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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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ENTERED  
Office of Proceedings  
May 15, 2014  
Part of  
Public Record

FINANCE DOCKET NO. 35141  
U S RAIL CORPORATION – CONSTRUCTION AND OPERATION EXEMPTION–  
BROOKHAVEN RAIL TERMINAL

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**SUBMISSION OF TOWN OF BROOKHAVEN WITH UPDATE TO BOARD  
AND CORRECTING MISSTATEMENTS OF FACT MADE BY BROOKHAVEN  
RAIL TERMINAL**

ROSENBERG CALICA & BIRNEY LLP  
100 Garden City Plaza, Suite 408  
Garden City, New York 11530  
(516) 747-7400

*Special Counsel for Town of Brookhaven*

Dated: May 15, 2014

## **Preliminary Statement**

The Town of Brookhaven respectfully makes this submission to update the Board concerning: (1) recently uncovered serious threats by the Brookhaven Rail Terminal (BRT) to the “*Sole Source Aquifers*” (the only Federally and New York State protected source of drinking water on Long Island) which lies only 20-30 feet below the BRT parties’ current level of excavation, sand mining, and removal of screened material from the BRT site; and (2) the Federal Court’s recent and intervening issuance of a Temporary Restraining Order against the BRT parties, and in favor of the Town, enjoining and prohibiting the BRT parties from conducting any further excavation, re-grading and related activities at the site.

Additionally, the Town respectfully writes to correct several serious and material misstatements of fact and law which BRT has made in its April 3, 2014 Reply to the Town’s submission to this Board.<sup>1</sup>

### **I. Update Concerning Threats to the “*Sole Source Aquifers*” and the Federal Court’s Intervening Issuance of a Temporary Restraining Order Against BRT**

As the Board is aware, the principal complaint of the Town against BRT is that it is conducting an illegal sand mining operation on the 93 acre “expansion” lot, is excavating deep into the ground (as much as 50 feet), is illegally “screening” the excavated native soil onsite to prepare it for resale, and is illegally removing the native screened soil by the ton and selling to various third parties, all without environmental review or approval or permits or compliance with law. Since March 12, 2014, there has been in place a lawful “Stop Work Order” issued under authorities of N.Y. Town Law and Brookhaven Town Code § 16-8 (Exhibit A hereto). The Stop

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<sup>1</sup> To the extent permission from the Board is required for the Town to correct these serious misstatements of fact, the Town hereby respectfully requests permission to do so. As shown below, the misstatements of fact in BRT’s Reply are so pervasive, and go to the very heart of the issues presented, that they warrant full exposure and explanation before the Board.

Work Order is explicitly

limited to prohibiting non-railroad activities at the site, all of which were illegally undertaken by BRT in the complete absence of authority, and all of which are explicitly and by definition not subject to federal railroad preemption. Id. (“*Please be advised that you are directed to stop work [including, but not limited to, construction, cutting and removing trees, excavating, and removing excavated materials] regarding any matter not pertaining to railroad construction*”) (emphasis supplied). BRT has not sought either from this Board or from any Court any preliminary injunction to lift the Stop Work Order.

The Town has previously notified this Board that it was filing a lawsuit against BRT and others in State Court to address matters over which this Board does not possess jurisdiction, i.e. enforcement of the “So Ordered” Stipulation of Settlement from a prior lawsuit, to prevent and redress the illegal excavation and construction of non-railroad uses on the BRT property (including “manufacturing” and other clearly non-railroad uses), and to redress violations of non-reempted State and local laws. By stipulation of the parties to that lawsuit, the Town's State Court lawsuit was removed to federal court and now bears the caption Town of Brookhaven v. Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations LLC, Oakland Transportation Holdings LLC, Sills Expressway Associates, Watral Brothers, Inc., and Pratt Brothers, Inc., U.S. District Court, E.D.N.Y. Case No. 14-CV-02286 (LDW, AKT).

On May 12, 2014, United States District Court Judge Leonard D. Wexler granted the Town an interim Temporary Restraining Order enjoining and prohibiting BRT and the remaining

defendants therein from undertaking any activities to excavate, screen, grade, or remove any native sands and vegetation from the subject property. Exhibit B. In addition, the Court scheduled an evidentiary hearing upon the Town's Preliminary Injunction Motion, which hearing is currently scheduled to commence on May 16, 2014. Id.

A copy of the Town's submissions in support of the Preliminary Injunction Motion, with select exhibits, is appended as Exhibit C (initial papers), Exhibit D (supplemental papers), and Exhibit E (rebuttal and reply papers). As shown in those papers, the Town has retained the services of two expert consultants, Geologist Stephanie O. Davis, CPG and Engineer Ritu Modi, P.E., of FPM Group Engineering. The results of their findings are contained in their accompanying declarations (see Davis and Mody Declarations attached to Exhibit C and Exhibit E). As set forth in those Declarations, the egregiously unlawful and environmentally destructive conduct of BRT which the Town presently seeks to enjoin, and which the Federal Court has now temporarily restrained, is of a virtually unprecedented magnitude on Long Island. It is resulting in an irreversible environmental "insult" and environmental harm which, if not immediately restrained, will result in permanent and incalculable impacts to Long Island's "*Sole Source Aquifers*" (the only and both Federally and New York State protected source of drinking water on Long Island) which lie directly below BRT's current and threatened level of excavation, sand mining, and removal of native soil. Indeed, as explained in the accompanying expert declarations and reports, BRT's current and threatened activities would result in devastating and illegal mining activities to within 10-20 feet of the water table. As the Town demonstrated to the Federal Court, unless these activities are immediately ceased, these activities will cause unprecedented and irreversible environmental harm and damage to the Town, to the Carman's

River Watershed, to the general public, and to other nearby sensitive and environmentally protected areas such as the vulnerable and legally protected “Long Island's Central Suffolk Pines Barrens”, and to other nearby environmentally vulnerable and sensitive areas.

As further detailed in those supporting Declarations, under the guise and legal pretext of constructing a mere “*ancillary spur*” track extension from the 28 Acre Parcel onto the adjoining 93 Acre Parcel site, BRT has already excavated a vast swath of the 93 Acre Parcel with tremendous and unapproved excavation activities deep below grade, which is not only blatantly illegal and unapproved, but which is being undertaken at grade levels which are below and are wholly inconsistent with the mere laying of tracks and incidental construction. Indeed, as documented therein, the current BRT excavation is to a level of 50 feet above “mean sea level” (“MSL”), which is fully 50 feet lower than the 100 foot MSL grade at which the Long Island Railroad track which currently serves the trackage located on the 28 Acre Parcel runs and at which level the tracks will enter the proposed 93 Acre Parcel rail facility. Further, in reality, BRT has no tenants or current building plans for the site, and is effectively constructing a “Subterranean Railway” (assuming it actually is intended to be a railroad facility at all rather than merely an illegal “sand mine”).

The Board should also be aware that BRT has essentially admitted that it is removing large quantities of native soil from the site, and is selling it to numerous third parties. Specifically, in unsuccessfully opposing the issuance of the Temporary Restraining Order based upon BRT’s false claim that it is not “sand-mining” the site (i.e., removing and selling virgin native sand material for sale to third parties), BRT submitted the Declaration of its CFO, Dennis K. Miller, wherein he alleges and brazenly admits that an injunction will cause financial harm to

BRT's numerous "sand customers" and to its profitable "sand business" (Exhibit F, Miller Decl. dated May 7, 2014, 28-31).

## **II. Correction of Misstatements of Fact in BRT's April 3, 2014 Reply**

Additionally, we respectfully bring to the Board's attention several serious misstatements of fact contained in BRT's April 3, 2014 Reply to this Board.

### **1. BRT falsely claims the Town is preventing BRT's environmental review.**

In a galling misrepresentation, BRT contends in its Reply to this Board that the Town's mere insistence that environmental and regulatory review and approval be conducted before BRT continues to unilaterally strip the land bare and dig deep into the ground and engage in a sand mining operation, somehow prevents BRT from conducting an environmental assessment. The allegation is completely fabricated and unsupported by any genuine assertion of fact, strains reality, and is utterly specious.

### **2. BRT falsely claims the Stop Work Order violates federal preemption.**

BRT's contention that the Stop Work Order ("SWO") issued by the Town inspector violates federal preemption principles is specious and contrary to the express scope and wording of the SWO itself. As quoted above, the SWO specifically prohibits BRT from engaging in any activity which is "**not pertaining to railroad construction**". Exhibit A hereto, Stop Work Order ("*Please be advised that you are directed to stop work [including, but not limited to, construction, cutting and removing trees, excavating and removing excavated materials] regarding any matter not pertaining to railroad construction.*"). The Stop Work Order expressly does not extend to any construction which is federally preempted. BRT's contention that the Order potentially extends to all of its activities on the property is nothing more than a

further smokescreen to conceal its illegal non-railroad activities from this Board, and yet further indicative of BRT's sheer lack of candor to this Board.

**3. BRT falsely claims there are insufficient "changed circumstances" to warrant the reopening of this proceeding.**

Perhaps most remarkably, in purporting to contend that the Town does not adequately set forth "changed circumstances," BRT resorts to simply ignoring (and at times downplaying) its admitted noncompliance with the Environmental Conditions, and its admitted extensive construction, activities, and uses even on Parcel A which are completely contrary to the plan and uses allowed by the Board. BRT thus ignores the fact that its as yet uncompleted construction on Parcel A bears no resemblance to the site plan reviewed by this Board in this proceeding, which plan was incorporated and attached to the Stipulation of Settlement, and which itself was expressly incorporated into the Environmental Conditions imposed by this Board. See Environmental Conditions, attaching Stipulation of Settlement and its attached site Plan.

BRT's false and incredible denial that no "changed circumstances" can be discerned from its addition of more buildings and structures on Parcel A than allowed by the Board, its use of that Parcel for altogether different purposes and uses than the limited one-way delivery of aggregate approved by this Board, and its activities on Parcel A connected to its "expansion" onto Parcels B and C, is irrational, at best, and highly misleading, at worst. By its own account, "*construction on Parcel A is not yet fully completed*" (BRT's Reply at p. 19). That is, the construction reviewed and approved by this Board has not yet even been implemented, and yet the plan has been so drastically changed and altered to the point where it makes a sheer mockery of this Board's serious review and approval of the former plan in this proceeding.

Moreover, BRT's false assertion that its authority to add a "spur" without this Board's approval prevents this Board from addressing BRT's overt violation of the Environmental Conditions and the actual plan approved by this Board, even before the construction on the approved plan is completed, if accepted, would mean that this Board possesses no authority to enforce its limited approvals of particular plans or its imposition of express Environmental Conditions. According to BRT's tortured position, the "spur" exception, even if it applied (which it does not), would then render virtually all reviews and approvals by this Board a meaningless process, because as soon as any approval is granted and deliveries by track commence, the applicant could simply disregard the entire approval process and simply label its completely different plans and activities a "spur".

Additionally, BRT's Reply admits that its new and different construction and activities on Parcel A are integral to and a part of its activities on Parcels B and C (BRT's Reply, p. 9). Moreover, in 2012, BRT (through its landlord and partial owner Sills Road Realty, LLC): (a) specifically agreed that the procedures and limitations contained in the Stipulation of Settlement which was adopted and imposed by this Board as Environmental Conditions to its 2010 approval, would govern the expansion into Parcels B and C; (b) agreed that buffers in accordance with the Stipulation would apply; and (c) agreed that reporting and specified building code provisions would be adhered to, and that its non-compliance with the Stipulation regarding the 28 acre site (insufficient buffers and other violations) would be corrected. See Exhibit G, Sills Road Realty, LLC Letter dated April 30, 2012 (misdated on its cover page as April 25, 2012) (see especially under heading "Stipulation of Settlement and STB Approval", where BRT directly "confirm[ed] the understandings reached at the meeting" with the Town, wherein it "agreed" that "All plans

*for the construction of the BRT will comply with the environmental mitigation measures set forth in the STB Approval”, and “As we agreed, the Stipulation establishes the local building and other requirements that construction of the BRT must adhere to and a procedure for Bowne to certify to the Town compliance with those requirements. We agreed to follow the procedures set forth in the Stipulation”*). Indeed, it is well settled that “voluntary agreements” with a rail carrier are not subject to federal preemption, and are fully enforceable. Township of Woodbridge v. Consolidated Rail Corp., 2000 WL 1771044, at \*3 (S.T.B. December 1, 2000); Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co., 297 F.Supp.2d 326, 332-33 (D.Me. 2003); PCS Phosphate Co., Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009).

With respect to the illegal sand mining, screening and removal of environmentally protected soil, BRT incredibly contends that its massive excavation and removal of native soil is supposedly mere “grading”, and asks this Board to accept its flatly incredible claim on its mere “say so” alone. However, BRT’s Reply makes no effort to substantiate this contention, because no justification exists, and instead mentions in a footnote on page 9 of its Reply that it will file a new declaratory judgment proceeding. However, the significantly changed overall plan and activities on all three Parcels, including the new grading plan purporting to connect the three Parcels, manifestly constitutes a further substantial “change in circumstances.” See Expert Declarations included in Exhibits C and E.

In fact, Environmental Condition No. 3 imposed by this Board in the 2010 Decision specifically required BRT to “*develop and implement a spill prevention, control, and countermeasures plan (SPCC Plan) to ensure protection of the Nassau-Suffolk Sole Source Aquifer in the event of an accidental spill*” and further mandated that such plan “*shall be*

*developed in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7*". Significantly, no such plan has been prepared, or possibly could be prepared, in compliance with the specified environmental regulations, especially where, as here, BRT's overall and changed plan for Parcels A, B, and C is to severely imperil and endanger the Sole Source Aquifers.

**4. BRT falsely claims that "expansion of BRT's operations and customer base is well within the scope of the 2010 Decision"**

BRT falsely alleges in its Reply that "expansion of BRT's operations and customer base is well within the scope of the 2010 Decision" (BRT's Reply at p. 17). This is directly contrary to this Board's September 7, 2010 Decision (2010 WL 3513386, "2010 Decision"). The 2010 Decision was careful to assess the impact of the proposed rail based on its limited scope, limited purpose, and limited impacts. See 2010 Decision, 2010 WL 3513386 at \*1 ("The purpose of the proposed construction is to enable U S Rail to serve the BRT as a common carrier and to deliver up to 500,000 tons of aggregate annually from sources in upstate New York to Sills Road Realty, LLC"); at \*2 ("The Board's Section of Environmental Analysis (SEA) has conducted an environmental review of the proposal"); at \*3 ("After considering the entire record, including both the transportation aspects of the petition and the environmental issues, we will grant the requested construction exemption as discussed below, subject to the environmental mitigation measures recommended in the Final EA and one additional condition"); at \*7 ("In short, in reaching our decision here, we have taken into account the potential environmental impacts associated with this construction proposal by fully considering the Draft EA, Final EA, and the entire environmental record, including all of the comments received"); at \*7 in Conclusion

section (“*It is Ordered: ... 2. Under 49 U.S.C. § 10502, the Board exempts the construction and operation of the above-described line and related rail facilities from the prior approval requirements of 49 U.S.C. § 10901, subject to the environmental mitigation measures set forth in the Appendix to this decision*”) (emphasis supplied).

**5. BRT falsely claims that its construction management firm Gannett Fleming prepared an environmental review “for delivery to the Town”.**

Only after the Town Attorney on February 20, 2014 wrote to BRT indicating that BRT’s operations and excavations are completely illegal, and indicating that the Town would enforce its rights (which it did a few weeks later when it filed its application to this Board and filed the lawsuit against BRT which is now pending in Federal Court, did BRT at the end of February or early March 2014 provide the Town with a document prepared by Gannett Fleming dated February 2014. The Gannett Fleming firm is apparently BRT’s construction manager. That amorphous “Environmental Review” document, a copy of which the Town has already submitted to this Board in its supplemental submission dated April 3, 2014, conspicuously does not describe the proposed project! What it does do is primarily review the 2010 report prepared by this Board’s Section of Environmental Analysis in connection with this proceeding, to conclude that various state and federal agencies are likely to object, express concerns, or require approvals for BRT’s current plans.<sup>2</sup> Contrary to BRT’s contention in its Reply (at p. 19), the Gannett

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<sup>2</sup> Even Gannett Fleming, in its report, admits that environmental approvals are likely necessary for the expansion, including:

Surface and Ground Water (pp. 3-4): “groundwater is estimated to be 70.5 feet on average, with a water table minimum depth at 67.5 feet and maximum at 73.5 feet”. “Based on development of the Brookhaven Rail Terminal, EPA is likely to raise concerns regarding stormwater detention/retention and the need for Spill Prevention Control and Countermeasure plans for on-site fuel storage, if the site is developed, to minimize potential effects to the sole

Fleming report was not created “for delivery to the Town”, it was in fact not even provided to the Town until after the Town Attorney issued a letter indicating that the Town was intent on obtaining regulatory and judicial redress for BRT’s illegal activities. The report also does not claim that any Town official was consulted in its preparation. Whatever BRT hoped to gain by having its construction company prepare a report which does not describe its actual changed plan, the report clearly was not done for the Town as now claimed by BRT.

Further, as we pointed out in our April 3, 2014 submission to this Board, the February 2014 Gannett Fleming report contains a picture of a plan on its cover which confirms that BRT’s actual and changed plans for Parcels A, B, and C include what can only be genuinely described as distinctly non-railroad activities, which are irrefutably not subject to federal preemption, and which are irrefutably subject to state and local environmental, zoning, and other regulation, including with respect to the planned 400,000 square foot “*Manufacturing and Warehousing Building*”, a “*Propane Transfer Station*” and several other new buildings or structures which appear of BRT’s newly changed plans.

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source [Long Island] aquifer”.

Air Quality (p. 4): “Based on the development of the Brookhaven Rail [T]erminal, general conformity analysis of ozone and PM2.5 emissions may be required if the site is developed.”

Cultural Resources (pp. 7-8): Suffolk County Poor Farm (a 200 acre site) is immediately adjacent to the Eastern boundary of the site, and the Suffolk County Almshouse House is 2,500 feet East from that boundary and is listed on the National Register of Historic Places. “To minimize potential effects to cultural resources, future use of the site should consider retaining a vegetative buffer along the eastern boundary of the site to avoid effect to the historic agricultural context and setting of these historic resources.”

Transportation (pp. 10-11): “Additional analysis of transportation effects, including site trip generation, would likely be required to ensure the local transportation network could accommodate traffic generated by future development and operation of the site”.

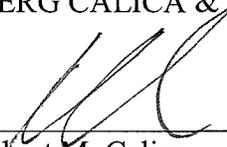
**Conclusion**

It is respectfully requested that the Board re-open STB F.D. No. 35141, and that the Board grant new declaratory and injunctive orders to address the urgent matters set forth in the Town's March 12, 2014 submission and those set forth above ((whether upon the re-opened proceeding or a new proceeding).

Dated: May 15, 2014

ROSENBERG CALICA & BIRNEY LLP

By: \_\_\_\_\_

  
Robert M. Calica

*Attorneys for Town of Brookhaven*  
100 Garden City Plaza, Suite 408  
Garden City, New York 11530  
(516) 747-7400

Of counsel:  
Robert M. Calica  
Judah Serfaty



# EXHIBIT A



Town of Brookhaven  
Long Island  
Attorney's Office

# STOP WORK ORDER

Subject Premises/Property: SCTM# 0200-663.00-03.00-029.001 Sills  
Expressway Associates

Please be advised that you are directed to stop work [including, but not limited to, construction, cutting and removing trees, excavating and removing excavated materials] regarding any matter not pertaining to railroad construction.

Investigator: B. THILL Shield: #130 Date: 3/12/2014

**DO NOT REMOVE THIS PLACARD**

Department of Law  
One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6500 • Fax (631) 698-4489 • Fax (631) 451-6505  
[www.brookhaven.org](http://www.brookhaven.org)

Litigation papers are NOT to be served by FAX except by express prior written permission

# EXHIBIT B

**Doreen Salera-Calabrese**

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**From:** Rob Calica  
**Sent:** Tuesday, May 13, 2014 11:21 AM  
**To:** Judah Serfaty; George Kordas; Edward M. Ross  
**Cc:** Doreen Salera-Calabrese  
**Subject:** FW: Activity in Case 2:14-cv-02286-LDW-AKT Town of Brookhaven v. Sills Road Realty LLC et al Show Cause Hearing

**From:** [ecf\\_bounces@nyed.uscourts.gov](mailto:ecf_bounces@nyed.uscourts.gov) [[mailto:ecf\\_bounces@nyed.uscourts.gov](mailto:ecf_bounces@nyed.uscourts.gov)]  
**Sent:** Tuesday, May 13, 2014 10:04 AM  
**To:** [nobody@nyed.uscourts.gov](mailto:nobody@nyed.uscourts.gov)  
**Subject:** Activity in Case 2:14-cv-02286-LDW-AKT Town of Brookhaven v. Sills Road Realty LLC et al Show Cause Hearing

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

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**U.S. District Court**

**Eastern District of New York**

**Notice of Electronic Filing**

The following transaction was entered on 5/13/2014 at 10:03 AM EDT and filed on 5/13/2014

**Case Name:** Town of Brookhaven v. Sills Road Realty LLC et al

**Case Number:** 2:14-cv-02286-LDW-AKT

**Filer:**

**Document Number:** 36

**Docket Text:**

**Minute Entry for proceedings held before Judge Leonard D. Wexler: Preliminary Injunction Hearing held on 5/13/2014. Plaintiff(s) represented by Robert M. Calica, Esq., George Kordas, Esq. and Annette Eaderesto, Esq. Defendant(s) represented by Yonaton Aronoff, Esq., David T. Ralston, Jr., Esq. and Vanessa L. Miller, Esq. Arguments heard regarding Plaintiffs request for a Temporary Restraining Order (TRO). Plaintiffs request for a Temporary Restraining Order is hereby GRANTED. Preliminary Injunction Hearing is hereby set for 5/16/2014 at 11:00 AM in**

**Courtroom 940 before Judge Leonard D. Wexler. Proceedings concluded.(Court Reporter Perry Auerbach.) (Russo, Eric)**

**2:14-cv-02286-LDW-AKT Notice has been electronically mailed to:**

Robert M. Calica [rcalica@rcblaw.com](mailto:rcalica@rcblaw.com)

Judah Serfaty [jserfaty@rcblaw.com](mailto:jserfaty@rcblaw.com)

Yonaton Aronoff [aronoff@foley.com](mailto:aronoff@foley.com)

**2:14-cv-02286-LDW-AKT Notice will not be electronically mailed to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP NYEDStamp\_ID=875559751 [Date=5/13/2014] [FileNumber=8740900-0]  
[dbffbbb0ac6a1762f821d9d16b12578f648a1254d77f7496f0125acbe4718997a629b  
be84db0e90e99bf6955c40b3b7ef217240f9958e6cdadec7f753e142d6a]]

**CIVIL CAUSE FOR PRELIMINARY INJUNCTION HEARING**

**BEFORE:** Honorable Leonard D. Wexler  
**DATE:** May 12, 2014  
**TIME:** 10:15 to 11:15 (1 Hr.)  
**DOCKET:** 14-CV-2286 (LDW) (AKT)  
**TITLE:** Town of Brookhaven v. Sill Road Realty, LLC, et al

**APPEARANCES:**

- Plaintiff(s) represented by:
    - Robert M. Calica, Esq.
    - George Kordas, Esq.
    - Annette Eaderesto, Esq.
  
  - Defendant(s) represented by:
    - Yonaton Aronoff, Esq.
    - David T. Ralston, Jr., Esq.
    - Vanessa L. Miller, Esq.
  
  - Court Reporter: Perry Auerbach
  
  - Courtroom Deputy: Eric L. Russo
- 

- ✓ Case called.
  
- ✓ Arguments heard regarding Plaintiff's request for a Temporary Restraining Order (TRO).
  
- ✓ Plaintiff's request for a Temporary Restraining Order is hereby **GRANTED**.
  
- ✓ Preliminary Injunction Hearing is hereby set for **May 16, 2014 at 11:00 AM**.
  
- ✓ Proceedings concluded.

# EXHIBIT C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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TOWN OF BROOKHAVEN,

Plaintiff,

Case No. 14-CV-02286  
(LDW, AKT)

-against-

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

**ORDER TO SHOW CAUSE FOR  
PRELIMINARY INJUNCTION  
AND TEMPORARY  
RESTRAINING ORDER**

Defendants.

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Upon the annexed Declarations of Brookhaven Town Attorney, Annette Eaderesto, Esq., dated April 24, 2014, the Declarations of Stephanie O. Davis, CPG, and Ritu Mody, P.E. of FPM Group each dated April 24, 2014, upon the Amended Complaint of the Town of Brookhaven dated April 9, 2014 filed in the New York Supreme Court, County of Suffolk (Suffolk County Clerk's index no. 2014-061613), and removed to this Court on April 9, 2014, it is

**ORDERED**, that the above named defendants or their counsel show cause before Hon. Leonard D. Wexler, United States District Judge, on April \_\_, 2014 at \_\_:\_\_.m., at Room \_\_ of the United States District Court for the Eastern District of New York, at the Courthouse located at 944 Federal Plaza, Central Islip, New York, 11722, why an Order should not be granted pursuant to Fed. R. Civ. P. 65, enjoining and restraining defendants (collectively, the "Brookhaven Railroad Terminal Defendants" or "Defendants") from continuing to undertake any and all further actions and activities to excavate, screen, grade, and remove native sand and vegetation from a 93 acre site located to the East of the 28 acre local railway yard facility owned

or operated by one or more of the Brookhaven Railroad Terminal Defendants at 205 Sills Road, Yaphank, New York (the "Brookhaven Railroad Terminal"), during the pendency of this action and pending further Order of the Court; and it is further

**ORDERED**, that sufficient reason having been shown therefor, that pending the hearing of the Town's application for a preliminary injunction, and pending further Order of the Court, pursuant to Fed. R. Civ. P. 65, the Defendants, their employees, agents, successors and assigns, and anyone acting under their respective control or in concert with them, be, and they hereby are, temporarily enjoined and restrained from undertaking any further actions or activities to excavate, screen, grade, or remove native sand and vegetation from the Brookhaven Railroad Terminal; and it is further

**ORDERED**, that service of a copy of this Order via ECF upon Foley & Lardner LLP, attorneys for all defendants (other than for defendant Sills Expressway Associates), at [yaronoff@foley.com](mailto:yaronoff@foley.com), and upon Farrell Fritz, LLP, attorneys for defendant Sills Expressway Associates, at [pcurry@farrellfritz.com](mailto:pcurry@farrellfritz.com), on or before \_\_ o'clock on April \_\_, 2014 shall be deemed good and sufficient service hereof.

Dated: Central Islip, New York  
April \_\_, 2014

**ENTER :**

\_\_\_\_\_  
U.S. District Court Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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TOWN OF BROOKHAVEN,

Plaintiff,

-against-

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

Defendants.

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Case No. 14-CV-02286  
(LDW, AKT)

**DECLARATION IN SUPPORT  
OF TOWN OF BROOKHAVEN'S  
MOTION FOR PRELIMINARY  
INJUNCTION PURSUANT TO  
RULE 65 OF THE FED R. CIV. P.**

**ANNETTE EADERESTO**, an attorney duly admitted to practice law before the Courts  
of the State of New York declares pursuant to 28 U.S.C. §1746 under penalty of perjury as  
follows:

**Parties and Relief Sought**

1. I am the Town Attorney of the Town of Brookhaven ("Town"), a New York  
municipal corporation, appointed by its Town Board, and a Public Officer. As the Town  
Attorney, I am the Town's Chief Legal Officer, and serve as legal counsel to the Town  
Supervisor (Hon. Edward Romaine, to whom I report directly), his Deputies, the Members of the  
Town Board, the Commissioners of the Town's Departments, and other Town officials and  
representatives, as appropriate. Thus, as further detailed below, I have personal knowledge  
concerning the matters set forth in this Declaration which is submitted in support of the Town's  
motion pursuant to FRCP 65 for a preliminary injunction (including a temporary restraining  
order) against defendants who, under the demonstrably false pretext of constructing a 93 acre

railway “*spur*” on environmentally vulnerable lands, are actually operating and conducting an illegal sand mining, tree-clearing, dumping, and related unlawful and environmentally destructive construction activities on newly acquired property adjacent to their 28 acre local railway yard facility located at 205 Sills Road, Yaphank, New York known as the “*Brookhaven Rail Terminal*” (herein, “BRT”)<sup>1</sup>.

2. As documented below, the BRT Defendants purport to, but are in no manner currently constructing a bona fide “*railway facility*” at the 93 acre site (the “93 Acre Parcel”) which adjoins their previously constructed and operating 28 acre rail facility (the “28 Acre Parcel”). The 28 Acre Parcel facility, wholly unlike the current 93 Acre Parcel expansion, was specifically licensed and authorized (as required) by the United States Surface Transportation Board (“STB”) and is further subjected by the Town to rigorous environmental, Building Code and fire protection ordinance standards as set forth in prior rulings of the STB and in a prior Stipulation of Settlement “so ordered” by this Court in a related action entitled “Sills Road Realty LLC v. U S Rail Corporation, et seq., the Town of Brookhaven”, CV 07-4584 (TCP) (ETB) [the “Prior Action”].

3. Rather, under the pretext of constructing an “*ancillary spur*” to the licensed, regulated and permitted 28 Acre Parcel facility, the BRT Defendants, which recently acquired the undeveloped, formerly heavily wooded, and environmentally sensitive 93 Acre Parcel: (a) have totally clear-cut much of 93 acres of vegetation; (b) have already excavated a significant portion of the 93 Acre Parcel site by a level of 50 feet or more below the original grade; (c) are illegally (and unnecessarily for any bona fide railway construction purpose) “*screening*” the

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<sup>1</sup> As used herein, the term “BRT” refers to the owners and operators of the rail terminal, i.e. Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations LLC, Oakland Transportation Holdings LLC, and Sills Expressway Associates, and includes all defendants with regard to excavation and construction activities (collectively, the “BRT Defendants”).

mined material on site in violation of DEC and Town Code; (d) are trucking away hundreds of thousands of cubic yards of screened native sand from the site; and (e) are selling it to third parties so as to earn millions of dollars of fees as a result of palpably illegal and environmentally destructive “*sand mining*” activities.

4. Simply stated, excavating, removing, screening on site, and then selling screened sand from a site is not remotely “*building a railroad*”, much less a “*spur*”. The Court is respectfully directed to a shocking comparison of the pre-construction aerial photograph annexed as Exhibit A, and the series of recently taken aerial photographs reflecting the current condition of the site collectively attached as Exhibit B<sup>2</sup>.

5. As set forth in the accompanying Declarations of the Town’s expert consultants, Geologist Stephanie O. Davis, CPG and Engineer Ritu Modi, P.E., of FPM Group Engineering, the egregiously unlawful and environmentally destructive conduct of the BRT Defendants which the Town’s present motion seeks to enjoin is of a virtually unprecedented magnitude on Long Island. It is resulting in an irreversible environmental “insult” and environmental harm which, if not immediately restrained by this Court, will result in permanent and incalculable impacts to Long Island’s “*Sole Source Aquifer*” (the only and both Federally and New York State protected source of drinking water on Long Island) which lies only 20-30 feet below the BRT defendants’ current level excavation, sand mining, and removal of screened material. Further, unless these activities are immediately enjoined, these activities will cause unprecedented and irreversible environmental harm and damage to the Carman’s River Watershed as well as to other nearby sensitive and environmentally protected areas such as the vulnerable and legally protected “Long

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<sup>2</sup>Attached as Exhibit B-1 is an overlay prepared by the Town’s Engineering Consultants, FPM Group showing the location of the proposed new BRT trackage over the still vegetated, and as yet unexcavated areas of the site (taken from Google Earth in September 2013). Much of the already cleared area has been extensively excavated further by BRT since then.

Island's Central Pines Barrens Area", and other nearby environmentally vulnerable and sensitive locales.

6. As documented below, BRT, which in 2010 obtained strictly limited and environmentally conditioned approvals from the STB (and from this Court) to construct a limited 18,000 foot industrial rail line upon the 28 Acre Parcel site connecting to the tracks of the Long Island Rail Road ("LIRR"), has now unlawfully acted to "*expand*" its limited approved facility from the approved 28 Acre Parcel site so as to include an adjacent 93 acre site, as well as vastly increased proposed trackage, and plans to construct and operate over 1.2 million square feet of proposed warehousing, manufacturing, and shipping facilities, the vast majority or all of which directly violate those strictly limited approvals and which pose imminent and serious danger to the health, safety and welfare of the public, the environment and the Long Island water supply.

7. As further detailed below, under the guise and legal pretext of constructing a mere "*ancillary spur*" track extension from the 28 Acre Parcel onto the adjoining 93 Acre Parcel site, BRT has already excavated a vast swath of the 93 Acre Parcel with tremendous and unapproved excavation activities deep below grade (see Exhibit B), which is not only blatantly illegal and unapproved, but which are being undertaken at grade levels which are below and are wholly inconsistent with the mere laying of tracks and incidental construction. Indeed, as documented below, the current BRT excavation is to a level of 50 feet above sea level, which is fully 50 feet lower than the 100 feet above sea level at which the Long Island Railroad track which currently serves the trackage located on the 28 Acre Parcel runs and at which level the tracks will enter the proposed rail facility on the 93 Acre Parcel. In reality, the new BRT owners (an ownership change occurred recently), which have no tenants or building plans for the site are effectively constructing a "*Subterranean Railway*" (assuming it actually is intended to be a railroad facility

at all rather than merely an illegal “*sand mine*”<sup>3</sup>. They also failed to provide any grading plans to the Town until earlier this month, and well after the Town filed suit and served BRT with a Stop Work Order.

8. In short, the BRT facility is no ancillary “*spur*” to a railway facility at all. Rather, it is an unlawful “*sand mine*”, a dumping ground for burial of construction debris, is already improved with unsafe and illegal structures on the 28 Acre Parcel, and poses an immediate threat to the health, safety and welfare of the public, including BRT’s own employees, customers, others using the facilities, and the environment.

#### **Procedural Background**<sup>4</sup>

9. The Town’s action was initially filed in the New York Supreme Court, County of Suffolk on March 11, 2014 and was recently removed to this Court upon application of the BRT Defendants (and consented to by the Town) pursuant to Stipulation dated April 9, 2014 (Exhibit F). Removal was sought by the BRT Defendants by reason of their contention that the Town’s claims are subject to Federal “pre-emption” under 28 U.S.C. §1441 since construction of rail facilities are extensively (but not exclusively as to local safety requirements) subject to Federal jurisdiction<sup>5</sup>. The Town, while disputing and not acknowledging BRT’s “pre-emption” claim, nevertheless agreed that the action could properly be removed to this Court because of the “so ordered” Stipulation of Settlement entered into by most of the same parties in the Prior Action

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<sup>3</sup> As detailed in the accompanying Declarations of the Town’s expert consultants, the BRT Defendants, which concealed their actual grading plans for the 93 Acre Parcel from the Town until disclosing them for the first time earlier this month, are excavating the 93 Acre Parcel 50 feet below the level of the adjacent Long Island Railroad tracks that will connect to the 93 Acre Parcel.

<sup>4</sup> Copies of the Town’s Amended Complaint and the BRT Defendants’ Answer are annexed as Exhibit C and D.

<sup>5</sup> See, discussion of Green Mountain Railway, Inc. v. Vermont, 404 F.3d 638 (2d Cir 2005), and similar authorities discussed in the accompanying Memorandum of Law prepared by our Special Counsel, Rosenberg Calica & Birney LLP.

which retained jurisdiction in this Court (Exhibit F). The Town has also recently filed an Application before the STB to reopen and to obtain certain relief from the STB concerning the BRT Defendants' current actions.

**The Prior STB Proceedings and Prior Federal Action**

10. The actions by the BRT Defendants to obtain the initial approvals for even their currently operating, limited rail facility on the 28 Acre Parcel have been highly suspect, resulting in extended proceedings before the STB and the Federal Courts between 2007 and 2010. This included a sharp rebuke of the BRT Defendants' conduct by the STB which, in an earlier ruling, stated that it would "*view with disfavor any future request for authority to commence rail operations over trackage at [the Brookhaven Rail Terminal location] unless the construction of that trackage has first been authorized by the Board.*" Id.

11. Despite that express caution, barely one month later, on October 2, 2007, the Board received a letter from the Town complaining that a rail facility was nevertheless being constructed by US Rail on the 28 acre Brookhaven Rail Terminal site. Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2973596, at \*1 (S.T.B. Oct. 12, 2007).

12. After receiving the Town's letter, and upon further investigation, citing "*new evidence that rail construction may be occurring or contemplated on this property, and because no party has sought authority from the Board to construct any rail facilities at this site,*" the STB reopened the Suffolk & Southern proceeding on its own motion and US Rail was made a party to the proceeding. Id. at \*2. The STB further ordered US Rail, Suffolk & Southern, Sills Road "*or any other related entity*" that was engaging in construction on the Brookhaven Rail Terminal site

to “*immediately cease*” such activity and to either obtain Board authorization or a decision from the Board that such activity does not require the Board’s approval. *Id.*<sup>6</sup>

13. On November 1, 2007, US Rail, Suffolk & Southern, Sills Road, and their construction contractors, Watral and Pratt (as well as one other contractor entity), then filed a lawsuit in federal district court against the Town seeking to prevent the Town from enforcing Town Code Violation summonses which had been issued concerning the property pertaining to unlawful tree and vegetation clearing and other violations on the 28 Acre Parcel, and seeking to enjoin the Town from interfering with their construction activities. Sills Road Realty LLC, US Rail Corporation et. seq v. Town of Brookhaven, E.D.N.Y. CV 07-4584 (TCP) (ETB).

14. An evidentiary hearing upon their preliminary injunction motion was conducted before Magistrate Judge E. Thomas Boyle on December 5 and 6, 2007, and on July 18, 2008, Magistrate Judge Boyle rendered a comprehensive 27-page decision recommending that no preliminary injunction be granted to US Rail and its cohort plaintiffs because, noting that localities retain significant local control to enforce town building and fire codes as to railway facilities (see, Green Mountain Railway Corp. v. Vermont, 404 F.3d 638 [2d Cir 2005]), they had little likelihood of succeeding on the merits of their “pre-emption” claim (Exhibit G). On June 30, 2009, District Court Judge Thomas C. Platt adopted in full the Magistrate’s Report and Recommendation, and denied the preliminary injunction (Exhibit H).

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<sup>6</sup> US Rail and Sills Road thereafter unsuccessfully attempted to have the October 12, 2007 order of the Board overturned or stayed. On November 16, 2007, the Board denied the petition for a stay. Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 3437681, at \*3 (S.T.B. Nov. 16, 2007). On December 20, 2007, the Board denied US Rail and Sills Road’s petition for reconsideration. Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 4466696, at \*5 (S.T.B. Dec. 20, 2007). On November 9, 2007, while their petition for reconsideration was still pending before the Board, US Rail, Suffolk & Southern and Sills Road filed with the Second Circuit Court of Appeals a petition for judicial review of the October 12, 2007 decision, requesting a temporary restraining order and a preliminary injunction enjoining enforcement of the decision. The Second Circuit denied their application and dismissed their petition on November 13, 2007.

15. On August 7, 2008 (i.e., one month after Magistrate Boyle recommended denial of US Rail and its co-plaintiffs' preliminary injunction motion), US Rail filed a petition with the STB under 49 U.S.C. § 10502 for exemption from the provisions of 49 U.S.C. § 10901 to construct and operate a line of railroad at the 28-acre site to be known as the BRT. U.S. Rail Corporation - Construction and Operation Exemption - Brookhaven Rail Terminal, STB F.D. No. 35141.

16. On April 22, 2010, Judge Platt in the prior Federal Court action "so ordered" a Stipulation of Settlement between the parties whereby US Rail, Sills Road and the remaining plaintiffs (i.e., the defendants in this action) agreed, among other things, to comply with the local town building and zoning code provisions listed in an attached site plan, to provide certain vegetation buffers, and to provide certain engineering reporting. In return, the Town agreed to withdraw its objections before the Board, which it did.

17. On September 7, 2010, after receiving the Stipulation of Settlement and hearing from several interested parties, the STB granted the petition of U.S. Rail for exemption from the provisions of 49 U.S.C. § 10901 to construct and operate a line of railroad at the BRT. The limited approval was made "*subject to the environmental mitigation measures*" proposed by the STB's Section of Environmental Analysis, including the mitigation measures contained in the Stipulation of Settlement with the Town. Specifically, the 28 acre site was approved by the STB for the intended and limited use of delivering "*500,000 tons of aggregate<sup>7</sup> annually from sources in upstate New York to Sills Road Realty, LLC (Sills), the owner of the underlying property, and*

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<sup>7</sup> In the building and construction context, the term "aggregate" means "material used for mixing with cement, bitumen, lime, gypsum, or other adhesive to form concrete or mortar. The aggregate gives volume, stability, resistance to wear or erosion, and other desired physical properties to the finished product. Commonly used aggregates include sand, crushed or broken stone, gravel (pebbles), broken blast-furnace slag, boiler ashes (clinkers), burned shale, and burned clay." ENCYCLOPEDIA BRITANNICA, *aggregate* (<http://www.britannica.com/EBchecked/topic/9076/aggregate>).

*its affiliates*". U S Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal, STB Fin. Docket No. 35141, 2010 WL 3513386 (S.T.B. Sept. 7, 2010).

18. On January 7, 2011, the STB approved a corporate family transaction whereby the leasehold rights, and construction and operation rights of US Rail in the BRT, were transferred to U S Rail New York, LLC, which is now known as Brookhaven Rail LLC. Gabriel D. Hall—Corporate Family Transaction Exemption—U S Rail New York, LLC and U S Rail Corporation, STB Fin. Docket No. 35458 (S.T.B. Jan. 7, 2011).

19. The Town has recently learned of yet a further transfer of operation and control of the BRT Defendants to an entity known as Oakland Transportation LLC, as reflected in an STB Decision dated June 15, 2012 under STB Fin. Docket No. 35635 (Exhibit I hereto).

#### **Intervening Development of the 93 Acre Parcel Site**

20. On an unknown date, the BRT Defendants determined to “*expand*” the BRT to the adjoining approximately 93 acre site, a previously naturally wooded site. As of 2012, the Town was only advised by BRT that the “*expansion*” was to involve only 5,600 feet of additional track to be located on both the 28 Acre Parcel and on only a small portion of the 93 Acre Parcel.

21. BRT falsely contended to the Town that the expansion would be limited to a bona fide “*ancillary spur*” which, under 49 U.S.C. § 10906, does not require Board approval (and, in the case of a bona fide “*spur*”, is totally exempted from any federal environmental regulation whatsoever).

22. On May 11, 2012, the Town Engineer listed the conditions that would be necessary concerning the (alleged) 5,600 foot (alleged) “*spur*” construction, including natural vegetation buffers along the expansion tracks. See Town Engineer's Letter dated May 11, 2012 (Exhibit J).

23. Notwithstanding those limits, BRT then unilaterally and unlawfully clear-cut and deeply excavated and mined much of the 93 Acre Parcel “expansion” site, and not just the limited portion necessary for the laying of 5,600 feet track on the two parcels, and not just clearing and re-grading work, while at the same time utterly failing to comply with the promised “buffer” obligations. See Photographs, Exhibit B.

**BRT’s Current Plans for Both the 28 and 93 Acre Parcels**

24. BRT’s website describes its current expansion plan as vastly different from the Rail Terminal approved by the STB:

With Brookhaven Rail Terminal, Long Island businesses and farmers now have increased access to world markets through BRT’s connection to the national rail network. The ability to use BRT to ship and store commodities in refrigerated, climate-controlled and dry warehousing translates to lower costs, more flexible local service and a greatly expanded market reach. In addition, BRT’s rail transportation shipping and warehousing services are keeping transportation costs competitive while significantly protecting the environment.

See <http://www.brookhavenrailterminal.com/about-brookhaven-rail-terminal.asp>

(last visited 4/21/14) (emphasis supplied).

25. In a recent February 6, 2014 letter from BRT’s construction manager, Gannett Fleming, Inc. (Exhibit K), the current expansion project is now described as:

“The existing Brookhaven Rail Terminal is a 28-acre parcel with approximately 12,800 linear feet of rail track and a connection with the Long Island Railroad. The proposed expansion would involve extension of the facility onto an adjacent approximately 93-acre site and involve construction of an additional 12,500 linear feet of internal track to support future warehousing/manufacturing and cold/dry storage facilities (emphasis supplied).”

26. Additionally, the Town was recently provided by BRT with a copy of a document denominated as a purported “**Environmental Overview**” dated February 2014 prepared on

behalf of BRT by the engineering firm of Gannett Fleming Inc. (Exhibit L hereto). This amorphous document, while scarcely amounting to any type of bona fide environmental review, does clearly and unambiguously depict, on its cover page, the proposed rail and warehousing and manufacturing facilities which BRT is intending to construct on the adjacent 93 Acre Parcel and to serve with its now 12,000 foot purported “*ancillary spur*”. The proposed expansion includes, inter alia: (a) a 400,000 square foot building denominated as “*Manufacturing and Warehousing Building*”; (b) a 400,000 “*Cold/Dry Storage Building*”; (c) a covered “*Salt Storage Building*” of nearly 40,000 square feet; and (d) a proposed “*Propane Transfer Station*” of approximately 262,000 square feet, all spread across a newly purchased, adjacent 93 Acre Parcel site which is nearly 3½ times the size of the previously approved limited facility, and which entails more than 5 times the square footage of the already constructed Transload Building on the 28 Acre Parcel, all proposing to serve a vastly expanded customer base in terms of both enlarged geographic locale and volume.

**The Removal Stipulation Retains the Town’s Objections**

27. In an effort to effect a reasonable “*standstill*” period of time during which the parties could obtain an expedited determination by the STB as to the authority and lawfulness of the BRT Defendants’ conduct and activity upon the 93 Acre Parcel site, the Town and the BRT Defendants recently entered into a Stipulation removing the Town’s New York Supreme Court action to this Court (the “*Removal Stipulation*”, Exhibit F hereto) which sets forth the current procedural posture of the case as follows:

“6. The BRT Defendants contend that the current and anticipated development at Parcels B and C (the “*Disputed Construction*”) shall be treated as a “spur, industrial, team, switching or side track” within the meaning of 49 U.S.C. § 10906, contend that such ancillary “spur” is subject to Federal Pre-emption which limits the Town’s jurisdiction and control respecting Parcels B and C, and agree to seek an expedited

determination of these issues before the U.S. Surface Transportation Board (the "Board") (the "Ancillary Spur Claims"). Without limitation, Brookhaven Rail, LLC and Brookhaven Terminal Operations, LLC d/b/a Brookhaven Rail Terminal agree that they shall promptly file a Petition for Declaratory Order with the Board to address issues of Pre-Emption and the Ancillary Spur Claims (i.e., whether the additional track to be installed by BRT constitutes a "spur, industrial, team, switching or side track" within the scope of 49 U.S.C. § 10906) ("STB Declaratory Petition"). The parties agree that they will each request an expedited Final Determination by the Board of the Ancillary Spur Claims pursuant to the STB Declaratory Petition, and pursue and cooperate with such expedited proceedings before the Board as the Board may direct to obtain the earliest possible Final Determination of the Ancillary Spur Claims.

7. The Town has previously issued a certain Stop Work Order (the "SWO") and certain Notices of the violations (the "Violations") respecting the Disputed Construction on Parcels B and C. Without construing the SWO as either prohibiting or allowing same, the parties agree that for a period of 60 days from the date of this Stipulation, or such sooner time as the STB shall render a determination upon the Ancillary Spur Claims, the Town will withdraw, without prejudice, so much of the SWO and Violations which are deemed to prohibit so much of the Disputed Construction which concerns excavation, removal of fill, and grading which is incidental to the construction of additional railway track upon Parcels B and C (the "Track Construction") as are depicted in a Site Plan to be negotiated and agreed upon between the parties within ten (10) business days (the "Town Consent"). The Town will also adjourn the Violations without prejudice for the same period of time.

8. The Town Consent is strictly limited to such excavation, removal of fill and grading which is actually and reasonably required for the purpose of the aforesaid Track Construction, and the Town specifically objects to and continues its objection to any further excavation, removal of fill, grading, or other Disputed Construction upon any other portion of Parcels B and C.

9. The Town Consent is entered into without prejudice and with a full reservation of all other rights, claims, contentions and defenses of all parties. In the event a dispute shall arise concerning the Town Consent and the extent of the Disputed Construction, the Town shall be authorized to reissue a SWO and Violations (a "Construction Dispute"), and the parties agree that the Construction Dispute shall or may be determined before such a

forum (whether the EDNY, the STB, or further State Court proceedings) as may be determined to be available by law. Without prejudice to the BRT Defendants' positions with respect to the scope of Pre-Emption, the BRT Defendants agree to promptly and without delay keep the Town fully informed and apprised of the Track Construction including by providing such Site Plans, grading plans, fill removal reports, measurements (including by means of a photogrammetric survey to be commissioned by the BRT Defendants within ten (10) business days) elevations, and other information and data which the Town Engineer or its Consultant may reasonably require and shall permit representatives of the Town the right to make periodic inspections of Parcels B and C upon reasonable advance notice, subject only to the limitation that such inspections shall not unreasonably interfere with the Track Construction.

10. The parties consent to expedited discovery under Rule 26 of the Fed.R.Civ.P. in respect of the State Court Action to be removed to EDNY and agree that a Rule 26(f) conference shall occur on April 24, 2014 following such removal.

11. Except as provided above, all rights, claims, defenses, remedies, and contentions of all parties in respect of the State Court Action, the Prior Federal Action and the Removed Action be and the same hereby are otherwise fully reserved."

**The Current Dispute/Need for Immediate Injunctive Relief**

28. Despite the Town's good faith efforts to permit (for a limited time period, and subject to strict construction limitations) the BRT Defendants to conduct "*excavation, removal of fill and grading which is actually and reasonably required for the purpose of...track construction*", for a period of a maximum of 60 days, the parties were unable to agree upon the particulars of a "*Site Plan to be negotiated and agreed upon between the parties*" specifying the extent of the authorized "Track Construction" (Stipulation, paras. 7 and 8). The Town thus expressly reserved the right "*[i]n the event a dispute shall arise concerning the Town Consent and the extent of the Disputed [Track] Construction...[to apply] before such a forum (whether the EDNY, the STB, or further State Court proceedings) as may be determine to be available by law*" to challenge it.

**The BRT Defendants' Multiple and Ever-Changing "Plans"**

29. The current dispute and need for immediate injunctive relief arose principally by reason of the multiple and ever-changing sets of supposed track "Plans" which the BRT Defendants belatedly disclosed to the Town. Prior to the Town's filing of its State Court lawsuit, the BRT Defendants had only provided the Town with a preliminary plan prepared by the engineering firm of P.W. Grosser entitled "*Overall Site Plan*" dated December 11, 2012 (Exhibit M), but which included almost no grading or elevation details whatsoever, and which barely resembles or reflects the actual current excavation activities occurring on the 93 Acre Parcel. It was only after the Town filed its lawsuit on March 11, 2014 that the Town was first provided with a copy of a January 15, 2014 Plan prepared by the BRT Defendants' railway engineering firm of AECOM entitled "*Lot B and C Base Plan*" (Exhibit N). This second "Plan" likewise contained no grading or elevation data.

30. Thereafter, more belatedly still in early April 2014, the BRT Defendants provided yet another Plan of its additional engineers, Sidney B. Bowne LLP dated April 1, 2014 entitled "*Subgrade Preparation Plan*" (Exhibit O). It was only upon receipt of the Bowne Plan earlier this month that the Town first became aware that the current excavation is in no manner "*actually and reasonably*" required for bona fide track construction. Indeed, the excavation and new track grading elevations shown to the Town, for the first time, in the April 1, 2014 Bowne Plan reveal that the grading of the proposed track will be excavated so as to sharply drop upon entering the property at the 100 foot level of the current LIRR tracks in the Southwest corner of the 93 Acre Parcel, to a graded elevation of 60 feet near the Southeast corner, then drop still further to a graded level of only 50 feet, and that the 50 foot excavation level will then continue for the entirety of not only the track, but the entire 93 Acre Parcel (see aerial photos, Exhibit B and Bowne Track Plan Exhibit O).

31. The AECOM and Bowne plans from 2014, which the BRT Defendants provided to the Town only after the Town filed suit and after the Town filed its application to reopen STB proceedings, bear no resemblance whatsoever to the earlier P.W. Grosser “*Overall Site Plan*” dated December 11, 2012 and provided to the Town in 2012 (Exhibit M). BRT/Sills representatives had previously represented to the Town that the Grosser Plan showed a proposed 5,600 foot “J- Track” entering the 93 acre site from the Northwest corner adjacent to the grading level of the 28 Acre Parcel site. Thus, the BRT Defendants have essentially undertaken its currently ongoing excavation activities, which commenced in 2013, without having provided the Town with any track construction or associated grading plans whatsoever.

32. The Town also learned recently for the first time that the BRT Defendants had misrepresented to the Town that there was a supposed “need” to lower the grade of Parcels B and C (the 93 Acre Parcel) from the 100 foot elevation in the Southwest corner (at which the Long Island Rail Road tracks will enter the 93 Acre Parcel) to a 50 foot elevation. It was stated to me directly at a recent telephone conference with BRT representatives and their legal counsel on March 26, 2014 that lowering the grade from 100 feet to 50 feet on the 93 Acre Parcel was necessary in order to “*align*” the existing tracks located on the 28 Acre Parcel with the new Track Extension to be constructed on the 93 Acre Parcel.

33. But the Town’s expert consultant, Stephanie O. Davis, CPG of FPM Group, has since advised the Town that the current Long Island Rail Road track planned to enter in the Southeast corner of the 93 acre parcel is at a 100 foot elevation. Thus, there is no bona fide reason or necessity for the AECOM and Bowne Plans to show the grade of the 93 Acre Parcel being reduced from 100 feet to approximately 60 feet in the Southeast corner and eventually down to 50 feet for the bulk of the 93 Acre Parcel for purposes of “track alignment” between the 28 Acre Parcel and 93 Acre Parcel (see AECOM and Bowne Plans, Exhibits N and O). This was

all apparently a blatant pretext by the BRT Defendants to “*sand mine*” the 93 Acre Parcel, particularly since even if certain of the areas of the 93 Acre Parcel are already materially lower than the 100 foot elevation at which the track will enter in the Southwest corner (the eastern side of the site reportedly slopes downward), the excess screened native sand located elsewhere on site could be used to “level” the overall site in the manner in which traditional site grading is done so as to minimize removal of environmentally required fill from a building or construction site.

34. The conclusion that this is clearly a pretext for massive “sand mining” is bolstered by the fact that the BRT Defendants are also “screening” the sand on site (in violation of both Brookhaven Town Code, Chapter 53 and DEC Sand Mining/Permit requirements), merely so as to render the screened native sand material more valuable for removal and sale to third parties.

35. Indeed, with no actual buildings currently planned by the BRT Defendants for the 93 Acre Parcel (except those conceptual structures preliminarily proposed on the February 2014 Gannett Fleming, Inc. “Environmental Overview” cover page, Exhibit L), it is clearly evident that the entire 93 Acre Parcel is being unnecessarily excavated down to a 50 foot grade first, and then the future/proposed buildings would be constructed at a grade which will by then have already been artificially (and irreversibly) lowered for the obvious purpose of “*sand mining*” to obtain maximum financial yield for the BRT Defendants (estimated to be well over \$10 million at current market prices of \$6 per cubic yard) from excavating, removing, and selling screened native sand, and by unnecessarily lowering the grade of the property from a maximum of 100 feet to as little as 50 feet in elevation. See current aerial photographs from the Town’s Complaint (Exhibits B and C).

36. As matters currently stand, the BRT Defendants are now excavating and re-grading the 93 Acre Parcel without demonstrating, as required by the Stipulation, that such excavation is “*actually and reasonably required for the purpose of the [] Track Construction*”.

37. Intervening efforts by counsel and by their respective engineers to reach agreement upon the proper limits of the grading and track construction details which are “*actually and reasonably required*” for bona fide railroad purposes have been unsuccessful, thus necessitating the present motion.

**Environmental Consequences of the BRT Defendants’ Ongoing Actions**

38. We respectfully direct the Court’s attention to the accompanying Declaration of Stephanie O. Davis, CPG, a highly experienced and nationally regarded Geologist and Hydrogeology Specialist and Senior Vice President of FPM Group (expert consultants to the Town), which sets forth the acute environmental concerns resulting from the BRT Defendants’ massive excavation and ongoing screening of native sand and removal activities in the following cautionary language:

“...[The BRT Defendants’] forest-clearing, sand excavation, and any subsequent filling with materials that are not certified as clean, are likely to impact the underlying Upper Glacial Aquifer, which is a sole-source drinking water aquifer and subject to substantial protective regulations. Certain eventual uses of the BRT site are also likely to impact the aquifer.

The aquifers beneath the BRT site, which include in descending order, the Upper Glacial (water table) aquifer, the Magothy Aquifer, and the Lloyd Aquifer, are designated as Sole-Source Aquifers under the Federal Safe Drinking Water Act of 1974 as they are the only potable water source for Long Island. As such, the US Environmental Protection Agency (EPA) has regulatory jurisdiction over activities above Long Island’s aquifers. The New York State Department of Environmental Conservation (NYSDEC) prohibits incompatible uses over Sole Source Aquifers under New York’s environmental law (NY Code, Section 15-0514). Incompatible uses include uses involving hazardous wastes or substances (including petroleum) that may ultimately be

discharged to groundwater, or the storage of such substances that may contaminate the groundwater....

*In addition, the BRT site is located in a deep flow recharge area (Hydrogeologic Zone III), as defined in the Long Island Comprehensive Waste Treatment Management Plan of 1978, developed pursuant the Clean Water Act, Section 208 and referred to as the '208 Plan'. Deep flow recharge areas are relatively undeveloped and contain groundwater of excellent quality; these are the areas through which the deeper portions of our aquifers are recharged and are necessary to the continued long-term health of our aquifer system. The NYSDEC regulates certain activities in deep flow recharge areas, including landfilling (Long Island Landfill Law, ECL 27-0704). The BRT site also adjoins the south side of the Central Suffolk Pine Barrens Critical Environmental Area (CEA), established by Suffolk County in 1988 for the protection of groundwater resources. Potential groundwater impacts must be considered for activities subject to the State Environmental Quality Review Act (SEQRA) that are located within CEAs. No such consideration of potential groundwater impacts appears to have been conducted for the current forest-clearing and sand excavation activities on Parcel C or for future railroad, commercial and/or industrial activities.*

.... The planned excavation of much of Parcel C to an elevation of 50 feet MSL will place the new ground surface as little as 10 feet above the top of the Upper Glacial Aquifer. We note that the Carmans River is located within the South Haven County Park and Wertheim National Wildlife Refuge and portions of the river have been designated by the NYSDEC as a scenic river, with associated permit requirements and environmental concerns. Based on the water table elevation and flow direction, it appears that groundwater migrating beneath the BRT property eventually discharges to the Carmans River.

Based on our review of the plans provided (i.e., PWGC December 11, 2012 Overall Site Plan; AECOM's January 15, 2014 Lot B and C Base Plan; Bowne's April 1, 2014 Subgrade Preparation Plan), as well as discussions with BRT and AECOM, we understand that it is planned to clear the existing forest and excavate much of Parcel C to a final grade of approximately 50 feet MSL, which would place the new grade between 10 and 20 feet above the water table surface in this area. It is planned to place fill to support railroad tracks (at a minimum) and to conduct freight railroad activities on Parcel C. The exact nature of these activities has not yet been determined, but presumably will include commercial and industrial activities. These activities will undoubtedly include at

least some use and storage of hazardous substances that may impact groundwater quality. To the extent that groundwater becomes impacted beneath the BRT site and migrates to the Carman's River, it has the potential to impact surface water quality in this designated scenic river.

*Excavation and removal of up to 50 feet of clean virgin sand and removal of the existing forest from Parcel C effectively removes up to 50 feet of filtering capacity for infiltrating stormwater that presently recharges the aquifers through the surface of Parcel C. Furthermore, the planned and presumed uses on the excavated surface of Parcel C will undoubtedly result in degradation of the quality of stormwater that recharges through Parcel C, the removal of forest will result in an increase in stormwater runoff from the surface of Parcel C, and compaction and paving/construction on the surface of Parcel C will decrease its recharge capability. The uses on Parcel C will also result in the generation of sanitary waste and may include generation of other wastes to be discharged to the aquifer. Removal of the forest and up to 50 feet of the unsaturated zone sand above the aquifer will significantly reduce the effectiveness of removal of nitrogen, pathogens, and other deleterious materials typically present in sanitary and other wastes that are discharged to onsite underground injection control (UIC) systems. UIC systems will be necessary on Parcel C to manage stormwater, sanitary waste and/or other discharges to the aquifer. Regardless of the installation of UIC systems, the changes associated with removal of the forest, removal of up to 50 feet of clean virgin sand, and eventual railroad/commercial/industrial activities on Parcel C will almost certainly include a degradation of groundwater quality beneath and downgradient of Parcel C.*

In contrast to the BRT's removal of up to 50 feet of clean sand overlying the aquifer at Parcel C, at another large project recently constructed in close proximity, the Caithness Energy Center, the materials excavated for construction purposes were stored onsite and reused as fill and topsoil in final grading to the extent possible. This preservation of soil at the Caithness facility will help to protect Long Island's Sole Source Aquifer and is an approach that recognizes the importance of the aquifer to Long Island's drinking water supply. This protective approach is strikingly different than BRT's removal of the protective soil on Parcel C.

In conclusion, the contemplated forest removal and sand excavation activities on Parcel C, some of which are already underway, eventually followed by railroad/commercial/industrial activities, are almost certain to adversely impact Long Island's

sole-source drinking water aquifer and may impact the Carmans River, to which groundwater from the Parcel C area discharges. These activities would normally be regulated by the USEPA and/or NYSDEC, and be subject to significant environmental review.” (emphasis supplied)

39. We also respectfully direct the Court’s attention to the accompanying Declaration of Ritu Modi, P.E., a Licensed Professional Engineer working in conjunction with Geologist Stephanie O. Davis, CPG, at FPM Group, which demonstrates, from an engineering perspective, precisely why the excavation and re-grading of the site from the 100 foot level at which the LIRR tracks currently enter, down to 60 feet and then a level of 50 feet is totally unjustified. Ms. Modi’s Declaration explains:

“It is our understanding that much of Parcel C (approximately 93 acres) of the BRT site is presently being cleared of forest and excavated to an elevation of 50 feet above mean sea level (MSL) as part of BRT’s track extension project so as to align the new tracks for a rail road spur on Parcel C with existing tracks. Based on our review of the plans provided (i.e., PWGC December 11, 2012 Overall Site Plan; AECOM’s January 15, 2014 Lot B and C Base Plan; Bowne’s April 1, 2014 Subgrade Preparation Plan), as well as discussions with BRT and AECOM, we understand that the existing Long Island Rail Road (LIRR) track near the southwest corner of Parcel C is at an approximate 100-foot elevation. The original topographic contours indicate that the southwest portion of Parcel C was at an elevation of about 100 feet and generally sloped downward to the east-northeast to an elevation of somewhat less than 50 feet. Our observations indicate that the majority of the original surface of Parcel C was above elevation 50 feet.

FPM met with AECOM engineers on April 15, 2014 to obtain a better understanding of the track layout and site design. *However they could not provide a sound engineering reason or need for the existing grade of Parcel C to be reduced to approximately 60 feet in the southeast corner of the site and eventually down to 50 feet for majority for the 93-acre parcel.* In addition, even though certain areas of the Parcel are already below the 100-foot elevation at which the existing LIRR track enters in the Southwest corner, *good engineering practice dictates using the excess fill located elsewhere on the site to level the site and thereby reduce the need for excavation and removal of clean virgin material. Our engineering experience indicates that a gradual grade as required*

*to lay the new rail road tracks can be achieved by the 'traditional cut and fill' method to level the overall site so as to minimize the removal of excess soil from the site.*

Excavating, removing and selling of sand (sand mining) in New York State is regulated by the New York State Department of Environmental Conservation (NYSDEC) and requires a permit prior to the start of mining operations. New York State is rich in minerals that are mined for industrial and construction uses. Almost 90 percent of mining in New York involves the excavation of sand, gravel and limestone, which are often processed through screens and crushers and used in concrete, road fill, and construction projects. New York ranks seventh in the nation in the production of construction sand and gravel.

The New York State Legislature enacted Article 23, Title 27 of the Environmental Conservation Law (ECL) of New York State to achieve the policies of the State which are to ensure the environmentally sound, economic development of New York's mineral resources and the return of affected land to productive use for current and future generations. Regulations (6NYCRR Parts 420 – 425) and a permitting program designed to achieve these goals have been established by the NYSDEC. The Mined Land Reclamation Program applies to all excavations from which greater than 1,000 tons, or greater than 750 cubic yards, whichever is less, of mineral(s) are removed, or are proposed to be removed, during 12 successive months. We note that certain excavation or grading operations conducted solely in aid of onsite construction or farming may be exempt from the permitting requirements. However, in this case, as there is no reported plan for onsite construction on Parcel C, other than for the railroad spur, this exception does not appear to apply.

Obtaining a sand mining permit requires submitting a Mining Permit Application, Mined Land Organizational Report, Environmental Assessment Form, and a Mined Land Use Plan to the NYSDEC Regional Office for their review and approval. We have no indications that any of these required documents exist.” (emphasis supplied)

40. Indeed, any remaining question concerning whether the BRT Defendants are merely “*sand mining*”, or are actually grading for purposes of track construction, is made clear by a comparison of the Final Environmental Impact Statement (“FEIS”) for the adjacent Caithness Long Island Energy Center which was constructed on a 95 acre parcel immediately to

the south of the current BRT location. Unlike the BRT Defendants which are “screening” on site, removing, and selling native sand material, in striking contrast, the Caithness FEIS states at Section 15.2 (Exhibit P) that following “*excavation and compaction for foundations for planned buildings, and excavation for and placement/backfilling of underground pipes and conduits...[e]xcavated materials would be stored on their site and reused as fill and topsoil material in final grading to the extent possible*”. (emphasis supplied).

### Summary of Legal Arguments

41. The Court is respectfully directed to the attached Memorandum of Law prepared by the Town’s Special Counsel, Rosenberg Calica & Birney LLP, which demonstrates as follows:

a. The documentary record before the Court leaves little (if any) doubt that the Town is likely to prevail upon its claims that the BRT Defendants, under the guise and pretext of constructing an “*ancillary spur*” to their limited and licensed 28 acre rail yard, are actually conducting environmentally destructive “*sand mining*” on the 93 Acre Parcel. As the documentary exhibits and the expert Declarations of Geologist Stephanie O. Davis, CPG and Engineer Ritu Mody, P.E., both of FPM Group, clearly demonstrate, the BRT Defendants cannot provide “*a sound engineering reason or need*” to lower the grade of virtually the entire 93 Acre Parcel from the 100 foot level at which the existing Long Island Railway tracks will enter the parcel to a grade of 50 feet is a brazen pretext to “*sand mine*” the site by excavating, illegally “*screening*”, and then selling hundreds of thousands of cubic yards of screened sand material and so to reap an estimated \$10 - \$15 million by selling an environmentally sensitive and regulated commodity to third parties. The Town has thus made the required showing of “*(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping*

*decidedly toward the party requesting the preliminary relief*" (Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (citations and quotations omitted). See, Point I of the Town's accompanying Memorandum of Law;

b. The proposed additional trackage and structures to be constructed on the 93 acre parcel are not a "spur" under 49 U.S.C. §10906 and are not otherwise exempt from STB approval requirements. See, Point II of the Town's accompanying Memorandum of Law;

c. Regardless of whether the proposed additional trackage is exempt from STB approval requirements, the Town reserves jurisdiction over non-rail services and facilities not "integrally related" to transportation. The Town also retains extensive "*police power*" (Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005) ("*Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption*"); Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (no ICCTA pre-emption when "*West Palm Beach is acting under the traditionally local police power of zoning and health and safety regulation*"); New York Susquehanna and Western Ry. Corp. v. Jackson, 500 F.3d 238, 252-253 (3d Cir. 2007). See, Point III of the Town's accompanying Memorandum of Law; and

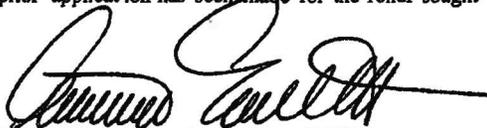
d. The court should dispense entirely with the bond requirement or require only a nominal bond under Fed. R. Civ. P. 65(c). See, Point IV of the Town's accompanying Memorandum of Law.

Conclusion

42. For these reasons, it is respectfully requested that the Court grant a temporary restraining order in the proposed Order to Show Cause submitted herewith and preliminary injunction enjoining and restraining the BRT Defendants from any further excavation, grading, removal of native sand, removal of vegetation, or other construction activities on the 93 Acre Parcel site pending further Order of the Court.

43. Except as noted above, no prior application has been made for the relief sought herein.

Dated: April <sup>24</sup>, 2014



ANNETTE EADERESTO

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

Case No. 14-CV-02286  
(LDW, AKT)

-against-

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

Defendants.

**DECLARATION OF STEPHANIE  
O. DAVIS, CPG IN SUPPORT  
OF TOWN OF BROOKHAVEN'S  
MOTION FOR PRELIMINARY  
INJUNCTION PURSUANT TO  
RULE 65 OF THE FED R. CIV. P.**

-----X

**STEPHANIE O. DAVIS, CPG**, declares pursuant to 28 U.S.C. §1746 under penalty of perjury as follows:

1. I am a Certified Professional Geologist and Senior Project Manager and Vice President of FPM Group-Engineering and Environmental Science ("FPM") which includes both a Professional Engineering Section and Environmental Sciences Section (of which I am Senior Project Manager and Vice President).

2. FPM has been retained to assist Rosenberg Calica & Birney LLP ("RCB"), Special Counsel to the Town of Brookhaven ("Town") in connection with this litigation which concerns the ongoing construction, excavation and development activities by the defendants herein, d/b/a the Brookhaven Railroad ("BRT") to construct what defendants describe as an ancillary railway "spur" on a 93 acre site (the "93 Acre Parcel") which adjoins BRT's previously constructed and operating 28 acre rail facility (the "28 Acre Parcel"). FPM's role is to provide

RCB and the Town with a professional geological and hydro-geological assessment of the environmental impacts of the BRT Defendants' ongoing and planned actions.

3. I have read the accompanying Declaration of Brookhaven Town Attorney Annette Eaderesto, Esq. and its exhibits, I have reviewed all of the various proposed site plans, development plans, grading plans and track construction plans provided to the Town by the BRT Defendants, and I also met personally at FPM's office recently with engineering representatives of AECOM, an engineering firm which has been identified by the BRT Defendants as the principal designers of the proposed track installations on the 93 acre "spur" parcel.

4. I obtained a Bachelor of Science in Geology from Bucknell University in 1981, a Master of Science in Geology from University of Southern California in 1984, I am a Certified Professional Geologist ("CPG"), and I am duly licensed as such in the States of California and Pennsylvania which recognize professional licensing in Geology.

5. I was employed for nearly 10 years between 1984 and 1993 by affiliates of Chevron Oil Company performing various geological activities on behalf of Chevron, and have been employed by FPM Group since 1993 (currently, as a Vice President and Senior Project Manager in FPM's geology section). My experience in geology, hydro-geology, and my personal involvement in and oversight of major environmental and remedial projects is set forth in my Curriculum Vitae annexed (exhibit 1).

6. I incorporate below, as my Declaration under oath, the contents of my Report to RCB dated April 21, 2014 (exhibit 2) in its entirety reading as follows:

"The following information is provided regarding hydrogeology issues as they relate to the Brookhaven Rail Terminal (BRT) site. It is our understanding that much of Parcel C (approximately 93 acres) of the BRT site is presently being cleared of forest and excavated to an elevation of 50 feet above mean sea level (MSL) as part of BRT's track extension project for the ostensible purpose

of aligning the new tracks for a railroad spur on Parcel C with existing tracks. Presumably this target grade is also intended to be useful for the eventual commercial/industrial activities to be conducted within Parcel C. This forest-clearing, sand excavation, and any subsequent filling with materials that are not certified as clean, are likely to impact the underlying Upper Glacial Aquifer, which is a sole-source drinking water aquifer and subject to substantial protective regulations. Certain eventual uses of the BRT site are also likely to impact the aquifer.

The aquifers beneath the BRT site, which include in descending order, the Upper Glacial (water table) aquifer, the Magothy Aquifer, and the Lloyd Aquifer, are designated as Sole-Source Aquifers under the Federal Safe Drinking Water Act of 1974 as they are the only potable water source for Long Island. As such, the US Environmental Protection Agency (EPA) has regulatory jurisdiction over activities above Long Island's aquifers. The New York State Department of Environmental Conservation (NYSDEC) prohibits incompatible uses over Sole Source Aquifers under New York's environmental law (NY Code, Section 15-0514). Incompatible uses include uses involving hazardous wastes or substances (including petroleum) that may ultimately be discharged to groundwater, or the storage of such substances that may contaminate the groundwater. Insofar as the contemplated railroad activities, and any eventual commercial or industrial activities, are conducted on the BRT site and include use or storage of hazardous wastes or hazardous substances (including petroleum) that may ultimately be discharged to or contaminate groundwater, these activities may be in contravention of federal and/or New York environmental laws.

In addition, the BRT site is located in a deep flow recharge area (Hydrogeologic Zone III), as defined in the Long Island Comprehensive Waste Treatment Management Plan of 1978, developed pursuant the Clean Water Act, Section 208 and referred to as the "208 Plan". Deep flow recharge areas are relatively undeveloped and contain groundwater of excellent quality; these are the areas through which the deeper portions of our aquifers are recharged and are necessary to the continued long-term health of our aquifer system. The NYSDEC regulates certain activities in deep flow recharge areas, including landfilling (Long Island Landfill Law, ECL 27-0704). The BRT site also adjoins the south side of the Central Suffolk Pine Barrens Critical Environmental Area (CEA), established by Suffolk County in 1988 for the protection of groundwater resources. Potential groundwater impacts must be considered for activities subject to the State Environmental Quality Review Act (SEQRA) that are located

within CEAs. No such consideration of potential groundwater impacts appears to have been conducted for the current forest-clearing and sand excavation activities on Parcel C or for future railroad, commercial and/or industrial activities.

Groundwater in the Upper Glacial Aquifer is the principal source of water in local wells and is found at an elevation of between 30 and 40 feet MSL beneath the BRT site, with flow to the east-southeast, towards the Carman's River (USGS Water Resources Investigations Report 01-4165, 2000). The planned excavation of much of Parcel C to an elevation of 50 feet MSL will place the new ground surface as little as 10 feet above the top of the Upper Glacial Aquifer. We note that the Carmans River is located within the South Haven County Park and Wertheim National Wildlife Refuge and portions of the river have been designated by the NYSDEC as a scenic river, with associated permit requirements and environmental concerns. Based on the water table elevation and flow direction, it appears that groundwater migrating beneath the BRT property eventually discharges to the Carmans River.

Based on our review of the plans provided (i.e., PWGC December 11, 2012 Overall Site Plan; AECOM's January 15, 2014 Lot B and C Base Plan; Bowne's April 1, 2014 Subgrade Preparation Plan), as well as discussions with BRT and AECOM, we understand that it is planned to clear the existing forest and excavate much of Parcel C to a final grade of approximately 50 feet MSL, which would place the new grade between 10 and 20 feet above the water table surface in this area. It is planned to place fill to support railroad tracks (at a minimum) and to conduct freight railroad activities on Parcel C. The exact nature of these activities has not yet been determined, but presumably will include commercial and industrial activities. These activities will undoubtedly include at least some use and storage of hazardous substances that may impact groundwater quality. To the extent that groundwater becomes impacted beneath the BRT site and migrates to the Carman's River, it has the potential to impact surface water quality in this designated scenic river.

Excavation and removal of up to 50 feet of clean virgin sand and removal of the existing forest from Parcel C effectively removes up to 50 feet of filtering capacity for infiltrating stormwater that presently recharges the aquifers through the surface of Parcel C. Furthermore, the planned and presumed uses on the excavated surface of Parcel C will undoubtedly result in degradation of the quality of stormwater that recharges through Parcel C, the removal of forest will result in an increase in stormwater runoff from the surface of Parcel C, and compaction and paving/construction on

the surface of Parcel C will decrease its recharge capability. The uses on Parcel C will also result in the generation of sanitary waste and may include generation of other wastes to be discharged to the aquifer. Removal of the forest and up to 50 feet of the unsaturated zone sand above the aquifer will significantly reduce the effectiveness of removal of nitrogen, pathogens, and other deleterious materials typically present in sanitary and other wastes that are discharged to onsite underground injection control (UIC) systems. UIC systems will be necessary on Parcel C to manage stormwater, sanitary waste and/or other discharges to the aquifer. Regardless of the installation of UIC systems, the changes associated with removal of the forest, removal of up to 50 feet of clean virgin sand, and eventual railroad/commercial/industrial activities on Parcel C will almost certainly include a degradation of groundwater quality beneath and downgradient of Parcel C.

In contrast to the BRT's removal of up to 50 feet of clean sand overlying the aquifer at Parcel C, at another large project recently constructed in close proximity, the Caithness Energy Center, the materials excavated for construction purposes were stored onsite and reused as fill and topsoil in final grading to the extent possible. This preservation of soil at the Caithness facility will help to protect Long Island's Sole Source Aquifer and is an approach that recognizes the importance of the aquifer to Long Island's drinking water supply. This protective approach is strikingly different than BRT's removal of the protective soil on Parcel C.

In conclusion, the contemplated forest removal and sand excavation activities on Parcel C, some of which are already underway, eventually followed by railroad/commercial/industrial activities, are almost certain to adversely impact Long Island's sole-source drinking water aquifer and may impact the Carmans River, to which groundwater from the Parcel C area discharges. These activities would normally be regulated by the USEPA and/or NYSDEC, and be subject to significant environmental review.

We note that the "Environmental Overview" prepared by Gannett Fleming, Inc. (February 2014) for the proposed expansion (Parcels B and C) of the BRT discussed the sole source aquifer and potential concerns regarding stormwater detention/retention and the need for Spill Prevention Control and Countermeasure (SPCC) Plans for onsite fuel storage. However, this "overview" does not consider the location of the parcels within Hydrogeologic Zone III, their proximity to the CEA, potential impacts to the scenic Carmans River, or the effects of removal of the forest and a substantial portion of the unsaturated zone sand on the quantity and quality of aquifer recharge. These deficiencies seriously reduce

the credibility of this document and indicate that the environmental impacts of the proposed BRT expansion have not been adequately assessed.”

Dated: April 14, 2014



STEPHANIE O. DAVIS, CPG

**EXHIBIT 1**

**Stephanie O. Davis, PG, CPG**



Engineering and Environmental Science



Ms. Davis has diversified experience in geology and hydrogeology. Her professional technical experience includes groundwater, soil, and soil vapor investigations, design and management of soil and groundwater remediation projects, design and installation of groundwater containment systems, design and evaluation of soil vapor mitigation systems, groundwater flow modeling, aquifer testing and interpretation, evaluation of site compliance with environmental regulations, environmental permitting, and personnel training. Ms. Davis presently manages several large-scale investigation and remedial programs, including program scopes, budgets, staffing, and schedules.

Functional Role	Title	Years of Experience
Senior Project Manager	Vice President	30

**Personal Data**

**Education**

M.S./1984/Geology/University of Southern California  
 B.S./1981/Geology/Bucknell University

**Registration and Certifications**

Certified Professional Geologist #9487, (AIPG) 1995  
 California Registered Geologist #5192, 1991  
 Pennsylvania Registered Geologist #PG-000529-G, 1994  
 OSHA – Approved 40 hour Health and Safety Training Course (1990)  
 OSHA - Approved 8 hour Health and Safety Training Refresher Courses (1991-Present)  
 OSHA-Approved 8-hour Site Safety Supervisor Training Course (2008)  
 National Ground Water Association  
 Long Island Association of Professional Geologists  
 USEPA Triad Training for Practitioners

**Employment History**

1993-Present FPM Group  
 1992-1993 Chevron Research and Technology Co.  
 1990-1992 Chevron Manufacturing Co.  
 1984-1990 Chevron Exploration, Land, and Production Company

**Continuing Education**

- o Treatment of Contaminated Soil and Rock
- o Groundwater Pollution and Hydrology
- o Environmental Law and Regulation
- o Remedial Engineering
- o Soil and Foundation Engineering
- o Environmental Geochemistry
- o Project Management Professional (PMP) training

**Detailed Experience**

**MGP Site Experience**

- **Field Team Supervisor. Soil Remediation, Brooklyn Union Coney Island MGP site.** Responsible for coordinating all field activities associated with segregation and removal of lead-paint impacted soil from MGP waste at this NYSDEC-listed MGP site. Conducted pre-excavation waste characterization, implemented HASP, oversaw subcontractor and FPM staff, coordinated with client and NYSDEC, managed waste manifesting, conducted community air monitoring, and prepared remediation report.
- **Field Sampling Services. Soil Investigation, Brooklyn Union Greenpoint MGP site.** Conducted soil sampling and screening activities during tank removal activities at this former MGP facility. Tasks included visual observations, screening with a calibrated PID, soil sampling, interfacing with the client, subcontractors and NYSDEC personnel, and report preparation.
- **Program Manager. Soil Vapor Intrusion Investigation and Mitigation, Brooklyn MGP site.** Developed and implemented a soil vapor intrusion (SVI) investigation following the discovery of chlorinated solvents in soil vapor beneath a shopping center constructed on an MGP site. Managed all scheduling, budget and contract issues. Reviewed results and developed an SVI mitigation plan to address the chlorinated solvent vapors. Oversaw design and installation of a sub-slab depressurization system (SSDS) to address SVI. This work was completed ontime and within budget.

**Site Investigations**

- **Program Manager** for ongoing investigation and remedial projects at several New York State Inactive Hazardous Waste Disposal sites, Voluntary Cleanup Program (VCP) sites, and Brownfield Cleanup Program (BCP) sites. Investigations have included site characterization, Remedial Investigations/Feasibility Studies (RI/FS), and Resource Conservation and Recovery Act (RCRA)

**Stephanie O. Davis, P.G., C.P.G.**

**FPM** group

Engineering and Environmental Science

facility investigations and closures. Remedial services have included contaminated soil removal; ORC and HRC injections; design, installation, and operation of air sparge/soil vapor extraction (AS/SVE) systems and sub-slab depressurization systems (SSDS), capping, and other remedial services.

- **Program Manager, NYS BCP Site, Far Rockaway, NY.** Managed all aspects of pre-application investigation, BCP application, RI Work Plan development, and Citizen Participation Plan (CPP) for a chlorinated solvent site. Responsible for scope development, NYSDEC and NYSDOH coordination, budget, schedule, staffing, and report management.
- **Program Manager, Site Characterization (SC) for NYS Inactive Hazardous Waste Disposal Site, Flushing, NY.** Responsible for SC scope development, budget, schedule, SC Work Plan and report review, staffing, and agency negotiations for a chlorinated solvent site undergoing residential redevelopment.
- **Program Manager** for all Phase I ESA, Phase II investigations, and remediation projects for a major commercial developer on Long Island, New York. Projects have included environmental services associated for the purchase and redevelopment of office buildings, aerospace facilities, former research and development facilities, and large manufacturing plants. Remedial services have included RCRA closures, UIC closures, tank removals, and BCP projects.
- **Program Manager, Remedial Investigation/ Feasibility Study (RI/FS), Levittown, NY.** Managed all aspects of RI/FS for a Class 2 Inactive Hazardous Waste Disposal (Superfund) site involving chlorinated solvents. Responsibilities included RI/FS scope, budget and schedule development, RI/FS work plan, HASP, CAMP, and QAPP, coordination with client, tenants, and regulatory agencies, report review, remedial approach development, and conceptual design.
- **Project Manager, RCRA Facilities Investigation (RFI), Barksdale AFB, LA, AFCEE.** Responsible for all aspects of field program planning, solicitation and selection of subcontractors, mobilization and establishment of a field office, supervising multiple field crews, installation and sampling of monitoring wells, collection and soil samples, data tracking and management and preparation of an RFI report. The scope of work included characterization of the nature and extent of groundwater and soil contamination at thirteen Solid Waste Management Units (SWMUs), performing a base-wide evaluation of background contaminant concentrations, and developing a long-term monitoring (LTM) program for the base.
- **Field Services Manager, UST Investigation, Plattsburgh AFB, NY, AFCEE.** Responsible for field crew training, coordination of sampling crews at multiple sites, sample labeling, handling, tracking, and shipping, field data management and remote field office management. The scope of work included collection of over 450 groundwater samples to characterize groundwater conditions in the vicinity of 150 USTs using a Geoprobe sampling rig, well points, and rapid turnaround-time analysis.
- **Project Manager** for site investigation activities, including soil vapor sampling, soil sampling and analysis, groundwater sampling and analysis, and geotechnical evaluation for numerous sites in Suffolk County, New York. The resulting data were utilized by a major supermarket company in the negotiations for the purchase of the properties and in the property remediation prior to development.
- **Project Manager, Site Investigation, Bronx, NY, NYCT.** Managed field sampling and data analysis activities, including soil vapor analysis, soil sample analysis, and groundwater sampling and analysis at an active commercial bus terminal. Made recommendations for site remediation, including UST removal, soil excavation and disposal, and free-phase product extraction.
- **Project Manager, RCRA Facilities Investigation, City of Richmond, CA.** Prepared RFI work plan, incorporating existing geologic, chemical, and historical data, evaluating newly-acquired site data, and developing recommendations for further investigation and remedial action at a former municipal landfill.
- **Project Manager, Site Investigation, Bay Shore, NY, Manufacturing facility.** Managed onsite and offsite soil and groundwater sampling program. Compiled and evaluated data and prepared a comprehensive report of the investigation results for the Suffolk County Department of Health Services (SCDHS) and NYS Department of Environmental Conservation (NYSDEC). Proposed remediation technologies for onsite soil contamination and onsite and offsite groundwater contamination.
- **Project Manager, Site Investigation, Newark Airport, NJ, FAA.** Managed and conducted a soil and groundwater sampling program adjacent to Runway 29. Analyzed chemical analytical data and developed recommendations.

**Stephanie O. Davis, P.G., C.P.G.**

**FPM** group

Engineering and Environmental Science

- **Project Manager, Remedial Investigation, Richmond Refinery, CA.** Supervised and conducted drilling, soil sampling, cone penetrometer testing, and well installation at a refinery process water effluent treatment system and former municipal landfill.
  - **Senior Hydrogeologist, multiple sites, NY metro area.** Supervised drilling, installation, development, and sampling of monitoring wells at numerous sites in the greater New York metro area. Utilized resulting stratigraphic, hydrologic, and chemical analytical data to evaluate site conditions.
  - **Program Manager, multiple sites, major New York Metro area automobile dealer.** Managed all investigation and remedial activities for a major automobile retailer with multiple facilities. Sites included tanks, petroleum spills, underground injection control (UIC) systems, soil vapor intrusion issues, and hazardous waste management. Responsible for work scope and budget preparation, staffing and oversight, client and regulatory agency interactions, addressing insurance issues, reporting and certification, and project closeouts.
  - **Program Manager, SWTP groundwater monitoring program, Town of East Hampton.** Managed groundwater sampling and reporting for the Scavenger Waste Treatment Plant (SWTP). Responsibilities included oversight of well installation, purging and sampling the SWTP groundwater monitoring wells, and providing data to the Town for reporting purposes.
- Remediation**
- **Program Manager, NYSDEC BCP site, NY City, major real estate developer.** In responsible charge of all investigation and remedial activities at a NYSDEC BCP site in New York City. Prepared the Remedial Investigation and Remedial Work Plan; coordinated with the owner, other contractors, and the NYSDEC; prepared for and conducted citizen participation activities; supervised all waste characterization, profile preparation, and waste management; developed the Final Engineering Report (FER) and Site Management Plan (SMP) for NYSDEC approval; and ensured that all remedial requirements were met such that the Certificate of Completion (COC) was issued. Continuing activities include coordination of the ongoing site management, communications with the NYSDEC and NYSDOH, and preparation of the annual Certification Report.
  - **Program Manager, Major Oil Storage Facility (MOSF) closure, Glen Harbor, NY. Real estate developer.** Responsibilities included coordination of the work scope with the NYSDEC and NCDOH, development of work plans for tanks, UIC, and petroleum spill closure, budget and schedule development, staffing and oversight, reporting and certification, and closeout of all environmental issues such that residential redevelopment could proceed.
  - **Program Manager, Delineation and Remedial Services, NYS Spill Site, St. James, NY.** Responsible for client and agency coordination, budget, schedule, staffing, remedial design and reporting for a petroleum release at a Service Station property with offsite impacts.
  - **Program Manager, RCRA Closure Site, Freeport, NY.** Managed all aspects of RCRA Closure of a former printing facility, including scope, budget and schedule development, Closure Plan, NYSDEC interactions, QAPP, and specifications for contractor services.
  - **Program Manager, Sub-slab depressurization system (SSDS), Brooklyn, NY.** Managed all aspects of SSDS implementation, including delineation sampling, remedial design, budget and schedule, construction services testing, reporting, and O&M manual development for a former dry cleaner site in an active shopping center.
  - **Program Manager, SSDS, Bronx, NY.** Responsible for all aspects of SSDS implementation for a former dry cleaner site in a mixed-use building, including delineation sampling, SSDS design, construction contractor services, testing, reporting, and O&M manual development.
  - **Project Manager, Soil Remediation, Hauppauge, NY. Metal plating facility.** Planned remedial project and managed contractor support for soil remediation. Project was completed and approved by SCDHS.
  - **Remedial Design, AS/SVE projects.** Developed pilot test plans, evaluated pilot test results, and prepared conceptual designs for several air sparge/soil vapor extraction (AS/SVE) systems to treat petroleum and/or chlorinated solvent VOCs. These systems were subsequently installed and Ms. Davis provides ongoing review of system operations and remedial monitoring results.
  - **Program Manager, Waste soil management, Brooklyn, NY. Travelers Insurance.** In responsible charge of several task orders for waste characterization of a 90,000-cy construction soil stockpile at a municipal sewer facility. Responsibilities included development and implementation of Sampling and Analysis Plans

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(SAP), coordination of staffing, review of lab data, preparation of Field Sampling Summary Reports (FSSR), coordination with disposal facilities, and preparation of waste profiles.

- **Program Manager, NYS Inactive Hazardous Waste Disposal (Superfund) site, Hicksville, NY. Property owner.** Responsibilities included developing and implementing pre-demolition investigations, developing and implementing remedial actions (source removal) in conjunction with retail redevelopment, conceptual design and installation of sub-slab depressurization systems (SSDSs), maintaining ongoing OM&M programs.
- **Project Manager, Remedial projects, Patchogue, NY. US Tape.** Designed and performed indoor underground storage tank abandonment program, leaching pool remediation plan, and managed contractor support for closure activities at a manufacturing facility. SCDHS provided oversight and approval.
- **Senior Hydrogeologist, Remedial design for a landfill, Richmond, CA.** Contributed to the design of a groundwater containment and remediation system for a former municipal landfill, including subsurface groundwater barrier walls and extraction wells.
- **Project Manager, Soil remediation, Carle Place, NY, Kimco.** Designed remedial plan and supervised soil remediation activities at an active construction site involving excavation and disposal of 5,000 tons of PCB-, metal-, and petroleum-contaminated soil. NYSDEC oversaw and approved the completed remediation.
- **Project Manager, Groundwater containment system, Richmond, CA.** Coordinated technical aspects of groundwater barrier wall construction, including routing, permitting, design, material selection, and field activities.
- **Project Manager, Multiple UIC investigations and closures, Suffolk and Nassau Counties, NY** Responsible for investigation and remediation of contaminated cesspool and stormwater drain pool in systems. Fully conversant with SCDHS SOP 9-95 and USEPA UIC regulations for investigation and cleanup of leaching pool systems, including Action Levels and Cleanup Standards, groundwater monitoring criteria, and remedial requirements.
- **Project Coordinator, UIC Closure, Hempstead, NY.** Coordinated and supervised all aspects of waste management for a UIC closure, including disposal facility review, waste sampling and classification, manifesting, project closeout, and taxation issues.

#### Hydrogeologic Evaluations

- **Project Manager, well permitting, East Hampton, NY. Private client.** Prepared Engineer's Report for Long Island Well Permit for a 230-gpm irrigation supply well. Responsible for evaluation of well interference, salt water upconing, impacts from contaminants, and other factors affecting the proposed well. Performed well design (gravel pack size, screen size, etc.) for numerous groundwater wells on Long Island. Familiar with sieve analyses, well construction and development methods.
- **Senior Hydrogeologist, groundwater modelling, East Hampton, NY.** Utilized Visual Modflow to evaluate the impact of a contaminant plume on a proposed SCWA wellfield. Model development included evaluation of recharge, aquifer properties, subsurface stratigraphy, boundary conditions, plume source and concentration, and various wellfield locations and pumping rates.
- **Hydrogeologist, aquifer testing, Manhattan, NY. NYCT.** Participated in a multi-day, multi-well aquifer pumping test for NYCT. Responsible for operating and maintaining data logging equipment, coordinating manual water level measurements, and analyzing resulting drawdown data.
- **Hydrogeologist, aquifer evaluation, Brooklyn, NY. NYCT.** Evaluated subsurface geologic conditions for subway site utilizing existing boring logs, topographic, and historic map data.
- **Hydrogeologist, aquifer testing, Queens, NY. NYCT.** Performed slug tests on monitoring wells at an East Side Access site, and evaluated hydrologic properties using the HYDROLOGIC ISOAUX computer program.
- **Hydrogeologist, remedial wells, Deer Park, NY. USEPA.** Supervised drilling, installation and development of groundwater extraction, injection, and monitoring wells at a Superfund site. Interpreted aquifer and well performance from development data and recommended modification of drilling and development procedures.
- **Hydrogeologist, aquifer testing, NYC, NYCT.** Performed aquifer pumping and slug tests and evaluated hydrologic properties using the computer program AQTESOLV.
- **Hydrogeologist, aquifer evaluation, Mattituck Airport, Mattituck, NY.** Performed water level and water quality monitoring at a NYSDEC Superfund site. Constructed groundwater elevation contour maps and utilized chemical analytical data to predict contaminant plume migration.

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- **Senior Hydrogeologist, DEIS services, Lazy Point, NY. Town of East Hampton.** Prepared a detailed evaluation of groundwater conditions and potential impacts for a water extension to Lazy Point for a draft Environmental Impact Statement (DEIS). Evaluated current and historic groundwater data and analytical models to determine potential impacts for both Lazy Point and the drinking water source area and prepared associated portions of the DEIS.

#### Landfills

- **Program Manager, Greenhouse gas monitoring program, Town of Islip, NY.** Responsibilities include scope and budget management, staffing, client and USEPA coordination, reporting review, and troubleshooting.
- **Project Manager, Landfill Closure Investigations, Town of East Hampton, NY.** Prepared Closure Investigation work plans, including Hydrogeologic investigations, methane investigations, surface leachate investigations, and vector investigations. Prepared final Closure Investigation Reports, approved by the NYSDEC.
- **Project Manager, Landfill monitoring networks, Town of East Hampton, NY.** Supervised installation of groundwater and methane monitoring wells at the landfills, including hollow-stem auger and mud-rotary well installations, split-spoon soil sampling and boring log preparation, oversight and interpretation of wireline electric logging, and completion of initial baseline monitoring events.
- **Hydrogeologist, Landfill groundwater monitoring, NJ, private client.** Performed groundwater sampling at a radio tower facility constructed on a landfill. Analyzed results and made recommendations.
- **Hydrogeologist, Landfill gas monitoring, Town of East Hampton, NY.** Conducted methane monitoring at two landfills over a multi-year period.
- **Program Manager, Landfill monitoring programs, Town of East Hampton, NY.** Supervises ongoing groundwater and methane monitoring programs, including field team coordination, communications with the Town, report scheduling, data review, and report review prior to distribution to the client and NYSDEC. Negotiated successfully with NYSDEC for reduced monitoring frequencies based on historic monitoring results.
- **Senior Hydrogeologist, Landfill plume modeling, Town of East Hampton, NY.** Conducted groundwater flow modeling to evaluate the nature and extent of a landfill plume and its fate. Findings were presented at public meetings and were used to determine the configuration of the landfill's groundwater monitoring network.
- **Hydrogeologist, Septage lagoon Superfund site, Town of East Hampton, NY.** Conducted sampling of former septage lagoons at a landfill. Evaluated the resulting data and prepared a delisting petition for this NYSDEC Superfund site.
- **Hydrogeologist, containment system modeling, Richmond, CA.** Used the FLOW PATH modeling program to predict groundwater flow directions and evaluate extraction well locations and pumping rates for a groundwater containment and remediation system at a former municipal landfill.
- **Program Manager, Landfill gas monitoring program, Town of Islip, NY.** Manages monthly methane monitoring for all landfills, including onsite and offsite monitoring wells, methane collection systems, and flare systems. Data is recorded electronically and downloaded to computer for formatting prior to expedited delivery to Town.
- **Program Manager, Landfill monitoring reporting program, Town of Smithtown, NY.** Supervised and reviewed production of quarterly and annual monitoring reports for all monitoring programs at the landfills for Town compliance with NYSDEC requirements, including tabulation and reporting of groundwater and methane monitoring data, solid waste and recycling collection data, yard waste composting operations, and landfill leachate collection and disposal data.
- **Program Manager, Landfill remediation, Town of Huntington, NY.** An historic landfill was removed from parkland under the NYSDEC's ERP. Responsibilities included work scope development, schedule and budget management, staffing, client and regulatory agency coordination and reporting, and report review and certification.

#### Environmental Data Analysis

Ms. Davis has participated in multiple sessions of environmental geochemistry training provided by environmental geochemists, including physical chemistry, thermodynamics, ionic interactions, complexation, biologic effects, and other basic principles. Training also included field sampling procedures and effects on chemical data, chemical analytical methods and equipment, and QA/QC procedures and interpretation. Attended periodic environmental chemistry training sessions hosted by environmental laboratories and participated in hands-on training in data and QA/QC evaluation.

- **Data Evaluation, multiple projects.** Reviewed and evaluated numerous soil, groundwater, product, indoor/ambient air, and soil vapor chemical analytical datasets, including evaluation

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of batch and site-specific QA/QC samples, laboratory narratives, comparison to regulatory agency criteria, historic data, and background data.

- **QAPPs, multiple projects.** Developed and implemented numerous QAPP, including QAPP design, sample delivery group (SDG) evaluations, sampling procedures and sequences, and QA/QC sample preparation/collection.
- **DUSR Preparation, multiple projects.** Prepared Data Usability Summary Reports (DUSRs) for numerous chemical analytical datasets for projects overseen by USEPA, NYSDEC and other regulatory agencies, including soil, groundwater, soil vapor, indoor air, and ambient air datasets.
- **Electronic Data Deliverables, multiple projects.** Implemented protocols and procedures for all FPM sites for which NYSDEC Electronic Data Deliverables (EDDs) are required. Responsibilities included staff training, data package QA/QC, client interactions, budget and schedule impact assessments, and dissemination of EDD training information.
- **Data Evaluation, multiple sites.** Performed forensic assessments of historic environmental chemical analytical data to resolve apparent discrepancies with modern data and other inconsistencies.
- **Leachate test assessments.** Assessed leachate test protocols and results to determine the most applicable methods to evaluate and develop soil cleanup objectives for non-regulated compounds.
- **Organic parameter breakdown assessments.** Interpreted numerous organic parameter datasets to evaluate breakdown sequences, likely original parameters, and rates of degradation.
- **Insitu remediation assessments, multiple sites.** Formulated numerous chemical treatment plans for insitu remediation, including assessment of contaminant concentrations and distribution, chemical processes and indicators, natural attenuation indicators, additional stoichiometric demands, and hydrogeologic factors.

#### Community Impacts

- **Community Monitoring Plans, multiple hazardous waste sites.** Developed Community Air Monitoring Plans (CAMP) for investigation and remediation projects, including monitoring procedures, action levels, and mitigation measures for odors, traffic, noise, dust, and/or vapors with the potential to affect surrounding communities. Each CAMP was reviewed and approved by the NYSDEC and NYSDOH and was implemented under agency oversight. Presented CAMP findings

at numerous community meetings. Addressed community and agency questions and issues

- **Vector Assessments, multiple landfill sites, Long Island, NY.** Evaluated and implemented abatement for vectors (rodents, flies, and seagulls) in association with landfill closures, including inspection and reporting of vector populations, development of vector abatement plans, and assisting Town personnel with vector abatement.
- **Odor Abatement, NYSDEC BCP site, NYC, NY. Major real estate developer.** Developed and implemented an odor abatement plan for highly-odorous soil discovered during a remedial project. The site was surrounded by three public schools; complaints following discovery of odorous soil resulted in a job shutdown until the nuisance was abated. The odor abatement plan was prepared and implemented within 24 hours and involved immediate covering of the odorous soil followed by spot excavation and removal during non-school hours (night work) and the use of odor-controlling foam. The removal was completed within one week without further incident. The NYSDEC and NYSDOH approved the completed work, allowing the job to recommence.
- **Vector Assessment, transfer station, Town of East Hampton, NY.** Conducted inspections of intense fly infestations at a Town transfer station building to identify the locations and migration pathways of flies inside the building and to develop an abatement plan. This plan was successfully implemented and abated the nuisance flies.
- **Soil Vapor Intrusion Assessments, multiple sites.** Developed and implemented air and soil vapor investigations of residential and commercial properties, as approved by the NYSDEC/NYSDOH, to evaluate potential air quality impacts and determine if mitigation or monitoring was necessary. Monitoring/mitigation designs were developed for NYSDEC/NYSDOH approval.
- **CAMP Monitoring, multiple sites.** Conducted odor, dust, noise, and organic vapor monitoring in communities surrounding environmental sites. Data were collected and interpreted in accordance with NYSDEC and/or NYSDOH guidance and the results were submitted to these agencies together with recommendations for mitigation, if appropriate.
- **Project Manager, Environmental data assessment, Windmill Village, Town of East Hampton, NY.** Evaluated environmental data obtained during due diligence testing for a proposed housing development. Recommended additional sampling and confirmed the absence of impacts.

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**Expert Witness/Technical Services**

- **Expert Witness/Technical Services, residential project, Glen Harbor, NY. Private client.** Provided expert witness and technical services regarding environmental conditions and remedial procedures for residential redevelopment of a former oil terminal, including preparing and obtaining NYSDEC and NCDOH approval of remedial work plans, preparing remedial cost estimates and schedules, and providing testimony at a public hearing before the Town Board from which a change of zone was requested. The proposed change of zone, although subject to considerable public opposition, was approved, allowing redevelopment and associated remediation of the property to move forward.
- **Expert Witness/Technical Services, petroleum spill site, Westbury, NY. Private client.** Provided expert witness and technical services to a petroleum company defending NYSDEC cost recovery claims for a petroleum spill. The spill site involved two very large petroleum releases at gasoline stations adjoining the defendant's property. Services provided included evaluating tank tests, groundwater, soil and soil vapor chemical analytical data, petroleum fingerprint data, remediation activities and costs. Prepared numerous detailed timelines of activities, large displays of site information and subsurface conditions, and cost allocation calculations. Conducted a detailed subsurface investigation to evaluate stratigraphic conditions.
- **Expert Technical Services, development site, Village of Larchmont, NY.** Assisted the Village in successfully opposing the construction of a very large superstore in the adjoining community, including evaluating previous environmental investigations, developing cost estimates and scopes of work for a full environmental site assessment, preparing scoping cost estimates for likely remediation scenarios, preparing technical documents in support of the Village's position, and making a presentation at a public hearing. The proposed project was subsequently withdrawn.
- **Expert Hydrogeologist Services, development site, Town of Carmel, NY.** Provided technical evaluation of a proposed water district. The proposed water district would impact existing residents due to limited available water supplies and likely impact on existing wells. The work included evaluation of aquifer pumping tests, determining impacts on nearby wells, assessment of likely increased water demand, preparation of supporting documents, and presentations at project hearings. The proposed project was subsequently conditionally approved by the NYSDEC with

significant modifications to protect the water rights of existing residents.

- **Expert Witness Affidavits, multiple projects.** Prepared affidavits regarding environmental conditions at client properties in support of pending legal actions, including landfill issues, wetlands and navigatable waterway issues, and petroleum spills.
- **Expert Technical Services, road construction projects, Westchester County, NY. Croton Watershed Clean Water Coalition.** Provided technical services to the CWCWC to assess impacts from proposed road construction projects on the Kensico Reservoir and other New York City water supply system facilities. This work included evaluating stormwater pollutant loading calculations, assessing impacts to wetlands, promoting application of more accurate stormwater runoff calculation methods, assessing proposed stormwater management techniques, presenting at public meetings, preparing technical statements for submittal to regulatory agencies, and participating in the NYSDOT SWPPP Guidance committee.
- **Expert Technical Services, solvent plume site, Nassau County, NY. Private client.** Provided technical support to a property owner subject to a USEPA investigation as the potential source of a large chlorinated solvent plume, including evaluation of a plume-wide RI/FS, detailed review of property historic information, multiple meetings with the USEPA, client and counsel, and identification of additional potential source areas.

**Health and Safety**

- **Health and safety monitoring, multiple sites.** Implemented HASP monitoring at investigation and remediation sites during intrusive activities, including calibration and operation of photoionization detector (PID) and flame ionization detector (FID) for organic vapors and combustible gas indicator (CGI) for methane. Compared results to applicable action levels and implemented protective measures as necessary.
- **CAMP monitoring, multiple sites.** Performed community monitoring, including monitoring for noise, particulates (dust), and organic vapors. Recorded observations and compared to applicable action levels. Calibrated and operated noise meters, particulate monitors, and PID/FID.
- **Radiation screening, multiple sites.** Performed screening for radiation at select sites, including operating Geiger counter in different radiation modes and obtaining background readings.

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#### Miscellaneous Projects

- **Phase I ESAs.** Performed numerous Phase I Site Assessments for residential and industrial sites in the metropolitan New York area.
- **Environmental Trainer.** Conducted aquifer pumping and soil vapor extraction test training. Instructed classes for site investigation methods, aquifer pumping test analysis, and risk assessment.
- **Project Management.** Performs a wide range of project management functions, including development and management of project budgets and schedules, coordination of field and office staffing, document preparation, review, editing, and interaction with clients, regulatory, legal, real estate, consultant, and compliance personnel.
- **Field Mapping Studies.** Organized, supervised, and conducted field mapping studies in Alaska.
- **Downhole Logging.** Directed petroleum well site geophysical logging operations and interpreted geophysical well logs.
- **Geophysical Data Interpretation.** Processed and interpreted seismic reflection data and constructed seismic velocity models.
- **Regulatory Evaluations.** Assisted and reviewed regulator's revision of proposed risk assessment-based UST cleanup guidelines. Reviewed proposed USEPA NPDES permits for remediation system effluent.
- **Geologic Mapping.** Constructed and interpreted structural and stratigraphic cross sections, and structure contour, fault surface, isochore, and isopach maps.

#### Regulatory Compliance

- **Site Audits.** Has conducted numerous site audits for regulatory compliance, particularly with respect to Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Responsibility and Liability Act (CERCLA), the Clean Water Act (CWA) and Clean Air Act (CAA).
- **RCRA compliance audits.** Conducted inspections and reporting regarding underground and aboveground storage tanks (USTs and ASTs), hazardous waste storage facilities, waste management and reporting requirements, and hazardous waste storage area closures in compliance with RCRA.
- **CERCLA Compliance.** Oversees and coordinates environmental site assessments (ESAs) for compliance with CERCLA requirements for a wide variety of facilities including operating and historic

industrial sites manufacturing plants, abandoned facilities, and multi-property Brownfield sites.

- **Superfund Sites.** Managed multiple investigation and remedial projects at state and federal Superfund sites. Is very familiar with all phases of CERCLA projects including PA/SI, RI, FS, RD and RA. Has overseen activities at many Superfund sites from investigation through closure.
- **CWA Projects.** Conducted investigation and remediation of Class V underground injection control (UIC) Systems, investigation and acquisition of UIC discharge permits, and discharges into surface water bodies.
- **CAA Compliance Projects.** Conducted facility investigations for emissions sources, including paint booths, fume hoods, process discharges and other point sources. Sampled and evaluated remediation system discharges for CAA compliance, recommended emissions treatment when required.

#### Representative DOD Projects

- **Barksdale RFI, Barksdale AFB, LA, \$520K-Lead Geologist for RFI for multiple Base-wide sites at Barksdale AFB, including landfills, petroleum spills, fire training areas, sewage treatment plans, and chemical spills. Managed field crews and sampling of soil, groundwater, and waste, performed sample and waste management, and coordinated with Base representatives. Prepared RFI Report, including analytical data reports, CS, and recommendations.**
- **Barksdale LTM Program, Barksdale AFB, LA, \$1.7M-Lead Geologist for LTM Program for Base-wide Barksdale groundwater, including landfills, petroleum spills, fire training areas, sewage treatment plants, and chemical spills. Supervised field crews, managed samples and waste, prepared LTM Reports and made recommendations for LTM optimization.**
- **Site Characterization, Plattsburgh AFB, NY, \$720K-Field Team Leader for SC investigation of fuel oil USTs and petroleum spills at Base housing, officers' quarters, and support building prior to transition of these areas to other uses. Working for AFCEE, developed and conducted an SC for over 200 USTs, including soil and groundwater sampling to identify petroleum contamination. Supervised several field crews in an accelerated sampling program to complete the SC prior to winter conditions. Prepared SC Report submitted to and approved by the NYSDEC.**

**EXHIBIT 2**

**FPM** group \_\_\_\_\_ Engineering and Environmental Science

FPM Group, Ltd.  
FPM Engineering Group, P.C.  
*formerly Fanning, Phillips and Molnar*

CORPORATE HEADQUARTERS  
909 Marconi Avenue  
Ronkonkoma, NY 11779  
631/737-6200  
Fax 631/737-2410

VIA EMAIL

April 21, 2014

Robert M. Calica, Esq.  
Rosenberg Calica & Birney LLP  
100 Garden City Plaza, Suite 408  
Garden City, NY 11530

Re: **Brookhaven Rail Terminal  
205 Sills Road, Yaphank, NY  
Hydrogeology Information  
FPM File No. 1151g-14-01**

Dear Mr. Calica,

The following information is provided regarding hydrogeology issues as they relate to the Brookhaven Rail Terminal (BRT) site. It is our understanding that much of Parcel C (approximately 93 acres) of the BRT site is presently being cleared of forest and excavated to an elevation of 50 feet above mean sea level (MSL) as part of BRT's track extension project for the ostensible purpose of aligning the new tracks for a railroad spur on Parcel C with existing tracks. Presumably this target grade is also intended to be useful for the eventual commercial/industrial activities to be conducted within Parcel C. This forest-clearing, sand excavation, and any subsequent filling with materials that are not certified as clean, are likely to impact the underlying Upper Glacial Aquifer, which is a sole-source drinking water aquifer and subject to substantial protective regulations. Certain eventual uses of the BRT site are also likely to impact the aquifer.

The aquifers beneath the BRT site, which include in descending order, the Upper Glacial (water table) aquifer, the Magothy Aquifer, and the Lloyd Aquifer, are designated as Sole-Source Aquifers under the Federal Safe Drinking Water Act of 1974 as they are the only potable water source for Long Island. As such, the US Environmental Protection Agency (EPA) has regulatory jurisdiction over activities above Long Island's aquifers. The New York State Department of Environmental Conservation (NYSDEC) prohibits incompatible uses over Sole Source Aquifers under New York's environmental law (NY Code, Section 15-0514). Incompatible uses include uses involving hazardous wastes or substances (including petroleum) that may ultimately be discharged to groundwater, or the storage of such substances that may contaminate the groundwater. Insofar as the contemplated railroad activities, and any eventual commercial or industrial activities, are conducted on the BRT site and include use or storage of hazardous wastes or hazardous substances (including petroleum) that may ultimately be discharged to or

Robert M. Calica, Esq.

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contaminate groundwater, these activities may be in contravention of federal and/or New York environmental laws.

In addition, the BRT site is located in a deep flow recharge area (Hydrogeologic Zone III), as defined in the Long Island Comprehensive Waste Treatment Management Plan of 1978, developed pursuant to the Clean Water Act, Section 208 and referred to as the "208 Plan". Deep flow recharge areas are relatively undeveloped and contain groundwater of excellent quality; these are the areas through which the deeper portions of our aquifers are recharged and are necessary to the continued long-term health of our aquifer system. The NYSDEC regulates certain activities in deep flow recharge areas, including landfilling (Long Island Landfill Law, ECL 27-0704). The BRT site also adjoins the south side of the Central Suffolk Pine Barrens Critical Environmental Area (CEA), established by Suffolk County in 1988 for the protection of groundwater resources. Potential groundwater impacts must be considered for activities subject to the State Environmental Quality Review Act (SEQRA) that are located within CEAs. No such consideration of potential groundwater impacts appears to have been conducted for the current forest-clearing and sand excavation activities on Parcel C or for future railroad, commercial and/or industrial activities.

Groundwater in the Upper Glacial Aquifer is the principal source of water in local wells and is found at an elevation of between 30 and 40 feet MSL beneath the BRT site, with flow to the east-southeast, towards the Carmans River (USGS Water Resources Investigations Report 01-4165, 2000). The planned excavation of much of Parcel C to an elevation of 50 feet MSL will place the new ground surface as little as 10 feet above the top of the Upper Glacial Aquifer. We note that the Carmans River is located within the South Haven County Park and Wertheim National Wildlife Refuge and portions of the river have been designated by the NYSDEC as a scenic river, with associated permit requirements and environmental concerns. Based on the water table elevation and flow direction, it appears that groundwater migrating beneath the BRT property eventually discharges to the Carmans River.

Based on our review of the plans provided (i.e., PWGC December 11, 2012 Overall Site Plan; AECOM's January 15, 2014 Lot B and C Base Plan; Bowne's April 1, 2014 Subgrade Preparation Plan), as well as discussions with BRT and AECOM, we understand that it is planned to clear the existing forest and excavate much of Parcel C to a final grade of approximately 50 feet MSL, which would place the new grade between 10 and 20 feet above the water table surface in this area. It is planned to place fill to support railroad tracks (at a minimum) and to conduct freight railroad activities on Parcel C. The exact nature of these activities has not yet been determined, but presumably will include commercial and industrial activities. These activities will undoubtedly include at least some use and storage of hazardous substances that may impact groundwater quality. To the extent that groundwater becomes impacted beneath the BRT site and migrates to the Carmans River, it has the potential to impact surface water quality in this designated scenic river.

Excavation and removal of up to 50 feet of clean virgin sand and removal of the existing forest from Parcel C effectively removes up to 50 feet of filtering capacity for infiltrating stormwater that presently recharges the aquifers through the surface of Parcel C. Furthermore, the planned and presumed uses on the excavated surface of Parcel C will undoubtedly result in degradation of the quality of stormwater that recharges through Parcel C, the removal of forest will result in an increase in stormwater runoff from the surface of Parcel C, and compaction and

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paving/construction on the surface of Parcel C will decrease its recharge capability. The uses on Parcel C will also result in the generation of sanitary waste and may include generation of other wastes to be discharged to the aquifer. Removal of the forest and up to 50 feet of the unsaturated zone sand above the aquifer will significantly reduce the effectiveness of removal of nitrogen, pathogens, and other deleterious materials typically present in sanitary and other wastes that are discharged to onsite underground injection control (UIC) systems. UIC systems will be necessary on Parcel C to manage stormwater, sanitary waste and/or other discharges to the aquifer. Regardless of the installation of UIC systems, the changes associated with removal of the forest, removal of up to 50 feet of clean virgin sand, and eventual railroad/commercial/industrial activities on Parcel C will almost certainly include a degradation of groundwater quality beneath and downgradient of Parcel C.

In contrast to the BRT's removal of up to 50 feet of clean sand overlying the aquifer at Parcel C, at another large project recently constructed in close proximity, the Caithness Energy Center, the materials excavated for construction purposes were stored onsite and reused as fill and topsoil in final grading to the extent possible. This preservation of soil at the Caithness facility will help to protect Long Island's Sole Source Aquifer and is an approach that recognizes the importance of the aquifer to Long Island's drinking water supply. This protective approach is strikingly different than BRT's removal of the protective soil on Parcel C.

In conclusion, the contemplated forest removal and sand excavation activities on Parcel C, some of which are already underway, eventually followed by railroad/commercial/industrial activities, are almost certain to adversely impact Long Island's sole-source drinking water aquifer and may impact the Carmans River, to which groundwater from the Parcel C area discharges. These activities would normally be regulated by the USEPA and/or NYSDEC, and be subject to significant environmental review.

We note that the "Environmental Overview" prepared by Gannett Fleming, Inc. (February 2014) for the proposed expansion (Parcels B and C) of the BRT discussed the sole source aquifer and potential concerns regarding stormwater detention/retention and the need for Spill Prevention Control and Countermeasure (SPCC) Plans for onsite fuel storage. However, this "overview" does not consider the location of the parcels within Hydrogeologic Zone III, their proximity to the CEA, potential impacts to the scenic Carmans River, or the effects of removal of the forest and a substantial portion of the unsaturated zone sand on the quantity and quality of aquifer recharge. These deficiencies seriously reduce the credibility of this document and indicate that the environmental impacts of the proposed BRT expansion have not been adequately assessed.

If you have any questions, please do not hesitate to contact me at (631) 737-6200, ext. 228.

Very truly yours,

  
Stephanie O. Davis, CPG  
Senior Project Manager  
Vice President

SOD:sod

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**FPM**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,  
  
Plaintiff,

Case No. 14-CV-02286  
(LDW, AKT)

-against-

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

**DECLARATION OF RITU  
MODY, P.E. IN SUPPORT  
OF TOWN OF BROOKHAVEN’S  
MOTION FOR PRELIMINARY  
INJUNCTION PURSUANT TO  
RULE 65 OF THE FED R. CIV. P.**

Defendants.

-----X

**RITU MODY, P.E.**, declares pursuant to 28 U.S.C. §1746 under penalty of perjury as follows:

1. I am a New York Licensed Professional Engineer employed by FPM Group-Engineering and Environmental Science (“FPM”).

2. FPM has been retained to assist Rosenberg Calica & Birney LLP (“RCB”), Special Counsel to the Town of Brookhaven (“Town”) in connection with this litigation which concerns the ongoing construction, excavation and development activities by the defendants herein, d/b/a the Brookhaven Railroad (“BRT”) to construct what defendants describe as an ancillary railway “spur” on a 93 acre site (the “93 Acre Parcel”) which adjoins BRT’s previously constructed and operating 28 acre rail facility (the “28 Acre Parcel”). FPM’s role is to provide RCB and the Town with a professional engineering assessment of the impacts of the BRT Defendants’ actions.

3. In this regard, I have read the accompanying Declaration of Brookhaven Town Attorney Annette Eaderesto, Esq. and its exhibits, I have reviewed all of the various proposed site plans, development plans, grading plans and track construction plans provided to the Town by the

{00131310-1}

BRT Defendants, and I also met personally at FPM's office recently with engineering representatives of AECOM, an engineering firm which has been identified by the BRT Defendants as the principal designers of the proposed track installations on the 93 acre "spur" parcel.

4. I obtained a Bachelor of Science and Chemical Engineering from University of Bombay and obtained a Master of Science in Environmental Sciences from Rutgers University in 2000, and have been a New York licensed Professional Engineer since 2009. A copy of my Curriculum Vitae is annexed (exhibit 1).

5. I incorporate below, as my Declaration under oath, the contents of my Report to RCB dated April 22, 2014 (exhibit 2) in its entirety reading as follows:

"It is our understanding that much of Parcel C (approximately 93 acres) of the BRT site is presently being cleared of forest and excavated to an elevation of 50 feet above mean sea level (MSL) as part of BRT's track extension project so as to align the new tracks for a rail road spur on Parcel C with existing tracks. Based on our review of the plans provided (i.e., PWGC December 11, 2012 Overall Site Plan; AECOM's January 15, 2014 Lot B and C Base Plan; Bowne's April 1, 2014 Subgrade Preparation Plan), as well as discussions with BRT and AECOM, we understand that the existing Long Island Rail Road (LIRR) track near the southwest corner of Parcel C is at an approximate 100-foot elevation. The original topographic contours indicate that the southwest portion of Parcel C was at an elevation of about 100 feet and generally sloped downward to the east-northeast to an elevation of somewhat less than 50 feet. Our observations indicate that the majority of the original surface of Parcel C was above elevation 50 feet.

FPM met with AECOM engineers on April 15, 2014 to obtain a better understanding of the track layout and site design. However they could not provide a sound engineering reason or need for the existing grade of Parcel C to be reduced to approximately 60 feet in the southeast corner of the site and eventually down to 50 feet for majority for the 93-acre parcel. In addition, even though certain areas of the Parcel are already below the 100-foot elevation at which the existing LIRR track enters in the Southwest corner, good engineering practice dictates using the excess fill located elsewhere on the site to level the site and thereby reduce the need for excavation and removal of clean virgin material. Our engineering experience indicates that a gradual grade as required to lay the new rail road tracks can be

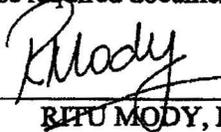
achieved by the "traditional cut and fill" method to level the overall site so as to minimize the removal of excess soil from the site.

Excavating, removing and selling of sand (sand mining) in New York State is regulated by the New York State Department of Environmental Conservation (NYSDEC) and requires a permit prior to the start of mining operations. New York State is rich in minerals that are mined for industrial and construction uses. Almost 90 percent of mining in New York involves the excavation of sand, gravel and limestone, which are often processed through screens and crushers and used in concrete, road fill, and construction projects. New York ranks seventh in the nation in the production of construction sand and gravel.

The New York State Legislature enacted Article 23, Title 27 of the Environmental Conservation Law (ECL) of New York State to achieve the policies of the State which are to ensure the environmentally sound, economic development of New York's mineral resources and the return of affected land to productive use for current and future generations. Regulations (6NYCRR Parts 420 – 425) and a permitting program designed to achieve these goals have been established by the NYSDEC. The Mined Land Reclamation Program applies to all excavations from which greater than 1,000 tons, or greater than 750 cubic yards, whichever is less, of mineral(s) are removed, or are proposed to be removed, during 12 successive months. We note that certain excavation or grading operations conducted solely in aid of onsite construction or farming may be exempt from the permitting requirements. However, in this case, as there is no reported plan for onsite construction on Parcel C, other than for the railroad spur, this exception does not appear to apply.

Obtaining a sand mining permit requires submitting a Mining Permit Application, Mined Land Organizational Report, Environmental Assessment Form, and a Mined Land Use Plan to the NYSDEC Regional Office for their review and approval. We have no indications that any of these required documents exist."

Dated: April 24, 2014



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RIPU MODY, P.E.

# EXHIBIT 1

**Ritu A. Mody, P.E., LEED® Green Assoc.**

**FPM** group \_\_\_\_\_ Engineering and Environmental Science



Ms. Mody has environmental engineering experience in several areas including environmental impacts/assessments, evaluation of site compliance with environmental regulations and environmental permitting; soil, air and groundwater investigations at various hazardous waste sites and air dispersion modeling.

Functional Role	Title	Years of Experience
Environmental Engineer	Environmental Engineer	14

**Personal Data**

**Education**

M.S./Environmental Sciences/2000  
 B.S./Chemical Engineering/1998

**Registration and Certifications**

Professional Engineer/New York State  
 LEED® Green Associate/2011  
 NYSDEC Stormwater Qualified Inspector Training  
 OSHA-approved 40-hr Health & Safety Training  
 OSHA-approved 8-hr Refresher Training  
 OSHA-approved 8-hr HAZWOPER Supervisor Training

**Employment History**

2001-present FPM Group  
 2000-2001 Langan Engineering and Environmental Services, Inc.

**Detailed Experience**

**Site Investigation/Remediation**

- Provided engineering and environmental services during remediation of a former landfill situated in the Town of Huntington, NY as part of NYS Brownfield Cleanup Program. The project included an historic landfill and restoration of the site to park use. Work included preparing bidding and contract documents, meeting the Town, NYSDEC and other agencies for permitting, as well as providing oversight and monitoring during remediation. Responsibilities included daily reporting to the owner, waste manifesting as well as coordination among multiple on-site contractors.
- Performed Phase I Environmental Site Assessment (ESA) for an industrial site in Brooklyn, NY. Phase I ESA tasks included site inspections, evaluation of state and federal databases, records review at local and state agencies and report preparation. Phase I led to Phase II investigation which included a geophysical survey, soil & groundwater monitoring and remediation activities including soil excavation, and free product recovery. Provided oversight and monitoring during remediation.
- Worked with NYSOGS and NYSDEC to remediate prioritized waste tire dump sites across NY State. Developed plans and specifications for processing

the waste tire material into shred material to be used by NYSDOT. Also assisted NYSOGS with bidding phase services including contractor award and construction/ remediation/restoration/oversight.

- Performed landfill gas monitoring at various landfill locations in Long Island to determine levels of methane, oxygen, and carbon dioxide in the subsurface and uploaded data to database for analysis and reporting.
- Collected groundwater samples as a part of long-term monitoring projects at several landfills in Suffolk County, NY.
- Performed site investigation to address the petroleum spill issue for a New York State Correctional facility located at Fishkill, New York. The entire contaminated area was excavated and replaced with un-contaminated soil. Collected end-point samples at various locations in the contaminated area to confirm the completion of remediation and prepared a Closure Report for submittal to the NYSDEC.
- Performed soil and groundwater sampling for several spills associated with storage of diesel fuel for a corrugated box manufactures in Maspeth, NY. Remediation activities included excavation, ORC and Regenox injection and routine groundwater monitoring to evaluate the impact of the spill.
- Performed site investigation to identify potential sources of volatile organic compounds in the basement and the subsurface outside the basement for a corrugated box manufacturer in Maspeth, NY. Performed groundwater and soil sampling for various contaminants (chlorinated VOCs, Metals, SVOCs) to evaluate site contamination.
- As part of a property transaction, performed a Phase II Investigation in New Hyde Park, NY. A geophysical survey as well as numerous soil borings were performed to confirm the presence/locations of known of suspected USTs as well as to evaluate potential petroleum releases on the facility.
- Performed site investigation for a housing development to address a petroleum spill issue at their Stream Generation Plant in Manhattan, NY. Prepared and executed the NYSDEC approved work plan to delineate the extent of the petroleum contamination for the open spill.

**Ritu A. Mody, P.E., LEED® Green Assoc.**

# **FPM** group \_\_\_\_\_ Engineering and Environmental Science

- Supervised numerous boring and drilling activities at Englewood Cliffs, NJ. Performed soil and/or water sampling at various hazardous waste/hazardous substance sites.
- Worked on NJDEP projects that focused on the integration of multiple chemicals emitted from multiple facilities and studied the health effects of the chemicals on the community.

## **Design**

- Designed a sub-slab depressurization system (SSDS) for a 4,000 sf vacant office building on a 1-acre parcel that was utilized as a municipal landfill by the City of Peekskill. The design involved horizontal wells and blower system to prevent potential methane gas intrusion inside the building which was being converted to an outpatient treatment facility by DASNY and NYS Office of Alcoholism and Substance Abuse Services (OASAS).
- As a Village of Lake Success environmental consultant, involved in a groundwater pump and treat system design review as well as review of the quarterly OU-1 and OU-2 remedial system operation, maintenance and monitoring reports.
- Reviewed drawings and provided oversight for construction of an SSDS system for a 1.4 million sf facility of a 94-acre parcel in the Village of Lake Success and Town of North Hempstead.
- Designed repairs to failing on-site sewage disposal systems at U.S. Coast Guard facilities in Long Island, NY. This included evaluating alternative design options to traditional gravity systems (e.g. septic tanks and leaching pools) including pump stations and shallow plastic infiltration/trench systems.
- Designed and prepared application package for conventional sewage disposal systems for several private and government agencies including evaluating transfer of credit option and variance application.
- Designed a new sewer connection for a flavor manufacturing facility in NY. The design of the sewer connection involved a detailed survey of the sewer route along major roadways, pretreatment design for wastewater generated inside the facility and design of piping.
- Conventional subsurface sewage disposal system for a NYCT substation in Station Island, NY.
- Designed a new track and field athletic complex at the US Coast Guard Academy in New London, CT. The project involved the replacement of an existing 6-lane track with synthetic type running surface, separate throwing events and a full size athletic playing field with a synthetic turf surface in the center of the track.

- Hazardous material storage area design for an antenna manufacturer in accordance with Suffolk County regulations and containment provisions.
- Worked on a project associated with remediating prioritized waste tire dump sites on Long Island and within the mid Hudson and northern New York regions.

## **Regulatory Compliance/Permitting**

- Prepared and/or reviewed numerous Spill Prevention Control and Countermeasure Plans (SPCCPs) in accordance with 40 CFR Part 112. The plan provides a framework to prevent, minimize, and to control and contain spills of petroleum and other hazardous substances at the facility.
- Air permitting and associated reporting including Title V air permits; new source review; seasonal variance applications, emission statements; annual and semi-annual compliance certifications; and air facility registrations.
- Prepared application and plans for Suffolk County Department of Health Services (SCDHS) Article 12 Toxic and Hazardous Material Storage Permit for several facilities including: Firework Manufacturer in Brooklyn, NY; Air Freshener Manufacturer in Farmingdale, NY; Metal Part Manufacturer in Melville, NY; and State Park Facility located in Belmont, NY.
- Performed RCRA compliance activities involving waste stream characterizations; waste minimizations; pollution prevention; manifest tracking; preparation of quarterly and annual reports; and training.
- Prepared hazardous waste closure plans in accordance with 6NYCRR 373-3.
- Reviewed and updated a RCRA Part B Permit Application for compliance with 40 CFR Part 270 and NJ Hazardous Waste Regulations for a hazardous waste storage building at McGuire Air Force Base.
- Assisted in reviewing NIOSH and EPA ambient air sampling methods for release of air contaminants (VOCs, SVOCs, ammonia, formaldehyde, and mercury) to obtain permit for a medical waste sterilization system in Brooklyn, NY.
- Prepared EPCRA-required toxic chemical release inventory (TRI) report for a manufacturing facility in Bayshore, NY.

**Ritu A. Mody, P.E., LEED® Green Assoc.**

# **FPM** group ————— Engineering and Environmental Science

- Performed UST Engineering Study for Nassau and Suffolk County. Included site investigations and code review (as per NYSDEC, SCDOH, NCDOH, NFFPA agencies) to identify non-compliance issues. Prepared a report detailing deficiencies, solutions and associated costs.
- Studied the exposure of individuals to various air contaminants using personal air monitors. Prepared samples for the field test and also performed leak checks on the personal air monitors. Designed a poster in Arcview depicting the selected area with local contaminant sources including car repair shops, gas stations, and dry cleaners.

## **Environmental Impact Assessment**

- Prepared an environmental assessment (EA) in accordance with the requirements of National Environmental Policy Act (NEPA) and its implementing regulations (40 CFR 1500 et seq) to assess the potential environmental effects of implementing the proposed dam rehabilitation work at the Mine Lake Dam in West Point for the United States Army Garrison.
- Assisted in preparing several environmental assessments (EA) and Finding of No Significant Impacts (FONSI) in accordance with the Army Regulation (AR) 200-2 and the National Environmental Policy Act (NEPA) for projects involving the construction/expansion of military reservations at military bases on the island of Oahu in Hawaii. These include the facilities at Schofield Barracks, Helemano Military Reservation and Aliamanu Military Reservation.
- Performed a historic investigation of numerous structures associated with the World War II era for the USDA in Plum Island, NY. The work included analysis of existing conditions for all the structures (64) as well as recommendations for the stabilization/maintenance of all the structures and equipments.

## **Hydrology**

- Hydrologist consultant to New York City Transit (NYCT) involving numerous drainage studies and investigation of mitigation measures for stormwater and groundwater issues at bus depots and subway station.
- Evaluated Stormwater management alternatives for the development of a new bus depot in Staten Island, NY. Based on series of percolation tests & site geology review, designed a temporary on-site

stormwater retention basin to capture the rainfall in accordance with NYCDEP & NYSDEC regulations. As part of the project, also designed a UST for storage of rainwater runoff to be used for bus washing as well as evaluated and recommended alternate water sources.

- Investigated leaks at the New South Ferry station in Manhattan, NY and prepared an engineering report to alleviate the water infiltration problem by investigating different dewatering solutions.
- As part of NYCT's MS4 permit for discharges associated with industrial activity, collected stormwater runoff samples and evaluated the water quality of the runoff from the NYCT's property.

- For a new railroad station parking lot in Staten Island, NY reviewed the design drawings for compliance with NYSDEC Stormwater Management Design Manual (SMD) and prepared a NOI and SWPPP for the construction activity.

- Performed dye testing for several NYCT facilities in NYC.

- Evaluated porous pavement as a design alternative to handle stormwater runoff for a proposed NYCT bus depot parking lot in Bronx, NY. The work involved performing permeability tests for the newly installed porous pavement.

- Evaluation and rehabilitation of groundwater well pumping stations via downhole camera videotaping, riser swab cleaning and high velocity jetting.

## **Modeling**

- As a consultant to the Town of Greenburgh, NY performed drainage calculations and modeling (TR-55 and US Army Corps HEC-HMS software) for the 2, 10, 25, and 100 year storm events to analyze peak flow and runoff volumes generated under pre-existing and post construction activities.

- Performed air dispersion modeling for selected facilities in Newark, NJ and Phillipsburg, NJ using the ISCLT3 model.

- Experienced database management with Arcview (GIS)

## **Health and Safety**

- Performed health and safety monitoring at investigation and remediation sites during intrusive activities. Monitoring included calibration and operation of photoionization detector (PID) and flame-ionization detector (FID) for organic vapors and combustible gas indicator (CGI) for methane. Compared results to applicable action levels and

**Ritu A. Mody, P.E., LEED® Green Assoc.**

**FPM** group \_\_\_\_\_ Engineering and Environmental Science

took preventative/protective measures as necessary.

- Performed community monitoring, including monitoring for noise, particulates (dust), and organic vapors. Recorded observations and compared to applicable action levels. Familiar with calibration and operation of noise meters, particulate monitors, and PID/FID.
- Performed screening for radiation at select sites. Familiar with operation of Geiger counter in different radiation modes and with background readings.

#### **Solid Waste Management**

- Assisted the Town of Riverhead to update their 2005 Solid Waste Management Plan (SWMP) to incorporate comments received by NYSDEC aimed at consistency between the SWMP & Comprehensive Recycling Analysis (CRA).
- Assisted in estimating the remaining volume and footprint for the Youngs Avenue Landfill which was in full-scale reclamation mode. Performed field activities based on a boring and excavation plan developed which included sampling, preparation of boring logs, test pit logs, etc. Utilizing field data as well as existing survey information, performed manual volume calculations using average end sections.
- Worked with USDA to prepare plans and specifications involving removal and disposal of over 10,000 cy of construction and demolition debris at various waste management areas on Plum Island, NY
- Performed field activities including sampling and soil borings to evaluate the nature and extent of the in-site petroleum contamination that was discovered at the Youngs Ave Landfill during reclamation activities.

## EXHIBIT 2

**FPM** group \_\_\_\_\_ Engineering and Environmental Science

FPM Group, Ltd.  
FPM Engineering Group, P.C.  
*formerly Fanning, Phillips and Molnar*

CORPORATE HEADQUARTERS  
909 Marconi Avenue  
Ronkonkoma, NY 11779  
631/737-8200  
Fax 631/737-2410

**VIA EMAIL**

April 22, 2014

Robert M. Calica, Esq.  
Rosenberg Calica & Birney LLP  
100 Garden City Plaza, Suite 408  
Garden City, NY 11530

Re: **Brookhaven Rail Terminal  
205 Sills Road, Yaphank, NY  
Sand Mining Permit Information  
FPM File No. 1151g-14-02**

Dear Mr. Calica,

The following information is provided regarding sand-mining regulatory issues as they relate to the Brookhaven Rail Terminal (BRT) site. It is our understanding that much of Parcel C (approximately 93 acres) of the BRT site is presently being cleared of forest and excavated to an elevation of 50 feet above mean sea level (MSL) as part of BRT's track extension project so as to align the new tracks for a rail road spur on Parcel C with existing tracks. Based on our review of the plans provided (i.e., PWGC December 11, 2012 Overall Site Plan; AECOM's January 15, 2014 Lot B and C Base Plan; Bowne's April 1, 2014 Subgrade Preparation Plan), as well as discussions with BRT and AECOM, we understand that the existing Long Island Rail Road (LIRR) track near the southwest corner of Parcel C is at an approximate 100-foot elevation. The original topographic contours indicate that the southwest portion of Parcel C was at an elevation of about 100 feet and generally sloped downward to the east-northeast to an elevation of somewhat less than 50 feet. Our observations indicate that the majority of the original surface of Parcel C was above elevation 50 feet.

FPM met with AECOM engineers on April 15, 2014 to obtain a better understanding of the track layout and site design. However they could not provide a sound engineering reason or need for the existing grade of Parcel C to be reduced to approximately 60 feet in the southeast corner of the site and eventually down to 50 feet for majority for the 93-acre parcel. In addition, even though certain areas of the Parcel are already below the 100-foot elevation at which the existing LIRR track enters in the Southwest corner, good engineering practice dictates using the excess fill located elsewhere on the site to level the site and thereby reduce the need for excavation and removal of clean virgin material. Our engineering experience indicates that a gradual grade as required to lay the new rail road tracks can be achieved by the "traditional cut and fill" method to level the overall site so as to minimize the removal of excess soil from the site.

Robert M. Calica, Esq.

-2-

April 22, 2014

Excavating, removing and selling of sand (sand mining) in New York State is regulated by the New York State Department of Environmental Conservation (NYSDEC) and requires a permit prior to the start of mining operations. New York State is rich in minerals that are mined for industrial and construction uses. Almost 90 percent of mining in New York involves the excavation of sand, gravel and limestone, which are often processed through screens and crushers and used in concrete, road fill, and construction projects. New York ranks seventh in the nation in the production of construction sand and gravel.

The New York State Legislature enacted Article 23, Title 27 of the Environmental Conservation Law (ECL) of New York State to achieve the policies of the State which are to ensure the environmentally sound, economic development of New York's mineral resources and the return of affected land to productive use for current and future generations. Regulations (6NYCRR Parts 420 – 425) and a permitting program designed to achieve these goals have been established by the NYSDEC. The Mined Land Reclamation Program applies to all excavations from which greater than 1,000 tons, or greater than 750 cubic yards, whichever is less, of mineral(s) are removed, or are proposed to be removed, during 12 successive months. We note that certain excavation or grading operations conducted solely in aid of onsite construction or farming may be exempt from the permitting requirements. However, in this case, as there is no reported plan for onsite construction on Parcel C, other than for the railroad spur, this exception does not appear to apply.

Obtaining a sand mining permit requires submitting a Mining Permit Application, Mined Land Organizational Report, Environmental Assessment Form, and a Mined Land Use Plan to the NYSDEC Regional Office for their review and approval. We have no indications that any of these required documents exist.

If you have any questions, please do not hesitate to contact me at (631) 737-6200, ext. 220.

Very truly yours,



Ritu Mody, P.E., LEED Green Assoc.

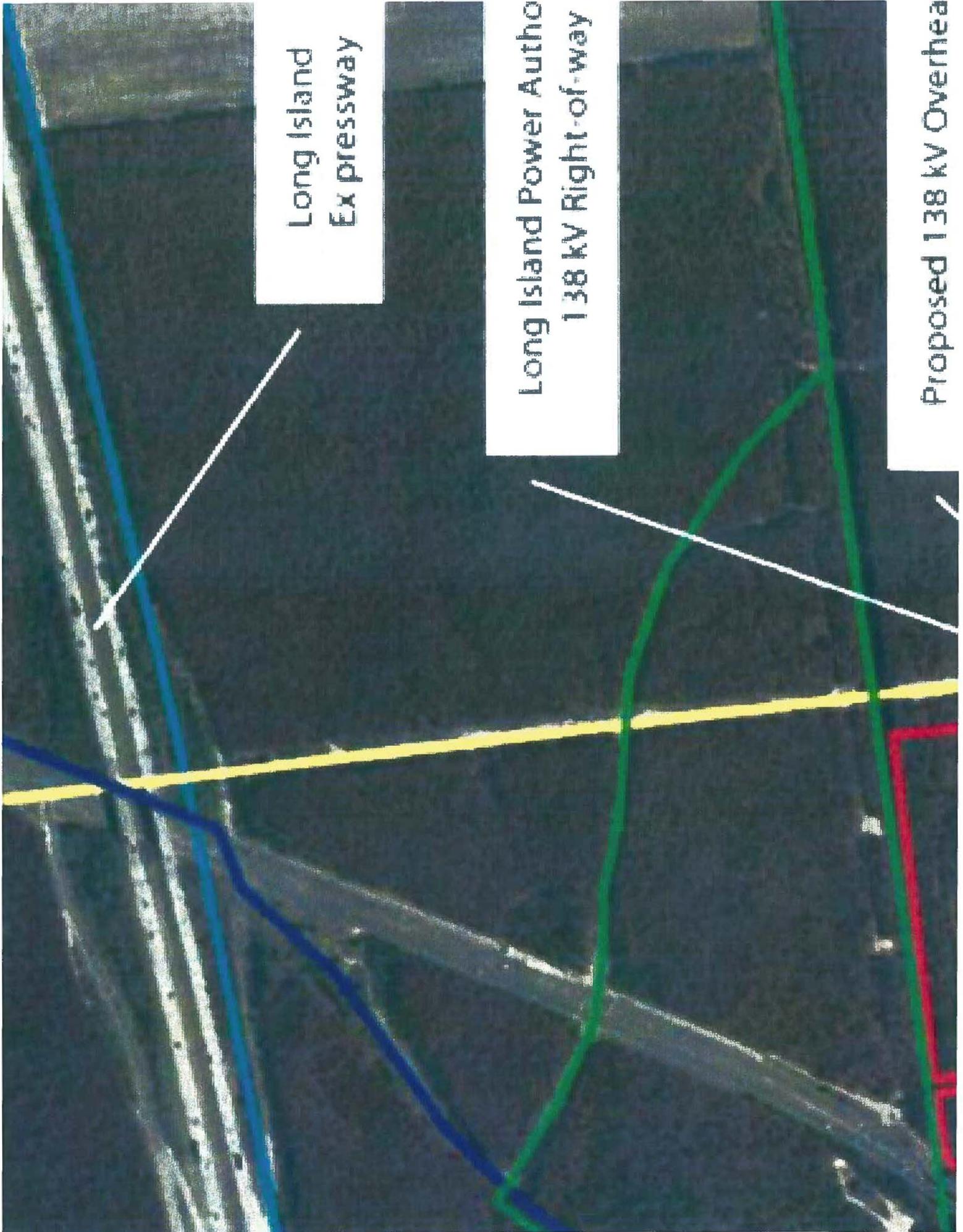
Engineer

RAM:ram

S:\Robert Calica\Town of Brookhaven-1-BRT\CalicaSandMining\tr4\_042214.docx

**FPM**

EXHIBIT A TO APRIL 24,  
2014 ORDER TO SHOW  
CAUSE



Long Island  
Expressway

Long Island Power Autho  
138 kV Right-of-way

Proposed 138 kV Overhea

**EXHIBIT B TO APRIL 24,  
2014 ORDER TO SHOW  
CAUSE**



**EXHIBIT B-1 TO APRIL 24,  
2014 ORDER TO SHOW  
CAUSE**



1 OVERLAY SITE PLAN

**LEGEND**

- PROPERTY LINE
- PROPOSED TRACK LAYOUT
- BASE MAP TAKEN FROM 8/19/2013 GOOGLE EARTH



SECTION CONTROL SHEET  
**FPM ENGINEERING GROUP, P.C.**  
 800 MARCONI AVENUE  
 SUITE 1177A  
 ELIOT, NY 11731-8520

**WARNING:**  
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REVISIONS

PROJECT TITLE AND LOCATION  
**PROPOSED TRACK LAYOUT  
 BROOKHAVEN RAIL TERMINAL  
 205 SILLS ROAD  
 YAPHANK, NY**

PROJECT NO. 1151G-14-02  
 DRAWING TITLE  
**OVERLAY SITE PLAN**

DESIGNED BY: FPM	DRAWN BY: BJ	CHECKED BY: DS	SCALE: AS SHOWN	DATE: 25 APRIL 2014	SHEET 1 OF 1
DRAWING NO.				1	

EXHIBITS C – I TO APRIL  
24, 2014 ORDER TO SHOW  
CAUSE OMITTED HERE

EXHIBIT J TO APRIL 24,  
2014 ORDER TO SHOW  
CAUSE



# Town of Brookhaven Long Island

Mark Lesko, Supervisor

May 11, 2012

Mr. Andrew Kaufman  
Sills Road Realty, LLC  
56 Comsewogue Road  
East Setauket, NY 11791

Re: Sills Road Realty, LLC  
Development of Brookhaven Rail Terminal (BRT) Phase II  
Yaphank, NY

Dear Mr. Kaufman:

On behalf of the Town of Brookhaven I appreciate the opportunity to comment upon the above-referenced project. I have had an opportunity to preliminarily review the new plans for development of the second phase pertaining to this rail terminal and offer the following comments:

Generally the plans should meet the same level of detail provided on the first phase of the project during the BRT approval process with the NTSB and the Town. I will now list a few items of concern and also indicate those standard items to include.

- All existing conditions to remain shall be shown on plans.
- Underlying old filed subdivision to be abandoned in accordance with Town and County procedures.
- 100 foot natural and undisturbed buffer along the Long Island Expressway with 100 foot natural and undisturbed buffer on all sides of the NYS recharge basin, with the exception of site entrances.
- 50 foot wide natural and undisturbed buffer along the westerly property line adjacent to the LIPA transmission lines, with the exception of inter parcel access and easements.
- 150 foot natural and undisturbed buffer along the all property lines as per section 85-315-K(4) Transportation terminal criteria- This buffer is needed along the easterly side of the parcel adjacent to the Suffolk County Honor Farm.

**Department of Planning, Environment and Land Management**

Brenda Prusinowski, AICP, Deputy Commissioner

Division of Engineering

Gregg G. Kelsey, P.E., Assistant Town Engineer

One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6298 • Fax (631) 451-6419

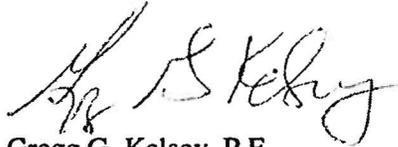
[www.brookhaven.org](http://www.brookhaven.org)

Printed on recycled paper

- 75 foot natural and undisturbed buffer along the Long Island Railroad
- Access to the LIE service road requires a permit from NYSDOT and will need to include Entrance road design, deceleration lane and acceleration lane along LIE south service road.
- Location of LIE main road access ramp and end of south service lanes.
- Second means of access to the expansion parcel for emergency vehicles and/or vehicle access.
- Provide engineering calculations including removal of excess materials certification and provide NYSDEC mining exemption or permit in accordance with NYSDEC policy of November 2011 if removing greater than 750 cubic yards.
- Elevations along LIPA property and gas service easement to power plant.
- Proposed track elevations and slope.
- All proposed fencing to be shown on plans including type and height.
- Proposed road grades and slope.
- Slope easements across LIPA property near main track and existing retaining walls.
- Continue 30' wide LIPA easement along southern property line for existing overhead wires.
- Area of site landscaping and natural buffers to equal 30% of total site area. Provide Landscape plan to demonstrate conformance.
- Drainage design criteria and calculations.
- Parking and loading design criteria, calculations and locations.
- General site notes, acreage, key map, etc.
- Site lighting concept and lamp heights.
- Water main and fire hydrant locations in conformance with NYS building/ fire codes.
- Preliminary site grading and drainage structures, retention areas, recharge basin, etc including compliance with SWPPP is required.
- Provide documents for NYS SEQRA review or provide documentation of NEPA determination .
- Site Plan application, approval and building permits are required for all non railroad uses and buildings.

I appreciate the opportunity to provide these comments regarding the proposed development for the Brookhaven Rail Terminal Expansion Project. Please feel free to contact me at 451- 6400 if you have any questions regarding these comments. I would also be available to meet with you to discuss these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregg G. Kelsey". The signature is written in a cursive style with a large initial "G".

Gregg G. Kelsey, P.E.  
Assistant Town Engineer

GGK:gk  
Encl.

Cc: Matt Miner  
David Barnes  
Paul Stevens, P.E., SB Bowne  
James Pratt

EXHIBIT K TO APRIL 24,  
2014 ORDER TO SHOW  
CAUSE



**Gannett Fleming**

*Excellence Delivered As Promised*

SUPERVISOR'S OFFICE  
TOWN OF BROOKHAVEN

2014 FEB 10 AM 11:35

February 6, 2014

Town of Brookhaven Office of the Supervisor  
Mr. Ed Romaine, Supervisor  
One Independence Hill  
Farmingville, NY 11738

Re: Brookhaven Rail Terminal Expansion Project – Environmental Review

Brookhaven Terminal Operations, LLC is proposing an expansion of an existing intermodal rail freight facility in the Village of Yaphank, Town of Brookhaven, Suffolk County. The existing Brookhaven Rail Terminal is a 28-acre parcel with approximately 12,800 linear feet of rail track and a connection with the Long Island Railroad. The proposed expansion would involve extension of the facility onto an adjacent approximately 93-acre site and involve construction of an additional 12,500 linear feet of internal track to support future warehousing/manufacturing and cold/dry storage facilities.

On September 19, 2013, Governor Cuomo announced that Brookhaven Terminal Operations, LLC was awarded a grant through the New York State Department of Transportation Passenger and Freight Rail Assistance Program to support the proposed track expansion. To support the award, an environmental assessment is being prepared to consider the effects of this proposed action.

The site is bordered to the west by the existing Brookhaven Rail Terminal, on the south by the Long Island Railroad, on the east by agricultural fields of the Suffolk County Farm and Education Center, and on the north by Interstate 495 (Long Island Expressway). The proposed rail would connect with the existing Brookhaven Rail Terminal and would not involve any new connection to the Long Island Railroad.

On behalf of Brookhaven Terminal Operations LLC, we are requesting your comments and concerns regarding the proposed freight rail track extension.

Thank you for your time and consideration of this request. If you have questions, please do not hesitate to contact me via email at [cshirk@gfnet.com](mailto:cshirk@gfnet.com) or via phone at (717) 763-7212 extension 2566.

Gannett Fleming, Inc.

Craig S. Shirk, AICP  
Senior Project Manager

cc: 056231

Gannett Fleming, Inc.

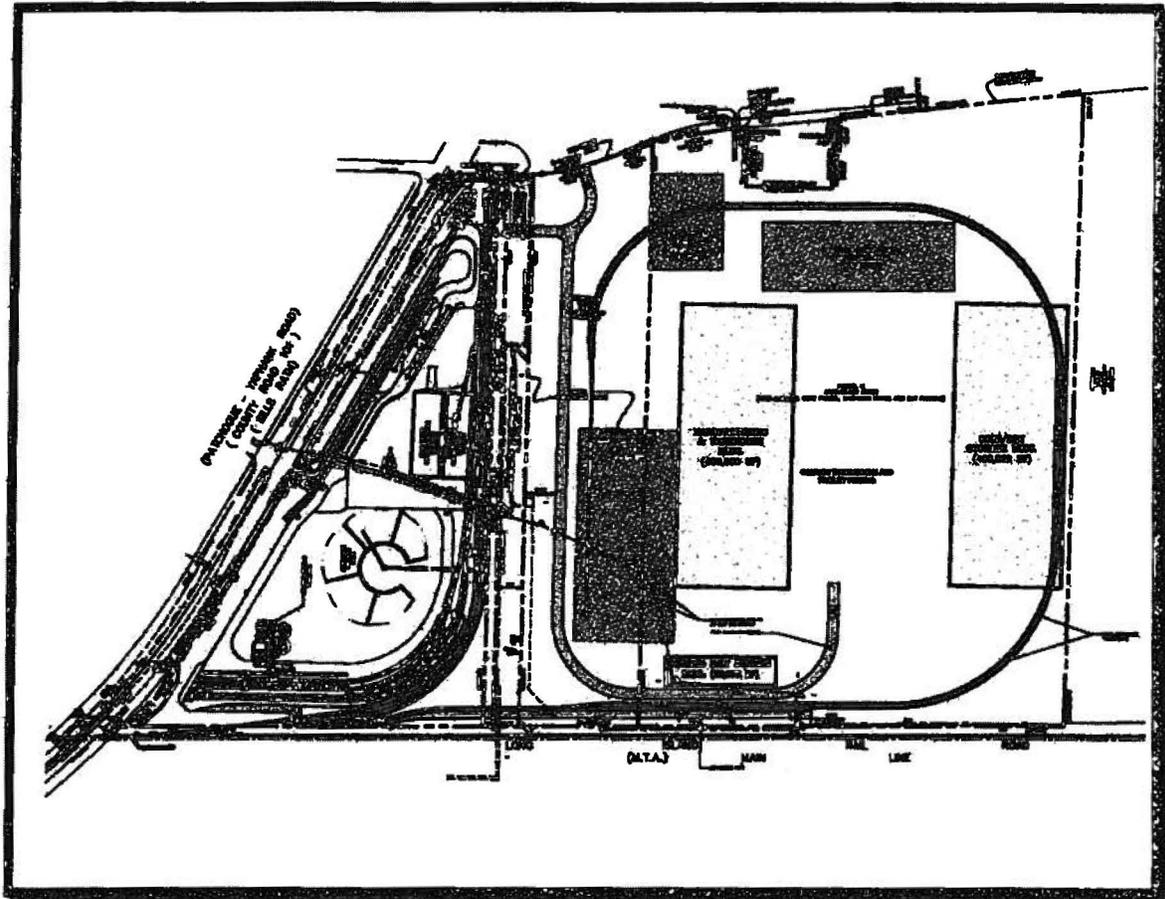
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EXHIBIT L TO APRIL 24,  
2014 ORDER TO SHOW  
CAUSE

# BROOKHAVEN RAIL TERMINAL

## Proposed Expansion (Parcels B and C)

### ENVIRONMENTAL OVERVIEW



**Prepared for:**  
Brookhaven Rail, LLC.

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## **I. Introduction**

This Environmental Overview evaluates the environmental setting and potential resource concerns associated with a proposed expansion of the existing Brookhaven Rail Terminal in the Village of Yaphank, Town of Brookhaven, Suffolk County, NY. The purpose of this study is to:

- Characterize natural, social, and cultural resources on and adjacent to the site;
- Identify potential resource and/or regulatory concerns which may require further analysis if future development is proposed; and
- Where applicable, suggest additional studies and/or minimization measures which may be necessary to full characterize and address natural, social and cultural resource effects associated with future development and operation of the site.

Expansion concepts involve development of rail infrastructure on a combined 93 acres immediately east of the Brookhaven Rail Terminal at 205 Sills Road, Yaphank, NY (Figure 1). The site encompasses Parcel B, which is a 19.3 area parcel and Parcel C, a 73.7 acre parcel. The site would be rail served with rail access from the existing terminal and will have access to the Interstate 495 Service Road.

The scope of this Environmental Overview generally parallels the environmental factors and resource analyses typically performed to comply with the National Environmental Policy Act (NEPA) and the New York State Environmental Quality Review Act (SEQRA). The overview has been developed based on existing and readily available information from federal, state and local regulatory and resource agencies, scientific literature and data, and applicable environmental analysis of other proposed actions in the vicinity of the site.

## **II. Study Area**

The study area for this Environmental Overview encompasses an approximately 93 acre site located in the Town of Brookhaven, Suffolk County, NY. The site is bordered on the north by Interstate 495 (Long Island Expressway), on the west by the existing Brookhaven Rail Terminal, on the south by the Long Island Railroad (LIRR), and on the east by agricultural lands associated with the Suffolk County Farm and Education Center (Figure 2).

For resource considerations other than socioeconomics and transportation, the analysis in the Environmental Overview is limited to the proposed expansion site. For socioeconomic and transportation resources, the study area encompasses a larger area covering two Census tracts (1587.07 and 1591.06).

## **III. Physical Resources**

### **A. Geology, Soils and Climate**

The site is classified as part of the Atlantic Coastal Plain Physiographic province. The Atlantic Coastal Plain Province stretches along the east coast of the United States from Cape Cod, Massachusetts southward into Mexico. The site is part of a glacial outwash plain, which is composed of sand and gravel deposited by melt-water streams in front of a glacial terminal moraine located north of the project area. The terminal moraine is a ridge-like accumulation of till, and unstratified mix of clay, silt, sand, gravel, and boulders that mark a standstill of the retreating glacial ice sheet. The local

unconsolidated formations date back approximately 100 million years and are comprised of the Raritan Formation, which immediately overlies the bedrock complex and the Magothy Formation, which overlies the Raritan Formation. The depth to bedrock is approximately 1,500 feet below the ground surface<sup>1</sup>.

According to the Soil Survey of Suffolk County, NY<sup>2</sup>, soils on the site are classified as part of the general Riverhead-Plymouth-Carver soil association. Soils in this association are typically deep, nearly level to gentle sloping, well drained and excessively drained soils which are moderately to coarsely textured.

Specific soil types found on the site include Carver and Plymouth sands, Haven loam, Plymouth loamy sand, and Riverhead sandy loam (Table 1 and Appendix A).

Table 1: Soil types and distribution

Map Symbol	Map Unit	Approximate Site Coverage
CpE	Carver and Plymouth sands, 15 to 35 percent slopes	12.3%
HaA	Haven loam, 0 to 2 percent slopes	22.1%
PIA	Plymouth loamy sand, 0 to 3 percent slopes	38.4%
RdA	Riverhead sandy loam, 0 to 3 percent slopes	13.6%
RdB	Riverhead sandy loam, 3 to 8 percent slopes	13.6%

Source: Custom Soil Resource Report, Suffolk County, NY, Parcels B/C, obtained via USDA-NRCS Web Soil Survey, <http://websoilsurvey.sc.egov.usda.gov/App/WebSoilSurvey.aspx>

**Carver and Plymouth sands, 15 to 35% slopes (CpE):** This soil is very deep and excessively drained, and its parent material consists of coarse sandy glaciofluvial deposits. The depth to the top of a seasonal high water table is greater than 80 inches. These soils are not considered prime farmland soils due to low natural fertility and high drought potential. This soil has a land capability rating of Class 7s, exhibiting very severe limitations that make them unsuited to cultivation and that restrict their use mainly to rangeland, forestland, or wildlife habitat. The suitability of this soil series for development generally exhibits severe use limitations due to high erosion potential, rapid permeability, and low compressibility which affect foundation strength.

**Haven loam, 0 to 2% slopes (HaH):** This soil is very deep and well-drained with parent material consisting of glaciofluvial deposits over sandy and gravelly glaciofluvial deposits. The depth to the top of a seasonal high water table is greater than 80 inches. Despite low natural fertility, this soil is designated as a Class 1 capability soil and considered a prime farmland soil due to high available soil moisture capacity and low erosion potential. The soil exhibits only slight limitations for development related to low compressibility and high permeability.

**Plymouth loamy sand, 0 to 3% slopes (PIA):** This soil is very deep and excessively drained, and the parent material consists of acid sandy glaciofluvial or deltaic deposits. The depth to the top of a seasonal high

<sup>1</sup> U.S. Geological Survey, 1995. Ground water atlas of the United States, HA 730-M. [http://capp.water.usgs.gov/gwa/ch\\_m/index.html](http://capp.water.usgs.gov/gwa/ch_m/index.html)

<sup>2</sup> USDA Soil Conservation Service, 1975. Soil Survey of Suffolk County, New York. Publication O-473-964. [http://www.nrcs.usda.gov/Internet/FSE\\_MANUSCRIPTS/new\\_york/suffolkNY1975/suffolk.pdf](http://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/new_york/suffolkNY1975/suffolk.pdf)

water table is greater than 80 inches. Despite low natural fertility, this soil is designated as a Class 3s capability soil and considered farmland soil of statewide importance, generally requiring irrigation. The soil exhibits moderate limitations for development mostly related to low compressibility.

*Riverhead sandy loam, 0 to 3% slopes (RdA) and Riverhead sandy loam, 3 to 8% slopes (RdB):* These soils are very deep and well drained with parent materials consisting of loamy glaciofluvial deposits overlying stratified sand and gravel. The depth to the top of a seasonal high water table is greater than 80 inches. These soils have a Class 2s land capability rating and are considered prime farmland soils, having low natural fertility but only moderate limitations that reduce the choice of plants or require moderate conservation practices. The soils exhibit moderate limitations for development mostly related to low compressibility and moderate to rapid permeability.

The climate of Suffolk County consists of winters that are modified by the Atlantic Ocean (the ocean raises the average winter temperature and decreases the average day-to-night range). Suffolk County summers are characterized by warm afternoons and cool evenings. Average annual precipitation is roughly 49 inches, and is distributed fairly evenly throughout the year. The average annual temperature is approximately 55 degrees Fahrenheit (F). The annual average temperature is approximately 35 degrees F in winter and 71 degrees F in summer. Total average annual snowfall is approximately 31 inches<sup>3</sup>.

#### B. Surface and Ground Water

No surface waters are found on the site; an approximate 0.5 acre New York State Department of Transportation (NYS DOT)-owned stormwater retention pond is located along the northern boundary of the site along the Interstate 495 service road. The nearest significant surface water is the Carmans River, located approximately 1.0 mile from the site (Figure 3).

The site is not located within a Federal Emergency Management Agency (FEMA) designated floodplain area (Figure 3) or within the state's Coastal Area Boundary as determined by the New York Department of State, Office of Communities and Waterfronts which manages the state's coastal zone management program.

The site is located over a portion of the Upper Glacial aquifer which underlies all of Nassau and Suffolk Counties. The Upper Glacial aquifer consists of fine to coarse brown sand, gravel and stones and has a probable maximum thickness of about 700 feet below ground surface. Data from the U.S. Geological Survey (USGS) indicate that the elevation of groundwater in the Upper Glacial Aquifer beneath the project area is approximately 37.5 feet above mean sea level. However, the water table at the site is subject to seasonal and/or year-to-year fluctuations ranging from four to six feet. Based on surface elevations, depth to groundwater is estimated to be 70.5 feet on average, with a water table minimum depth at 67.5 feet and maximum at 73.5 feet<sup>4</sup>.

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<sup>3</sup> Surface Transportation Board and U.S. Rail Corporation, July 2010. Draft Environmental Assessment for Brookhaven Rail Terminal, Finance Docket 35141. <http://www.stb.dot.gov/Decisions/readingroom.nsf/WEBUNID/4410AD28E2F4A1828525776C0048AFE9?OpenDocument>

<sup>4</sup> Smolensky, D.A., H.T. Buxton and P.K. Shernoff, 1989. Hydrological Framework of Long Island, New York. U.S. Department of the Interior, U.S. Geological Survey.

The site is within the Nassau-Suffolk "sole source" aquifer (i.e. the Upper Glacial aquifer) as determined by the U.S. Environmental Protection Agency (EPA)<sup>5</sup>. A sole source aquifer is a sole or principal drinking water source whose contamination would pose a hazard to public health. This designation protects an area's groundwater resource by requiring the EPA to review proposed projects within the designated area that would receive federal financial assistance. The EPA review is designed to ensure that potential projects do not endanger the groundwater source. The site would be served by public water and wastewater services. Based on development of the Brookhaven Rail Terminal, EPA is likely to raise concerns regarding stormwater detention/retention and the need for Spill Prevention Control and Countermeasure plans for on-site fuel storage, if the site is developed, to minimize potential effects to the sole source aquifer.

### C. Air Quality

The Clean Air Act (CAA) and amendments of 1990 define a "nonattainment area" as a locality where air pollution levels persistently exceed National Ambient Air Quality Standards (NAAQS) or that contribute to ambient air quality in a nearby area that fails to meet standards. The EPA designations of nonattainment areas are based on violations of NAAQS for carbon monoxide (CO), nitrogen dioxide (NO<sub>2</sub>), ozone (O<sub>3</sub>), particulate matter (PM<sub>10</sub> and PM<sub>2.5</sub>), sulfur dioxide (SO<sub>2</sub>), and lead (Pb). The CAA established two types of national air quality standards: 1) primary standards set limits to protect public health, including the health of "sensitive" populations such as asthmatics, children, and the elderly and 2) secondary standards that set limits to protect public welfare, including protection against decreased visibility, damage to animals, crops, vegetation, and buildings.

Suffolk County is classified<sup>6</sup> as:

- Moderate nonattainment for 8-hr Ozone (1997 standard)
- Marginal nonattainment for 8-hr Ozone (2008 standard)
- Nonattainment for PM<sub>2.5</sub> (1997 standard)
- Nonattainment for PM<sub>2.5</sub> (2006 standard)

This region is designated as either attainment or unclassified for SO<sub>2</sub>, PM<sub>10</sub>, NO<sub>2</sub>, CO, and Pb. Based on the development of the Brookhaven Rail terminal, general conformity analysis of ozone and PM<sub>2.5</sub> emissions may be required if the site is developed.

## IV. Biological Resources

### A. Vegetation

The site is a relatively flat, undeveloped parcel comprised of oak and pine trees and brush. The dominant trees are pitch pine, mixed with scarlet oak, white oak, red oak, and black oak. A review of historical aerial photography indicates the site has been undeveloped forest land since at least 1957. The predominant vegetation surrounding the site is a terrestrial upland forest categorized as pitch

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<sup>5</sup> U.S. Environmental Protection Agency, 2009. Region 2 Sole Source Aquifers. <http://www.epa.gov/Region2/water/aquifer/>

<sup>6</sup> U.S. Environmental Protection Agency, 2013. The Green Book of Nonattainment Areas for Criteria Pollutants. <http://www.epa.gov/airquality/greenbook/>

pine-oak forest. Pitch pine-oak forest habitat and similar pine barren habitats occur in dry areas where a high degree of disturbance and nutrient poor soils exist. The surrounding forest land is comprised of similar pitch pine-oak forest vegetation, with trees generally about 30 feet in height and five to ten-inches in diameter

#### B. Wetlands

Based on a review of National Wetland Inventory mapping (Figure 4) and New York State Department of Environmental Conservation (NYS DEC) mapping (Figure 5), there are no regulatory wetlands within the boundaries of the site. The approximate 0.5 acre NYS DOT-owned stormwater retention pond north of the site along the Interstate 495 service road is classified as a palustrine, unconsolidated bottom freshwater pond (PUBHx) which is permanently flooded.

#### C. Wildlife

Wildlife species adapted for disturbance and/or early-to-mid successional pine barren plant habitats are expected to occur within the site. Most of the species that may be found on the site would be classified as common suburban, forest and edge species, with limited potential for forest interior dependent and/or 'sensitive' species, as the site is bordered by active business/industrial activity and transportation facilities. Common species found on the site would be those able to utilize a broad range of habitats and food sources.

Bird species likely to use the site and surrounding area include Mourning dove, brown thrasher, and Northern mockingbird<sup>7</sup>. Other typical species would include Gray catbird, Black-capped chickadee, Northern cardinal, American crow, Northern flicker, Common grackle, Blue jay, and European starling<sup>8</sup>.

Small rodents and insectivores such as mice, shrews, and moles are expected to be the most abundant mammals, but the surrounding area may support larger mammals as well. Some mammal species likely to occur on or near the project site are the short-tailed shrew, eastern mole, woodchuck, eastern chipmunk, white-tailed deer, raccoon, and eastern gray squirrel.

Because there are no wetlands and other aquatic habitats on the site, aquatic reptiles and amphibians (except for occasional transient species) would not generally be found, although some species may be located in proximity to the NYS DOT detention pond.

#### D. Endangered, Threatened and Rare Species

Consultation with the U.S. Fish and Wildlife Service (USFWS) was conducted using their Information, Planning and Conservation System (IPAC) on-line screening tool. Results indicated the potential for six threatened, endangered, or candidate species and/or designated critical habitat (Table 2) to be present on or adjacent to the site (Appendix B). These six species are those known or believed to occur within Suffolk County, not necessarily within the site.

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<sup>7</sup> Calithness Long Island II, LLC, December 2013. Calithness Long Island Energy Center II Draft Environmental Impact Statement. <http://www.brookhaven.org/Departments/PlanningEnvironment/PlanningandEnvironment.aspx>

<sup>8</sup> Surface Transportation Board and U.S. Rail Corporation, July 2010. Draft Environmental Assessment for Brookhaven Rail Terminal, Finance Docket 35141. <http://www.stb.dot.gov/Decisions/readingroom.nsf/WEBUNID/4410AD2BE2F4A1828525776C0048AFE9?OpenDocument>

**Table 2: USFWS Consultation – Federal Threatened and Endangered Species of Concern**

Species	Scientific Name	Federal Status
<i>Birds</i>		
Piping plover	<i>Charadrius melodus</i>	Threatened
Red knot	<i>Calidris canutus rufa</i>	Proposed Threatened
Roseate tern	<i>Sterna dougallii dougallii</i>	Endangered
<i>Flowering Plants</i>		
Sandplain gerardia	<i>Agalinis acuta</i>	Endangered
Seabeach amaranth	<i>Amaranthus pumilus</i>	Threatened
<i>Mammals</i>		
Northern long-eared bat	<i>Myotis septentrionalis</i>	Proposed Endangered

*Piping plover* is a small migratory shorebird which breeds along dry sandy beaches or in areas that have been filled with dredged sand, often near dunes in areas with little or no beach grass. Foraging areas are typically beaches, dunes and tidal areas. Piping plover may breed along the southern Long Island beaches and in the harbors of northern Suffolk County<sup>9</sup>.

The *red knot* is a large, bulky sandpiper which generally migrates between South American wintering areas and breeding grounds in the central Canadian Arctic. Areas along the Atlantic coast, potentially including the Long Island beaches, are utilized as stopover areas for rest and refueling. Spring migration is timed to coincide with the spawning season of the horseshoe crab<sup>10</sup>.

The *roseate tern* is another coastal migratory waterbird which breeds along southern Long Island, utilizing salt marsh islands and beaches with sparse vegetation. A primary food source is the American sand lance, a small marine fish<sup>11</sup>.

*Sandplain gerardia* is a small annual maritime plant that grows in native grasslands along the coast. On Long Island, significant remnant populations remain only at Sayville, the Hempstead Plains, and Montauk. Current multi-agency management efforts concentrated at Sayville have been successful at increasing plant numbers in recent years<sup>12</sup>.

*Seabeach amaranth* occurs on barrier Island beaches just above the high tide line, growing on nearly pure sand substrate. This small annual maritime plant traps sand, initiating dune formation and creating suitable habitat for other plants, such as sea oats and beach grass. Today, most amaranth sites are within areas symbolically fenced to protect endangered piping plovers<sup>13</sup>.

The *Northern long-eared bat* is widely distributed throughout the eastern and northcentral U.S., generally associated with old-growth forests composed of trees 100 years old or older. It relies on

<sup>9</sup> NYS Department of Environmental Conservation, no date. Piping Plover Fact Sheet. <http://www.dec.ny.gov/animals/7086.html>

<sup>10</sup> U.S. Fish and Wildlife Service, September 2013. Rufa red knot fact sheet. <http://www.fws.gov/northeast/redknot/facts.pdf>

<sup>11</sup> NYS Department of Environmental Conservation, no date. Roseate Fact Sheet. <http://www.dec.ny.gov/animals/7084.html>

<sup>12</sup> U.S. Fish and Wildlife Service, no date. Long Island Recovery Efforts, Sandplain gerardia. <http://www.fws.gov/northeast/myfo/es/lirecovery.htm>

<sup>13</sup> Center for Biological Diversity, no date. Seabeach amaranth profile. [http://biologicaldiversity.org/campaigns/esa\\_works/profile\\_pages/SeabeachAmaranth.html](http://biologicaldiversity.org/campaigns/esa_works/profile_pages/SeabeachAmaranth.html)

intact interior forest habitat with low edge-to-interior ratios. Winter hibernation and roosting typically occurs in caves, mines and tunnels, while in summer they may also utilize cavities in both live and dead trees<sup>14</sup>.

Based on the review of these species' life history and habitat, it is unlikely that any of these species occur within or adjacent to the site. No suitable marine or coastal habitats exist within or near the site and no old-growth/substantial un-fragmented forest habitat or caves/other hibernacula are present or nearby.

Review of the NYS DEC Environmental Resource Mapper (Figure 5) did not identify any rare plant/animal or significant natural communities on or immediately adjacent to the site. The map layer entitled rare plants and animals includes generalized locations of all species that are listed by the State as rare, endangered or threatened.

#### **V. Noise**

Previous noise investigations for the development of the Brookhaven Rail Terminal determined that ambient noise levels near the project site range from 63 A-weighted decibels (dBA) along the LIRR to 70 dBA near Sills Road and Interstate 495. These levels are considered moderate and are typical of developed areas in proximity to roadway infrastructure<sup>15</sup>.

Recent noise analysis for a proposed development directly south of the site found noise levels to be generally around 59 dBA during the morning rush hour, approximated to 46 to 50 dBA during the daytime<sup>16</sup>. Overnight noise levels were measured as low as 43.6 dBA. The same analysis also included a parcel close to Interstate 495 (similar to the northern portion of the site) where noise levels were measured at 63.4 dBA during the morning rush hour, approximated to 56 to 59 dBA during the daytime, with nighttime levels around 52.6 dBA.

No noise sensitive receptors (residences, schools, parks, etc.) are found within 0.25 mile of the site and surrounding land uses to the west and south of the site are devoted to industrial uses. The Town of Brookhaven Noise Ordinance sets noise level limits of 75dBA for industrial areas.

#### **VI. Cultural Resources**

According to the NY State Historic Preservation Office, no federal or state listed or eligible historic resources are associated with the site. Furthermore, the site is not considered an archaeological sensitive area (Figure 6).

The Suffolk County Almshouse Barn (90NR01779) was listed in the National Register of Historic Places (NRHP) in 1986. Built in 1871, this is a large multi-story barn with gable roof and wood shingle sheathing. The entire Suffolk County Poor Farm, containing approximately 200 acres bounded by

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<sup>14</sup> U.S. Fish and Wildlife Service, January 6, 2014. Northern long-eared bat. <http://www.fws.gov/midwest/endangered/mammals/nlba/>

<sup>15</sup> Surface Transportation Board and U.S. Rail Corporation, July 2010. Draft Environmental Assessment for Brookhaven Rail Terminal, Finance Docket 35141. <http://www.stb.dot.gov/Decisions/readingroom.nsf/WEBUNID/4410AD2BE2F4A1828525776C0048AFE9?OpenDocument>

<sup>16</sup> Suffolk County, NY, March 2011. Draft Generic Environmental Impact Statement, Declaration as Surplus and Subsequent Sale of 250 Acres of County Owned Land in Yaphank for Mixed Use Development Purposes. <http://www.suffolkcountyny.gov/Departments/Planning/Boards/CouncilonEnvironmentalQuality/DGEIS.aspx>

Yaphank Avenue, LIRR, and Patchogue Road (Long Island Avenue) has been determined to be eligible for listing in the NRHP by the NY State Historic Preservation Office<sup>17</sup>.

While the Suffolk County Poor Farm resource is immediately adjacent to the eastern boundary of the site, the Suffolk County Almshouse Barn is approximately 2,500 feet to the east separated from the site by agricultural fields. To minimize potential effects to cultural resources, future use of the site should consider retaining a vegetative buffer along the eastern boundary of the site to avoid effects to the historic agricultural context and setting of these historic resources.

#### **VII. Hazardous Materials/Waste Sites**

According to the NYS DEC, the site does not contain active hazardous remediation or associated regulated activities (Figure 7). A previous Phase 1 Environmental Site Assessment completed in accordance with American Standard for Testing & Materials (ASTM) *Standard Practice Guidelines for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process (E 1527-05)* by the property owner identified no environmental conditions<sup>18</sup>.

#### **VIII. Land Use**

The site is currently an undeveloped, partially forested parcel. Land uses surrounding the site include other industrial activities at the Brookhaven Rail Terminal, the Sills Road Industrial Park along Old Dock Road, and the proposed expansion of the Calthness Power facility to the west and southwest. South of the site is the LIRR, which abuts other vacant lands to the south. To the east of the site are agricultural fields of the Suffolk County Farm and Education Center. The site is bordered on the north by Interstate 495 (Long Island Expressway).

The site and the adjoining Brookhaven Rail Terminal are currently zoned as Industrial 1. No land use or zoning issues related to future development of the site appear to be a concern.

#### **IX. Socioeconomic Setting**

##### **A. Population Demographics**

The Town of Brookhaven encompasses approximately 530 square miles in central Suffolk County, accounting for almost a quarter of the County's land area and more than a third of its population. From 1990 to 2010, the population of the Town of Brookhaven and Suffolk County all increased; however, the Town of Brookhaven experienced the strongest population growth in comparison with Suffolk County (Table 3).

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<sup>17</sup> Suffolk County, NY, March 2011. Draft Generic Environmental Impact Statement, Declaration as Surplus and Subsequent Sale of 250 Acres of County Owned Land in Yaphank for Mixed Use Development Purposes.

<http://www.suffolkcountyny.gov/Departments/Planning/Boards/CouncilonEnvironmentalQuality/DGEIS.aspx>

<sup>18</sup> Oakland Law Group LLC, July 2011. Phase I Environmental Site Assessment, Sills Road Parcels.

**Table 3: Population and housing characteristics**

Geography	1990	2000	2010	Annual Growth		% Increase
				1990-2000	2000-2010	1990-2010
<b>Town of Brookhaven</b>						
Population	407,832	448,248	486,040	0.9%	0.8%	19%
Households	129,109	146,904	162,884	1.3%	1.0%	26%
<b>Suffolk County</b>						
Population	1,321,330	1,419,369	1,493,350	0.7%	1.8%	13%
Households	424,561	469,299	499,992	1.0%	0.6%	18%

Source: U.S. Census Bureau, Census 2010 SF1

Long-term projections indicate that the population of the Town of Brookhaven could increase by more than 120,000 people between 2010 and 2035 (Table 4). The town is expected to experience a greater population increase, by percentage, than Suffolk County over the same period.

**Table 4: Population growth projections**

Geography	Population						2010-2035 Percentage Growth
	2010	2015	2020	2025	2030	2035	
Town of Brookhaven	486,040	522,400	554,900	579,300	595,500	607,000	25%
Suffolk County	1,493,350	1,580,000	1,648,800	1,700,200	1,734,300	1,758,200	18%

Source: Suffolk County Comprehensive Plan 2035, August 2011. [http://suffolkcountyny.gov/Portals/0/planning/CompPlan/Vol1/Vol1\\_FrontEnd\\_Re082211.pdf](http://suffolkcountyny.gov/Portals/0/planning/CompPlan/Vol1/Vol1_FrontEnd_Re082211.pdf)

## B. Economics and Employment

Areas included in the socioeconomic study area are characterized by lower unemployment in comparison to the Town and County (Table 5). From an economic standpoint, per capital income in the site area is generally below that estimated for the Town and County, while median family income is higher in areas north of the site and lower in communities to the south.

**Table 5: Unemployment and income characteristics**

Geography	Percent Unemployment	Per Capita Income (2012 \$)	Median Family Income (2012 \$)
Suffolk County	7.0%	\$36,819	\$100,179
Town of Brookhaven	6.3%	\$34,231	\$98,732
Census Tract 1587.07	4.9%	\$33,663	\$108,173
Census Tract 1591.06	4.1%	\$30,172	\$96,750

Source: U.S. Census Bureau, American Community Survey, 2008-2012 5-year average

**X. Community Facilities and Services**

There are few community facilities and services in proximity to the site. The Suffolk County Offices at 360 Yaphank Avenue and 335 Yaphank Avenue house several governmental offices, including County Board of Elections, Public Works Department, Transit Bus, and Wastewater Management. Adjacent to the county office building on the western side of Yaphank Avenue is Suffolk County Farm and Education Center. Other community facilities along Yaphank Avenue include the County Fire Academy, County Police Headquarters, and the Yaphank Correctional Facility. The Southaven County Park, encompassing 1,356 acres, is located along Gerard Road approximately 1.8 miles from the site.

Integrity Christian Fellowship Church is located at 1 Old Dock Road in the Sills Industrial Park. Baseball Heaven is a large, private sports facility at 350 Sills Road.

**XI. Transportation**

**A. Roadway**

The site has available highway access from County Road 101 (Sills Road) via the Brookhaven Rail Terminal site and the Interstate 495 Service Road.

Existing average annual daily traffic volumes (AADT) in the vicinity of the site are shown in Table 6.

**Table 6: Average Annual Daily Traffic (AADT) for select roadway segments**

Location	Segment	AADT
County Road 101 (Sills Road)	Station Road and County Road 16 (Horseblock Road)	17,000
	County Road 16 (Horseblock Road) and I-495 South Service Road	16,100
County Road 16 (Horseblock Road)	Station Road to County Road 101 (Sills Road)	22,800
	County Road 101 (Sills Road) and County Road 99 (Woodside Avenue)	10,900
I-495 (Long Island Expressway)	Exit 66 (Sills Road) and Exit 67 (Yaphank Avenue)	66,802

Source: Calthness Long Island II, Draft Environmental Impact Statement, December 2013.

Recent traffic analysis<sup>19</sup> in the area also examined the applicable Level of Service (LOS) for roadway intersections. LOS is a representative measure of traffic flow based on the perception of delay from a typical motorist. LOS ranges from LOS A, which corresponds to generally congestion-free traffic conditions, to LOS F which corresponds to congested or “traffic jam” conditions.

<sup>19</sup> Calthness Long Island II, LLC, December 2013. Calthness Long Island Energy Center II Draft Environmental Impact Statement. <http://www.brookhaven.org/Departments/PlanningEnvironment/PlanningandEnvironment.aspx>

Unsignalized intersections (i.e. stop-sign controlled intersections) were found to generally operate at an LOS B level. Signalized intersections were generally found to operate at LOS C or better (Table 7).

**Table 7: Level of Service (LOS) for select roadway segments**

Roadway	Intersection at:	LOS
County Road 16 (Horseblock Road)	County Road 101 (Sills Road)	C
	Old Dock Road	C
	Alexan Road	C
County Road 101 (Sills Road)	Long Island Avenue (South)	A
	Long Island Avenue (North)	A
	I-495 Service Road (South)	A
	I-495 Service Road (North)	B

Source: Caltrans Long Island II, Draft Environmental Impact Statement, December 2013.

Additional analysis of transportation effects, including site trip generation, would likely be required to ensure the local transportation network could accommodate traffic generated by future development and operation of the site.

#### B. Rail

There are currently 74 passenger trains, including revenue and non-revenue movements, operating over the LIRR on an average weekday. Freight movements along the railroad generally occur during off-peak periods. The calculated freight movement capacity of the LIRR within the current passenger schedule is approximately 96,000 east-bound loads with westbound returns. In 2012, the New York and Atlantic Railway delivered approximately 20,610 carloads (including both eastbound and westbound return movements). Therefore, current freight movements on the LIRR represent less than 25 percent of the available operating capacity<sup>20</sup>.

#### XII. Environmental Justice

The racial profile of the area population surrounding the site shows that lands to the north of the site show less racial diversity in comparison to the Town and County, while lands to the south show greater racial diversity (Table 8). It appears that the percentage of minority residents in Census Tract 1591.06 is concentrated in the Atlantic Point apartment complex south of Horseblock Road along Alexan Boulevard in the most southern portion of the socioeconomic study area.

<sup>20</sup> Long Island Railroad, September 2013. Long Island Rail Road Double Track Project, Ronkonkoma to Farmingdale, Environmental Assessment. <http://web.mta.info/lirr/doubletrack/environmentalassessment.htm>

**Table 8: Racial demographics**

Geography	Population/Race								Minority/Ethnic Characteristics		
	Total	White	Black or African American	American Indian & Alaska Native	Asian	Native Hawaiian & Other Pacific Islander	Some other race	Two or more races	Total Racial Minority Percentage	Hispanic Population	Hispanic Percentage
Suffolk County	1,493,350	1,206,297	111,224	5,366	50,972	495	82,965	36,031	19.2%	246,239	16.5%
Town of Brookhaven	486,040	410,649	26,639	1,368	19,082	152	16,855	11,295	15.5%	60,270	12.4%
Census Tract 1587.07	1,671	1,494	70	3	16	0	38	50	10.6%	164	9.8%
Census Tract 1591.06	6,887	5,226	899	17	253	2	244	246	24.1%	1,432	20.8%

Source: U.S. Census Bureau, 2010 Census SF1

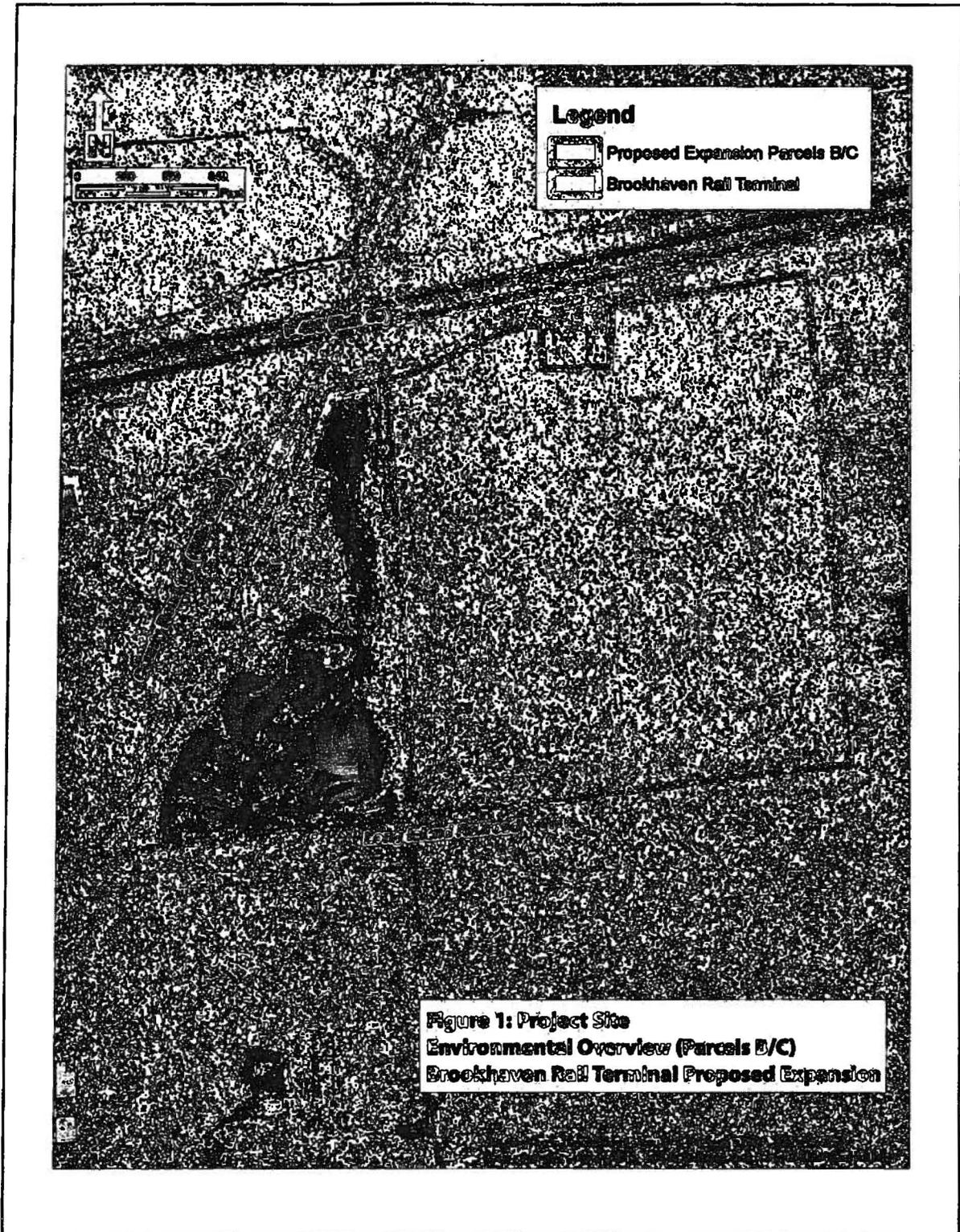
Estimates of poverty indicate that the area north of the site (Census Tract 1587.07) experiences a slightly greater percentage of poverty in comparison to the Town and County, while areas south of the site (Census Tract 1591.06) have a substantially lower percentage of residents living below poverty levels (Table 9).

**Table 9: Poverty characteristics**

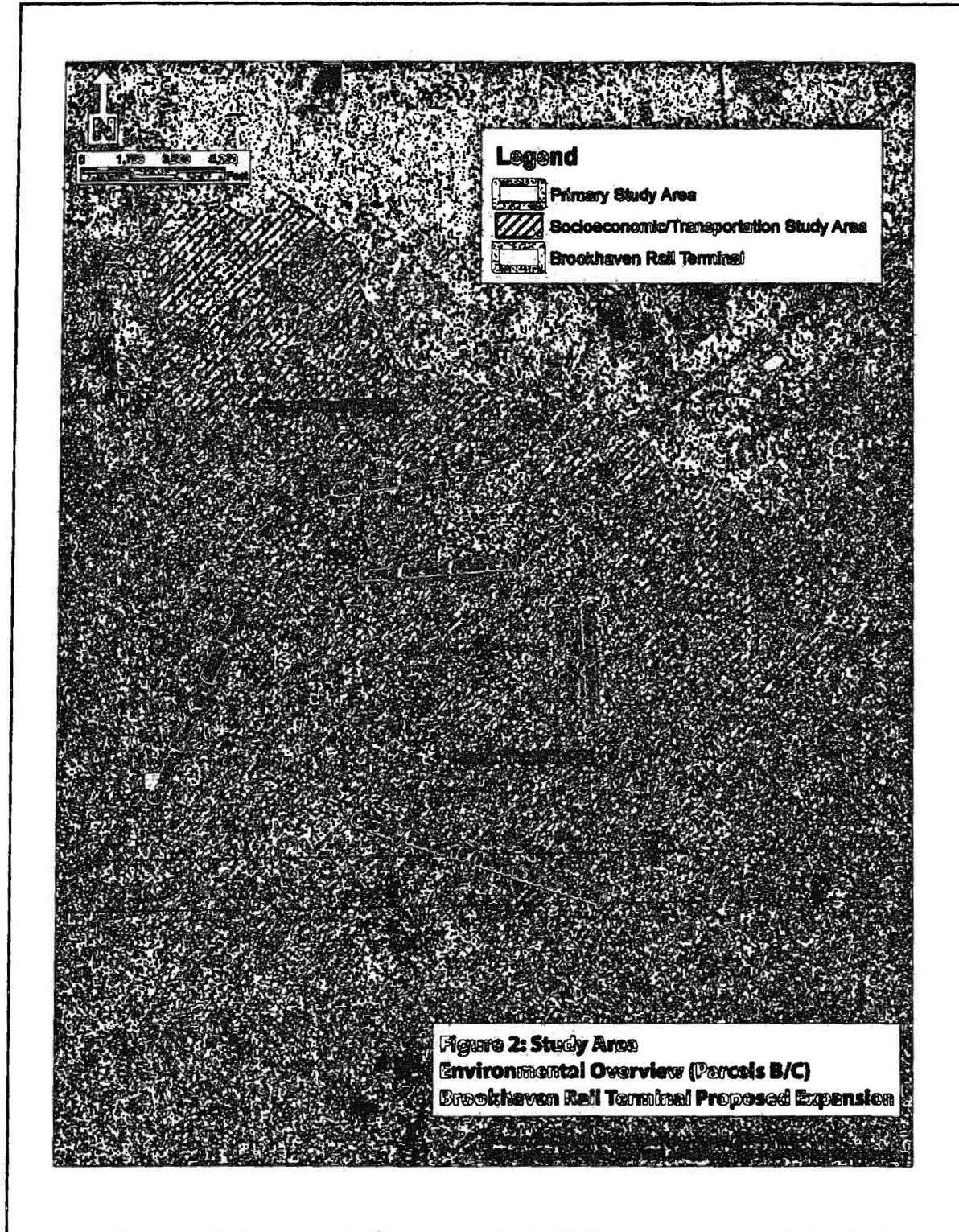
Geography	Total Population	Population living below poverty level	Percent of population living below poverty level
Suffolk County	1,465,199	89,650	6.1%
Town of Brookhaven	471,988	33,684	7.1%
Census Tract 1587.07	1,621	123	7.6%
Census Tract 1591.06	5,391	113	2.1%

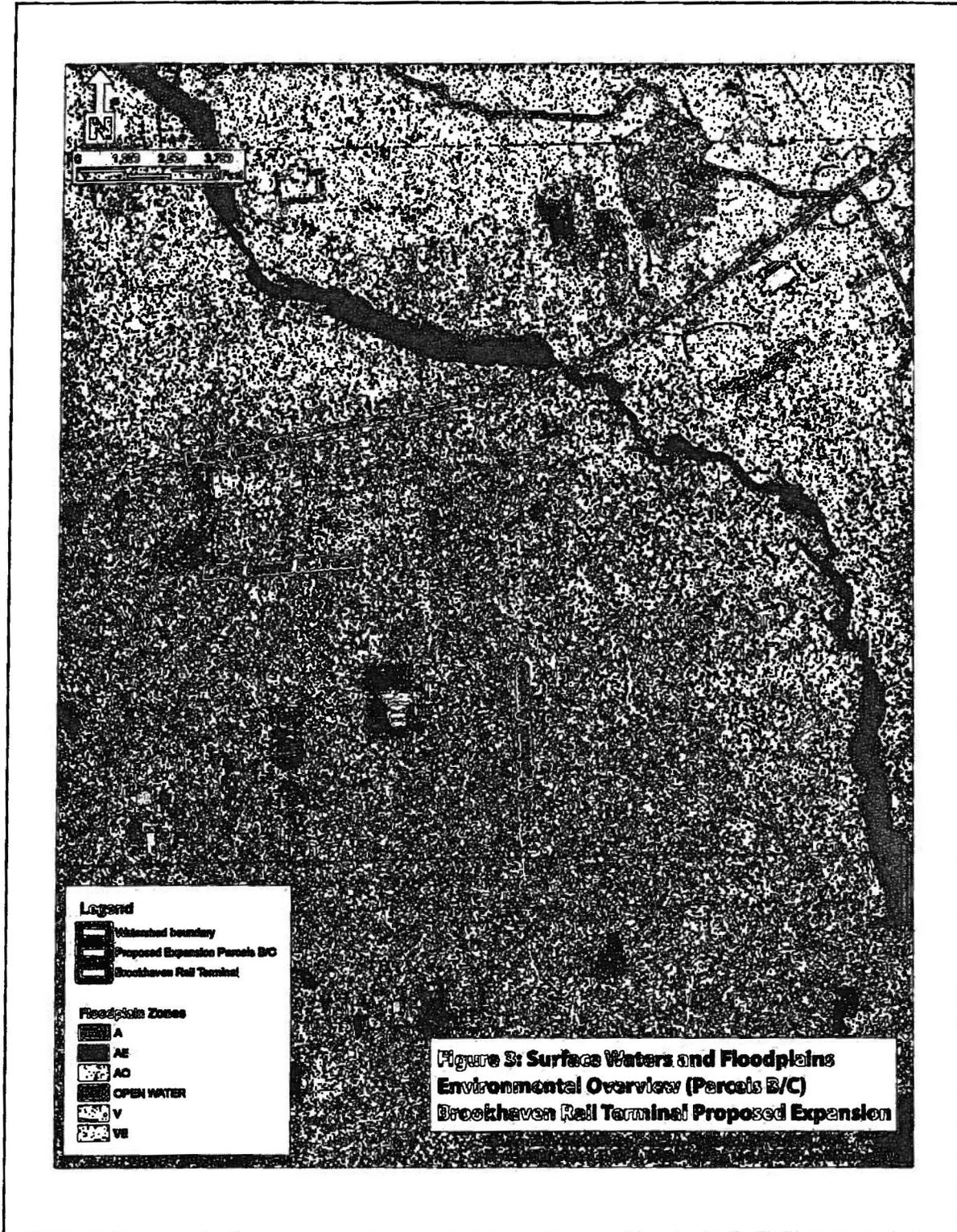
Source: U.S. Census Bureau, 2008-2012 American Community Survey

As the site is generally distant from residential areas, environmental justice populations would not be expected to experience disproportionate effects from activities at the site.



**Figure 1: Project Site  
Environmental Overview (Parcels B/C)  
Brookhaven Rail Terminal Proposed Expansion**





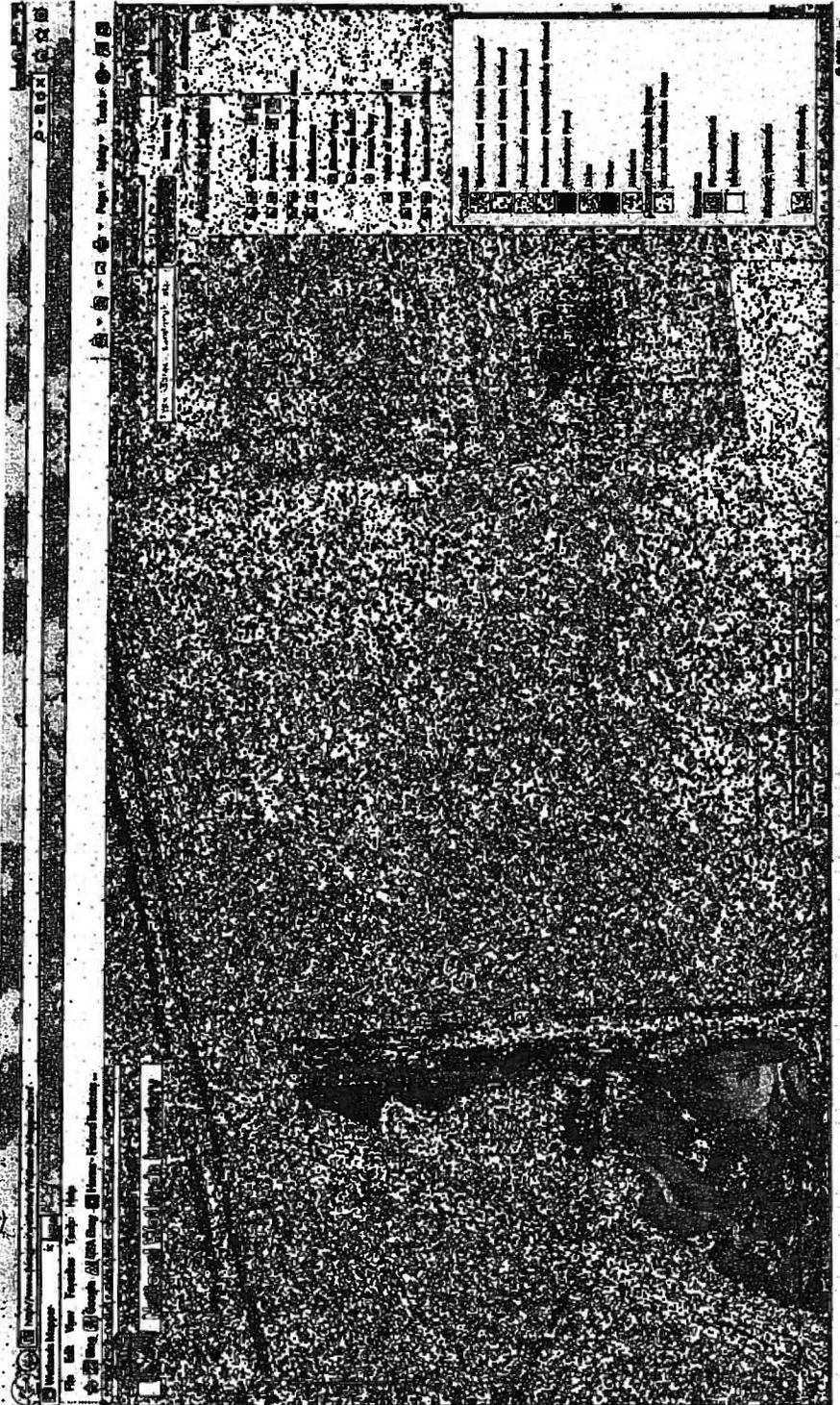


Figure 4: USFWS National Wetland Inventory

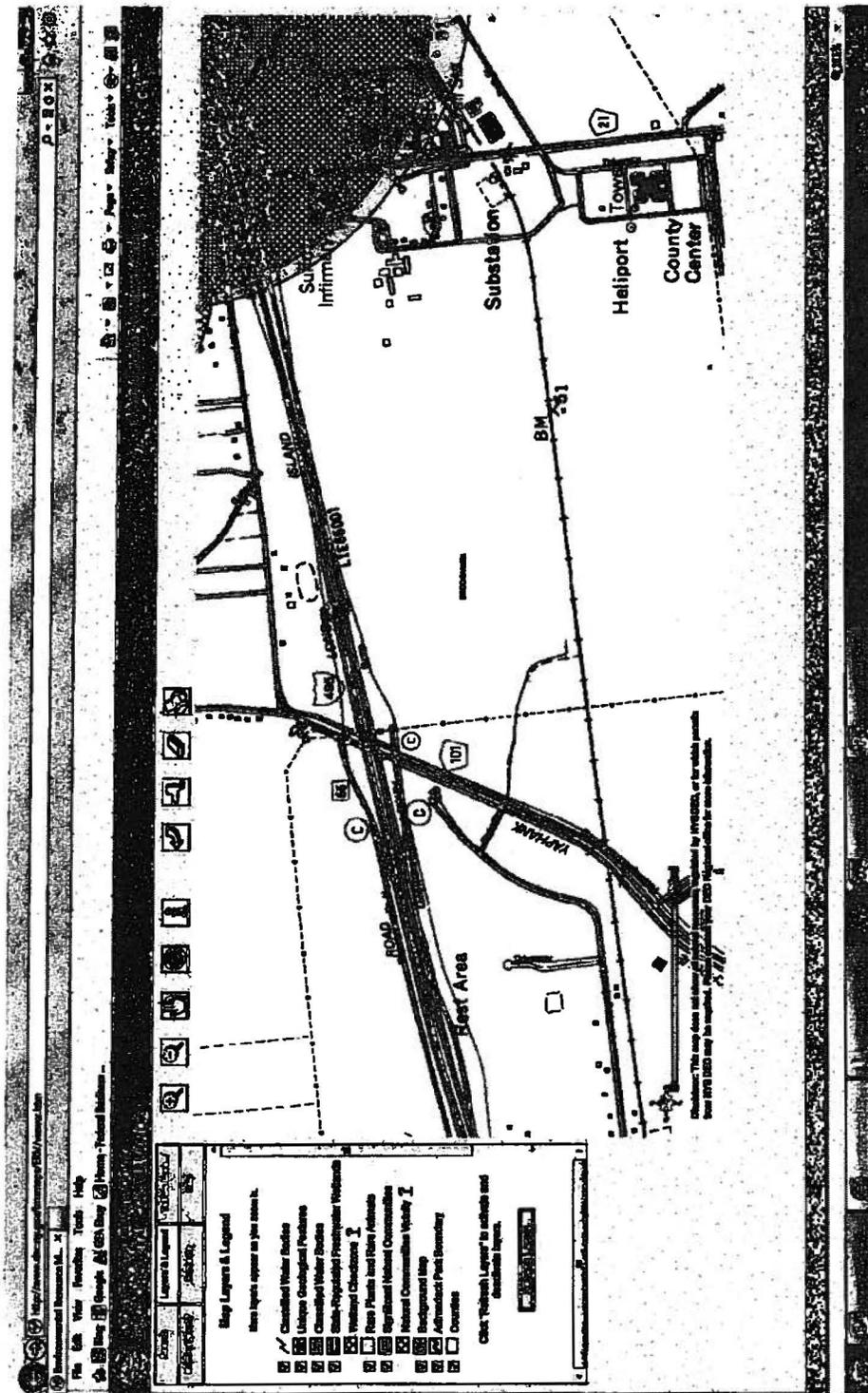


Figure 5: NYS DEC Environmental Mapper – Wetlands and Rare Plants and Rare Animals

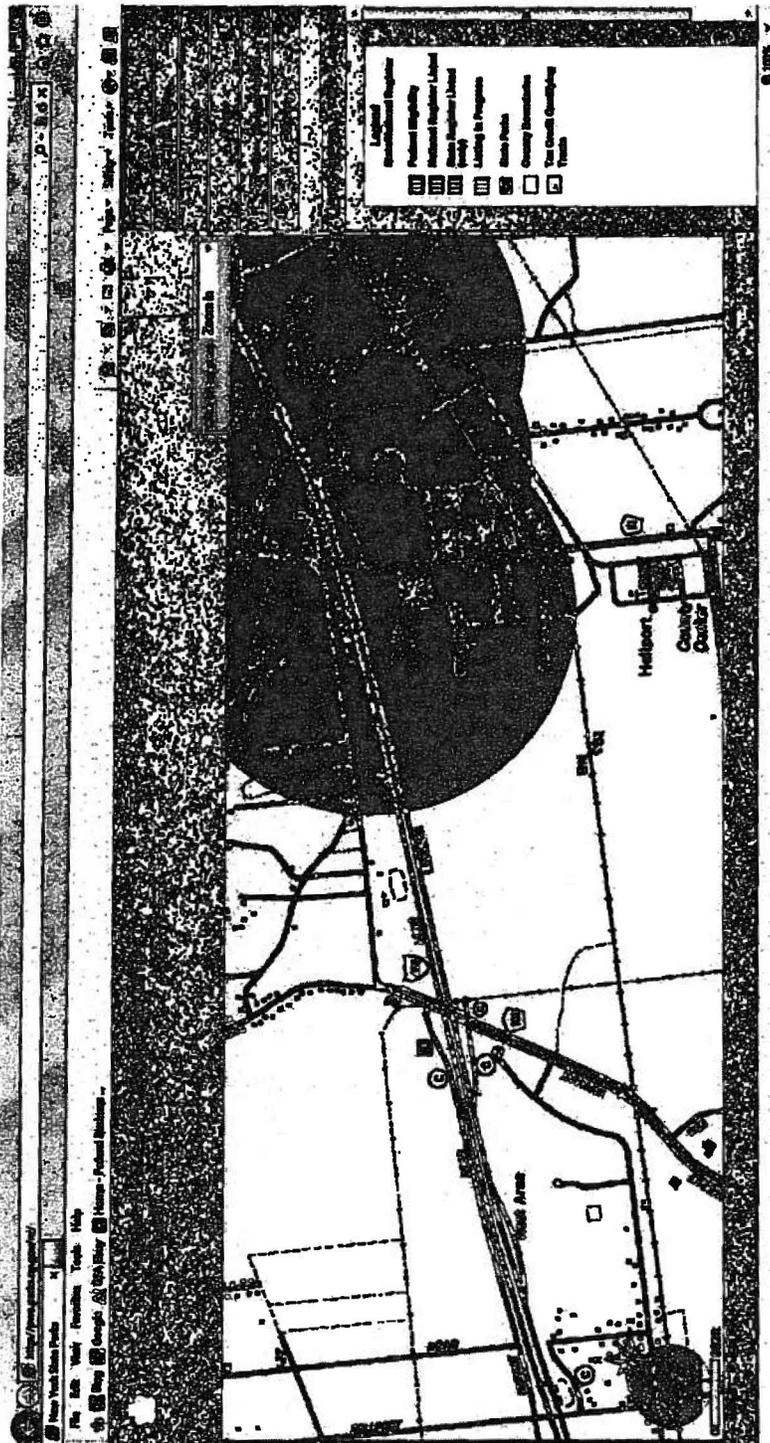


Figure 6: NY State Historic Preservation Office – Cultural Resources

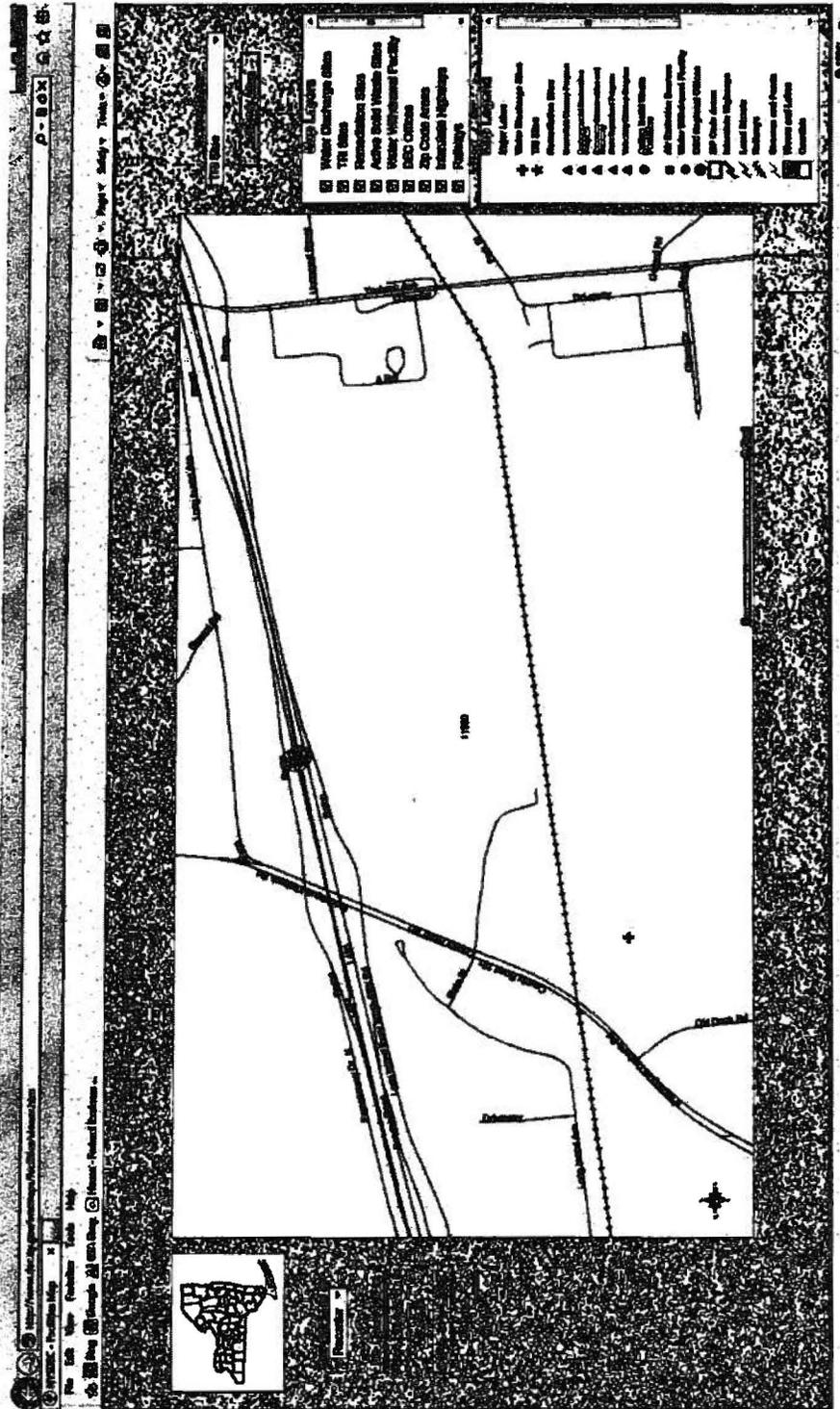


Figure 7: NYS DEC Environmental Navigator - Facilities

**APPENDIX A**

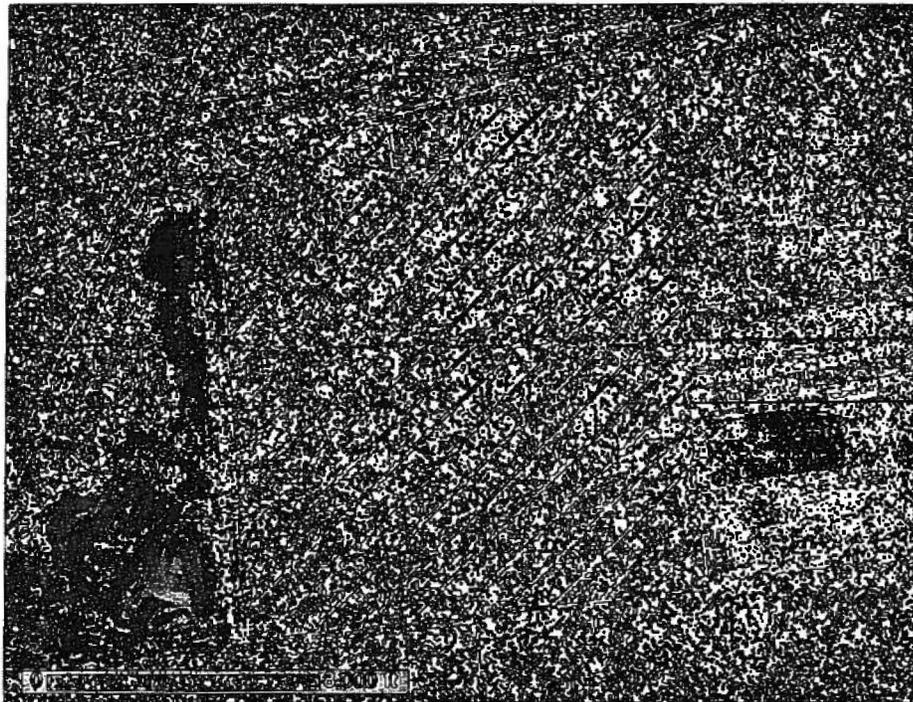
**Custom Soil Report**



A product of the National Cooperative Soil Survey, a joint effort of the United States Department of Agriculture and other Federal agencies, State agencies including the Agricultural Experiment Stations, and local participants

# Custom Soil Resource Report for Suffolk County, New York

Parcels B/C



January 20, 2014

## Preface

Soil surveys contain information that affects land use planning in survey areas. They highlight soil limitations that affect various land uses and provide information about the properties of the soils in the survey area. Soil surveys are designed for many different users, including farmers, ranchers, foresters, agronomists, urban planners, community officials, engineers, developers, builders, and home buyers. Also, conservationists, teachers, students, and specialists in recreation, waste disposal, and pollution control can use the surveys to help them understand, protect, or enhance the environment.

Various land use regulations of Federal, State, and local governments may impose special restrictions on land use or land treatment. Soil surveys identify soil properties that are used in making various land use or land treatment decisions. The information is intended to help the land users identify and reduce the effects of soil limitations on various land uses. The landowner or user is responsible for identifying and complying with existing laws and regulations.

Although soil survey information can be used for general farm, local, and wider area planning, onsite investigation is needed to supplement this information in some cases. Examples include soil quality assessments (<http://www.nrcs.usda.gov/wps/portal/nrcs/main/soils/health/>) and certain conservation and engineering applications. For more detailed information, contact your local USDA Service Center (<http://offices.sc.egov.usda.gov/locator/app?agency=nrcs>) or your NRCS State Soil Scientist ([http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/contactus/?oid=nrcs142p2\\_063951](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/contactus/?oid=nrcs142p2_063951)).

Great differences in soil properties can occur within short distances. Some soils are seasonally wet or subject to flooding. Some are too unstable to be used as a foundation for buildings or roads. Clayey or wet soils are poorly suited to use as septic tank absorption fields. A high water table makes a soil poorly suited to basements or underground installations.

The National Cooperative Soil Survey is a joint effort of the United States Department of Agriculture and other Federal agencies, State agencies including the Agricultural Experiment Stations, and local agencies. The Natural Resources Conservation Service (NRCS) has leadership for the Federal part of the National Cooperative Soil Survey.

Information about soils is updated periodically. Updated information is available through the NRCS Web Soil Survey, the site for official soil survey information.

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## **How Soil Surveys Are Made**

Soil surveys are made to provide information about the soils and miscellaneous areas in a specific area. They include a description of the soils and miscellaneous areas and their location on the landscape and tables that show soil properties and limitations affecting various uses. Soil scientists observed the steepness, length, and shape of the slopes; the general pattern of drainage; the kinds of crops and native plants; and the kinds of bedrock. They observed and described many soil profiles. A soil profile is the sequence of natural layers, or horizons, in a soil. The profile extends from the surface down into the unconsolidated material in which the soil formed or from the surface down to bedrock. The unconsolidated material is devoid of roots and other living organisms and has not been changed by other biological activity.

Currently, soils are mapped according to the boundaries of major land resource areas (MLRAs). MLRAs are geographically associated land resource units that share common characteristics related to physiography, geology, climate, water resources, soils, biological resources, and land uses (USDA, 2006). Soil survey areas typically consist of parts of one or more MLRA.

The soils and miscellaneous areas in a survey area occur in an orderly pattern that is related to the geology, landforms, relief, climate, and natural vegetation of the area. Each kind of soil and miscellaneous area is associated with a particular kind of landform or with a segment of the landform. By observing the soils and miscellaneous areas in the survey area and relating their position to specific segments of the landform, a soil scientist develops a concept, or model, of how they were formed. Thus, during mapping, this model enables the soil scientist to predict with a considerable degree of accuracy the kind of soil or miscellaneous area at a specific location on the landscape.

Commonly, individual soils on the landscape merge into one another as their characteristics gradually change. To construct an accurate soil map, however, soil scientists must determine the boundaries between the soils. They can observe only a limited number of soil profiles. Nevertheless, these observations, supplemented by an understanding of the soil-vegetation-landscape relationship, are sufficient to verify predictions of the kinds of soil in an area and to determine the boundaries.

Soil scientists recorded the characteristics of the soil profiles that they studied. They noted soil color, texture, size and shape of soil aggregates, kind and amount of rock fragments, distribution of plant roots, reaction, and other features that enable them to identify soils. After describing the soils in the survey area and determining their properties, the soil scientists assigned the soils to taxonomic classes (units). Taxonomic classes are concepts. Each taxonomic class has a set of soil characteristics with precisely defined limits. The classes are used as a basis for comparison to classify soils systematically. Soil taxonomy, the system of taxonomic classification used in the United States, is based mainly on the kind and character of soil properties and the arrangement of horizons within the profile. After the soil scientists classified and named the soils in the survey area, they compared the

#### Custom Soil Resource Report

individual soils with similar soils in the same taxonomic class in other areas so that they could confirm data and assemble additional data based on experience and research.

The objective of soil mapping is not to delineate pure map unit components; the objective is to separate the landscape into landforms or landform segments that have similar use and management requirements. Each map unit is defined by a unique combination of soil components and/or miscellaneous areas in predictable proportions. Some components may be highly contrasting to the other components of the map unit. The presence of minor components in a map unit in no way diminishes the usefulness or accuracy of the data. The delineation of such landforms and landform segments on the map provides sufficient information for the development of resource plans. If intensive use of small areas is planned, onsite investigation is needed to define and locate the soils and miscellaneous areas.

Soil scientists make many field observations in the process of producing a soil map. The frequency of observation is dependent upon several factors, including scale of mapping, intensity of mapping, design of map units, complexity of the landscape, and experience of the soil scientist. Observations are made to test and refine the soil-landscape model and predictions and to verify the classification of the soils at specific locations. Once the soil-landscape model is refined, a significantly smaller number of measurements of individual soil properties are made and recorded. These measurements may include field measurements, such as those for color, depth to bedrock, and texture, and laboratory measurements, such as those for content of sand, silt, clay, salt, and other components. Properties of each soil typically vary from one point to another across the landscape.

Observations for map unit components are aggregated to develop ranges of characteristics for the components. The aggregated values are presented. Direct measurements do not exist for every property presented for every map unit component. Values for some properties are estimated from combinations of other properties.

While a soil survey is in progress, samples of some of the soils in the area generally are collected for laboratory analyses and for engineering tests. Soil scientists interpret the data from these analyses and tests as well as the field-observed characteristics and the soil properties to determine the expected behavior of the soils under different uses. Interpretations for all of the soils are field tested through observation of the soils in different uses and under different levels of management. Some interpretations are modified to fit local conditions, and some new interpretations are developed to meet local needs. Data are assembled from other sources, such as research information, production records, and field experience of specialists. For example, data on crop yields under defined levels of management are assembled from farm records and from field or plot experiments on the same kinds of soil.

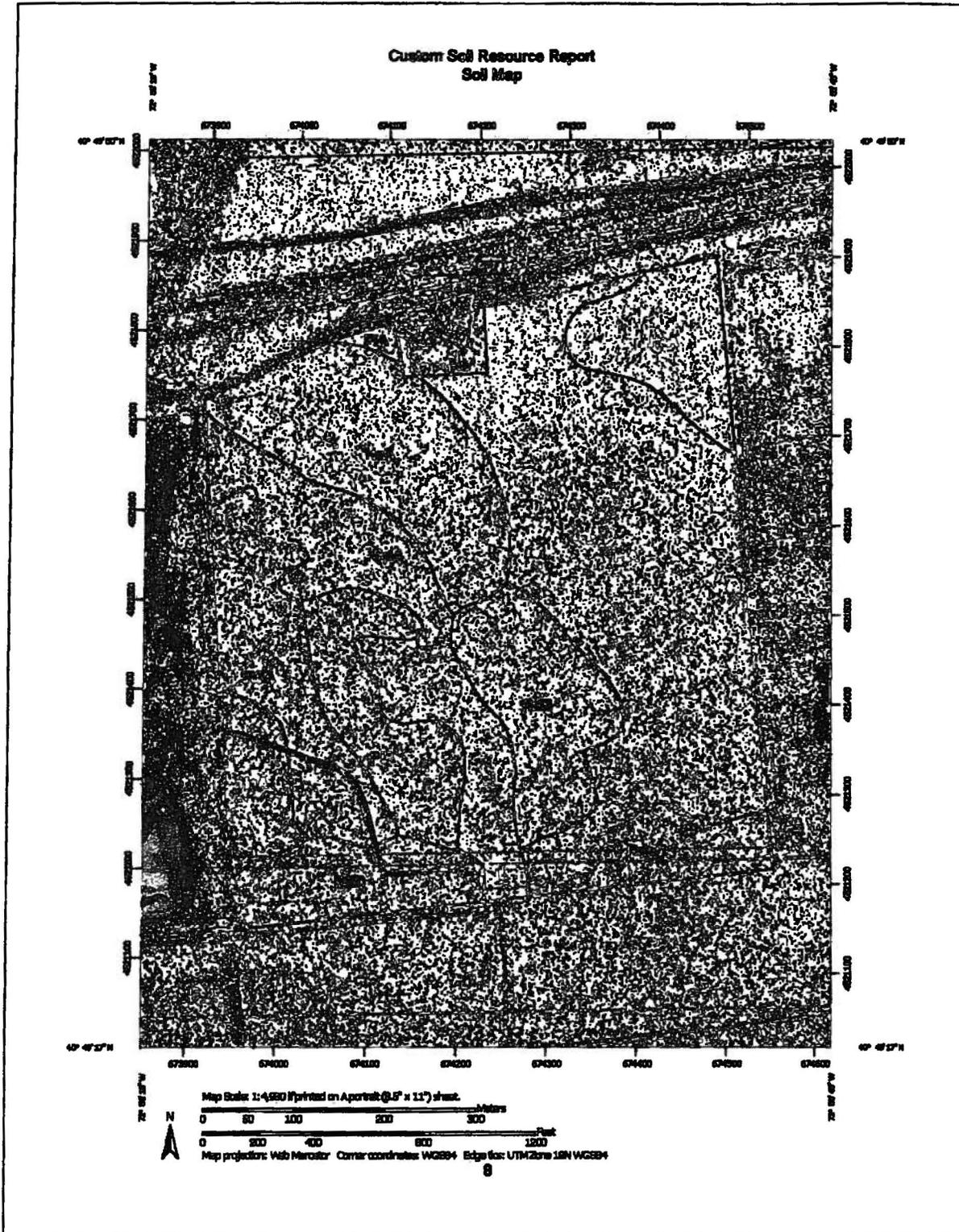
Predictions about soil behavior are based not only on soil properties but also on such variables as climate and biological activity. Soil conditions are predictable over long periods of time, but they are not predictable from year to year. For example, soil scientists can predict with a fairly high degree of accuracy that a given soil will have a high water table within certain depths in most years, but they cannot predict that a high water table will always be at a specific level in the soil on a specific date.

After soil scientists located and identified the significant natural bodies of soil in the survey area, they drew the boundaries of these bodies on aerial photographs and identified each as a specific map unit. Aerial photographs show trees, buildings, fields, roads, and rivers, all of which help in locating boundaries accurately.

## **Soil Map**

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The soil map section includes the soil map for the defined area of interest, a list of soil map units on the map and extent of each map unit, and cartographic symbols displayed on the map. Also presented are various metadata about data used to produce the map, and a description of each soil map unit.



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MAP LEGEND		MAP INFORMATION
<p><b>Area of Interest (AOI)</b></p> <ul style="list-style-type: none"> <li> Area of Interest (AOI)</li> </ul> <p><b>Soils</b></p> <ul style="list-style-type: none"> <li> Soil Map Unit Polygon</li> <li> Soil Map Unit Line</li> <li> Soil Map Unit Point</li> </ul> <p><b>Special Point Features</b></p> <ul style="list-style-type: none"> <li> Shoat</li> <li> Burrow Pit</li> <li> Clay Spot</li> <li> Closed Depression</li> <li> Gravel Pit</li> <li> Gravelly Spot</li> <li> Landslide</li> <li> Low Flow</li> <li> Marsh or Swamp</li> <li> Mine or Quarry</li> <li> Shallowness Water</li> <li> Ponded Water</li> <li> Rock Outcrop</li> <li> Saline Spot</li> <li> Stony Spot</li> <li> Severely Eroded Spot</li> <li> Stratified</li> <li> Stile or Step</li> <li> Stake Spot</li> </ul>	<p><b>Special Line Features</b></p> <ul style="list-style-type: none"> <li> Soil Area</li> <li> Stony Spot</li> <li> Very Stony Spot</li> <li> Wet Spot</li> <li> Other</li> </ul> <p><b>Water Features</b></p> <ul style="list-style-type: none"> <li> Stream and Canal</li> </ul> <p><b>Transportation</b></p> <ul style="list-style-type: none"> <li> Rail</li> <li> Interstate Highway</li> <li> US Route</li> <li> Major Road</li> <li> Local Road</li> </ul> <p><b>Background</b></p> <ul style="list-style-type: none"> <li> Aerial Photography</li> </ul>	<p>The soil surveys that comprise your AOI were mapped at 1:20,000.</p> <p><b>Warning: Soil Map may not be valid at this scale.</b></p> <p>Enlargement of maps beyond the scale of mapping can cause misunderstanding of the detail of mapping and accuracy of soil line placement. The maps do not show the small areas of contrasting soils that could have been shown at a more detailed scale.</p> <p>Please rely on the bar scale on each map sheet for map measurements.</p> <p>Source of Map: National Resources Conservation Service                  Web Soil Survey URL: <a href="http://websoilsurvey.nrcs.usda.gov">http://websoilsurvey.nrcs.usda.gov</a>                  Coordinate System: Web Mercator (SP002857)</p> <p>Maps from the Web Soil Survey are based on the Web Mercator projection, which preserves direction and shape but distorts distance and area. A projection that preserves area, such as the Albers equal-area conic projection, should be used if more accurate calculations of distance or area are required.</p> <p>This product is generated from the USDA-NRCS certified data as of the version date(s) listed below.</p> <p>Soil Survey Area: Sullivan County, New York                  Survey Area Date: Version 11, Dec 18, 2013</p> <p>Soil map units are labeled (as space allows) for map scales 1:50,000 or larger.</p> <p>Date(s) aerial images were photographed: Mar 28, 2011—May 12, 2011</p> <p>The orthophoto or other base map on which the soil lines were compiled and digitized probably differs from the background imagery displayed on these maps. As a result, some minor shifting of map-unit boundaries may be evident.</p>

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**Map Unit Legend**

Brookhaven County, New York (NY 103)			
Map Unit Symbol	Map Unit Description	Area in Aci	Percent of Aci
CpE	Carver and Plymouth sands, 15 to 35 percent slopes	11.6	12.3%
HaA	Haven loam, 0 to 2 percent slopes	20.9	22.1%
PIA	Plymouth loamy sand, 0 to 3 percent slopes	36.3	38.4%
RdA	Riverhead sandy loam, 0 to 3 percent slopes	12.9	13.6%
RdB	Riverhead sandy loam, 3 to 8 percent slopes	12.8	13.6%
Totals for Area of Interest		94.5	100.0%

**Map Unit Descriptions**

The map units delineated on the detailed soil maps in a soil survey represent the soils or miscellaneous areas in the survey area. The map unit descriptions, along with the maps, can be used to determine the composition and properties of a unit.

A map unit delineation on a soil map represents an area dominated by one or more major kinds of soil or miscellaneous areas. A map unit is identified and named according to the taxonomic classification of the dominant soils. Within a taxonomic class there are precisely defined limits for the properties of the soils. On the landscape, however, the soils are natural phenomena, and they have the characteristic variability of all natural phenomena. Thus, the range of some observed properties may extend beyond the limits defined for a taxonomic class. Areas of soils of a single taxonomic class rarely, if ever, can be mapped without including areas of other taxonomic classes. Consequently, every map unit is made up of the soils or miscellaneous areas for which it is named and some minor components that belong to taxonomic classes other than those of the major soils.

Most minor soils have properties similar to those of the dominant soil or soils in the map unit, and thus they do not affect use and management. These are called noncontrasting, or similar, components. They may or may not be mentioned in a particular map unit description. Other minor components, however, have properties and behavioral characteristics divergent enough to affect use or to require different management. These are called contrasting, or dissimilar, components. They generally are in small areas and could not be mapped separately because of the scale used. Some small areas of strongly contrasting soils or miscellaneous areas are identified by a special symbol on the maps. If included in the database for a given area, the contrasting minor components are identified in the map unit descriptions along with some characteristics of each. A few areas of minor components may not have been observed, and consequently they are not mentioned in the descriptions, especially where the pattern was so complex that it was impractical to make enough observations to identify all the soils and miscellaneous areas on the landscape.

#### Custom Soil Resource Report

The presence of minor components in a map unit in no way diminishes the usefulness or accuracy of the data. The objective of mapping is not to delineate pure taxonomic classes but rather to separate the landscape into landforms or landform segments that have similar use and management requirements. The delineation of such segments on the map provides sufficient information for the development of resource plans. If intensive use of small areas is planned, however, onsite investigation is needed to define and locate the soils and miscellaneous areas.

An identifying symbol precedes the map unit name in the map unit descriptions. Each description includes general facts about the unit and gives important soil properties and qualities.

Soils that have profiles that are almost alike make up a *soil series*. Except for differences in texture of the surface layer, all the soils of a series have major horizons that are similar in composition, thickness, and arrangement.

Soils of one series can differ in texture of the surface layer, slope, stoniness, salinity, degree of erosion, and other characteristics that affect their use. On the basis of such differences, a soil series is divided into *soil phases*. Most of the areas shown on the detailed soil maps are phases of soil series. The name of a soil phase commonly indicates a feature that affects use or management. For example, Alpha silt loam, 0 to 2 percent slopes, is a phase of the Alpha series.

Some map units are made up of two or more major soils or miscellaneous areas. These map units are complexes, associations, or undifferentiated groups.

A *complex* consists of two or more soils or miscellaneous areas in such an intricate pattern or in such small areas that they cannot be shown separately on the maps. The pattern and proportion of the soils or miscellaneous areas are somewhat similar in all areas. Alpha-Beta complex, 0 to 6 percent slopes, is an example.

An *association* is made up of two or more geographically associated soils or miscellaneous areas that are shown as one unit on the maps. Because of present or anticipated uses of the map units in the survey area, it was not considered practical or necessary to map the soils or miscellaneous areas separately. The pattern and relative proportion of the soils or miscellaneous areas are somewhat similar. Alpha-Beta association, 0 to 2 percent slopes, is an example.

An *undifferentiated group* is made up of two or more soils or miscellaneous areas that could be mapped individually but are mapped as one unit because similar interpretations can be made for use and management. The pattern and proportion of the soils or miscellaneous areas in a mapped area are not uniform. An area can be made up of only one of the major soils or miscellaneous areas, or it can be made up of all of them. Alpha and Beta soils, 0 to 2 percent slopes, is an example.

Some surveys include *miscellaneous areas*. Such areas have little or no soil material and support little or no vegetation. Rock outcrop is an example.

Custom Soil Resource Report

Suffolk County, New York

**CpE—Carver and Plymouth sands, 15 to 35 percent slopes**

**Map Unit Setting**

*Mean annual precipitation:* 45 to 50 inches  
*Mean annual air temperature:* 50 to 54 degrees F  
*Frost-free period:* 150 to 225 days

**Map Unit Composition**

*Carver and similar soils:* 40 percent  
*Plymouth, sand, and similar soils:* 40 percent  
*Minor components:* 20 percent

**Description of Plymouth, sand**

**Setting**

*Landform:* Outwash plains, moraines  
*Landform position (two-dimensional):* Backslope  
*Landform position (three-dimensional):* Riser  
*Down-slope shape:* Convex  
*Across-slope shape:* Convex  
*Parent material:* Acid sandy glaciofluvial or deltaic deposits

**Properties and qualities**

*Slope:* 15 to 35 percent  
*Depth to restrictive feature:* More than 80 inches  
*Drainage class:* Excessively drained  
*Capacity of the most limiting layer to transmit water (Ksat):* High to very high (5.95 to 19.98 in/hr)  
*Depth to water table:* More than 80 inches  
*Frequency of flooding:* None  
*Frequency of ponding:* None  
*Available water capacity:* Very low (about 2.4 inches)

**Interpretive groups**

*Farmland classification:* Not prime farmland  
*Land capability (nonirrigated):* 7s  
*Hydrologic Soil Group:* A

**Typical profile**

*0 to 4 inches:* Sand  
*4 to 27 inches:* Sand  
*27 to 80 inches:* Gravely coarse sand

**Description of Carver**

**Setting**

*Landform:* Outwash plains, moraines  
*Landform position (two-dimensional):* Backslope  
*Landform position (three-dimensional):* Riser  
*Down-slope shape:* Convex  
*Across-slope shape:* Convex  
*Parent material:* Coarse sandy glaciofluvial deposits

**Custom Soil Resource Report**

**Properties and qualities**

*Slope:* 15 to 35 percent  
*Depth to restrictive feature:* More than 80 inches  
*Drainage class:* Excessively drained  
*Capacity of the most limiting layer to transmit water (Ksat):* Moderately high to high  
(0.20 to 5.95 in/hr)  
*Depth to water table:* More than 80 inches  
*Frequency of flooding:* None  
*Frequency of ponding:* None  
*Available water capacity:* Low (about 3.6 inches)

**Interpretive groups**

*Farmland classification:* Not prime farmland  
*Land capability (nonirrigated):* 7s  
*Hydrologic Soil Group:* A

**Typical profile**

*0 to 1 inches:* Highly decomposed plant material  
*1 to 9 inches:* Coarse sand  
*9 to 23 inches:* Coarse sand  
*23 to 60 inches:* Coarse sand

**Minor Components**

**Carver, dark subsoil**  
*Percent of map unit:* 5 percent

**Haven**  
*Percent of map unit:* 5 percent

**Riverhead**  
*Percent of map unit:* 5 percent

**Montauk, sandy vertic**  
*Percent of map unit:* 5 percent

**HaA—Haven loam, 0 to 2 percent slopes**

**Map Unit Setting**

*Mean annual precipitation:* 45 to 50 inches  
*Mean annual air temperature:* 50 to 54 degrees F  
*Frost-free period:* 150 to 225 days

**Map Unit Composition**

*Haven and similar soils:* 75 percent  
*Minor components:* 25 percent

**Description of Haven**

**Setting**

*Landform:* Outwash plains

Custom Soil Resource Report

*Landform position (two-dimensional):* Summit  
*Landform position (three-dimensional):* Tread  
*Down-slope shape:* Convex  
*Across-slope shape:* Convex  
*Parent material:* Loamy glaciofluvial deposits over sandy and gravelly glaciofluvial deposits

**Properties and qualities**

*Slope:* 0 to 2 percent  
*Depth to restrictive feature:* More than 80 inches  
*Drainage class:* Well drained  
*Capacity of the most limiting layer to transmit water (Ksat):* Moderately high to high (0.20 to 1.98 in/hr)  
*Depth to water table:* More than 80 inches  
*Frequency of flooding:* None  
*Frequency of ponding:* None  
*Available water capacity:* Low (about 4.3 inches)

**Interpretive groups**

*Ferriand classification:* All areas are prime farmland  
*Land capability (nonirrigated):* 1  
*Hydrologic Soil Group:* B

**Typical profile**

*0 to 2 inches:* Highly decomposed plant material  
*2 to 5 inches:* Loam  
*5 to 19 inches:* Loam  
*19 to 28 inches:* Gravelly loam  
*28 to 80 inches:* Stratified gravelly sand

**Minor Components**

**Riverhead**

*Percent of map unit:* 5 percent

**Scio**

*Percent of map unit:* 5 percent

**Unnamed soils, gravelly**

*Percent of map unit:* 5 percent

**Bridgestonpton**

*Percent of map unit:* 5 percent

**Montauk**

*Percent of map unit:* 5 percent

**PIA—Plymouth loamy sand, 0 to 3 percent slopes**

**Map Unit Setting**

*Mean annual precipitation:* 45 to 50 inches  
*Mean annual air temperature:* 50 to 54 degrees F  
*Frost-free period:* 150 to 225 days

Custom Soil Resource Report

**Map Unit Composition**

*Plymouth and similar soils: 85 percent*  
*Minor components: 15 percent*

**Description of Plymouth**

**Setting**

*Landform: Moraines, outwash plains*  
*Landform position (two-dimensional): Summit*  
*Landform position (three-dimensional): Tread*  
*Down-slope shape: Convex*  
*Across-slope shape: Convex*  
*Parent material: Acid sandy glaciofluvial or deltaic deposits*

**Properties and qualities**

*Slope: 0 to 3 percent*  
*Depth to restrictive feature: More than 80 inches*  
*Drainage class: Excessively drained*  
*Capacity of the most limiting layer to transmit water (Ksat): High to very high (5.95 to 19.98 in/hr)*  
*Depth to water table: More than 80 inches*  
*Frequency of flooding: None*  
*Frequency of ponding: None*  
*Available water capacity: Very low (about 2.4 inches)*

**Interpretive groups**

*Farmland classification: Farmland of statewide importance*  
*Land capability (nonirrigated): 3s*  
*Hydrologic Soil Group: A*

**Typical profile**

*0 to 4 inches: Loamy sand*  
*4 to 27 inches: Loamy sand*  
*27 to 60 inches: Gravelly coarse sand*

**Minor Components**

**Riverhead**

*Percent of map unit: 5 percent*

**Montauk, sandy variant**

*Percent of map unit: 5 percent*

**Carver**

*Percent of map unit: 5 percent*

**RdA—Riverhead sandy loam, 0 to 3 percent slopes**

**Map Unit Setting**

*Mean annual precipitation: 45 to 50 inches*  
*Mean annual air temperature: 50 to 54 degrees F*

Custom Soil Resource Report

*Frost-free period:* 160 to 226 days

**Map Unit Composition**

*Riverhead and similar soils:* 80 percent

*Minor components:* 20 percent

**Description of Riverhead**

**Setting**

*Landform:* Moraines, outwash plains

*Landform position (two-dimensional):* Summit

*Landform position (three-dimensional):* Tread

*Down-slope shape:* Convex

*Across-slope shape:* Convex

*Parent material:* Loamy glaciofluvial deposits overlying stratified sand and gravel

**Properties and qualities**

*Slope:* 0 to 3 percent

*Depth to restrictive feature:* More than 80 inches

*Drainage class:* Well drained

*Capacity of the most limiting layer to transmit water (Ksat):* High (1.98 to 5.95 in/hr)

*Depth to water table:* More than 80 inches

*Frequency of flooding:* None

*Frequency of ponding:* None

*Available water capacity:* Low (about 5.1 inches)

**Interpretive groups**

*Fermland classification:* All areas are prime farmland

*Land capability (nonirrigated):* 2s

*Hydrologic Soil Group:* A

**Typical profile**

*0 to 12 inches:* Sandy loam

*12 to 27 inches:* Sandy loam

*27 to 35 inches:* Gravelly loamy sand

*35 to 65 inches:* Stratified coarse sand to gravelly sand

**Minor Components**

**Plymouth**

*Percent of map unit:* 5 percent

**Sudbury**

*Percent of map unit:* 5 percent

**Haven**

*Percent of map unit:* 5 percent

**Montauk, sandy variant**

*Percent of map unit:* 3 percent

**Riverhead, silt loam layers**

*Percent of map unit:* 2 percent

Custom Soil Resource Report

**Rd1B—Riverhead sandy loam, 3 to 8 percent slopes**

**Map Unit Setting**

*Mean annual precipitation:* 45 to 50 inches  
*Mean annual air temperature:* 50 to 54 degrees F  
*Frost-free period:* 150 to 225 days

**Map Unit Composition**

*Riverhead and similar soils:* 80 percent  
*Minor components:* 20 percent

**Description of Riverhead**

**Setting**

*Landform:* Moraines, outwash plains  
*Landform position (two-dimensional):* Summit  
*Landform position (three-dimensional):* Tread  
*Down-slope shape:* Convex  
*Across-slope shape:* Convex  
*Parent material:* Loamy glaciofluvial deposits overlying stratified sand and gravel

**Properties and qualities**

*Slope:* 3 to 8 percent  
*Depth to restrictive feature:* More than 80 inches  
*Drainage class:* Well drained  
*Capacity of the most limiting layer to transmit water (Ksat):* High (1.98 to 5.95 in/hr)  
*Depth to water table:* More than 80 inches  
*Frequency of flooding:* None  
*Frequency of ponding:* None  
*Available water capacity:* Low (about 5.1 inches)

**Interpretive groups**

*Fermland classification:* All areas are prime farmland  
*Land capability (nonirrigated):* 2s  
*Hydrologic Soil Group:* A

**Typical profile**

*0 to 12 inches:* Sandy loam  
*12 to 27 inches:* Sandy loam  
*27 to 35 inches:* Gravelly loamy sand  
*35 to 65 inches:* Stratified coarse sand to gravelly sand

**Minor Components**

**Plymouth**

*Percent of map unit:* 5 percent

**Bridgeton**

*Percent of map unit:* 5 percent

**Custom Soil Resource Report**

**Haven**  
*Percent of map unit: 5 percent*

**Montauk, sandy variant**  
*Percent of map unit: 3 percent*

**Riverhead, silt loam layers**  
*Percent of map unit: 2 percent*

## References

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- United States Department of Agriculture, Natural Resources Conservation Service. National forestry manual. <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/forestry/pub/>
- United States Department of Agriculture, Natural Resources Conservation Service. National range and pasture handbook. <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/landuse/rangepasture/?cid=stetprdb1043084>

Custom Soil Resource Report

United States Department of Agriculture, Natural Resources Conservation Service. National soil survey handbook, title 430-VI. [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/scientists/?cid=nrca142p2\\_054242](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/scientists/?cid=nrca142p2_054242)

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**APPENDIX B**

**U.S. Fish and Wildlife Service IPAC Report**



U.S. Fish and Wildlife Service

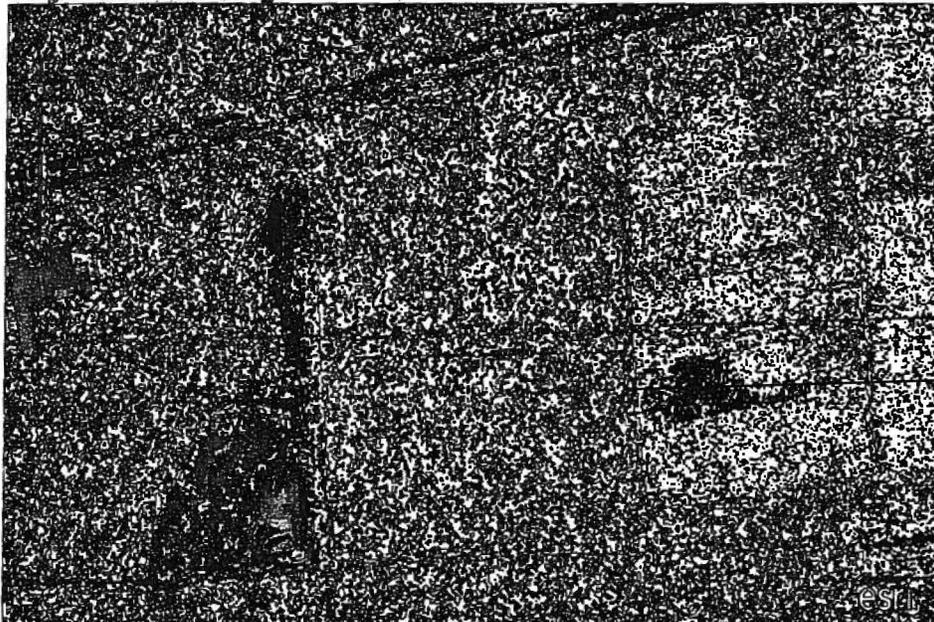
## Natural Resources of Concern

This resource list is to be used for planning purposes only — it is not an official species list.

Endangered Species Act species list information for your project is available online and listed below for the following FWS Field Offices:

LONG ISLAND ECOLOGICAL SERVICES FIELD OFFICE  
340 SMITH ROAD  
SHIRLEY, NY 11967  
(631) 286-0485

### *Project Location Map:*





U.S. Fish and Wildlife Service

## Natural Resources of Concern

**Project Counties:**

Suffolk, NY

**Geographic coordinates (Open Geospatial Consortium Well-Known Text, NAD83):**

MULTIPOLYGON (((-72.9378144 40.828081, -72.9351966 40.8288929, -72.9350679 40.8283733, -72.9333995 40.8285032, -72.9340808 40.8290893, -72.9309051 40.8296105, -72.9301755 40.8233772, -72.9370849 40.8226254, -72.9378144 40.828081)))

**Project Type:**

Development

**Endangered Species Act Species List (USEWS Endangered Species Program)**

There are a total of 6 threatened, endangered, or candidate species, and/or designated critical habitat on your species list. Species on this list are the species that may be affected by your project and could include species that exist in another geographic area. For example, certain fishes may appear on the species list because a project could cause downstream effects on the species. Please contact the designated FWS office if you have questions.

**Species that may be affected by your project:**

Birds	Status	Species Profile	Contact
Fiping Plover ( <i>Charadrius melodus</i> ) Population: except Great Lakes watershed	Threatened	species info	Long Island Ecological Services Field Office
Red Knot ( <i>Calidris canutus rufa</i> )	Proposed Threatened	species info	Long Island Ecological Services Field Office
Roseate tern ( <i>Sterna dougallii dougallii</i> ) Population: northeast U.S. nesting pop.	Endangered	species info	Long Island Ecological Services Field Office
<b>Flowering Plants</b>			
Sandplain gerardia ( <i>Agalinis acuta</i> )	Endangered	species info	Long Island Ecological Services Field Office
Seabeach amaranth ( <i>Amaranthus pumilus</i> )	Threatened	species info	Long Island Ecological Services Field Office
<b>Mammals</b>			



U.S. Fish and Wildlife Service

### Natural Resources of Concern

northern long-eared Bat ( <i>Myotis septentrionalis</i> ) Population	Proposed Endangered	species info	Long Island Ecological Services Field Office
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**~~FWS National Wildlife Refuges (USFWS National Wildlife Refuges Program)~~**  
 There are no refuges found within the vicinity of your project.

**~~FWS Migratory Birds (USFWS Migratory Bird Program)~~**

Most species of birds, including eagles and other raptors, are protected under the Migratory Bird Treaty Act (16 U.S.C. 703). Bald eagles and golden eagles receive additional protection under the Bald and Golden Eagle Protection Act (16 U.S.C. 668). The Service's Birds of Conservation Concern (2008) report identifies species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become listed under the Endangered Species Act as amended (16 U.S.C 1531 et seq.).

*Migratory bird information is not available for your project location.*

**~~NWI Wetlands (USFWS National Wetlands Inventory)~~**

The U.S. Fish and Wildlife Service is the principal Federal agency that provides information on the extent and status of wetlands in the U.S., via the National Wetlands Inventory Program (NWI). In addition to impacts to wetlands within your immediate project area, wetlands outside of your project area may need to be considered in any evaluation of project impacts, due to the hydrologic nature of wetlands (for example, project activities may affect local hydrology within, and outside of, your immediate project area). It may be helpful to refer to the USFWS National Wetland Inventory website. The designated FWS office can also assist you. Impacts to wetlands and other aquatic habitats from your project may be subject to regulation under Section 404 of the Clean Water Act, or other State/Federal Statutes. Project Proponents should discuss the relationship of these requirements to their project with the Regulatory Program of the appropriate U.S. Army Corps of Engineers District.

The following wetlands intersect your project area:

Wetland Type	NWI Classification Code	Approximate Acres
Endorheic Pond	EBPB	0.5585

EXHIBITS M – P TO APRIL  
24, 2014 ORDER TO SHOW  
CAUSE OMITTED HERE

# EXHIBIT D

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

Case No. 14-CV-02286  
(LDW, AKT)

-against-

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

Defendants.

**REPLY DECLARATION OF  
MATTHEW J. MINER IN  
FURTHER SUPPORT OF TOWN  
OF BROOKHAVEN'S MOTION  
FOR PRELIMINARY  
INJUNCTION PURSUANT TO  
RULE 65 OF THE FED R. CIV. P.**

-----X

**MATTHEW J. MINER**, declares pursuant to 28 U.S.C. §1746 under penalty of perjury  
as follows:

1. I am the Chief of Operations of plaintiff, the Town of Brookhaven ("Town"), and also the Commissioner of the Town's Department of Waste Management. In my capacity as the Town's Chief of Operations, I have the principal administrative responsibility for carrying out the major Executive and Administrative functions of the Town's elected Supervisor, Hon. Edward Romaine to whom I report directly. In addition, since at least the year 2010, I have been the Town's principal liaison with the ever-changing group of individuals and entities which have represented themselves to the Town to be the owners or operators of the Brookhaven Rail Terminal.

2. This Declaration responds to and dispels the materially false representation made by the BRT Defendants that the Town was advised in advance by the operators of the Brookhaven Rail Terminal of their plans (currently being carried out) to so severely excavate,

{00131965-1}

remove and mine virgin native sand from the 93 Acre Parcel, and to regrade the property for supposed “track construction” that they have lowered actual grades from as much as 100 feet to 50 feet on large portions of the 93 Acre Parcel and are continuing to do so. As documented below, this contention is absolutely false. Moreover, it is directly contradicted by the multiple and ever-changing versions of supposed “Track Plans” which the BRT Defendants have provided to the Town since the year 2012 (first an “*L-Track Plan*”, followed by a “*J-Track Plan*”, and now belatedly, a totally new “*O-Track Plan*” encompassing the entire 93-Acre Site, with tracks now proposed on all sides).

3. I directly confirm, under oath, the statement contained in the moving Declaration of Brookhaven Town Attorney Annette Eaderesto, Esq., dated April 24, 2014 reading:

“29. The current dispute and need for immediate injunctive relief arose *principally by reason of the multiple and ever-changing sets of supposed track “Plans” which the BRT Defendants belatedly disclosed to the Town.* Prior to the Town’s filing of its State Court lawsuit, the BRT Defendants had only provided the Town with a preliminary plan prepared by the engineering firm of P.W. Grosser entitled “Overall Site Plan” dated December 11, 2012 (Exhibit M), but which included almost no grading or elevation details whatsoever, and which barely resembles or reflects the actual current excavation activities occurring on the 93 Acre Parcel. It was only after the Town filed its lawsuit on March 11, 2014 that the Town was first provided with a copy of a January 15, 2014 Plan prepared by the BRT Defendants’ railway engineering firm of AECOM entitled “Lot B and C Base Plan” (Exhibit N). This second “Plan” likewise contained no grading or elevation data.

30. Thereafter, more belatedly still in early April 2014, the BRT Defendants provided yet another Plan of its additional engineers, Sidney B. Bowne LLP dated April 1, 2014 entitled “Subgrade Preparation Plan” (Exhibit O). *It was only upon receipt of the Bowne Plan earlier this month that the Town first became aware that the current excavation is in no manner “actually and reasonably” required for bona fide track construction.* Indeed, the excavation and new track grading elevations shown to the Town, for the first time, in the April 1, 2014 Bowne Plan reveal that the grading of the proposed track will be excavated so as to sharply

drop upon entering the property at the 100 foot level of the current LIRR tracks in the Southwest corner of the 93 Acre Parcel, to a graded elevation of 60 feet near the Southeast corner, then drop still further to a graded level of only 50 feet, and that the 50 foot excavation level will then continue for the entirety of not only the track, but the entire 93 Acre Parcel (see aerial photos, Exhibit B and Bowne Track Plan Exhibit O).

31. The AECOM and Bowne plans from 2014, *which the BRT Defendants provided to the Town only after the Town filed suit and after the Town filed its application to reopen STB proceedings, bear no resemblance whatsoever to the earlier P.W. Grosser "Overall Site Plan" dated December 11, 2012 and provided to the Town in 2012* (Exhibit M). BRT/Sills representatives had previously represented to the Town that the Grosser Plan showed a proposed 5,600 foot "J-Track" entering the 93 acre site from the Northwest corner adjacent to the grading level of the 28 Acre Parcel site. Thus, *the BRT Defendants have essentially undertaken its currently ongoing excavation activities, which commenced in 2013, without having provided the Town with any track construction or associated grading plans whatsoever.*" (emphasis supplied)

4. The utter falsity of the BRT Defendants' contention that they made their plans to massively regrade the 93 Acre Parcel known to the Town in advance are demonstrably false, as further documented by the following:

a. As part of an e-mail message to me from one of BRT's principals dated June 26, 2012, Andy Kaufman, I was provided with the cover letter of SYSTRA Engineering Inc. likewise dated June 26, 2012 which enclosed aerial photograph which ostensibly showed the proposed location of new track (in an "*L-Track*" configuration totally different from all other supposed "Track Plans" subsequently provided by BRT), and showing no apparent elevations of the proposed additional trackage at all;

b. The cover letter of SYSTRA Engineering which was provided to me

stated that *“the limited re-grading work is necessary to set the track at proper grades and elevation for its users as well as for potential future connections to tracks south of the LIRR in Parcel D”*;

c. Nothing in the documentation provided to me indicated to the Town that a massive excavation and regrading of the site from 100 feet to 50 feet over much of the 93-acre parcel was planned and instead, the work was falsely described to me as *“limited-regrading work”*. This plan also showed the track in a so-called *“L Track”* configuration, ending at the northeastern portion of the Parcel where the natural elevation is lowest, without then travelling back around to where the natural elevation is highest;

d. Some months later, I was provided with yet a different proposed track plan by the BRT Defendants, prepared by PW Grosser Consulting Engineers dated December 2012 (exhibit M to the Town’s moving papers, and exhibit B hereto), this one showing a supposed *“J Track”* configuration in a completely different area than the prior *“L Track”* (exhibit A), and again showing no apparent elevations of the proposed trackage;

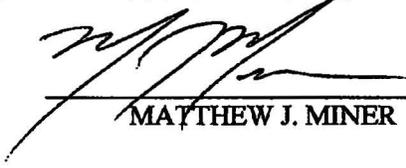
e. As noted above, it was not until well after the Town filed the instant litigation against the BRT Defendants in March 2014 and issued its Stop Work Order that the Town was belatedly provided with the so-called AECOM Plan dated January 2014 (exhibit N to the Town’s moving papers, and exhibit C hereto) which again shows no apparent elevations of the proposed additional track, this time in a supposed *“O Track”* configuration running along all four boundaries of the 98 Acre Parcel; and

f. Finally, as noted above, it was even later still, the first week in April 2014, when the BRT Defendants, for the first time, provided me with a copy of yet a different proposed “Track Plan” prepared by its current engineers, Bowne A&T Group dated April 1, 2014 (exhibit O to the Town’s moving papers, and exhibit D hereto). The Bowne Plan, for the first time,

revealed to the Town that what the BRT Defendants are doing is drastically lowering the grade at which the tracks will enter the 93 Acre Parcel from the 28 Acre Parcel at 100 feet above sea level to a precipitous drop of 60 feet above sea level and then 50 feet above sea level, including by regrading vast central portions of the 93 Acre Parcel from its current elevations of 80 to 100 feet to a reduced track level of 50 feet. It was this belated disclosure by the BRT Defendants, occurring earlier this month after the Town filed suit, only after the Town issued its Stop Work Order, and only after the Town insisted that the BRT Defendants provide a single "Track Plan" representing its actual planned excavation of the site, that the Town filed its instant motion for a preliminary injunction to bring a halt to the BRT Defendants' illicit and environmentally destructive "sand mining" of the environmentally sensitive and sale of native sand from the site to third-parties.

5. In summary, the BRT Defendants have at various times provided the Town with (a) a so-called "*L-Track plan*" with no track grades shown (exhibit A); (b) a supposed "*J-Track plan*" with no apparent grades shown (exhibit B); and (c) now an "*O-Track plan*" (exhibits C and D hereto), only the very last of which (exhibit O to the Town's moving papers, exhibit D hereto) discloses the actual drastically reduced elevations to which the BRT Defendants are regrading the site by means of the unlawful excavation and removal of native sand material directly above Long Island's Sole Source Aquifer in an environmentally vulnerable statutorily protected "Hydrological Zone 3" created by both Federal and State statute.

Dated: April 30, 2014



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MATTHEW J. MINER

# **EXHIBIT A**

>>> Andy Kaufman <[akaufman@brookhavenrailterminal.com](mailto:akaufman@brookhavenrailterminal.com)> 06/26/2012 4:48 PM >>>

Matt, Jim asked that I forward the attached. Also please note that SCWA will be doing an inspection of the water tap this week and service will be installed shortly thereafter. Once service is complete we can schedule the completion of grading and planting in that area.



June 26, 2012

Mr. Andrew Kaufman  
President  
Brookhaven Rail Terminal  
205 Sills Road  
Yaphank, NY 11980

**Re: Phase 2 Trackwork Design**

Dear Mr. Kaufman:

A summary of our conceptual track layout plan, prepared on 5/1/12, also known as the "J" track option is as noted below.

The proposed track will begin at an existing stub-ended track located in the southern portion of Block 3, Lot 29.1, Parcel A and extend east across Parcel B and into Parcel C parallel to the Long Island Rail Road main line track. The proposed Track will be approximately 65 feet from the existing southern property boundary line. As the track approaches the eastern side of Parcel C it turns approximately 90 degrees north and will be set parallel to the eastern property boundary line of Parcel C. The centerline of track will be set approximately 95 feet from the eastern property boundary line. The track will be on a descending 1.25% grade from west to east. A turnout will be placed approximately 800 feet from the north end of the track forming a second track that will remain parallel to the eastern property boundary line of Parcel C and be on a descending 1.25% grade south towards the LIRR main line track. The centerline of this track will be set approximately 75 feet from the eastern property boundary. The total length of track is approximately 5600 feet. See attached drawing for reference.

Clearing and re-grading for the track construction of the work, an area 150 feet wide, to allow for construction equipment access, re-grading requirements and construction of the track itself. The limited re-grading work is necessary to set the track at proper grades and elevation for its use as well as for potential future connections to tracks south of the LIRR in Parcel D.

Should you have any questions, please do not hesitate to contact me directly at (973) 873-9744 or at [jbonsignore@systrausa.com](mailto:jbonsignore@systrausa.com).

Sincerely,  
**SYSTRA Engineering, Inc.**

**SYSTRA Engineering, Inc.**

520 Eighth Avenue, Suite 2100, New York, NY 10018

Voice: 212/494-9111 • Fax: 212/494-9112 • <http://www.systraconsulting.com>

*An AA/Equal Opportunity Employer*

**Brookhaven Rail Terminal**  
**Page Two**  
**4/30/2014**

**Joseph Bonsignore, P.E.**  
**Project Manager**

**SYSTRA Engineering, Inc.**

520 Eighth Avenue, Suite 2100, New York, NY 10018

Voice: 212/494 9111 • Fax: 212/494 9112 • <http://www.systraconsulting.com>

*An AA/Equal Opportunity Employer*



# EXHIBIT B



# **EXHIBIT C**



**EXHIBIT D**



# **EXHIBIT E**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

Case No. 14-CV-02286  
(LDW, AKT)

-against-

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

**REPLY DECLARATION OF  
STEPHANIE O. DAVIS, CPG IN  
SUPPORT OF TOWN OF  
BROOKHAVEN'S MOTION FOR  
PRELIMINARY INJUNCTION  
PURSUANT TO RULE 65 OF  
THE FED R. CIV. P.**

Defendants.

-----X

**STEPHANIE O. DAVIS, CPG**, declares pursuant to 28 U.S.C. §1746 under penalty of perjury as follows:

1. I am a Certified Professional Geologist and Senior Project Manager and Vice President of FPM Group-Engineering and Environmental Science ("FPM") which includes both a Professional Engineering Section and Environmental Sciences Section (of which I am Senior Project Manager and Vice President).

2. I respectfully direct the Court's attention to my previously filed Declaration, as an Expert Consultant to the Town of Brookhaven, which addresses the materially adverse impacts to Long Island's Sole Source Aquifer which are likely to result from the current excavation, regrading and track construction activities of the BRT Defendants (previously defined). The Court's attention is also directed to the prior Declaration of Ritu Mody, P.E., an FPM Group Engineer who is also providing expert consulting services to the Town as it relates to the

engineering aspects and impacts of the excavation, regrading and track construction activities of the BRT Defendants.

3. I have reviewed the opposing Declarations of Robert Humbert, P.E., of AECOM (the principal designer of the proposed railway track installation), and of Nelson Abrams, P.G., a Geologist employed by AECOM submitted on behalf of the BRT Defendants.

4. Ritu Mody, P.E. and I have provided our response and analysis to the Humbert and Abrams' Declarations in a joint Rebuttal Report dated May 9, 2014 which is attached as Exhibit A, and which I incorporate herein as my further Expert Declaration in this matter.

5. I specifically and respectfully direct the Court's attention to the following portions of our joint attached Rebuttal Report:

"FPM disagrees with the assertion that the excavation of the track-related area of Parcel C to an elevation of 50 feet above mean sea level (MSL) is not likely to have any meaningful or harmful impact on the Upper Glacial Aquifer.

- The undisturbed area on Parcel C that would be graded for track-related construction is presently undisturbed, un-compacted, and forested. The beneficial effects of undisturbed soil horizons and a mature forest on both the quantity and quality of water infiltration that recharges the aquifer are well-documented. These features act to remove contaminants that may be present in runoff via filtration, absorption, evaporation, transpiration, and other processes, thus improving the quality of water that recharges the aquifer. Furthermore, water infiltration rates are higher in forested areas and areas that are not compacted by excavation and grading processes. The effects of grading will include removal of the forest and compaction of the remaining sand, which will reduce the amount of water infiltration that will recharge the Upper Glacial Aquifer. Thus, the grading process alone, regardless of the removal of significant amounts of sand, will reduce the quality and quantity of water recharge to the Upper Glacial Aquifer;

- Town of Brookhaven land development standard 85-50(A)(6) recognizes this issue by requiring a minimum landscaped or natural area of 30% in connection with a commercial center or industrial use occupying a site of five acres or more. This standard

provides for protection of underlying aquifers by requiring that the infiltration properties of natural areas be preserved.

FPM disagrees with the assertion that the track-related grading that would occur on the higher elevations of the site would merely align those areas with the natural elevation of the majority of the site.

- The majority of the site exists at a natural elevation of approximately 60 feet and greater, with about 80% of the western border of the site at an elevation of 100 feet or greater. A very minimal amount of the site is at a natural elevation of 50 feet or less. The track-related grading that is planned for the higher elevations of the site will significantly reduce the elevation of these areas relative to the current elevation of the majority of the site.

FPM disagrees with the assertion that the elevated southwestern portion of the site is a minor topographic feature compared to the surrounding topography of the area.

- A review of the USGS Bellport topographic quadrangle (USGS, 1967), which includes the site vicinity, illustrates that the site is located on the eastern margin of a large area of glacial outwash deposits into which the Carmans River, located to the east, has incised a river channel. An area of thick sand and gravel outwash deposits at an elevation of 100 feet and higher extends for over a mile and a half to the west of the site and for nearly two miles to the north-northwest, where the edge of the Ronkonkoma glacial moraine is present. This elevated area is not a minor topographic feature - it is an important component of the deep flow recharge area (Hydrogeologic Zone III) that recharges the groundwater in the Upper Glacial Aquifer, from which much of Long Island's water supply is provided.

Mr. Abrams states that he knows of no reason why these topographic features would be of particular importance in preserving the groundwater in the aquifer below. Mr. Abrams also states that grading to a level of 50 feet at the site should not have any meaningful impact upon the quantity of runoff.

- These statements demonstrate that Mr. Abrams does not fully understand or appreciate the processes by which Long Island's sole-source aquifers are recharged, nor does he understand the impacts of grading on infiltration capacity. Recharge occurs primarily through elevated areas such as those that exist on much of the site. The infiltration capacity of a forested area is generally greater than that of an area over which the forest has been removed

and the underlying soil graded and compacted in the process. Removal of the forest, natural soil, and the underlying sand, all of which filter out impurities and have a greater infiltration capacity than the compacted surface that will remain after sand removal and grading, will result in a decrease in the quality and quantity of recharge to our sole source aquifers.

FPM disagrees with the assertion that the proposed lowest track elevation of 50 feet would leave an adequate amount of soil to isolate the Upper Glacial Aquifer from any potential impacts due to surface water runoff.

- While FPM agrees that while that NYSDEC recommended buffer of 4 feet above the seasonally high water table is likely to remain after excavation of the site, we recognize that the site is not a recharge basin, which is a small point source of contaminants and is typically periodically maintained to remove contaminants and improve infiltration capacity. The site is a 93-acre parcel with a significant thickness of protective sand and overlying natural soil and forest above the aquifer in a deep recharge zone. These features provide significant protection above the portion of the aquifer through which Long Island's drinking water is sourced. A railroad spur is planned to be constructed on the site and we understand that commercial and industrial activities are likely to be eventually conducted on the site. These are likely to include activities with the potential for significant contaminant releases to surface water. Because of this it is imperative that a maximal amount of protective materials, including forest, natural soil, and sand, be retained on the site surface above the aquifer."

Dated: May 9, 2014

  
STEPHANIE O. DAVIS, CPG

# EXHIBIT A

FPM Group, Ltd.  
FPM Engineering Group, P.C.  
*formerly Fanning, Phillips and Molnar*

CORPORATE HEADQUARTERS  
909 Marconi Avenue  
Ronkonkoma, NY 11779  
631/737-6200  
Fax 631/737-2410

**VIA EMAIL**

May 9, 2014

Robert M. Calica, Esq.  
Rosenberg Calica & Birney LLP  
100 Garden City Plaza, Suite 408  
Garden City, NY 11530

Re: **Brookhaven Rail Terminal  
206 Sills Road, Yaphank, NY  
Rebuttal Report  
FPM File No. 1151g-14-01**

Dear Mr. Calica,

The following information is provided following review of the Declarations of AECOM Engineer Robert Humbert, PE and Geologist Nelson Abrams regarding issues related to the Brookhaven Rail Terminal (BRT) site, and, in particular, Parcel C (approximately 93 acres) of the BRT site.

**Rebuttal to Geologist Nelson Abrams Declaration**

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Thus, the grading process alone, regardless of the removal of significant amounts of sand, will reduce the quality and quantity of water recharge to the Upper Glacial Aquifer;

- Town of Brookhaven land development standard 85-50(A)(6) recognizes this issue by requiring a minimum landscaped or natural area of 30% in connection with a commercial center or industrial use occupying a site of five acres or more. This standard provides for protection of underlying aquifers by requiring that the infiltration properties of natural areas be preserved.

FPM disagrees with the assertion that the track-related grading that would occur on the higher elevations of the site would merely align those areas with the natural elevation of the majority of the site.

- The majority of the site exists at a natural elevation of approximately 60 feet and greater, with about 80% of the western border of the site at an elevation of 100 feet or greater. A very minimal amount of the site is at a natural elevation of 50 feet or less. The track-related grading that is planned for the higher elevations of the site will significantly reduce the elevation of these areas relative to the current elevation of the majority of the site.

FPM disagrees with the assertion that the elevated southwestern portion of the site is a minor topographic feature compared to the surrounding topography of the area.

- A review of the USGS Bellport topographic quadrangle (USGS, 1967), which includes the site vicinity, illustrates that the site is located on the eastern margin of a large area of glacial outwash deposits into which the Carmans River, located to the east, has incised a river channel. An area of thick sand and gravel outwash deposits at an elevation of 100 feet and higher extends for over a mile and a half to the west of the site and for nearly two miles to the north-northwest, where the edge of the Ronkonkoma glacial moraine is present. This elevated area is not a minor topographic feature - it is an important component of the deep flow recharge area (Hydrogeologic Zone III) that recharges the groundwater in the Upper Glacial Aquifer, from which much of Long Island's water supply is provided.

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filter out impurities and have a greater infiltration capacity than the compacted surface that will remain after sand removal and grading, will result in a decrease in the quality and quantity of recharge to our sole source aquifers.

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#### **Rebuttal to AECOM Engineer Robert J. Humbert's Declaration**

FPM disagrees with the assertion that "the Spur track was designed to accommodate existing topographical features and BRT's business needs".

- We have not been provided with any design drawings and/or construction plans for the development of any commercial or industrial facilities on the site to verify the statement. It is our understanding that BRT has no contracts with any vendors and that no construction plans exist for development of the area inside of the Spur track loop.

FPM disagrees with the assertion that "Approximately 44% of the original ground elevation of Parcel C has ground contours with elevations of 55' above sea level or less. Thus, the natural topography of almost half of Parcel C already slopes downward to an elevation consistent with the grading level for the Spur track."

- The Spur track would be constructed on both Parcels B and C and majority of the site exists at a natural elevation of 60' or greater. In fact, the part of the site that they are seeking to re-grade has an average elevation of 80'. The track layout proposed along the western boundary of the site will significantly reduce the site elevation as compared to the natural elevation. Only a small northeastern portion of the site has a natural elevation of 50' or less.

FPM disagrees with the assertion that "Additionally, leveling the Spur track to an elevation of 50' above sea level will allow BRT wide flexibility in terms of the use of the area inside of the Spur Track loop, much of which already exists at a natural elevation at or close to 50'."

- The contours on AECOM's Lot "B" and "C" Base plan depicts that only a small portion of the area inside the Spur track loop exists at a natural elevation at or close to 50'. The majority of the area inside the Spur track loop is at a natural elevation of 60' or higher.

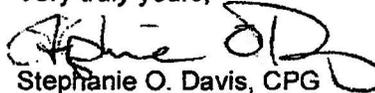
FPM disagrees with the assertion that "the planned elevation levels of the Spur track are designed to allow for efficient and level access to the Service Road from either side of the LIE recharge basin."

- The proposed spur track layout is very close to the recharge basin, thereby preventing any access from the east side of the recharge basin (unless they cross the tracks). Based on the current proposed layout, it appears that road access will be along with western boundary of the site, which exists at a natural elevation of 100 feet or higher. An engineering design with a ramp/step up can be designed to link the 51'-53' service road elevation to a higher onsite elevation.

FPM disagrees with the assertion that "The Spur Track then slopes downward from west to east, towards a lower elevation point designed for future access to Parcel D."

- We have no knowledge of the future proposed expansion of the spur to Parcel D, which is reportedly an area located to the southeast of Parcel C. In addition, no design layout/plan has been provided to FPM to verify the statement.

Very truly yours,



Stephanie O. Davis, CPG  
Senior Project Manager  
Vice President



Ritu Mody, PE, LEED Green Assoc.  
Engineer

SOD/RM:sod

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**FPM**



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

TOWN OF BROOKHAVEN,

Plaintiff,

Case No. 14-CV-02286  
(LDW, AKT)

-against-

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

Defendants.

**REPLY DECLARATION OF  
RITU MODY, P.E. IN SUPPORT  
OF TOWN OF BROOKHAVEN'S  
MOTION FOR PRELIMINARY  
INJUNCTION PURSUANT TO  
RULE 65 OF THE FED R. CIV. P.**

-----X

**RITU MODY, P.E.**, declares pursuant to 28 U.S.C. §1746 under penalty of perjury as

follows:

1. I am a New York Licensed Professional Engineer employed by FPM Group-Engineering and Environmental Science ("FPM").
2. I respectfully direct the Court's attention to my previously filed Declaration, which details the manner in which the BRT Defendants are unnecessarily excavating and regrading the level of the 93 Acre Parcel for purposes of planned railway track construction by improperly lowering grades from as much as the 100 foot level at which existing LIRR tracks enter the parcel and regrading almost the entire parcel to an artificially and unnecessarily uniformly lowered grade of 50 feet. In doing so, the BRT Defendants are excavating and removing native sand and earth from nearly the entire westerly section of the 93 Acre Parcel which currently has (or which recently had prior to excavation) an average elevation of between 100 and 80 feet.

3. I have reviewed the opposing Declarations of Robert Humbert, P.E., of AECOM (the principal designer of the proposed railway track installation), and of Nelson Abrams, P.G., a Geologist employed by AECOM submitted on behalf of the BRT Defendants.

4. Stephanie O. Davis, CPG. and I have provided our response and analysis to the Humbert and Abrams Declarations in a joint Rebuttal Report dated May 9, 2014 which is attached as Exhibit A, and which I incorporate herein as my further Expert Declaration in this matter.

5. I specifically and respectfully direct the Court's attention to the following portions of our joint attached Rebuttal Report:

"FPM disagrees with the assertion that the track-related grading that would occur on the higher elevations of the site would merely align those areas with the natural elevation of the majority of the site.

- The majority of the site exists at a natural elevation of approximately 60 feet and greater, with about 80% of the western border of the site at an elevation of 100 feet or greater. A very minimal amount of the site is at a natural elevation of 50 feet or less. The track-related grading that is planned for the higher elevations of the site will significantly reduce the elevation of these areas relative to the current elevation of the majority of the site.

\* \* \*

FPM disagrees with the assertion that "the Spur track was designed to accommodate existing topographical features and BRT's business needs".

- We have not been provided with any design drawings and/or construction plans for the development of any commercial or industrial facilities on the site to verify the statement. It is our understanding that BRT has no contracts with any vendors and that no construction plans exist for development of the area inside of the Spur track loop.

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Dated: May 09, 2014

  
RITU MODY, P.E.

# EXHIBIT A

FPM Group, Ltd.  
FPM Engineering Group, P.C.  
*formerly Fanning, Phillips and Molnar*

CORPORATE HEADQUARTERS  
909 Marconi Avenue  
Ronkonkoma, NY 11779  
831/737-6200  
Fax 831/737-2410

**VIA EMAIL**

May 9, 2014

Robert M. Calica, Esq.  
Rosenberg Calica & Birney LLP  
100 Garden City Plaza, Suite 408  
Garden City, NY 11530

Re: **Brookhaven Rail Terminal  
205 Sills Road, Yaphank, NY  
Rebuttal Report  
FPM File No. 1151g-14-01**

Dear Mr. Calica,

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Very truly yours,



Stephanie O. Davis, CPG  
Senior Project Manager  
Vice President



Ritu Mody, PE, LEED Green Assoc.  
Engineer

SOD/RM:sod

U:\Robert Calica\Town of Brookhaven-BRT\CalicaHydro\tr4\_05092014.docx

**FPM**

# **EXHIBIT F**

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

-----X  
TOWN OF BROOKHAVEN, :

Plaintiff, :

-against- :

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

DEFENDANTS. :

-----X

Case Number 2:14-cv-02286

**DECLARATION**

**DECLARATION OF DANIEL K. MILLER**

I, Daniel K. Miller, hereby declare:

1. I make this declaration on personal knowledge and, if called as a witness, am competent to testify to the facts set forth herein.

2. I am currently the Chief Financial Officer of Brookhaven Rail LLC ("BR") and Chief Financial Officer of Brookhaven Terminal Operations LLC. I have been the Chief Financial Officer for BR since July 2011 and for Brookhaven Terminal Operations LLC since September 2012. Brookhaven Terminal Operations LLC is often referred to by its trade name, Brookhaven Rail Terminal ("BRT"). I am also the Managing Director of Oakland Transportation Holdings LLC, which owns all of the equity interests in BR (formerly known as US Rail New York, LLC) pursuant to a control exemption approved by the Surface and Transportation Board.

3. Through my role as Chief Financial Officer for both BR and Brookhaven Terminal Operations LLC and as Managing Director of Oakland Transportation Holdings LLC, I

have personal knowledge of, and am familiar with, Brookhaven Rail Terminal, a transloading facility located in Yaphank, New York.

4. I make this declaration in opposition to the Motion for Preliminary Injunction (the “Motion”) filed by Plaintiff Town of Brookhaven (the “Town”).

**Background**

5. BRT is a railroad transloading facility located in Yaphank, Long Island, New York.

6. BR provides rail carrier and transloading services at BRT, principally switching activities and the marshalling and receipt of freight rolling stock at BRT for transportation over the rail lines of the Long Island Railroad (“LIRR”). Freight rail services are provided to BRT and Brookhaven Rail over LIRR lines by the New York & Atlantic Railway Company (“NY&A”), a Class III rail carrier, which interchanges with Brookhaven Rail upon arrival of the switch lead at BRT.

7. Because the NY&A, under a contract with the LIRR, holds the exclusive franchise to provide freight rail service over LIRR lines, Brookhaven Rail’s rail carrier operations are limited to BRT’s transloading and terminal operations; Brookhaven Rail does not (and cannot) provide short or long-haul service over LIRR lines.

**Current Operations and Planned Expansion of BRT**

8. The Town’s motion seeks to enjoin “any and all further actions and activities to excavate, screen, grade, and remove native sand and vegetation from a 93 acre site located to the East of the 28 acre local railway yard facility...”, and the Town appears to contend in its motion papers that BRT is illegally grading the entirety of the 93 acre site. This is not accurate; nor are

the multitude of other accusations about BRT's construction activities and development plans set forth in the Town's Motion.

9. As we have advised the Town repeatedly, the *only* construction activity presently occurring and planned for the foreseeable future is grading the shaded track loop area depicted in Exhibit O to the Declaration submitted by Town Attorney Annette Eaderesto. It is within that shaded area that BRT intends, eventually, to install a railroad track; the principle purpose of grading the track area to a level of 50 feet above sea level is to align the elevated portions of the site with the remainder of the site which already exist at a natural elevation of approximately 50 feet.

**Harm To Rail Customers, Rail Construction & Loss Of Rail Business**

10. Certainly, the Town's request for an injunction requiring stoppage of *all* construction work at the site would be devastating to BRT, and the Town makes no effort to limit or tailor its injunction request. Even a stoppage of the limited track-related grading work that presently is ongoing would harm BRT irreparably, as explained below.

11. BRT currently has 11 major rail customers ("Rail Customers"), including The Home Depot (BRT's largest customer), Safety Kleen, Wenner Bread, one of the largest bakeries on Long Island, and Renewable Energy Group, Inc., which is a leading North American biodiesel producer and distributor.

12. BRT currently services its Rail Customers' transloading needs through a rail terminal, trackage and loading facilities on a piece of property referred to as "Parcel A."

13. BRT currently is operating seven (7) tracks on Parcel A, as depicted on the AECOM Rail Subgrade Plan annexed as Exhibit A hereto:

- a. Track 1, located on the east side of Parcel A, is the inbound track for the NY&A to arrive into and drop railcars that are destined to BRT's Rail Customers;

- b. Track 2, also located on the east side of Parcel A, is used for outbound cars that have been unloaded;
- c. Track 3, located to the west of Tracks 1 and 2, must be kept clear to allow the NY&A to transport engines to couple the engines on Track 2, perform federally required brake tests, and then depart to the west;
- d. Track 4, the first stub end track, is used for loading of trucks and unloading of flour cars and for storage of flour cars that are waiting to be unloaded;
- e. Track 5, the second stub end track, is used for overflow storage of railcars going to the Rail Customers;
- f. Track 6, the third stub end track, is used for bio-diesel and houses the portable steaming unit for heating the bio-diesel; and
- g. Track 7, the fourth and final stub end track, is used for loading and unloading lumber and building material cars.

14. On Parcel A, in addition to the 7 numbered tracks, BRT also operates two (2) tracks devoted to loading and unloading for its lumber and building products customers, including The Home Depot. The track branching from Track 3 is the transload track that goes through The Home Depot warehouse building. There is also a short stub track, originally designed to house the locomotive power, but as a result of high demand for track space, this track is now being used to unload The Home Depot wood products that do not require indoor storage.

15. BRT's business has been growing significantly as its customers have increased their reliance on BRT's services, and it is now operating at or near full capacity on all seven (7)

tracks on Parcel A. Since the beginning of 2014, BRT has been averaging 130 rail cars per month. During that same time, BRT has been handling more than 100 total loads (train cars, some inbound trucking, transfer, warehousing and then outbound short haul truck) for The Home Depot *per week*, directly contributing to a marked decrease in costs for Long Island businesses. Similarly, a number of large scale commercial bakeries have begun to obtain IB flour via rail and BRT, reducing their transportation costs, permitting them to purchase materials from a wider range of suppliers, and shifting that traffic, previously delivered entirely by truck, to rail. Recently, BRT transloaded approximately 9 million pounds of flour in a month, its highest monthly volume to date. BRT also recently added Culpeper Wood Products as a customer, which has already shipped more than 1,000 tons of wood products from Fredericksburg, Virginia to Long Island via BRT. This traffic previously moved from Virginia to Nassau and Suffolk counties entirely via truck; thus, at a conversion rate of 5 trucks to 1 rail car, more than 50 truck trips have been diverted from the New York metropolitan area road system (and the heavily congested Long Island Expressway specifically) to rail by this customer alone. For all commodities, we estimate that BRT has handled more than the equivalent of 7,500 trucks since 2012.

16. Because BRT is now operating at capacity on Parcel A, to handle a major new customer would require additional track capacity, and if warehouse or storage capacity were required, construction of additional warehouse or storage capacity beyond what Parcel A is capable of providing.

17. Among other things, BRT needs to add additional flat storage capabilities to expand our outdoor storage space for BRT building products customers. Moreover, continued increase in biodiesel, flour and other transloading traffic requires additional track space with

adjacent flat, hard surface area, for the staging of truck trailers next to railcars for transloading product. In addition to the requirements of existing customers BRT has commissioned official engineering and marketing studies from a professional design/build firm that specializes in the design and construction of temperature controlled storage facilities. Based on the initial research, it would appear that there is significant market demand on Long Island for a facility capable of accepting inbound temperature-controlled railcars and providing storage and transloading services for temperature-controlled products. This is just one of multiple initiatives BRT is exploring in connection with creating a final development plan for the next phase of construction.

18. Thus, in order to meet the growing and anticipated demands of its existing Rail Customers and to expand business to other customers, it is critical that BRT add additional trackage and trans-loading facilities to the original 28-acre site.

19. Anticipating the need for future expansion, in 2011 and 2012 BRT obtained the right to control additional property adjacent to Parcel A, referred to as "Parcel B" (19.3 acres) and "Parcel C" (73.7 acres). *See* Exhibit A. BRT also obtained and holds a permanent easement on Parcel B for the property on which rail track will be laid on that parcel.

20. BRT plans to lay additional trackage on Parcel B and Parcel C to support the growing transloading needs of its existing Rail Customers. As can be seen on Exhibit A, Parcel B and Parcel C adjoin Parcel A (and the existing BRT rail terminal), and the spur track BRT is constructing on Parcels B and C will extend from the existing BRT spur track and rail yard on Parcel A, and utilize the same main line switch and interchange with the NY&A and the LIRR. The spur will encircle Parcels B and C, essentially forming a racetrack configuration around the parcels, and will support the rail transloading and terminal facilities that are planned for Parcels

B and C. As with Parcel A, rail operations of the spur on Parcels B and C will be controlled and operated by Brookhaven Rail as part of the same railroad transload facility, BRT. The extended spur line will support rail transloading and terminal facilities that are planned for Parcels B and C. Brookhaven Rail will provide rail carrier service over the spur line, in conjunction with, and as an extension of, its existing service on Parcel A.

21. Recognizing BRT's positive impact on the community, the New York State Department of Transportation ("NYSDOT") has awarded BRT a \$2.5 million grant award to help BRT's expansion. The NYSDOT grant constitutes approximately 52% of the projected cost of BRT's next phase of track construction, as part of the planned expansion on those parcels.

22. I understand that the Town has alleged that construction of the spur is a pretext for BRT to engage in "sand-mining" on Parcels B and C. This is untrue. As explained, BRT's expansion to Parcels B and C is a critical extension of its successful and growing business, and a direct response to the needs of BRT's new and future customers.

23. Moreover, contrary to the Town's allegations, BRT is grading the rail right of way in accord with the AECOM Rail Subgrade Plan (annexed hereto as Exhibit A), a plan developed by AECOM, a national, well-established engineering firm with considerable rail experience. BRT is grading, and intends to grade, to construct the spur consistent with the AECOM Rail Subgrade Plan, which establishes target site elevations realistic for expected needs, rail and rail transportation-related operational requirements and safety. As part of the construction process to lay the additional trackage on Parcel B and Parcel C and in order to complete the construction by the end of 2014, BRT has been grading portions of these properties to a target site track elevation of approximately 50 feet above sea level. The goal of the grading

is to bring the land on the Parcels to an appropriate, even grade that will be suitable for rails to be laid over top and for efficiently connecting the track to other sites.

24. Also contrary to other Town claims, BRT has not laid track directly under the Long Island Power Authority (“LIPA”) power lines without proper authorization. Rather, BRT purchased two permanent easements from LIPA that expressly authorize BRT to construct rail and truck access infrastructure between Parcels A and B, as we have advised the Town repeatedly.

**The Impact of a Work Stoppage Upon BRT Would Be Significant and Incalculable**

25. If BRT is prevented from clearing and grading a flat surface to lay additional trackage, railroad construction on Parcel B and Parcel C cannot proceed as scheduled and likely will need to be suspended.

26. Without being able to proceed with the construction, grade the track area and lay the additional trackage according to the construction plans, BRT will not be able to meet the growing needs of its existing Rail Customers. This will jeopardize BRT’s relationship with its existing Rail Customers, its ability to procure additional business from these Rail Customers, its ability to market its rail services and facility to potential customers and its ability to obtain business from other rail customers, who will seek out other methods of transportation for their goods.

27. If the construction is delayed even for a matter of weeks, the project risks not being completed until 2015. By delaying the project into the next fiscal year, 2015, Rail Customers and potential rail customer likely will have entered into other year-long leases or annual contracts with other shippers and BRT risks entirely losing these additional opportunities and suffering substantial harm and incalculable losses.

**Harm To Sand Customers & Loss Of Sand Business**

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

29. In addition to the disruption to the construction at the BRT itself, if these grading operations are disrupted, numerous employees at the Sand Customers will be idled. These Sand Customers employ many local residents.

30. The Sand Customers, in turn, will not be able to provide sand to local businesses and end use customers, many of which are located on Long Island. Thus, stoppage of sand grading will impact other local construction sites and their employees that were utilizing the excess sand removed from Parcel B and Parcel C.

31. Even if the Sand Customers are able to obtain sand from other sources, the stoppage in sand supply will result in irreparable harm to the BRT because it will lose the Sand Customers’ business as a result of its inability to meet their commercial needs. BRT will lose their business because the Sand Customers will no longer consider BRT to be a consistent, reliable source for sand. The loss of their business and loss of their assistance with excavating the property to grade and removing the excess sand from the property will result in further construction delays for BRT’s planned construction of additional trackage, and incalculable losses.

**Additional Irreparable Harm To Brookhaven Rail Terminal**

32. In addition to the direct harm to BRT and to third-party Rail Customers and Sand Customers, as well as a loss of business from potential customers, BRT will suffer irreparable harm to its reputation and the goodwill it has built with both its Rail Customers and its Sand

Customers if it is forced to delay construction and cease excavating the property pursuant to the grading plan.

33. Beyond these incalculable losses, BRT would suffer substantial financial losses as a result of any delay or cessation of construction, which BRT estimates to be approximately \$20,000 per day for each day that the construction is ceased.

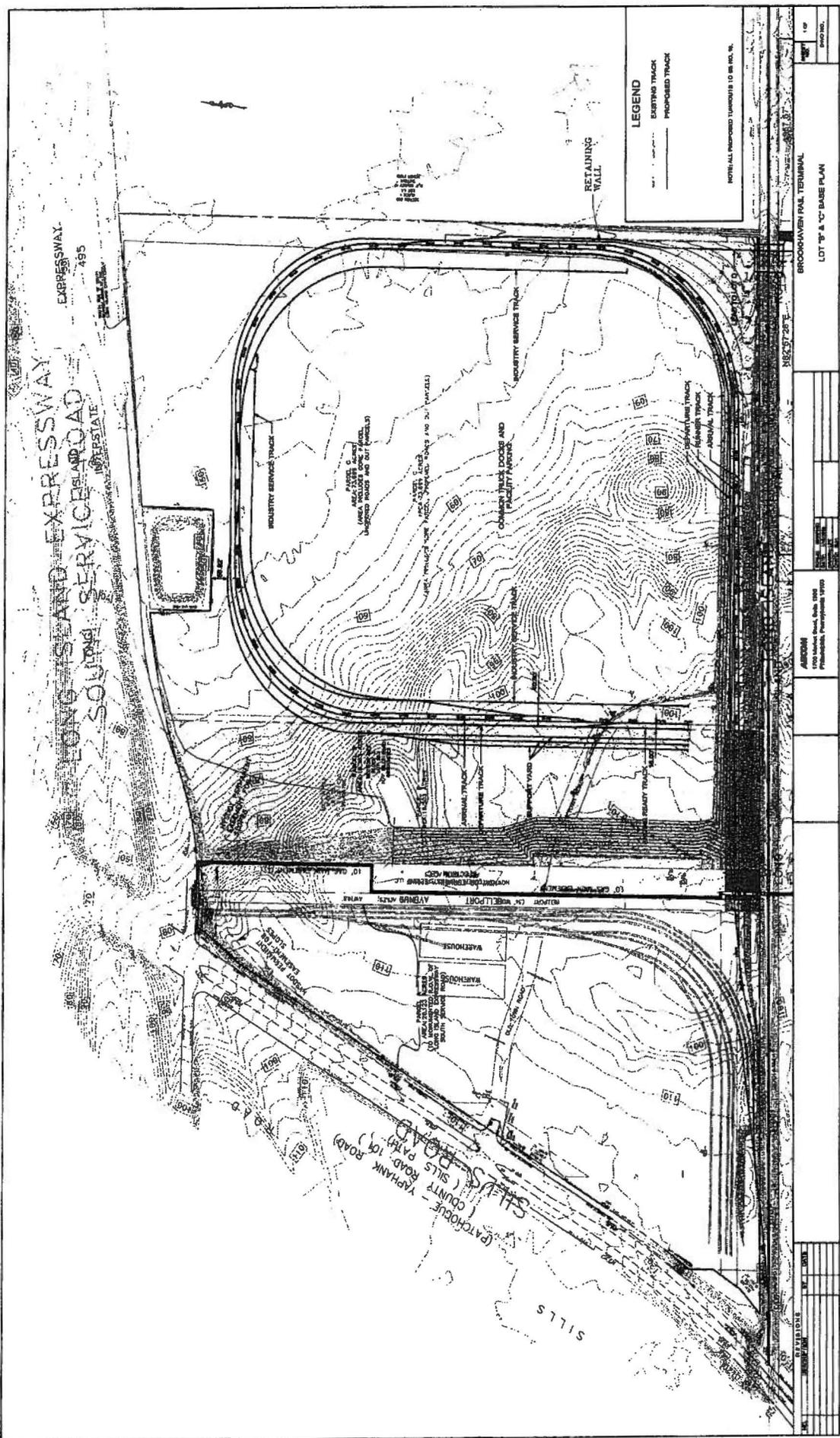
34. In its Motion, the Town refuses to post a bond leaving BRT no means of recovering against the Town for even its quantifiable financial losses, let alone its numerous other significant, unquantifiable harms. Thus, in light of the Town's refusal to post a substantial bond, even BRT's quantifiable financial losses are irreparable.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

EXECUTED at Wednesday May 7, 2014.

  
\_\_\_\_\_  
Daniel K. Miller

# EXHIBIT A



EXPRESSWAY 495  
 LONG ISLAND EXPRESSWAY  
 SOUND SERVICE ROAD  
 STATE

**LEGEND**  
 ———— EXISTING TRACK  
 - - - - - PROPOSED TRACK

NOTE: ALL PROPOSED TURNPIERS TO BE IN NO. 11.

BROOKHAVEN FRIAL TERMINAL  
 LOT 79 & 107 BASE PLAN

ADDITION  
 1970 Edition Book, No. 100  
 Philadelphia, Pennsylvania 19106

NO.	DATE	BY	REVISION

# **EXHIBIT G**



**Sills Road Realty, LLC**

April 25, 2012

Gregg Kelsey P.E.  
Assistant Town Engineer  
Division of Engineering  
Department of Planning, Environment and Land Management  
Town of Brookhaven  
One Independence Hill  
Farmingville, New York 11738

Re: Sills Road Realty, LLC  
Development of Brookhaven Rail Terminal  
Yaphank, New York

Dear Mr. Kelsey:

Thanks you for your recent comments on the revised plans for the Brookhaven Rail Terminal ("BRT" of the "Terminal") and for meeting with us at the site to review those comments. As you suggested we are writing to confirm the understandings reached at the meeting. This letter will generally follow the order of your written comments.

**Drawing C-1 Site Alignment Plan ("Alignment Plan")**

*Parking*

We carefully considered the number of employees per shift as well as potential daily visitors in calculating the number of proposed parking spaces. Our experience in operating the Terminal since September, 2011 confirms our conclusion that we have provided adequate parking facilities to meet our expected needs. We have placed the parking spaces in easy proximity to both the working areas of the site and the proposed office space for the convenience of our yard and office workers as well as visitors. We will, of course, provide standard signage and pavement markings in the completed parking area. Final construction of the scale house building will comply with all applicable governmental requirements of the Stipulation of Settlement ("Stipulation").

RECEIVED

MAY - 1 2012

56 Comsewogue Road, East Setauket, New York 11791  
Tel (631) 473-0200 Fax (631) 473-0419

COMMUNICATION

*Emergency Access Road*

As we discussed, the emergency access road will be rendered redundant by a permanent entrance way on the Long Island Expressway's south service road contemplated for the expansion of the BRT on the 92 acres east of Long Island Power Authority's ("LIPA") transmission corridor ("LIPA Corridor"). A second access point, for both emergency and commercial purposes, to the 28 acre site will be available through this proposed permanent entrance way. Since the emergency access road shown on the Alignment Plan will be redundant, we agreed that drop curbs, aprons and similar features were not necessary at this time but would be incorporated as required into the permanent road way between the two parcels. We are in discussion with New York State Department of Transportation regarding both the emergency access shown on the Alignment Plan and the proposed permanent entrance to the east. We are near to concluding an agreement with LIPA for the proposed easements across the LIPA Corridor shown in the Alignment Plan which will provide permanent access for both truck and rail between the two sites and to the LIPA Corridor.

*Buffers and Landscaping*

We intend to restore and revegetate the 50' buffer along Sills Road as required by the Stipulation. Shaping of berms and planting will begin at the corner of Sills Road and the south service road in early May. The balance of the landscaping will begin in the early fall. As we discussed, New York & Atlantic's requirements for sufficient track space at the north end of the 28 acre site to accommodate three engines necessitated impinging upon the 100' buffer contemplated by the Stipulation. We are in the process of preparing a landscaping plan for the site in compliance with the Surface Transportation Board's ("STB") Decision of September 9, 2010 ("STB Approval") which will provide enhanced vegetation in the 100' foot buffer area and at the intersection of Sills Road and the south service road to effectively screen the site from public view. We will provide you a copy of the landscaping plan.

*Miscellaneous*

The BRT will be open 24 hours a day and will have security on site at all times. All signage at the site will comply with applicable requirements under the Stipulation. We have acquired the Suffolk County parcels along Sills Road and will incorporate those parcels into the final, as-built plans. The permanent easement line is a slope easement only in favor of YS DOT and will not affect the construction or operation of the Terminal. With respect to obtaining building permits generally, we discussed the fact that STB has exclusive jurisdiction over the BRT and that we had agreed in the Stipulation to comply with applicable governmental requirements as well as provide to the Town Sidney Bowne & Sons ("Bowne") certification that the Terminal met such requirements. We agreed that Bowne's certification with respect to the sanitary system and the scale house would be sufficient and that no permits from the Town or other local authorities would be required for those facilities.

**Drawing C-2 Grading and Drainage Plan ("Drainage Plan")**

*Drainage*

As noted above, the emergency access is temporary intended to be replaced with access from the eastern 92 acre parcel. We agreed that drop curbs, aprons and similar features were not necessary at this time but would be incorporated as required into the permanent road way between the two parcels. We have moved drainage structures from the buffer area to the extent possible. We have registered the site with the USEPA as required by applicable regulations relating to injection wells.

*Miscellaneous*

The hydrant shown on the Drainage Plan will be dedicated to and maintained by the Suffolk County Water Authority ("SCWA") and we have obtained SCWA approval for a backflow device for domestic service. As noted above, Bowne will certify the Terminal's sanitary system compliance with applicable codes as required by the Stipulation. We will have a sprinkler system to control dust from the aggregate piles and the height of the piles and operation of the stacker system will comply with the Stipulation.

**Drawing C-3 Sanitary Plan**

*Sanitary Design*

The sanitary system will comply with applicable governmental requirements, as certified by Bowne. The scale house is the only building planned for the site; neither the transload dock nor the unloading control house (the only other structures on the site) will have sanitary facilities. The unloading control house will be shown on the final, as-built plans.

*Landscaping*

As noted above, we intend to restore and revegetate the 50' buffer along Sills Road as required by the Stipulation. As we discussed, New York & Atlantic's requirements for sufficient track space at the north end of the 28 acre site to accommodate three engines necessitated impinging upon the 100' buffer contemplated by the Stipulation. We are in the process of preparing a landscaping plan for the site in compliance with the STB Approval which will provide enhanced vegetation at the bridge, in the 100' foot buffer area and at the intersection of Sills Road and the south service road to effectively screen the site from public view. We will provide you a copy of the landscaping plan.

**Drawing C-4 Site Details Plan**

Additional details, including details of the jersey barrier/guide rail interface at the entrance road way, may be required as we develop final construction drawings which we will share with you. Track crossings will be constructed in accordance with Federal Railroad Administration ("FRA") guidelines, as will erosion and sediment controls. As noted above, we are in the process of preparing a landscaping plan for the site in compliance with the STB Approval. We will provide you a copy of the landscaping plan.

**Drawing C-5 Landscaping Plan**

As noted above, we are in the process of preparing a landscaping plan for the site in compliance with the STB Approval. We will provide you a copy of the landscaping plan. We began consultations with the USDA prior to beginning construction of the BRT, as required by the STB Approval, and have provided copies of all correspondence to date with USDA to the Town. As we discussed, the STB has certain requirements in its Approval that we must comply with. To the extent we can incorporate the Planning Departments revegetation specifications into the landscaping plan without jeopardizing compliance with the STB Approval, we will do so.

**Stipulation of Settlement and STB Approval**

The phased construction of the BRT contemplated by the Stipulation was eliminated with the STB Approval and we are constructing the Terminal in one phase, which we expect to complete this summer. As-built drawings and Bowne's compliance certification will be provided to the Town as soon as possible after completion.

Bowne has provided bi-monthly inspection reports to the Town as required by the Stipulation since the beginning of construction in September, 2010.

We have provided the Town with a copy of the Suffolk County Department of Public Works permit and preliminary plans for the improvements to Sills Road and the traffic signal as well as improvements to the turning lanes near the Long Island Expressway.

As noted above, the hydrant shown on the Drainage Plan will be dedicated to and maintained by the SCWA and we have obtained SCWA approval for a backflow device for domestic service. We have provided the Town with a copy of SCWA's backflow approval.

All plans for the construction of the BRT will comply with the environmental mitigation measures set forth in the STB Approval.

We have provided the Town with copies of the filed covenants and restrictions contemplated by the Stipulation.

Spill prevention is governed by FRA rules and regulations and the Terminal will comply with those requirements.

We no longer contemplate proceeding with the abandonment process for Bellport Avenue.

As we agreed, the Stipulation establishes the local building and other requirements that construction of the BRT must adhere to and a procedure for Bowne to certify to the Town compliance with those requirements. We agreed to follow the procedures set forth in the Stipulation.

We look forward to working with you as BRT construction progresses.

Very truly yours,

Sills Road Realty, LLC

By:   
Andrew Kaufman  
President