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October 29, 2003

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OCT 29 2003

**SURFACE
TRANSPORTATION BOARD**

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

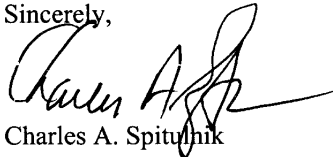
Re: Finance Docket No. 34429; *New York City Economic Development Corporation,
Acting on Behalf of the city of New York, New York for Declaratory Order*

Dear Sir:

I am enclosing an original and ten (10) copies of the Verified Petition of New York City Economic Development Corporation, Acting on Behalf of The City of New York, New York for Declaratory Order in the above-referenced proceeding. An extra copy is enclosed for date stamp and return to our messenger. In addition, we are enclosing a 3.5" diskette with this document along with a check in the amount of \$1400 for the filing fee.

Thank you.

Sincerely,


Charles A. Spitulnik

FILED

OCT 29 2003

**SURFACE
TRANSPORTATION BOARD**

Enclosures

cc: Joseph H. Dettmar, Esquire

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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OCT 29 2003

SURFACE
TRANSPORTATION BOARD
FINANCE DOCKET NO. 34429

VERIFIED PETITION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NEW YORK
FOR DECLARATORY ORDER

EXPEDITED HANDLING REQUESTED

ENTERED
Office of Proceedings

FILED

OCT 29 2003

SURFACE
TRANSPORTATION BOARD



OCT 29 2003
Part of
Public Record

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Attorneys for New York City Economic
Development Corporation

Dated: October 28, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34429

**VERIFIED PETITION OF
THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION,
ACTING ON BEHALF OF THE CITY OF NEW YORK, NEW YORK
FOR DECLARATORY ORDER**

This Petition is filed by the New York City Economic Development Corporation, acting on behalf of The City of New York, New York ("NYCEDC"). NYCEDC hereby requests this Board to institute a declaratory order proceeding pursuant to 5 U.S.C. §554(e) to confirm that: (1) pursuant to 49 U.S.C. §10906, the construction project described in this Petition is construction of spur or switching tracks that does not require the Board's approval; and (2) that under 49 U.S.C. §§10501(b)(2) and 10901, federal law preempts all otherwise applicable state and local laws, and that neither the State of New York nor any agency or political subdivision thereof can require compliance with any state or local regulation that would otherwise require permits or prior approval with respect to the construction, operation, upgrading and maintenance of the track described herein if such permits or approval would impede the ability of NYCEDC to proceed with the construction of the track and other rehabilitation of the SIRR described herein.

I. STATEMENT OF FACTS

The construction project involves the addition of a spur and/or switching track (“New Track”) to the Staten Island Railroad (“SIRR”)¹. In addition to the construction of the New Track, NYCEDC will rehabilitate the SIRR by constructing, improving and/or replacing the following:

- Replacing existing timber trestle bridges
- Replacing existing timber and bituminous grade crossings with full depth rubber crossings
- Constructing a new Wye connection between the SIRR North Shore Line and the SIRR Travis Branch
- Construct potential retaining walls
- Construct, replace and or repair bridges and/or bridge underpinnings
- Replace and repair tracks at Arlington Yard.
- Repair and paint the Arthur Kill Lift Bridge

(“Railroad Rehabilitation Work”) See Exhibit A (map of Staten Island Railroad Project showing location of switching/spur track in relation to the remainder of the SIRR facilities).

¹ This construction project and rehabilitation work described in this Petition are part of a multi-phase and multi-party plan for reactivation of the operations of the SIRR. The Board will be receiving a Notice of Modified Certificate Convenience and Necessity pursuant to 49 C.F.R. §§1150.21-24 advising of the designation of CSX Transportation, Inc. and Norfolk Southern Railway Company (“NSR”) as the modified certificate operators of the lines of the SIRR that had been abandoned and then acquired by the City of New York, NY and the State of New Jersey. The Board has already received a Petition of the Port Authority of New York and New Jersey for Declaratory Order, Finance Docket No. 34428 (filed October 22, 2003) with respect to the proposed construction of a connection between the north shore line of the SIRR and the so-called Chemical Coast Line.

The segment of the SIRR on which the New Track will be built and the Railroad Rehabilitation Work performed is owned by New York City ("the City") and is managed by NYCEDC pursuant to a contract with the City. The New Track is required for the efficient pick up of trains from and delivery of trains to a City Department of Sanitation facility ("DSNY Facility") being constructed at the Fresh Kills landfill site on Staten Island. It will be used to break up and make up trains that are destined for or that originate at the DSNY Facility.

The DSNY Facility is an element of the City's Comprehensive Solid Waste Management Plan as modified by the City Council and approved by the New York State Department of Environmental Conservation ("NYSDEC") in February 2001 for long-term export of DSNY managed waste. The DSNY Facility is being constructed on City-owned property at the Fresh Kills Landfill. Based on the expected volumes of traffic, a movement to switch-out full cars and bring in empty cars would occur approximately every 3½ days. Rail movement of municipal solid waste would be accomplished by constructing the New Track across Lots 1, 225 and 300 within Block 2705 and also across Victory Boulevard. *See Exhibit B at pages 3 and 4 of 11* (provides a detailed plan of the proposed right-of-way ("ROW") required for the New Track)². *See also Exhibit A.*

² Exhibit B is an excerpt from an application filed by the City under the City's Uniform Land Use Review Procedure ("ULURP"), created pursuant to section 197-c of the new City Charter approved on November 4, 1975. When undertaking one of the actions specified in the City Charter that triggers this process, the proponent of the change in land use is required to submit a detailed application, which triggers a series of reviews by affected Community Boards, the President of the Borough in which the land is located, the City Planning Commission, the City Council and, ultimately, the Mayor. While the construction project is described in the ULURP application as an extension of the Travis Branch, the word "extension" is not used to suggest that the proposed project is one that requires STB approval under 49 U.S.C. §10901, but is used in the common, everyday usage sense of additional track. The reasons that this is a "spur" or "switching track" and not an "extension" requiring prior STB approval are described more fully, *infra* at Section II.A.

NYCEDC and the Port Authority of New York & New Jersey ("PANYNJ") are in the process of completing major upgrades to the SIRR to enable freight rail movements between Staten Island and the Howland Hook Terminal, on the one hand, and freight rail lines in New Jersey, on the other. In addition to having completed improvements to the Arthur Kill Lift Bridge, the SIRR's Arlington Yard complex and the existing Travis Branch, the City will also fund the completion of the New Track to permit switching of cars and make-up and break-up of trains to and from the DSNY Facility. All required rail interconnections are currently estimated to be complete by Fall 2005. By that time, the DSNY will have contracted with a private company that will, among other waste management services, provide for rail transport arrangements from the DSNY Facility to a disposal site. This company will make arrangements for long haul rail transport.

The total length of the ROW for the New Track from the DSNY property boundary at the DSNY Facility site to the northern boundary of the Arthur Kill Power property is approximately 6,744 feet. The track layout has been designed to minimize interference with the access roads from Victory Boulevard to the Visy Paper and Arthur Kill Power properties.

Rail service to and from the DSNY Facility will be in unit trains that will be approximately 4,700 feet long. Switching full/empty railcars from/to the transfer station requires that a unit train be broken into sections. The disassembly (placement) of empty railcar sections in an arriving unit train and the assembly of full railcar sections into a unit train would occur in two areas of the ROW that have a double-tracked rail layout. These double-tracked sections are: (1) south of the Visy Paper entrance road and extending across Victory Boulevard and the Consolidated Edison ("ConEd") property to the box culvert rail bridge; and (2) at the northern end of the Arthur Kill Power property. See Exhibit B, p.4 of 11 (figure 1). During railcar

switching operations sections of railcars would be periodically set on one of these double-tracked sidings to facilitate switching operations.

The southern end of the ROW begins on a ConEd-owned, approximately 90-acre, parcel of vacant land, Block 2705, Lot 300, lying between the DSNY Facility site and the southern edge of Victory Boulevard. The ROW would accommodate a main line track, a passing track and a surface road to provide access for maintenance of the track and an embankment. The second track on this section of the ROW is a passing track and is essential to enabling train switching operations, when a full set of 70 full cars will be swapped with a full set of empty cars.

As NYCEDC has been developing plans for the proposed construction, it has advised the NYSDEC of its plans. NYSDEC is now attempting to impose permitting and other requirements on NYCEDC including the implementation of an environmental review pursuant to the New York State Environmental Quality Review Act, *N.Y. Env'tl. Conserv. Law* § 8-101, *et seq.* (McKinney 2003). Specifically, NYSDEC is requiring permits for activities in tidal and freshwater wetlands and possibly for protection of waters, and is requiring an environmental review in connection with such permit applications.³ NYCEDC's applications for permits for fill to tidal wetlands have been pending for eleven months. Unresolved issues over environmental review and mitigation of wetlands impacts have prevented the applications from being deemed complete. These state and local permitting or pre-clearance requirements give the state or local body the ability to impede NYCEDC's construction of the facilities that are necessary to conduct

³ The New York State statutes that the NYSDEC is relying on for its permit requirements are as follows: *N.Y. Env'tl. Conserv. Law* § 15-0101 *et seq.* (for protection of waters permit for disturbance to streams); *N.Y. Env'tl. Conserv. Law* § 17-0101 *et seq.* (for discharges to waters including storm water from construction activity); *N.Y. Env'tl. Conserv. Law* § 24-0101 *et seq.* (for fresh water wetlands permit); and *N.Y. Env'tl. Conserv. Law* § 25-0101 *et seq.* (for tidal wetlands permit)

operations. This could directly affect the carrier(s) that will be operating the SIRR lines pursuant to the Modified Certificate of Public Convenience and Necessity, and encroach on the carrier(s)' ability to operate effectively and to fulfill its or their obligations to the shippers.

II. ARGUMENT

A. The Proposed Construction Project Does Not Require STB Approval.

The New Track constitutes a spur and switching track. Even though the DSNY facility has not previously received direct rail service, the newly reactivated SIRR is not reaching into territory previously served by another carrier, nor is the market served by SIRR being expanded. SIRR has always served Staten Island and now the City is taking advantage of the reactivation of the line it acquired in 1994 to build switching tracks and a lead into the City-owned facility on Staten Island. The City here is just like any other shipper on or near a line of railroad that uses its own funds and resources to build the track that allows it to connect it to an existing railroad and receive direct rail service for the first time. No STB approval is required for the construction.

Under 49 U.S.C. 10901(a), a person may "construct an extension to any of its railroad lines...[or] construct an additional railroad line...only if the Board issues a certificate authorizing such activity...." An extension or addition to a rail line occurs when a construction project enables a carrier to penetrate or invade a new market. *Texas & Pac. Ry. v. Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926); *Nicholson v. Missouri Pacific Railroad Company*, 366 I.C.C. 69, 72 (1982), *aff'd sub nom. Nicholson v. ICC*, 711 F.2d 364 (D.C.Cir.1983), *cert. denied*, 464 U.S. 1056 (1984); *Chicago Great W. Ry. v. Illinois Central R.R.*, 275 F. Supp. 909 (N.D. Iowa 1967).

However, the Board does not have authority "over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks." 49 U.S.C. §10906. It is well established that the determination of whether a particular track segment is a

“railroad line” requiring STB authorization pursuant to section 10901(a), or a “spur, industrial, team, switching or side” track, exempt from STB jurisdiction pursuant to Section 10906 turns on the intended use of the track segment, not on the label or cost of the segment. *Nicholson v. I.C.C.*, 711 F.2d 364, 368 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984). Quoting *Nicholson*, the U.S. Court of Appeals for Third Circuit in 1991 confirmed that:

If, however, the track is “designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for [transporting goods between two different points of shipment],” that track is a spur and lies outside ICC jurisdiction.

Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594 (3rd Cir. 1991), *cert. denied*, *Consol Pennsylvania Coal Co. v. Hughes*, 504 U.S. 955 (1992). To determine whether particular track is “spur, industrial, team, switching, or side track” under 49 U.S.C. 10906, it is necessary to consider all of the track's characteristics. In other words, there is no single test of what constitutes an exempt track, and the Board's analysis focuses on the track's use, history, and physical characteristics. To that end, the Board relies on a variety of indicia, including: the length of the track; whether it serves more than one shipper; whether it is stub ended; whether it was built to invade the territory of another railroad; whether the shipper is located at the end of the track; whether there is regularly scheduled service; the volume of traffic moving over the track; who owns and maintains the track; whether the track was constructed with light weight rail; the condition of the track; what the track is used for (e.g., loading, unloading, switching); and whether there are stations on the track. *CNW--Aban. Exemp.--In McHenry County, IL*, 3 I.C.C.2d 366 (1987) (“*McHenry*”), *rev'd on other grounds sub nom. Illinois Commerce Com'n v. ICC*, 879 F.2d 917 (D.C.Cir.1989); *See also Valley Feed Company v. Greater Shenandoah Valley Development Company*, STB Docket No. 41068 (Served December 11, 1998).

In *Valley Feed Company*, Valley Feed, the owner and operator of a mill, petitioned the Board to reopen an ICC decision dismissing its complaint requesting an order directing a railroad (“Shenandoah”) to restore rail service to its mill. The ICC, using the factors set forth in *McHenry*, determined that the 1,700- foot segment of track (“Valley Feed Track”) was an exempt spur under the predecessor of 49 U.S.C. §10906. Valley Feed challenged the ICC's spur determination by contending, among other things, that multiple shippers used the Valley Feed Track at the same time. The Board denied Valley Feed's petition to reopen. In doing so the Board noted that despite the fact that multiple shippers used the Valley Feed Track it was an exempt spur. *Id.* Furthermore, the decision in *Valley Feed Company* reiterated that an extension or addition to a rail line occurs when a construction project enables a carrier to penetrate or invade a new market. *Id. citing Texas & Pac. Ry., supra.*

An analysis in the instant proceeding of the factors used in *McHenry* and *Valley Feed* compels the same conclusion with respect to the New Track that the Board reached in *Valley Feed*. The length of the track will be approximately 6,744 feet, and it has been designed specifically to maximize the efficiency of the switching of rail cars relating to the pick-up and delivery to and from the DSNY Transfer Station. Furthermore, the New Track is initially earmarked to serve only one shipper at the DSNY facility,⁴ is stub-ended, will not be built to invade the territory of another railroad and thus will not extend any operations into the territory of another railroad. *See United Transportation Union-Illinois Legislative Board v. STB*, 183

⁴ There is a possibility that Visy Paper may build a lead into its plant from the New Track. However, at this time, the extent of that use and the projected volume of traffic, if any, remains uncertain.

F.3d 606, 614 (7th Cir. 1999)(warehouse track found to be excepted spur because it would not extend railroad's operations into territory of another railroad). Additional factors include that the shipper it will serve will be located at the end of the New Track, therefore movement on the New Track will be limited to the shipper that is conducting the switching operations. Also, the service to the DSNY facility is expected to generate 70 outbound cars twice per week. The City of New York, through DSNY, and not the railroad, owns and will be responsible for maintaining⁵ the New Track, which will be constructed with 115-pound rail. There will be no stations on the New Track.

The intended use of the New Track is for switching and for pick-up and delivery to and from the DSNY Transfer Station and, to the extent they become a shipper that uses the track, Visy Paper. According to *Nicholson v. I.C.C.*, *supra*, it is well established that the determination of whether a particular track segment is a "railroad line" turns on the intended use of the track segment. The description of the New Track in the application filed by the City in the ULURP process⁶ documents this intended use. The description of the 6,744 feet of new track to be constructed at the end of the current Travis Branch (in Attachment LR to the ULURP Application, Item 3 at page 6 of 11) attached to this Motion as Exhibit A, is as follows:

Switching full/empty railcars from/to the transfer station requires that a unit train be broken into sections. Switching operations over the Rail Extension would be conducted at restricted speed, in the range of 5 to 10 miles per hour. The rail operator would be responsible for making arrangements with the property owners for the opening and closing of gates at property lines.

The disassembly (placement) of empty railcar sections in an arriving unit train and the assembly of full railcar sections into a unit train would occur in two areas of the ROW that have

⁵ NYCEDC may contract out the maintenance responsibility for the New Track to a third party.

⁶ See fn. 2, *supra*.

a double-tracked rail layout. These double-tracked sections are (1) south of the Visy Paper entrance road and extend across Victory Boulevard and the ConEd property to the box culvert rail bridge; and (2) at the northern end of the Arthur Kill Power property. During railcar switching operations sections of railcars would be periodically set on one of these double-tracked sidings to facilitate switching operations.

This case is materially different from the *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL*, STB Docket No. 41986 (service dated September 12, 1997) in which the Board found that construction of a “stub-ended track that would be used exclusively for switching to and from present and future shippers in an industrial park” fell within its jurisdiction. *Id.* In that case the Board held that while the character of the track may have been switching “the larger purpose and effect of ERRC’s [railroad’s] proposal is to construct what will constitute ERRC’s entire line of railroad to serve a new shipper.” *Id.* at p.3. Specifically, *Effingham* involved “a new carrier” and a proposal to construct a track that would constitute the new carrier’s entire operation. In *Effingham* a new railroad was being created.

That is not the situation in the instant case. Here, the track is ancillary to and supplemental to the track that is being used by the Modified Certificate holder (*see fn. 1, supra*) to provide rail service for the benefit of the DSNY Facility as well as any other shippers on the Travis Branch or elsewhere on Staten Island.

Under the *McHenry and Valley Feed* factors the Board’s prior authorization of the construction of the New Track is not required as the New Track is stub-ended, will not invade the territory of another railroad, will not extend the railroad’s operations into the territory of another railroad, and will be used for switching and making up trains by the shipper. In view of

these factors and particularly the “intended use” of the New Track, the New Track is either a spur or switching track and no STB approval of its construction is required. *See Nicholson, supra*. NYCEDC’s Petition for a Declaratory Order to that effect should be granted.

B. The Board’s jurisdiction over this track preempts the application of state and local regulations.

Even though §10906 removes from the Board the authority to approve the construction of the New Track, this Board’s jurisdiction over the track and its construction prevents any agencies of the state or local governments from imposing regulations or requirements that would have the effect of interfering with the project as it moves forward. Such regulations or requirements cannot be enforced because this would give the agencies of the state or local governments the ability to effectively deny NYCEDC the right to construct the New Track or perform the Railroad Rehabilitation Work. The question is whether a particular environmental review, local or state agencies’ requirements or requirements for disclosure or mitigation of any potential impacts on the environment, any zoning requirements, or any other local ordinance or requirement may actually or potentially impede the construction of the New Track or the Railroad Rehabilitation Work. If the answer to this question is yes, and the track on which the work is performed is within the Board’s jurisdiction, the regulation is preempted.

The Board’s exclusive and plenary jurisdiction over rail lines used in interstate commerce has been mandated by Congress and repeatedly confirmed by the Courts. Under 49 U.S.C. §10501(b)(2) the Board has exclusive jurisdiction over rail transportation to the extent that it involves “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks of facilities, even if the tracks are located, or intended to be located entirely in one state.” *Friends of the Aquifer, et al.*, STB F.D. No. 33966 (service

dated August 15, 2001), *slip op.* at 2. See also *City of Auburn v. STB*, 154 F.3rd 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999).

Section 10501(b) provides further that both “the jurisdiction of the Board over transportation by rail carrier” and “the remedies provided under [49 U.S.C. §§10101-11908] are exclusive and preempt the remedies provided under the federal or state law.” *Friends of the Aquifer, supra*, citing *City of Auburn*, 154 F.3rd 1029-1031; *Borough of Riverdale – Petition for Declaratory Order – The New York, Susquehanna and W. Ry. Corp.*, STB F.D. No. 33466 (served Sept. 10, 1999). Courts and agency precedents interpreting this statutory preemption provision have made it clear that, under this broad preemption regime, state and local regulation cannot be used to veto or unreasonably interfere with railroad operations. Thus, for example, state and local permitting or pre-clearance requirements (including environmental requirements) have been found to be preempted because by their nature they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations. *North San Diego Co. Transit Dev. Board – Petition for Declaratory Order*, STB F. D. No. 34111 (served August 21, 2002), *slip op.* at 7. See also *Green Mountain R. Corp. – Petition for Declaratory Order*, STB F.D. No. 34052 (served May 28, 2002), *slip op.* at 5-6; *Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern RR – Stampede Pass Line*, 2 S.T.B. 330 (1997), *aff’d*, *City of Auburn, supra*.

Zoning ordinances and local land use permitting requirements are preempted as to facilities that are an integral part of the railroad’s operations, which includes all of the lines, even ancillary trackage and facilities that are used to conduct interstate operations. *Friends of the Aquifer*, at 4. Significantly, for the purposes of NYCEDC’s request, the STB has confirmed that this rule applies “even though we lack licensing authority over such projects.” *Friends of the*

Aquifer, at 4; citing STB F.D. No. 33971, *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA* (served May 1, 2001), *slip op.* at 8 and cases cited there. *See also*, *North San Diego County*, *slip op.* at 7. As the Court stated in *CSX Transp., Inc. v. Georgia Pub. Service Comm’n.*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996), “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations” than that contained in section 10501(b).

Various courts have rejected the theory that there is an exception to the broad preemption of § 10501 in instances where the state or local authority is enforcing environmental laws. *See Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000) (*Flynn*); *Norfolk Southern Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997); *Village of Ridgefield Park v. New York, Susquehanna & Western Ry.*, 750 A.2d 57 (N.J. 2000). Notwithstanding the usual presumption to the contrary, *see Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), even local environmental regulation is preempted where Congress intended to preempt all state and local law. As explained in *City of Auburn*, 154 F.3d at 1030-31, Congressional intent to preempt a state or local permitting process for prior approval of rail activities and facilities related to interstate transportation by rail is explicit in the plain language of section 10501(b) and the statutory framework surrounding it. In other words, valid regulation by state and local governments under federal statutes is permitted to the extent that it does not unduly burden or unreasonably interfere with interstate commerce. *See Tyrrell v. Norfolk Southern Ry.*, 248 F.3d 517, 523 (6th Cir. 2001). Simply invoking federal environmental statutes does not overcome § 10501(b). *Friends of the Aquifer, supra*.

NYCEDC recognizes that state and local governments may impose reasonable, nondiscriminatory "police power" regulations upon railroads such as laws that prohibit dumping

of excavated dirt into a local waterway, discharge of harmful materials, or disposal of waste, and can enforce local codes for electrical, building, fire, and plumbing. The role of state and local agencies in implementing federal environmental statutes is not preempted unless the regulation is applied in such a manner as to unduly restrict the railroad from conducting its operations, *Friends*, pp. 5-6; *Town of Ayer*, pp. 9-10 (holding that town's purported enforcement of Federal Clean Water Act and Safe Drinking Water Act is preempted because it was being used as a pretext for preventing construction of a railroad automotive unloading facility). Valid safety regulation under the Federal Railroad Safety Act is also not preempted, *Friends of the Aquifer*, *supra*.

In this instance, the requirements that the NYSDEC is seeking to impose, based on state law, go beyond the permissible "police power" regulation and amount to impermissible permitting and environmental review requirements. They are preempted because, by their nature, they interfere with interstate commerce by giving NYSDEC the ability to deny NYCEDC the right to construct the New Track and perform the Railroad Rehabilitation Work. Like the environmental and other land use restrictions that the state and local governments were attempting to impose in *City of Auburn*, *North San Diego County*, *Town of Ayer*, and the host of other decisions that underscore the scope of the preemption of federal and other laws, these requirements are preempted by the STB's exclusive and plenary jurisdiction over tracks and facilities used in interstate commerce.

III. EXPEDITED HANDLING OF NYCEDC'S REQUEST IS REQUIRED.

NYCEDC has asked this Board to expedite its handling of this Petition. The construction season in New York is short. To allow the tracks and related facilities to be completed by the time the DSNY waste transfer facility is fully operational, NYCEDC must begin offering the

construction contracts for bid by November 2003 to allow contracts to be let in time for the construction to commence no later than March 2004. Nearly a year has elapsed since NYCEDC filed applications for wetlands permits from the NYSDEC. This delay and requirement of a full environmental review in connection with such permits is effectively preventing this project from proceeding in a timely way and threatens both the proposed rail spur and the City's ability to carry out its Solid Waste Management Plan using rail transport.

IV. CONCLUSION

This is a case that is ripe for declaratory orders to clarify the rights and obligations of NYCEDC with respect to the construction of the New Track and the Railroad Rehabilitation Work. NYCEDC submits that with respect to both issues it has raised, prior agency decisions have confirmed that the order it is requesting is consistent with the law. The New Track is clearly switching track: the functions NYCEDC stated will take place on this track, according to its ULURP application confirm that this description is accurate. Moreover, recent decisions from this Board have confirmed that even though no Board approval is required for the construction, the Board's exclusive and plenary jurisdiction over the line preempts the application of any state or local laws, ordinances or regulations that would diminish the ability of the Modified Certificate operator to carry out its freight operations.

WHEREFORE, and in view of all the foregoing, NYCEDC hereby respectfully requests this Board to issue a declaratory order stating:

- (1) That pursuant to 49 U.S.C. §10906, the Board's prior authorization of the construction of the New Track is not required; and
- (2) That under 49 U.S.C. §§10501(b)(2) and 10901, federal law preempts otherwise applicable state and local laws with respect to the construction of the New Track or the

performance of the Railroad Rehabilitation Work, and that neither the State of New York, the State of New Jersey, nor any agency or political subdivision, can require compliance with any state or local regulation that would otherwise require permits or prior approval with respect to the construction of the New Track or the performance of the Railroad Rehabilitation Work that would give the State of New York, the State of New Jersey, or any agency or political subdivision the ability to impede that construction.

Respectfully submitted,



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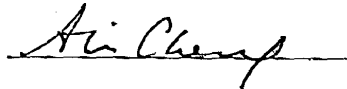
Dated: October 29, 2003

Verification

City of New York) ss.

State of New York)

Alice Cheng makes the following oath and says that she is a Vice President of New York City Economic Development Corporation, acting on behalf of the City of New York, New York ("NYCEDC"), the petitioner herein; that she has been authorized by the applicant to verify and file with the Surface Transportation Board the foregoing Petition For Declaratory Order in Finance Docket No. 34429; that she has carefully examined all of the statements in the application as well as the exhibits attached thereto and made a part thereof; that she has knowledge of the facts and matters relied upon in the application; and that all representations set forth therein are true and correct to the best of her knowledge, information, and belief.

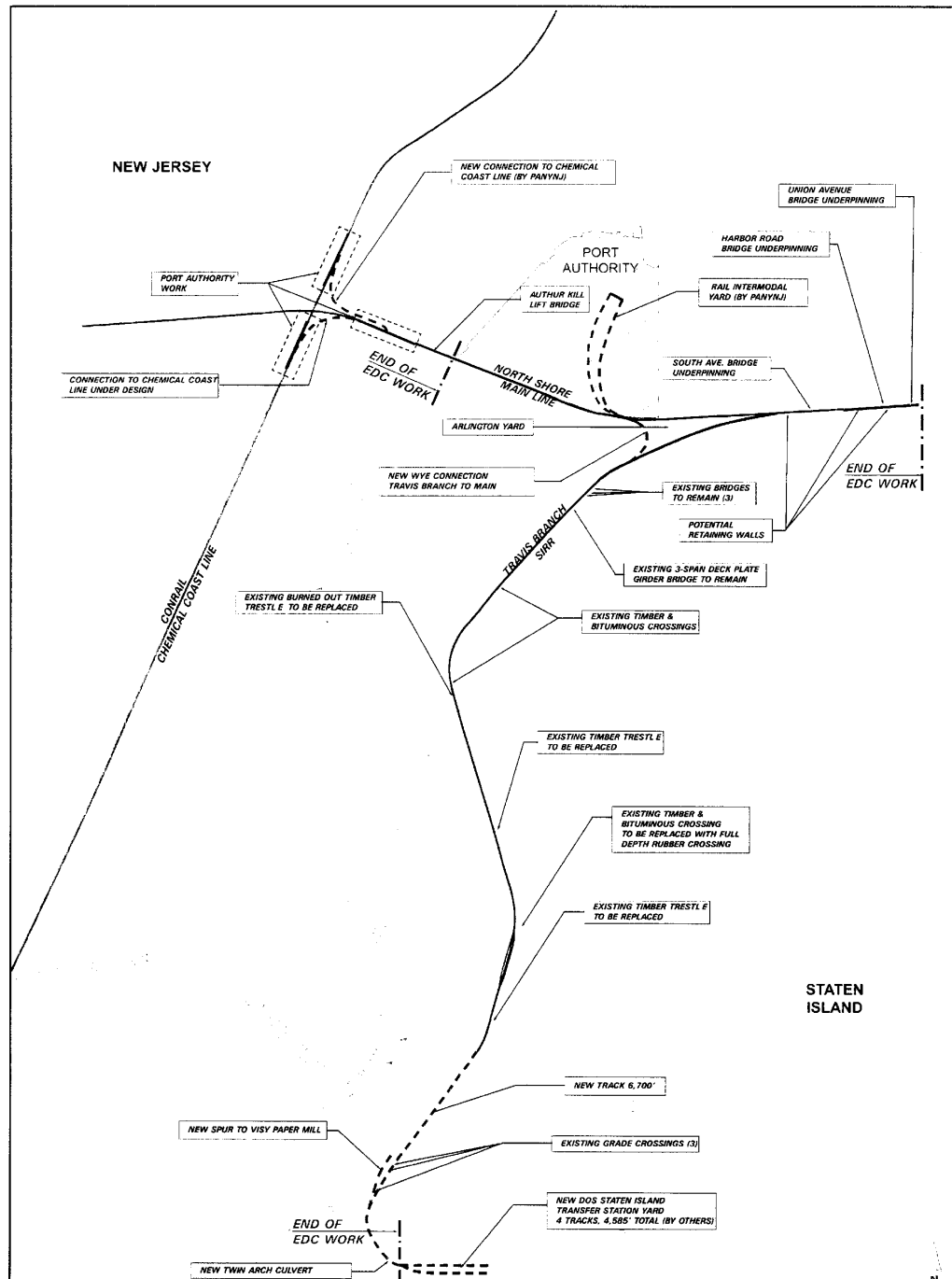


Subscribed and sworn to before me Brendan Healey in and for the State and City above named, this 28th day of October 2003

My commission expires

BRENDAN C. HEALEY
Notary Public, State of New York
No. 01HE5079803
Qualified in Richmond County 6/06/2007
Commission Expires

A



Staten Island Railroad Reactivation Project

New York City Economic Development Corporation



HNTB Corporation

B

Attachment LR, Item 3
DESCRIPTION OF PROPOSED ACTION

1.0 Overall Project Description

This application, being filed by The City of New York's (City) Department of Sanitation (Department or DOS) and Department of Business Services (DBS), seeks certain approvals, as specified herein, in connection with the extension of the Staten Island Railroad (SIRR). The SIRR, owned by the City and under the jurisdiction of DBS, is managed by New York City Economic Development Corporation (NYCEDC) pursuant to contract with the City.

The extension of the SIRR is required to connect the SIRR to a DOS facility being constructed in the Fresh Kills area of Staten Island, as further described below. In order to accomplish this connection, the City must extend the existing SIRR over three parcels of land and across Victory Boulevard, as detailed in Sections 2.0 through 2.4 herein. At this time, the City is in negotiation with the three parties from whom the City seeks certain real property interests (*e.g.* easements) to enable construction of such extension. The three parties are Arthur Kill Power LLC (Arthur Kill Power), Visy Paper (NY), Inc. (Visy Paper), and Consolidated Edison Co. of New York, Inc. (ConEd). The following describes more fully the proposed project which necessitates this application and the details pertinent to the real property interests sought to be acquired by the City.

DOS is developing the Staten Island Transfer Station (Transfer Station) on Lot 100 within Block 2685. The Transfer Station is an element of the City's Solid Waste Management Plan Modification, adopted by the City Council in Local Law 72 of 2000 and approved by the New York State Department of Environmental Conservation (NYSDEC) in February 2001 for long-term export of Department-managed waste. The long-term export program was developed to comply with the statutory mandate (Chapter 170 of the Laws of the State of New York of 1996) to close the Fresh Kills Landfill by January 1, 2002. The Transfer Station, inclusive of the area to be used for Travis Branch Rail Extension (Rail Extension), along with other elements of the City Plan for long-term export, was subject to City Environmental Quality Review/State

Environmental Quality Review (CEQR/SEQRA) review (CEQR No. 99 DOS 002Y) in a Final Environmental Impact Statement (FEIS) completed on October 16, 2000. Copies of the FEIS may be obtained from:

Harry Szarpanski, P.E., Assistant Commissioner
Bureau of Long Term Export
NYC Department of Sanitation
44 Beaver Street, 12th Floor
New York, New York 10004
Telephone: (212) 837-8001

The Transfer Station is being constructed on City-owned property, a portion of Block 2685, Lot 100, at the Fresh Kills Landfill in the area formerly occupied by DOS administrative offices along the West Service Road before the underpass crossing under the West Shore Expressway. A Uniform Land Use Review Procedure (ULURP) action for Site Selection of a Public Facility was completed for the Transfer Station site on February 28, 2001.

The Transfer Station will receive deliveries of Department-managed waste generated on Staten Island only. The Transfer Station includes: a 70,000 square foot processing building to receive weigh, unload, compact and containerize the waste in metal, sealed, leak-proof containers; and four rail sidings with sufficient track to hold 70, 64-foot rail cars on which containers would be loaded, three to a car. Based on the expected volumes of Department-managed waste on Staten Island, a movement to switch-out full cars and bring in empty cars would occur approximately every 3 ½ days. The Transfer Station also includes administrative offices and maintenance facilities. Rail export is dependent upon completion of two rail interconnections between (1) the SIRR and Chemical Coast Line freight rail line in New Jersey, and (2) the Travis Branch of the SIRR and the Transfer Station site, the Rail Extension. In the interim, containerized waste will be exported in transfer trailers.

The Department opened bids for construction of the Transfer Station on August 7, 2001 and expects to award a construction contract in the summer of 2002. Construction is expected to be completed in 18 months. The facility construction program includes the creation of a three-acre wetland along the northwestern edge of the site bordering Little Fresh Kills. The new wetland is being constructed to mitigate the impacts of a box culvert rail bridge across a tidal creek at the

northern border of the Transfer Station site. The impacts of the bridge on a small area of existing wetlands in this area are being mitigated at a 3 to 1 ratio by the creation of the new wetland in accordance with a wetlands permit application that is under review by the NYSDEC. The United States Army Corp of Engineers (USACOE) has approved the application under Section 10 (Rivers and Harbors Act) and Section 404 (Clean Water Act) for the bridge crossing.

Rail export of solid waste would be accomplished by constructing the Rail Extension across Lots 1, 225 and 300 within Block 2705 and also across Victory Boulevard. This application includes Attachment 2, Site Plan, Travis Branch Extension, Right-of-Way Easement Acquisitions, that provides a detailed plan of the proposed right-of-way (ROW) required for the Rail Extension. The existing right-of-way for the SIRR Travis Branch terminates approximately 540 feet south of the northeastern corner of the Arthur Kill Power property (Block 2705 Lot 1) (see Sta 165+83 on Attachment 2).

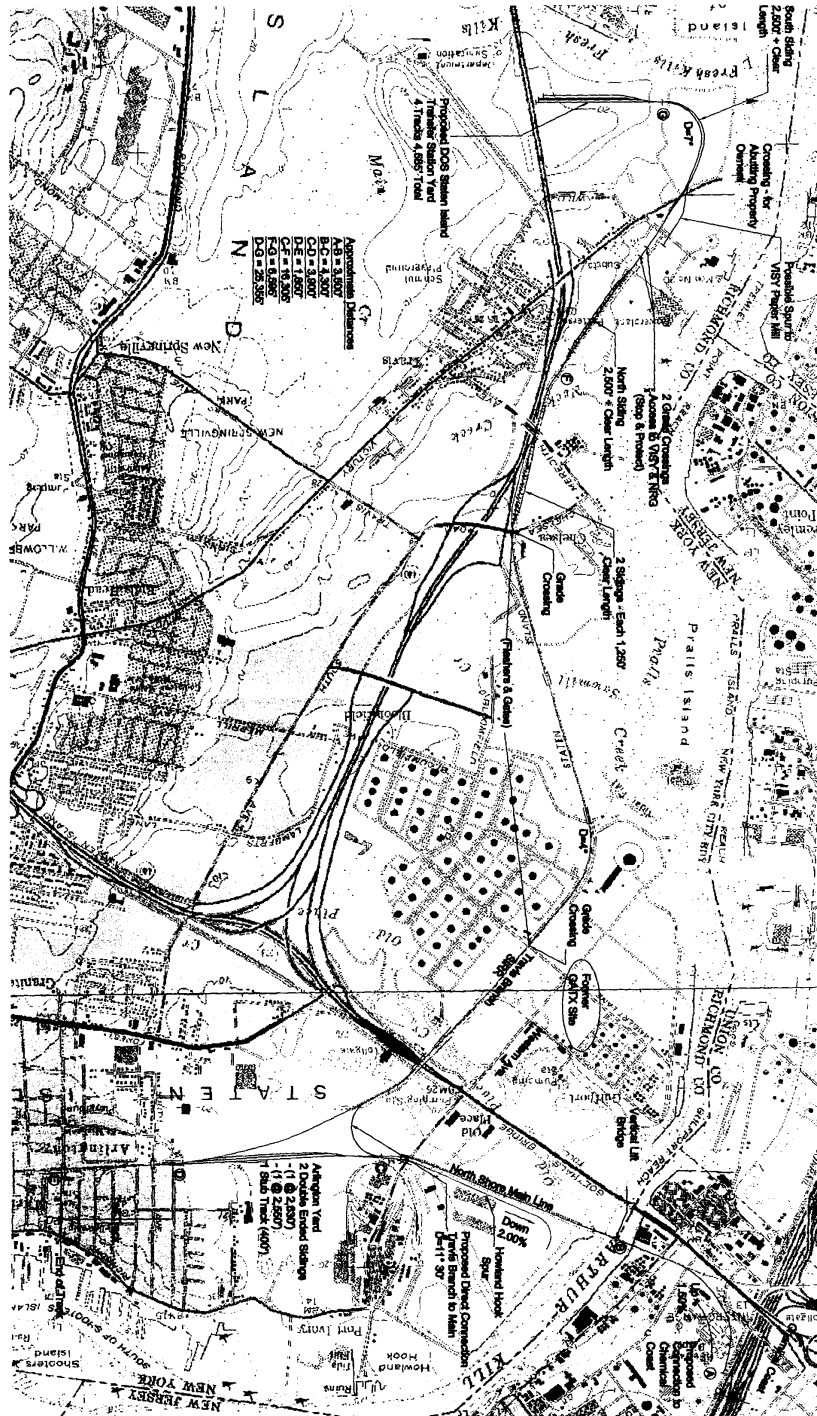
NYCEDC is in the process of completing major upgrades to the SIRR to enable freight rail movements between Staten Island and the Howland Hook Terminal and freight rail lines in New Jersey. In addition to having completed improvements to the Arthur Kill Lift Bridge, the SIRR's Arlington Yard complex and the existing Travis Branch, NYCEDC will also fund the completion of the Rail Extension to the Transfer Station site. The Port Authority of New York and New Jersey is funding design and construction of both northbound and southbound interconnections between the SIRR, as it crosses a trestle bridge between the Arthur Kill Lift Bridge and the New Jersey Turnpike, and the Chemical Coast Line, which serves an industrial corridor to the north and south of the planned interconnections. Figure 1 is a map of the existing (green) and proposed (red) segments of the SIRR that will provide rail service between the Transfer Station and freight rail lines in New Jersey.

All required rail interconnections are currently estimated to be complete by early 2005. By that time, the Department will have contracted with a private company that will, among other waste management services, provide for rail transport arrangements from the Facility to a disposal site. This company will make arrangements through either of the Class 1 freight lines, CSX

LEGEND

- = EXISTING TRACK TO REMAIN
- = PROPOSED TRACK

FIGURE 1



HNTB CORPORATION
1792 MASSACHUSETTS AVENUE
LAURENS, MI 48450

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION
STATEN ISLAND RAILROAD PROPOSED TRACK CONFIGURATION
DATE JULY 10, 2001

Transportation, Inc. (CSX) or the Norfolk Southern Corporation (NS), for long haul rail transport. Based on plans for operation of the SIRR that are being implemented by NYCEDC and the Port Authority, the Class 1 freight line will have access to the SIRR from the Chemical Coast Line and will make arrangements with the shortline railroad that will then be under contract to either NYCEDC or the Port Authority to provide switching services on the SIRR.

Because of the different completion schedules for the Transfer Station and the Rail Extension, the ULURP application related to the Rail Extension is filed separately from the ULURP action for the Transfer Station site selection.

2.0 Description of Area B Rail Extension Project

The actions proposed in this ULURP application, referred to as the Area B Rail Extension Application, include: (1) (a) obtaining ROW easements together with any other rights or interests that may be necessary to enable construction of the Rail Extension across the above referenced properties (A Site Selection of a Public Facility action under ULURP), and (b) in connection with obtaining the ROW for the Rail Extension, the possibility of acquiring the entire ConEd property, *i.e.* Block 2705, Lot 300, an approximately 90-acre parcel of vacant land more particularly described in Section 2.1 below (as opposed to acquiring only an easement interest over a small portion of said property); and (2) demapping of the westernmost portion of Victory Boulevard in the area where the Rail Extension would cross the existing street (A Change in the City Map action under ULURP).

The following provides a description of the Rail Extension project, starting from the southern end of the Rail Extension at the Department property boundary for the Transfer Station site to the point of interconnection with the existing Travis Branch near the northern boundary of the property owned by Arthur Kill Power. The demapping of Victory Boulevard is depicted in Attachment 13, Proposed City Map Change. Attachment 2, Site Plan, provides details of the proposed ROW. Station markers, identified in the form (Sta xxx + xx), on the plan are used to establish distances at various points along the centerline of the tracks on the proposed Rail Extension and are referenced frequently in this description.

The total length of the ROW for the Rail Extension from the DOS property boundary at the Transfer Station site to the northern boundary of the Arthur Kill Power property is approximately 6,744 feet. Most of the proposed ROW for the Rail Extension is zoned M3-1 except for the northeastern most portion of Arthur Kill Power property, which is zoned M2-1. The track layout has been designed to minimize interference with the access roads from Victory Boulevard to the Visy Paper and Arthur Kill Power properties.

A unit train, which is the most efficient and reliable mode for managing rail service to and from the Transfer Station, would be approximately 4,700 feet long. Switching full/empty railcars from/to the transfer station requires that a unit train be broken into sections. Switching operations over the Rail Extension would be conducted at restricted speed, in the range of 5 to 10 miles per hour. The rail operator would be responsible for making arrangements with the property owners for the opening and closing of gates at property lines.

The disassembly (placement) of empty railcar sections in an arriving unit train and the assembly of full railcar sections into a unit train would occur in two areas of the ROW that have a double-tracked rail layout. These double-tracked sections are: (1) south of the Visy Paper entrance road and extend across Victory Boulevard and the ConEd property to the box culvert rail bridge; and (2) at the northern end of the Arthur Kill Power property. During railcar switching operations sections of railcars would be periodically set on one of these double-tracked sidings to facilitate switching operations. Switching operations could extend over a period of up to six (6) hours.

The following describes details of the proposed easements for Rail Extension across each of the properties along the proposed ROW. DOS, in cooperation with NYCEDC, is completing the negotiation of easement agreements for the ROW easements with the three affected property owners, ConEd, Visy Paper and Arthur Kill Power. However, depending upon the outcome of such negotiations, the City wants to leave open the possibility of acquiring the entire ConEd property rather than just an easement over a smaller portion of the ConEd property for the ROW.

2.1 ConEd Property to Victory Boulevard

The southern end of the ROW begins on a ConEd-owned, approximately 90-acre, parcel of vacant land, Block 2705, Lot 300, lying between the Transfer Station site and the southern edge of Victory Boulevard. A survey of the ConEd property is included in Attachment 1, Right-Of-Way Easement Acquisition, Sheets 3 and 4. Attachment 2 is a drawing showing the proposed Right-of-Way across Block 2705, Lot 300. The property line between the DOS property (Block 2685, Lot 100) and the ConEd property is the centerline of a tidal creek that separates the properties. A ROW, approximately 110 feet wide, would extend on a seven-degree curve over a length of approximately 2,399 feet (from Sta 0+70 DOS Trk.1 to Sta 209+28 on Attachment 2). The property is zoned M3-1. The ROW would accommodate a main line track, a passing track and a surface road to provide access for maintenance of the track and an embankment. The tracks would be laid on an embankment that has an average height of five feet. The embankment at the top is approximately 39 feet wide to accommodate two tracks laid 15 feet on center and the bottom is approximately 60 feet wide with side slopes of two feet horizontal to one foot vertical. The second track on this section of the ROW is a passing track and is essential to enabling train switching operations, when a full set of 70 full cars will be swapped with a full set of empty cars. The width of the maintenance road at the bottom of the embankment is approximately 12 feet. The total area of the proposed ROW on the ConEd property is approximately 6.06 acres.

Within the southeast quadrant of the intersection of the proposed rail line and Victory Boulevard, an additional grading and drainage easement will be required on the ConEd property, Block 2705, Lot 300. This easement is necessary to accommodate construction of a drainage ditch to collect and channel surface water as indicated on Attachment 2. This proposed easement is 30 feet wide measured perpendicular to the side line of Victory Boulevard, 223 feet long measured along the side line of Victory Boulevard from its intersection with the proposed railroad ROW easement boundary, and 290.6 feet long measured along the line 30 feet away from and parallel to the Victory Boulevard side line. The total area thus enclosed is 7,704 square feet.

The ROW across the ConEd property does not impact any mapped wetlands or the limits of "adjacent areas". NYSDEC wetland maps designate this area as uplands. The vegetation is sparse to non-existent and consists of an intermittent stand of common reed and some low quality vegetation, such as mugwort.

If the City cannot obtain an easement over the ConEd property on acceptable terms, then as an alternative to acquiring an easement over that portion of the ConEd property for the ROW, the City may seek to acquire the entire ConEd property. There are no current plans for use of the remainder of the ConEd property not occupied by the ROW.

It is also important to note that the boundary of the ConEd property abuts the boundary of the Visy-owned property at the northwest end of Victory Boulevard. ConEd's ownership includes the land and the land under water between the western end of Victory Boulevard, which is 80 feet wide at this point, and the US Pier and Bulkhead Line. The City has a sewer easement that is approximately 30 feet wide, extending from the southwest corner of Victory Boulevard across this property. Except for the sewer easement there is no public access to Arthur Kill (*i.e.* the water body) from the western end of Victory Boulevard.

2.2 Victory Boulevard Crossing

The ROW for the track and the embankment continues from the northern boundary of ConEd property as it abuts Victory Boulevard (Sta 209+28) across the publicly-owned Victory Boulevard right-of-way to the southern boundary of the abutting Visy Paper property (Block 2705, Lot 225) (Sta 207+21). This section of the ROW continues the embankment approximately five feet above the grade of the existing road to keep the grade of the track relatively level. On the embankment across Victory Boulevard, at Sta 210+36, a turnout provides access to a spur that continues onto the Visy Paper property and provides a siding on which Visy Paper could receive and ship material by rail. The top of the embankment carries three tracks across Victory Boulevard.

As it crosses Victory Boulevard, the embankment on either side of the track bed would be designed to slope gradually, at a four-degree grade, back to the existing grade of Victory Boulevard. This

grade will enable traffic to and from Visy Paper and ConEd to cross over the tracks. Drainage easements and culverts, as depicted in the section detail on Attachment 2, would carry the stormwater flow on Victory Boulevard around the embankment. The westernmost portion of Victory Boulevard, where the street would be ramped up at a 4 degree grade to cross the railroad embankment, would be marked with signage indicating the railroad crossing and the end of the public street. Typical crossbuck signs, pavement markings, and an advance warning sign would indicate a rail crossing ahead. Trains approaching the crossing would be operating at a speed not exceeding 10 MPH and would provide audible warning prior to occupying the crossing. There would be no active signal system indicating that a train is approaching the crossing. However, floodlighting from overhead street lighting poles would be installed to illuminate the crossing at night.

Victory Boulevard, from a point beginning approximately 240 feet west of its intersection with the West Service Road to its western terminus, was never officially mapped as a City street but is effectively a public street and is owned by the City. A Change in City Map affecting Victory Boulevard is also proposed in this application. Train switching operations to and from the Transfer Station, occurring approximately twice per week, would temporarily block the section of Victory Boulevard crossed by the ROW. Traffic to the westernmost portion of Victory Boulevard, beyond the rail crossing, is solely for the purpose of access to the property of the two abutting private owners, ConEd and Visy Paper. To minimize the potential for safety problems arising from public use of the existing street over the rail crossing, DOS is proposing a Change in City Map to demap approximately 895 feet of the westernmost portion of Victory Boulevard beginning approximately where the existing grade of the street would be ramped-up to cross over the rail embankment and continue to the end of the existing street. Under ULURP procedures, because Victory Boulevard was never officially mapped as a public street, it must first be mapped, as a basis for the Change in City Map action (demapping) proposed in this application. Attachment 13 provides details on the mapping and demapping proposed in this application. Although it would be demapped, Victory Boulevard would continue to be maintained by the City as a private road. As such, the City would remain responsible for maintenance of the road, servicing utilities under the road and providing street lighting and plowing services. The City would grant an easement to the owners of the abutting properties, guaranteeing access on the private road in perpetuity.

2.3 Visy Paper to Arthur Kill Power, LLC

The proposed ROW extends approximately 765 feet across the Visy Paper property on Block 2705, Lot 225. Locked gates would be installed at the fence lines at either end of the Visy Paper property across the ROW and would be opened by the train crew during switching operations. Visy Paper is a manufacturing facility that processes recycled paper to produce and market a finished product. The City's Curbside Recycling Program delivers recycled paper to Visy Paper by both barge and truck, with the latter being material collected on Staten Island. The approximate 38.8-acre property accommodates a large manufacturing building with receiving and shipping areas and outside parking and storage areas. At its southernmost end, the ROW is 80 feet wide to accommodate the two tracks coming off the Victory Boulevard embankment. Within 474 feet of the southern Visy Paper property line at Victory Boulevard (Sta 202+47), the ROW narrows to a width of 45 feet to carry a single track to the northern boundary of Visy Paper and Arthur Kill Power. The elevation of land also rises in this area (Sta 203+00) to the level of the track elevation so that the embankment is minimal as the ROW continues across Visy Paper onto the Arthur Kill Power property. The ROW crosses the main entrance road to Visy Paper from Victory Boulevard at a point that is 54 feet to the south of the property line between Visy Paper and Arthur Kill Power (Sta 199+56). Both sides of this crossing would be marked with crossbuck signs, pavement markings, and an advance warning sign to indicate a rail crossing ahead.

The single track layout across the Visy Paper entrance road is intended to minimize blockage of the road during car switching operations. No cars would be set on this section of track during switching operations. The longest section moving to and from the Transfer Station site would be less than 2,500 feet. Traveling at 5 miles per hour, a section of this length would take approximately 5 ½ minutes to cross by the Visy Paper gate.

2.4 Arthur Kill Power, LLC to Existing Terminus of the Travis Branch

The proposed ROW extends approximately 3,312 feet across the Arthur Kill Power property on Block 2705, Lot 1. Locked gates would be installed at the fence lines at either end of the Arthur Kill Power property across the ROW and would be opened by the train crew during switching

operations. Arthur Kill Power owns and operates an electric generating facility that was formerly owned and operated by ConEd. The property is comprised of approximately 112.5 acres. It is rectangular in shape except for an L section at the southeastern end, which provides access to the site from an entrance on Victory Boulevard. The electric generating facilities, located in the southwestern area of the site, occupy a relatively small portion of the total site, most of which is vegetated area and wetlands. The northern boundary of the property is in the vicinity of Chelsea Creek.

The ROW generally follows the original alignment of a rail line that was used to bring coal fuel to the electric generating plant in past years. The ROW crosses the main entrance road to the Arthur Kill Power (Sta 199+15) at a point that is approximately 41 feet north of the Visy Paper property line. The 45-foot ROW from the Visy Paper property line continues for a distance of approximately 242 feet. The single track in this area is designed with same intent as the ROW across the Visy Paper entrance road, minimizing blockage of the entrance road.

Between Sta 197+14 and Sta 192+90, the ROW narrows from 45 feet to 41.4 feet through a reverse curve. The narrowing is required to avoid the adjacent ConEd property to the east (Block 2705, Lot 90). A second track begins in this area extending approximately 3,038 feet north to provide a track siding necessary to accommodate switching operations.

Between Sta 192+90 and Sta 192+00 the ROW narrows from 41.4 feet to 35.9 feet to avoid a segment of an existing building to the west side. After passing by the building at Sta 192+00, the ROW widens to 41.4 feet where it is still adjacent to the ConEd property to the east. The 41.4 feet ROW is maintained for 734 feet – Sta 192+00 to Sta 184+66.

At Sta 184+66, the ROW widens to 45 feet after passing the end of the ConEd property to the east. Beyond this point the abutting property to the east is part of the right-of-way for the West Shore Expressway. At a point approximately 540 feet from the northeastern corner of the Arthur Kill Power property (Sta. 165+83), the ROW meets the Arthur Kill Power property line to connect to the existing Travis Branch right-of-way.