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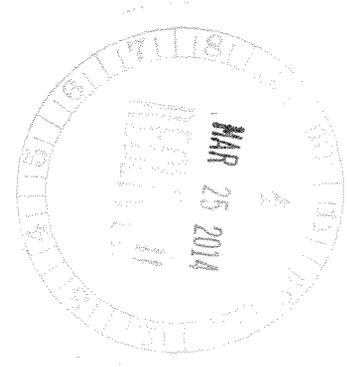
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March 24, 2014  
235688

ENTERED  
Office of Proceedings  
March 25, 2014  
Part of  
Public Record



**VIA FEDERAL EXPRESS**

Surface Transportation Board  
395 E Street, SW  
Washington DC 20423

Re: Brookhaven Rail Terminal  
205 Sills Rd, Yaphank, NY 11980 & STB F.D. No. 35141

Dear Sir/Madam:

As instructed by Andrea Pope-Matheson of your office, we enclose an Affidavit of Service confirming service on all parties and certain non-parties with our March 12, 2014 letter-application on behalf of the Town of Brookhaven, New York seeking, among other things, reopening of this proceeding and which was filed with your office previously.

Very truly yours,

**ROSENBERG CALICA & BIRNEY LLP**

Judah Serfaty

RMC:ds  
Enclosure

{00128659-1}

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SUFFOLK

-----X

TOWN OF BROOKHAVEN,

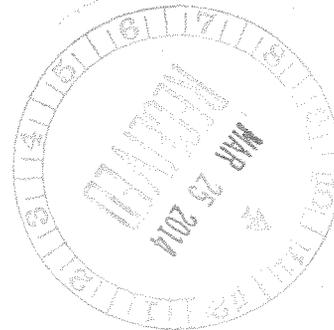
Index No.: 2014-061613

Plaintiff,

**AFFIDAVIT OF SERVICE**

-against-

SILLS ROAD REALTY LLC d/b/a  
BROOKHAVEN RAIL TERMINAL, SUFFOLK &  
SOUTHERN RAIL ROAD LLC, U S RAIL  
CORPORATION, U S RAIL NEW YORK LLC,  
BROOKHAVEN RAIL LLC, ADJO  
CONTRACTING CORP., WATRAL BROTHERS,  
INC., and PRATT BROTHERS, INC.,



Defendants.

-----X

STATE OF NEW YORK     )  
                                  ) ss.:  
COUNTY OF NASSAU     )

DOREEN A. SALERA, being sworn says: I am not a party to the action, am over 18 years of age and reside in East Meadow, New York.

That on the 19<sup>th</sup> day of March, 2014, deponent caused to be served the within **LETTER-APPLICATION DATED MARCH 12, 2014 WITH EXHIBITS** by mailing the same in a properly addressed sealed envelope, with postage prepaid thereon, in an official depository of the United States Postal Service within the State of New York, addressed to said attorney at the address provided for such purpose:

TO: Vanessa L. Miller, Esq.  
Foley & Lardner LLP  
One Detroit Center  
500 Woodward Ave, Suite 2700  
Detroit, MI 48226

U S Rail New York LLC  
205 Sills Road  
Yaphank, NY 11980

NYS Dept of Transportation  
50 Wolf Road  
Albany NY 12232  
Attn: Robert A. Rybak, Esq.

James H.M. Savage, Esq.  
1750 K Street, N.W., Suite 350  
Washington DC 20006

Lyngard Knutson, Esq.  
Region 2 E.P.A.  
290 Broadway, 25<sup>th</sup> Floor  
New York NY 10007

NYS Dept. of Environmental Conservation  
New York Natural Heritage Program  
Albany NY 12233-4757  
Attn: Tara Seoane

Field Office Supervisor U.S. Fish and Wildlife Service  
Long Island Field Office  
3 Old Barto Rd.  
Brookhaven NY 11719  
Attn: David A. Stilwell

MTA Long Island Rail Road  
Jamaica Station  
Jamaica NY 11435-4380  
Attn: Helena E. Williams

  
\_\_\_\_\_  
DOREEN A. SALERA

Sworn to before me this  
24<sup>th</sup> day of March, 2014

  
\_\_\_\_\_  
Notary Public

MARYELLEN BOYLE  
Notary Public, State of New York  
No. 01BO5043092  
Qualified in Queens County 2015  
Commission Expires May 1, 2015

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¶ALSO ADMITTED N.J.

March 12, 2014

## VIA FEDERAL EXPRESS

Surface Transportation Board  
395 E Street, SW  
Washington DC 20423

Re: Brookhaven Rail Terminal  
205 Sills Rd, Yaphank, NY 11980 & STB F.D. No. 35141

Dear Members of the Surface Transportation Board:

We are special legal counsel for the Town of Brookhaven. This letter concerns the Brookhaven Rail Terminal (BRT), located in the Town of Brookhaven, Suffolk County, New York, which over the past seven years has had a controversial history before this Board, including a Board-imposed cease and desist order which was in place for three years. The Town now respectfully requests that: (1) the Board re-open STB F.D. No. 35141 to address BRT's failure to comply with the conditions and environmental requirements imposed by this Board therein, as well as a substantial change of circumstances; and (2) whether upon the re-opened proceeding or a new proceeding, render declarations regarding the Board's jurisdiction with respect to the recent efforts and plans of BRT to "expand" its facility from the approved 28 acre site so as to include an adjacent 100 acre site as well as vastly increased trackage, excavation at the site, and plans to construct extensive warehousing, manufacturing, and shipping facilities, all without approval of the Board, and in violation of BRT's obligations to both the Board and to the Town.

As shown below, such action by the Board is especially urgent here when, under the guise of constructing a supposed "spur" line extension into the adjoining 100 acre site with minor clearing and re-grading along the track line, BRT has recently excavated a vast swath of the 100 acre parcel with tremendous and unapproved excavation activities deep below grade, which can only be described as illegal soil mining. Aerial photographs of these activities taken on March 9, 2014 are enclosed as Exhibit A. The Town believes BRT and the owner of its property who is in the business of using and selling construction materials and construction aggregate, Sills Road Realty, LLC, are in whole or in part conducting non-railroad activities at

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the site, are illegally selling the excavated soil for profit without complying with law, and are using the claim of a spur track extension as a subterfuge to avoid application of the full brunt of the Town Code restrictions on tree and vegetation clearing, soil removal and excavations, and other restrictions. Additionally, the Town believes BRT is also unlawfully using the combined sites for the unlawful burial of construction debris (such as RCA, which is crushed concrete and asphalt), which is imported from outside the site and then illegally buried on the site for a fee.

**Procedural History and Prior Surface Transportation Board and Federal Court  
Proceedings Concerning 28 Acre Site**

On May 18, 2007, Suffolk & Southern Rail Road LLC (“Suffolk & Sothern”) filed a notice of exemption with the Board, indicating that it had entered into an agreement with Sills Road to lease, construct and operate the railroad trackage and facilities intended to be constructed at the Brookhaven Rail Terminal as an exempt spur. Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 1576775, at \*1 (S.T.B. June 1, 2007). In a decision dated June 1, 2007, the Board found Suffolk & Southern’s notice of exemption to be incomplete and directed it to file supplemental information describing the construction because, based on Suffolk & Southern’s *“intent to provide for hire service over the trackage, it appear[ed] that Sills [Road Road Realty, LLC] [was] constructing a line of railroad subject to the [STB’s] jurisdiction.”* *Id.* Suffolk & Southern did not provide the supplemental information requested but instead, on June 15, 2007, sought to withdraw its notice of exemption before this Board *“due to a ‘change in circumstances.’”* Suffolk & S. R.R. LLC -Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2299734, at \*1 (S.T.B. Aug. 13, 2007).

By decision dated August 13, 2007, the Board denied Suffolk & Southern’s request to withdraw its notice of exemption and directed it to file the supplemental information as previously ordered by August 23, 2007. *Id.* The Board further directed Suffolk & Southern to provide *“a substantive reason for its attempted withdrawal”* and to *“explain in more detail whether it or Sills [Road] anticipates that for-hire service will be provided over the trackage being constructed.”* *Id.*

On August 23, 2007, Suffolk & Southern filed a response to the Board’s August 13, 2007 decision, stating that the owner of the property, Sills Road Realty, LLC (“Sills Road”), allegedly never undertook any construction of rail facilities at the Brookhaven Rail Terminal. Suffolk & S. R.R. LLC - Lease & Operation Exemption - Sills Rd. Realty, LLC, STB Fin. Docket No. 35036, 2007 WL 2778092, at \*1 (S.T.B. Sept. 25, 2007). Suffolk & Southern further stated that *“it never concluded any agreement or other relationship with Sills [Road] with respect to the lease, construction, or operating of the trackage, and for [that] reason, had attempted to terminate the proceeding.”* *Id.* Suffolk & Southern also asserted that Sills Road *“never anticipated providing for-hire rail service.”* *Id.* Based on its submission, the Board permitted

Suffolk & Southern to withdraw its notice of exemption. Id. However, the Board warned that if either Suffolk & Southern or Sills Road anticipated providing for-hire service over trackage to be constructed, approval by the Board and an environmental review would be required. Id. The Board further 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.

Barely one month later, on October 2, 2007, the Board received a letter from the Town complaining that a rail facility was being constructed by US Rail on the 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). After receiving the Town’s letter, and upon further investigation finding “*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 Board reopened the Suffolk & Southern proceeding on its own motion and US Rail was made a party to the proceeding. Id. at \*2. The Board 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>1</sup>

On November 1, 2007, US Rail, Suffolk & Southern, Sills Road, and their construction contractors, 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, 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). 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

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<sup>1</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.

be granted to US Rail and its cohort plaintiffs, because they had little likelihood of succeeding on the merits. On June 30, 2009, District Court Judge Thomas C. Platt adopted in full the Magistrate's Report and Recommendation, and denied the preliminary injunction.

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 Board 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.

On April 22, 2010, Judge Platt in the federal court action "So Ordered" a Stipulation of Settlement between the parties whereby US Rail, Sills Road and the remaining plaintiffs agreed, among other things, to comply with the building and zoning code provisions listed in an attached site plan, provide certain vegetation buffers, and provide certain engineering reporting. The Town agreed to withdraw its objections before the Board, which it did.

On September 7, 2010, after receiving the Stipulation of Settlement, and hearing from several interested parties, the Board granted the petition of US Rail 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 Brookhaven Rail Terminal (BRT). The limited approval was made "*subject to the environmental mitigation measures*" proposed by the Board'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 Board for the intended and limited use of delivering "*500,000 tons of aggregate<sup>2</sup> annually from sources in upstate New York to Sills Road Realty, LLC (Sills), the owner of the underlying property, and its affiliates*". U S Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal, Decided September 7, 2010, S.T.B, 2010 WL 3513386 (S.T.B.).

On January 7, 2011 the Board 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 ("US Rail-NY"). Gabriel D. Hall—Corporate Family Transaction Exemption—U S Rail New York, LLC and U S Rail Corporation, STB F.D. No. 35458 (January 7, 2011).

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<sup>2</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 BRITANICA, *aggregate* (<http://www.britannica.com/EBchecked/topic/9076/aggregate>).

**The Adjoining 100 Acre Site**<sup>3</sup>

On an unknown date, Sills Road, US Rail and/or US Rail-NY determined to “*expand*” the BRT to an adjoining approximately 100 acre, previously farmland, site. As of 2012, the “*expansion*” was to involve 5,600 feet of additional track to be located on both the 28 acres and the 100 acres. BRT falsely contended to the Town that the expansion would be limited to a “*spur*” which, under 49 U.S.C. § 10906, does not require Board approval. In a letter to the Town Engineer dated April 30, 2012, Sills Road agreed on behalf of BRT, that procedures contained in the prior Stipulation of Settlement would govern the expansion, that buffers in accordance with the Stipulation would apply, that reporting and specified building code provisions would be adhered to, and that its non-compliance with the Stipulation and the Board’s environmental conditions regarding the 28 acre site (insufficient buffers and other violations) would be corrected. See Sills Road Realty, LLC Letter dated April 30, 2012. On May 11, 2012, the Town Engineer listed the conditions which he agreed 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.

Notwithstanding the foregoing, BRT has unilaterally and unlawfully clear-cut and deeply excavated and mined a large portion of the 100 acre “*expansion*” site, and not just the limited portion necessary for the laying of 5,600 feet track on the two parcels, and not just minor clearing and re-grading work, while at the same time utterly failing to comply with the buffer obligations. See Photographs, Exhibit A.

**BRT’s Plans for Both the 28 and 100 Acre Parcels**

The BRT’s website describes its current expansion plan as vastly different from the terminal approved by the Board:

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.

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<sup>3</sup> The expansion site has been variously described as 100 acres, 99 acres, and 93 acres.

<http://www.brookhavenrailterminal.com/about-brookhaven-rail-terminal.asp> (last visited 2/28/14) (emphasis added).

In a recent February 6, 2014 letter from the BRT's construction manager, Gannett Fleming, Inc., the current expansion project is 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).

On February 20, 2014, Town Attorney Annette Eaderesto wrote back to BRT's construction manager Gannett Fleming, stating:

In response to your letter dated February 6, 2014, the Town is not able to comment on Brookhaven Rail Terminal's proposal without further information.

First, Brookhaven Rail Terminal is an existing 28 acre site which currently operates and is maintained in violation of the 2010 Court Ordered Stipulation. Attempts by the Town to bring Brookhaven Rail Terminal into compliance have been ignored and blatantly disregarded. The site also maintains illegal tent/storage structures.

Pursuant to your letter, Brookhaven Rail Terminal now intends to extend this use onto the adjacent 93 acre property. Although your attachment shows this property as wooded, the vast majority of acres is actually cleared. This was done without permission from the Town and without any environmental review. In 2012, the Town allowed for a rail line expansion of approximately 5,600 feet toward the property line, and Brookhaven Rail Terminal was to provide for a buffer. Rather, Brookhaven Rail Terminal clear cut the entire 93 acres. Your documents should accurately show existing conditions.

Furthermore, your letter and attachments do not provide the Town with any plans regarding the "future warehousing/manufacturing and cold/dry storage facilities" which the Town can review. Your

letter also does not provide any correspondence from the Surface Transportation Board regarding the proposed use. Historically, Brookhaven Rail Terminal has taken the position that all of its activities are preempted by Federal regulations. Federal preemption is not infinite. The Town will require detailed plans of Brookhaven Rail Terminal's proposal to determine whether it may seek an opinion from the Surface Transportation Board on its own account.

Unless and until the Town receives more detailed information regarding Brookhaven Rail Terminal's proposal, we can provide no further comment. The Town intends, however, to protect its interests in light of the existing violations as stated above, and in connection with the prior clearing of the 93 acre parcel.

By letter dated February 27, 2014, BRT responded claiming that its 2012 indication to the Town regarding minor clearing and re-grading work for a 5,600 feet track alleged spur on the 28 and 100 acre parcels, constituted sufficient "notice" to the Town of its current activities under the Stipulation of Settlement. It attached some select building plans, but appears to have deliberately left out others. Specifically, close inspection of the very last document it supplied, page 1 of 2 of a "FIRE SAFETY ANALYSIS" of an "OVERALL SITE PLAN" (it did not provide page 2 of 2 thereof), reveals hints at what activities Sills Road (the non-railroad carrier which deals in construction aggregate and other materials) or others, plans to conduct on the 28 acre and 100 acre parcels, including the "manufacturing" activity which Gannett Fleming's letter had passingly referenced. That document shows, among other things, (1) a "POLYMER PLANT" on the 28 acre parcel; (2) an "ASPHALT CEMENT TERMINAL" on the 28 acre parcel; (3) an "AGGREGATE STORAGE AREA" on the 28 acre parcel; and (4) a 262,500 square foot "PROPANE TRANSFER STATION" on the 100 acre parcel. A reduced-size copy of that "FIRE SAFETY ANALYSIS" document is provided as Exhibit B, wherein we highlighted in red-lettering features which the plan reveals.

#### **2014 State Court Action**

Simultaneously with this letter, the Town has filed a lawsuit in New York State Supreme Court against BRT, including Sills Road, US Rail-NY, and others, for violation of New York laws. Town of Brookhaven v. Sills Road Realty, LLC et. al, N.Y. Sup. Court, Suffolk County Index No. 061613/2014. Among other things, its complaint alleges:

"34. Without limitation, BRT has committed the following unauthorized and unlawful activities:

a. BRT, which obtained strictly limited and environmentally conditioned approvals to construct a limited 18,000 foot industrial rail line upon a 28 acre site connecting to the LIRR tracks has unlawfully acted to “*expand*” its facility from the approved 28 acre site so as to include an adjacent 100 acre site as well as vastly increased trackage, in addition to BRT’s plans to construct extensive warehousing, manufacturing, and shipping facilities, all without required approvals, and in direct violation of BRT’s obligations to the Town;

b. Under the guise of constructing a mere “*spur*” line extension into the adjoining 100 acre site with minor clearing and re-grading along the track line, the BRT has recently excavated a vast swath of the 100 acres parcel, with huge excavation deep below grade, coupled with unlawful dumping activities and the unlawful burying of construction debris at the site, all of which goes well beyond, and is wholly inconsistent with, the limited approvals and the mere laying of tracks;

c. BRT’s current activities, rather than being incidental to the construction and grading of tracks, actually consist of, *inter alia*, the unlawful excavation, mining, and removal of valuable, environmentally sensitive, and regulated fill material for sale and for road construction and related purposes (such as removing 6-7 or more truckloads per hour of fill amounting to thousands of cubic yards from the illegal sand-mining of the site);

d. BRT is also unlawfully using the combined sites for the unlawful burial of construction debris (such as RCA which is crushed concrete and asphalt) imported from outside of the site, and unlawfully burying such materials on the site for a fee;

e. BRT and especially the owner of the property, Sills Road, which is in the business of using and selling construction materials and construction aggregate, are conducting these unauthorized non-railroad activities at the site, are selling the excavated soil for profit, and illegally dumping and burying construction debris at the site, while attempting to justify their illegal activities by falsely and pretextually claiming they are merely developing spur track extensions as a subterfuge to avoid application of the Town Code restrictions concerning tree and vegetation clearing, soil removal and excavations, burial of construction debris and aggregate materials such as RCA, and other environmental restrictions;

f. BRT has recklessly and unlawfully constructed even those portions of its “*expansion*” activities which arguably fall within the scope of the limited allowed trackwork, such as by laying track directly over a natural gas line supplying the nearby Caithness Energy facility, and directly under LIPA electrical lines and towers, posing potentially catastrophic safety risks;

g. BRT has constructed its track in unauthorized areas, such as within 50 feet of the Long Island Expressway despite the 100 foot minimum setback required;

h. BRT has constructed two large warehouse and material handling facilities of approximately 200,000 square foot each without complying with State and local electrical, fire and safety codes, without required or sufficient emergency access roads and facilities to protect workers and customers and, upon information and belief, has installed septic facilities and water connections without required Suffolk County Water Authority approvals or compliance with their requirements; and

i. The BRT facility is an unlawful sand mine, dumping ground for burial of construction debris, RCA and other materials, is improved with unsafe and illegal structures, and poses an immediate threat to the health, safety and welfare of the public, including BRT's own employees, customers and others using the facilities.”

#### **Need for Board Intervention**

It is respectfully requested that the Board re-open STB F.D. No. 35141 and (whether upon the re-opened proceeding or a new proceeding) that the Board grant new declaratory and injunctive orders to address the following:

\* BRT's failure to comply with the conditions and environmental requirements imposed by the Board in its September 7, 2010 order (STB F.D. No. 35141), including, among other things, failing to comply with the vegetation and setback requirements, erecting and intending to erect further structures not contained or allowed in the site plan incorporated into the Stipulation (Environmental Condition No. 1), and conducting activities at the site not reflected on the site plan or permitted by the Board (*id.* and overall Order); failing to “*employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils*” (Environmental Condition No. 2); and failing 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 ... in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7*” (Environmental Condition No. 3).

\* The substantial change in circumstances and planned use of the BRT from the one approved by this Board, i.e. a one-way delivery of 500,000 tons of aggregate annually from sources in Upstate New York to a single customer Sills Road, into a terminal providing altogether different services to customers from a wider and different geographic area. Additionally, although its more recent letters may deny it, there are references in BRT's 2012 letters to the Town reflecting that the expansion is also intended to make a new connection in a new location between the BRT and the Long Island Rail Road. A June 26, 2012 letter of

SYSTRA Engineering, Inc., a copy of which BRT provided to the Town, indicates that “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” (emphasis supplied);

\* Whether some or all of the activities at both parcels are in actuality not performed by or on behalf of any railroad carrier, and are instead by or on behalf of Sills Road, such that these activities fall into the category of cases where federal preemption does not apply. New York & Atlantic Ry. Co. v. Surface Transp. Bd., 635 F.3d 66 (2d Cir. 2011) (affirming STB’s determination that notwithstanding a contract between the entities purporting to make the rail carrier responsible for the construction and operation of a transloading (rail-to-truck) facility, the overall contract made clear that the rail company was not the true operator); Hi Tech Trans. L.L.C. v. New Jersey, 382 F.3d 295, 308–309 (3d Cir.2004); Girard v. Youngstown Belt Ry. Co., 979 N.E.2d 1273 (Sup. Ct. Ohio 2012); Babylon–Petition for Declaratory Order, STB Finance Docket No. 35057, 2008 WL 4377804 (2008) (lease by railroad to entity which transloaded construction debris “*do not qualify for Federal preemption under 49 U.S.C. 10501(b) and are therefore fully subject to local regulation by [the Town of] Babylon*”). The Town asserts that this is the case here, as reflected by, among other things, the ownership by Sills Road of the land, the history of the BRT, the planned “*manufacturing*” activity at the parcels, the fact that the storage activity is tied to the manufacturing activity (“*future warehousing/manufacturing and cold/dry storage facilities*”), the “AGGREGATE STORAGE AREA”, and tellingly, the lead role played by Sills Road in the project.<sup>4</sup> The recent unilateral clear-cutting and deep excavation activity on the 100 acre parcel is also so large that it clearly does not relate to the mere laying of tracks or rail facilities, and reflects excavation and mining activities consistent with removal of soil commodities for resale or construction use, a line of business consistent with the business of Sills Road.

\* Whether the expansion plans do not qualify as a spur, such that (if they are subject to federal preemption at all) Board approval is necessary. The BRT “*extension*” here is now planned to be 12,500 feet, which translates to approximately 2.4 miles in a suburban Long Island location. BRT’s representations, plans, and public statements concerning the new facility make clear that it is intended to reach new customers in new geographic areas, and provide altogether different services from those which it represented to the Board it was supplying. It is thus clear

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<sup>4</sup> It was Sills Road (and conspicuously not Brookhaven Rail or US Rail-NY) who on April 30, 2012 wrote to the Town Engineer providing a (false and incomplete) delineation of what the expansion project would entail. More striking, in that same letter it was Sills Road which made numerous representations and concessions to the Town concerning the expansion project (which it and BRT later breached), including an agreement in that letter that various provisions of the 2010 Stipulation of Settlement entered with respect to the 28 acre parcel would apply with respect to the 100 acre parcel as well.

Surface Transportation Board

March 12, 2014

Page 11

that the planned new installations are not a mere ancillary “*spur, industrial, team, switching, or side tracks*” (49 U.S.C. § 10906). See Kansas City Southern Railway Company – Construction and Operation Exemption – to Exxon Corporation’s Plastics Plant near Baton Rouge and Baker, Louisiana, Decided: June 2, 1995, STB, 1995 WL 348732; Colorado & W. Ry. Co. v. Colorado & S. Ry. Co., 469 F.2d 483 (10th Cir. 1972) (internal citations omitted) (citing *inter alia* Texas & Pacific Ry. v. Gulf, C. & S.F.Ry., 270 U.S. 266 (1926)); Nicholson v. Interstate Comm. Comm’n., 711 F.2d 364, 367 (D.C.Cir.1983) (the analysis focuses on “the intended use” of the added track).

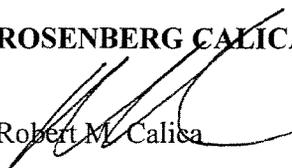
The Town respectfully reserves its rights to obtain redress and further redress of the violations of law at the BRT through its ordinary code violation proceedings in state court, and civil proceedings in court to enforce the Stipulation of Settlement, and the later representations and agreements made by Sills Road and BRT, including to seek a court injunction. Simultaneously with this letter, a Town Investigator is issuing summonses to BRT for non-permit related violations of the Town Code, and a “stop-work” order for non-railroad related activities, and as indicated, the Town is commencing an action in New York State Supreme Court under N.Y. Town Law §§ 268(2) and 135, and New York common law breach of contract/breach of stipulation principles, seeking, among other things, a permanent injunction.

Please advise us, as attorneys for the Town, in the event a formal Petition or other administrative procedures are required on the Town’s part in order to obtain the relief detailed above.

We appreciate the Board’s consideration.

Very truly yours,

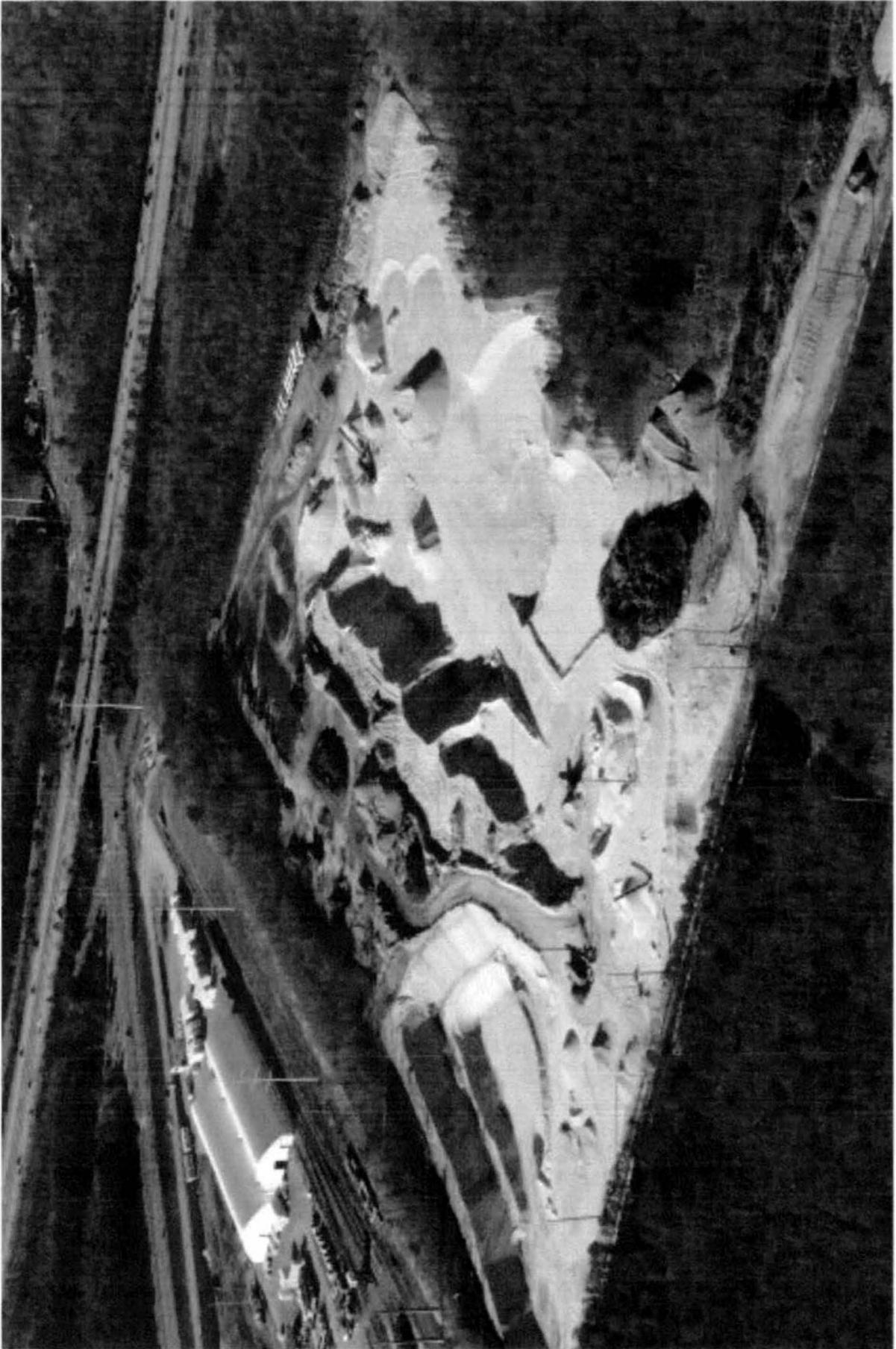
**ROSENBERG CALICA & BIRNEY LLP**

  
Robert M. Calica

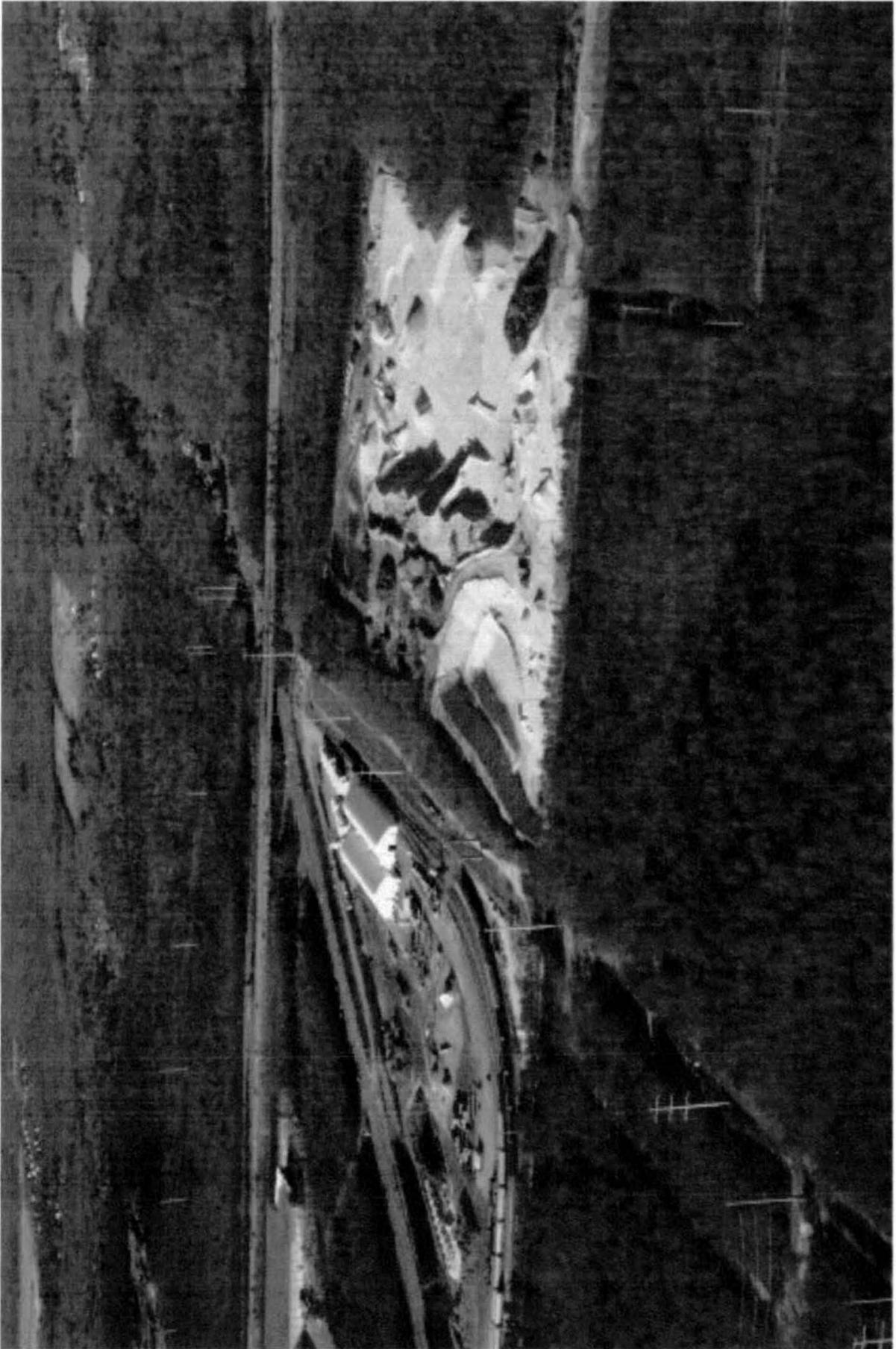
cc: Brookhaven Rail Terminal (*via Federal Express, w/encls.*)  
Brookhaven Town Attorney Annette Eaderesto (*via Federal Express, w/encls.*)

Enclosures

# **EXHIBIT A**







# **EXHIBIT B**

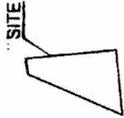


**PWGC**  
 Planning, Engineering and Construction Services

530 Avenue of the Americas  
 New York, NY 10011-3601  
 Phone: (212) 512-1333 / Fax: (212) 512-1335  
 E-mail: pwgc@pwgc.com

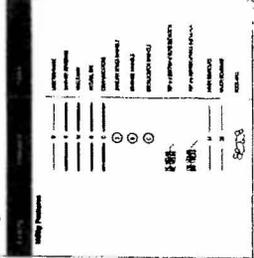
CONDUIT SIZES

**Site Location Map**



SCALE 1"=100'

**Legend**



**Site Notes**

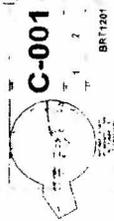
NO.	DATE	DESCRIPTION
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2	11/11/00	ISSUED FOR PERMITTING
3	11/11/00	ISSUED FOR PERMITTING
4	11/11/00	ISSUED FOR PERMITTING
5	11/11/00	ISSUED FOR PERMITTING
6	11/11/00	ISSUED FOR PERMITTING
7	11/11/00	ISSUED FOR PERMITTING
8	11/11/00	ISSUED FOR PERMITTING
9	11/11/00	ISSUED FOR PERMITTING
10	11/11/00	ISSUED FOR PERMITTING

BROOKHAVEN RAIL TERMINAL  
 1000 BROOKHAVEN AVENUE  
 BROOKHAVEN, NY 11793

**FIRE SAFETY ANALYSIS**

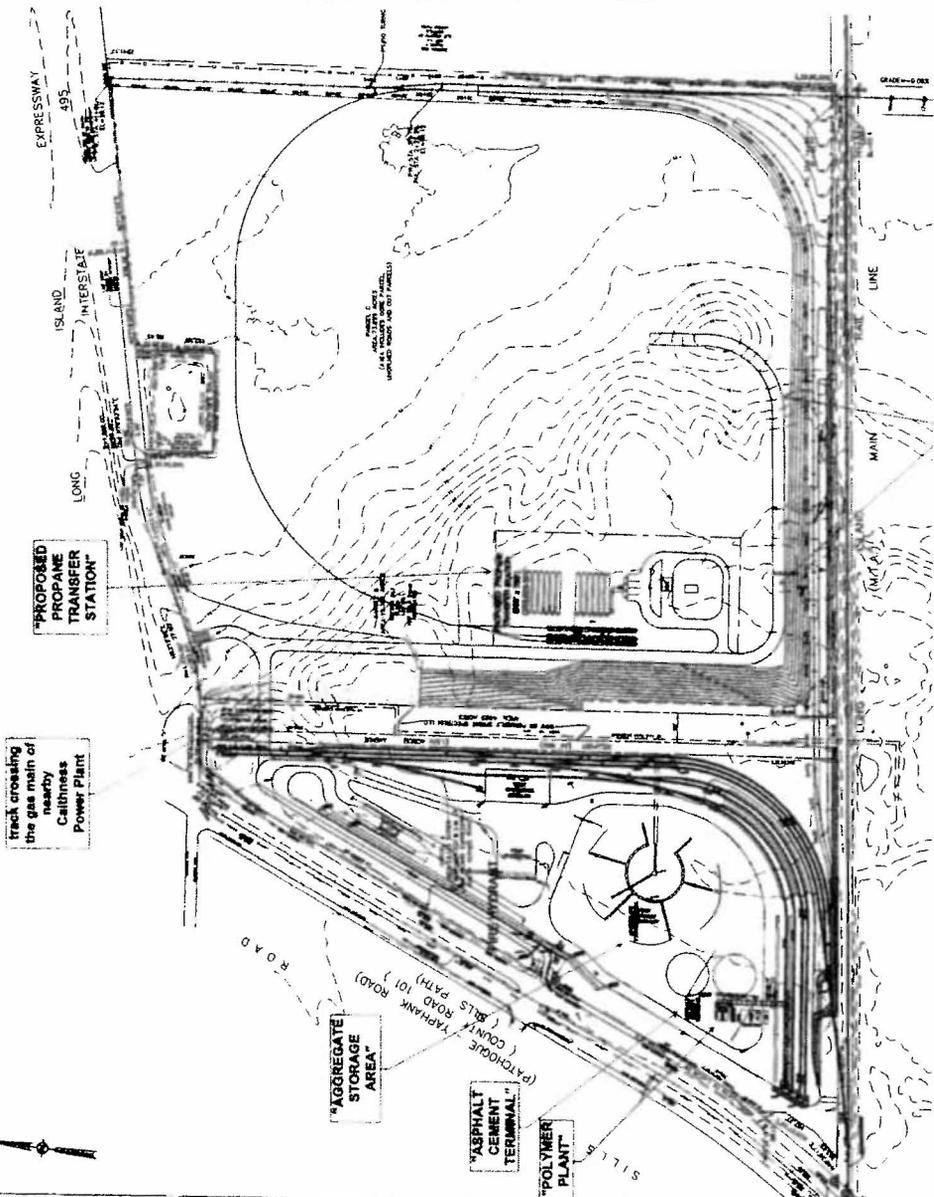
1000 BROOKHAVEN AVENUE  
 BROOKHAVEN, NY 11793

**OVERALL SITE PLAN**



**C-001**

BR 11201



track crossing the gas main of nearby Callithness Power Plant

"PROPOSED PROPANE TRANSFER STATION"

"AGGREGATE STORAGE AREA"

"ASPHALT CEMENT TERMINAL"

"POLYMER PLANT"

expansion track in new site is mainly along perimeter and not interior where excavation conducted

**OVERALL SITE PLAN**

SCALE 1"=100'

