopted into the Excavation Agreement. (Tr. 39).

33. The Excavation Agreement contains absolutely no reference to the Proposal. The Proposal also does not contain any reference to US Rail but rather indicates that it is a “Bid to Sills Road Realty.” (Exhibit 10).

34. Hall testified that he had written some checks to Adjo for their construction work but could not tell whether the method by which Adjo was being paid was by selling materials being pulled out of the site and was not aware that Adjo was being compensated for and allowed to sell the material they took out of the site. (Tr. 43).

35. After reviewing the Excavation Agreement, Hall acknowledged that Adjo appears to be permitted to sell the material from the site but could not confirm that this was how they were being paid despite having reviewed and signed the Excavation Agreement on behalf of US Rail. (Tr. 44).

36. Hall acknowledged that there was nothing in the Tickets directing US Rail to stop construction. (Tr. 41).

37. Gerard Drumm is CFO and General Counsel to both Sills and Suffolk. (Tr. 52 & 62). He acknowledged that there was no cease and desist language in the Tickets. (Tr. 73).

38. Empire Asphalt (“Empire”) is an asphalt company that is owned by Adjo, Warral and Pratt, which is located approximately 20 miles away from the Property. (Tr. 75, 77 & 106). At the hearing, Plaintiffs attempted to establish that tickets were issued to Empire (Exhibit 6) in retribution

for Plaintiffs' activities at the Property and with knowledge of the fact that some of Plaintiffs were partners in Empire. (Tr. 75-84).

39. An investigator for the Town Attorneys Office of Defendant, Brian Tohill, testified that he was responsible for issuing the tickets to Plaintiffs and tickets to Empire and he did not know of the connection between Empire and Plaintiffs. (Tr. 98). He further testified that the tickets issued to Empire were not issued in reprisal for activities at the Property but were based on complaints received from a constituent living in the vicinity of Empire on or about September 28, 2007. (Tr. 99 & 105) (Exhibit C).

PROPOSED CONCLUSIONS OF LAW

POINT I

THIS CASE SHOULD BE DISMISSED BASED ON *YOUNGER* ABSTENTION

This action should be dismissed based upon the principles of abstention established by the Supreme Court in *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, the Supreme Court held there is a "federal policy forbidding federal courts from enjoining pending state criminal proceedings except under extraordinary circumstances." *Id.* at 46. As the *Younger* Court noted, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45.

In applying *Younger*, the Second Circuit has stated:

[F]ederal courts should generally refrain from enjoining or otherwise interfering in ongoing state proceedings. This principle of abstention is grounded in interrelated principles of comity and federalism. Both considerations require federal courts to be cognizant that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.... In recognition of this balance of interests, *Younger* generally prohibits courts from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings so as to avoid unnecessary friction.

Spargo v. N.Y. State Comm'n on Judicial Conduct, 351 F.3d 65, 74 (2d Cir. 2003) (citations omitted).

The Second Circuit has consistently applied *Younger* to reject inappropriate attempts to enjoin state criminal proceedings. *Citizens for a Better Environment, Inc. v. Nassau County*, 488 F.2d 1353, 1358 (2d Cir. 1973); *Schlagler v. Phillips*, 166 F.3d 439 (2d Cir. 1999); *Hansel v. Town Court*, 56 F.3d 391 (2d Cir. 1995). In *Citizens for a Better Environment*, several plaintiffs sought to enjoin a county's enforcement of appearance tickets issued for violation of an anti-solicitation ordinance. *Citizens for a Better Environment*, 488 F.2d at 1358. Violation of the ordinance in question was punishable by a fine not exceeding \$250 or imprisonment, or both. *Id.* Applying *Younger*, the Court held: "to the extent the individual plaintiffs are seeking to enjoin the criminal actions against them, *Younger* must control." *Id.* at 1359. Similarly, in *Schlagler*, the plaintiff was issued an appearance ticket charging him with a violation of the New York State Penal Law for placing racially offensive stickers throughout a café. *Schlagler*, 166 F.3d at 439. Schlagler sought an action to enjoin the pending criminal proceedings claiming that the ticket violated his constitutional right to free speech. *Id.* The Second Circuit held that an injunction should not be granted insofar as "abstention is required absent a suggestion that a prosecution was 'brought in bad faith or is only one of a series of repeated prosecutions'" reasoning that the constitutionality of the statute could be addressed in Schlagler's state criminal prosecution. *Id.* at 443 (quoting *Younger* 401 U.S. at 49).

While *Citizens for a Better Environment* and *Schlagler* involved constitutional claims, the United States Supreme Court places preemption claims on the same footing as other federal constitutional claims for abstention purposes. *New Orleans Public Service, Inc. v. Council of the City of New Orleans* 491 U.S. 350, 365 (1989) ("[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than pre-emption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action").

In applying *Younger* abstention courts "must determine (1) whether there is an ongoing state proceeding; (2) whether an important state interest is involved; and (3) whether the federal plaintiff

has an adequate opportunity for judicial review of his constitutional claims during or after the proceeding.” *University Club v. City of New York*, 842 F.2d 37, 40 (2d Cir. 1988) (quoting *Christ the King Regional High School v. Culvert*, 815 F.2d 219, 224 (2d Cir.), cert. denied, 484 U.S. 830, 108 S.Ct. 102, 98 L.Ed.2d 63 (1987)). An exception to *Younger* provides that even if all three factors point toward abstention, a federal court may still intervene if a plaintiff demonstrates bad faith, harassment or any unusual circumstances that would call for equitable relief. *Spargo*, 351 F.3d at 75, n. 11.

The Tickets are a part of ongoing State Criminal Proceedings

Plaintiffs seek to enjoin a criminal proceeding². (Tr. 106-111). The Tickets read: “The People of the State of New York v.” a number of the Plaintiffs named herein and there was testimony that many of these Tickets are considered misdemeanors. (Exhibits 1-5)(Tr. 109). As such, there can be no serious argument that the Tickets are not a part of an ongoing criminal proceeding.

The Tickets are a part of State Criminal Proceedings that Implicate Important State Interests

“There is no question that [an] ongoing prosecution implicates important state interests.” *Davis v. Lansing*, 851 F.2d 72, 76 (2d Cir. 1988). Protecting the health, safety and welfare of the public through enforcement of local ordinances is an important interest. In fact, this Court has held that the right of a municipality to “regulate land use and enforce its regulations through criminal and civil enforcement actions implicates important state interests.” *Sendlewski v. Town of Southampton*, 734 F. Supp. 586, 591 (EDNY 1990).

The State Proceedings Provide an Adequate Forum for Plaintiffs to Raise any Federal Claims

² There was some discussion at the hearing as to whether the Tickets were criminal or civil in nature. (Tr. 106-108). Even if the tickets were considered civil in nature, abstention would still apply insofar as *Younger* has been extended to state civil or administrative proceedings. See *Washington v. County of Rockland*, 373 F.3d 310, 318 (2d Cir. 2004); *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002); *Sabrina v. Jones*, 1988 U.S. Dist. LEXIS 15289(2d Cir. 1988).

Plaintiffs asserted at the hearing that this Court is "better equipped to deal with federal questions of preemption than a local district court." (Tr. 129). This argument clearly runs afoul of the notions of federalism and comity articulated in *Younger. Spargo*, 351 F.3d at 74 (noting "the vital purpose of reaffirming the competence of the state courts, and acknowledging the dignity of states as co-equal sovereigns."). Moreover there are myriad examples of state courts, including district courts, adjudicating federal or constitutional questions. See e.g. *People of the State of New York v. Sposito*, 126 Misc.2d 185, 481 N.Y.S.2d 613 (Suff. Cty. Dist. Ct.1984)(holding a portion of Brookhaven Town Ordinance §85-421A unconstitutionally vague); *People of the State of New York v. Mendelson*, 15 Misc.3d 925, 834 N.Y.S.2d 445 (Nass. Cty. Dist. Ct. 2007)(holding town ordinance violative of the First Amendment); *People of the State of New York v. Frie*, 169 Misc.2d 407, 646 N.Y.S.2d 961 (Suff. Cty. Dist. Ct.1996)(holding an anti-noise ordinance does not run afoul of constitutional vagueness standard).

There is No Evidence of Harassment or Bad Faith Prosecution

Plaintiffs sought to establish that tickets were issued to Empire in retribution for Plaintiffs' activities at the Property and with knowledge of the fact that some of Plaintiffs were partners in Empire. (Tr. 75-84). An investigator for Defendant testified that he was responsible for issuing the tickets to Plaintiffs and tickets to Empire and he did not know of the connection between Empire and Plaintiffs. (Tr. 98). He further testified that the tickets issued to Empire were not issued in reprisal for activities at the Property but rather were based on complaints received from a constituent living in the vicinity of Empire on or about September 28, 2007. (Exhibit C)(Tr. 99 & 105). It was also established at the hearing that the Empire facility is located approximately 20 miles away from the Property. (Tr. 75, 77 & 106). In sum, the Tickets were not issued in bad faith or to harass the Plaintiffs.

POINT II

PLAINTIFFS LACK STANDING

Plaintiffs lack standing because this Court cannot grant them relief that would redress the alleged harm. Even a completely favorable decision by this Court, which would enjoin the prosecution of the Tickets, the issuance of additional tickets and forbid any Town efforts to impede construction, would not redress Plaintiffs' alleged injury (their inability to continue construction) since the STB cease and desist order (October 12 Decision) is still in effect and will not allow construction.

It is an "irreducible constitutional minimum of standing" that: (1) the plaintiff suffer an injury in fact, which is "an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical"; (2) there be "a causal connection between the injury and conduct complained of" so that the injury is "fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court"; and (3) it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Ziembra v. Rell*, 409 F.3d 553, 554 (2d Cir. 2005); *N.Y. Coastal P'ship, Inc. v. United States DOI*, 341 F.3d 112, 116 (2d Cir. 2003). "Without a plaintiff's satisfaction and demonstration of the requirements of Article III standing, a federal court has no subject matter jurisdiction to hear the merits" of a plaintiff's claim. *Cent. States Southeast & Southwest Areas Health & Welfare Fund v. Merck Medco Managed Care, L.L.C.*, 443 F.3d at 181. ("Where the relief sought would not resolve the entire case or controversy as to any party, but would merely determine a collateral legal issue governing certain aspects of pending or future suits, a declaratory judgment action falls outside the constitutional definition of a case in Article III.") See also, *Jenkins v. United States*, 386 F.3d 415 (2d Cir. 2004).

The Second Circuit has denied standing when the court could only speculate whether the remedy plaintiffs sought would redress their purported injuries. *N.Y. Coastal P'ship, Inc. v. United States DOI*, 341 F.3d 112. In *N.Y. Coastal*, the Plaintiffs sought to compel the Department of the Interior to implement the Fire Island Interim Project ("FIIP") or take affirmative steps to combat shore erosion on Fire Island. *Id.* The Court held there was no indication that implementation of the FIIP would ameliorate Fire Island's erosion problems and denied plaintiffs' standing because the remedial effect of the requested relief was speculative. *Id.* at 116.

Plaintiffs have only made conclusory allegations about the impact of Defendant's actions in issuing the Tickets. They claim that "Defendant's actions have a direct and immediate impact on the construction and operation of the Brookhaven Rail Terminal and impose actual concrete injury upon Plaintiffs (Complaint ¶36) and that they have "suffered and, absent preliminary and permanent injunctive relief, will continue to suffer irreparable harm by reason of Defendant's improper conduct." (Complaint, ¶50). They further allege that Defendant's illegal actions have and will cause them economic harm due to the construction delays for the Rail Terminal. Based on these alleged illegal actions and irreparable harm, they are requesting that this Court enjoin the Defendant from: (a) prosecuting the Tickets; (b) issuing more tickets; and (c) "taking any other action to interfere with or obstruct Plaintiffs' construction and operation of the Brookhaven Rail Terminal".

However, the construction delay and attendant harm are not due to the actions of Defendant. Plaintiffs' witnesses testified that construction has stopped based on the cease and desist mandate set forth in the STB October 12 Decision. Moreover, Plaintiffs' witnesses conceded there is nothing in the tickets directing them to stop construction. (Tr. 41 & 74).

Thus, even if Defendant were to concede (which it does not) that Plaintiffs had suffered an injury-in-fact at the hands of Defendant that was fairly traceable to the challenged action, there is no way that this injury could be redressed by the requested relief. This Court expressed a similar concern relative to the third prong of Plaintiffs' Order to Show Cause when it noted "you may not even have a

case in controversy before this court as far as that request for relief. Because at this point everything is very hypothetical.” (Tr. 122).

Based on the foregoing, Plaintiffs have failed to satisfy their burden of establishing standing, and therefore this Court should decline to exercise subject matter jurisdiction over their claims.

POINT III

PLAINTIFFS HAVE FAILED TO MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION

A preliminary injunction is an extraordinary remedy that should not be granted as a routine matter. *See Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63 (2d Cir. 1999); *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990). A party seeking a preliminary injunction generally must demonstrate that he or she: (a) will suffer irreparable harm in the absence of the requested relief; and (b) either (1) is likely to succeed on the merits or (2) there are sufficiently serious questions going to the merits and the balances of hardship tips decidedly in the movant’s favor. *See Latino Officers Ass’n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999); *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70 (2d Cir. 1979). Where a private party seeks to enjoin enforcement of state power, the public interest must be balanced against the private interest asserted by the plaintiff. *Brody v. Village of Port Chester*, 261 F.3d 288 (2d Cir. 2001).

There must be an “extraordinarily pressing need for immediate federal equitable relief.” *Lawson v. City of Buffalo*, 52 Fed. Appx. 562, 563 (2d Cir. 2002); *Diamond “D” Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002).

As noted above, there is no need for immediate federal equitable relief here because Plaintiffs cannot resume construction of their rail facility even if granted an injunction. In addition, as set forth below, Plaintiffs have neither sustained nor alleged irreparable harm, nor are they likely to succeed on the merits. Therefore, their request for a preliminary injunction must be denied.

A. Plaintiffs Have Failed To Establish That They Have, Or Will, Suffer An Irreparable Harm If This Application Is Not Granted By The Court

The showing of irreparable harm is the “single most important prerequisite for the issuance of a preliminary injunction”. *Bell & Howell v. Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983). The mere possibility of harm is not sufficient: the harm must be imminent and the movant must show she is likely to suffer irreparable harm if equitable relief is denied. *JSG Trading Corp.*, 917 F.2d at 80. Nor will a preliminary injunction be granted if the movant can be compensated adequately by money damages. *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991).

1. Plaintiffs’ Right To Defend The Tickets In a Local District Court defeats their Irreparable Harm Argument.

The “cost or inconvenience of having to defend against a single criminal prosecution” does not establish the sort of irreparable injury that would permit state interference in state proceedings. *Feerick v. Sudoinik*, 816 F.Supp. 879 (SDNY 1993) (quoting *Younger*, 401 U.S. at 46). Indeed, this Court has held that a party who has an opportunity to redress his federal claim in state court cannot establish irreparable harm. *Hart v. Felder*, 2007 U.S. Dist. LEXIS 89915 at *5 (EDNY 2007) (citing *Lusk v. Vill. of Cold Spring*, 475 F.3d 480, 485 (2d Cir. 2007)).

While Plaintiffs sought to attach great significance to the fact that they were issued criminal violations, (Tr. 73), the mere fact that they are being subject to criminal prosecution does not establish irreparable harm.

2. Plaintiffs’ Circumstances are Not Similar to the *Coastal* or *BSOR* cases.

Plaintiffs have pinned much of their hopes of demonstrating irreparable harm on what they have described as the remarkable similarity of their case to a recent Second Circuit case, *Coastal Distribution, LLC v. Town of Babylon*, 216 Fed. Appx. 97, 100 (2d Cir. 2007) (“*Coastal*”) and *Buffalo Southern Railroad, Inc. Village of Croton on Hudson*, 434 F. Supp. 2d 241 (SDNY 2006) (“*BSOR*”).³

³ The *Coastal* case has been modified to the extent that STB recently ruled that Coastal was not acting as an Agent of New York and Atlantic Railroad and, as a result, the STB “does not have jurisdiction over Coastal’s activities” and the federal pre-emption in section 10501(b) does not apply. See *Town of Babylon and Pinelawn Cemetery Petition for Declaratory Order*. STB Finance Docket No. 35057, 2008 WL 6488488 (STB February 1, 2008).

It is clear that Plaintiffs have not demonstrated facts remotely similar to those set forth in *Coastal* or *BSOR*. In *Coastal*, the Town of Babylon issued a stop-work order and attempted to close a rail facility that was already operating. *Coastal*, 216 Fed. Appx. At 99. The Second Circuit held that it was not clearly erroneous for the District Court to find that *Coastal*'s relationships would be permanently harmed by its inability to assure customers that its business would be ongoing. *Id.* at 100.

In *BSOR*, there was an existing rail facility in operation and the plaintiff rail entity alleged that eminent domain proceedings instituted by the Village would foreclose its ability to do business in the area entirely and would cause the loss of a potential business and customer goodwill. *BSOR*, 434 F.Supp.2d at 247-48. The Court specifically noted that such factors had been held to constitute irreparable injury in the analogous *Coastal* case. *Id.*

In this case, Plaintiffs have a business plan to transport rock and stone by rail to deliver better pricing in a competitive market. (Tr. 54-55). However, unlike *Coastal* or *BSOR* there is no ongoing operation nor have they begun to provide a service or product to customers.

This Court is not the first venue in which Plaintiffs have advanced their vacuous argument for irreparable harm. The STB considered and rejected Plaintiffs' claims of irreparable harm, explaining that Plaintiffs' "claim of opportunity costs and constructions costs are strictly monetary in nature." Alleged monetary damages, even if proven do not constitute irreparable harm. (JE-1, Tab 6, Exhibit C, p. 6) (citations omitted).

B. Plaintiffs Have Failed To Establish That They Will Succeed on the Merits of Their Claim

Plaintiffs argue that regulation of their activities is preempted by ICCTA. This Court should review Plaintiffs' preemption arguments in light of the strong presumption against preemption. "Preemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" *AGG Enterp. v. Washington County*, 281 F. 3d 1324, 1327 (9th Cir. 2002). *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F. 3d 1324 (11th Cir. 2001) (there is a presumption

against preemption recognized by the U.S. Supreme Court). Reliance “on the presumption against pre-emption limits ‘congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.” *Id.* at 1328 (citing *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)).

a. The STB has rejected the merits of Plaintiffs’ Arguments.

As set forth below, Plaintiffs are unlikely to prevail in their argument that the STB will treat them as an exempt “spur” and as such will not ultimately prevail on the merits of their substantive claim.

Plaintiffs have argued that the rail facility is likely to be deemed a “spur” track which is subject to STB jurisdiction but does not require construction approval. Specifically in their submissions to the STB, they have claimed “the proposed use of the track would not require prior Board approval for construction under 49 U.S.C. 10901 or operations under 49 U.S.C. 10902(a) but, rather, qualifies for the exception from the Board’s entry/exit licensing authority in 49 U.S.C. 10906 because the track has some of the characteristics of “spur” track and would be used as a “disconnected” ancillary “spur” of an existing carrier, U.S. Rail.” (JE-1, Tab 6, Exhibit B, p. 3).

Defendant maintains that “the proposed track is either a line of railroad subject to the Board’s licensing requirements because it would be an invasion of new territory, or else “private” track not subject to the Board’s jurisdiction.” (JE-1, Tab 6, Exhibit B, p. 4). Defendant further contends that the track in question cannot “be characterized as ancillary “spur” or switching track because it is not adjacent or ancillary to U.S. Rail’s existing rail operations, which are located hundreds of miles away from Brookhaven in Ohio. *Id.*

The STB was required to examine the likelihood of Plaintiffs’ “spur” track argument on the merits when it decided Plaintiffs’ petition for a stay of the October 12 Decision. The STB concluded

that the subject track is likely to be characterized as "a line of railroad"⁴ because the "purpose of the proposed construction and operations appears to be to allow U.S. Rail to serve new shippers and noted that the track cannot reasonably be viewed as used for a purpose ancillary to the service that U.S. Rail is already authorized to provide, as the proposed construction and operations will be located hundreds of miles from U.S. Rail's existing operations in Ohio. (*Id.* at p. 4).

b. Plaintiffs did not present proof of rail construction.

In order to have this Court seriously consider that Plaintiffs are seeking construction authority from the STB, they should, at a minimum, show evidence of rail construction. Given the Plaintiffs' checkered past with the STB, a healthy dose of suspicion about its motivations and representations is warranted. Among the Plaintiffs are entities, Suffolk and Sills, that made application to the STB for a certain type of exemption from STB construction authority. In seeking to withdraw that application, Suffolk and Sills represented that they never undertook any construction of rail facilities at the Property. (JE-1, Tab 6, Exhibit C, p. 1). Sills made this representation in mid-August, 2007 even though it had already signed the Excavation Agreement on August 7, 2007, pursuant to which railroad construction was to occur. (Exhibit 10). The STB allowed Suffolk and Sills to withdraw their application based on this false representation. (JE-1, Tab 6, Exhibit B, pp. 1-2). When the STB became aware of the nature of the activities of Suffolk, US Rail and Sills, it issued the October 12 Decision mandating that Plaintiffs cease all construction activities. (JE-1, Tab 1, Exhibit A).

Now this Court is being asked to enjoin local code enforcement efforts based on Plaintiffs representations that it intends to construct a rail facility. However, the documents presented to this Court clearly demonstrate that the past pattern of misrepresentations continue. The documents

⁴ In reaching this conclusion, the STB noted that "[t]here are three types of railroad track: (1) railroad lines that are part of the interstate rail network, which require a Board license under 49 U.S.C. 10901 to construct or acquire and operate. . . ; (2) ancillary track, such as "spur," "industrial" or "switching" track, which does not require prior authorization from the Board to construct or remove under 49 U.S.C. 10906. . . ; and (3) so called "private" track which is not part of the national rail transportation system or subject to the Board's jurisdiction because the track is not intended to serve the general public. State and local regulation is fully applicable to private track." (JE-1, Tab 6, Exhibit B, p. 2).

introduced into evidence at the hearing do not establish an intent to pursue "rail construction" rather they starkly demonstrate that US Rail's involvement at the Property is a mere subterfuge by which Plaintiffs seek to cloak themselves in federal preemption to avoid state and local oversight of their true business venture—a lucrative sand-mining operation.

US Rail's involvement in this sand-mining scheme is governed by three documents that were introduced at the hearing: (a) a "Railroad Operating Agreement and Property Lease", (b) an Excavation Agreement; and (c) the unsigned Proposal. The first document, the Agreement, is a lease for a 28-acre industrial site, for a 30-year term for the whopping annual rent of \$1,000. Under the terms of the Agreement, US Rail has no obligation to pay property taxes and was paid a signing bonus of \$10,000. The second document, the Excavation Agreement, allows Adjo, the general contractor (and partner in Sills) to sell sand it excavates from the Property and be paid from the proceeds of the sale of the sand up to \$3,000,000 plus a 25% fee or all of its costs (Exhibit 10). For its part, Sills gets up to \$6,000,000 plus a 50% fee. (Exhibit 10). The third document, The Proposal, is an unsigned document that contains specifications for a rail construction and indicates that it is a "Bid To: Sills Road Realty". (Exhibit 10).

Plaintiffs claim that the Proposal has been incorporated into the Excavation Agreement (Tr. 39) (even though neither document contains any reference to the other) and further claim that these documents evidence US Rail's obligation to construct a rail facility. (Exhibit 9 & 10). Hall, US Rail's President and CEO, testified that he was making payments to Adjo for construction; he produced no proof of these payments at the hearing. (Tr. 42). Hall was so ignorant of the details of the transactions occurring at the Property that he initially testified he was unaware of the provisions of the Excavation Agreement by which Adjo was paid from the proceeds of the materials that were mined from the Property. (Tr. 42). When presented with the text of the Excavation Agreement, Hall acknowledged that it appeared that payments were being made for sand mining but could not confirm that this was the payment arrangement. (Tr. 44).

Hall's testimony and the three documents Plaintiffs offered into evidence present a very clear picture: US Rail, the STB-certified Class III rail carrier, which is allegedly constructing a rail facility thereby affording the parties the protection of federal preemption, has only a nominal role in the Property as evidenced by a sham agreement under which it pays \$1,000 a year⁵ to rent 28 acres of prime industrial land with no obligation to pay property taxes. This Court is also asked to believe that US Rail would obligate itself to pay for the \$5,450,000 of rail construction improvements and equipment in the Proposal even though its lease for the Property could be terminated on 90 days notice and there is no express provision for repayment of the \$5,450,000 in construction improvements and equipment. (Exhibit 7, ¶3(b)).

While the Agreement, appears not to make economic sense, when you consider the very lucrative arrangements that Sills and Adjo (a partner in Sills) have negotiated based on their ability to sand-mine at the Property without any state or local oversight, this arrangement makes complete sense. As the Second Circuit has noted, the equitable powers of the Court should "never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage." *PenneCom B.V. v. Merrill Lynch & Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004) (quoting *Bein v. Heath*, 47 U.S. 228, 247 (1848)). Along the same lines, this Court is being asked to sanction an abuse of the federal railroad preemption doctrine in order to further Plaintiffs' thinly-veiled scheme to avoid legitimate local land use and sand-mining regulations.

C. The October 12 Decision does not represent an assertion of jurisdiction over the facility by the STB.

Plaintiffs have argued that the October 12 Decision represents an assertion of jurisdiction over the rail facility by the STB. As a result, they claim they are likely to succeed on the merits of their claim that the rail facility falls within the purview of 49 U.S.C. §10901(a), and thereby preempts any local code enforcement efforts. This argument is directly contrary to the STB's October 12 Decision.

⁵ At the present time, US Rail rents the Property at no cost because it was paid a \$10,000 signing bonus.

which has directed Plaintiffs to cease from conducting rail construction and either obtain authorization from the STB pursuant to 49 U.S.C 10901(a) or obtain an STB decision finding that such activity does not require STB approval.

Until such time as Plaintiffs receive such direction from the STB, the STB has not asserted jurisdiction. At this point, the only thing which the STB has "asserted" is that if Plaintiffs intend to pursue "rail construction" they must apply to the STB and obtain approval or an exemption.

In making this argument, Plaintiffs rely heavily on the *BSOR* case. However, *BSOR* is readily distinguishable from this matter in numerous material respects. In *BSOR*, Plaintiff rail entity sought to restrain the Village from continuing an eminent domain proceeding that would force operations at the site to cease. *BSOR*, 434 Supp.2d at 254. Here operations at the site have ceased due to the STB's October 12 Decision. Unlike *BSOR*, where Plaintiff sought enjoin on eminent domain proceeding that would close its operations, the Plaintiffs here must merely defend ordinance violations in local District Court and are free to raise, as a defense, the arguments they have articulated in this proceeding.

In *BSOR*, the Village interposed the argument that *BSOR* was not really a "rail carrier" - at least, not in the part of the world. *Id.* at 250. The Village argued that *BSOR* "was not a rail carrier in this part of the world" because its "proposed operation is an attempt to acquire or operate an 'extended or additional rail line' without first obtaining the necessary operating authority." *Id.* at 251. This argument, which is very similar to the arguments that STB has considered about US Rail's its likelihood of success, was not, however, presented to the STB. On the other hand, in this matter the argument that US Rail is not "a rail carrier in these parts" has been presented to the STB and the STB has found, in unequivocal terms, that what US Rail is attempting to do is to extend a line of railroad, something which they cannot do until they apply for and receive STB approval. (JE-1, Tab 6, Exhibit C, pp. 4-6).

An additional distinction is that in *BSOR*, the Court declined to delve into whether *BSOR* was actually looking to extend a "line of railroad" (the position advanced by the Village) because the site

was subject already to STB jurisdiction, in part, because the *BSOR* was operating from a yard that would be considered a "facility" under ICCTA. *Id.* at 252. The facility in question contained 1,600 feet of spur track, which intersected with the main line at the edge of the property and contained a warehouse connected to the spur that allowed the spur to be used as a "transloading facility." *Id.* at 244. As such, transportation by rail carrier was immediately possible. Here, there is only vacant land for which Plaintiffs may seek construction authority from the STB. An existing rail facility does not exist.

There is, however, one significant similarity between this case and *BSOR* that this Court should consider and follow. In *BSOR*, the plaintiff sought to enjoin **"the enforcement of Village zoning laws; permitting and pre-clearance requirements and other local ordinances and regulations that could interfere with its operations..."** *Id.* at 249 (emphasis added). That request for injunctive relief was not granted. *Id.* at 256-57. Here, Plaintiffs are essentially asking for the same injunctive relief by seeking to enjoin the: (a) prosecution of the Tickets; (a) issuance of further tickets and; and (c) taking of any other action to interfere with or obstruct Plaintiffs' construction of the Rail Terminal. As in *BSOR*, this request for injunctive relief must be denied.

D. The Equities Balance against an Injunction

Plaintiffs face a very simple result if an injunction does not issue: they will be required to defend the prosecution of Tickets in local District Court. During those proceedings they are free to raise as defenses the federal preemption arguments they raise in this matter. Defendant, on the other hand, faces a more difficult result if an injunction is granted: its hands will be completely tied when it comes to dealing with Plaintiffs even though, as has been widely reported, Plaintiffs have clear cut 18 acres of trees and sand-mined thousands of cubic yards of material from the site. (JE-1, Tab 1, Exhibit D, Exhibit B). On balance, Defendant and (the public's) interest should outweigh those asserted by Plaintiffs.

E. The possibility of Harm to other Interested Parties and to the Public Interest in General Should be Considered in Deciding whether to Grant the Preliminary Injunction

This court should consider the possibility of harm to other interested persons from the grant or denial of injunctive relief. *Liddy v. Cisneros*, 823 F. Supp. 164, 177 (S.D.N.Y. 1993) (citing *Stamcarbon, N.V. v. American Cynamid Co.*, 506 F.2d 532, 537 (1974)) (determination of propriety of injunction "cannot always be made simply by reference to the interests of the parties before the court") (quoting *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 552, 57 S. Ct. 592, 601 (1937)); *Standard & Poor's Corp. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982)).

There is a very legitimate public interest in ensuring that the integrity of Defendant's local land use regulations, to the extent not preempted by federal law, are maintained. As the STB has noted in the October 12 Decision there is a possibility that the facility in question would be found to be a "private track," in which case, which is not subject to STB jurisdiction and to which state and local regulation would be fully applicable. (JE-1, Tab 6, Exhibit B, p. 1, n. 1). Since Plaintiffs did not apply to the STB for construction authority prior to commencing their work, there is no way on knowing whether federal or state and local law would apply. Moreover, notwithstanding any claim of federal preemption the Second Circuit has held in *Green Mountain*⁶ that local authorities may continue to exercise "traditional police powers," provided 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. Insofar as the ordinances on which the Tickets are based could still be found to be permissible health safety and welfare regulations, it is in the public interest not to enjoin Defendant's enforcement efforts and allow a local court to make this decision.

⁶ 404 F.3d 638, 645 (2d Cir. 2005)

Plaintiffs have articulated their public interest argument to the STB in their petition for a stay of the October 12 Decision. In addressing this argument, the STB noted that "[w]hile petitioners cite the need for more freight facilities on Long Island, the October 12 Decision does not prevent the facility from being constructed once appropriate approvals are obtained. Thus, any potential public benefit could still be realized. Instead, the public interest is better served by precluding the potential evasion or misuse of the Board's processes that could result from allowing the construction and operations proposed here to proceed without the license and NEPA review that appear to be required." (JE-1, Tab 6, Exhibit B, p. 7). That rationale is equally compelling in the current context.

CONCLUSION

For the reasons set forth above, Defendant Town of Brookhaven respectfully submits that the evidence in the hearing record warrants a denial of Plaintiffs' request for a preliminary injunction.

Dated: Huntington, New York
March 31, 2008

Respectfully submitted,

LAW OFFICES OF
MARK A. CUTHBERTSON

/s/ Mark A. Cuthbertson

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(631) 351-3501

To: Charlotte A. Biblow, Esq.
Attorney for Plaintiffs

EXHIBIT F

RAILROAD OPERATING AGREEMENT AND PROPERTY LEASE

THIS AGREEMENT is made by and between: Sills Road Realty LLC, a New York limited liability company, whose address is 485 Underhill Boulevard, Syosset, New York, hereinafter "LESSOR", and by U S RAIL Corporation, whose address is 7846 W. Central Avenue Toledo, Ohio 43617, hereinafter "LESSEE", and collectively, the "PARTIES"

THE PARTIES AGREE AS FOLLOWS:

1. LEASED ASSETS.

Lessor hereby leases to Lessee, upon the terms and conditions of this Agreement, the real property right of way more fully described on the attached Exhibit # 1, (the "Leased Assets") for the purpose of operating a common carrier railroad and transload facility, including but not limited to the following assets:

- (a) All tracks, switches and connecting track, related or connected property, or any other property associated or connected with the running, operating or servicing of customers of the Lessee, and all road ways or other property used, connected or related to the operation of the railroad, including all buildings described on Exhibit #1 to be built by the Lessee and constructed to the design and satisfaction of Lessor;
- (b) All transferable governmental permits, consents, approvals and licenses owned or used by Lessor, if any, in connection with the Leased Assets;

- (c) All rights, benefits and privileges of the Lessor in connection with the Leased Assets in its capacity as grantor, licensors, lessor or franchiser, or in any similar capacity, arising out of or under any contract, easement, franchise, right-of-way, license or lease, if any, relating to the Leased Assets;
- (d) All leases, easements, licenses, rights-of-way or other interests in real property owned, leased, used, held for use or otherwise held by the Lessor in connection with the operation, use or enjoyment of the Leased Assets, if any, and
- (e) All utility service contracts in connection with the operation, use or enjoyment of the Leased Assets (including, without limitation, public and private grade crossing agreements, and pipeline, wireline, fiber optic and other utility service agreements) if any.

2. LESSEE'S RIGHTS.

- (a) Effective on the date of execution of this Agreement, Lessee will have all rights, free from restrictions, interference or hindrance from the Lessor, its agents, affiliates, employees, or any entity connected to any of them, to:
 - (i) To fully and completely use all Leased Assets for any lawful purpose;
 - (ii) To operate the Leased Assets as a common carrier railroad or other legitimate business connected with the operation of a common carrier railroad.

- (iii) to receive and demand payment for rail services to customers; and
 - (iv) To receive and demand payment for easements, leases, rentals or repair services.
- (b) At any time during the term of the Lease, Lessee may enter into an agreement with an affiliated business entity that will handle the actual day-to-day operation of the Leased Assets as a common carrier railroad; provided, however, that Lessee shall remain primarily liable for the performance of such day-to-day operations in accordance with this Lease.

3. TERM AND RENTAL PAYMENTS.

- (a) Term: Subject to Section 3(c) of the Lease, the term of this Agreement shall be thirty (30) years, beginning July 15, 2007. Thereafter, this Lease will automatically renew for additional periods of ten (10) years each, unless Lessee gives written notice of its intention to terminate the Lease to the Lessor at least one (1) year prior to the expiration of the Lease.
- (b) Base Rent: Lessee will pay annual rent in the amount of one thousand dollars (\$1,000) per year during the term of this Lease, including any renewal periods.
- (c) Early Termination: Lessor may terminate this Lease at any time upon ninety (90) days prior written notice to the Lessee. In the event of such termination, Lessor shall pay, promptly upon receipt of Lessee's invoice therefor, all of Lessee's reasonable costs of termination, including costs of moving Lessee's equipment from the premises.

4. INDUCEMENT TO LESSEE.

In order to induce Lessee to enter in to this Lease, Lessor agrees to pay Lessee upon execution of this Lease, the sum of Ten Thousand Dollars (\$10,000.00). Lessee agrees that it will treat this payment by Lessor for services provided by Lessee to Lessor, and credited to Lessor for engineering and construction services provide in connection with the construction of the track on the Leased Assets.

5. OWNERSHIP AND USE.

- (a) The Leased Assets shall be the exclusive property of Lessor, except for Lessee's rights to use them in normal business operations under this Lease.
- (b) Lessee shall keep all Leased Assets at all times free and clear from all liens and encumbrances unless agreed to by Lessor. Lessee shall give Lessor immediate notice of any such attachment or other judicial process affecting any of the Leased Assets.
- (c) Lessee shall use the Leased Assets in a careful and proper manner and shall comply with all federal laws regulating railroads and all other applicable laws. Lessee shall not make any alterations to the Leased Assets that shall decrease the value of said Leased Assets without Lessor's prior written consent.
- (d) Lessee may not sublease any of the Leased Assets without Lessor's prior written consent.
- (e) Notwithstanding anything to the contrary set forth in this Lease, Lessee's use and occupation of the Leased Assets shall be solely for the purpose, and only to the extent necessary, to provide for the movement of railcars and

the loading and unloading thereof as required or requested by the Lessor or a customer situated on the premises and to fulfill its obligations under Section 11 (a) hereof. Lessor retains all rights to otherwise use and occupy the Leased Assets for its purposes. Lessor and Lessee agree to execute and deliver such modifications to this Lease or such other instruments as may be necessary or desirable to evidence and implement their respective rights hereunder to use and occupy the Leased Assets.

6. NOTICES.

Lessee, at its own cost and expense, will be responsible for preparing and filing all notices, if any, with respect to this Lease that are required by the United States Surface Transportation Board, the Federal Railroad Administration, and any other federal government agency or administrative body having jurisdiction over the operation of the Leased Assets by Lessee or its assignee.

7. REPAIRS AND REPLACEMENTS.

Lessee shall keep the Leased Assets in good condition and, at Lessee's own cost and expense, make all repairs and replacements where necessary. All such replacements shall immediately become the property of Lessor.

8. INSURANCE.

Lessee, at Lessee's own cost and expense, shall insure the Leased Assets against casualty, fire, and vandalism in the amount of \$2 million, and obtain public liability insurance with minimum limits of \$1 million per person / \$5 million per incident.

for bodily injury and \$1 million for property damage, all in the form and with the insurance companies that shall be satisfactory to Lessor. All insurance policies shall name both Lessee and Lessor as insured, and copies of the policies and the receipts for the payment of premiums shall be furnished to Lessor. Each liability policy shall provide that all losses be paid on behalf of Lessee and Lessor as their respective interests appear. Each insurance company shall agree that it will give Lessor 30 day's prior written notice of any alteration or cancellation of any policy.

9. TAXES.

Lessor shall pay when due all taxes imposed with respect to the Leased Assets during the term of the Lease, other than Lessee's income taxes.

10. INDEMNITY.

Lessee assumes liability for and shall indemnify Lessor from all losses, damages, claims, suits, costs, expenses, and disbursements, including legal expenses, incurred by Lessor in any way relating to the use of the Leased Assets. The indemnities contained in this section shall continue even after the termination of this Lease if arising with respect to occurrences during the term of this Lease.

11. INSPECTION.

Agents of or the Lessor may at reasonable times enter Lessee's premises to inspect the Leased Assets and the manner in which the Leased Assets are being used.

12. REPRESENTATIONS AND WARRANTIES OF LESSOR.

Lessor represents and warrants the following to be true:

- (a) Status of Lessor. Lessor is a New York limited liability company duly organized, validly existing, and in good standing under the laws of that State; and, further, is properly authorized, according to its Operating Agreement, and duly adopted Resolution, to enter into and carry out the transactions contemplated by this Lease.
- (b) Authority. When executed, this Lease will be a legal, valid, and binding obligation of Lessor.
- (c) Absence of Undisclosed Liabilities. Lessor does not know or have reasonable grounds to know of any basis for the assertion against Lessor, of any claim that, if presented, would impair Lessor's ability to enter into this Lease or impair Lessee's ability to use the Leased Assets or operate a railroad.
- (d) Title to Properties. Lessor has good and marketable title to all of the Leased Assets, subject to no mortgage, pledge, lien, encumbrance, security interest, or charge other than the encumbrances set forth in Exhibit 2 to this Lease. Further, except as set forth in this Lease, there are no imperfections of title that would affect the marketability of title of Lessor's assets, or the ability of Lessor to lease the Leased Assets to Lessee.
- (e) Status of Contracts. Lessor has, to the best of its knowledge, complied with all of the provisions of contracts described in this Lease, if any, and of all other contracts and commitments to which Lessor is a party to the extent non-compliance would materially and adversely affect Lessor's performance of this Lease.

- (f) Taxes. All personal property taxes and other taxes of any nature assessed against Lessor and/or the Leased Assets are fully paid by Lessor when due through the date of execution of this Lease.
- (g) No Tax Disputes. Lessor is not involved in any dispute with any tax authority on the amount of taxes due nor has it received any notice of any deficiency, audit, or other indication of deficiency from any tax authority not disclosed to the Lessee to this Lease, other than as set forth in Exhibit #2 to this Lease.
- (h) Litigation or Insolvency Proceedings.
- (i) Litigation. There are no actions, suits, claims, investigations, or legal, administrative, or arbitration proceedings pending or, to the best of Lessor's knowledge, threatened or likely to be asserted by or against Lessor or relating to the Leased Assets or this Lease before any court, governmental agency, or other body, including any quasi-judicial or administrative forum, and no judgment, order, writ, injunction, decree, or other similar command of any court, governmental agency, or body has been entered against or served upon Lessor which, in the aggregate, would materially and adversely affect Lessor's performance of this Lease.
- (ii) Insolvency Proceedings. Lessor is not involved in any proceeding by or against it in any court under the Bankruptcy Code or any other insolvency or debtor's relief act, whether state or federal, or for the appointment of a trustee, receiver, liquidator, assignee, or other similar official of Lessor or its property.
- (k) Labor Relations—Employees.

- (i) Collective Bargaining Agreements. There are no collective bargaining agreements currently in effect between Lessor and labor unions or organizations representing any of Lessor's employees; and there does not now exist and there has been no formal or informal request to Lessor for collective bargaining or for an employee election from any union or from the National Labor Relations Board (the "NLRB").
- (ii) Employment Regulations Compliance. Lessor is in material compliance with all applicable federal, state, and local laws and regulations respecting employment and employment practices, terms, and conditions of employment and wages and hours; and further, (a) there are no unfair labor practice complaints against Lessor pending before the NLRB, and no such complaints have been threatened; (b) there is no labor strike, dispute slowdown, or stoppage actually in progress or threatened against Seller; (c) no grievance or arbitration proceedings are pending and no such claim has been asserted; and (d) Lessee will not incur any liability or obligation of any kind arising out of Lessor's employment of or termination of Lessor's employees nor for any other claim by any of Lessor's employees arising out of any employment relationship with Lessor.
- (iii) Exclusion of Employee Benefits. Lessor acknowledges:
Lessee does not assume any employee benefits of Lessor whatsoever; and (b) Lessee shall have no obligation to provide employee benefits other than such benefits as Lessee shall agree to provide to its employees in the exercise of Lessee's sole discretion.

(l) Environmental Matters. To the best of Lessor's knowledge there is no Hazardous Material in, on, or under any of the property of the Leased Assets. In addition, there are no presently pending or threatened administrative or enforcement actions, investigations, compliance orders, claims, demands, actions, or litigation based on environmental laws or regulations or otherwise related to the presence of Hazardous Material, in, on, or under the Leased Assets. Lessor makes no other environmental representations or warranties, but Lessor acknowledges that neither Party is required to sign this Lease unless satisfied with the environmental reports or assessments conducted by or on behalf party in accordance with this Agreement. For purposes of this paragraph, the term "Hazardous Material" shall mean any toxic or hazardous waste or substance (including without limitation asbestos and petroleum products) which is regulated by applicable local, state, or federal environmental laws or regulations.

(m) Condition of Leased Assets. Subject to Section 14(c) hereof, the following representations are made with respect to the Leased Assets:

- (i) There are not any known defects that have not been disclosed to Lessee.
- (ii) There are no known outstanding citations issued by any health, building, or other governmental agency, under the Occupational Safety and Health Act and/or under the Americans with Disabilities Act having jurisdiction over the operation of the Leased Assets and/or the Lessor, including any claims or any violation of any federal, state, or local environmental statutes, regulations, ordinances, or other environmental regulatory requirements

- (n) No Violation or Breach. The performance of this Lease will not be in violation of any laws, statutes, local ordinances, state or federal regulations, court or administrative order, or ruling, nor is the performance of this Lease in violation of the conditions or restrictions in effect for financing pursuant to any loan documents, whether any such loan is secured or unsecured other than as set forth in Exhibit #2 to this Lease.
- (o) Broker's or Finder's Fees. No agent, broker, investment banker, person, or firm acting on behalf of Lessor is or will be entitled to any broker's or finder's fees or any other commission or similar fee directly or indirectly from either of the Parties in connection with the Lease.
- (q) Reliance. Subject to Section 14(c) of this Lease, the foregoing representations and warranties are made by the Lessor with the knowledge and expectation that Lessee is placing complete reliance on them.

14. REPRESENTATIONS AND WARRANTIES OF LESSEE.

Lessee represents and warrants the following to be true:

- (a) Status of Purchaser. Lessee is an Ohio corporation duly organized, validly existing, and in good standing under the laws of that State; and, further, is properly authorized, according to its Articles or Bylaws and by a duly adopted Resolution, to enter into and carry out the transactions contemplated by this Lease.
- (b) Authority. This Lease when executed will be a legal, valid and binding obligation of Lessee.

(c) Awareness of Lessee. Lessee acknowledges the following:

(i) Lessee has had an opportunity to examine the Leased Assets and agrees to accept the same "As Is," subject to the remaining conditions and other provisions of this Lease.

(ii) Lessee has, either individually or through its agents or employees, sufficient knowledge, expertise, and financial capacity, Lessee is capable of evaluating the merits and risks of leasing the Leased Assets pursuant to this Lease.

(d) Litigation. There are no actions, suits, or proceedings pending or, to Lessee's knowledge, threatened or likely to be asserted, against the Lessee, before any court, administrative agency, or other body that would impair Lessee's ability to enter into this Lease or to operate the Leased Assets as a railroad as contemplated, and no judgment, order, writ, injunction, decree, or other similar command of any court or governmental agency has been entered against or served upon Lessee relating to this Lease and/or the transactions contemplated by this Lease.

(e) Broker's or Finder's Fees. No agent, broker, investment banker, person, or firm acting on behalf of Lessee is or will be entitled to any broker's or finder's fees or any other commission or similar fee directly or indirectly from either of the Parties in connection with this Lease.

15. LIABILITY FOR DAMAGE.

Lessee shall be responsible for any damage to the Leased Assets during the term of this lease and shall pay to Lessor the

value of as much of the Leased Assets as may be damaged or destroyed. On receipt of the payment, Lessor shall, to the extent of the amount paid, assign to Lessee any rights Lessor may have with respect to the damaged or destroyed Leased Assets under any insurance.

16. BREACH.

Upon a failure to pay rent when due or upon a breach of any other condition of this Lease, or Lessee discontinues business, Lessor shall have the right to terminate this Lease, upon giving sixty (60) days advanced written notice, with respect to a breach other than the failure to pay rent when due, to Lessee, specifying the breach on which such termination is based. Lessee shall have adequate time, but not less than 60 calendar days from the date of such notice to cure the breach specified by Lessor. In the event this Lease is terminated for failure to cure the breach, Lessor shall have the right to pursue any remedies available to Lessee as are permitted by law.

17. GENERAL.

- (a) Lessee may not assign or transfer (by operation of law or otherwise) any of its rights or obligations under this Lease, except to an affiliate of Lessee, or with the agreement of Lessor.
- (b) Lessor may not assign this Lease without Lessee's consent, other than to financial institutions that may, from time to time, provide financing to the Lessor in connection with the Leased Assets.
- (c) This Lease contains the entire agreement between the Parties, cannot be modified except in writing and signed by Lessor and Lessee, and shall be binding upon the

parties and their legal representatives, heirs, successors, and assigns.

- (d) This Lease can be specifically enforced.
- (e) The interpretation and enforcement of this Lease shall be governed by New York law, and applicable federal law.
- (f) This Lease may be executed in counterparts, with each counterpart constituting one and the same instrument.

18. Agreement Not To Compete.

From the effective date of this Lease until two years following the termination hereof, Lessee will not, without the express written consent of Lessor, own, lease, operate or otherwise provide railroad operating services at any rail yard, side track, industrial side track or other railroad facility located within the County of Suffolk, New York. Lessee recognizes and acknowledges the competitive value of its agreement contained in this Section 18 and the damage that could result to Lessor from Lessee's breach thereof. Accordingly, Lessee agrees that money damages would not be a sufficient remedy for any such breach by it, and that, in addition to the rights and remedies otherwise available to Lessor], Lessor shall be entitled to equitable relief by way of specific performance, injunction or otherwise if Lessee breaches or threatens to breach any of its agreements contained in this Section 18. In the event of any legal proceedings to enforce or protect any rights under this Section 18, Lessor shall be entitled to recover its costs (including reasonable attorneys' fees) incurred in connection therewith. Lessee hereby submits to the jurisdiction of any federal or New York State court located in the City of New York, New York in connection with any legal proceedings brought by Lessor] to enforce its rights hereunder. Notwithstanding any other provision herein to the contrary, Lessee shall not be liable for punitive

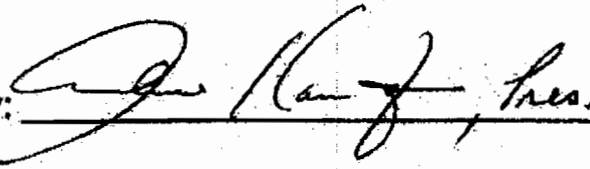
consequential, special, indirect, exemplary or any other damages other than actual damages arising under, or as a result of a breach of, its obligations under this Section 18.

This Lease is executed on the dates set forth below, and the parties intend it to be effective as of the commencement of the Lease term specified in §3(a).

[Signature Page Follows]

THIS LEASE HAS BEEN EXECUTED BY THE PARTIES HERETO ON THE
BELOW INDICATED DATES AFTER THEIR RESPECTIVE SIGNATURES

Sills Road Realty, LLC, Lessor

By:  Hanf, Pres. Date 8/8/07

U S RAIL Corporation, Lessee

By: _____ Date: _____

THIS LEASE HAS BEEN EXECUTED BY THE PARTIES HERETO ON THE
BELOW INDICATED DATES AFTER THEIR RESPECTIVE SIGNATURES

Sills Road Realty, LLC, Lessor

By: _____ Date _____

U S RAIL Corporation, Lessee

By: Shall, President Date Aug 7, 2007

EXHIBIT 1 Leased Assets

Property Name	Vacant Land-Sills Road
Location	S/W/C of Sills Road & Express Drive South, Yaphank, New York
Assessor's Parcel Number	663-3-1, 27.001, 27.002, 27.003 & 27.004 704-2-2, 30, 31, 32, 33, 34, 35 & 36 704-4-1 & 2 704-5-1 & 2

EXHIBIT 2
Qualifications to Lessee's Representations

Section 12 (d). *Encumbrances on the Leased Assets.* The Leased Assets are subject to a first mortgage lien, securing debt in the principal amount of \$5,300,000, in favor of Kennedy Funding, Inc.

Section 12 (g). *Tax disputes.* Lessee has asserted a claim challenging the real property tax assessment on the Leased Assets.

Section 12 (n). *Compliance with other agreements.* Execution and delivery of the Agreement requires the consent of Kennedy Funding Inc.

EXHIBIT G

EXCAVATION AGREEMENT

AGREEMENT entered into as of the 7th day of August, 2007, among ADJO CONTRACTING CORP., a New York corporation, having its principal place of business at 207 Knickerbocker Avenue, Bohemia, New York 11716 (hereinafter referred to as "Contractor"), U S RAIL CORPORATION, an Ohio corporation, having its principal place of business at 7846 W. Central Avenue, Toledo, Ohio 43617 (hereinafter referred to as "U S Rail") and SILLS ROAD REALTY LLC, a New York limited liability company having its principal place of business at 485 Underhill Boulevard, Syosset, New York 11791 (hereinafter referred to as "Owner").

WHEREAS, Owner has acquired land in the Town of Brookhaven, Suffolk County, New York, described more fully in Exhibit A hereto (the "Subject Properties") and has leased the Subject Properties to U S Rail for the purpose of constructing and operating a rail terminal ("Rail Terminal") thereon but has retained all rights to any minerals which may be extracted from the Subject Properties;

WHEREAS, U S Rail has contracted with Contractor for the improvement of the Subject Properties and the installation of the Rail Terminal;

WHEREAS, in order to facilitate the improvement of the Subject Properties and the installation of the Rail Terminal, the parties desire to enter into an agreement under which Contractor will arrange for the excavation and site preparation of the Subject Properties;

NOW THEREFORE, for and in consideration of the mutual promises and benefits herein contained, the parties agree as set forth herein.

1. APPOINTMENT; EXCAVATION PLAN.

U S Rail agrees to retain Contractor, on the terms and conditions set forth in this Agreement, to excavate in, on, and under the Subject Properties and to remove all materials, and any products derived from such materials (collectively, "Bank Run"), from the Subject Properties. Contractor shall use its best efforts to conform its operations on the Subject Properties during the Term hereof and to perform its obligations hereunder in compliance with the excavation and site preparation plan in effect from time to time (the "Excavation Plan"). For all excavation and site preparation work hereunder, Contractor shall be entitled to recover, from the proceeds of the sale of Bank Run, the greater of (i) \$ 3,000,000 plus ten percent (10%) thereof for overhead, ten percent (10%) thereof for profit and five percent (5%) thereof for management (collectively, the "25% Allowance") or (ii) all of Contractor's Costs, as hereinafter defined, plus the 25% Allowance; provided, however, that, with respect to Contractor's Costs that are subcontractor costs, the 25% Allowance shall be ten percent (10%).

2. CONTRACTOR'S EXCLUSIVE RIGHTS; U S RAIL'S RESERVED RIGHTS.

Contractor shall have the exclusive right to enter on the Subject Properties at any and all times during the term of this Agreement to remove Bank Run for Contractor's use in accordance herewith. U S Rail reserves to itself the right to go on and use the Subject Properties, for any purpose, without unreasonable interference with the operations of Contractor. However, neither U S Rail nor Owner shall remove Bank Run from the Subject Properties except for use in constructing the Rail Terminal. Owner shall not sell, or grant, lease, or license, any rights to remove Bank Run from the Subject Properties to any person other than Contractor.

3. TERM AND TERMINATION.

(a) Term. The term of this Agreement shall be deemed to have commenced as of the effective date of this Agreement as set forth in the first paragraph on the first page of this Agreement (the "Effective Date") and shall continue for a period of two (2) years from the Effective Date of this Agreement (the "Term"). This Agreement may be terminated prior to the end of the Term in accordance with the provisions of Sections 3(b) and 3(c).

(b) Termination by U S Rail or Owner. Either U S Rail or Owner may terminate this Agreement upon sixty (60) days notice to Contractor.

(c) Termination by Any Party. This Agreement may be terminated by any party upon or after the occurrence of any of the following events:

(i) failure by any other party to make any payment due hereunder within ten (10) days after receipt of written demand therefor;

(ii) breach by any other party of any of the other material terms or conditions of this Agreement which is not cured within ninety (90) days after receipt of written notification thereof, provided, however, that the ninety-day cure period shall be extended to account for any period during which cure is made impossible or impractical by seasonal or weather conditions;

(iii) depletion of Bank Run reserves on the Subject Properties;

(iv) entry of an "Order for Relief" naming any other party as a "Debtor" under Title 11 of the United States Code or upon the entry of a decree or order by a court having competent jurisdiction in respect to any petition filed or action respecting such party directly involved in a reorganization, arrangement, creditors composition, readjustment, liquidation, dissolution, bankruptcy or similar relief under any other present or future statute, law or regulation, whether or not resulting in the appointment of a receiver, liquidator, assignee, trustee, custodian, or other similar official, and the continuation of any such decree or order is unstayed and in effect for a period of ninety (90) consecutive days; or

(vi) making by any other party of an assignment for the benefit of creditors, or the admission by such party in writing of its inability to pay its debts generally as they become due, or the taking of action by such party in furtherance of any such action.

4. PRICING; PAYMENT; QUANTITIES.

(a). For all Bank Run, Contractor agrees to pay, or provide payment, to Owner (i) Six Million Dollars (\$6,000,000) (the "Base Payment") plus (ii) fifty percent (50%) of the excess (the "Excess Payment"), if any, of all Revenues (as hereinafter defined) over Contractor's Expenses (as hereinafter defined). The Base Payment shall be paid in installments as set forth in Exhibit B hereto. The Excess Payment shall be paid within sixty (60) days following the end of the Term or earlier termination of this Agreement. Quantities of Bank Run extracted from the Subject Properties shall be determined using Owner's scales installed on the Subject Properties.

(b) For the purposes of this Agreement, (i) "Revenues" shall mean the gross revenues derived from the sale of Bank Run and all other gross revenues derived from the excavation and site preparation of the Subject Properties and (ii) "Contractor's Expenses" shall mean all documented costs of Contractor in performing its obligations under this Agreement ("Costs"), an allowance equal to twenty five percent (25%) of Costs and the Base Payment actually paid to Owner. Owner shall have the right from time to time to inspect Contractor's books and records to confirm any determination of Revenues or Contractor's Expenses.

(c) Owner agrees to allow Contractor to remove an indeterminate quantity of Bank Run from the Subject Properties, with no annual or cumulative maximum quantities, limited only by the requirements of the Excavation Plan and the depletion of Bank Run reserves on the Subject Properties.

5. OPERATIONS; ROADS; MACHINERY AND EQUIPMENT.

(a) Contractor agrees to perform all labor and provide all equipment necessary for the exploration, extraction, processing, loading, and hauling of Bank Run and to otherwise perform its obligations under this Agreement.

(b) Contractor and U S Rail will consult, confer, and cooperate in planning excavation of the Subject Properties and establishing stockpile or processing areas, and arranging brush and timber as needed for such purposes.

(c) In order to obtain access to the Subject Properties, and to carry on its operations, Contractor shall have the right to make use of and, if Contractor so desires, improve all roadways now existing on the Subject Properties, and shall have the right to build such additional roads as may be necessary for the excavation, processing, stockpiling and removal of Bank Run and to otherwise perform its obligations under this Agreement. In maintaining, improving, or building such roads, Contractor may use sand, gravel, and fill from the Subject Properties. Contractor shall not be required to pay for such materials so used. Any road not in use by Contractor shall be left in a condition at least as good as existed before use by Contractor under this Agreement. Contractor shall consult and confer with US Rail as to the location, layout, and standards of new roads that may be required, but U S Rail shall not unreasonably withhold approval of any such new road. Contractor and U S Rail shall negotiate in good faith to share the costs of construction and maintenance of any such roads that will be used to a significant extent by U S Rail, based on the relative use of such roads by Contractor and U S Rail. Contractor and U S Rail may construct and maintain gates on roads as either may require, at the cost of the party so requiring, provided that the other party shall be given keys thereto.

(d) Contractor shall have the right to place on the Subject Properties machinery, equipment, Bank Run processing equipment, tool sheds, and other structures required by it in connection with its operations; with the full right to remove all the machinery, equipment and structure within one hundred eighty (180) days after termination of this Agreement.

6. PERMITS; TAXES; INSURANCE

(a) U S Rail and Contractor shall cooperate, consult and confer to plan operations in accordance with existing permits and licenses and to obtain new permits and licenses as needed, and Owner, as property owner, shall provide any and all approvals and signatures that are necessary to maintain and/or obtain such permits and licenses.

(b) Contractor shall be responsible, on behalf of Owner, for payment of and filing all reports and returns for excavation or similar taxes relating to the Subject Properties. Owner shall be responsible for the payment of and filing all reports and returns for property taxes relating to the Subject Properties.

(c) Contractor shall be responsible for any taxes on any machinery, equipment, or structures that it owns.

(d) Contractor shall maintain in full force and effect at all times during the term of this Agreement insurance with reputable carriers insuring U S Rail, Owner and Contractor as their interests may appear against liability to third parties arising from Contractor's operations on the Subject Properties in accordance with industry standards for similar operations. Prior to entry on the Subject Properties, Contractor shall provide U S Rail and Owner with certificates evidencing the insurance required by this Section 6(d).

7. RECLAMATION

On conclusion of operations of any significant portion of the Subject Properties and on termination of this Agreement, Contractor shall perform at its cost any reclamation work required by the Excavation Plan, by law or under the applicable permits, and remove Contractor's machinery, equipment, and structures.

8. COMPLIANCE WITH LAW

Each party agrees to comply with all applicable laws, statutes, ordinances, and governmental rules and regulations applicable to the subject matter of this Agreement. U S Rail and Owner shall have the right to inspect the Subject Properties, and to require Contractor to perform such tests as may be desired, to confirm Contractor's compliance with its obligations under this Section.

9. INDEMNITY

(a) Contractor will hold U S Rail and Owner harmless from all claims that may arise out of its occupation of the Subject Properties and operations conducted thereon by it, its employees, agents, or contractors and shall indemnify and defend U S Rail and Owner against any suit, claim, judgment or demand whatsoever arising out of the breach of this Agreement by Contractor or the negligence or willful misconduct of Contractor in the exercise of any of its rights pursuant to this Agreement, but only to the extent that U S Rail or Owner, as the case may be, is not a contributing cause to the events giving rise to such suit, claim, demand or judgment.

(b) Owner and US Rail, severally and not jointly, will hold Contractor harmless from all claims that may arise out of Owner's or US Rail's ownership or use of the Subject Properties and shall indemnify and defend Contractor against any suit, claim, judgment or demand whatsoever arising out of the breach of this Agreement by Owner or US Rail, as the case may be, or the negligence or willful misconduct of Owner or U S Rail, but only to the extent that Contractor is not a contributing cause to the events giving rise to such suit, claim, demand or judgment.

(c) The obligations of the parties under this Section shall survive the expiration or termination of this Agreement.

10. FORCE MAJEURE

No party shall be liable for failure to perform any of its obligations under this Agreement, other than an obligation for the payment of money, during any period in which performance is prevented by any cause beyond such party's control, which causes are called "force majeure" below. For purposes of this Agreement, "force majeure" includes, but is not limited to, acts of God, fire, flood, undue shortage of energy or power, strikes, insurrection or mob violence, requirements or regulations of government with which a party cannot reasonably comply, and other causes of a similar nature that are beyond the control of a party. The party whose performance is prevented will notify the other parties of the date of commencement and cause of each period of force majeure and the time of removal of such cause.

11. INDEPENDENT CONTRACTORS

This Agreement shall not constitute or give rise to a partnership or joint venture between or among the parties. All activities by a party under the terms of this Agreement shall be carried on as independent contracting parties and not as an agent for or employee of any other party, and each party shall be solely responsible for the acts of its agents and employees. No party shall have any right, power, or authority to create any obligation, express or implied, on behalf of any other party.

12. NOTICES

All notices, reports, and consents required or permitted to be given under this Agreement shall be in writing and deemed given when hand delivered or by documented overnight delivery service, or sent by telecopy, telefax, or other electronic transmission service, provided a confirmation copy is also sent no later than the next business day by first class mail, return receipt requested, to the party to whom the same is directed at its address as set forth in the first paragraph of this Agreement or to such other address as such party shall designate by notice under this Section.

13. GENERAL

(a) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to its principles of conflicts of laws.

(b) Entire Agreement. This Agreement, including all exhibits hereto, constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior understandings, whether oral or in writing.

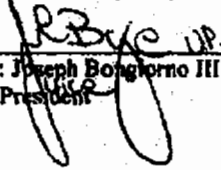
(c) Severability. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. The determination by any court of competent jurisdiction that one or more of the sections or provisions of this Agreement are unenforceable shall not invalidate this Agreement, and the decision of such court shall be given effect so as to limit to the extent possible the sections or provisions of this Agreement which are deemed unenforceable. To the extent such determination has a material impact upon the economic expectations of the parties hereto, the parties agree to make appropriate modifications to this Agreement to take such impact into account.

(d) Headings; Construction. Section headings contained in this Agreement are for convenient reference only and shall not in any way affect the meaning or interpretation of this Agreement. The language used in this Agreement will be deemed the language chosen by the parties hereto to express their mutual intent and no rule of strict construction will be applied against any party.

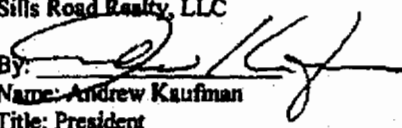
(e) Counterparts. This Agreement may be executed simultaneously in one or more counterparts, including by means of telefaxed signature pages, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

THIS AGREEMENT has been executed by the duly authorized representative of the parties as of the date first hereinabove set forth.

ADJO Contracting Corp.

By: 
Name: Joseph Bongiorno III
Title: President

Sills Road Realty, LLC

By: 
Name: Andrew Kaufman
Title: President

U S Rail Corporation

By: _____
Name: Gabriel D. Hall
Title: President

(c) Severability. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. The determination by any court of competent jurisdiction that one or more of the sections or provisions of this Agreement are unenforceable shall not invalidate this Agreement, and the decision of such court shall be given effect so as to limit to the extent possible the sections or provisions of this Agreement which are deemed unenforceable. To the extent such determination has a material impact upon the economic expectations of the parties hereto, the parties agree to make appropriate modifications to this Agreement to take such impact into account.

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THIS AGREEMENT has been executed by the duly authorized representative of the parties as of the date first hereinabove set forth.

ADJO Contracting Corp.

By: _____
Name: Joseph Bongiorno III
Title: President

Sills Road Realty, LLC

By: _____
Name: Andrew Kaufman
Title: President

U S Real Corporation

By: _____
Name: Gabriel D. Hall
Title: President

Exhibit A
Description of Subject Properties

Property Name	Vacant Land-Sills Road
Location	S/W/C of Sills Road & Express Drive South; Yaphank, New York
Assessor's Parcel Number	663-3-1, 27.001, 27.002, 27.003 & 27.004 704-2-2, 30, 31, 32, 33, 34, 35 & 36 704-4-1 & 2 704-5-1 & 2

Exhibit B
Payment of Base Payments

Base Payments shall be payable on the first day of the months and in the respective amounts set forth below:

September, 2007	\$250,000
October, 2007	\$350,000
November, 2007	\$350,000
December, 2007	\$200,000
January, 2008	\$200,000
February, 2008	\$200,000
March, 2008	\$200,000
April, 2008	\$350,000
For the 8 months thereafter	\$487,500 each month

EXHIBIT H

4-JUN-01

ADJO CONTRACTING CORP.
WATER, DRAINAGE, SANITARY SYSTEMS
 207 Knickerbocker Avenue, Bohemia, NY 11716

PH (631) 589-0800
FAX (631) 589-0804

Don Quigley

proposal

Page 1 of 3

PROJECT NAME:

Brookhaven Rail Link, Sills Road, Yaphank

BID TO:

Sills Road Realty

ADDRESS

TOWN

STATE

ZIP

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR:

Brookhaven Rail Terminal

28 acre facility

We propose to perform the following scope of work at the above referenced project.

Site subgrading work for 1,097,712 square feet
 \$50,000.00

Site Drainage
 \$85,000

Sub-base and Paving
 \$600,000.00

	Quantity	Unit Price	Total
New Main Line Switch	1	\$ 800,000	\$ 800,000
Reconditioned Interior Switch	17	\$ 45,000	\$ 765,000
New Track, ties and ballast	11,000	\$ 120	\$ 1,320,000
Misc. track equipment	1	\$ 100,000	\$ 100,000
Entrance and Bridge	1	\$ 500,000	\$ 500,000
Aggregates Unloading & Bunkers	1	\$ 350,000	\$ 350,000
Transload Facility	1	\$ 1,000,000	\$ 1,000,000
General Conditions			\$250,000
GC Fee			\$400,000
Misc.			\$100,000

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

We hereby propose to furnish labor and materials - complete in accordance with the above specifications, for the sum of:

with payment to be made as follows:

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs, will be estimated only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. ADJO Contracting reserves the right to renegotiate contract price if strikes, accidents or delays are encountered. Owner to carry fire, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Authorized Signature _____

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work specified. Payment will be made as outlined above.

ACCEPTED

Signature

Signature

ADJO CONTRACTING CORP.
WATER, DRAINAGE, SANITARY SYSTEMS
207 Knickerbocker Avenue, Bohemia, NY 11716

PA (631) 589-0800
FAX (631) 589-0404

Don Quigley

Date		
proposal		Page 2 of 3
PROJECT NAME: Brookhaven Rail Link, Sills Road, Yaphank		
BID TO: Sills Road Realty		
ADDRESS		
TOWN	STATE	ZIP

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR:

Site Lighting w/ 90 foot poles, concrete bases, high intensity fixtures

Site Utilities
\$85,000.00

Prestressed Membrane Building with Concrete Foundation

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

We hereby propose to furnish labor and materials - complete in accordance with the above specifications, for the sum of:
with payment to be made as follows:

It is guaranteed to be as specified. All work to be completed in a
criminally manner according to standard practices. Any alteration or
variation from above specifications involving extra costs, will be executed
only upon written orders, and will become an extra charge over and above
the estimate. All agreements contingent upon strikes, accidents or delays
beyond our control. ADJO Contracting reserves the right to renegotiate
contract price if strikes, accidents or delays are encountered. Owner to
carry fire, tornado and other necessary insurance. Our workers are fully
covered by Workmen's Compensation Insurance.

(Authorized Signature)

NOTE: This proposal may be withdrawn by us if not accepted within

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work specified. Payment will be made as outlined above.

ACCEPTED

Signature

Signature

Date

ADJO CONTRACTING CORP.
WATER, DRAINAGE, SANITARY SYSTEMS
 207 Knickerbocker Avenue, Bohemia, NY 11716

PH (631) 589-0800
 FAX (631) 589-0804

Don Quigley

Exclusion List

Page 3 of 3

PROJECT NAME:

Brookhaven Rail Link, Sills Road, Yaphank

BID TO:

Sills Road Realty

ADDRESS

TOWN

STATE

ZIP

This proposal, in its entirety, shall be the basis of our agreement and shall be made an integral part of and be incorporated into any purchase order, AIA contract or subcontract agreement and shall take precedence should there be any conflict.

EXCLUSION LIST:

- Engineering, line, grade, or stake out
- Bonds, fees, permits
- Saw cut, demolition & removal of concrete subroad, if any
- Soils engineer & testing
- Removal & dumping of buried debris, rubble, hazardous material, contaminated soil, buried fuel tanks
- Asbestos abatement
- Unsuitable excavation- below plan grade and control fill & backfill of the same
- Furnish and install bankrun, gravel and/or select backfill materials, collar material from on site only
- Rock excavation
- Erosion control-silt fence-hay bales
- dust control
- Frost excavation and backfill
- Mechanical trade excavation & backfill
- Curb excavations
- Removal of excess fill
- Off set, sheeting, shoring, bracing, and/or underpinning or excavation for same
- Utility interference/utility disconnects and/or damage to unmarked underground utilities
- Dewatering & pumping of any kind
- Winter Conditions
- Conflicts for minimum separation between sewer, water, or drainage
- Cast iron pipe
- Hand labor excavations
- Any Penetration of building, all piping terminates 5 feet outside of building
- Vents, traps, pits, cast iron/ductile pipe, dummy ring, add. depth for proper percolation as per county requirements
- Electrical disconnects or other Utility disconnects
- Select pipe type due to conflicts for minimum cover of water, sewer, or drainage
- Site to be plus or minus 6" to rough grade prior to the commencement of work
- Temporary fencing, barricades, lights, etc.
- RPZ freeze protection, insulation, heat tracing, electrical wiring, yearly RPZ Certifications
- Irrigation sprinkler systems and winterizing
- Micro biological testing and lab analysis of water systems
- Tap fees / Meter fees
- Water Meter or RPZ assembly
- Tree protection and restoration
- As Builts on Milar, CAD or Microfilm, stamped by a LS/PE
- Restoration (curb, sidewalk, asphalt, landscape, sawcutting, fence, etc.)
- Master Mechanics, Teamster Stewards and/or Labor Stewards or charges related to same
- Any compaction around drywells other than water jetting, if required
- Removal of concrete paving
- Changes in time, labor, equipment due to a higher water table than indicated on the plans or test borings
- If item is not listed on proposal or excluded, then it is excluded

ACCEPTED

Signature

EXHIBIT I

Brake pulled on rail work

A3

Feds say firms acted without authority in Yaphank; evidence emerges that site was eyed for trash hauling

BY JENNIFER SMITH AND ERIK GERMAN

jennifer.smith@newsday.com
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The Ohio railroad that claimed federal law allowed it to clear 18 acres and build a Yaphank truck-rail facility without government approvals has no federal authority for the project, says the federal body that regulates railroads.

Work should not resume in any form until board authority is obtained or the board determines that authorization is not required, the federal Surface Transportation Board said in a letter yesterday to John Heffner, a Washington, D.C., attorney for U.S. Rail Corp.

As the project falls under federal scrutiny, new details also suggest that backers may have one foot in the garbage business. A company with the same Syoset address and principal as that proposing the Yaphank project was described last spring as a Suffolk solid-waste board as interested in sending trash off Long Island by rail.

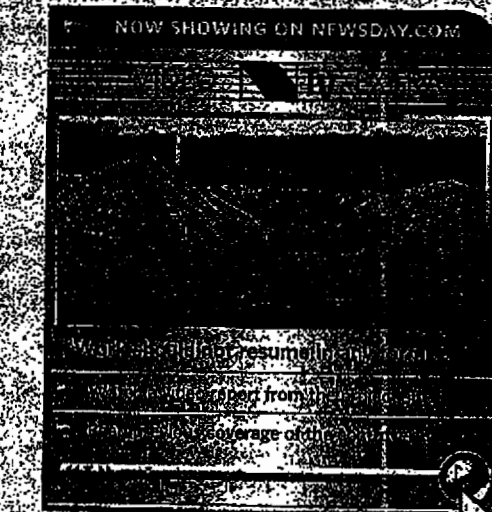
And in a letter last year to the Surface Transportation Board, another attorney for U.S. Rail — which would have operated the Yaphank facility — says “our client generates a large part of its revenue from hauling solid waste materials.”

Yesterday’s letter from the board cited a *Newsday* story this week about land-clearing and sand excavation at Yaphank. It also mentioned an Oct. 2 letter from the Town of Brookhaven asking whether U.S. Rail was entitled to the federal exemption it claimed.

Heffner was directed to tell the board by Oct. 9 of any and all activities in Yaphank and the surrounding area that were being undertaken by the railroad, its agents or any entity that Heffner represents.

Heffner and railroad president Gabriel Hall did not return calls seeking comment yesterday. Gerard Drumm, attorney for the property owner, Silks Road Realty, declined to comment, saying he had not yet read the letter.

The new letter drew praise from Peter Scully, regional director of the state Department of Environmental Conservation. The agency last week cited Silks Road Realty and the



subcontractor clearing the site, Walnut Bros. Inc., for mining without a permit. Said Scully: “So much for the myth that these activities enjoy federal exemption.”

Brookhaven spokesman Tom Burke said the town was “pleased” by the board’s response to his request. Burke called yesterday’s letter “proof positive of the efficacy of the town’s actions.”

Still, Johan McConnell, presi-

dent, said, and they’re here, that’s it. They’re going to do whatever they want.

Last week, Drumm said that his company was “not in the waste business.”

But minutes from a March meeting of Suffolk County’s Regional Solid Waste Management Commission show former Babylon town supervisor and garbage consultant Anthony Noto discussing his work with a company called E Rail Logistics. E Rail was planning a truck-rail facility and was interested in sending municipal solid waste by rail to Ohio and Virginia, he said.

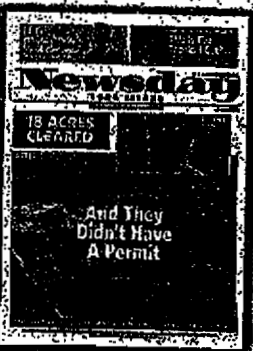
That company, which now appears to be inactive, had the same address and principal — Andrew Kaufman — as Silks Road Realty, according to state records and a 2005 Securities Exchange Commission filing.

Noto said yesterday he was “unofficially” working with Kaufman but has no current involvement with the project. Kaufman did not return a message seeking comment.

All three of U.S. Rail’s Ohio rail lines ship municipal solid waste, as well as paper, chemicals and construction goods, the railroad’s Web site says.

In the 2006 letter to the Surface Transportation Board that alluded to U.S. Rail’s waste-hauling ambitions, the company’s Michigan attorney said: “Our research indicates that solid waste in Northeast [sic] region of the United States is that region’s major commodity component for export.”

But the Michigan attorney, Thomas Dew, said yesterday that U.S. Rail primarily ships minerals and raw materials.



TUESDAY
How *Newsday* covered the story

dent of the South Yaphank Civic Association said she was “amused” that the town “just took the company’s word for it” earlier this summer.

Brian Hurley, president of the Yaphank Taxpayers and Civic Association, said her members are concerned that U.S. Rail’s proposed construction depot could turn into a solid-waste shipping station. “Once they have their foot in the door,” she

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EXHIBIT J

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Reply to
Ann Arbor Office

January 25, 2006

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SIMON EDELSTEIN +

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* ALSO AUTHORIZED TO PRACTICE IN
ONTARIO, CANADA, NEW YORK AND
ILLINOIS

Vernon Williams, Secretary
United States Surface Transportation Board
Washington, D.C. 20433

RE: New England Transrail, LLC D/B/A Wilmington and Woburn Railway, Petition for
Exemption from 49 USC 10901 to Acquire, Construct and Operate as a Rail Carrier on
Tracks and Land in Wilmington and Woburn, Massachusetts

Dear Mr. Williams:

This office is general counsel to US Rail Corporation, a Class III short line railroad with operations in Ohio. Our client generates a large part of its revenue from hauling solid waste materials. The purpose of this letter is to comment in support of the above captioned petition.

Like many short line railroads, a major focus of our client's service is to identify commodities suitable for rail transportation into and out of its local markets; conduct or arrange for the transloading of those commodities onto or off of rail cars; and to assemble and switch cars for long-haul carriers. Suitable transloading sites are a critical component for our services and we are continuously seeking financing entities willing to invest the capital for their development. An integrated national rail system relies on all of its components for its success, whether these components are long-haul rail lines, regional carriers, switching yard or local transloading facilities.

BERRY ♦ MOORMAN

January 25, 2006

Page 2

Our research indicates that solid waste in Northeast region of the United States is that region's major outbound component for export. Because of the high volumes and dense bulk, loads of solid waste are ideally suited for rail transportation. In order to attract this commodity, railroads must be able to locate suitable transloading facilities (meeting the appropriate local health and safety requirements) in order to interface with local customers. Without transloading facilities such as the one proposed in this petition, the entire system will suffer because this rail traffic will not be generated for long-haul carriers or other short lines at the destination end.

In passing the Interstate Commerce Commission Termination Act of 1995, Congress did not distinguish between waste and other commodities when defining transportation activities to include the lifting, storage and handling of materials despite efforts by some members of Congress to do so. The Board should not draw that distinction either.

Rail transportation of solid waste has considerable environmental, social and fiscal benefits over long-haul trucking of this commodity to distant landfills, including: (i) reduced air emissions; (ii) improved highway safety and reduced road congestion; and (iii) decreased damage to roadway caused by over-the-road long haul trucking.

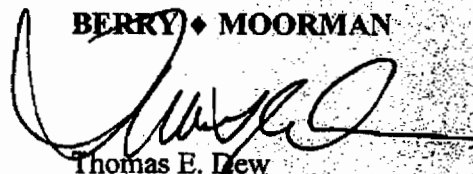
In addition to pointing out some of the benefits generated by the New England Transrail project, we also caution that, should projects such as the this transloading facility be inordinately delayed, or otherwise bogged own in "red tape", it is likely that capital sources will be discouraged from investing in the rail industry. The damage from such a loss of access to capital for operations and expansion of the railroad industry (particularly Class III railroads) is incalculable.

For this and the other foregoing reasons, we urge you to expeditiously approve the above captioned application without delay. Please do not let competing interests or parochial local concerns cloud the issues and abuse your administrative process; but rather allow the Board to continue to develop and improve a nationally integrated rail system.

Thank you for your consideration.

Sincerely,

BERRY ♦ MOORMAN



Thomas E. Dew

TED/cle

cc: US Rail Corporation

EXHIBIT K

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Our File No.
20375-100

October 5, 2007

Via Fax and First Class Mail

Robert F. Quinlan, Esq.
Town Attorney
Town of Brookhaven
One Independence Hill
3rd Floor
Farmingville NY 11738-9807

Re: Sills Road Realty, LLC

Dear Mr. Quinlan:

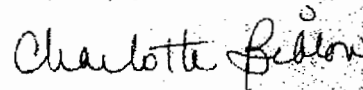
As you know, this firm represents Sills Road Realty, LLC, (hereinafter "Sills Road"), the owner and lessor of property located at Sills Road, Yaphank, New York. As you also know, U.S. Rail Corporation is the lessee of that property (hereinafter the "Brookhaven Rail Terminal"). I am writing this letter to clarify some misconceptions that have arisen about the Brookhaven Rail Terminal. There have been statements made claiming that the Brookhaven Rail Terminal will be a municipal solid waste facility. That is incorrect.

We previously advised the Town that the Brookhaven Rail Terminal is an intermodal transportation center that will incorporate switching and a railroad siding from existing Long Island Railroad tracks located on the property's southern boundary, as well as freight transfer areas. The Brookhaven Rail Terminal will principally handle aggregates and other stone products, lumber and other construction-related materials. No municipal solid waste collection has ever been contemplated at the Brookhaven Rail Terminal. Indeed, our client and U.S. Rail are prepared to enter into an agreement with the Town that would preclude our client, U.S. Rail and any other user of the Brookhaven Rail Terminal from conducting municipal solid waste operations thereon without first obtaining all required governmental approvals.

Mr. Quinlan
October 5, 2007
Page 2

As our client has stated and done in the past, Sills Road will fully cooperate with the Town to address all legitimate concerns regarding the operation of the Brookhaven Rail Terminal. We look forward to completing a facility which our client believes will be a catalyst to economic development and job growth within the town's Empire Zone and a significant solution to the pressing issues of truck safety and congestion on Long Island's roadways.

Very truly yours,



Charlotte Biblow

cc: Mark Cuthbertson, Esq. (via fax and first class mail)
Peter L. Curry, Esq.
Gerald Drumm (via fax)

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