

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35036

SUFFOLK & SOUTHERN RAIL ROAD LLC
-- LEASE AND OPERATION EXEMPTION --
SILLS ROAD REALTY, LLC

REPLY TO PETITION FOR STAY

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November 5, 2007

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Set forth below is the reply of the Town of Brookhaven ("Brookhaven") to the Petition for Stay of Decision of October 12, 2007 filed by counsel for Sills Road Realty, LLC ("Sills") and U.S. Rail Corporation ("US Rail") (US Rail and Sills are hereinafter collectively referred to as "Petitioners"). The issue before the Board is the status of US Rail's proposed operations at Sills Road in the Town of Brookhaven New York (the "Property") over 11,000 feet of track (the "Track") on a 28-acre site. Based on the facts currently known to Brookhaven, there appears to be a substantial likelihood that the Board's exemption procedures are being used inappropriately in this proceeding. Brookhaven urges that the Board's decision of October 12, 2007 be upheld and that its Order, which requires US Rail, Sills, Suffolk & Southern Rail, LLC ("Suffolk") or, any other related entity conducting rail construction at the subject site to immediately cease that activity and either obtain authorization from the Board pursuant to 49 U.S.C.

10901(a) or a Board decision, finding that such activity does not require Board approval remain in place should be upheld.

ARGUMENT

I. THE PETITION FOR STAY IS INAPPROPRIATE AND SHOULD BE REJECTED BY THE BOARD

Brookhaven respectfully requests the Board to reject the Petition for Stay on the grounds that the Board's October 12, 2007 was made effective on the date that it was served and therefore cannot be stayed. Instead, Petitioners should seek reopening of the October 12, 2007 decision, but must meet a heavy burden. The provision allowing for a stay in STB proceedings is set forth at 49 CFR § 1115.5(a) and provides as follows:

A party may petition for a stay of an action pending a request for judicial review, for extension of the compliance date, or for modification of the date the terms of the decision take effect. The reasons for the desired relief must be stated in the petition, and the petition must be filed not less than 10 days prior to the date the terms of the action take effect. No reply need be filed. If a party elects to file a reply, the reply must reach the Board no later than 5 days after the petition is filed.

In this case Petitioners have not sought judicial review of the Board's action therefore that portion of 49 CFR § 1115.5 is not applicable. Insofar as the Board made its October 12, 2007 effective on the date that it was served, Petitioners cannot request an extension of the compliance date or a modification of the date the decision takes effect.

Indeed, based on the variety of facts presented by Petitioners in this proceeding and the clearly inaccurate representations that have been made to the Board, Brookhaven respectfully requests that the Board leave the stay in place so that Petitioners cannot continue their piecemeal approach, and instead require Petitioners to seek authorization for the construction in controversy, including compliance with the environmental

requirements of 49 C.F.R. Part 1105, prior to any further construction occurring, and permitting Petitioners to file a motion to dismiss, based on all of the facts, if Petitioners believe that it is warranted. In the alternative, Brookhaven argue below that Petitioners have not justified the lifting of the cease and desist order in the Board's October 12, 2007 decision.

II. A STAY SHOULD NOT ISSUE

As interested party seeking a Board-ordered stay must establish that: (1) there is a strong likelihood that it will prevail on the merits; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

As set forth below, Petitioners have not met the criteria for the grant of a stay.

A. SUCCESS ON THE MERITS.

Petitioners argue that the Track is excepted track as defined at 49 U.S.C. §10906, not a railroad line or rail line as that term is used in 49 U.S.C. §§10901 and 10902. In fact, however, there are three types of railroad track throughout the United States: (1) a line of railroad that is subject to the full panoply of Board jurisdiction and regulation; (2)

a spur, industrial, team switching, or side track¹ that is subject to Board jurisdiction but as to which advance Board authority to operate is not required under 49 U.S.C. § 10906; and (3) track that is not part of the regulated rail system in the United States, but is a private track or a plan facility not subject to the jurisdiction of the Board. Brookhaven respectfully submits that the Track, as it is proposed to be operated is either a line of railroad that is subject to Board jurisdiction and regulation or a private track, which is not subject to the Board's jurisdiction. If Petitioners intend to operate the Track as a private track, there is no need for Board authorization, whether through the Notice of Exemption procedure or otherwise. However, Brookhaven's land use rules and laws would apply, including applicable state environmental review statutes.

While private track and spur track have similar physical characteristics, the two can be distinguished by the circumstances of their construction and use. "The usual conception of a spur, as far as physical characteristics are concerns, is a stub end, or side track, connecting only at one end with a main line or branch of a railroad and constructed by or for the use of the carrier owning or operating the railroad. This, of course, excludes any line constructed by an independent company, unless, possibly, the independent company were incorporated merely for the purposes of the existing carrier." *Operation of Lines by C. R. & E. Ry. Co.*, 94 I.C.C. 389, 394 (1925). In contrast, "[p]lant service is private service. Its distinguishing characteristic is that it is performed in the interest of particular shippers, and that the facilities employed are not available or accessible to shippers generally." *A. T. & S. F. Ry. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 99 (1915); see also *General Electric Co. v. New York Central & H. R. R. Co.*, 14 I.C.C. 237 (1912) (interior switching tracks constructed to meet the needs of a business are plant

¹ We will refer to "a spur, industrial, team switching, or side track" as "Spur Track."

facilities). The Board has recognized the existence of private track in more recent decisions.²

The question before the Board is how the Track should now be classified in light of US Rail's lease of the Track and proposed operations over the Track. Brookhaven contends that the Track could be classified as either private track or as line of railroad, depending on the specific facts of US Rail's operations, but that (as explained below) it cannot possibly be characterized as Spur Track with respect to US Rail's operations because it is not adjacent or auxiliary to US Rail's rail line. Moreover, Petitioners have relied on the wrong criteria and precedent in their analysis of Nicholson. The proper standard is whether this rail operation results in the invasion of new territory. See Nicholson v. ICC, 711 F.2d 364, 368-70 (1983), cert. denied, 464 U.S. 1056 (1984); *Friends of the Aquifer, City of Hauser, ID, Hauser Lake Water District, Cheryl L. Rodgers, Clay Larkin, Kootenai Environmental Alliance, Railroad and Clearcuts Campaign*, STB Finance Docket No. 33966 STB served August 15, 2001) at 6.

In Duluth, the ICC found that it had certification authority under section 10901 because constructing interchange and connecting tracks allowed the carriers to compete in territories they had not previously served. 307 I.C.C. at 315. See also Jude at 6, n.6. In RCC, the Supreme Court's determination similarly was consistent with the new territory standard: "[t]he extensions of the lines and main tracks of these railways . . . are not great in distance, but they involve a new intramural destination for each railway with important

² *Devens Recycling Center, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34592 (STB served January 9, 2007); *Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company*, STB Finance Docket No. 34509 (STB served May 3, 2005); *Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc.*, STB Finance Docket No. 34486 (STB served September 28, 2004); *GW Switch Services, L.P. – Operation Exemption – Lines of Southern Pacific Transportation Company*, STB Finance Docket No. 32481 (STB served August 7, 2001).

changes in the handling of interstate traffic and passengers." 264 U.S. at 346. *Id.* at 7. It is clear that US Rail, which operates hundreds of miles away from Brookhaven would be invading the territory of another railroad, especially based on Petitoers arguments that there is no equivalent facility on Long Island.

US Rail asserts that it is an existing Class III rail carrier. Its operations are along 60.36 miles of rail running from Firechuck, Ohio to Hampden, Ohio over a line of the former Great Miami & Scioto Railway Company³ in the City of Jackson, Ohio ("Jackson Line")⁴. US Rail claims that it is providing common carrier service over the Track, but the nature of US Rail's use of the Track is far from clear at present.

If the track in question were adjacent to a rail line near Jackson, Ohio, some additional analysis might be required to determine whether the track would be properly characterized as Spur Track or a private track. But no such analysis is required for this track in Yaphank, New York. Spur Track is adjacent to a line of the railroad operating over the Spur Track. *See Effingham RR Co. – Pet. For Declaratory Order*, 2 S.T.B. 606 (1997), *reconsideration denied*, *Effingham Railroad Company – Petition for Declaratory Order Construction at Effingham, IL, et al.* STB Docket No. 41986 (STB served Sept. 18, 1998), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999) ("*Effingham*"). US Rail's Erie Line is about 600 miles away. As to US Rail, the Track is not Spur Track. The Track does not permit US Rail to provide services that are auxiliary

³ The Great Miami & Scioto Railway Company change in Operator Exemption – Certain lines of the City of Jackson, Ohio (ICC served January 20, 1994).

⁴ US Rail provides information about receiving ICC authority for its predecessor to operate, but has not indicated the authority that it received to change the name of the railroad.

to the common carrier service US Rail provides over the Jackson Line. As was the case in *Effingham*, US Rail is providing a new service in a new territory.⁵

In *Effingham*, the Board concluded that because the railroad was going to "operate in territory it has not previously served" and "that this proposal will constitute its entire operation" the "proposed operation is [a line of railroad] subject to our authority." *Id* at 610. The only distinction between the facts in *Effingham* and those here is that US Rail is an existing common carrier. But US Rail is not authorized to operate as a common carrier beyond the Jackson Line and US Rail's operations on the Track are not related to US Rail's operations on the Jackson Line. It is also clear that US Rail is invading a new territory; US Rail has never operated in or even near Brookhaven.

Before an industry may open its private track and facilities to the public as a common carrier of interstate commerce, as US Rail says it is seeking to do, it is obliged to establish that public convenience and necessity requires its operations as such. *U.S. Phosphoric Products Corp. v. A. C. L. R. R.*, 206 I.C.C. 411, 418 (1935). In order to make a showing of public convenience and necessity, the railroad is required to file an application for authority or an exemption request to construct and operate a new track.

Brookhaven has demonstrated that the operation of this track by a non-contiguous railroad located over 600 miles away does not convert it to Spur Track. Depending on the nature of the operation, the Track is either private track or becomes a line of railroad requiring US Rail to obtain authority from the Board.

⁵ US Rail argues that the question whether the Track is now properly characterized as Spur Track can be determined based on its factual representations and would have the Board decide this matter as a purely legal question without further proceedings. While Brookhaven believes that the Board can determine that the Track is *not* excepted track without further factual development (because it is uncontested that the Track is not adjacent or auxiliary to US Rail's main line), the Board could not determine that the Track *is* excepted track without factual development of US Rail's current and intended future use of the Track. And even if the Board were to conclude that the Track is a Spur Track as to US Rail, such that there would be some form of Interstate Commerce Commission Termination Act ("ICCTA") preemption, the scope of that preemption would still have to be determined in light of the specific facts presented.

The Board's jurisdiction is being invoked in this proceeding and in a number of other recent proceedings in novel ways as entities seek to use ICCTA preemption, 49 U.S.C. § 10501(b), to displace state and local authority. These proceedings present difficult issues for the Board. The Board is charged with protecting the legitimate operations of an interstate rail network, and must not allow its processes to be abused by entities that are created for sham purposes.

The Board has already warned about the dangers of such activities in this proceeding when it admonished that:

At the same time, however, Suffolk and Sills should be aware that if either entity anticipates providing for-hire service over trackage to be constructed, approval under 49 U.S.C. 10901 and an appropriate environmental review would be required. While Suffolk has stated that Sills has not undertaken any construction of "rail facilities" at the Sills Road location, Suffolk has not stated that Sills has not constructed other facilities at that location that might be converted in the future to rail facilities. The Board would view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.

Petitioners complain that the Board's October 12, 2007 letter that orders them to cease and desist is based solely on the letter sent by the Brookhaven Town Attorney to the Board on October 2, 2007 and the enclosures thereto, which included newspaper accounts of the construction activities at the Property and two prior letters sent by John Heffner, counsel to US Rail. Those letters (which are identical) dated July 12, 2007 and July 25, 2007 describe US Rail's involvement at the Property and its intention to rely on 49 U.S.C. § 10906 because the Track would be classified as a spur track.

It is clear that the Board relied on more than just these documents to issue its cease and desist order. Previous to the submission of the October 12, 2007 letter, there were a number of submissions by Suffolk indicating that they were seeking an exemption

for their proposed activities at the Property without any mention of the activities of US Rail. Those submissions culminated in Suffolk requesting permission to withdraw its notice of exemption. The Board balked at Suffolk's withdrawal of the notice of exemption based on Suffolk's failure to provide information previously requested about its activities and requested that Suffolk provide a substantive reason for its attempted withdrawal. Suffolk's response on August 13, 2007 made absolutely no mention of the activities of US Rail even though Suffolk's attorney (who is also the attorney for US Rail) had contacted Brookhaven in mid-July, 2007 and indicated its intention to rely the exemption set forth in 49 U.S.C. § 10906 for spur track with respect to its activities at the Property. Moreover, in its August 13, 2007 response, Suffolk made the false representation that neither it nor its affiliate Sills had undertaken any construction activity at the Property. Based, in part, on the false representations made by Suffolk, the Board allowed Suffolk to withdraw its notice of exemption in a decision dated September 25, 2007. The statement in Mr. Heffner's letter of August 23, 2007 that Suffolk and Sills never undertook any construction at the site is not only contradicted by newspaper accounts that demonstrate that construction began in late August, but also by Mr. Heffner's own letter to this Board of October 9, 2007, attached to the present Petition. Attached to Mr. Heffner's October 9, 2007 letter as Exhibit D is a timeline submitted by Mr. Heffner which indicates: "August 20, 2007 – Site clearing commences." Clearly Mr. Heffner should have known of this clients' clearing activities before he wrote to the STB three days after they commenced, perhaps craftily, representing to the STB that his now former client "Suffolk has never undertaken any development construction or other activity at this site." Knowing full well that his client, Sills Road, had already started clearing. As both Sills and Suffolk had already been identified by the Board as

“affiliates” in its prior decisions, the actions of one are attributable to the other in spite of Mr. Heffner’s efforts in his August 23, 2007 letter to distinguish them.

The Board concluded that decision with a statement that now can be viewed as a harbinger: “The Board would view with disfavor any future request for authority to commence rail operations over the trackage at this location unless the construction of that trackage has been first authorized by the Board.”

The October 12, 2007 letter from the Town Attorney of Brookhaven made two facts very clear that would justify the Board’s cease and desist order: (a) newspaper accounts that the Town Attorney enclosed in his letter clearly demonstrated that construction had commenced in late-August, 2007 in direct contradiction to Suffolk’s representations that no construction activity had taken place at the Property on August 23, 2007; and (b) Suffolk failed to disclose the role of US Rail at the Property even though US Rail’s role had been revealed to Brookhaven in mid-July, 2007.

B. IRREPARABLE HARM

Petitioners have not come forward with sufficient evidence to show that they will suffer irreparable harm if the Board’s decision is allowed to stand. The harm that Petitioners allege is strictly monetary in nature. For example, Petitioners claim by way of verified statements that there are “customers who have made commitments to use this facility for moving aggregate from points in upstate New York to Brookhaven Rail Terminal for construction projects on eastern Long Island . . . [and] why track is inadequate or even unavailable for these movements and that there are no other suitable transload facilities located on Long Island” However, Petitioners have carefully

avoided stating that they have entered contractual commitments and have not provided those contracts to the Board. A second verified statement describes the efforts made to “develop Brookhaven Rail Terminal and the opportunity costs and construction costs associated with each day of delay.” These alleged monetary damages, if proven, do not constitute irreparable harm.⁶ Neither the Board nor the courts have found economic injuries of this nature to be irreparable, because they are compensable through reparations. *See Delaware and Hudson Railway Co. – Lease and Trackage Rights Exemption – Springfield Terminal Railway Company*, Finance Docket No. 30965 (Sub-No. 1) (ICC served July 15, 1988). “Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weights heavily against a claim of irreparable harm.” *Sampson v. Murray*, 415 U.S. 61 (1974) at 88-92 (quoting *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

C. ISSUANCE OF A STAY WILL HARM OTHER PARTIES

Substantial harm has already occurred to the environment and to the residents of Brookhaven when Petitioners’ clear-cut 18 acres of land and sand-mined hundreds of thousands of cubic yards of sand without any permission or oversight. In the Board’s decision dated August 13, 2007 it pointed out that if for-hire services were intended for the trackage underlying Suffolk’s notice of exemption, then, the construction that has either already occurred or will occur in the future is construction of a “line of railroad

⁶ Petitioners’ argument that these losses are difficult to prove and quantify is unpersuasive. As the Board has noted “[t]he calculation of damages related to lost profits and devalued assets is standard fare in most business tort litigation. Courts are well-equipped to resolve these issues.” *New Hampshire Central Railroads, Inc. – Lease and Operation Exemption – Line of the New Hampshire Department of Transportation* STB Finance Docket No. 35022 (served May 31, 2007).

subject to Board's jurisdiction, and Board authorization for the construction is required under 49 U.S.C. 10401 . . . and also requires that the Board conduct an environmental review under Natural Environmental Policy Act ("NEPA"). See 49 CFR 1105.6(a), (b)(1). NEPA is the cornerstone of our Nation's environmental laws and was enacted to ensure that information on the environmental impacts of any Federal, or federally funded, action is available to public officials and citizens before decisions are made and before actions are taken. Had the Petitioners followed the appropriate procedures, it is likely that a review under NEPA would have been required and there would have been public input on the environmental impacts and potential mitigation measures with respect to the development of the Property. If the Board's cease and desist order is stayed, there is the real potential that the unauthorized damage to the environment that has already occurred will be exacerbated.

In its petition for stay, Petitioners correctly states that Brookhaven is the only entity that has contacted the Board about US Rail's activity at the property. While that may be the case there are numerous other parties, including the New York State Department of Environmental Conservation ("DEC") that have contacted Brookhaven and the Petitioners about the potential harm that its activities may cause at the Property. As set forth in a newspaper account in *Newsday* on October 1, 2007, the DEC has issued summonses to the construction contractor at the Property for mining without a permit. In that article, the regional director for the DEC, Peter Scully, states that "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 yards of cubic material could move forward without any environmental review." In that article, US Rail's president acknowledges that had received citations from DEC and that it was "in discussions" with the DEC about the

citations that could lead to administrative hearings. Brookhaven has annexed to the verified statement of Robert F. Quinlan two letters that DEC has sent to counsel for Sills and Suffolk about the sandmining activities that have taken place at the Property. Based on the above it is clear that the DEC, the agency in charge of the regulation of the environment in New York State, has serious concerns with respect to the activities at the Property.

In addition, in the same *Newsday* article, the president of the local civic association expressed her concerns about the potential environmental impacts of the activities at the Property.

Petitioners disingenuously argue that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by the Town Attorney one day after he had learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

D. THE ISSUANCE OF A STAY IS NOT IN THE PUBLIC INTEREST

The issuance of a stay would allow Petitioners to continue construction without the benefit of any environmental review.

The Board has expressed concern about the misuse of the exemption process and acted to prevent such abuse on numerous occasions. In this case, the Board specifically warned Petitioners about its concerns that the exemption process was being abused when it stated:

At the same time, however, Suffolk and Sills should be aware that if either entity anticipates providing for-hire service over trackage to be constructed, approval under 49 U.S.C. 10901 and an appropriate environmental review would be required. While Suffolk has stated that Sills has not undertaken any construction of "rail facilities" at the Sills Road location, Suffolk has not stated that Sills has not constructed other facilities at that location that might be converted in the future to rail facilities. The Board would view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.

There is clear public interest in the Board ensuring that its exemption process is not abused. Moreover, there is a clear public interest in the Board ensuring that a party that claims an exemption or exception is applicable to it, provide adequate proof of same. In this case there were several options available to the Petitioners that would have permitted them to raise their purported exemption prior to the commencement of construction. The Petitioners could have file a notice of exemption based on 49 U.S.C. § 10906 and sought a motion to dismiss based on their claim of operating a spur track. Alternatively, Petitioners could have sought a declaratory order based on their claim of exemption under 49 U.S.C. § 10906. Either option would have allowed them to receive the Board's blessing prior to the commencement of construction. Given the shifting nature of the representations that have been made to the Board in this proceeding it is clearly in the public interest that the Board undertake a declaratory hearing on the

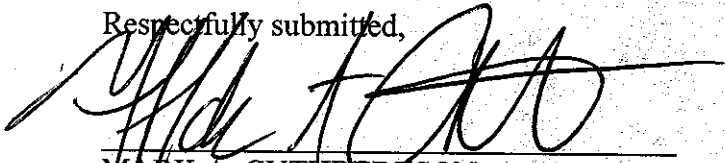
underlying arguments raised by Petitioners concerning their purportedly exempt spur track. At this point it is unclear what parties are undertaking construction and what parties will operate the rail line. Given this fact it is imperative that there be full discovery as to the identity of the parties and their intended actions with respect to the property.

In many respects the Board's actions in this case is akin to situations where the Board has revoked an exemption due to the fact that the exemption process was not appropriate to the transaction in question. For example, in *Jefferson Terminal Railroad – Acquisition & Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket No. 33950 (STB served Mar. 19, 2001), the Board revoked the notice of exemption because it believed that the applicant was using the process to obtain property for non-rail purposes using federal preemption as a shield. In addition, in *Union Pacific Railroad – Operation Exemption – in Yolo County, CA*, STB Finance Docket No. 34252 (STB served Dec. 5, 2002) (“UP-Yolo”), the Board rejected the notice of exemption and found that the line, which had been excepted industrial track, would not be operating as a common carrier subject to the agency's jurisdiction. See also *Northeast Interchange Railway, LLC – Lease & Operating Exemption – Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734 (STB served No. 18, 2005), in which the STB stayed the effectiveness of the exemption and ultimately rejected the notice of exemption filed by Northeast Interchange Railway, LLC. Since it appears that there has been an abuse of the exemption process and that Petitioners' claim for exemption under 49 U.S.C. § 10906 is without merit, it is clearly in the public interest there not be a stay of the Board's decision that requires Petitioners to cease and desist its construction activities.

CONCLUSION

In opposing a stay, Brookhaven submits that none of the criteria for a stay are met in this case. Those criteria are (1) irreparable harm absent a stay, (2) likelihood of success on the merits, (3) substantial harm to other interested parties absent a stay, and (4) the public interest will be harmed absent a stay. Based on the foregoing, Brookhaven asks the Board to deny a stay of its decision dated October 12, 2007.

Respectfully submitted,



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November 5, 2007

**VERIFIED STATEMENT OF
ROBERT F. QUINLAN**

My name is Robert F. Quinlan. I am the Town Attorney of the Town of Brookhaven ("Brookhaven"). I am the chief legal officer of Brookhaven, a large town of approximately 480,000 people and 532 square miles in size. Brookhaven is located in central Long Island, in the state of New York.

As the Town Attorney I am responsible for significant facets of local land use regulation and code enforcement. In Brookhaven we have comprehensive regulations that govern, among other things, the zoning and site plans for facilities such as those proposed for property involved in this proceeding. Those regulations are intended to ensure that these facilities are sited in appropriate places. In addition, in siting and regulating such facilities we are required to follow the New York State Environmental Quality Review Act ("SEQRA") (the state counterpart to NEPA) to review the environmental impacts of projects and to ensure, if such projects are built that adequate environmental mitigation measures are implemented.

I submit this statement in support of Brookhaven's reply to the petition for stay submitted by Sills Road Realty, LLC ("Sills"), US Rail Corporation ("US Rail") (Sills and US Rail are hereinafter collectively referred to as "Petitioners"). The proceeding before the Board involves property located on Sills Road in the hamlet of Yaphank in Brookhaven ("Property"). I have set forth below the history of this matter before the Board, which clearly evidences how the Petitioners are abusing the exemption system to avoid appropriate state and local regulation.

On May 18, 2007, Suffolk filed another verified notice of exemption for the Property. The exemption was sought 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 be constructed at the Property. The lease involved the use of approximately 11,000 feet of track on a 28-acre parcel. In the summary of the transaction, it indicated that the exemption involved a lease in common carrier operation by a new Class III short line railroad (Suffolk) over railroad trackage and facilities to be constructed. It contained an extensive description of the proposed facility, including that it will make provisions for rolling stock and construction of an on-site overpass bridge, cross dock, intermodal container storage and receiving, handling and storage bunkers with sufficient capacity to accommodate 500,000 tons of construction aggregates per annum. On June 1, 2007, the Board 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 Board's jurisdiction. It noted that under 49 USC §10901, Board authority is required to construct a line of railroad and that Sills has not sought Board authority for this construction. The Board further indicated that if the Board were to accept Suffolk's verified Notice as complete, Board action might be seen as tacit approval of Suffolk's lease and operation over a line of railroad that has been constructed without Board authority and that because the Notice of Exemption did not provide sufficient information to make a definitive determination that exemption was appropriate here, additional information was necessary for Suffolk's Notice of Exemption to be considered complete. Suffolk was directed to file supplemental information by June

21, 2007 describing its construction activities on the trackage to date and any construction anticipated in the future.

On June 15, 2007 Mr. Heffner wrote the Board a letter indicating that due to a change in circumstance, Suffolk had decided to withdraw its Notice of Exemption.

On July 12, 2007, Mr. Heffner, faxed me a letter in my capacity as Town Attorney to advise me 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. His letter stated that US Rail has leased real property and intended to construct and operate a "exempt spur" within the meaning of 49 USC §10906 a line of rail and related side tracks, yard tracks, turn outs, switches and connecting tracks (collectively, the "Rail Yard") thereon for the purpose of operating a common carrier railroad and transload facility at that location. The letter further indicated the Rail Yard will provide rail transportation services to customers shipping and receiving and/or transloading aggregate stone or other stone products as well as lumber, plywood, sheetrock, and related construction materials and other merchandise freight and that as a common carrier railroad, US Rail's construction of the Rail Yard are governed by federal law and subject to the exclusive jurisdiction of the STB.

It is important to note that at this point I was not aware of any activities at the Property or any proceedings before the Board. At no point in his letter did Mr. Heffner indicate that there were any pending proceedings in front of the Board. Also, conveniently missing from Mr. Heffner's letter was any mention of the involvement of Sills or Suffolk. I was left to investigate the location of the property because all Mr. Heffner provided were tax map descriptions of the property.

On July 25, 2007, Mr. Heffner addressed and mailed a letter to me that was identical to his July 12, 2007 letter, which was received by my office on July 27, 2007 while I was away.

On August 13, 2007, the Board unaware of the new involvement by US Rail, issued a decision in response to Suffolk's attempt to withdraw its second Notice of Exemption. It noted that in its June 1, 2007 decision Suffolk's notice of exemption was found incomplete and it was directed to file supplemental information describing in detail the construction of trackage, which, it noted, would appear to be line of railroad subject to the Board's jurisdiction based on Suffolk's stated intention to provide for-hire service over it. The Board stated that Suffolk had not provided it with the supplemental information required by its June 1, 2007 decision nor had it provided a substantive reason for its withdrawal. In failing to explain the situation, the Board stated that Suffolk left unrefuted in its verified statement that for-hire service is intended for the trackage being constructed by its affiliate Sills. The Board's conclusion that Suffolk and Sills were affiliated was based on telephone conversations between Board staff legal counsel for Suffolk.

The Board's decision denied Suffolk's request to terminate the proceeding. Given the concerns raised, the Board directed Suffolk to file the information required by its June 1 decision, directed Suffolk to provide substantive reasons for the withdrawal and explain whether it or Sills will provide for-hire service at the trackage. The Board commented where, as here, a party concludes that environmental thresholds will not be exceeded, the notice of exemption should explain why the transaction would not exceed the thresholds or otherwise warrant the preparation of environmental documentation.

The Board's decision explained that if for-hire service was intended for the trackage being constructed by Sills then the "construction that has either already occurred or will occur in the future is construction of a line of railroad subject to the Board's jurisdiction, and the Board authorization for the construction is required under 49 U.S.C. 10901. The proposed construction of a line of railroad also requires that the Board conduct an environmental review under the National Environmental Policy Act. See 49 CFR 1105.6(a)(b)(1)."

In its decision the Board was justifiably suspicious of Petitioner's activities and warned:

The Board 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 at 49 CFR 1105.7(e)(4) or (5) will not be met. See 49 CFR 1105.6(b)(4), (c)(2)(i). 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 Board's 3 train per day threshold for environmental documentation under 49 CFR 1105.7(e)(5)(ii)(A). Nor did Suffolk explain why the anticipated increase in truck traffic would not meet or exceed the Board's thresholds under 49 CFR 1105.7(e)(5)(ii)(C).

In response to the Board's August 13, 2007 decision, Suffolk filed a response that can only be characterized as evasive.

It is important to note that, when Suffolk received the Board's August 13, 2007 decision, which inquired about its construction activity, it had planned to or was in the

process of commencing construction. Newspaper accounts¹ make it clear that construction commenced at the Property in late August.

Mr. Heffner wrote to the Board on August 23, 2007 and stated that the simple answer to STB's inquiry is that Suffolk and Sills never concluded any agreement or other relationship with respect to the lease, construction, or operation of the rail facility and incredibly also stated that **"Suffolk has never undertaken any development construction or other activity at this site."** He further stated Sills never undertook any construction of rail facilities at the Sills location for the simple reason that Suffolk and Sills never consummated their agreement.

The statement in Mr. Heffner's letter of August 23, 2007 that Suffolk and Sills never undertook any construction at the site is not only contradicted by newspaper accounts that demonstrate that construction began in late August, but also by Mr. Heffner's own letter to this Board of October 9, 2007, attached to the present Petition.

Attached to Mr. Heffner's October 9, 2007 letter as Exhibit D is a timeline submitted by Mr. Heffner which indicates: "August 20, 2007 – Site clearing commences." Clearly Mr. Heffner should have known of this clients' clearing activities before he wrote to the STB three days after they commenced, perhaps craftily, representing to the STB that his now former client "Suffolk has never undertaken any development construction or other activity at this site." Knowing full well that his client, Sills Road, had already started clearing. As both Sills and Suffolk had already been

¹ In a newspaper account on October 1, 2007 in *Newsday*, a Long Island daily newspaper, it was revealed in late August, 2007 work was begun at the Property, which involved clear-cutting 18 acres of the site and the mining of hundreds of thousands of cubic yards of materials. The article indicated that US Rail had signed a 30-year lease with Sills. In this article, Gerard Drumm, the chief financial officer of Sills indicated that they intended to build a rail facility at the site. The article also made it clear that Petitioners were attempting to make an end-run around the Board procedures that would have required Board authorization and environmental review.

identified by the Board as "affiliates" in its prior decisions, the actions of one are attributable to the other in spite of Heffner's efforts in his August 23, 2007 letter to distinguish them.

Additionally, upon information and belief, the source of such information and grounds for such belief being conversations with the Town of Brookhaven's Commissioner of the Department of Waste Management, John Kowalchuk, and review of a letter attached hereto as Exhibit A, one of the proposers who responding to the Town's Final Request For Proposals for the disposal of the Solid Waste Stream generated by the Town of Brookhaven, indicated that Sills Road had represented to others in the waste management industry that they "had commenced development efforts" at the Sills Road site prior to August 23, 2007. Attached hereto as Exhibit A is a letter from the President of Sills Road Realty, LLC to Tully Environmental, Inc., a proposer for the removal of waste materials stating the above. This also shows the real purpose to which the facility is intended to be used, as I have been advised by Mr. Kowalchuk that Tully submitted the letter in support of their proposal for waste removal to show that the Sills Road site could be used as a potential site for loading waste on to railcars in the future.

Thereafter, the Board, in a decision dated September 25, 2007, allowed Suffolk to withdraw its Notice for Exemption. This decision was based, in large part, on the misrepresentations set forth in Heffner's letter of August 23, 2007. Specifically, the Board relied on the misrepresentations about activity at the site when it stated that "because Suffolk states that neither it nor Sills has 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, Suffolk has provided information to support its attempted withdrawal of its Notice of Exemption."

Petitioners' response was so rife with misrepresentations that the Board made note of this in its decision when it stated:

Suffolk also asserts that Sills never anticipated providing for-hire rail service. However, this statement appears to contradict Suffolk's earlier statement that it "has reached an agreement with Sills for the lease and operation of railroad trackage [at issue here]," through which "Suffolk intends to hold itself out as a common carrier to provide service to all potential customers . . ."² Suffolk's filing also appears inconsistent with the statement made by Suffolk's counsel in a telephone conversation with Board staff that Suffolk and Sills are affiliated parties (in that one owns a significant portion of the other).

Given these suspicious activities and the patent misrepresentations that had been made, the Board concluded with the following admonition:

At the same time, however, Suffolk and Sills should be aware that if either entity anticipates providing for-hire service over trackage to be constructed, approval under 49 U.S.C. 10901 and [sic] an appropriate environmental review would be required. While Suffolk has stated that Sills has not undertaken any construction of "rail facilities" at the Sills Road location, Suffolk has not stated that Sills has not constructed other facilities at that location that might be converted in the future to rail facilities. The Board would view with disfavor any future request for authority to commence rail operations over trackage at this location unless the construction of that trackage has first been authorized by the Board.

Newspaper accounts that reported on activities at the Property made it clear that Sills was constructing facilities at the location that would later be converted to rail facilities, which was in direct contradiction to the representations Heffner made to the Board.

It was only after review of the above referred to applications, decisions and other documents, as well as learning of the reported activity at the site, that the full scope and

² See Suffolk's Verified Notice of Exemption at 3-4.

nature of the Petitioner's activity became clear. Given that Petitioners' did not appear to have any approval from the Board, I wrote to Nancy Beiter of the STB on October 2, 2007. In that letter, I requested information as to what, if any, authorization US Rail had received from the Board and to advise the Board that if such information was not forthcoming that Brookhaven intended to file a petition for a declaratory order.

On October 4, 2007 Melvin F. Clemens, in the STB Office of Compliance and Consumer Assistance, wrote to Mr. Heffner and recounted that information that we had provided to the Board with respect to the construction at the Property. Mr. Clemens noted that Mr. Heffner did not deny that construction was taking place at the site (although he had done so shortly a month before that) and did not assert US Rail had received authority from the Board to undertake these activities. He noted that US Rail had sent letters to me in July, 2007 claiming that it was exempt from state and local law.

Since US Rail had received no authority from the STB to construct a rail facility, US Rail and Sills Road were directed by Mr. Clemens to cease activities at the site and to provide the Board with a detailed account of activities taken in the area and to explain why it did not believe Board approval was required. By this time, it was my understanding, that US Rail and Sills Road had already agreed with the New York State Department of Environmental Conservation to cease all activities until a mutual agreement could be reached.

At this point it was clear to me that Petitioners had pulled what could be characterized as a "classic developer's trick": build now and beg forgiveness later. Here, however, forgiveness should not be forthcoming. Eighteen acres of land have been clear-cut and hundreds of thousands of cubic yards of materials have been mined without any

environmental study as to its impacts as required by both NEPA and SEQRA and what, if any, measures could have been taken in mitigation. Additionally, such clearing was done in violation of Town Codes relating to clearing, site plan review, construction activities and sandmining.

Thereafter, US Rail did submit a response that alleges that what it is now seeking to do does not require Board approval because it is a spur, industrial, team, switching or side track within the meaning of 49 U.S.C. 10906. The merits of this argument are addressed in the foregoing reply prepared by our counsel.

Petitioners disingenuously argue that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by me one day after I learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

There are numerous agencies, organizations and individuals that are concerned with the potential environmental harm that may result from Petitioner's activities at the

Property, including the New York State Department of Environmental Conservation ("DEC"). As set forth in a newspaper account in *Newsday* on October 1, 2007 (annexed as Exhibit B), the DEC has issued summonses to the construction contractor at the Property for mining without a permit. In that article, the regional director for the DEC, Peter Scully, states that "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 yards of cubic material could move forward without any environmental review." In that article, US Rail's president acknowledges that he had received citations from DEC and that it was "in discussions" with the DEC about the citations that could lead to administrative hearings. Annexed hereto as Exhibit C are two letters that DEC has sent to counsel for Sills and Suffolk about the sandmining activities that have taken place at the Property. In addition, in the same *Newsday* article, the president of the local civic association expressed her concerns about the potential environmental impacts of the activities at the Property.

Petitioners suggest that "Although the Town of Brookhaven has indicated their concern that no review of this project has occurred under federal or New York environmental laws, the Town concedes that US Rail's actions may be, in its words, 'justified' (i.e., exempt from state and local oversight) if it is acting under Board authority." This letter, which was written by me one day after I had learned about the activities at the Property, acknowledges that federal preemption may have application in this matter based on what little it knew about the Petitioner's activities at the Property and should hardly be viewed by the Board as Brookhaven's acknowledgement that the issuance of a stay in this matter will not harm any other parties. Brookhaven believes

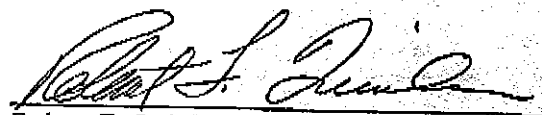
that significant harm may be visited on its environment and on behalf of its approximately 480,000 residents. For this reason, it has indicated its intention to participate actively in this proceeding, commencing with its opposition to the stay sought by petitioners.

I note in closing that given the lack of information given to the Board to date by Petitioners, the shifting nature of the parties and the outright misrepresentations³ that have been made, the Board should use whatever means are at its disposal and inquire into the true nature of operations proposed at the facility and the parties involved.

³ As further proof of this, I submit to you as Exhibit D 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. A newspaper account in *Newsday* on October 5, 2007 (annexed as Exhibit E) explains the close ties that Sills Road has to the garbage industry and also reveals that US Rail has stated to this Board in a letter dated February 25, 2006 in the *New England Transrail* (annexed as Exhibit F) case 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, as the Board knows, was seeking approval for its solid waste transload facility.

VERIFICATION

I, Robert F. Quinlan, declare under penalty of perjury that the facts stated in the foregoing document are true and correct, to the best of my knowledge, information and belief. Executed on this 5th day of November, 2007.



Robert F. Quinlan
Town Attorney
Town of Brookhaven

EXHIBIT A

Sills Road Realty LLC

August 9, 2007

Daniel T. Scully
Vice President
Tully Environmental, Inc.
127-50 Northern Boulevard
Flushing, New York 11368

Dear Dan:

You have inquired about the status of the Brookhaven Rail Terminal (the "Terminal").

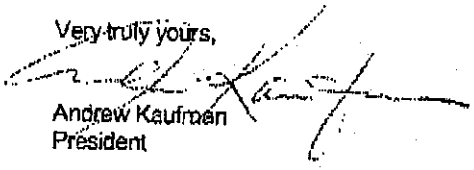
Sills Road Realty, LLC has contracted for the construction and operation of a rail facility to transport bulk commodities and merchandise freight. The Terminal will also have the capacity to transload between trucks and rail cars, containerized freight. The Terminal will contain approximately 11,000 feet of track and facilities to unload and temporarily store bulk commodities, principally aggregates and other stone products, and to transload freight between trucks and rail cars.

We have commenced development efforts at the site of the Terminal and expect the Terminal to be fully operational no later than December, 2008.

We believe the Terminal will provide a crucial and cost effective transportation alternative to Long Island businesses, act as a catalyst to economic development within and around the Town's Empire Zone (within which the site is located) and significantly reduce truck traffic congestion.

If you require any additional information, please feel free to contact me at your convenience.

Very truly yours,


Andrew Kaufman
President

485 Underhill Boulevard, Suite 103 Syosset, NY 11791
Tel. (516) 364-4433 Fax (516) 677-1911

EXHIBIT B

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.

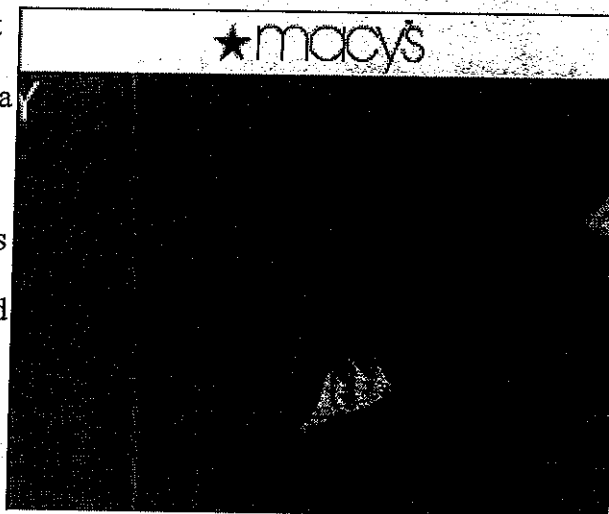
Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any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

New York State Department of Environmental Conservation**Office of General Counsel, Region One**

Stony Brook University

50 Circle Road, Stony Brook, New York 11790 - 3409

Phone: (631) 444-0260 • FAX: (631) 444-0348

Website: www.dec.state.ny.us

Alexander B. Grannis
Commissioner

November 5, 2007

VIA MAIL & FAX (202) 296-3939

John D. Heffner, Esq.

1750 K Street, N.W., Suite 350

Washington, D.C. 20006

RE: 28 acre site at Sills Road, Yaphank

Dear Mr. Heffner:

Thank you for your letter of October 12, 2007, clarifying the intended uses for the subject site. As I believe you are already aware, the New York State Department of Environmental Conservation ("Department") has issued Administrative Tickets to Sills Road Realty, LLC and Watral Brothers Inc., for mining without a permit as required by Environmental Conservation Law Article 23 - the Mined Land Reclamation Act. I have been advised, and I believe a decision issued by the Surface Transportation Board (STB) on October 12, 2007 (STB Finance Docket No. 35036) directs, that all activities at the site cease pending further action by the STB, which would also include the cessation of any mining activities.

Your letter indicates that your client intends on cooperating with the Town of Brookhaven to address operational concerns with regard to intended uses of the subject site. This sounds like an excellent posture for your client to be taking.

As I have previously advised Ms. Biblow, in order for your client to be granted an exemption from the authority of the Department to regulate mining at the subject site, either site plan approval must first be obtained from the Town of Brookhaven, or a sufficient demonstration shall be made to the Department that the proposed activities are entitled to preemption and have undergone the necessary environmental review. In the absence of the foregoing, mining at the site without the benefit of a permit from the Department would be a violation.

The undersigned may be contacted directly at (631) 444-0262, to discuss this matter further.

Sincerely,

Craig L. Elgar

Acting Regional Attorney

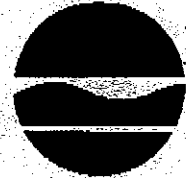
cc: Charlotte A. Biblow, Esq. *via mail & fax* (516) 227-0777
Peter A. Scully, Regional Director, NYSDEC
Robert Yager, Mined Land Reclamation Specialist, NYSDEC

New York State Department of Environmental Conservation**Division of Legal Affairs, Region One**

Stony Brook University

50 Circle Road, Stony Brook, New York 11790 - 3409

Phone: (631) 444-0260 • FAX: (631) 444-0348

Website: www.dec.state.ny.usAlexander B. Grannis
Commissioner

October 4, 2007

VIA MAIL & FAX (516) 227-0777

Charlotte A. Biblow, Esq.

Farrell Fritz, P.C.

1320 RexCorp Plaza

Uniondale, NY 11556-1320

RE: 28 acre site at Sills Road, Yaphank

Dear Ms. Biblow:

In order for your client to be granted an exemption from the authority of the New York State Department of Environmental Conservation ("Department") to regulate mining at the subject site pursuant to Environmental Conservation Law Article 23 - the Mined Land Reclamation Act, either site plan approval must first be obtained from the Town of Brookhaven, or a sufficient demonstration shall be made to the Department that the proposed activities are entitled to preemption and have undergone the necessary environmental review. In the absence of the foregoing, mining at the site would be a violation.

The undersigned may be contacted directly at (631) 444-0262, to discuss this matter further.

Sincerely,

Craig L. Elgut
Acting Regional Attorney

cc: Peter A. Scully, Regional Director, NYSDEC
Robert Yager, Mined Land Reclamation Specialist, NYSDEC

EXHIBIT D



1320 RexCorp Plaza
Uniondale, New York 11556-1320
Telephone 516.227.0700
Fax 516.227.0777
www.farrellfritz.com

Charlotte Biblow
Partner

Direct Dial 516.227.0686
Direct Fax 516.336.2266
cbiblow@farrellfritz.com

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:

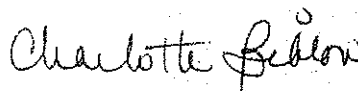
As you know, this firm represents Sills Road Realty, LLC, (hereinafter "Sills Road"), the owner and lessor of property located at Sills Road, Yaphank, New York. As you also know, U S Rail Corporation is the lessee of that property (hereinafter the "Brookhaven Rail Terminal"). I am writing this letter 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 US 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)

EXHIBIT E

Brake pulled on rail work

A9

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
erik.german@newsday.com

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 Sycoset address and principal as that proposing the Yaphank project was described last spring before 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's owner, Sills 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 Sills Road Realty and the

subcontractor clearing the site, Watral 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 its 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.

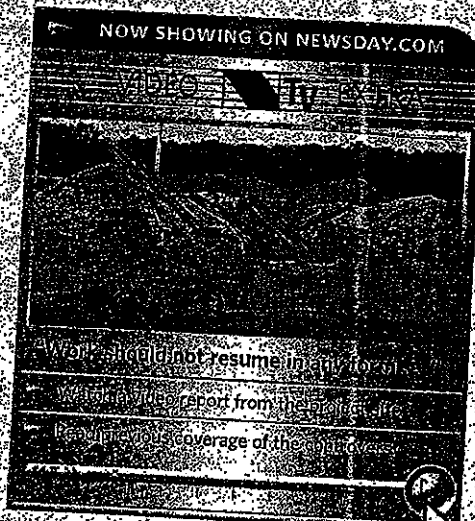
That company, which now appears to be inactive, had the same address and principal — Andrew Kaufman — as Sills Road Realty, according to state records and a 2005 Securities Exchange Commission filing.

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 outbound 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 this story

dent of the South Yaphank Civic Association said she was "annoyed" that the town just took the company's word for it earlier this summer.

Eran 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 F

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January 25, 2006

FEB 3 2006

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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.

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January 25, 2006

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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.

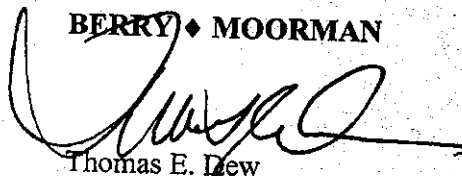
In addition to pointing out some of the benefits generated by the New England Transrail project, we also caution that, should projects such as the this transloading facility be inordinately delayed, or otherwise bogged own in "red tape", it is likely that capital sources will be discouraged from investing 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



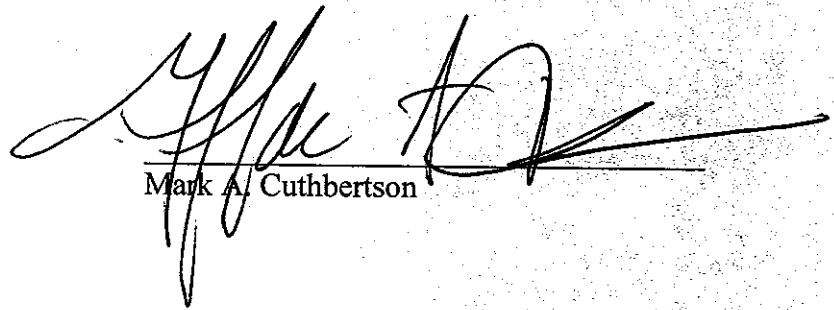
Thomas E. Dew

TED/cle

cc: US Rail Corporation

CERTIFICATE OF SERVICE

I, Mark A. Cuthbertson, certify that, on this 5th day of November, 2007, I caused a copy of the foregoing document to be served by e-mail on all parties of record in STB Finance Docket No. 35036.



Mark A. Cuthbertson