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# ROSENBERG CALICA & BIRNEY LLP

ATTORNEYS AND COUNSELORS AT LAW  
100 GARDEN CITY PLAZA, SUITE 408  
GARDEN CITY, NEW YORK 11530  
TELEPHONE (516) 747-7400  
FACSIMILE (516) 747-7480  
WWW.RCBLAW.COM

RONALD J. ROSENBERG\*  
ROBERT M. CALICA  
WILLIAM J. BIRNEY  
EDWARD M. ROSS\*  
LESLEY A. REARDON  
KENNETH E. ANESER\*  
JOHN S. GIULLA

JUDAH SERFATY  
PETER J. WILLIAMS\*  
ROBERT J. HOWARD  
DIANA G. ATTNER  
JOSHUA M. LIEBMAN†  
GEORGE B. KORDAS  
RYAN J. McMAHON\*

TAMIR M. YOUNG  
KENNETH J. WEINSTEIN  
RICHARD A. ROSS  
OF COUNSEL

\*ALSO ADMITTED FL  
\*ALSO ADMITTED CT  
°ALSO ADMITTED CT, NJ, DC  
\*ALSO ADMITTED MD  
\*ALSO ADMITTED NJ

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

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 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.

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).

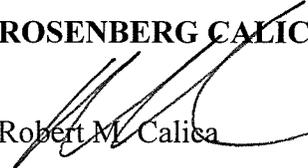
The Town respectfully reserves its rights to obtain redress and further redress of the violations of law at the BRT through its ordinary code violation proceedings in state court, and civil proceedings in court to enforce the Stipulation of Settlement, and the later representations and agreements made 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

**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:**

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**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.

**C**

## **Brookhaven Rail Terminal**

### **Strategic Planning and Design Studies**

**February 18, 2014**

Based on the results of the planning and design studies completed to date, on recent meetings with BRT staff, on discussions with County and State transportation agencies and on recent BRT team conference calls, the following are the planning and design studies that AECOM proposed to complete over the next 3-4 months to advance the progress of the redesign and expansion of the existing BRT facility in Yaphank, NY. The approximate costs associated with these activities are also included.

In the following discussions, “Northern Terminal” refers to the portion of the BRT property located north of the LIRR tracks and comprised of Lots “A,” “B” and “C.” The Southern Terminal is the portion south of the LIRR tracks and comprised of Lot “D.”

### **Roadway Access**

Based on the results of the recent meetings with the Suffolk County Department of Public Works (SCDPW) and the Region 10 office of New York State Department of Transportation (NYSDOT), the following tasks are recommended to inform the site roadway access decisions for the BRT facility. The goal of these activities is to:

- Better inform the decision-making process regarding where those access points should be, their conceptual design and the timing for their implementation,
- Continue consultation with SCDPW and NYSDOT regarding these issues to insure their concurrence with these decisions, and a clear set of required actions and approvals by those agencies, BRT and others to implement these connections, and
- The likely timeframe for when these connections would need to be made relative to planned expansion of BRT operations.

#### **1. Develop Preliminary Rail and Truck Operational Program**

- Develop Overall BRT Site Access Program
  - Vehicle trip generation (especially trucks) for Northern and Southern terminals under full build-out
  - Preliminary Site Access Program and relation of access points and internal circulation plan to present rail infrastructure layout plans
  - Projected trip assignment/volumes at entrance/exits as required by reviewing agencies

- Coordinate with Gannett Fleming (GF) regarding
  - truck trip generation estimates for BRT for environmental approval documents required for NYSDOT's grant support for rail infrastructure on Lot "C"
- Request and review materials from SCDPW and NYSDOT
  - Survey files from SCDPW that were discussed at December 2013 meeting
  - Survey and related files from NYSDOT for EB service road on northern border as discussed at the January 24<sup>th</sup> meeting
- Confirm internal site circulation concept plans for both rail and truck operations including connectivity between the Northern and Southern Terminals, optimal connection point(s) to the LIE Service Road and Yaphank Ave. and Horseblock Rd.
- Confirm projected timing for development of Lots "B" and "C" and associated time requirement for completion of new roadway connections.

## 2. Develop Conceptual Access and Circulation Options for Site

### LIE Service Road

- Develop initial design factors and constraints for access to EB LIE Service Road
  - Define internal site access assumptions (where connection would need to be to avoid truck-rail conflicts) and location of "no access" zone created by FHWA as part of initial funding for service road
  - Review applicable FHWA/AASHTO guidelines for connections involving ramps on LIE mainline
- Define high-level concepts for possible access schemes
  - Directly off of existing service road and access road stump (at northeast corner of Lot "C")
  - Access via extended service road to Yaphank Avenue EB off-ramp
- Identify conformity of high-level concepts with highway design criteria and implications regarding Federal involvement, potential costs, development timeframe
- Discuss issue of farmer pathway under LIE with SCDPW, including long-term uses of County-owned farm fields connected to farm path and ownership of ROW
- Discuss internally with BRT team about options, recommended approach, etc
- Review in concept form with NYSDOT staff for reactions
- Coordinate Incorporation of concepts into most current Northern Terminal site plan

### Yaphank Avenue and Horseblock Road

- Advance Concepts for Yaphank Avenue and Horseblock Road
  - Establish survey base utilizing BRT survey and SCDPW survey files
  - Develop high-concept design for Glover Rd/Yaphank Ave. intersection and extension of roadway to BRT site based on SCDPW-recommended design approach
  - Develop high-concept design for BRT access connection to Horseblock Rd at intersection with County waste management site.



- Discuss internally with BRT team about options, recommended approach, etc.
- Review in concept form with SCDPW for reactions
- Incorporate concepts into most current southern terminal site plan

### **3. Documentation**

- Prepare memorandum summarizing the results of Tasks 1 and 2, including documentation and initial concept plans provided to NYSDOT and SCDPW

## **Rail Infrastructure Design**

The following tasks represent the next phase in the development of implementable plans for the expansion of the rail and related operations at BRT's Yaphank facility. It includes project site design work, review of concepts with BRT staff, coordination with other BRT consultants, and eventual presentation of concepts to LIRR for their review and concurrence.

### **Track Layout Concept Advancement**

1. **Develop alternate track concept plan modifying the full-build BRT Layout Plan titled Lot "B" & "C" Base Plan dated 1/15/2014.**
  - A. Provide access roadway running north / south along east side of Lot "C". This access roadway to connect horizontally and vertically to the proposed access road adjacent to the proposed lead track with both passing under the LIRR providing access to Lot "D".
    - 1) Shift the track layout and corresponding warehouse layout to the west while maintaining the operational flexibility of the base plan.
    - 2) Prepare preliminary grading plan to insure proper accommodations have been made for side slopes required to connect eastern edge of access roadway to existing ground contours along eastern limit of Lot "C".
2. **Develop alternate tail track concept plan modifying the current tail track within BRT property.**
  - A. Extend the tail track underneath Sills Road OH Bridge
    - 1) Maintain operational flexibility enabling cars to be switched from Lot "C" into Lot any of the tracks in Lot "A".
    - 2) Preserve required lateral clearance from centerline of proposed tracks to all LIPA high tension line support structures.
3. **Project Review Meeting**
  - A. Conduct an on-site project review meeting with Jim Newell, Andy Kaufman and Tom Solomon at BRT Terminal to review alternative concept plans and decide on which concept or combination of concepts elements (tail track configuration and truck access location) are to be advanced in combination with the overall track layout and be advanced through the Preliminary Engineering phase and ultimately included in presentations to the LIRR.



- B. Conduct a site reconnaissance and meet with representative of the Bowne AE&T Group in preparation of progressing preliminary engineering design documents.
  - 1) Secure the latest available electronic survey documentation including horizontal and vertical controls and datum references; property description with corner / easement monument identification; digital terrain model covering Lots "A" and "B", easement area between Lots "A" and "B" and Lot "C"; existing track locations including Lot "A" tracks and the LIRR tracks; LIPA pole and support locations; drainage facilities, utility locations / easements, wetland delineations along with any other pertinent survey data that would prove relevant to advancing the preliminary engineering for Lots "B" and "C".
  - 2) Develop understanding of Bowne AE&T Group's scope of work so as to avoid replication of work and enable AECOM to use and advance engineering design work already completed.
  - 3) To the extent necessary, secure available data, design criteria and any constraints associated with Lot "D" to ensure compatibility with the design being advanced for Lot "C".

### **Track and Roadway Alignment Design**

#### **4. Preliminary Engineering Phase**

##### **A. Site Work, Grading and Drainage**

- 1) The preliminary design plans will be based on survey data secured from BRT or their engineering representative.
- 2) The grading plan for the proposed track configuration will be developed for the full-build condition (Lots "B" & "C") and for the initial development (Lot "C" only).
- 3) The grading plan will include the design locations for truck access roadways based on concept plan approved for advancement.
- 4) The grading plan will be developed in concert with the preliminary drainage considerations, track alignment and other site considerations to form a comprehensive plan for the proposed site.

##### **B. Track Alignment Design**

- 1) All track alignment geometry will meet AREMA design criteria unless noted otherwise in the design report.
- 2) The horizontal track alignment geometry will be designed to correspond to the approved concept plan approved by BRT to advance through the preliminary engineering phase.
  - a) All proposed turnouts / crossovers will be No. 10 unless noted otherwise.
  - b) All proposed track centers will be designed at a minimum of 14'.



- 3) The vertical alignments for the top of rail profiles will be designed recognizing the constraints imposed on track profiles in the concept phase with top of rail profiles not to exceed 1.5% grade.

#### C. Roadway Alignment Design

- 1) The roadway access alignment geometry for any new connections to the BRT site from adjacent roadways will be developed as described under the Road Access scope items listed above. This connection will be designed into the site plan based on the accept concept plan approved by BRT and applicable agencies to advance through the preliminary engineering phase.
- 2) The vertical alignment for the top of pavement for roadways within the BRT site will be designed to minimize the grade. Except for any internal roadways utilizing the LIPA easement corridor, it is anticipated that the roadway profile will reflect the adjacent top of rail profile.

#### D. Deliverables for Preliminary Design Phase Submission

The following is a list of anticipated deliverables at each submission in the project as part of the final design and are applicable to each design section:

- 1) 30% Civil /Track Plans –
  - a) Title Sheet, General Notes, Abbreviations & Legends,
  - b) Survey Control (benchmarks & control points),
  - c) Base site plans with limits of work,
  - d) Limits of Right-of-Way established
  - e) Horizontal track alignment plans
  - f) Top of rail profile for Arrival Track
  - g) Typical critical sections,
  - h) Conceptual drainage plans
  - i) Proposed contour plans
  - j) Horizontal roadway access alignment plans
  - k) Top of pavement profile for roadway access and eastern access road to Lot "D".

#### E. Design Report

- 1) All design criteria defined
  - a) Civil Criteria
  - b) Track Criteria
- 2) Calculations of final horizontal and vertical alignments
  - a) Roadway
  - b) Track
  - c) Track design criteria with all design criteria and final recommendations clearly defined.
- 3) Range of Magnitude Cost Estimate



## BRT UG Bridge under the LIRR: Type, Size and Location (TS&L) Alternates

### 1. **Project Management/Technical Oversight:**

- Verifying all required procedures are in place prior to start of any work
- Conducting cursory checks during the preliminary design to verify appropriate assumptions and design methodology
- Co-ordination with Track and other disciplines during preliminary design to resolve issues.

### 2. **TS&L Alternates** - alternates will be evaluated and preliminary designs developed for two (2) concepts -- Steel and Prestressed Concrete. Both alternates will be designed for E80 loading with full diesel impact per AREMA 2013 and the LIRR standards and are anticipated to be ballasted deck structures.

**Steel** – steel deck girders with either steel deck plates or concrete deck (CIP or precast panels). Steel girders will be sized for span anticipated to be up to 48 feet for future double tracking.

**Prestressed Concrete** – adjacent concrete box beams, anticipated to be double cell units, with waterproofing and ballasted deck. Concrete beams are anticipated to be designed for spans up to 36 feet. Span length will be controlled by permissible grades to establish the vertical under clearance – projected as 21’.

**Substructure (abutment) units** - will be recommended based on the geotechnical evaluation of existing borings and soil data for the area and adjacent terminal yard. It is anticipated that abutments could consist of stub abutments on piles/drilled shafts and T-wall retaining structures.

### 3. **Foundation Recommendation** - this work will involve the review of all existing soil borings and data to be provided by the railroad from the work in the adjacent yard and any existing data available from adjacent construction. The foundation recommendation will profile soil bearing capacity for shallow spread footing type foundations and pile /drilled shaft capacity for deep foundations.

### 4. **Plan Presentation** – the development of drawings for typical Type, Size and Location (TS&L) plans. Drawings anticipated include –

- General Plan and Elevation
- Typical Sections
- General Notes and Project Criteria



5. **TS&L Report with Cost Comparison** – a typical TS&L report will be developed which will provide the following information:

- Description of the Project and the overall site conditions
- Subsurface information and soil evaluation with foundation recommendations
- Alternatives evaluated - steel and prestressed concrete with information on loadings and stress, span constraints and material and girder size selection and costs
- Constructability issues
- Costs comparison between Steel, Prestressed Concrete and Precast CONTECH arch alternate
- Recommendation for structure type.

### Projected Costs and Schedule

Table 1 presents the projected costs for the work activities presented above. Costs for communication and coordination with BRT staff and other project consultants, site visits, meeting with involved agencies and project documentation and reports are included (where specified), along with estimates expenses. Because of the iterative nature of this work, with BRT staff frequently asking for additional assessment of other options, follow-up assessments requested by reviewing agencies, revisions to existing concepts, etc., a budget line for Miscellaneous. Related Meetings, Follow-up Tasks has also been included to be utilized on an as-requested basis.

The following is an approximate schedule in weeks of the timeframe for these activities. The actual schedule of these tasks, projected over an approximately 3-month period, will depend in part on a variety of factors, including the availability of necessary data from team members and third-party sources, the scheduling of timely meetings with reviewing agencies and the ability to meet and coordinate with BRT staff and make key decisions on a timely basis. However, based on work completed to date, the support shown to date by key agencies, and our familiarity with site conditions, the availability of data and the key issues to be addressed, we feel that the proposed schedule is a reasonable estimate. Note that this schedule would allow for a presentation of concepts to the LIRR in Week 8.

	Projected Schedule (weeks)											
	1	2	3	4	5	6	7	8	9	10	11	12
Roadway Access Plan and Concepts	█	█	█	█	█	█	█					
Track Layout Concept Advancement	█	█	█									
Track & Roadway Alignment Design		█	█	█	█	█	█	█				
LIRR Undergrade Bridge TS&L			█	█	█	█	█	█				
Presentation of Concepts to LIRR								★				
Misc. Meetings, Follow-Up Tasks								< -----As Required ----- >				



**Brookhaven Rail Terminal  
Strategic Planning and Design Studies**



**Table 1: Projects Costs**

<b>ROADWAY ACCESS</b>		<b>LIRR UNDERGRADE BRIDGE TS&amp;L</b>	
<b>Roadway Access Plan Development</b>		Project Management	\$3,200
BRT Site Access Demand, Access Program	\$14,000	TS&L Alternates	\$14,000
G-F Coordination	\$3,000	Foundation Recommendation	\$8,500
Obtain Materials from NYSDOT, SCDPW	\$1,750	Drafting	\$7,500
<b>Sub-Total</b>	<b>\$18,750</b>	TS&L Report with cost Comparison	\$5,900
<b>Development of Access Concept Plans</b>		<b>Sub-Total</b>	<b>\$39,100</b>
LIE EB Service Road Concepts	\$34,000	<b>EXPENSES</b>	
Advance Yaphank/Horseblock Concepts	\$15,000	Travel	\$1,800
<b>Sub-Total</b>	<b>\$49,000</b>	Misc.	\$400
<b>Meetings and Documentation</b>		<b>TOTAL</b>	<b>\$2,200</b>
Meetings with NYSDOT & SCDPW	\$12,000	<b>SUMMARY</b>	
Tech Memos	\$6,000	ROADWAY ACCESS	\$85,750
<b>Sub-Total</b>	<b>\$18,000</b>	RAIL INFRASTRUCTURE & SITE DESIGN	\$61,400
<b>TOTAL</b>	<b>\$85,750</b>	LIRR UNDERGRADE BRIDGE TS&L	\$39,100
<b>RAIL INFRASTRUCTURE &amp; SITE DESIGN</b>		EXPENSES	\$2,200
<b>Track Layout Concept Advancement</b>		<b>TOTAL</b>	<b>\$188,450</b>
Alt. Concept PlanS - Eastern Access Rdwy	\$11,000	<b>Optional Tasks</b>	
Alt. Concept Plans - Extend Tail Track	\$3,000	Misc. Related Meetings, Follow-up Tasks	\$20,000
Project Review Meeting	\$9,000		
<b>Sub-Total</b>	<b>\$23,000</b>		
<b>Track and Roadway Alignment Design</b>			
Site Work	\$7,000		
Track Alignment	\$11,500		
Roadway Alignment	\$4,800		
Deliverables	\$6,000		
Design Report	\$5,200		
Project Review Meeting	\$3,900		
<b>Sub-Total</b>	<b>\$38,400</b>		
<b>TOTAL</b>	<b>\$61,400</b>		



I hope that this information is helpful in understanding our approach to completing the required next steps and the associated level of effort to complete those tasks. Feel free to call regarding any questions you may have on any aspect of the proposed work. We appreciate the continued opportunity to work with your group on this exciting and timely project. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Crowell".

William H. Crowell, Ph.D., LEED® AP  
Vice President



**D**

# ***BRT***

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***Brookhaven Rail Terminal  
Long Island***

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## **Transforming Freight Rail Transportation East of the Hudson**

*A Brookhaven Rail Terminal White Paper*

205 Sills Road  
Yaphank, NY 11980  
(631) 924-8800  
[www.brookhavenrailterminal.com](http://www.brookhavenrailterminal.com)  
[www.brookhavenrail.com](http://www.brookhavenrail.com)

September 2012

## I. Executive Summary

It is widely recognized that more freight must be moved onto Long Island by rail in order to address the worsening congestion on the region's roads, bridges and tunnels and ensure the long-term competitiveness of regional economy. Currently, less than 1% of all freight brought onto Long Island is transported by rail. In turn, truck traffic continues to grow – trucks, for example, occupy 60% of available space on the Cross Bronx Expressway during peak hours – with freight carriers and residents alike facing longer commutes and the entire region facing greater emissions. The result of increasing congestion (and tolls) is also higher freight prices – and, therefore, higher prices for businesses and consumers for their every day needs.

A number of factors have constrained freight rail growth East of the Hudson, including:

- **The lack of major freight rail routes** across the Hudson River and New York Harbor onto Long Island that require rail carriers to take circuitous and expensive routes.
- **Out-of-date rail infrastructure** – specifically, height and weight limitations – that prevents the use of cost-effective, high-capacity rail equipment East of the Hudson.
- **Historically limited rail yard capacity** that has constrained intermodal interchange and distribution on Long Island, and therefore the overall ability to bring freight onto Long Island by rail.
- **A complicated and costly supply chain** that requires freight to pass through multiple parties to reach its destination on Long Island.

The Brookhaven Rail Terminal (BRT) has and is prepared to move forward with a vision – working with regional partners – for a new, streamlined cross-harbor supply chain that will begin the process of transforming freight rail transportation East of the Hudson. The BRT believes this vision can be achieved in the near-term while providing the foundation for the longer-term investments that are needed, such as addressing the clearance and weight restrictions. Specifically, the BRT's near-term vision offers a way to address each of the constraints that has historically limited freight rail East of the Hudson in an efficient, achievable and cost-effective way and consists of:

- **Working with partners to expand cross-harbor rail float operations** using barges that carry rail cars across the harbor, providing a highly cost-effective and efficient means to move freight across the Hudson River.
- **Investing in specialized rail equipment** that can operate on Long Island's out-of-date rail infrastructure, including specialized rail cars that meet the height and weight constraints while still carrying enough freight to be cost-effective.
- **Leveraging the development of the Brookhaven Rail Terminal**, a 355-acre, modern intermodal rail yard in the middle of Long Island as the hub for intermodal exchange and distribution.
- **Developing a streamlined supply chain** where businesses can coordinate their shipments and remove many of the costly and cumbersome steps in the supply chain.

Ultimately, this vision for a new, streamlined cross-harbor supply chain is a vision for a more livable, economically prosperous, and environmentally sustainable New York. It is also a highly cost effective and achievable vision as it works within the constraints and opportunities in the region's existing freight rail infrastructure. At the same time, it will help to advance needed long-term Cross Harbor and East of Hudson infrastructure improvements by building and demonstrating the potential of the freight rail market. The BRT is committed to entering into the partnerships and making the investments to realize this vision and looks forward to working with public and private leaders to bring it to fruition.

## II. BRT's Vision for a New, Streamlined Cross-Harbor Supply Chain

While the New York metropolitan area has the highest volume of freight movement of any metropolitan area in the nation, less than 1% of all freight transported East of the Hudson (and in particular onto Long Island) is moved by rail. As a result of the overwhelming reliance on trucks to move freight, highway congestion has steadily increased over the years. With freight volumes projected to increase 50% - 70% over the next 20 years, expanded freight rail capacity is critical to the region's future quality of life and economic competitiveness.

Historically, however, there have been four factors that have constrained freight rail East of the Hudson and that must be overcome to expand freight rail transportation onto Long Island. The BRT's vision for a new, streamlined cross-harbor supply chain addresses each of these factors in an efficient and cost-effective way and includes the following elements:

### 1) Working with regional partners to expand cross-harbor rail float capacity, providing a highly cost-effective means to move railcars across the Hudson River and to destinations on Long Island.

The lack of major freight rail routes across the Hudson River onto Long Island is a critical barrier to expanding freight rail transportation East of the Hudson. Specifically, the Hudson River and New York Harbor offer only two routes to freight shippers coming from the west or south of New York: (1) either float rail cars from the Port of Newark across New York Harbor to Brooklyn on barges; or (2) transport the rail cars on a 280 mile detour called the "Selkirk Hurdle" that requires crossing the Hudson on a rail bridge near Albany, only to go back south to reach Long Island.

At their peak in the 1950s, cross-harbor rail barges in New York Harbor moved over 1,000 rail cars *per day* and were a core part of the freight transportation network. Today, the Port of Newark is home to the only remaining rail float operation in New York Harbor, the New York New Jersey Rail (NYNJRR), which connects Greenville Yard in Greenville, Jersey City to Bush Terminal in Brooklyn. The NYNJRR, now owned and operated by the Port Authority of New York and New Jersey, currently moves about 1,500 cars *per year*.

The current and projected costs of truck transportation have again made floating rail cars a competitive alternative. The Port Authority has been acting accordingly to redevelop and modernize Greenville Yard on the New Jersey side and 65<sup>th</sup> Street/Bay Ridge Yard on the Brooklyn shore, where car float service is being transferred from the Bush Terminal.

The BRT Vision: BRT is prepared to bring this operation to its true potential, which NYNJRR sets at approximately a 15-fold increase in volume to 23,000 railcars by 2017. In a potential partnership with 65<sup>th</sup> Street yard operators, BRT is uniquely capable of coordinating the movement of freight between the point of entry in Brooklyn its ultimate destinations on Long Island. Further, BRT is willing to finance a float operation with private funds for either containers or expanded rail barge capacity in order to increase the volume of rail cars moved across the harbor via car floats.

### 2) Investing in specialized rail equipment that can operate on Long Island's outdated rail infrastructure, including specialized rail cars that can meet the height and weight constraints while still carrying enough freight to be cost effective.

A second fundamental barrier to expanding freight rail onto Long Island is the outdated rail infrastructure. In order to expand freight rail transportation, the region must address the height and weight clearance limitations that prevent the use of modern, cost-effective rail equipment East of the Hudson. Most of the railroad infrastructure East of the Hudson was built in the 19<sup>th</sup> and early 20<sup>th</sup> century and does not have the clearances or capacity to support modern railcars, such as double-stack cars. Virtually all the freight rail lines providing service in the nation have clearances high enough for double-stack cars and for the heaviest freight rail cars. The East-of-Hudson region, however, lags behind the national standards for clearances and

weight limits, ruling out the use of popular, cheap, and efficient intermodal trains which are heavy and tall. According to the Long Island Rail Road, bringing the rail network East-of-Hudson to modern standards would require significant funding, estimated at hundreds of millions of dollars, and at least 10 years to implement. This is a critical long-term imperative for the region's freight network.

The BRT Vision: In the near-term, the BRT is willing to finance specifically designed equipment, if demand is secured and the supply chain is coordinated, that would bring modern rail cars onto the outdated rail system. These cars can meet the height and weight constraints while still carrying enough freight to be cost effective. This would provide a short to medium term solution that would develop freight rail market potential and demonstrate the importance of updating the East-of-Hudson rail network.

**3) Leveraging the development of the Brookhaven Rail Terminal,** a 355-acre, modern intermodal rail yard in the middle of Long Island, as the hub for intermodal exchange and distribution.

Limited rail yard and intermodal transfer capacity on Long Island has been a third core barrier that has constrained the ability to bring freight onto Long Island by rail. While there are a number of sites that can be upgraded if various funding and environmental conditions are met, historically, the East-of-Hudson region has not had the efficient and high-capacity intermodal rail yards that the West-of-Hudson system has.

The BRT Vision: The Brookhaven Rail Terminal has already begun operations and will develop a total of 355 acres into a large-scale, intermodal rail terminal - offering Long Island a modern hub for intermodal exchange and distribution that is well on its way to full operation. As an approved Class III railroad, Brookhaven Rail plays an integral role in allowing the site to operate as a rail hub and rail-to-truck transfer facility. The BRT is also ideally located in the middle of Long Island and adjacent to the Long Island Expressway, providing easy rail-to-truck transfer capacity for last mile delivery. By leveraging the existing solution at the BRT, this historic constraint can be removed from the equation as a limiting factor.

- **Developing a streamlined supply chain** where businesses can coordinate their shipments and remove many of the costly and cumbersome steps in the supply chain.

The final constraint on growing freight rail transportation East of the Hudson is the inefficient supply chain that requires freight to pass through multiple parties to reach its destination on long island, increasing costs and adding prohibitive complexity to the supply chain. For example, for a shipper to price out a route taking the Selkirk Hurdle, it would likely receive a rate consisting of four different freight rail companies. The timing to receive a rate would be several days, and the rail traffic pattern itself is challenging, impacting reliability. For goods that do travel on cross-harbor car floats today, capacity is limited and the route can often require several different companies to transfer the freight and input their costs.

The BRT Vision: To move significant freight onto Long Island, the supply chain must be efficient and cost effective. To be efficient, the supply chain needs to modernize the float equipment and acquire Long Island capable equipment. To be cost effective, the different cost structures from the different entities involved in the cross-harbor supply chain need to be coordinated to provide simplified rate quoting and seamless service. As outlined here, BRT is prepared to enter into the partnerships and make the investments to realize this vision for a new, streamlined cross harbor supply chain. Doing so is critical to the region's future quality of life and economic competitiveness – and will also help to advance the needed long-term infrastructure improvements by building the East of Hudson freight rail market and proving its transformational potential.

# ***BRT***

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Long Island***

205 Sills Road  
Yaphank, NY 11980  
(631) 924-8800  
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## **Rail Freight Transportation on Long Island**

*A Brookhaven Rail Terminal White Paper*

**August 2012**

**Contents**

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<b>Freight Movements in the New York Region</b>	<b>1</b>
<b>Long Island Rail Freight Supply Chain</b>	<b>2</b>
<b>Dominance of Passenger Trains</b>	<b>2</b>
<b>Lack of Major Rail Freight Routes onto Long Island</b>	<b>2</b>
<b>Infrastructure Restrictions – Weight &amp; Vertical Clearance</b>	<b>3</b>
<b>Limited Land Availability for Major Yards and Warehousing</b>	<b>4</b>
<b>Simplified Supply Chain</b>	<b>5</b>

## **Freight Movements in the New York Region**

Nationally, rail accounts for approximately 16 percent, in tons, of overall movement of goods. In the past half-century, railroad companies have been relatively undercapitalized, and hence unable to fully meet their own capital needs, particularly in the northeast. However, rail has significant efficiency and environmental benefits relative to truck transport.

The public sector owns and maintains the right of way (roads) crucial to shipping, and the private sector owns and operates the vehicles. Freight transportation in the region supports a huge economy. For example, between 1999 and 2003, the value of merchandise trade through the Port of New York and New Jersey increased by 40 percent—a 42 percent increase for imports and a 36 percent increase for exports. During the same period, tonnage increased by 27 percent. Nearly 589,000 automobiles and other vehicles were imported and exported through the Port in 2002, a 7 percent increase over 2001 figures. Nearly 40 percent of cargo is liquid bulk material, 27 percent is handled in shipping containers, and 22 percent is crude oil, with the remainder made up of automobiles, dry bulk goods and general cargo. The majority of freight traffic 67.3 percent in New York City – is transported by truck.

Approximately 20 percent of freight traffic in the region travels via waterways. Port facilities in New York Harbor handle the second largest amount of freight traffic after Los Angeles. The Port brought in over \$101 billion dollars of international freight in 2003, representing about 13 percent of the value of U.S. international waterborne freight shipments. Only 0.9 percent of all freight is carried by rail in the region. The New York metropolitan area already experiences the highest volume of freight movement of any metropolitan area in the nation. Regional commodity flows are expected to grow from 434 million annual tons in 2004, to 804 million annual tons in 2030, an 85 percent increase. Growth is expected across the commodity spectrum. One of the fastest growing sectors is “Secondary Traffic,” which is a group of commodities moving between warehouses and distribution centers, including goods shipped in containers.

Highway congestion in the New York metropolitan area has steadily increased over the years; the slow traffic is frustrating to commuters, pollutant to the atmosphere, and puts local businesses at a competitive disadvantage. Much of the traffic and congestion is a result of the overwhelming reliance on the trucks to move freight. For Example, during the morning rush on the Cross Bronx Expressway, 72% of vehicles on the road are commuter cars, since each truck occupies as much road space as about four cars, trucks which occupy 28% of the vehicles actually occupy 60% of the available space. Highway congestion is expected to increase substantially in the next 20 years to accommodate an increase of 50% - 70% in freight.

With the bulk of freight being moved by trucks, shippers have been bearing the exorbitant cost of traffic and tolls paid to get into Manhattan and Long Island, recent studies estimate \$7.7 billion in wasted fuel and work time each year. A 6-axle truck delivering freight from the port of Newark to the center of Lon Island would conservatively drive for 5 hours and pay \$99.21 in bridge tolls alone. The total cost would average about \$700 - \$800 per truck. Additionally, tolls on the George Washington and Goethals Bridges for 6-axle trucks are projected to increase by 90% by 2015. In the fourth quarter of 2011, car and truck traffic on certain bridges decreased by 4% from the prior year due to a 50% increase in bridge tolls that took effect on September 19. During the same time, ridership on the subway connecting Manhattan and New Jersey rose



by about 3.7%. As the tolls continue to increase for trucks we expect shipper to similarly seek alternative routes and delivery methods which include rail.

### **Long Island Rail Freight Supply Chain**

The rail freight infrastructure on Long Island is constrained by four factors: 1) the dominance of passenger trains; 2) the lack of major rail freight routes; 3) vertical/lateral clearance restrictions that limit the use of modern rail equipment; and 4) limited land availability for major yards and warehousing facilities. As a result, only about one percent of goods (in tons) shipped to the region travel by rail.

### **Dominance of Passenger Trains**

Rail freight movements on Long Island are handled by the New York and Atlantic Railway ("NYA"). The NYA is a regional short line railroad owned by Anacostia and Pacific Holdings, based in Chicago, IL. The NYA operates under a 20 year franchise agreement with the Long Island Railroad ("LIRR"). The President of the LIRR is Helena Williams.

The LIRR is the busiest commuter rail in the world. Therefore, freight movements on this railroad must be carefully choreographed. Helena Williams is a big supporter of freight by rail but she recognizes that LIRR support for increased freight has been limited due the lack of space and coordination with NYA. The Brookhaven Rail Terminal ("BRT") offers sufficient space and is built to accommodate the largest block of cars that the LIRR will allow. The BRT will offer the LIRR and the NYA an avenue to support freight with a relatively simple operating plan.

### **Lack of Major Rail Freight Routes onto Long Island**

The Hudson River is such a critical boundary that it has divided the rail network between the East-of-Hudson and West-of-Hudson regions. While each region handles a similar amount of freight each year, the West-of-Hudson region moves about nine percent of its freight by rail vs. less than one percent on the East-of-Hudson region. The Hudson River and New York Bay offer only two routes to shippers coming from the west or south of New York; either float rail cars from the Port of Newark to Brooklyn on a barge, or move the rail cars 130 miles north via rail along the Hudson's west bank, past the Port of Albany to the nearest rail crossing over the Hudson River only to go back south on the Hudson's east bank for a 280 mile detour called the Selkirk Hurdle.

In 1969 a shift occurred from moving freight via rail to trucking it onto Long Island. What used to see activity of 1,000 floating rail cars a day and many floating railroads in 1954, the Port of Newark is now home to only one floating railroad, New York New Jersey Rail (NYNJR), which moves about 9 cars a day. The current and projected cost of truck transportation has made floating rail cars a more competitive option, thereby reversing the trend to shift back towards rail. The Port of New York and New Jersey (PANYNJ) has been acting accordingly to redevelop the Greenville Yards in Jersey City, N.J., this includes modernizing its car-



float operation. The Greenville yard is the only terminal in New Jersey that can handle the volume. Further, the rail-car float that is moved between New Jersey and Brooklyn can only support 6 cars at a time, thus, hindering the potential amount of cars that can be moved via rail.

BRT Solution – BRT is prepared to bring the operation to its true potential. In a potential partnership with 65<sup>th</sup> Street yard operators, BRT is uniquely capable of coordinating the movement of freight between the point of entry and the largest rail terminal on Long Island. Once the 65<sup>th</sup> Street yard becomes fully operational, the operator will be able to coordinate traffic moving onto Long Island with the Brookhaven Rail Terminal to maximize the efficiency and capacity of the 65<sup>th</sup> Street yard space. Further, BRT is willing to finance a float operation with private funds for either containers or expanded rail barge capacity in order to increase the volume of rail cars moved via rail.

### **Infrastructure Restrictions – Weight & Vertical Clearance**

In order to run modern freight trains along New York's tracks, the region must improve its obsolete rail network. Most of the railroad infrastructure in the area, especially in the East-of-Hudson sub-region, was built in the nineteenth and early twentieth century, but since then the tracks, in many cases, have not been well maintained or upgraded for freight rail use. In the past, freight cars were shorter and lighter, so consequently bridges and other structures that limit the height and weight of rail cars were constructed over tracks that the freight system shares with commuter rail. The result is that on some lines, bridges and pedestrian crossings are simply too low for modern trains. Generally, clearance requirements are based on the height of individual cars, the size of containers stacked on a car, and the vertical space between the tracks and the car bottoms.

The Association of American Railroads (AAR) sets the standards for rail clearances. "Plate" designations refer to the total vertical height of a rail car and are the standard system for estimating the heights of the rail cars and determining the necessary clearances. Virtually all the freight rail lines providing service in the nation, including New Jersey, have clearances high enough for double-stack cars and cars that are 286,000 pounds gross-weight-on-rail (GWOR) compliant. Thus, they can handle the heaviest freight rail cars and movement of plate F cars (17 feet), those with the greatest height.

The East-of-Hudson region, however, lags behind the national standards for clearances and weight limits. Currently, only the relatively low plate B (15 feet 1 inch) and plate C (15 feet 6 inch) boxcars with a maximum weight of 263,000 pounds GWOR can move freely in the rail network. Height and weight restrictions rule out the use of popular, cheap, and efficient intermodal trains, which are heavy and tall. According to the Long Island Rail Road, bringing the rail network East-of-Hudson to modern standards would require significant funding, estimated at hundreds of millions of dollars. Further, the time it would take to implement the changes and update the network would be at least 10 years.

BRT SOLUTION – BRT is willing to finance specifically designed equipment, if demand is secured and the supply chain is coordinated, that would bring the modern rail cars onto the antiquated rail system. This would provide a short to medium term solution that would demonstrate and underscore the importance of updating the East-of-Hudson rail network.

## **Limited Land Availability for Major Yards and Warehousing**

Today, the East-of-Hudson region, particularly Long Island, does not have the efficient and high-capacity rail yards that the West-of-Hudson system has. Nevertheless, the region has a number of yards, many of which can be upgraded

- ***Oak Point Yard***
  - A 35-acre, highly utilized rail freight terminal in the South Bronx, owned and operated by CSX. CSX and CP are the only carriers at Oak Point.
  
- ***Fresh Pond Yard***
  - A 10-acre rail freight yard in the Fresh Pond district of Queens, owned by the LIRR and operated by the NYA. The main rail carriers at Fresh Pond are the NYA, CSX, CP, and P&W. All on-rail freight originating or terminating in Brooklyn, Queens, or Long Island is delivered or received by the NYA at Fresh Pond from the intercity carriers CSX, CP, and P&W. The NYA is the sole freight carrier in Brooklyn, Queens, and Long Island.
  
- ***Harlem River Yard***
  - A 28-acre facility in the South Bronx, owned by the New York State Department of Transportation (DOT) and operated by Harlem River Yard Ventures, Inc. CSX and CP serve this yard, which consists of an intermodal transfer facility and a large municipal waste transfer facility.
  
- ***Hunts Point***
  - It is the largest food distribution center in North America, providing 80 percent of New York City's produce and 40 percent of the city's meat. The produce terminal is served by rail. The complex also includes a major East-of-Hudson rail reload center that specializes in the distribution of flour.
  
- ***The Sixty-fifth Street Yard***
  - A 25-acre yard owned by EDC and leases the operating rights. Trains are forwarded to the yard from Fresh Pond by the NYA via the Bay Ridge Line. The facility contains 13 tracks, an intermodal transfer area, a reload area, and two float bridges to accommodate cross-harbor float operations.
  
- ***Cedar Hill Rail Yard***
  - In southwest Connecticut, CSX operates a reload center in the former Cedar Hill rail yard near New Haven. The Cedar Hill yard, now underutilized, was once used to distribute large amounts of freight throughout Connecticut. The P&W recently opened a reload center in southwest Connecticut.

There has been significant debate over securing sufficient land for specific use as a rail freight facility. All of the sites selected have been subjected to significant public debate regarding land use, environmental impact



and cost. An example of this is the Pilgrim State terminal which never materialized due to its cost, size and lack of execution.

BRT Solution – BRT already has 355 acres secured, funded and partially developed. As an approved Class III railroad, Brookhaven Rail plays an integral role in allowing the site to operate as a rail terminal. Given an existing solution at BRT, the limitation can be completely removed from the assessment as a limiting factor.

### **Simplified Supply Chain**

The movement of goods onto Long Island by rail has proven to be costly. A move via CSX requires freight to move across the Hudson River near Albany in upstate New York. For freight originating from the western side of Manhattan it would require a 280 mile trip up to Albany, across the Hudson and down the east of the Hudson River where it would then get transferred to the NYA. For freight of volume it would then have to be delivered to the BRT. This route is referred to as the east of the Hudson. For a shipper to price out this route it would receive a rate that consisted of (CSX, CP, NYA and BRT). The timing to receive a rate would be several days and the traffic pattern is challenging.

For goods that travel from Norfolk Southern, the route would be to cross the NYNJ Float operation at a limited capacity of 6 rail cars per move. Once the barge reaches Brooklyn (65<sup>th</sup> Street Yard) it would then be handed off to the NYA and ultimately to BRT. This route is referred to as the cross harbor. For goods to move across this route a shipper would receive a rate from NS, NYNJ, NYA and BRT. This route could be as little as 70 miles but would still require four different companies to input their cost.

#### **BRT Solution**

To move significant freight onto Long Island, the supply chain must be efficient and cost effective. To be efficient, the supply chain needs to modernize the float equipment and acquire Long Island capable equipment. To be cost effective, the four different cost structures mentioned above need to be coordinated to provide simplified rate quoting and seamless service.

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## I-495 Service Road Extension

### *Supporting the expansion of Brookhaven Rail Terminal*

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**Project Summary:** Brookhaven Rail Terminal (BRT) is now fully operational and requires additional development to expand beyond Phase I, referred to as Parcel A. BRT is currently expanding into an adjacent property for the next phase of construction. *(see Exhibit A for an aerial view of the site)* A critical component to the success of the project is to strategically extend additional road access to I-495 in order to optimize traffic to the site and minimize truck traffic on local roads. This will extend the southbound service drive of the Long Island Express Way approximately half a mile east to connect exit 66 to and 67. *(see Exhibit B for an illustration)* This will significantly improve the functionality of the site and have a dramatic positive impact on neighborhood traffic and accessibility of the site.

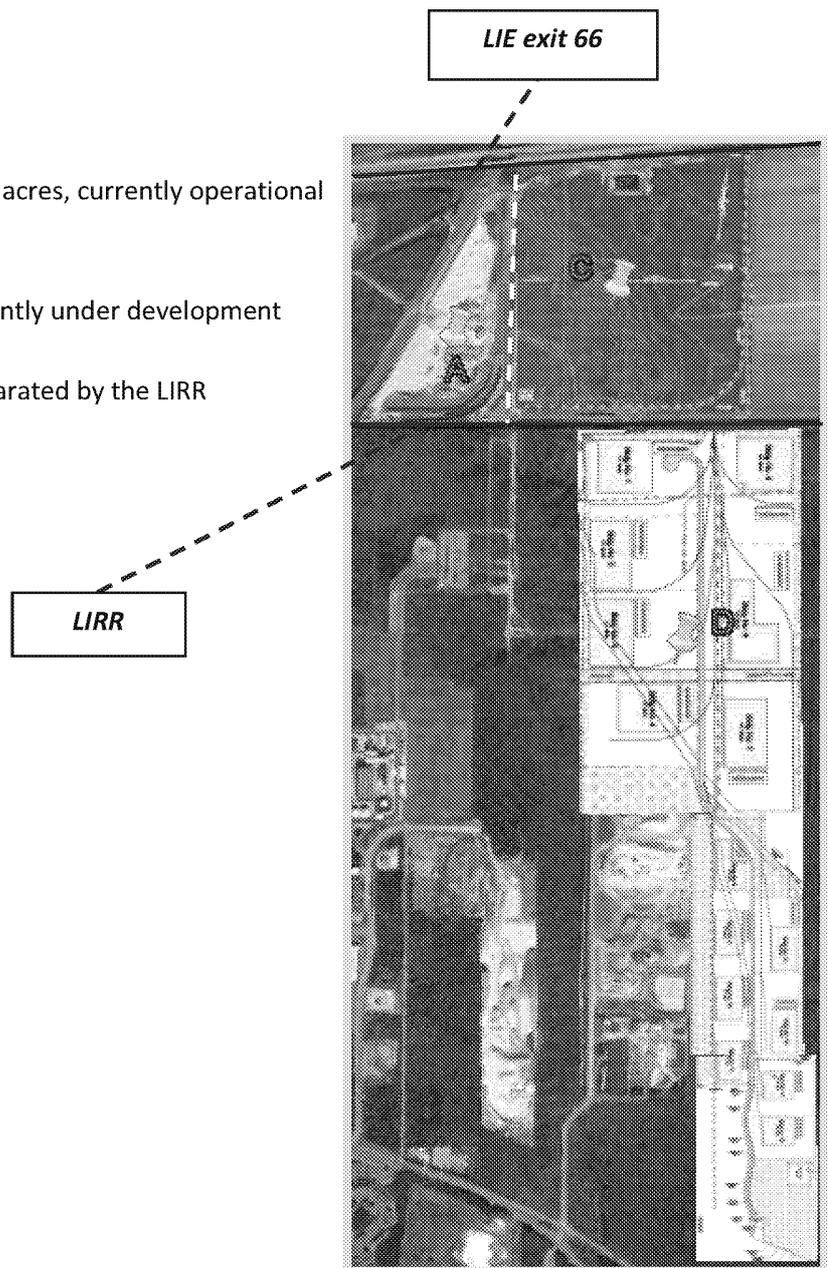
**Cost/Timeline:** The project is expected to cost \$2.3 million  
*(see Exhibit C for a breakdown of cost)*

**Benefits:** As the BRT expansion progresses, the volume of freight and trucks entering the facility will increase substantially. The extension of the I-495 service road will be essential in improving ingress and egress traffic, while reducing heavy truck traffic on local roads. Supporting the service road extension will enable BRT to become a more competitive site and attract top tier corporations new to Long Island by providing a strategically located rail served facility with efficient highway access for operations and distribution. BRT is expected to generate hundreds of permanent jobs and remove thousands of trucks per year from congested Long Island roads.

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**Exhibit A  
Site Layout**

- Parcel A:** The completed 28 acres, currently operational (Phase I)
- Parcel C:** The 70 acres currently under development
- Parcel D:** The 225 acres separated by the LIRR







*Brookhaven Rail Terminal  
Long Island*

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Item No.	Description	Units	Quantity	Unit Price	Total Price
1.0	Clearing	Acre	2	\$12,000.00	\$24,000
2.0	Excavation - Cut to Fill	CY	5,600	\$12.00	\$67,200
3.0	Fill from off site	CY	3,200	\$18.00	\$57,600
4.0	Additional grading, etc.				\$25,000
5.0	Curb	LF	2,800	\$25.00	\$70,000
6.0	RCA	CY	2,255	\$70.00	\$157,850
7.0	Bose Asphalt	TN	4,780	\$120.00	\$573,600
8.0	Binder Asphalt	TN	1,989	\$130.00	\$258,570
9.0	Top Asphalt	TN	1,592	\$140.00	\$222,880
10.0	Asphalt Mow Strip	TN	159	\$300.00	\$47,700
11.0	Guiderail Allowance	LF	2,760	\$70.00	\$193,200
12.0	Topsoil - 10' Both sides Road	CY	675	\$50.00	\$33,750
13.0	Seeding		55,200	\$0.15	\$8,280
14.0	Management, job office, etc.				\$150,000
15.0	Stripping Allowance				\$30,000
				Sub-Total	\$1,919,630
				General Conditions (10%)	\$191,963
				Sub-Total	\$2,111,593
				Construction Contingency (10%)	\$211,159
				<b>Total</b>	<b>\$2,322,752</b>

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## Construction of Bridge/Track Crossing Under LIRR

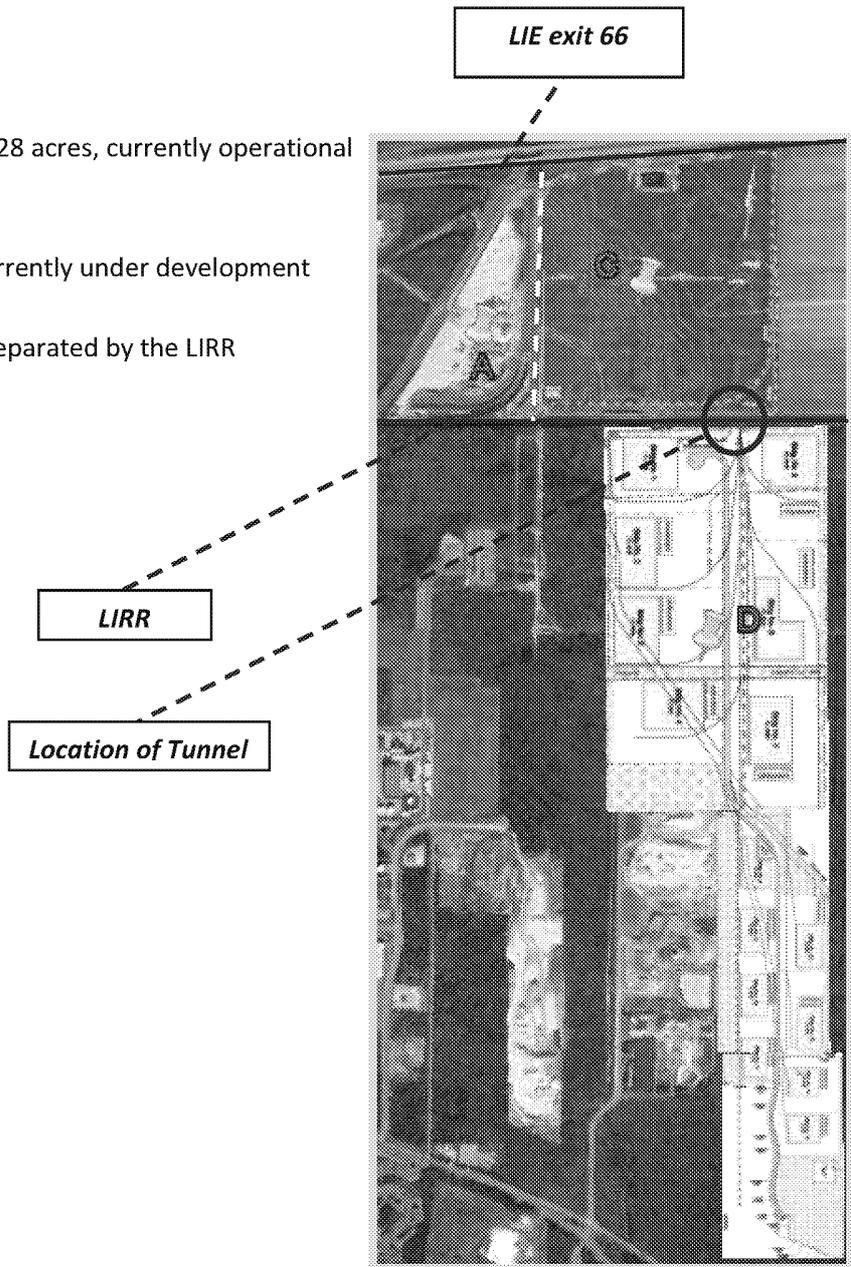
*Supporting the expansion of Brookhaven Rail Terminal*

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- Project Summary:** Brookhaven Rail Terminal(BRT) is now fully operational and requires additional development to expand beyond Phase I, referred to as Parcel A. BRT is currently expanding into an adjacent property for the next phase of construction. *(see Exhibit A for an aerial view of the site)* A critical component to the success of the project is to develop the 295 adjacent acres as one contiguous property. It is currently divided by the Long Island Railroad (LIRR) main line splitting the property into a 70 acre "Parcel C" and a 225 acre "Parcel D". The only feasible way to optimally connect the two parcels is to construct a tunnel under the LIRR to allow for locomotive and truck traffic to move efficiently throughout the terminal. This will significantly improve the functionality of the site and have a dramatic positive impact on limiting truck traffic entering local roads.
- Cost/Timeline:** Construction is slated to begin in the first quarter of 2014 and to be completed by the second quarter of 2015. The project is expected to cost \$5.3 million. *(see Exhibit B for cost breakdown)*
- Benefits:** The expansion of the terminal will not only support the local businesses in the community, but also enable BRT to become more competitive and attract top tier corporations to Long Island by providing a strategically located rail served facility for operations and distribution. BRT is expected to generate hundreds of permanent jobs and remove thousands of trucks per year from congested Long Island roads.

*Exhibit A  
Site Layout*

- Parcel A:** The completed 28 acres, currently operational (Phase I)
- Parcel C:** The 70 acres currently under development
- Parcel D:** The 225 acres separated by the LIRR





Brookhaven Rail Terminal  
Long Island

**Exhibit B**  
**Tunnel Construction Cost Breakdown (Provided by SYSTRA Consulting, Inc.)**

Item	Quantity	Unit	Unit Cost	Total Cost
Bridge	1060	SF	\$850	\$901,000
Retaining Wall	16555	SF	\$85	\$1,407,175
Track Removal (LIRR) (100 LF for each outage)	200	LF	\$200	\$40,000
Track Work (LIRR) (100 LF for each outage)	200	LF	\$500	\$100,000
C & S support and relocation	1	LS	\$100,000	\$100,000
<b>Sub Total</b>				<b>\$2,548,175</b>
General Contractors Overhead and Profit	20.0%			\$509,635
Construction Management Fee	7.0%			\$178,372
<b>Hard Cost Total</b>				<b>\$3,236,182</b>
Soft Costs:				
Builders Risk Insurance	1.0%			\$32,362
Performance Bond	1.5%			\$48,543
Design Contingency	30%			\$970,855
Allowance For Indeterminates	5%			\$161,809
Permits	1.0%			\$32,362
Design Fees	10%			\$323,618
LIRR Reviews, Administration	5%			\$161,809
LIRR Flagging Costs	5%			\$161,809
Construction Support Services	3%			\$97,085
Track Outages	2	3 weeks	\$50,000	\$100,000
<b>Grand Total</b>				<b>\$5,326,434</b>

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## Track Layout for Rail Terminal

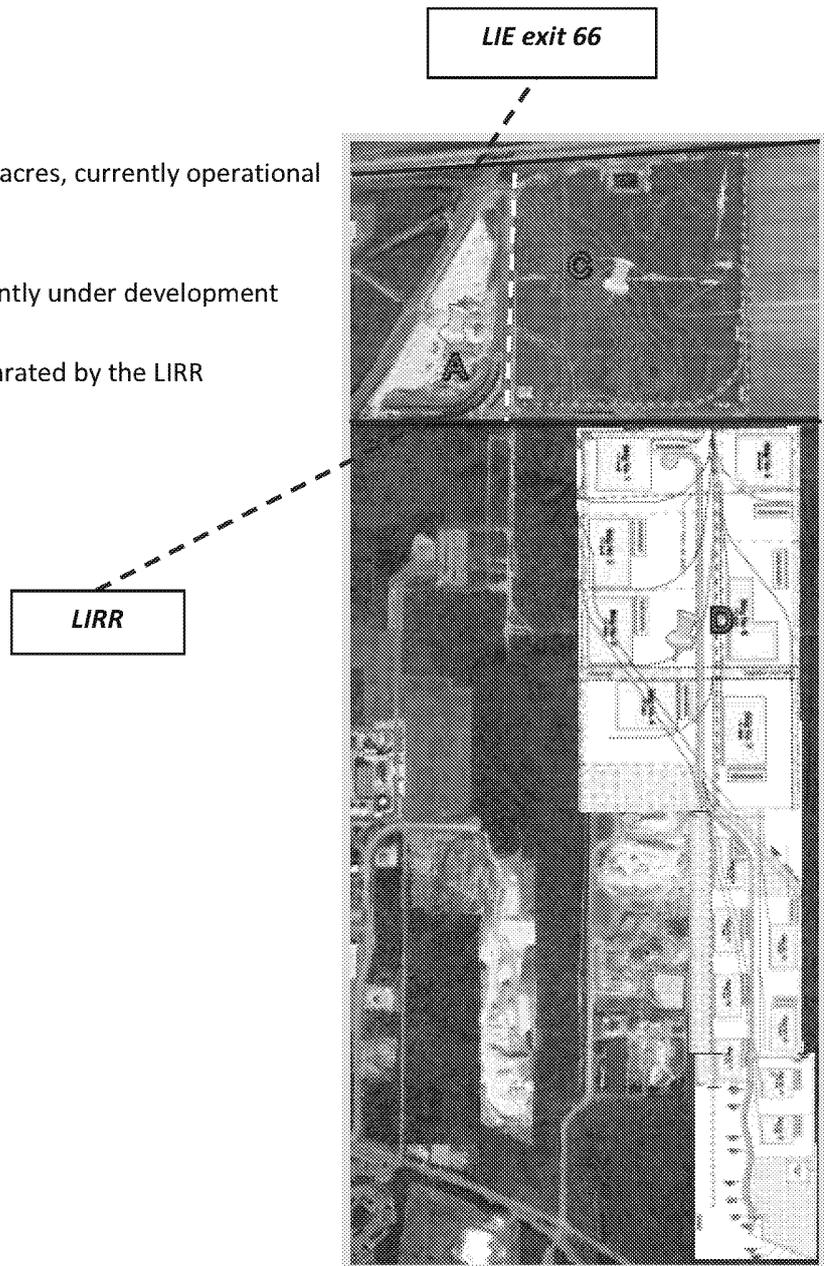
### *Supporting the expansion of Brookhaven Rail Terminal*

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- Project Summary:** Brookhaven Rail Terminal (BRT) is now fully operational and requires additional development to expand beyond Phase I, referred to as Parcel A. BRT is currently expanding into an adjacent property for the next phase of construction. *(see Exhibit A for an aerial view of the site)* A critical component to the success of the project is to strategically install railroad tracks on the 295 adjacent acres in order to optimize the buildable space for facilities, while offering the most efficient route for shipments to come on and off the Long Island Railroad (LIRR) main line. This will significantly improve the functionality of the site and have a dramatic positive impact on increasing rail served freight onto Long Island.
- Cost/Timeline:** Track construction includes the installation of five concrete crossings and 23,000 linear feet of track. Construction is slated to begin in the first quarter of 2013 and to be completed by the first quarter of 2018. The project is expected to cost \$11.9 million.  
*(see Exhibit B for cost breakdown)*
- Benefits:** The expansion of the terminal's track will not only support the local businesses in the community, but also enable BRT to become a more competitive site and attract top tier corporations new to Long Island by providing a strategically located rail served facility for operations and distribution. BRT is expected to generate hundreds of permanent jobs and remove thousands of trucks per year from congested Long Island roads.
-

**Exhibit A  
Site Layout**

- Parcel A:** The completed 28 acres, currently operational (Phase I)
- Parcel C:** The 70 acres currently under development
- Parcel D:** The 225 acres separated by the LIRR



***Exhibit B***  
***Trackwork Cost Breakdown (Provided by SYSTRA Consulting, Inc.)***

Item No.	Description	Units	Quantity	Unit Price	Total Price
	<b><i>Trackwork</i></b>				
1.0	Supply/Install Pre-cast Concrete Crossing 136RE (5 total)	TF	400	\$800.00	\$320,000
2.0	Supply/Install Sub-Ballast	CY	13200	\$175.00	\$2,310,000
3.0	Supply/Install Ballasted Track Relay 136RE	TF	23100	\$250.00	\$5,775,000
4.0	Supply/Install #8 Turnout	EA	16	\$80,000.00	\$1,280,000
5.0	Supply/Install Bumping Post	EA	15	\$10,000.00	\$150,000
6.0	Misc.	LS	1	\$25,000.00	\$25,000
				<b>Sub-Total Trackwork</b>	<b>\$9,860,000</b>
				<b>Sub-Total</b>	<b>\$9,860,000</b>
				<b>General Conditions(10%)</b>	<b>\$986,000</b>
				<b>Sub-Total</b>	<b>\$10,846,000</b>
				<b>Construction Contingency(10%)</b>	<b>\$1,084,600</b>
				<b>Total</b>	<b>\$11,930,600</b>

**E**

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**From:** Dan Miller [/O=LIVING/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DAN MILLER]  
**Sent:** 10/17/2013 11:33:55 AM  
**To:** Rimmer, Jennifer (Jennifer.Rimmer@aecom.com) [Jennifer.Rimmer@aecom.com]  
**CC:** Karim Beydoun [kbeydoun@ETCCAPITAL.COM]; Tom Solomon [TSolomon@etccapital.com]; Jim Newell [JNewell@oaklandtransportation.net]; Jake Watral [jake@watal.com]; Jim Pratt (jpratt@prattbrothers.com) [jpratt@prattbrothers.com]; Andy Kaufman (akaufman@brookhavenrailterminal.com) [akaufman@brookhavenrailterminal.com]; Judy@CJ2.com  
**Subject:** AECOM / BRT Pre-meeting Materials  
**Attachments:** 03.a BRT One Pager.pdf; 03.b BRT Brochure.pdf; 03.c BRT Map.pdf; 03.d Concept 1A with Double Loop 5-17-13.pdf; 04. Strategic Funding and Outreach Plan.pdf; 05. Org. Chart.pdf; 06. BTO Org Chart.pdf; 09. Summary of LIPA Outlots (10-15-2013).pdf; 10. Sample List of potential commodities.pdf; 0. AECOM Cover Letter.pdf; 01.a BRT Overview Presentation.pdf; 01.b East of Hudson Presentation.pdf; 01.c NYMTC Presentation.pdf; 02.a BRT Whitepaper.pdf; 02.b Public -White Paper - Rail Freight Transportation on Long Island.pdf; 02.c Service Road Extension.pdf; 02.d Tunnel Construction.pdf; 02.e Track Layout.pdf

Hello Jennifer,

In advance of our meeting next week, we have aggregated some information for your review. Please see the attached cover letter followed by the supplemental information. Due to the size of the files, Karim will send you separate emails with the files that are too large. Should you have any questions or need any additional information please let us know at your earliest convenience.

Best Regards,

Dan

**0. Cover Letter**

**1. Presentations:**

- a. BRT -Overview PPT
- b. BRT Presentation prepared for East of Hudson Task Force
- c. NYMTC Presentation

**2. White Papers:**

- a. BRT Internal Whitepaper
- b. Public -White Paper - Rail Freight Transportation on Long Island
- c. Service Road Extension
- d. Tunnel Construction
- e. Track Layout

**3. Marketing Material:**

- a. BRT One Pager
- b. BRT Brochure
- c. BRT Map
- d. Concept 1A with Double Loop 5-17-13

**4. Strategic Funding and Outreach Plan**

**5. Entity Org. Chart**

**6. BTO Org. Chart**

**7. Naval Architect RFP** *(to be sent in a separate email to Jennifer Rimmer)*

**8. Environmental Site Assessments:** *(to be sent in a separate email to Jennifer Rimmer)*

- a. Parcel A
- b. Parcel C

c. Parcel D

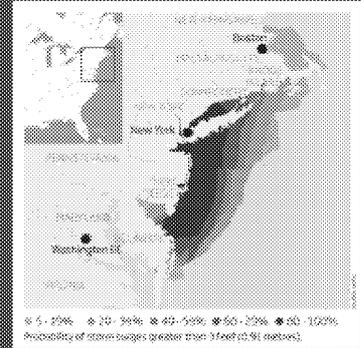
**9. Summary of LIPA Outlots (10-15-2013)**

**10. Sample list of commodities**

**11. 4 CADD/.dwg files** *(to be sent in a separate email to Jennifer Rimmer)*



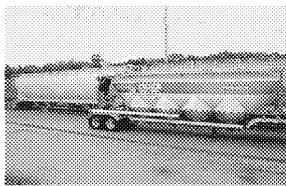
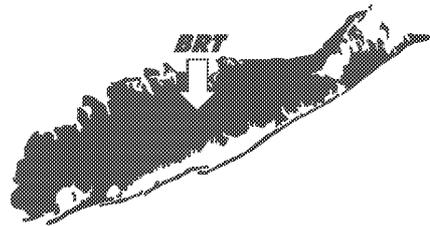
## Supporting the Recovery Efforts



# **BRT**

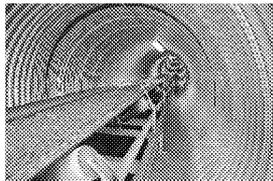
## **Brookhaven Rail Terminal Long Island**

Brookhaven Rail Terminal (BRT) is the first modern era, multi-modal rail freight facility on Long Island to provide rail based shipping, warehousing and logistic solutions.



Located in Yaphank, New York, BRT is immediately adjacent to the Long Island Rail Road (LIRR) and the Long Island Expressway (I-495) providing direct rail and road access.

BRT specializes in providing transloading services, terminal services, logistics solutions, real estate solutions and disaster recovery support.



Rail freight uniquely is positioned to assist in the event of a natural disaster or emergency event.

- BRT was able to receive and ship rail freight two days after Superstorm Sandy devastated Long Island.
- BRT has been permitted for removal of emergency storm debris.
- BRT already is bringing in bio-fuel, providing emergency supplies.

Materials and products that traditionally are shipped via truck can be shipped via rail to our facility and efficiently distributed to all areas of Long Island, often with significant cost savings.

Please contact us at 631-924-8800 for additional information on how BRT can help support the recovery efforts.

205 Sills Road Yaphank, NY 11980 • Phone 631-924-8800 • Fax 631-924-8802  
www.brookhavenrailterminal.com

# ***BRT***

## ***Brookhaven Rail Terminal Long Island***

***Transloading Services***

***Terminal Services***

***Logistics Solutions***

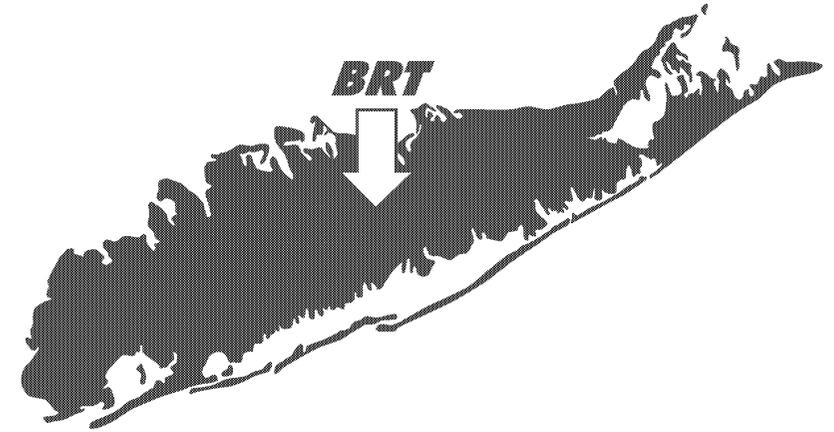
***Real Estate***



## Brookhaven Rail Terminal

Welcome to Brookhaven Rail Terminal (BRT), the future of safe, environmentally friendly and sustainable rail freight transportation to and from the Long Island, New York consumer market.

With BRT, Long Island businesses and consumers now have increased access to world markets through BRT's connection to the national rail network. Shippers, producers and suppliers have the ability to use BRT to ship and store commodities, providing them with a significant competitive advantage.



### Critical Market

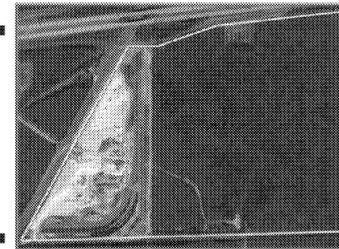
Long Island is one of the largest consumer markets in the United States with a population of more than 7.5 million of which 2.8 million people reside in Nassau and Suffolk Counties.

Despite its size, less than one percent of freight is delivered to Long Island by rail as compared to 19 percent in the nine northeastern states.

The population in Suffolk and Nassau Counties is expected to increase to approximately 3.3 million people by 2035, and inbound freight is projected to increase to 98 million tons per year.

L.I.E. Exit 66 ←

LIRR M.P. 57 ←



### Strategic Location

BRT is the first modern era, multi-modal rail freight facility on Long Island to provide rail based shipping, warehousing and logistic solutions.

Located in Yaphank, New York, BRT is immediately adjacent to the Long Island Rail Road (LIRR) and the Long Island Expressway (I-495) providing direct rail and road access.

The freight carrier on the LIRR is the New York and Atlantic which connects to the national rail network via Fresh Ponds in Glendale, New York.

## Facility Services

BRT handles construction aggregates, building materials and intermodal Trailer on Flat Car (TOFC) and Container on Flat Car (COFC) transport. Additionally, BRT can provide the following value-added rail terminal operations:

- Logistic Services
- Local Trucking
- Transloading Services
- Dry and Refrigerated Warehousing
- Management Information
- Container Freight Stations/Container Yard (CFS/CY)
- Maintenance and Repair
- Distribution Services

## Warehousing and Distribution Services

BRT is suited perfectly to provide warehousing and distribution services for a wide variety of commodities.



## Materials

BRT provides shipping and logistic services for the following commodities:

- **Agricultural Products** - Grain, Flour, Oils, Sweeteners, Ethanol
- **Building Materials** - Lumber, Plywood, Brick, Gypsum Wallboard, Roofing Materials, OSB and more
- **Consumer Products** - Textiles, Cut Stone, Tile, Appliances
- **Food Products** - Fresh, Frozen, Canned and Boxed Foods and Produce; Alcoholic Beverages and more
- **Metal and Metal Products**
- **Aggregates** - Construction Sand, Limestone, Specialty Stone, Metallurgical Stone
- **Other**
  - Industrial Sand
  - Paper and Fiber - Printing and Packaging Paper, Newsprint, Scrap Paper, Wood Pellets and more
  - Rock Salt and Industrial-grade De-icing Products

## Rail Services

### Freight Hauling

Brookhaven Rail Terminal has a solution for almost any freight shipped to or from our railroad. No matter where you are shipping from, we can help get your product on or off the Island via rail.

### Freight Pricing & Logistics Planning

Our team is dedicated to providing you with the optimal solution for your logistics needs. We have working relationships with all Tier 1 railroads as well as nearby ports and trucking companies which allows us to provide the best pricing possible.

### Switching

Brookhaven Rail Terminal offers a full switching service for our customers. We understand the importance of being able to access the right cars at the right time. We strive to coordinate our customers' switching activities to best meet their needs.

### Storage

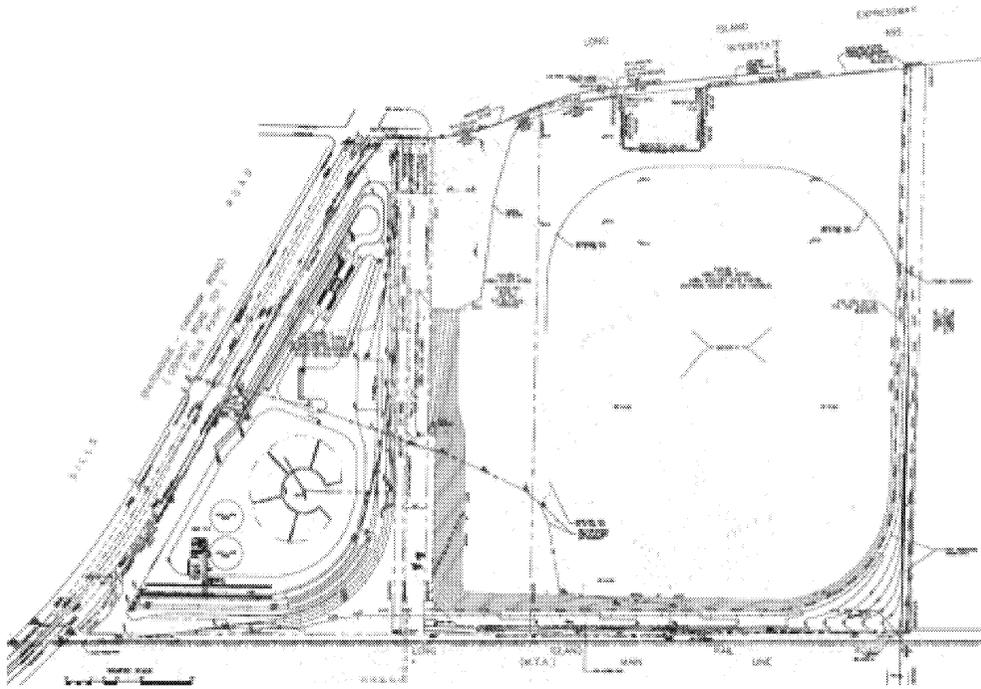
BRT has available track space to serve as your car storage solution. We are capable of storing loaded or empty cars on our track. For additional information regarding pricing, please contact us via email or telephone.

## Why Use Rail

### Economically Efficient & Environmentally Friendly

- One rail freight car can carry the equivalent of four truckloads.
- Railroads consume almost one-third less fuel than trucks per ton-mile moved.
- One rail car can carry a ton of cargo 480 miles on one gallon of fuel.
- One train can remove more than 280 trucks (the equivalent of 1,100 cars) from the highways.
- Short line railroads take the equivalent of nearly 33 million truckloads off the highways, saving the country more than \$1.4 billion annually in highway repair costs.
- If just 10 percent of the freight currently moved by truck is moved by rail, more than one billion gallons of fuel would be saved and greenhouse gas emissions would drop by 12 million tons.





## Emergency Preparedness & Disaster Recovery

Rail freight uniquely is positioned to assist in the event of a natural disaster or emergency event.

- BRT was able to receive and ship rail freight two days after super storm Sandy devastated Long Island
- BRT has been permitted for removal of emergency storm debris.
- In the near future, refrigerated warehousing for perishable food items and climate controlled warehousing for pharmaceuticals will be available for extended storage of these supplies.
- BRT already is bringing in bio-fuel providing emergency energy supplies.



## Real Estate

### Industrial and Commercial Real Estate Solutions

- Approximately 100 acres of rail served property
- Financing and co-investing opportunities
- Simplified approval process
- Build-to-suit opportunities



For Additional Information  
Please Visit:

[www.brookhavenrailterminal.com](http://www.brookhavenrailterminal.com)

[www.brookhavenrail.com](http://www.brookhavenrail.com)

Or Contact Us At:

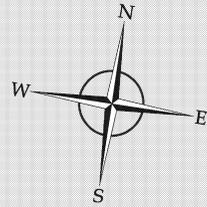
205 Sills Road  
Yaphank, NY 11980  
P: 631-924-8800  
F: 631-924-8802

***BRT***  
***Brookhaven Rail Terminal  
Long Island***

205 Sills Road Yaphank, NY 11980  
Phone 631-924-8800 • Fax 631-924-8802  
[www.brookhavenrailterminal.com](http://www.brookhavenrailterminal.com)

# BRT

**Brookhaven Rail Terminal  
Long Island**



Stills Road

Long Island Expressway Interstate 495

Proposed Laydown Transload Ramp Area

Proposed Lumber and Rebar Steel Transload Area

Proposed Manufacturing and Warehouse Bldg.

Common Truck Docks and Facility Parking

Proposed Cold/Dry Storage Bldg.

Covered Salt Storage Bldg.

Scale House  
Building Products  
Covered Transload

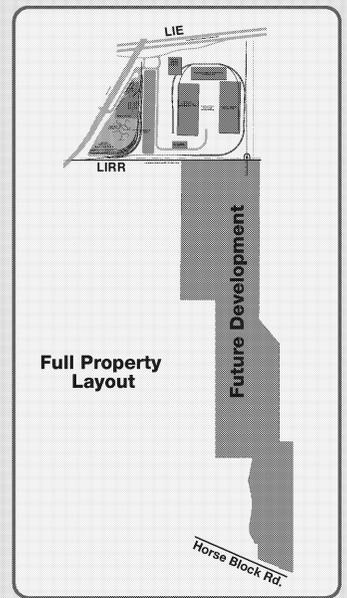
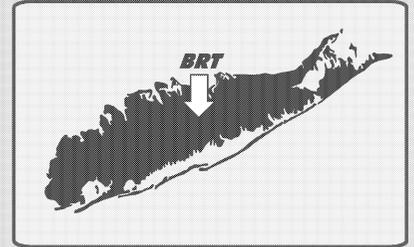
Outdoor Storage

Aggregate Storage Area

Aggregate Unload

General Transload Area  
Bentonite, Flour, Biodiesel

Long Island Rail Road (M.T.A.) Main Line





**F**



October 17, 2013

Jennifer Rimmer  
AECOM  
605 Third Avenue  
New York, NY 10158

Dear Ms. Rimmer,

In advance of our meeting next week, we have compiled preliminary information for your review. You will note that I have utilized some of the language and outline you provided in your scope of work in an effort to put together a comprehensive prep package for AECOM. *To the extent that some phone conversations would be helpful in advance of our kick off meeting our team can be available. Our goal is to minimize the amount of time devoted to background discussion and concentrate discussion on goals and next steps to achieve them.*

Our goal of this meeting is to provide AECOM with all the information required for them to begin

Based on the document you provided, following is some background information you and your team should find helpful prior to our meeting next week. For your reference, we have included an organization chart to help understand how different related parties are involved.

Brookhaven Rail Terminal (BRT):	Entity which owns the terminal operations – note that BRT is a dba of Brookhaven Terminal Operations, a NY LLC
Sills Road Realty: (SILLS)	45% owner of BRT
Oakland Transportation Holdings (OTH):	55% owner of BRT
Brookhaven Rail LLC (BHR):	STB approved Class III Railroad, owned by OTH
New York Site Operations: (NYSO)	NY State LLC which owns Parcel D, owned by OTH



## Part 1 – General Information

---

- **Existing Facilities/Operations and Expansion/Upgrade Activities**
  - Currently the site consists of approximately 350 acres of land, referred to as parcels A, B, C & D.
  - Parcel A is approximately 28 acres and was the first parcel acquired, and houses current transloading operations as well as the scalehouse. Parcel A is currently leased to BTO for a 20 year term from a related party with a \$10 buyout at lease term end.
  - Parcel B is directly to the east, approximately 20 acres. Parcel B is currently owned by a related party, and BTO has an option to purchase this property in the future. BTO also holds a permanent easement across the southern portion of Parcel B for the purposes of rail and road access to Parcels C & D.
  - Parcel C is further east, approximately 72 acres. Parcel C is currently being cleared and excavated for future development. Parcel C is owned by BTO, with an outstanding mortgage. Through a reciprocal agreement Parcel B is also currently being brought to grade concurrently.
  - Parcel D is the most recently acquired parcel of 225 acres south of the LIRR mainline extending to horseblock road. Parcel D is owned by Oakland Transportation Holdings.
- **Present Site Data and Information**
  - Included with this packet are CAD files prepared by Sidney Bowne
  - Also included with this packet are the environmental studies done to date
  - Very limited conceptual development of the site has been documented at this point, we look forward to working with AECOM to resolve this
- **Present Discussions with Public/Private Stakeholders**
  - Both BRT and it's members proactively manage relationships at a local, state and federal level
  - Judy White of CJ2 communications is based on the island and handles all local relationships and issues. In addition, Judy assists with state and federal relationship management as required.
  - OTH has engaged Park Strategies to assist with state level relationship management related to the project
  - Both OTH and BRT have an ongoing retainer with Foley and Lardner, LLP to manage relationships at the National Level.
  - Topics of concern for BRT include the following
    - Extension of LIE service road on north side of property
    - Appropriate ingress/egress for increased truck volumes
    - Acquisition of certain small parcels owned by LIPA surrounded by BTO land
    - Approval and cooperation with construction of Rail/Truck tunnel to connect parcels C & D in the first half of 2014
- **Present Relationship with NY&A and LIRR**
  - Currently BTO and OTH maintain an active and positive relationship with the LIRR. We hold ongoing discussions on topics of interest including our upcoming tunnel project and long term capacity requirements to service BRT volumes.



- While BTO proactively communicates with the NYA regarding standard operations issues, we have significant concerns about how this relationship will evolve as BRT grows.
- **Present Regulatory Position**
  - BTO operates on land that is leased and controlled by BHR. All transloading and other site activities are controlled by BHR and the site operates as a rail facility, which typically follow regulations as required by the STB and FRA.
- **Present / Proposed Marketing activities**
  - Current marketing initiatives are somewhat disjointed and not particularly well organized. We intend to bring on a full time marketing individual in 2014 and look forward to AECOM's input on potential business development and commodities.

As referenced in sections above, the following is a list of documents that are included for your review:

1. **Presentations:**
  - a. BRT -Overview PPT
  - b. BRT Presentation prepared for East of Hudson Task Force
  - c. NYMTC Presentation
2. **White Papers:**
  - a. BRT Internal Whitepaper
  - b. Public -White Paper - Rail Freight Transportation on Long Island
  - c. Service Road Extension
  - d. Tunnel Construction
  - e. Track Layout
3. **Marketing Material:**
  - a. BRT One Pager
  - b. BRT Brochure
  - c. BRT Map
  - d. Concept 1A with Double Loop 5-17-13
4. **Strategic Funding and Outreach Plan**
5. **Entity Org. Chart**
6. **BTO Org. Chart**
7. **Naval Architect RFP** *(to be sent in a separate email to Jennifer Rimmer)*
8. **Environmental Site Assessments:** *(to be sent in a separate email to Jennifer Rimmer)*
  - a. Parcel A
  - b. Parcel C
  - c. Parcel D
9. **Summary of LIPA Outlots (10-15-2013)**
10. **Sample list of commodities**
11. **4 CADD/.dwg files** *(to be sent in a separate email to Jennifer Rimmer)*

Please visit [www.brookhavenrailterminal.com](http://www.brookhavenrailterminal.com) & [www.brookhavenrail.com](http://www.brookhavenrail.com) for additional information.

Best Regards,

Daniel K. Miller

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205 Sills Road • Yaphank, NY 11980 • P 631-924-8600 • F 631-924-8602

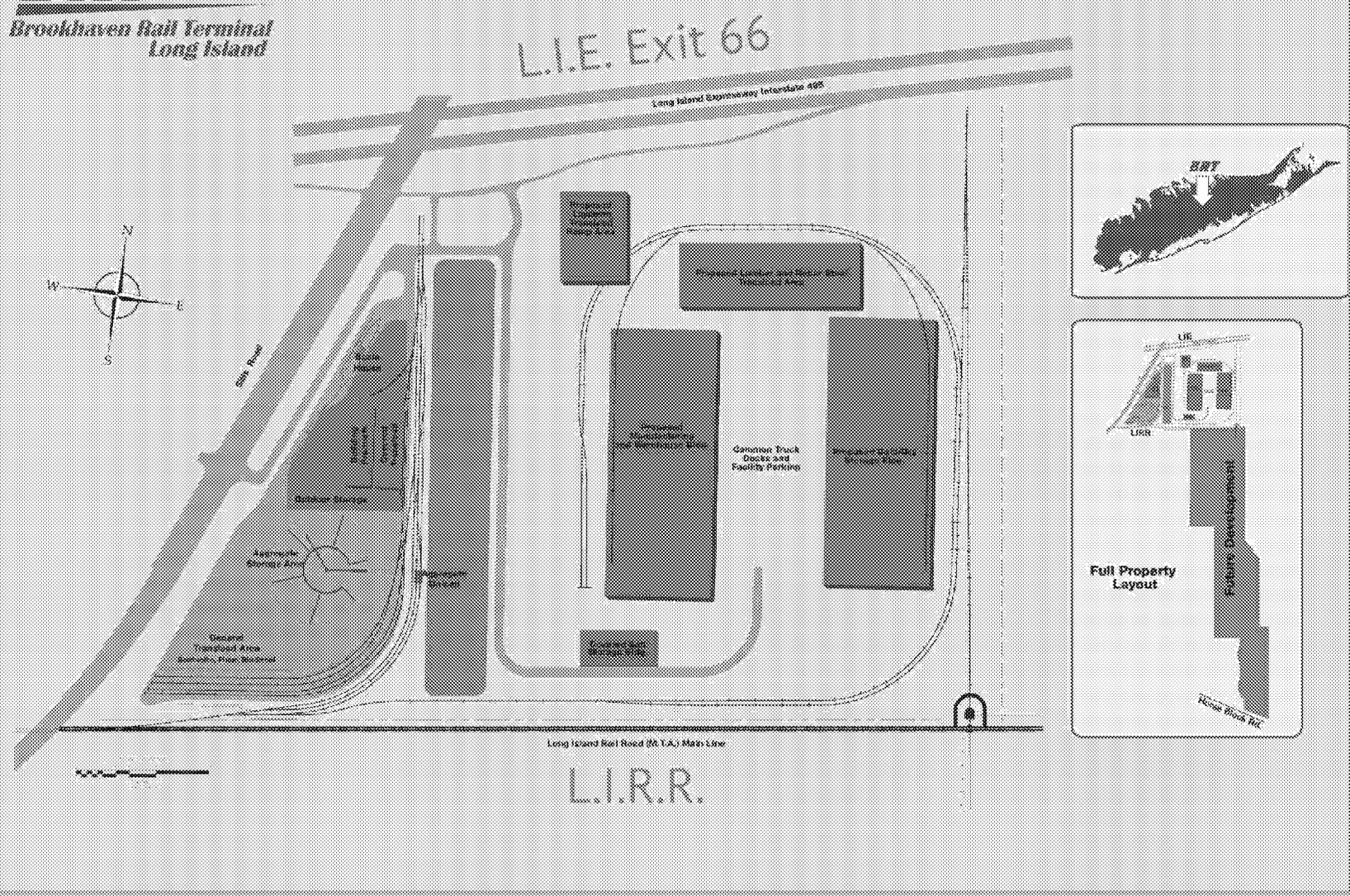
**G**

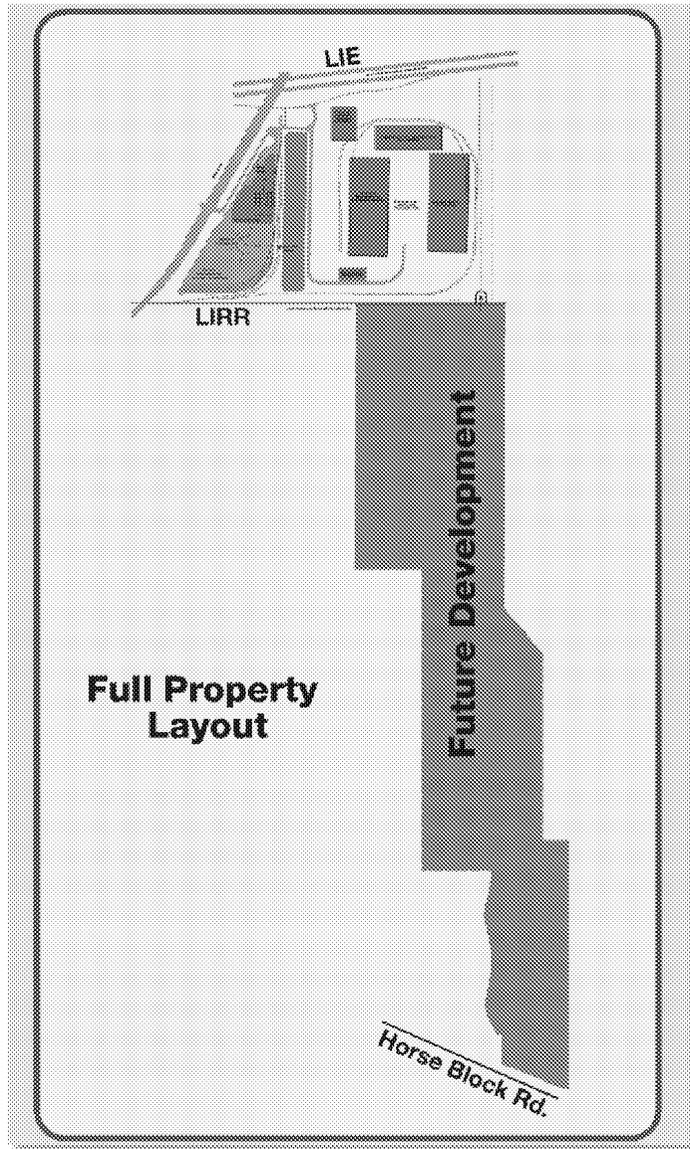
# *Brookhaven Rail & Brookhaven Rail Terminal*



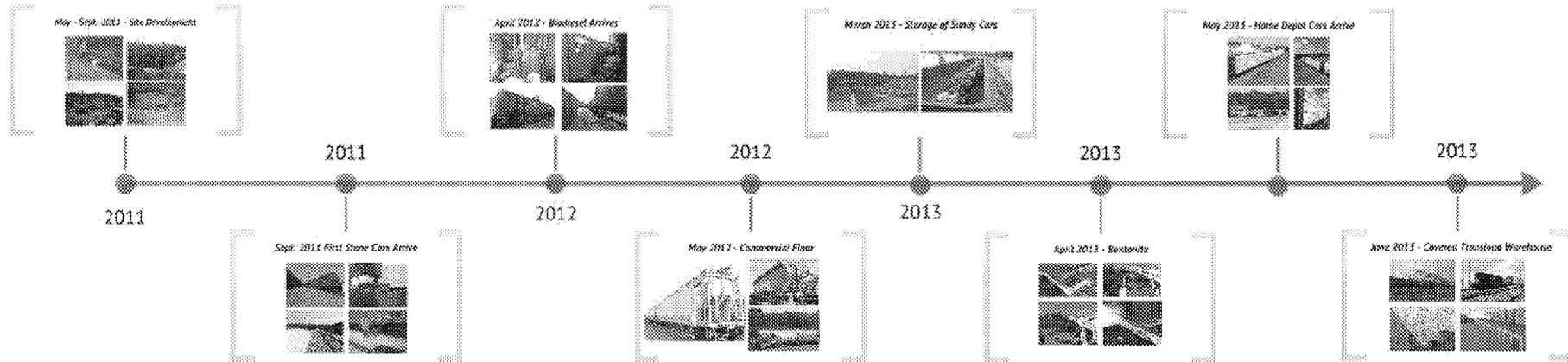
# **BRT**

Brookhaven Rail Terminal  
Long Island

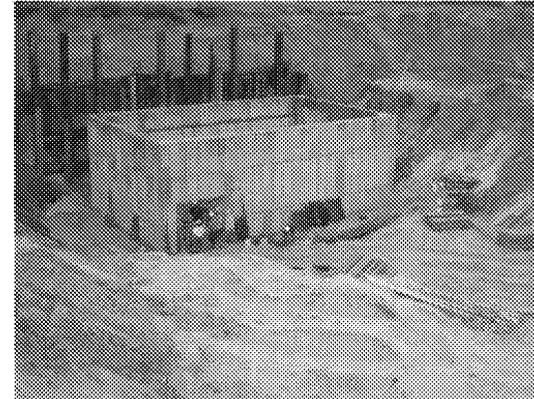
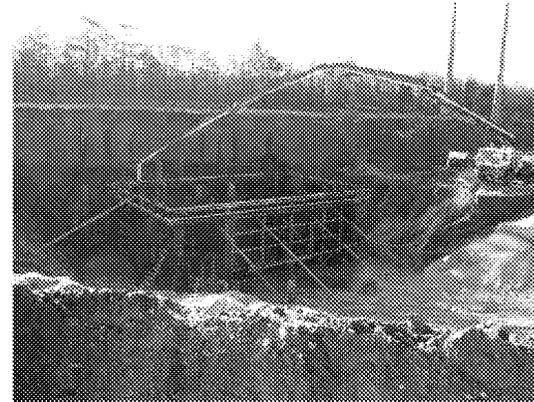
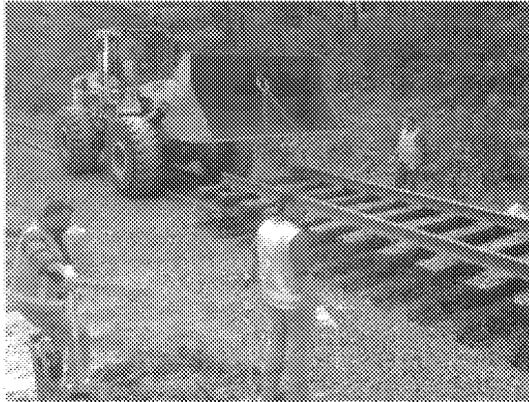




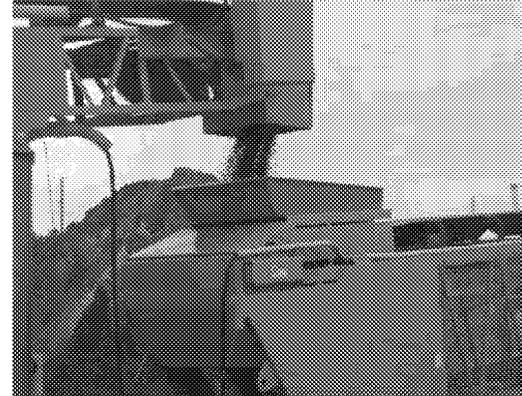
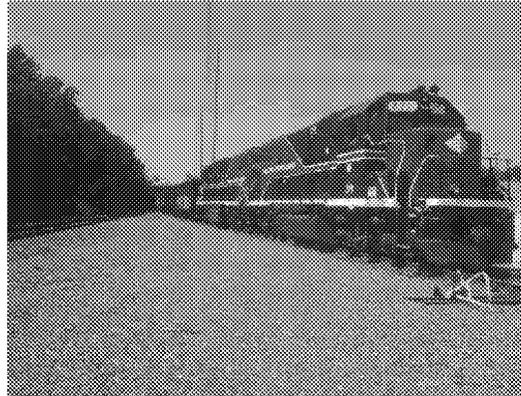
# BRT Timeline



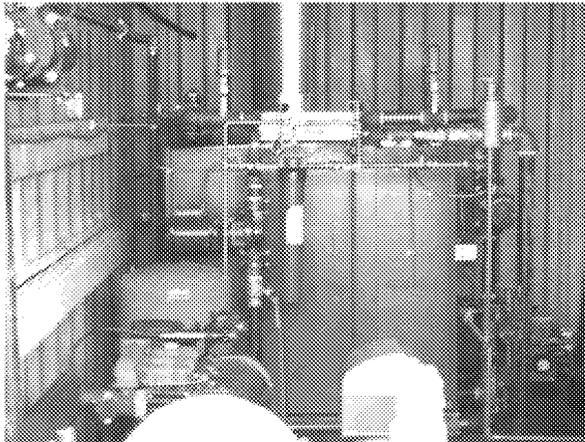
# May - Sept. 2011 - Site Development



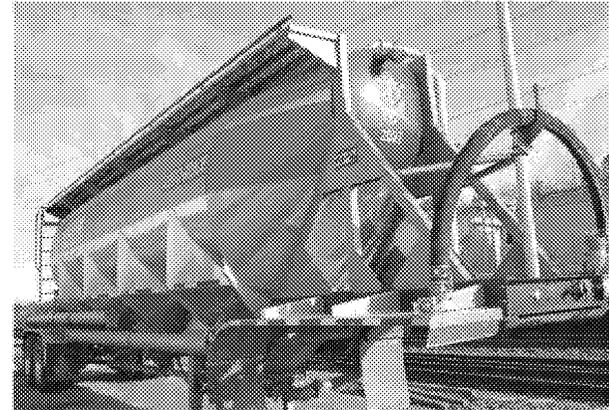
# Sept. 2011 First Stone Cars Arrive



# April 2012 - Biodiesel Arrives



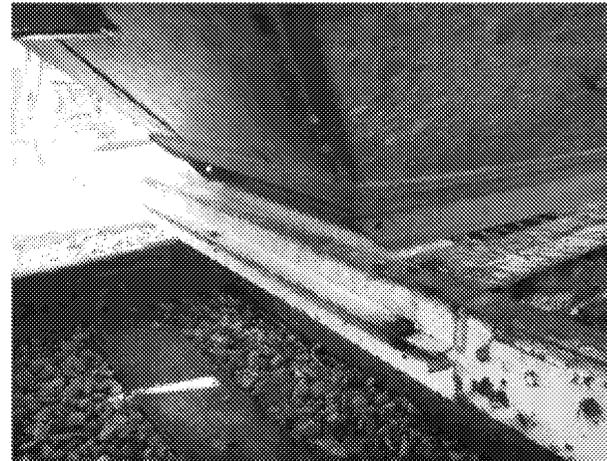
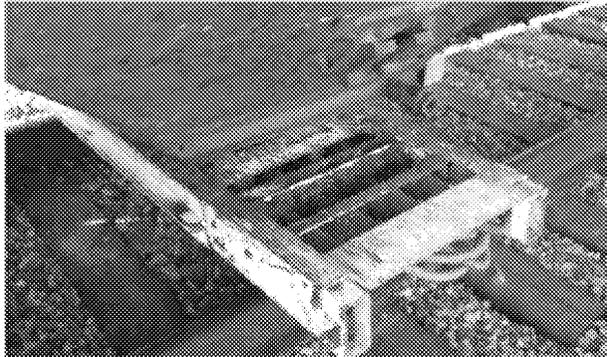
# May 2012 - Commercial Flour



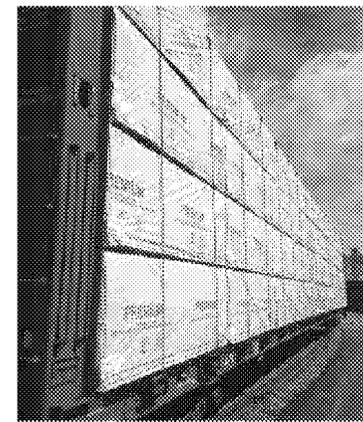
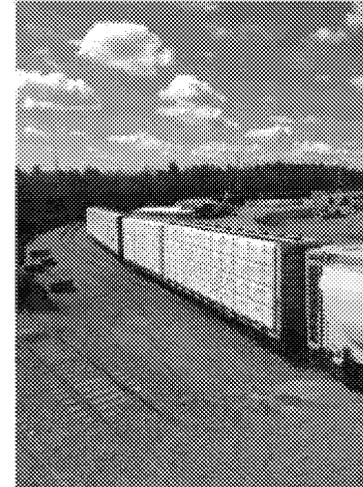
# March 2013 - Storage of Sandy Cars



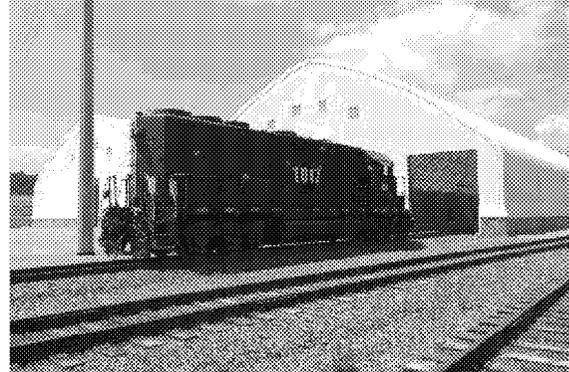
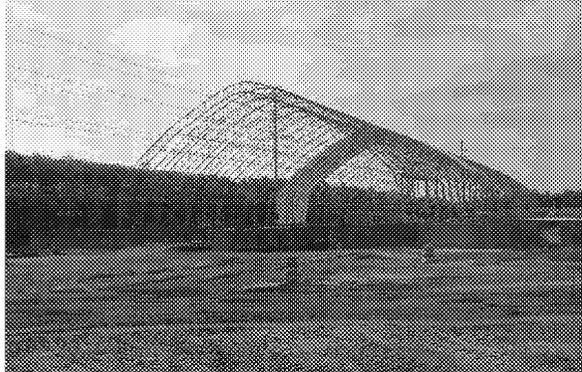
# April 2013 - Bentonite



# May 2013 - Home Depot Cars Arrive

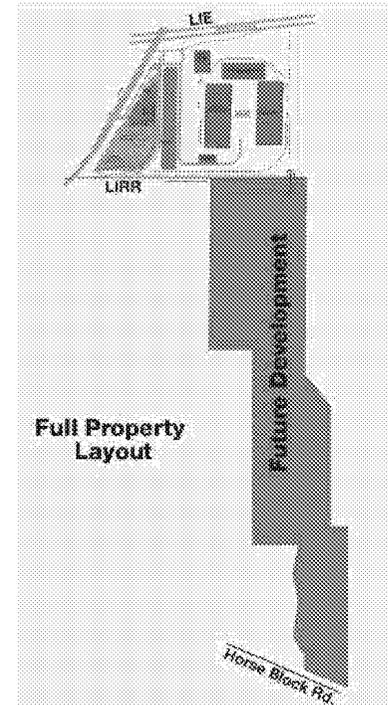


# June 2013 - Covered Transload Warehouse



# BRT's Vision

- *State of the Art built-out 300 + Acre Rail Freight Terminal*
- *Major freight market segments made penetrable*
  - *BRT availability*
  - *Cross harbor capacity*
  - *Clearances and weight mitigation*
- *Co-location of value added processing and manufacturing*
- *High corporate citizenship & continuing intergovernmental participation*



# Actions Required to Achieve Vision

*Intergovernmental Participation*

*Public Private (P3) Clearance Mitigation and Asset  
Development Projects*

# Actions Required to Achieve Vision

## *Intergovernmental Participation:*

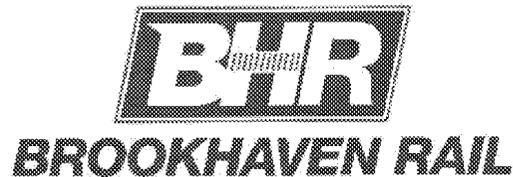
- *LIE Service Road*
- *2014 Regional Freight Plan Development*
- *Cross Harbor Tier 1 EIS PANYNJ Process*
- *System and technology to avoid passenger service impact*
  - *i.e. Dedicated Trains*
- *Rail System Unification from West of Hudson to 65th St & L.I.*
- *NYS DOT 2009 Rail Plan Implementation*

# Actions Required to Achieve Vision

## *Public Private (P3) Clearance Mitigation and Asset Development Projects:*

- *Financial structures and planning*
- *Weight / Height / 3rd Rail cover-plate*
- *Double Rail Main Line to BRT / Yaphank*
- *Infrastructure and terminal facilities development*

# Thank You!



For more information on  
Brookhaven Rail visit:

[www.brookhavenrail.com](http://www.brookhavenrail.com)



For more information on  
Brookhaven Rail Terminal visit:

[www.brookhavenrailterminal.com](http://www.brookhavenrailterminal.com)



[www.BrookhavenRail.com](http://www.BrookhavenRail.com)

[www.BrookhavenRailTerminal.com](http://www.BrookhavenRailTerminal.com)



**H**

# Brookhaven Rail Terminal Phase II (Parcels B and C) Environmental Assessment

Proposed Scope of Services – January 10, 2014

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## Introduction

This Environmental Assessment would evaluate the environmental setting and potential resource impacts associated with a proposed expansion of the existing Brookhaven Rail Terminal (BRT) in the Town of Brookhaven, Suffolk County, NY. Specifically, this Environmental Assessment would be prepared to assist in the evaluation of the proposed project in relation to the New York State Fiscal Year 2013-2014 Passenger and Freight Rail Assistance Grant Program.

The proposed project consists of expansion of the existing BRT at 205 Sills Road, Yaphank involving construction of approximately 12,500 linear feet of track on an adjacent 93 acre site (i.e. Parcels B and C) – see attached project maps. Construction of the track would help accommodate future expansion of manufacturing/warehousing operations at the BRT. It is anticipated that the expanded facility would handle a total of approximately 6,300 rail freight cars annually carrying a variety of manufacturing, construction, agricultural, and energy products.

The site would be served by existing rail access from the Long Island Railroad (LIRR) and have road access to County Road 101(Sills Road) and the I-495 Expressway Drive (Service Road).

## Scope of Work

The Environmental Assessment would imitate, in terms of general organization and format, the draft Environmental Assessment prepared for the Surface Transportation Board (July 26, 2010) which analyzed the now constructed Brookhaven Rail Terminal (i.e. Parcel A). The Environmental Assessment would be prepared consistent with the National Environmental Policy Act and the New York State Environmental Quality Review Act. No other project alternatives would be considered or evaluated. .

## Physical Resources

### *Geology and Soils*

Gannett Fleming would qualitatively describe and assess impacts on project area geology, soils (considering farmland and hydric soils), and topographic condition. Impact considerations would include engineering characteristics and involvement with steep slopes, unique geological features, and resultant topography. Information sources consulted would include U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) Soil Surveys, U.S. Geological Survey (USGS) geology mapping, and data from the New York Geological Survey.

### *Surface and Ground Waters*

Surface water and ground water resources would be qualitatively inventoried and evaluated, based on available data and scientific literature from the USGS, the U.S. Environmental Protection Agency (EPA) and the New York State Department of Environmental Conservation (NYSDEC). Impact considerations would include stormwater management, operations material management, Sole Source Aquifers, and the Carmans River Conservation and Management Plan. Federal Emergency Management Agency (FEMA)-delineated 100- and 500-year floodplains would be identified and floodplain impacts would be qualitatively assessed in accordance with Executive Order 11998 Floodplain Management.

## Brookhaven Rail Terminal Phase II (Parcels B and C) Environmental Assessment

Proposed Scope of Services – January 10, 2014

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### *Air Quality*

Similar to the determination in the environmental assessment for the existing BRT (i.e. Parcel A), the anticipated increase in rail activity would fall below the Surface Transportation Board's criteria of an increase of three trains per day in a "non-attainment" area for detailed air quality analysis. Therefore, no detailed air quality analysis of the rail operations is proposed as the low level of additional train traffic would not adversely affect regional air quality.

To address the effects of construction and mobile source operations on the site, Gannett Fleming would develop a general air quality analysis of particulate matter, mobile source air toxics, and greenhouse gas emissions similar to the analysis developed for the existing BRT environmental assessment. This analysis would not involve detailed modeling, but would use published emission factors and calculators to assess impacts of mobile operations on the site.

### Biological Resources

#### *Vegetation and Wildlife*

Gannett Fleming would qualitatively describe vegetation and terrestrial habitats, based on field observations and available supporting data and research information from the USGS, the New York Natural Heritage Program, the NYSDEC, the U.S. Fish and Wildlife Service (USFWS). Impact considerations would include quantitative conversion and quality impacts on land cover types.

#### *Wetlands*

Wetland resources would be identified using USFWS National Wetlands Inventory (NWI) wetland inventory mapping, NRCS hydric soils information, resource information from the NYSDEC, field views of the study area, and other applicable data sources. No detailed wetland delineation in accordance with U.S. Army Corps of Engineers methodology would be performed. Impacts would be qualitatively assessed in accordance with Executive Order 11990 Protection of Wetlands and other applicable regulations.

#### *Endangered, Threatened and Rare Species*

Coordination with the New York Natural Heritage Program and the USFWS would be completed to identify federal and state species of concern. We would also determine, based on this coordination and a field review of the proposed site, whether any sensitive wildlife or natural communities exist in the study area. If a protected species, species of concern, or habitat is found to be within the study area, we would work with the applicable agency to determine available measures to avoid harm to the feature or species.

### Noise

Noise screening analysis for rail and highway effects would be developed in accordance with applicable Federal Transit Administration/Federal Railroad Administration (FTA/FRA) (*Transit Noise and Vibration Impact Assessment, FTA-VA-90-1003-06*) and Federal Highway Administration (FHWA) (*Highway Traffic Noise: Analysis and Abatement Guidance, FHWA-HEP-10—25, December 2011*) guidance. The screening analysis would consider the presence of sensitive receptors and the noise contribution of the proposed action with ambient conditions. No additional detailed noise analysis or modeling is anticipated.

# Brookhaven Rail Terminal Phase II (Parcels B and C) Environmental Assessment

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## Proposed Scope of Services – January 10, 2014

### Cultural Resources

Coordination with the NY Historic Preservation Office would be completed to identify sites or resources eligible or potentially eligible for listing in the National Register of Historic Places. No national or state listed resources are currently designated on or adjacent to the site according to the NY State Historic Preservation Office – GIS Public Access mapping tool (<http://pwa.parks.ny.gov/nr/>). No additional evaluation is anticipated.

### Hazardous Materials/Waste Sites

To identify potential hazardous materials/waste site concerns, Gannett Fleming would review pertinent regulatory databases housed with the EPA and the NYSDEC to identify potential concerns — the EPA Envirofacts-Multisystem database, the NYSDEC Inactive Hazardous Waste Site Registry, and the NYSDEC Environmental Remediation database. Additional coordination with the Suffolk County Department of Health Services, Office of Pollution Control would be performed to identify any storage facilities containing toxic or hazardous liquids. If hazardous material/waste site concerns are identified, Gannett Fleming would consult with the applicable regulatory agency to determine appropriate evaluation and mitigation approaches.

### Land Use and Development

The analysis of land use and development would include field verification and mapping of surrounding land uses, review of Town of Brookhaven and Suffolk County community plans, and review of current zoning regulations to determine consistency of the proposed project with community character, applicable existing and future land use policies, and Smart Growth principles. The discussion of land use would also incorporate review of policies associated with the Carmans River Conservation and Management Plan and qualitatively address impacts of community aesthetics.

### Socioeconomics

Demographic data would be collected from the 2010 U.S. Census and the latest estimates from the American Community Survey to document socioeconomic characteristics of the study area and impacts associated with the proposed project. The analysis would include an assessment of effects to environmental justice populations in accordance with EO 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations.

Data to be collected and analyzed would be:

- Population
- Growth
- Race
- Age
- Income
- Poverty
- Employment
- Housing

### Community Facilities and Services

Based on available data, field views of the project area and coordination with local and county agencies and organizations, Gannett Fleming would identify and describe community services and facilities which may be affected by the project, including public recreational areas, sewer and water infrastructure, and other applicable utilities.

**Brookhaven Rail Terminal Phase II (Parcels B and C) Environmental Assessment**  
**Proposed Scope of Services – January 10, 2014**

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Transportation

*Roadway*

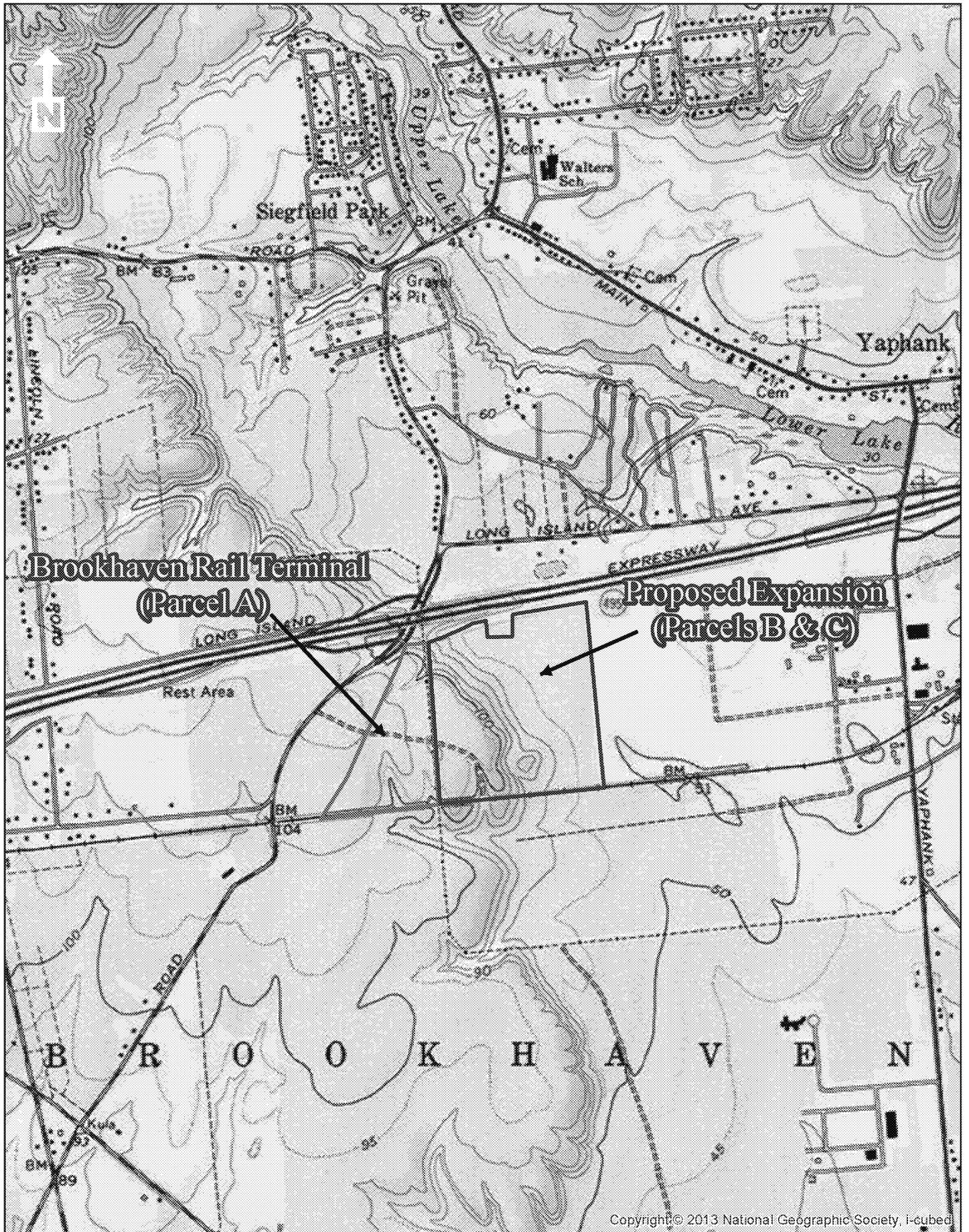
Existing roadway traffic volumes would be obtained from the NYSDOT Highway Data Services Bureau to document existing transportation demand in the study area. Increases in traffic volume would be estimated based on the conceptual development plan for the site and the latest land use/generation rates from the Trip Generation Manual, Institute of Transportation Engineers. As the ultimate origin/destination of highway vehicles (cars and trucks) accessing the expanded BRT would be unknown, analysis of roadway impacts would be limited to County Road 101 (Sills Road) and the mainline and service roads of Interstate 495 (Long Island Expressway), as all vehicles would use at least a portion of these road segments to access the site.

*Rail*

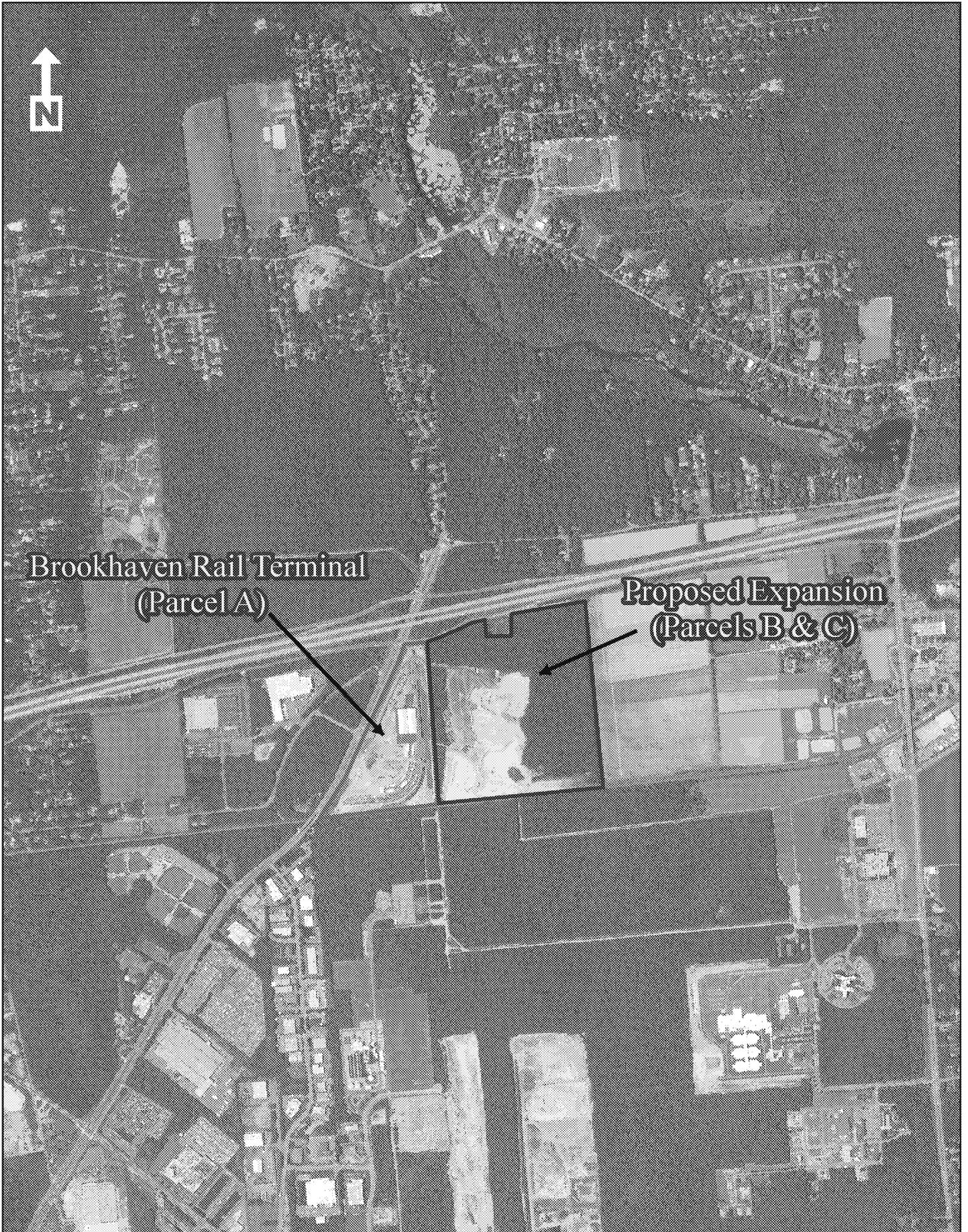
Proposed rail movement increases would be determined based on the build-out of the site and would be evaluated against existing and future rail traffic projections. Coordination with the Metropolitan Transit Authority-Long Island Railroad and the New York and Atlantic Railway would be performed to evaluate effects of the proposed rail movement increases on the local rail system.

Public Involvement

Since no significant environmental impacts are anticipated to be determined, results of the Environmental Assessment would be consistent with a Finding of No Significant Impact/Negative Declaration. Therefore, no public review or hearings would be required.



**Brookhaven Rail Terminal  
Phase II (Parcels B and C) Environmental Assessment**



0 0.2 0.4 0.8 Miles

**Brookhaven Rail Terminal  
Phase II (Parcels B and C) Environmental Assessment**

**I**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X

TOWN OF BROOKHAVEN, :  
Plaintiff, : 14 CV 02286

-against- : U.S. Courthouse  
Central Islip, N.Y.

SILLS ROAD REALTY LLC :  
BROOKHAVEN RAIL LLC f/k/a :  
U S RAIL NEW YOUR LLC, :  
BROOKHAVEN TERMINAL OPERATIONS,  
OAKLAND TRANSPORTATION HOLDINGS:  
LLC, SILLS EXPRESSWAY  
ASSOCIATES, WATRAL BROTHERS, :  
INC., and PRATT BROTHERS, INC., :  
Defendant. : TRANSCRIPT OF HEARING  
: May 19, 2014  
- - - - - X 9:30 a.m.

BEFORE:

HONORABLE GARY R. BROWN, U.S.M.J.

Court Reporter: HARRY RAPAPORT, CSR  
United States District Court  
100 Federal Plaza  
Central Islip, New York 11722  
(631) 712-6105

Proceedings recorded by mechanical stenography.  
Transcript produced by computer-assisted transcription.

*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
OFFICIAL COURT REPORTER*

For the Plaintiff: ROSENBERG CALICA & BIRNEY  
100 Garden City Plaza, Suite 408  
Garden City, New York 11530  
BY: ROBERT M CALICA, ESQ.  
GEORGE B. KORDAS, ESQ.

ANNETTE EADERESTO, ESQ.  
Brookhaven Town Attorney  
1 Independence Hill  
Farmingville, New York 11763

For the Defendants:  
FARRELL FRITZ  
For Sills Expressway 1320 RXR Plaza  
Uniondale, New York 11556  
BY: KEVIN P. MULRY, ESQ.

For remaining Defendants:  
  
FOLEY & LARDNER, ESQ.  
90 Park Avenue  
New York, New York 10016  
By: YONATON ARONOFF, ESQ.  
VANESSA L. MILLER, ESQ.  
ALISHA L. McCARTHY, ESQ.

MORNING SESSION

18  
19 THE COURT: Good morning.  
20 THE CLERK: Calling 14 CV to 02286. Brookhaven  
21 against Sills Road Realty.  
22 MR. CALICA: Good morning. Rosenberg Calica &  
23 Birney by Robert M. Calica and George B. Kordas.  
24 We are appearing as counsel for Brookhaven Town  
25 Attorney, Annette Eaderesto, who is also seated here.  
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1 THE COURT: Good morning.  
2 Have a seat.  
3 MR. ARONOFF: Nice to see you again, your Honor.  
4 Appearing for all the defendants except Sills Expressway.  
5 My name is Yonaton Aronoff, and with me is Vanessa Miller  
6 and Alisha McCarthy.  
7 MR. MULRY: Good morning.  
8 Kevin Mulry from Farrell Fritz for Sills  
9 Expressway Associates.  
10 THE COURT: Good morning.  
11 Nice to see you again.  
12 I have one matter before we get started.  
13 I spent a lot of time reviewing the papers which  
14 was very helpful and I appreciate everyone's work in that  
15 regard.  
16 I notice the last time there was a similar issue  
17 before Judge Boyle. The DEC appears to have been involved  
18 in some level.  
19 Does the DEC have a position here? Are they  
20 going to weigh in? Does anyone know?  
21 MR. CALICA: They may, your Honor. They have  
22 been recently alerted, and they have not yet taken a  
23 position.  
24 THE COURT: All right. Issue one.  
25 Issue two, how did we do with the discovery  
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1 matters over the weekend?  
2 MR. CALICA: I think we were successful.  
3 Neither had an opportunity to review the other's  
4 documents, we placed 2,900 documents on line and provided  
5 them and made them available.  
6 I will indicate to your Honor that it is all of  
7 the exchanges outside of the Town. We did invoke  
8 deliberative privilege within the Town under the  
9 Shinnecock case, which is Judge Bianco's case, which cites  
10 a New York Supreme Court case, which makes clear that  
11 governmental officials in forming policy are --  
12 THE COURT: I am familiar with the issue.  
13 MR. CALICA: So we produced 2,900 documents.  
14 We also had a town investigator and our  
15 environmental consultant geologist, Stephanie Davis, out  
16 on site on Saturday. Photographs were taken.  
17 Those that could be opened I provided to  
18 Mr. Aronoff. That's all I can open.  
19 The Town is converting under its IT system the  
20 remaining photographs which were not in a form that can be  
21 sent by email until they are converted.  
22 Mr. Aronoff 's office posted on line, maybe  
23 about 1:00 o'clock in the morning -- we did ours about  
24 7:00 in the morning, some 1,500 pages of documents. We  
25 assume it is a responsive search and we will review it.

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1 THE COURT: Anything?  
2 MR. ARONOFF: I would like to address a couple  
3 of things there.  
4 As Mr. Calica said, we received from him this  
5 morning about 2,800 pages of documents at 8:05 a.m.  
6 THE COURT: How were those?  
7 MR. ARONOFF: Exactly. I understand we didn't  
8 have a chance to review. However, I don't have the  
9 opportunity to review. I will cross-examine his witnesses  
10 without those documents, and my witnesses go on tomorrow,  
11 he will have the benefit to review those documents. I  
12 don't know how much we can do about that. But I wanted --  
13 THE COURT: It is simple. If it is something  
14 within the 2,900 you need to have the witness reappear, we  
15 will recall the witness.  
16 MR. ARONOFF: As to the privilege issue, we have  
17 not had an opportunity to review that issue. The first  
18 I'm hearing about it. I don't know if it applies if the  
19 town is making policy, and I would say injecting its  
20 positions into the issues in this case, I don't think it  
21 is able to hide behind the privilege at the same time as  
22 doing that. That is another thing I would like to reserve  
23 the right to challenge and perhaps brief, your Honor.  
24 THE COURT: Sure.  
25 How much time do you think your entire  
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6

1 presentation is going to require? How many days will you  
 2 be doing this?  
 3 MR. CALICA: One day.  
 4 THE COURT: How about your case?  
 5 MR. ARONOFF: The same.  
 6 THE COURT: Good.  
 7 Let's get started.  
 8 MR. CALICA: Your Honor, we have a further  
 9 application related to the search -- the inspection, the  
 10 site inspection that went on on Saturday. And Ms. Davis  
 11 is here and will testify to it.  
 12 They observed -- we had made a claim in our  
 13 complaint which was denied that materials being brought  
 14 from off-site, construction and demolition material, and  
 15 dumped on-site. They denied it.  
 16 The photographs and the notes and the  
 17 observations of Ms. Davis, who will be on the stand, says  
 18 she observed, and she will testify in a moment, about  
 19 30,000 cubic yards of what looks like construction and  
 20 demolition material brought in from other areas of the  
 21 type we see in New York City excavation.  
 22 We made our claim officially before Judge Bianco  
 23 on the record, that the trucks are coming in, or some  
 24 coming in full, dumping and taking virgin sand that is  
 25 being sold and removed.

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7

1 We are now requesting an opportunity to have  
 2 someone go back today and take samples of the dumping.  
 3 Ms. Davis will testify that if it is the type of  
 4 material she observed which is mixed with ash, tiles,  
 5 linoleum, what have you, it is material to be required by  
 6 law to be dumped in an approved landfill, or a DEC  
 7 approved 360 facility. If in fact that material is here,  
 8 there will be a DEC report and probably a DEC engagement.  
 9 But we need the Court's specific permission to have  
 10 somebody sample the materials that were observed  
 11 yesterday. And we have the photographs .  
 12 THE COURT: Let's stop you there. Let's come  
 13 back to that. Because I don't think you will be able to  
 14 have complete samples and results at the hearing. So  
 15 let's get started with the hearing.  
 16 MR. CALICA: Maybe, your Honor, the testing can  
 17 be done expeditiously, and we would like to reserve --  
 18 THE COURT: Why not get started.  
 19 MR. ARONOFF: One more issue, we have pro hoc  
 20 issues here for Ms. Miller and my colleague who is not  
 21 here today. They have been before Judge Tomlinson, but  
 22 they are in order.  
 23 THE COURT: I will grant them temporarily for  
 24 today's purposes, but I would like to take a look at them  
 25 first.

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Davis-Direct/Calica

8

1 MS. MILLER: Thank you.  
 2 MR. CALICA: The first witness is Stephanie  
 3 Davis, your Honor.  
 4 THE COURT: Ms. Davis, please come up.  
 5 MR. CALICA: I observe that my poster board is  
 6 not out yet since we don't have a document camera. May I  
 7 take a moment for my associate to do that?  
 8 THE COURT: Sure.  
 9  
 10 STEPHANIE DAVIS,  
 11 called as a witness, having been first  
 12 duly sworn, was examined and testified  
 13 as follows:  
 14 THE CLERK: Please be seated.  
 15 State and spell your name for the record.  
 16 THE WITNESS: Stephanie, S-T-E-P-H-A-N-I-E,  
 17 Davis, D-A-V-I-S.  
 18 THE COURT: Go ahead.  
 19 Please pull the microphone nice and close so we  
 20 can hear you.  
 21 THE WITNESS: Is that better?  
 22 THE COURT: Excellent.  
 23  
 24  
 25

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Davis-Direct/Calica

9

1 DIRECT EXAMINATION  
 2 BY MR. CALICA:  
 3 Q Good morning, Ms. Davis. What is your profession or  
 4 occupation?  
 5 A I am a hydrogeologist.  
 6 Q Would you tell his Honor, please, in more  
 7 conventional terms what that means?  
 8 THE COURT: The acoustics are terrible without  
 9 the microphone.  
 10 A By education, I have two degrees in geology, which is  
 11 the study of the earth, and in the last 20 years plus I  
 12 have been practicing hydrogeology, which is the study of  
 13 soils and ground water and environmental conditions.  
 14 Q Where did you obtain your degrees and when?  
 15 A I obtained my bachelor's of science in geology at  
 16 Bucknell University in 1981, and master's of science in  
 17 geology at USC in 1984.  
 18 Q Are there any states or jurisdictions that recognize  
 19 licenses in geology?  
 20 A A number of states do. But New York State is not  
 21 among them.  
 22 Q Are you licensed in any states that recognizes your  
 23 license in geology?  
 24 A Yes, the states of California and Pennsylvania.  
 25 Q Would you tell his Honor what your professional and

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1 business experience was after you obtained your degrees in  
 2 geology?  
 3 **A For nine years after I obtained my master's degree I**  
 4 **worked for Chevron Corporation; for three of those years**  
 5 **in material exploration, and three of those years in**  
 6 **petroleum production, and for the final years in doing**  
 7 **environmental investigation and clean-up work in the San**  
 8 **Francisco Bay area for Chevron.**

9 THE COURT: Are you proffering this witness as  
 10 an expert?

11 MR. CALICA: Yes, your Honor.

12 THE COURT: Is there any objection to her  
 13 testimony as an expert today?

14 MS. MILLER: No objection.

15 MR. MULRY: No objection, your Honor.

16 THE COURT: Please proceed.

17 **Q Ms. Davis, would you tell his Honor who you are**  
 18 **employed by now and what position you occupy and what you**  
 19 **do with the company that now employs you.**

20 **A Okay.**

21 **I have been employed since 1993 by FPM Group,**  
 22 **located in Ronkonkoma. I have worked my way up from**  
 23 **starting position of hydrogeologist to eventually as**  
 24 **department manager, currently a vice president working on**  
 25 **hydrogeology problems.**

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1 **I also worked with a number of redevelopment**  
 2 **sites in New York City metro area where we have literally**  
 3 **centuries of waste left behind and a lot of redevelopment**  
 4 **presently going on.**

5 **Q Did you have any role with what has been referred to**  
 6 **in the news as the Cero Wire factory site and adjacent**  
 7 **parcel purchased from the Town of Oyster Bay by Simon, the**  
 8 **owner of Roosevelt Field?**

9 **A Yes. We were engaged to do environmental**  
 10 **investigation there for Simon Properties prior to the**  
 11 **purchase.**

12 **Q What was your role in that?**

13 **A I basically led the investigation, helped design the**  
 14 **protocols, reviewed the results, and provided them to**  
 15 **counsel and client and helped interpret them.**

16 **Q Did you have any involvement in the construction of**  
 17 **what is now the Tanger Mall or The Arches Mall in Deer**  
 18 **Park?**

19 **A Yes.**

20 **It is another former aerospace site with a**  
 21 **legacy of contamination.**

22 **I was involved in the comprehensive**  
 23 **investigation of that site on behalf of a purchaser. And**  
 24 **then I helped design the remedial program.**

25 **Q Who engaged you to assist my law firm or the Town in**  
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1 **Q Does FPM Group have an engineering section as well?**

2 **A Yes, we have several engineering sections as well**  
 3 **with the hydrogeology department.**

4 **Q Do you work -- would you identify the engineers at**  
 5 **FPM with whom you have been working as it concerns the**  
 6 **Brookhaven assignments?**

7 **A I have been working with Ritu, R-I-T-U, Mody,**  
 8 **M-O-D-Y, and Kevin Loyst, L-O-Y-S-T.**

9 **Q Are both of those individuals, if you know, licensed**  
 10 **professional engineers?**

11 **A Yes, they are both licensed professional engineers.**

12 **Q Okay.**

13 **In your tenure for 20 years with FRM, have you**  
 14 **been involved in clean-ups and remediations of sites?**

15 **A Yes, I have.**

16 **Q Would you just tell his Honor from an experience**  
 17 **standpoint some of the larger remediation and clean-up**  
 18 **activities you have been involved with on Long Island --**  
 19 **in the Long Island area.**

20 **A Yes.**

21 **I worked at a wide variety of sites, some of the**  
 22 **larger ones are some of our former aerospace engineering**  
 23 **firms retired since World War II and left us a legacy of**  
 24 **fairly significant environmental problems, many of them**  
 25 **having to do with ground water.**

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1 this matter?

2 **A We were retained through your law firm.**

3 **Q Okay.**

4 **Have you and I had prior professional dealings?**

5 **A Yes.**

6 **Q Was the first of them as -- representing adverse**  
 7 **parties about a dozen years ago?**

8 **A Yes, it was.**

9 **Q Did you ever provide any services for a homeowners'**  
 10 **association of which I am the president?**

11 **A Yes, I did, as well.**

12 **Q Other than that, have we had any business,**  
 13 **professional, or personal engagement?**

14 **A None of which I'm aware of.**

15 **Q Okay.**

16 **When you were called upon by my firm to provide**  
 17 **services to the Town, what materials were provided to you?**

18 **A There have been a number of materials provided,**  
 19 **including some site plans for the subjects we will be**  
 20 **discussing today.**

21 **The law and environmental overview report, and**  
 22 **there was various items of correspondence.**

23 **Q Are you familiar with a document known as a**  
 24 **preliminary injunction motion?**

25 **A Umm, I'm not sure.**

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- 1 **Q** More specifically, were you provided with a copy of  
 2 the declaration of Brookhaven Town Attorney Annette  
 3 Eaderesto and the exhibits to it?  
 4 **A Yes, I did.**  
 5 **Q** And did you review all of those?  
 6 **A Yes, I did.**  
 7 **Q** And were you provided with copies by me of some  
 8 proposed hearing exhibits?  
 9 **A Yes, I was.**  
 10 **Q** All right.  
 11 Until this Saturday, had you ever seen the 93  
 12 acre site itself?  
 13 **A I had not seen it other than in area photographs, no.**  
 14 **Q** Okay.  
 15 Are you acquainted as a geologist with the area  
 16 or region in which the 93 acre site as we refer to it is  
 17 located?  
 18 **A Yes, I am.**  
 19 **Q** Okay.  
 20 When we refer to the 93 acre site, I'm referring  
 21 both to the aerial photograph, Exhibit B, and Exhibit B-1.  
 22 Are we referring to the same parcel?  
 23 **A Yes.**  
 24 **Q** Incidentally, on Exhibit B-1 appears to be an overlay  
 25 in green dotted material.

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- 1 **Q** And what do you understand it represents? What is  
 2 superimposed on that area?  
 3 MS. MILLER: Asked and answered.  
 4 THE COURT: I will allow it.  
 5 **A That represents the outlines of three parcels, I**  
 6 **understand, parcel A, B and C, and the proposed alignment**  
 7 **of a railroad spur.**  
 8 **Q** You mean track?  
 9 **A Yes.**  
 10 **Q** Okay.  
 11 Let me ask you this:  
 12 The aerial photograph itself, do you know what  
 13 the source of that is or was?  
 14 **A I'm not sure.**  
 15 **Q** The one with the track overlay, where it came from?  
 16 **A The aerial photograph?**  
 17 **Q** Yes.  
 18 **A I think it came from Google Earth.**  
 19 **Q** Do you know the timeline of the Google Earth photo  
 20 that was used to create the overlay?  
 21 **A I believe it was an area photograph taken last fall,**  
 22 **if I'm not mistaken.**  
 23 **Q** 2013?  
 24 **A I believe that's correct.**  
 25 **Q** And -- thank you.

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- 1 Do you know what that overlay is, what it  
 2 represents and how it was created?  
 3 **A I have been given to understand that green dye area**  
 4 **shows the outline for where a railroad spur is supposed to**  
 5 **be constructed.**  
 6 **Q** Where was Exhibit B-1 created?  
 7 **A Where was it created?**  
 8 **Q** At FPM?  
 9 **A It was not created at FPM, I don't believe.**  
 10 **Q** Were you requested at some point to have your office  
 11 prepare a track overlay over the area?  
 12 **A Yes.**  
 13 **Now that you point that out, I can barely see**  
 14 **that across the room. But, yes, it does look to be an FPM**  
 15 **product.**  
 16 **Q** You had some problems recognizing it from the  
 17 distance?  
 18 **A Yes.**  
 19 **I do wear glasses, as you know.**  
 20 **Q** Okay.  
 21 Did you have any role in the creation of that  
 22 overlay, Exhibit B-1, now that you can see it without your  
 23 glasses?  
 24 **A Yes, I did. I worked with the draftsman who put**  
 25 **that together.**

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- 1 Do you know what the term sole source aquifer  
 2 is?  
 3 **A Yes.**  
 4 **Q** Would you tell the Court what the term sole source  
 5 aquifer means as it references Long Island and the area in  
 6 which the 93 acre parcel is located.  
 7 **A Long Island, and most particularly Nassau and Suffolk**  
 8 **Counties, draws all of its water from the aquifers beneath**  
 9 **which we are sitting today. We have no other source of**  
 10 **drinking water other than the aquifers that are beneath**  
 11 **us.**  
 12 THE COURT: Are you saying aquifer or aquifers?  
 13 THE WITNESS: Aquifers.  
 14 THE COURT: There is more than one.  
 15 THE WITNESS: There are three primary aquifers  
 16 from which ground water is removed and used to provide  
 17 drinking water and as well as water from other sources --  
 18 **Q** What are the aquifers located on Long Island?  
 19 **A The other aquifer is called the Upper Glacial**  
 20 **aquifer.**  
 21 THE COURT: Upper Glacial?  
 22 THE WITNESS: Yes.  
 23 The aquifer below that is called the Magothy,  
 24 M-A-G-O-T-H-Y, aquifer, and the deepest aquifer is called  
 25 the Lloyd aquifer.

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1 **Q** Are all three aquifers located throughout Long  
 2 Island?  
 3 **A** **Not completely.**  
 4 **The Upper Glacial aquifer is largely absent**  
 5 **along the north shore where it has been eroded away.**  
 6 **Q** It has been what?  
 7 **A** **Eroded.**  
 8 **Q** All right.  
 9 **A** **The aquifers sit on an angle on the ground. They are**  
 10 **not perfectly flat. On the north shore, because of the**  
 11 **slope of the aquifers, the Upper Glacial has been exposed**  
 12 **and in places eroded away.**  
 13 **Q** In terms of source of drinking water, would you  
 14 explain to his Honor where drinking water comes from those  
 15 aquifers, in other words, how it is obtained throughout  
 16 Nassau and Suffolk Counties?  
 17 **A** **The drinking water is obtained from wells that are**  
 18 **drilled into the aquifers and then are pumped. And the**  
 19 **water is stored in water tanks and then enters into the**  
 20 **distribution systems.**  
 21 **In Suffolk County, the Suffolk County Water**  
 22 **Authority provides most of its water through this system.**  
 23 **In Nassau County there are a number of individual water**  
 24 **districts that provide the water through the system of**  
 25 **wells and tanks and distribution lines.**

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1 **generally 6,000 years or older, and it is our last resort.**  
 2 **Q** Do you know, did there come a time when some federal  
 3 body arranged for a study of the aquifers and the  
 4 classification of the land located above Long Island's  
 5 aquifers?  
 6 **A** **Yes.**  
 7 **The Safe Drinking Water Act of 1974 has certain**  
 8 **provisions with respect to sole source aquifers. That is,**  
 9 **aquifers that are the only supply of drinking water. On**  
 10 **Long Island and Nassau and Suffolk Counties we are fully**  
 11 **dependent upon sole source aquifers for our water supply.**  
 12 **Therefore, there was a study undertaken in -- I**  
 13 **think finished in 1978, and it is called the 208 study and**  
 14 **it examined a number of issues. But one of the things**  
 15 **that came out of the 208 study, and that refers to the**  
 16 **section, I believe, of the Safe Drinking Water Act that is**  
 17 **associated with it.**  
 18 **Out of the 208 study came a map which shows the**  
 19 **various hydrogeologic zones of Long Island.**  
 20 **Of most importance for water supply are what is**  
 21 **called deep recharge zone. These are the zones from which**  
 22 **water infiltrates downward from the surface and the Upper**  
 23 **Glacial aquifer, and where the head, the pressure in the**  
 24 **Upper Glacial aquifer is higher than the head in the**  
 25 **Magothy aquifer. Therefore, because of the pressure**

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1 **Q** As among the three aquifers you described, the Upper  
 2 Glacial, the Magothy and the Lloyd, is there any  
 3 allocation of use or where the drinking water comes from?  
 4 **A** **In general, the first aquifer that is tapped is the**  
 5 **Upper Glacial aquifer. It is the shallowest and the least**  
 6 **expensive to use.**  
 7 **Unfortunately, because it is the shallowest, it**  
 8 **is also the first aquifer generally to become contaminated**  
 9 **through a variety of contamination sources.**  
 10 **The deeper aquifer, the Magothy aquifer, is more**  
 11 **expensive to produce water from because the wells of**  
 12 **necessity have to be deeper. But it is also generally**  
 13 **cleaner because it takes longer for contaminants to work**  
 14 **the way down and into the Magothy aquifer, generally**  
 15 **speaking.**  
 16 **In Suffolk County we still receive, I believe,**  
 17 **about 50 percent of our water from the Upper Glacial and**  
 18 **50 percent from the Magothy.**  
 19 **In Nassau County, which has a longer history of**  
 20 **development and industrial use, most of the ground water**  
 21 **comes from Magothy at this point from -- for water supply**  
 22 **purposes.**  
 23 **The Lloyd is seldom used. In fact, it requires**  
 24 **a special permit to that aquifer. Because it is the**  
 25 **deepest and the cleanest, the water in the Lloyd is**

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1 **differential, there is water that moves from the Upper**  
 2 **Glacial aquifer and recharges underlying the other**  
 3 **aquifer.**  
 4 **The recharge is important for the long-term**  
 5 **health of the Magothy aquifer.**  
 6 **The 208 study established the number of**  
 7 **hydrogeologic zones, and in this particular area this**  
 8 **falls within hydro zone three, which is a deep recharge**  
 9 **zone.**  
 10 **Q** Before you continue with your narrative, you filed a  
 11 report in this case referred to the Clean Water Drinking  
 12 Act, not the Safe Water Drinking Act.  
 13 Are you amending that reference?  
 14 **A** **Yes. The correct reference is the Safe Water.**  
 15 **Q** Now, you indicated that there is a hydrological zone  
 16 three. Are there other zones created by this  
 17 classification of the 208 study?  
 18 **A** **Yes.**  
 19 **There are other zones.**  
 20 **Q** All right.  
 21 Would you describe the hydrological zone three,  
 22 which is called a deep recharge zone, in terms of its  
 23 characteristics and importance?  
 24 **A** **The characteristics are that it generally has a**  
 25 **fairly thick Upper Glacial aquifer. The potentiometric.**

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1           **The potentiometric head, if you would, the**  
 2 **pressure.**  
 3           **The pressure in the Upper Glacial aquifer in**  
 4 **hydro zone three is generally greater than the underlying**  
 5 **Magothy aquifer. Therefore, there is a tendency for**  
 6 **vertical ground water flow in a downward direction from**  
 7 **the Upper Glacial to the Magothy aquifer, potentially**  
 8 **recharging the Magothy.**  
 9 **Q** In terms of the type of hydrogeological concerns you  
 10 would consider in designing or evaluating a project, what  
 11 considerations would you bear in mind in dealing with a  
 12 project located in a hydrological zone three deeply  
 13 charged area?  
 14 **A** There are a number of considerations.  
 15           **One of which -- I guess the overlying one --**  
 16 **overriding one of which is that measures should be taken**  
 17 **to preserve the ability of the aquifer to recharge, and to**  
 18 **recharge high quality ground water so that its function in**  
 19 **terms of recharging the Magothy is not compromised.**  
 20           **For example, you would want to retain as much**  
 21 **clean material above the aquifer as possible. You would**  
 22 **want to retain the ability to infiltrate water to the**  
 23 **aquifer as much as possible. And you would want to reduce**  
 24 **or eliminate potential contaminants of the aquifer as much**  
 25 **as possible.**

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1           **The light colored material on these poster**  
 2 **boards is native sand.**  
 3 **Q** And when you were at the site physically this  
 4 weekend, May 17th?  
 5 **A** Yes, Saturday afternoon, yes.  
 6 **Q** And did you observe that type of sand at the site?  
 7 **A** Yes, I did.  
 8 **Q** All right.  
 9           Now, what is the consequence in terms of  
 10 recharge of water into the Upper Glacial aquifer that you  
 11 in your opinion associated with removal of sand in a  
 12 hydrological zone three or deep recharge area such as you  
 13 see in Exhibit B?  
 14 **A** Well, there are several different factors here.  
 15           **First of all, the removal of the native forest**  
 16 **out there, which is primarily oak woods, with a small**  
 17 **understory of top soil out there. The removal of those**  
 18 **materials will reduce the amount of infiltration and also**  
 19 **cleansing of the storm water.**  
 20           THE COURT: You have to slow down a second here.  
 21           THE WITNESS: Yes.  
 22           THE COURT: Why?  
 23           You are talking about how the sand filters  
 24 everything. Why is having dirt and trees on top of the  
 25 sand helpful?

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1 **Q** Okay.  
 2           Are you acquainted with the term native sand or  
 3 virgin sand?  
 4 **A** Yes.  
 5 **Q** What is that?  
 6 **A** Umm, native sand in this particular area is sand that  
 7 was essentially brought in by the glaciers. There are two  
 8 glacial advances onto the Long Island area. These  
 9 occurred ten, fifteen thousand years ago. They left  
 10 behind two terminal moraines, M-O-R-A-I-N-E-S, I believe.  
 11 In front of those moraines are outwashed plains.  
 12           THE COURT: You said plains?  
 13           THE WITNESS: Yes.  
 14           That is what they look like. They are generally  
 15 plan features with a very gradual slope to the south.  
 16 They are formed almost exclusively by very clean sand and  
 17 gravel, with very little in the way of fine material, clay  
 18 or silt. They are beautiful deposits, bearing blue  
 19 organic material in them, and very transmissive. They  
 20 allow ground water, infiltrating storm water and rain  
 21 water to infiltrate and recharge the aquifer.  
 22 **Q** Is the type of sand material seen in poster board  
 23 Exhibit B the type of native sand or virgin sand you just  
 24 described?  
 25 **A** Yes.

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1           THE WITNESS: The trees, as growing things, take  
 2 up nutrients, including nutrients that are present in  
 3 rainfall.  
 4           If you have water going through a root cell, you  
 5 remove a number of those nutrients. The water coming out  
 6 of the bottom is cleaner.  
 7           The same thing happens when you put water  
 8 through an organic rich layer, like the top soil beneath  
 9 the trees. That also acts as a filter.  
 10           If there is just bare sand out there, there is  
 11 less of a filtering capacity than if you have forest and  
 12 top soil.  
 13           Furthermore, the removal simply of the thickness  
 14 of the sand --  
 15 **Q** Let me stop you.  
 16           Are you acquainted with any Town of Brookhaven  
 17 zoning requirement in terms of the amount of vegetation  
 18 that is required to remain in place in any hydrological  
 19 zone three area?  
 20 **A** I have been informed that there is a retention of 30  
 21 percent, if I'm not mistaken, of vegetative material.  
 22 **Q** With the value of the vegetative area, would it be  
 23 that which you just described in terms of facilitating  
 24 recharge water?  
 25 **A** That is my understanding of the attempt, yes.

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1 **Q** Do you agree that that would be accomplished by  
 2 retaining natural vegetation and natural top soil beneath  
 3 the plants and trees?  
 4 **A Yes, I would agree it would help with the water**  
 5 **quality.**  
 6 **Q** Would you tell his Honor what type of ground water  
 7 impact you would understand professionally to be  
 8 associated with removing sand in an area, a deep recharge  
 9 area where there is a great deal of that sand?  
 10 **A Okay.**  
 11 **The removal of the sand, putting aside the**  
 12 **vegetation and top soil, will remove another thickness of**  
 13 **material through which infiltrating storm water will**  
 14 **percolate before it enters the aquifer. The less sand you**  
 15 **have, the less filtering capacity you have before that**  
 16 **water recharges the aquifer.**  
 17 **Q** All right.  
 18 Have you seen and have you been provided with  
 19 copies of 2014 grading elevations that show the pre-  
 20 construction elevations on the westerly side of the 93  
 21 acre parcel and the levels which the Brookhaven railroad  
 22 terminal are excavating and grading the property?  
 23 **A Yes, I have.**  
 24 **Q** Would you tell his Honor in terms of -- on the  
 25 westerly side of the parcel adjacent to the 28 acre  
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1 facility, as we described the existing rail facility, what  
 2 level are they starting at and what level are they  
 3 excavating down to?  
 4 **A The excavation alone of the western portion of that**  
 5 **parcel is about 100 feet above mean sea level, the**  
 6 **excavation I understand is to be taken to an elevation of**  
 7 **about 50 feet or a little bit below.**  
 8 **Q** And over how much of the westerly side of the parcel  
 9 is this occurring, that is to say where there is the 100  
 10 foot level? What level is it where the reduction of grade  
 11 at 50 feet is occurring?  
 12 **A As you can see from the excavation and the slopes**  
 13 **there, it looks like the area that is to be taken 50 feet**  
 14 **will include much of the western side of that parcel as**  
 15 **well as the central portion.**  
 16 **Q** Okay.  
 17 What portion of the overall site would you  
 18 estimate is at an elevation of 80 to 100 feet?  
 19 **A I would say that is probably a third of it.**  
 20 **Q** And that is being brought down to 50 feet?  
 21 **A That is my understanding.**  
 22 **Q** And based upon reading the grading plan?  
 23 **A Yes.**  
 24 **Q** All right.  
 25 And are there other areas that are being brought  
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1 down from 75 feet, 70, 65 feet, 60 to 50 feet as well?  
 2 **A Yes.**  
 3 **Q** And how much of the site falls into that category?  
 4 **A I would say at least half of the site.**  
 5 **Q** All right.  
 6 So it would be a correct summary then that half  
 7 the site is being brought down from 100 feet or 80 feet or  
 8 60 feet, down to a level of 50?  
 9 **A Yes.**  
 10 **Q** Okay.  
 11 Would you tell his Honor what impact or concern  
 12 would be associated with the removal of that volume of  
 13 native sand from a hydrological zone three, recharge area,  
 14 for purposes of track construction, in your position as a  
 15 hydrogeologist, and in terms of what your opinions are as  
 16 it relates to ground water characteristics.  
 17 **A I would say that the removal of the sand, as**  
 18 **mentioned before, is going to reduce the filtering**  
 19 **capacity of this parcel for any storm water, rain water**  
 20 **that is going to infiltrate through it.**  
 21 **The excavation and eventual compaction of that**  
 22 **surface to facilitate whatever activities they are going**  
 23 **to have in that area is also going to reduce the amount of**  
 24 **infiltration just through compaction.**  
 25 **The removal of the forest and the associated top**  
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1 **soil is also going to reduce the filtering and the**  
 2 **contaminant removal capacity from the parcel.**  
 3 **Q** At what level do you believe the Upper Glacial  
 4 aquifer is located beneath the 93 acre site? At what mean  
 5 sea level elevation?  
 6 **A It is from -- from the documents I reviewed, it**  
 7 **appears the top of the water table aquifer within the**  
 8 **Glacial is about 35 feet.**  
 9 **Q** So if they excavate 50 feet, they will be within 15  
 10 feet?  
 11 **A They would be then at 15 foot separation between the**  
 12 **top surface of the parcel and the water table.**  
 13 **Q** What if they excavate below that for construction  
 14 purposes?  
 15 **A Then there would be even less.**  
 16 **Q** All right.  
 17 Are any impacts on the ground water, do you  
 18 know, associated with industrial operations such as the  
 19 loading and unloading of trains, railway cars?  
 20 **A Yes.**  
 21 **In your generally considered industrial**  
 22 **activities, there can be associated released of petroleum,**  
 23 **of where the materials are coming in on the rail cars,**  
 24 **whether materials are associating with the trucking,**  
 25 **etcetera. There is a wide -- there could be a wide**  
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1 **variety of contaminants associated with the site.**  
 2 **Q** I'm not asking you to be hypothetical. I'm asking  
 3 you to express your opinion as to what the consequence is  
 4 going to be on the Upper Glacial aquifer in this area if  
 5 BRT completes its plan to excavate down to 50 feet above  
 6 mean sea level and install what they describe as an O  
 7 track across a parcel that has been uniformly lowered to a  
 8 grade of 50 feet, and assume they are planning on  
 9 constructing some 1.2 million square feet of various types  
 10 of warehousing manufacturing facilities?

11 MS. MILLER: Objection. It calls for  
 12 speculation. Improper expert testimony. And there is no  
 13 foundation for the witness to be testifying to all this.

14 MR. CALICA: Your Honor, I will withdraw it and  
 15 offer some exhibits in evidence.

16 THE COURT: While he is looking, I have a  
 17 question.

18 You testified a moment ago about the  
 19 introduction of, let's call them contaminants, by the  
 20 operation of a railway in this area.

21 THE WITNESS: Yes.

22 THE COURT: Petroleum, coal, tar, whatever.

23 Isn't it fair to say that that would be a  
 24 problem irrespective of how much sand is underneath it?

25 THE WITNESS: Yes.

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1 THE COURT: So does the excavation matter for  
 2 those purposes?

3 THE WITNESS: The excavation matters in that  
 4 there will be less opportunity to filter out contaminants  
 5 and more opportunity for contaminants to be introduced to  
 6 the aquifer.

7 And to give you an example, our health  
 8 department has requirements for separation between the  
 9 bottom of leaching facilities that leach the ground water  
 10 and the water table surface. And that is to allow for,  
 11 hopefully, enough filtration before whatever is recharging  
 12 through that recharge facility to enter the water table.

13 So our own regulations under which we operate in  
 14 Suffolk County take into account the ability of greater  
 15 amounts of sand and soil to provide for more filtration of  
 16 contaminants.

17 THE COURT: So basically there is a potential  
 18 outcome if there is more sand, you wind up with more dirty  
 19 sand unless it gets to the water. Is that the idea?

20 THE WITNESS: Generally, yes.

21 MR. CALICA: I would like to offer in evidence a  
 22 document pre-marked in our binder as Exhibit 9-B, it is  
 23 the Brookhaven Rail Terminal Advisory Overview prepared by  
 24 the defendants by their consultant, Gannette Fleming, and  
 25 I have an exhibit binder for the Court and one for the

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1 witness.

2 THE COURT: You are referring to 9-B?

3 MR. CALICA: Yes, your Honor.

4 THE COURT: I have a tab that says Exhibit 9.

5 MS. MILLER: I believe it is 8-B.

6 MR. CALICA: Any objection to the offer?

7 THE COURT: Any objection to 8-B?

8 MS. MILLER: No objection.

9 THE COURT: 8-B is admitted.

10 (Whereupon, Plaintiff's Exhibit 8-B was received  
 11 in evidence.)

12 **Q** Ms. Davis, have you been provided with a copy of

13 Exhibit 8-B, the Brookhaven Rail Terminal, Proposed

14 Expansion, parenthesis, parcels B and C, close

15 parenthesis, Environmental Overview prepared by Gannette

16 G-A-N-N-E-T-T-E, Fleming, F-L-E-M-I-N-G, dated February

17 2014?

18 **A Yes.**

19 **Q** Did you observe page one, the introduction that says

20 this environment overview evaluates the environmental

21 setting and potential resource concerns associated with a

22 proposed expansion of the existing Brookhaven rail

23 terminal in the village of Yaphank, Town of Brookhaven,

24 Suffolk County, New York?

25 THE COURT: Do you see, that is the question.

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1 **A Yes, I do.**

2 **Q** Did you observe the cover sheet of the environmental  
 3 overview?

4 THE COURT: Counsel, it is in evidence. You can  
 5 move along.

6 **Q** When you testified a few moments ago and were asked

7 to assume the type of structures that are planned to be

8 constructed and associated with what we referred to as an

9 O track, were you assuming the construction or creation of

10 those types of buildings that are shown on the first page

11 of the environmental overview?

12 **A Yes.**

13 **Q** Okay.

14 THE COURT: Why don't you go back to your  
 15 question.

16 MR. CALICA: Okay.

17 **Q** Now, what type of impact on ground water would you be

18 of the opinion would be associated with the grading of the

19 site from the existing elevations of between 100 feet and

20 60 feet down to 50 feet, and the portions that are at that

21 level, and the construction of the type of manufacturing,

22 warehousing, various loading, and even storage facilities

23 that are shown in Exhibit 8-B?

24 **A I would expect that there would be certain discharges  
 25 associated with these activities, either direct or**

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1 **indirect, and that those discharges would have a potential**  
 2 **to impact the aquifer.**  
 3 **Q** In what way? Is it a hypothetical, or is it  
 4 something you have an opinion about?  
 5 **A No.**  
 6 **My opinion would be that it would negatively**  
 7 **impact the aquifer in terms of water quality.**  
 8 **Q** To what extent?  
 9 **A It is hard to say to what extent. It would certainly**  
 10 **perhaps reduce its ability to be used for drinking water**  
 11 **purposes.**  
 12 **Q** Do you believe it would reduce or eliminate its  
 13 potability?  
 14 **A It certainly would eliminate its potability without**  
 15 **treatment, yes.**  
 16 **Q** Without what type of treatment?  
 17 **A The type of treatment would really depend on the**  
 18 **amount or the kinds of contamination involved. Certainly**  
 19 **water treatment is often necessary for impacts associated**  
 20 **with commercial and industrial development.**  
 21 **Q** Now, assuming the facility was constructed in a  
 22 different manner, and there has been some testimony where  
 23 I will ask you to assume and provide you a document that a  
 24 track entered --  
 25 MS. MILLER: Objection.  
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1 **A Yes. This shows a different design.**  
 2 **Q** Would it be correct to describe it as a J track in  
 3 resembling the letter J?  
 4 **A I guess, yes.**  
 5 **Q** Okay.  
 6 Where does it enter the site?  
 7 **A It enters the site at the southeast corner --**  
 8 **southwest corner, excuse me.**  
 9 THE COURT: Are we going to get a color picture  
 10 at this point?  
 11 MR. CALICA: Yes, your Honor.  
 12 **Q** Based on your review of the elevation data, what is  
 13 the height elevation at that location?  
 14 **A Somewhere at a hundred feet.**  
 15 **Q** Does the track continue along the southern portion to  
 16 the southeast corner?  
 17 **A Yes, it does.**  
 18 **Q** And what is, as you recall, the natural elevation in  
 19 that corner?  
 20 **A I believe the natural elevation in that area is**  
 21 **somewhere around 55 or 60 feet.**  
 22 **Q** Okay.  
 23 And does it then continue north right up to what  
 24 appears to be the Long Island Expressway?  
 25 **A Yes.**  
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1 THE COURT: Don't object until he finishes, I  
 2 need to hear the whole thing.  
 3 MR. CALICA: I will withdraw it and offer  
 4 Exhibit 1 in evidence.  
 5 THE COURT: Exhibit 1 is --  
 6 MR. CALICA: It is an email from Brookhaven Rail  
 7 Terminal, Mr. Andy Kaufman, sent to Matthew Minor, the  
 8 Town of Brookhaven's director of operation, who is also  
 9 the Commissioner of the Department of Solid Waste  
 10 Management. And it encloses a proposed plan, phase two  
 11 track work design dated June 26th, 2012, designed by  
 12 Systra, S-Y-S-T-R-A, Engineering, Inc. And then there is  
 13 an actual proposed track illustration that is part of the  
 14 document.  
 15 THE COURT: Any objection to Exhibit 1?  
 16 MR. ARONOFF: No.  
 17 THE COURT: There being no objection, Exhibit 1  
 18 is admitted.  
 19 (Whereupon, Plaintiff's Exhibit 1 was received  
 20 in evidence.)  
 21 **Q** Have you had an opportunity to review Exhibit 1  
 22 before today, Ms. Davis?  
 23 **A Yes, I have.**  
 24 **Q** And does that show a proposed track design that  
 25 differs from what we have referred to as an O track?  
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1 **Q** And does it end there?  
 2 **A It looks to me like it ends there.**  
 3 THE COURT: Did you say it was a J or a double  
 4 J?  
 5 MR. CALICA: A J.  
 6 THE COURT: All right, sorry.  
 7 **Q** And what is the natural elevation in that area?  
 8 **A The natural elevation in that area is between 55 and**  
 9 **50 feet.**  
 10 **Q** Okay.  
 11 Now, the cover letter sent to Mr. Kaufman,  
 12 president of Brookhaven Rail Terminal, by Systra  
 13 Engineering begins with the sentence, quote, a summary of  
 14 our conceptual track plan layout prepared on 5/1/12, also  
 15 known as the J track option, is as noted above -- below.  
 16 Would you say that is a correct description to  
 17 call it a J track?  
 18 MS. MILLER: Objection. This witness has no  
 19 foundation to be testifying to -- as an expert to rail  
 20 track layout or design. She is not qualified in -- in an  
 21 expert of hydrology --  
 22 THE COURT: I will allow it by way of background  
 23 only.  
 24 Continue, counselor.  
 25 **Q** Is that term used by Systra the same term you used in  
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1 describing the track design as looking like the letter J?  
 2 **A It certainly can look like the letter J, yes.**  
 3 **Q** And it is describing the letter as having a total  
 4 length of track as approximately 5,600 feet.  
 5 Based upon your observation of the various plan  
 6 documents you have seen, is that consistent with the track  
 7 that runs along the southerly border and then goes up  
 8 north on the easterly border and ends at the Long Island  
 9 Expressway?  
 10 MS. MILLER: Objection, your Honor. It is  
 11 beyond background information where we get into the  
 12 substance of the track design.  
 13 THE COURT: It is all right. I will allow it.  
 14 My question to you counsel is: Is this to  
 15 respond to the arguments as to whether or not the Town had  
 16 notice or does this go to your bigger point that you don't  
 17 think it is really a track?  
 18 MR. CALICA: Both, your Honor.  
 19 We will prove this is all they presented. And  
 20 secondly, as an offer of proof that if they had followed  
 21 that, then there would be no need or ability or  
 22 justification to mine the rest of the site.  
 23 THE COURT: All right.  
 24 **Q** Based upon -- incidentally, Ms. Davis, do you read  
 25 site plans professionally?

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1 THE COURT: Move on, counsel.  
 2 MR. CALICA: Okay.  
 3 **Q** Does a length of 5,600 feet in your opinion equate  
 4 with the track that runs just along the southerly border  
 5 of the 93 acre site and then along -- north along the  
 6 easterly border to the Long Island Expressway?  
 7 **A It would seem about right. But I have not measured**  
 8 **this out specifically to answer that question.**  
 9 **Q** Okay.  
 10 Assuming that the track had been constructed or  
 11 was planned to be constructed in the configuration shown  
 12 in Exhibit 1, 5,600 feet long, entering on the southwest  
 13 corner at 100 feet following the existing elevation to the  
 14 southeast corner, and then going straight north and ending  
 15 at the Long Island Expressway, would there be the types of  
 16 ground water impacts on the aquifers that you described  
 17 associated with a track configuration as shown on  
 18 Exhibit 1?  
 19 THE COURT: No matter what she says to that  
 20 question, I don't understand the question so it will not  
 21 help.  
 22 I have a question.  
 23 Right here on the letter you are looking at, it  
 24 says the track would be on a descending 1.25 grade from  
 25 west to east.

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1 Assuming that to be true, if we began at the 100  
 2 foot elevation on the western end, and at a 1.25 percent  
 3 slope, what would it be on the eastern? Do you have any  
 4 idea?  
 5 THE WITNESS: I assume it is somewhere around 50  
 6 feet. I haven't calculated that.  
 7 THE COURT: Thank you.  
 8 Go ahead, counsel.  
 9 **Q** Have you been provided with a copy of the Bowne  
 10 Engineering grading plan?  
 11 **A Yes.**  
 12 MR. CALICA: I will offer it in evidence. What  
 13 number is it?  
 14 It is Exhibit 5 in the binder of the pre-marked  
 15 documents. It is Bowne, B-O-W-N-E.  
 16 THE COURT: Exhibit 5 is a picture.  
 17 MR. CALICA: It shouldn't be.  
 18 MR. KORDAS: It is right there.  
 19 THE COURT: All right.  
 20 **Q** Have you seen that document before?  
 21 **A Yes, I have.**  
 22 MR. CALICA: Is there any objection to it?  
 23 MR. ARONOFF: Which document?  
 24 THE COURT: Exhibit 5, which I believe is a  
 25 single drawing, which looks a lot like the one on the big

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1 board that we have.  
 2 MS. MILLER: This document, Exhibit 5, I believe  
 3 was also the blowup, the exhibit that we were reviewing  
 4 earlier.  
 5 THE COURT: That is what exhibit?  
 6 MS. MILLER: B. But I don't believe it has been  
 7 marked. It was intended for settlement purposes. We  
 8 would object to the use of this.  
 9 THE COURT: I'm confused.  
 10 This is the old track?  
 11 MR. CALICA: Your Honor --  
 12 THE COURT: Isn't this what we looked at on  
 13 Friday as the plan? Am I wrong about that?  
 14 MR. ARONOFF: I'm confused what document he is  
 15 talking about.  
 16 The document he has blown up is what we gave --  
 17 (Counsel confer.)  
 18 MR. CALICA: Your Honor, let me make this  
 19 statement on the record.  
 20 After the lawsuit was filed the Town was  
 21 provided with plans.  
 22 We then have a stipulation that -- before the  
 23 record in which the parties agreed to try to agree upon an  
 24 acceptable track construction plan for stand still  
 25 purposes.

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**Davis-Direct/Calica**

42

1 We had a meeting at the offices of FPM  
 2 Engineering. It is referred to the declaration of  
 3 Ms. Davis' engineering colleague --  
 4 THE COURT: Stop.  
 5 Are you suggesting it was prepared for  
 6 settlement purposes? If it wasn't then it is fully  
 7 discoverable.  
 8 MS. MILLER: We are not talking about what is  
 9 shown in the plan. But just as to anything discussed at  
 10 those meetings.  
 11 THE COURT: We are admitting it, but obviously  
 12 settlement discussions are not to be referred to.  
 13 MR. CALICA: To be clear, and to make a record,  
 14 I explicitly said to Mr. Aronoff, we are here at the  
 15 offices with our engineers and your engineers to create a  
 16 document under a signed stipulation.  
 17 It is not privileged as it relates to track  
 18 design.  
 19 THE COURT: Counsel, what are you trying to show  
 20 me with the document? We don't have a jury here. Answer  
 21 the question.  
 22 MR. CALICA: I don't want it subject to any  
 23 privilege.  
 24 THE COURT: Counsel, the document is going in  
 25 for all purposes. The settlement discussions should not  
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**Davis-Direct/Calica**

43

1 be elicited. If you elicit anything relating to  
 2 settlement discussions I will not consider it.  
 3 So go ahead.  
 4 MR. CALICA: I will also supplement the offer  
 5 with the -- what number is it -- the AECOM plan, and the  
 6 binder which is Exhibit 4.  
 7 THE COURT: Any objection to Exhibit 4?  
 8 MS. MILLER: No, your Honor.  
 9 THE COURT: All right.  
 10 4 and 5 are admitted.  
 11 (Whereupon, Plaintiff's Exhibits 4 and 5 were  
 12 received in evidence.)  
 13 **Q** Have you reviewed the AECOM plan dated January 2014  
 14 and the Bowne plan dated April 2014 before?  
 15 **A Yes, I have.**  
 16 **Q** And do they show the preexisting elevations and  
 17 grades throughout the 93 acre parcel?  
 18 **A Yes, they do.**  
 19 **Q** And in your professional experience as a hydrologist,  
 20 you read grading data and elevation data?  
 21 **A Yes, I do.**  
 22 **Q** All right.  
 23 Going back to my question about the Systra  
 24 design J track, if the Systra design J track in Exhibit 1  
 25 were the track being constructed or planned for  
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**Davis-Direct/Calica**

44

1 construction, but the BRT defendant -- would that entail  
 2 the type of grading and fill removal that is associated  
 3 with the O track and the various exhibits that are before  
 4 you?  
 5 **A Certainly the J track design did not show the extent**  
 6 **of grading that is indicated on these plans.**  
 7 **Q** Did the Systra design J track from Exhibit 1, from  
 8 2012, show the track following more or less the natural  
 9 slope and grade of the property as it entered the  
 10 southeast corner of the 93 acre parcel and followed the  
 11 natural contours from the southwest to the southeast?  
 12 **A Yes. It appeared to follow the natural contours,**  
 13 **more or less.**  
 14 **Q** Okay.  
 15 Could you quantify your opinion as to the type  
 16 of ground water impacts that you would consider  
 17 professionally to be associated with a track design of the  
 18 Systra J track option as compared with the type of O track  
 19 shown in Exhibits 4 and 5?  
 20 **A Certainly the grading for the J track design did not**  
 21 **show the extent of removal of overburdened material.**  
 22 **Q** What does that mean in your terms?  
 23 THE COURT: In this context, what does that  
 24 mean?  
 25 THE WITNESS: Overburden in this case means the  
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**Davis-Direct/Calica**

45

1 unsaturated soil, the sand, the gravel, the forest and  
 2 associated top soil overlying, if you will, the aquifer.  
 3 The J track design does not show the extent of removal as  
 4 this other design.  
 5 **Q** And how would you quantify or compare the ground  
 6 water impacts on the aquifer as you described them with  
 7 the O plan, O track plan excavated to 50 feet, and  
 8 construction of the J track ending in the northeast corner  
 9 by the Long Island Expressway?  
 10 **A I'm not sure that I can quantify it. But I can**  
 11 **certainly say I expect the impacts on the aquifer to be**  
 12 **far more significant with this O track design, with the**  
 13 **associated excavation and removal of the native materials.**  
 14 **Q** Has this recharge area, apart from the Safe Water  
 15 Drinking Act of 1974, been identified by any other  
 16 governmental agencies? Yes or no.  
 17 **A Yes.**  
 18 **Q** Is one of them the US Geological Survey?  
 19 **A Yes.**  
 20 **Q** What is the United States Geological Survey?  
 21 THE COURT: That is my question. But I know  
 22 what it is. Go ahead.  
 23 **Q** Did the US Geological Survey actually prepare a  
 24 survey map of this area in the year 1967? A survey of  
 25 this area.  
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1 **A** There happens to be surveys of this area by the USGS,  
 2 **yes.**  
 3 **Q** Would you look at Exhibit 18 in the binder in front  
 4 of you.  
 5 THE COURT: Any objection to Exhibit 18?  
 6 MS. MILLER: No.  
 7 THE COURT: Exhibit 18 is admitted, counsel.  
 8 (Whereupon, Plaintiff's Exhibit 18 was received  
 9 in evidence.)  
 10 **Q** What is Exhibit 18 now that it has been admitted?  
 11 **A** Exhibit 18 is topographic map prepared by the USGS,  
 12 and it is dated 1967.  
 13 **Q** All right.  
 14 And is that a type of document that is used by  
 15 you in your profession as a geologist performing  
 16 professional services on Long Island?  
 17 **A** Yes, it is.  
 18 **Q** And would you tell his Honor what it shows in terms  
 19 of the area in which the 93 acre parcel is located?  
 20 **A** What it shows is that that particular area is  
 21 underlain by material that has an elevation of -- very  
 22 difficult to read this. This is usually printed much  
 23 larger. But it is underlain by material with an elevation  
 24 of 80, 90 feet, 80 feet and --  
 25 **Q** We have a blowup that was made in your office that  
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1 may assist in your reference.  
 2 **A** Thank you.  
 3 **Q** But we only have one.  
 4 Can you see the Long Island Expressway located  
 5 on this US Geological Survey drawing?  
 6 **A** Yes, I can.  
 7 **Q** Does it run approximately through the middle, from  
 8 left to right?  
 9 **A** Yes, it extends from left to right, or west to the  
 10 east across this topographic map.  
 11 **Q** All right.  
 12 What is the level of sand or earth elevation  
 13 associated with the area of, let's say, on the 93 acre  
 14 site and around it?  
 15 **A** On the 93 acre site, the elevation shown here starts  
 16 at about elevation 60. And since there is an area a  
 17 little bit below that and it is a ten foot contour area,  
 18 perhaps 55. And extending on to 105, perhaps 110 on the  
 19 very western portion of the 93 acre parcel.  
 20 **Q** Okay.  
 21 And as you continue to the west, does that area  
 22 of high elevation continue?  
 23 **A** Yes.  
 24 The area of high elevation continues perhaps a  
 25 mile, a mile and a half.  
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1 This relates back to the discussion we were  
 2 having earlier about the outwash plain, and the extensive  
 3 thickness of the gravel deposits.  
 4 **Q** Is this an important area in terms of it's important  
 5 to recharge and water production capacity for the Upper  
 6 Glacial aquifer?  
 7 **A** Yes, it is.  
 8 **Q** Now, is there an area known as the Carmans River  
 9 located nearby?  
 10 **A** Yes. The Carmans River is located to the east.  
 11 **Q** And is that the blue body of water that eventually  
 12 goes down to what is shown as Bellport Bay?  
 13 **A** Yes.  
 14 **Q** Okay.  
 15 And would you tell his Honor something about the  
 16 Carmans River, its classification, what it does, and where  
 17 its water flows?  
 18 **A** Yes.  
 19 The water flows from north to south generally in  
 20 the river. I understand that the river is classified as a  
 21 scenic and recreational river. The river receives ground  
 22 water discharges from the Upper Glacial aquifer. And the  
 23 river is basically sitting in a river plain area that has  
 24 been eroded down into the Glacial outwash deposits.  
 25 **Q** Is there an area known as the Carmen 's River  
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1 watershed?  
 2 **A** Yes, I understand that there is.  
 3 **Q** All right.  
 4 Do you know whether or not the Town of  
 5 Brookhaven itself has adopted any type of preservation or  
 6 conservation program for the Carmen's River watershed?  
 7 **A** I understand they have, yes.  
 8 **Q** And have you had a chance to review it?  
 9 **A** Yes. I have reviewed portions of it.  
 10 MR. CALICA: Your Honor, I would ask that the  
 11 Court judicially notice, and I can provide an excerpted  
 12 copy of the Carmans River Conservation and Management  
 13 Plan. It has the effect of the local law, it was adopted  
 14 by resolution of the Town Board in late 2013. It appears  
 15 on its website. And rather than use an inch and a half  
 16 thick proper that has schedule and appendicis, I have made  
 17 copies that I wanted to include for the witness'  
 18 attention.  
 19 I'm offering it to your Honor.  
 20 THE COURT: Is it one of the exhibits marked?  
 21 MR. CALICA: It may not have been. But we  
 22 provided counsel with copies.  
 23 THE COURT: What is the defendant's position on  
 24 this?  
 25 MS. MILLER: Let us review it quickly to make  
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1 sure that it is the same as the copy I previously  
 2 received.  
 3 Is the piece of property in issue within the  
 4 scope of this plan?  
 5 MR. CALICA: I will ask the witness to explain.  
 6 THE COURT: I'm asking you.  
 7 Is this piece of property part of the plan?  
 8 MR. CALICA: It runs off into it.  
 9 THE COURT: I don't know what that means.  
 10 MR. CALICA: Yes.  
 11 I'm getting the answer from the Town Attorney  
 12 who saw the environmental impact statement. I didn't,  
 13 your Honor.  
 14 THE COURT: All right.  
 15 MS. MILLER: Your Honor, we don't object to the  
 16 use of this document. But we will make a note that the  
 17 Court should take judicial notice that the document should  
 18 be noticed in its entirety as it is on the website, and  
 19 not just the excerpted portion that we have here today.  
 20 THE COURT: Are there other portions you expect  
 21 to be speaking to?  
 22 MS. MILLER: Maybe in a closing brief, your  
 23 Honor. But for today's purposes, no.  
 24 THE COURT: I think counsel is offering the  
 25 whole thing. If you feel I should acknowledge the  
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1 existence of the Town plan, I will do that.  
 2 It is so noticed.  
 3 MR. CALICA: Thank you, your Honor.  
 4 **Q** Ms. Davis, would you look at page 73 of the document.  
 5 MR. CALICA: Your Honor, can I assign a high  
 6 number to it since I have -- the next number would be 27,  
 7 if we can assign that number.  
 8 THE COURT: The excerpt from the plan is  
 9 Exhibit 27; is that correct?  
 10 MR. CALICA: Yes.  
 11 THE COURT: For the purposes of the hearing,  
 12 correct?  
 13 MR. CALICA: Yes.  
 14 **Q** There is a line says -- there is a bullet point  
 15 reading, control storm water runoff, period. To the  
 16 extent feasible, surface runoff should be intercepted and  
 17 disposed of as close as possible to the source. And then  
 18 it continues.  
 19 Would there be storm water runoff into the  
 20 Carmans River watershed associated with the type of  
 21 development on the 93 acre parcel that the BRT defendants  
 22 plan shows?  
 23 **A** I expect it would be since the parcel is within the  
 24 watershed and there would be storm water runoff.  
 25 **Q** Directing your attention to the part that says zone  
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1 Roman numeral III, colon, highest grade reservoir. It  
 2 reads, ground water in this zone is generally of excellent  
 3 quality, the ground water resource in this zone offers a  
 4 large potential for further development of public water  
 5 supplies provided that measures are taken to ensure the  
 6 protection of ground water quality.  
 7 Do you agree as a professional matter with the  
 8 that recommendation?  
 9 **A** Yes.  
 10 **I would agree that ground water in this zone**  
 11 **should be protected.**  
 12 **Q** Where does the water that enters the Carmans River  
 13 flow to? And you can see it on Exhibit 18. But perhaps  
 14 you can explain to his Honor what other areas or impacts  
 15 are associated with runoff into the Carmans River?  
 16 **A** The Carmans River eventually discharges to Bellport  
 17 Bay which is part of the Great South Bay.  
 18 **Q** Do you have any opinion as to whether runoff from the  
 19 BRT facility on the 93 acre parcel would enter the Carmans  
 20 River?  
 21 **A** Yes. From what I have reviewed, I understand the  
 22 runoff would enter the river.  
 23 **Q** Where would it flow once it enters the river?  
 24 **A** It would flow with the flow of the river which is to  
 25 Bellport Bay and Great South Bay.  
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 OFFICIAL COURT REPORTER

1 **Q** Do you have an opinion of the impact of the waters in  
 2 the Bellport Bay and Great South Bay would be from the  
 3 type of runoff you would expect to associate with the BRT  
 4 rail facility on this 93 acre parcel?  
 5 MS. MILLER: Objection. Lack of foundation.  
 6 THE COURT: I will sustain the objection for a  
 7 different reason.  
 8 Explain something to me.  
 9 If we built anything on that property, a parking  
 10 lot, a courthouse, there would be storm water runoff,  
 11 meaning it is not going into the sand, it is running off  
 12 the asphalt? Is that what we are talking about here?  
 13 THE WITNESS: No.  
 14 THE COURT: Good.  
 15 Explain to me what you are talking about.  
 16 THE WITNESS: Say you would have a parking lot  
 17 out there. There would be storm water when it rains. It  
 18 would need to be managed. You couldn't leave it sitting  
 19 out in the parking lot. It needs to be leached.  
 20 Typically we have storm water leaching pools to collect  
 21 the storm water and it is discharged into the ground from  
 22 the parking lot. From there it migrates downward, enters  
 23 the water table. In this area ground water is flowing  
 24 toward the river.  
 25 So there would be storm water discharge to the  
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1 aquifer which then flows to and discharges to the river.  
 2 THE COURT: Does the aquifer discharge into the  
 3 river?

4 THE WITNESS: The Upper Glacial aquifer in this  
 5 area, the flow is lateral and the flow is vertical. There  
 6 is a component of vertical flow downward. But there is  
 7 also a flow of lateral flow.

8 THE COURT: So what you are saying is when it  
 9 rains, water runs off whatever we are going to build there  
 10 and we build something?

11 THE WITNESS: Yep.

12 THE COURT: And it goes into the ground, into  
 13 the aquifer and into the river?

14 THE WITNESS: Eventually, yes.

15 THE COURT: And does the elevation matter, if we  
 16 dig out 50 feet of soil, or does it go back to the first  
 17 point that more sand is better?

18 THE WITNESS: It goes back to the first point.  
 19 The more filtration, regardless of the quality of the  
 20 storm water here, the more filtration the better.

21 THE COURT: Counsel, we can move along. I have  
 22 the idea which is your point. There are contaminants that  
 23 go into the aquifer, and that is not good, right? Because  
 24 either way it is not great; is that fair?

25 MR. CALICA: Yes, Judge.

*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
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1 **Q** Is salt itself a contaminant that has in fact  
 2 impacted the portions of the Upper Glacial aquifer?

3 **A** Yes.

4 **In several different contexts, salt**  
 5 **contamination has occurred both in the Upper Glacial and**  
 6 **places in the Magothy aquifer.**

7 **Q** In the areas where salt intrusion has occurred, is  
 8 the water any longer potable, that is, usable for drinking  
 9 purposes?

10 **A** Not potable without treatment, no.

11 **Q** Would it be suitable for a water district or a  
 12 pumping for drinking purposes?

13 **A** Not without treatment, no.

14 **Q** And do you have any concerns as a hydrogeologist as  
 15 to what type of salt water impact or intrusion might be  
 16 associated with constructing a 39,000 covered salt  
 17 building of the type covered in Exhibit 8-B?

18 **A** In this case it wouldn't be salt water intrusion,  
 19 because salt water intrusion is generally associated with  
 20 intruding salt water from water bodies like the Great  
 21 South Bay or the Atlantic Ocean.

22 **In this case it is the concern of discharges**  
 23 **from its facility directly to the ground water and**  
 24 **probably a resultant plume of salt water from the**  
 25 **facility.**

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1 THE COURT: All right.

2 **Q** Ms. Davis, one of the structures shown on Exhibit B,  
 3 the environmental overview, is a covered salt storage  
 4 building and it looks like 39,000 square feet on the south  
 5 end of the 93 acre parcel.

6 **A** Which exhibit is that?

7 **Q** The cover sheet, 8-B.

8 **A** Yes.

9 **Q** Do you have any environmental concerns about salt  
 10 storage?

11 **A** Yes.

12 **Q** And could you relate what that concern is to the  
 13 location shown on the 93 acre parcel.

14 **A** Salt storage almost invariably has salt that ends up  
 15 outside of the covered storage area. Salt being very  
 16 soluble. And at the time rain water hits it, it dissolves  
 17 and carries the salt down and enters the aquifer.

18 **I had experience with a number of salt storage**  
 19 **facilities and associated birne, B-I-R-N-E, highly**  
 20 **concentrated salty water that ends up being so treated**  
 21 **with these facilities.**

22 **So the presence of salt storage or future**  
 23 **presence of salt storage, the potential, on this parcel,**  
 24 **and particularly in an area where a lot of sand is being**  
 25 **removed, would present concern.**

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1 **Q** What in your opinion would result in the potability  
 2 or drinkability of the water in that location?

3 **A** It most likely would no longer be potable.

4 THE COURT: It is clear to say the drinking  
 5 water supply, sticking with Suffolk County for a moment,  
 6 which you say goes to the Suffolk County Water Authority,  
 7 is it already subject to treatment?

8 THE WITNESS: It is subject -- the raw water  
 9 coming straight out of the ground is subject to testing.

10 If testing demonstrates the presence of  
 11 contaminants, then there would be treatment requirements  
 12 if the contaminants exceed certain levels, there would be  
 13 treatment requirements before it is put into the  
 14 distribution system or distribution to customers.

15 THE COURT: Is it fair to say that those  
 16 treatment facilities are already in place, meaning that we  
 17 wake up tomorrow morning and somebody in the Suffolk  
 18 County Water Authority, nothing to do with this, something  
 19 else, says holy smoke, salt in the water, and do they just  
 20 click on a machine that is already there?

21 THE WITNESS: Salt is very difficult and  
 22 expensive to remove from water. Generally what happens if  
 23 there is salt water intrusion, which is the most common  
 24 problem, that is the end of those wells for water supply  
 25 purposes.

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1 There are other kinds of contaminants which are  
 2 often found in the ground water that are subject to much  
 3 less expensive treatment. And for those kind of  
 4 contaminants the water authority would treat the water.  
 5 THE COURT: Thank you.  
 6 THE WITNESS: Yes.  
 7 **Q** Ms. Davis, did you inspect the site physically  
 8 yesterday?  
 9 **A** On Saturday I did, yes.  
 10 **Q** Okay.  
 11 Did the site appear as -- did it generally  
 12 appear, except for the perspective as shown in the post  
 13 water marks Exhibit B, and the one we marked as  
 14 Exhibit 16?  
 15 **A** I would say it generally appeared as you would see it  
 16 in Exhibit B or 16, yes.  
 17 MR. CALICA: I will offer both in evidence, if  
 18 they are not already.  
 19 THE COURT: Any objection?  
 20 MS. MILLER: No.  
 21 THE COURT: So admitted.  
 22 Exhibit B and Exhibit 16.  
 23 (Whereupon, Plaintiff's Exhibits B and 16 were  
 24 received in evidence.)  
 25 MR. CALICA: 16 is in the pre-marked binder.  
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1 And B is now 21. I apologize. Those were the markings  
 2 from the preliminary injunction --  
 3 THE COURT: Exhibit B, a/k/a Exhibit 21, is  
 4 admitted.  
 5 (Whereupon, Government's Exhibit B was received  
 6 in evidence.)  
 7 THE COURT: Does Exhibit 16 have an a/k/a?  
 8 MR. CALICA: No, it is 16.  
 9 I apologize, your Honor. We did several  
 10 presentations referring --  
 11 THE COURT: Counsel, that is fine. Just keep  
 12 moving.  
 13 MR. CALICA: Okay.  
 14 **Q** Were you on the ground at the site?  
 15 **A** Yes, I was.  
 16 **Q** And did you observe anything on the site in addition  
 17 to excavated natural aversion of the sand?  
 18 **A** Yes.  
 19 **Q** What else did you observe?  
 20 **A** I observed some piles of asphalt. I observed some  
 21 piles of what is generally termed as historic fill.  
 22 **Q** What is historic fill?  
 23 **A** Historic fill is materials that were historically  
 24 used as fill. Primarily in the New York City metro area,  
 25 we run into it when we are dealing with sites in the New  
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1 **York City area very frequently.**  
 2 **Historic fill generally consists of soil. It**  
 3 **can contain ash. It usually contains a variety of**  
 4 **anthropogenic or human associated debris.**  
 5 THE COURT: What does that mean? Garbage or  
 6 something else?  
 7 THE WITNESS: Some of it may have originated as  
 8 garbage. But what happens in the areas of New York City,  
 9 which is surrounded by water and which historically, and  
 10 I'm talking about a very long time ago, had wetlands and  
 11 other low lying areas, these areas would fill with  
 12 development. A lot of times they would fill with waste  
 13 materials, often ash from burning garbage.  
 14 When dealing with environmental sites in the New  
 15 York City area, we often have to evaluate historic fill to  
 16 determine if it can be remaining on site or has to be  
 17 disposed of elsewhere.  
 18 **Q** Did you observe what you considered to be material  
 19 that would -- that was brought in from off-site and placed  
 20 or dumped on the 93 acre site?  
 21 **A** I observed three areas where it appears that soil  
 22 that was clearly not native, and that contained  
 23 anthropogenic debris, had been placed on the surface of  
 24 the site.  
 25 **Q** And where? Can you show it on Exhibit 21 and 16?  
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1 **A** This is modified a little from what I saw on  
 2 Saturday. But over on this side of the site I observed  
 3 two general areas where there are piles of --  
 4 THE COURT: Why don't you take that with you and  
 5 take it up to the witness stand. This way you can show us  
 6 all and we will be able to hear you better.  
 7 THE WITNESS: This portion of the photograph  
 8 right here (indicating), there was a large pile of what  
 9 appeared to be soil fill. And then there were two areas  
 10 in this area of the photograph where I observed piles of  
 11 what seemed to be historic fill.  
 12 THE COURT: If you can help her out to move it  
 13 around.  
 14 In the photo there are some dark mounds there,  
 15 and there you saw some piles of anthropogenic debris?  
 16 THE WITNESS: The dark mounds here, some  
 17 pronounced, some are mounds and some are appearing to be  
 18 mounds, and this appeared to be asphalt material.  
 19 THE COURT: When you say that, does it look like  
 20 fresh virgin asphalt they use in construction, or old  
 21 chopped roadway?  
 22 THE WITNESS: The piles of material appeared to  
 23 be old chopped roadway, what I would call asphalt  
 24 millings.  
 25 There appeared to be an area here where perhaps  
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1 millings were incorporated in more typical asphalt  
 2 material to make road bearing surfaces on which to drive.  
 3 That area extends down and along this apparent roadway,  
 4 and then along the line of the track here.  
 5 THE COURT: Is it fair to say that it is  
 6 perfectly legitimate be use for asphalt fillings?  
 7 THE WITNESS: To build a surface for travel of a  
 8 vehicle, yes.  
 9 **Q** Now, would you direct your attention to what you  
 10 described as historic fill.

11 **A** Okay.  
 12 **On this portion of the photograph, which would**  
 13 **be the lower left of the photograph, which is toward the**  
 14 **eastern and central portion, there is a pile of this soil**  
 15 **that was non-native and contained anthropogenic, human**  
 16 **materials.**

17 **In the area of the western portion of the 93**  
 18 **acre parcel here (indicating), I observed two more piles**  
 19 **of soil that was not native to the area and it contained**  
 20 **anthropogenic debris.**

21 THE COURT: Is there a construction purpose for  
 22 anthropogenic debris?

23 THE WITNESS: When the material likely was  
 24 originally placed for its original purpose somewhere else,  
 25 I think it was a matter of disposing of this material and

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1 simply using it as fill.  
 2 I have no idea what the purpose is of placing it  
 3 here.

4 THE COURT: In your professional opinion could  
 5 there be a legitimate purpose?

6 THE WITNESS: My experiences in dealing with  
 7 historic fill, the kinds of materials we are talking about  
 8 in these three soil piles, is that I typically have them  
 9 tested, and it is typically required by a regulatory  
 10 agency that they be tested to determine whether they are  
 11 suitable from a contamination standpoint to remain on site  
 12 that I'm dealing with.

13 My experiences have been that materials  
 14 typically are contaminated to the level where they are not  
 15 suitable for the purpose for which the site is going to be  
 16 used and, therefore, the materials have to be excavated  
 17 and properly disposed of off-site and then approved for a  
 18 facility.

19 In this case we have not tested any of the  
 20 materials. I don't know what the environmental quality is  
 21 and if they contain contaminants. But they are certainly  
 22 the kind of materials I would expect to be tested before  
 23 they are placed essentially in an uncontrolled facility.

24 **Q** Did you observe pieces of linoleum tile in there?

25 **A** I did observe two pieces of what appeared to be vinyl  
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1 **or linoleum tile.**  
 2 **I observed pieces of metal, pieces of glass,**  
 3 **pieces of bone, pieces of pipe. There is kinds of pipe,**  
 4 **plastic pile pipe, metal pipe, some clay pipe. I observed**  
 5 **china. A wide variety of material.**

6 **I observed a Metro card in the pile, one of the**  
 7 **piles.**

8 **Q** Are you familiar with the term C&D?

9 **A** Yes.

10 **Q** What is C&D material?

11 **A** It is anthropogenic material, typically building  
 12 materials that have been removed during demolition  
 13 process.

14 **Q** What does C&D stand for?

15 **A** Construction and demolition.

16 **Q** Is what you saw and what you described consistent  
 17 with what is known as C&D, construction and demolition  
 18 material?

19 **A** I would say the anthropogenic materials I observed in  
 20 these piles, some would be consistent with C&D.

21 **Q** And are you able to form an opinion as to whether  
 22 this material existed on the site and was uncovered during  
 23 excavation, or whether it is the type of non-native  
 24 material that would have had to have been brought to the  
 25 93 acre site?

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1 MS. MILLER: Objection, speculation, no  
 2 foundation to speculate.

3 THE COURT: I will hear the answer.

4 **A** I can certainly comfortably say it is not from this  
 5 location. The kinds of materials in the soil,  
 6 irrespective of the anthropogenic materials, are the kinds  
 7 of materials that simply don't occur in this area  
 8 geologically. These are the kinds of soils I would expect  
 9 to see from somewhere else.

10 THE COURT: You can certainly tell us that from,  
 11 say, the area to the 19th century the materials were not  
 12 there, and you don't know if someone dumped them at some  
 13 point at some time in the past.

14 THE WITNESS: I didn't observe the dumping  
 15 myself. But certainly the configuration of the piles of  
 16 these materials on the surface would be consistent with  
 17 them having been dumped there as opposed to them naturally  
 18 occurring there.

19 THE COURT: And were the piles in the area that  
 20 have been recently excavated, if you know?

21 THE WITNESS: The piles were in an area where  
 22 there is no longer topsoil on the surface, where the  
 23 forest has been removed. They were not at the bottom of  
 24 the pit, if you will.

25 THE COURT: Is this a good opportunity to take a  
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**Davis-Direct/Calica**

66

1 break?

2 MR. CALICA: No.

3 I would like to just offer the photographs

4 taken -- were they nine photographs -- the nine

5 photographs taken yesterday.

6 THE COURT: You mean Saturday, I believe.

7 Would you show it to counsel.

8 MR. CALICA: I have provided a copy.

9 THE COURT: Would you have the witness tell us

10 if they are her photos?

11 MR. CALICA: It is Exhibit 26.

12 Off the record, my compliments to Mr. Kordas

13 getting them inserted this morning.

14 THE COURT: Are these the photographs you took

15 on Saturday?

16 THE WITNESS: We had a town representative with

17 me. I didn't take the photos. He took the photos. But

18 they do appear to be the photos taken on Saturday.

19 THE COURT: They are not numbered, but I assume

20 there is -- it is page 9. There is some kind of a card

21 there. Is that the Metro card?

22 THE WITNESS: It is the Metro card.

23 THE COURT: All right.

24 MR. CALICA: This would be a good point to take

25 the break.

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**Davis-Direct/Calica**

67

1 THE COURT: Any objection to Exhibit 26?

2 MS. MILLER: No objection.

3 THE COURT: Exhibit 26 is admitted.

4 (Whereupon, Plaintiff's Exhibit 26 was received

5 in evidence.)

6 We will take a five minute break.

7

8 (Whereupon, a recess was taken.)

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**Davis-Direct/Calica**

68

1 BY MR. CALICA:

2 Q Ms. Davis, do you have the photographs marked

3 Exhibit 23 in front of you?

4 A Yes, I do.

5 Q Looking at the first of them, does it fairly and

6 accurately depict what you observed at the site over the

7 weekend?

8 THE COURT: It is already in evidence,

9 counselor.

10 MR. CALICA: All right.

11 Q Do you see the right side of the first photograph, it

12 is the darker material.

13 Would you tell his Honor what that depicts?

14 A The material out here, as best as I can tell since

15 the photographs are not real clear, that it indeed looks

16 to be the historic fill we were discussing.

17 Q What about the second photograph, the dark material,

18 the dark brown?

19 A I believe it also shows some historic fill, but not

20 completely clear.

21 Q And what about the fourth photograph?

22 A Yes. That photograph does show some of the historic

23 fill.

24 THE COURT: What is the banana shaped item in

25 the middle of the photograph.

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**Davis-Direct/Calica**

69

1 THE WITNESS: I believe it is a piece of pipe.

2 THE COURT: Okay.

3 Q And the last photograph?

4 A The very last photograph shows the anthropogenic

5 material, the Metro card, and pieces of brick in there.

6 Q Were you able to estimate the volume of non-native or

7 historic fill with the various ingredients as you

8 described them?

9 A Yes.

10 After looking at my notes, it would be somewhere

11 in the order of perhaps 12 to 15,000 cubic yards, more or

12 less.

13 Q Okay.

14 Now, do you have an opinion as to whether or not

15 any of that historic material, whether it is pipe, whether

16 it is a Metro card, whatever, could have been uncovered in

17 the course of excavating the site as shown in, I think it

18 is Exhibit 21, which we understand according to the Systra

19 document was originally completely vegetative?

20 A Certainly the historic fill is not native to this

21 parcel, so I would not have expected it to be underneath

22 the apparent wooded area, virgin wooded area shown in that

23 photograph.

24 Q Is it at all consistent with the type of virgin sand

25 material you testified as from the preceding glacial some

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**Davis-Direct/Calica**

70

1 15,000 years ago?

2 **A No, it is not consistent with that sand and gravel**

3 **material.**

4 **Q** Does the historic fill of the type you described,

5 assuming it came from New York City or some other area,

6 and assuming it has -- I can't pronounce the word, whether

7 it was athro something, you said, ash and burning garbage,

8 bones, whatever else you said was in there, does that

9 itself have any capacity to impact ground water?

10 MS. MILLER: Objection. Misstates the witness'

11 prior testimony.

12 THE COURT: I will allow it.

13 **A Certainly, it could have the capacity to impact the**

14 **ground water.**

15 **Typically historic fill does contain**

16 **contaminants. So the common contaminants are various**

17 **kinds of metals, semi-volatile organic compounds.**

18 **PCBs are a contaminant.**

19 **When we encounter the historic fill at sites,**

20 **and we are meaning to excavate it, we are required to test**

21 **typically for a wide variety of contaminants.**

22 **Q** Based on your observations and experience, would you

23 expect the fill be historically observed to contain the

24 type of contaminants you just described, metals, PCBs,

25 other items as you testified to?

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**Davis-Cross/Miller**

72

1 **A That's correct.**

2 MS. MILLER: May my colleague approach the

3 witness with copies of the declaration?

4 THE COURT: Yes.

5 Can you identify the exhibits?

6 MS. MILLER: Yes, Exhibit H and Exhibit L.

7 MR. ARONOFF: These are all of the defendant's

8 exhibits.

9 THE COURT: Thank you.

10 I want to thank counsel for increasing my muscle

11 mass.

12 **Q** I have handed you Exhibit H.

13 Do you recognize that document?

14 **A Yes, I do.**

15 **Q** What is it?

16 **A It is a declaration.**

17 **Q** And how about Exhibit L?

18 **A It is a reply declaration.**

19 THE COURT: I have H. I have not seen L. Hold

20 on.

21 MS. MILLER: Volume two.

22 **Q** And these are prepared --

23 **A Yes.**

24 **Q** You reached an opinion as to environmental harm you

25 would believe occurred as a result of activity on the

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**Davis-Cross/Miller**

71

1 **A It certainly has the potential to contain these**

2 **contaminants. We certainly have seen pieces of metal in**

3 **it. And that would suggest that metals could be a**

4 **contaminant.**

5 **Q** Is that why this type of material is required to be

6 placed only in authorized landfills and DEC licensed

7 facilities?

8 **A Yes.**

9 **If it is excavated at sites which are under some**

10 **form of regulatory oversight, it is typically required to**

11 **be tested. If the test results dictate it is required to**

12 **be disposed in an authorized facility such as a landfill.**

13 MR. CALICA: Thank you.

14 I have no further questions.

15 THE COURT: Excellent.

16 Cross-examination.

17

18 CROSS-EXAMINATION

19 BY MS. MILLER:

20 **Q** Afternoon, Ms. Davis.

21 Before Saturday you had not visited Brookhaven

22 Rail Terminal; is that correct?

23 **A That's correct.**

24 **Q** You submitted two declarations in support of the

25 Town's motion; is that correct?

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**Davis-Cross/Miller**

73

1 site; is that correct?

2 **A I have reached an opinion regarding potential**

3 **environmental harm that could occur, yes.**

4 **Q** Potential environmental harm.

5 You found there is potential threats to the

6 aquifer?

7 **A Yes.**

8 **Q** And do you know before the Town filed this motion, do

9 you know whether anyone from the Town ever expressed any

10 concerns to any of the Brookhaven Rail Terminal defendants

11 regarding the aquifer?

12 **A I don't know whether any such opinion was expressed.**

13 **Q** Let's talk about the sites specifically.

14 Brookhaven Rail Terminal is located in Suffolk

15 County; is that correct?

16 **A Yes.**

17 **Q** All of Suffolk and Nassau County are situated on top

18 of the aquifer?

19 **A All of Suffolk and Nassau County are situated on top**

20 **of some of the aquifer, yes.**

21 **Q** The aquifers underlie all of Nassau and Suffolk

22 County may be a better way to ask that.

23 **A Yes, more or less.**

24 **Q** There are, of course, properties in Suffolk County

25 over the aquifer that sit naturally at elevations of 50 or

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- 1 lower; is that correct?  
 2 **A Yes.**  
 3 **Q** Specifically there are commercial or industrial  
 4 properties throughout Suffolk County that are at an  
 5 elevation of 50 or lower?  
 6 **A Correct.**  
 7 **Q** You haven't conducted any analysis as to whether  
 8 these commercial or industrial properties were natural  
 9 elevations of 50 or lower or whether there was grading  
 10 done at those properties; is that correct?  
 11 **A Unless I was involved in an evaluation of a specific**  
 12 **property, no, I wouldn't.**  
 13 **Q** You spent some time talking about the fact that  
 14 Brookhaven Rail Terminal is located in what is referred to  
 15 as hydrogeologic zone three; is that correct?  
 16 **A Yes.**  
 17 **Q** And that zone was set by a zoning board; is that  
 18 accurate?  
 19 **A The zone as I understand it was established in the**  
 20 **208 study. It may have subsequently been implemented by**  
 21 **some sort of regulatory body.**  
 22 **Q** It was assigned zone three in approximately 1978; is  
 23 that correct?  
 24 **A That is my understanding of when the 208 study was**  
 25 **published, yes.**

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- 1 **A I would say that there has been excavation occurring**  
 2 **on the property. I would say that there has been**  
 3 **placement of piles of material on the property that did**  
 4 **not originate on the property, such as the historic fill**  
 5 **we have been discussing, as well as piles of asphalt.**  
 6 **Q** Let's focus on the grading or activation, okay?  
 7 You are taking issue with the loss of filtering  
 8 capacity; is that correct?  
 9 **A That is one of my focus, yes.**  
 10 **Q** And vegetation is removed and sand comes out of the  
 11 property, and then there is less filtration to the surface  
 12 of the land and the aquifer; is that correct?  
 13 **A That is the general context, yes.**  
 14 **Q** Any grading whatsoever removes filtration. Would you  
 15 agree with that?  
 16 **A I think you and I perhaps use the term "grading"**  
 17 **differently.**  
 18 **Grading to me means modifying elevation. It**  
 19 **doesn't necessarily mean removing material.**  
 20 **Q** How about any excavation whatsoever removes  
 21 filtration; is that correct?  
 22 **A Any excavation of clean native material reduces the**  
 23 **amount of filtration.**  
 24 **Q** And in your experience do most construction projects  
 25 involve excavation?

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- 1 **Q** And zone three is referred to as the deep flow  
 2 recharge area?  
 3 **A I believe that is the terminology, yes.**  
 4 **Q** How large is this zone three area?  
 5 **A It is quite extensive.**  
 6 **Q** Can you approximate the site?  
 7 **A I'm not sure I could assign a number of square miles**  
 8 **to it. But I know it extends from the eastern or western**  
 9 **portion of Suffolk County onto the Shinnecock inlet.**  
 10 **Q** Would you agree that there are other commercial or  
 11 industrial properties in Suffolk County located at zone  
 12 three?  
 13 **A I would, yes.**  
 14 **Q** For purposes of your testimony today, you haven't  
 15 conducted any analysis as to whether there are other  
 16 commercial or industrial properties within zone three that  
 17 are elevation of 50 or lower?  
 18 **A Not specifically with respect to the matter at hand,**  
 19 **no.**  
 20 **Q** You understand that the only current activity taking  
 21 place on the site is grading; is that correct?  
 22 **A I would not characterize that as only grading, no.**  
 23 **Q** Is it fair to say you have no evidence if other  
 24 activity is going on -- occurring on the front aside from  
 25 grading?

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- 1 **A Most construction projects involves some earth**  
 2 **moving. In some cases there are excavations. In other**  
 3 **cases there is an increase in elevation.**  
 4 **Q** Many construction projects involve excavating  
 5 material out, for example, to lay a foundation, or to lay  
 6 a subsurface; is that correct?  
 7 **A Yes.**  
 8 **Q** Removal of filtration is only an issue if there are  
 9 contaminants present?  
 10 THE COURT: Repeat your question.  
 11 **Q** Removal of filtration is only a danger to the aquifer  
 12 if there is contaminants present that can penetrate the  
 13 aquifer?  
 14 THE COURT: Can you answer that?  
 15 **A Removal of filtration is important if there are**  
 16 **introduced contaminants. Filtration is also important for**  
 17 **contaminants that naturally occur in storm water.**  
 18 **Q** But the act of excavation by itself does not  
 19 introduce contaminants to the aquifer?  
 20 **A If we observe the maintenance of excavation**  
 21 **equipment, I'm not sure we can make that statement.**  
 22 **In a typically clean world the excavation itself**  
 23 **would not introduce contaminants.**  
 24 **The introduction of heavy equipment needed for**  
 25 **excavation often introduces contaminants.**

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**Davis-Cross/Miller**

78

1 **Q** So in that situation it is the equipment itself that  
 2 poses a threat of contamination?  
 3 **A** **The maintenance of that equipment, yes.**  
 4 **Q** But the act of adding sand or soil to a site doesn't  
 5 actually prevent the contamination of the aquifer?  
 6 **A** **Adding of clean materials could, you know, avoid some**  
 7 **contaminations.**  
 8 **Q** But just add four layers -- more layers of  
 9 filtration. Is that correct?  
 10 **A** **If you added clean materials you could add more**  
 11 **layers of filtration.**  
 12 **Q** Turn to your first declaration, please, which is  
 13 Exhibit H.  
 14 I want to direct your attention to page 3. And  
 15 in the carry-over paragraph you refer to eventual  
 16 commercial/industrial activity to be conducted within  
 17 parcel C. Do you see that?  
 18 **A** **Yes, I do.**  
 19 **Q** And that at the end of that carry-over paragraph you  
 20 mention again, certain eventual uses of the BRT site will  
 21 also likely impact the aquifer.  
 22 Do you see that?  
 23 **A** **I do.**  
 24 **Q** And you are saying "eventual" there because there are  
 25 currently no commercial activities or industrial  
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**Davis-Cross/Miller**

80

1 **A** **Yes.**  
 2 **Q** And you include a definition of incompatible uses  
 3 reading, incompatible uses include uses of hazardous waste  
 4 or substances including petroleum that may ultimately be  
 5 discharged to ground water or the storage of such  
 6 substances may contaminate ground water.  
 7 Do you see that?  
 8 **A** **Yes.**  
 9 **Q** You have no specific knowledge of any hazardous waste  
 10 or substances located on the property, right?  
 11 **A** **Certainly not hazardous waste, but the equipment I**  
 12 **saw contains hazardous substances.**  
 13 **Q** And we will get to that.  
 14 Focus on the hazardous waste section. You have  
 15 no knowledge of hazardous waste being stored there?  
 16 **A** **That's correct.**  
 17 **Q** These concerns that you referenced here in your  
 18 declaration in Exhibit H are future concerns and not  
 19 current concerns?  
 20 **A** **That would be correct in terms of uses, yes.**  
 21 **Q** And in that same paragraph at the end you note that  
 22 these activities may be in contravention of federal and/or  
 23 New York environmental laws.  
 24 Do you see that?  
 25 **A** **Yes.**  
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**Davis-Cross/Miller**

79

1 activities being conducted at the site; is that correct?  
 2 **A** **I would assume that the excavation and grading,**  
 3 **screening of sand could potentially be considered an**  
 4 **industrial activity. But my statement in this case refers**  
 5 **to future uses, yes.**  
 6 **Q** And you have no specific knowledge of any future  
 7 commercial activity that will be conducted on the  
 8 property; is that correct?  
 9 **A** **Other than my understanding that there is going to be**  
 10 **a railroad track constructed on the property and**  
 11 **presumably operated as such, no.**  
 12 **Q** You have no knowledge of when the railroad track will  
 13 begin operation; is that right?  
 14 **A** **That's correct.**  
 15 **Q** Let's turn back to your declaration in the next  
 16 paragraph.  
 17 You talk about incompatible uses.  
 18 THE COURT: What is the next paragraph?  
 19 MS. MILLER: The next paragraph is Exhibit H --  
 20 THE COURT: What page?  
 21 MS. MILLER: Three.  
 22 THE COURT: All right.  
 23 **Q** It is the first full paragraph referring to  
 24 incompatible uses.  
 25 Do you see that?  
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**Davis-Cross/Miller**

81

1 **Q** Until you know what activities are actually  
 2 occurring, you can't reach a determination that they will  
 3 impact the ground water?  
 4 **A** **I would say that that is correct. I don't know when**  
 5 **that is going to happen.**  
 6 **Q** You can't reach a determination that they will  
 7 violate federal or New York environmental laws?  
 8 **A** **Not at this time, not without knowing the specific**  
 9 **use.**  
 10 **Q** Take a look at page 5 of your declaration in the  
 11 carry-over paragraph. At the top of page 5, the second  
 12 full sentence.  
 13 **A** **Yes.**  
 14 **Q** It starts: Removal of the forest and up to 50 feet  
 15 of the unsaturated zone sand above the aquifer will  
 16 significantly reduce the effectiveness of removal of  
 17 nitrogen, pathogen and other deleterious materials  
 18 typically present in sanitary and other wastes that are  
 19 discharged to on-site, underground injection control, UIC  
 20 systems.  
 21 Do you see that?  
 22 **A** **Yes.**  
 23 **Q** Putting aside your claim about the 50 feet being  
 24 removed, and I want to focus on the nitrogen, pathogen and  
 25 other deleterious materials.  
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- 1 You have not done any soil testing at the site;  
 2 is that correct?  
 3 **A Yes.**  
 4 **Q** And not any elevation, whether 50 or a hundred feet?  
 5 **A I have not performed any at the site.**  
 6 **Q** You have not collected any water samples from the  
 7 site; is that correct?  
 8 **A Yes.**  
 9 **Q** What are the reference to nitrogen, pathogen and  
 10 other deleterious materials?  
 11 **A Those references go back to the discussion above**  
 12 **concerning the sanitary waste reference.**  
 13 **Q** Concerning future activities at the site?  
 14 **A Correct.**  
 15 **Q** You attended an inspection at the site on Saturday?  
 16 **A Yes.**  
 17 **Q** And you were there for roughly two hours?  
 18 **A Yes.**  
 19 **Q** And how many photos were taken at that inspection?  
 20 **A I know there were quite a few. I don't know**  
 21 **precisely how many.**  
 22 **Q** More than a hundred?  
 23 **A I have no idea.**  
 24 **Q** We looked at Exhibit 26, which is nine of those  
 25 photos; is that correct?

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- 1 **A I don't have any specific knowledge about that, no.**  
 2 **Q** I hand you what is marked as Exhibit III.  
 3 THE COURT: I see a fourth I.  
 4 MS. MILLER: IIII.  
 5 I would ask the Court to take judicial notice  
 6 that this is a printout from the New York State Department  
 7 of Transportation website.  
 8 THE COURT: Any objection?  
 9 MR. CALICA: None, your Honor.  
 10 THE COURT: It is in evidence for purposes of  
 11 the hearing.  
 12 (Whereupon, Defendant's Exhibit IIII was  
 13 received in evidence.)  
 14 **Q** Turn to the fourth page of Exhibit IIII.  
 15 The reference is to construction practices to  
 16 reduce idling and congestion.  
 17 Do you see that?  
 18 **A Yes.**  
 19 **Q** And it talks there about use of recycled materials in  
 20 construction; is that correct?  
 21 **A Yes.**  
 22 **Q** It says the NYSDOT --  
 23 THE COURT: Rather than read it, I will accept  
 24 the New York State Department of Transportation encourages  
 25 such use.

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- 1 **A I believe there are nine in there, yes.**  
 2 **Q** Those photographs depict the -- are those the best  
 3 depictions of your current concerns on the site?  
 4 **A I'm not sure how to answer that question.**  
 5 **Q** Out of the many photographs that were taken, the ones  
 6 that are included as Exhibit 26, do those represent your  
 7 concerns -- your current concerns at the site?  
 8 THE COURT: The same objection as to form. I'm  
 9 not sure how she could answer that.  
 10 **Q** Were you involved in selecting the photographs that  
 11 would be discussed today?  
 12 **A Only very peripherally.**  
 13 **Q** Who selected the photographs?  
 14 **A I'm not sure who selected the photographs.**  
 15 **Q** Talk about the asphalt milling.  
 16 There is nothing improper about having asphalt  
 17 on a construction site; is that correct?  
 18 **A I would say specifically no.**  
 19 **Q** And they are often used in construction facilities?  
 20 **A Asphalt is used in many facilities.**  
 21 **Q** And asphalt millings are recycled materials; is that  
 22 correct?  
 23 **A That is my understanding, yes.**  
 24 **Q** Do you know whether the New York State Department of  
 25 Transportation encourages the use of recycled asphalt?

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- 1 **Q** It specifically lists asphalt.  
 2 Do you see that?  
 3 **A Yes, I do.**  
 4 **Q** Asphalt is often used as a top fill on roads; is that  
 5 correct?  
 6 **A I would assume so, yes. I'm not an expert in road**  
 7 **construction.**  
 8 **Q** And it is commonly used for temporary roads at  
 9 construction sites?  
 10 **A I'm not sure I can speak to that.**  
 11 **Q** Did you see asphalt in use on parcel B and C for  
 12 temporary roads?  
 13 **A I did see asphalt in use for what would be temporary**  
 14 **roads.**  
 15 **Q** It creates a stable surface for vehicles to travel  
 16 across; is that correct?  
 17 **A Presumably that is the purpose.**  
 18 **Q** More stable than sand, for example?  
 19 **A I would assume so.**  
 20 **Q** Are you familiar with Bowne, B-O-W-N-E?  
 21 **A In terms of --**  
 22 **Q** Are you familiar with the construction firm, Bowne?  
 23 **A Yes.**  
 24 **Q** And have you worked with them before?  
 25 **A I don't recall any specifics of that.**

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Davis-Cross/Miller

86

1 **Q** Are you aware that Bowne was hired by the Brookhaven  
 2 Rail Terminal defendants to provide construction -- were  
 3 you aware that the Brookhaven Rail Terminal retains Bowne  
 4 to provide construction expertise on parcels B and C?  
 5 **A** I'm aware that there is a plan, a site plan, and that  
 6 it has the Bowne name affiliated with it. That is the  
 7 extent of my knowledge.  
 8 **Q** Do you know that Bowne was providing twice a month  
 9 updates to the Town regarding the construction on parcels  
 10 B and C?  
 11 **A** I would have no knowledge of that.  
 12 **Q** Have you reviewed any reports provided to the Town  
 13 from Bowne regarding the construction of parcel B and C?  
 14 **A** Not that I'm aware of.  
 15 **Q** You have it in your report in which Bowne indicates  
 16 that the site is well maintained?  
 17 **A** I haven't seen any reports to that effect or any  
 18 other effect.  
 19 **Q** Are you surprised that Bowne has not taken any issue  
 20 with the present asphalt on the site?  
 21 MR. CALICA: Objection.  
 22 THE COURT: Objection sustained.  
 23 Let's move on.  
 24 **Q** Let's talk briefly about the discharge.  
 25 Are you familiar with the zoning ordinances  
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Davis-Cross/Miller

87

1 within the Town of Brookhaven?  
 2 **A** I'm not familiar with any specific zoning ordinances.  
 3 **Q** Are you familiar with the concept of the zoning  
 4 ordinances?  
 5 **A** Yes.  
 6 **Q** And are you aware that parcel B and C are zoned as  
 7 industrial properties?  
 8 **A** I was not aware of the zoning, no.  
 9 **Q** And is that something you would want to look at when  
 10 you are conducting an analysis on -- as to the  
 11 environmental uses of the property?  
 12 THE COURT: Objection sustained.  
 13 Move on.  
 14 **Q** Even though -- well, other industrial sites aside  
 15 from parcel B and C, they are also located in zone three,  
 16 face issue with respect to ground water; is that correct?  
 17 **A** I would assume that any zone or any parcel in hydro  
 18 zone three would have issues with respect to that.  
 19 **Q** Are you familiar with the I 495 storm water retention  
 20 basin located nearby?  
 21 **A** I'm aware that there is a storm water retention basin  
 22 presumably associated with I 495.  
 23 THE COURT: Is that the square cutout on the  
 24 north quarter of the property?  
 25 THE WITNESS: Yes.  
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Davis-Cross/Miller

88

1 **Q** And this is the I 495 basin present in some of the  
 2 plans that you reviewed; is that correct?  
 3 **A** Yes.  
 4 **Q** And the highway storm water retention basin is to  
 5 collect and recharge roadway runoff; is that correct?  
 6 **A** That is the primary function.  
 7 THE COURT: In that context, what do you mean by  
 8 recharge?  
 9 THE WITNESS: What I'm talking about is the  
 10 recharging of storm water runoff from the highway to the  
 11 aquifer primarily as a means to recharge quantity of water  
 12 and to manage storm water from the roadway. Obviously you  
 13 can't leave the storm water sitting on the roadway. That  
 14 would be a hazard.  
 15 **Q** The state built the basin; is that correct?  
 16 **A** I have no idea who built the basin. Presumably  
 17 whoever built 495 built it.  
 18 **Q** As you consider whether the basin poses more concern  
 19 for a long-term entry point for potential contaminants  
 20 into the aquifer than the current --  
 21 **A** That is a very big question. But I think in the case  
 22 of this we are talking about a very small storm water  
 23 basin relative to the surface area of parcels B and C.  
 24 **Q** But the basin is located within five feet of the  
 25 water table; is that correct?  
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Davis-Cross/Miller

89

1 **A** I don't know what the elevations of the basin is.  
 2 And I don't know what the material is at the bottom of the  
 3 basin either.  
 4 **Q** Do you know whether it is lower than the current  
 5 proposed 50 foot elevation grade at parcel B and C?  
 6 **A** I don't know that.  
 7 **Q** How about the Long Island Rail Road -- were you aware  
 8 of the Long Island Rail Road going down to an elevation of  
 9 69.4 at the southeast corner of parcel C?  
 10 **A** I was aware that the Long Island Rail Road decreases  
 11 in elevation towards the southeast corner. I didn't know  
 12 exactly what elevation it is presently at the southeast  
 13 corner.  
 14 **Q** The Long Island Rail Road is actually running rail  
 15 cars right now?  
 16 **A** I'm not out there to observe that. But I would  
 17 assume that that would be the case.  
 18 **Q** As opposed to future running of rail cars that you  
 19 are concerned about in parcels B and C?  
 20 **A** It is not just the future running of rail cars. It  
 21 is the entire collection of industrial activity that would  
 22 be the concern.  
 23 **Q** Do you consider whether the expansion proposed by the  
 24 Long Island Rail Road is greater than the threat posed of  
 25 the current activity at the Brookhaven Rail Terminal?  
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- 1 **A Are you asking me, did I observe that or should I**  
 2 **opine on that.**  
 3 **Q Did you consider that?**  
 4 **A I didn't consider that question specifically.**  
 5 **Q Are you aware that there is a farm immediately to the**  
 6 **east of the Brookhaven Rail Terminal site?**  
 7 **A I was aware that there is an agricultural property to**  
 8 **the east.**  
 9 **Q The storm water infiltrating to the water table from**  
 10 **the Brookhaven rail site is unlikely to contain more**  
 11 **contaminants than the farm; would you agree?**  
 12 **A I think it would be a highly speculative comment**  
 13 **without examining what went on in the farm relative to**  
 14 **what is going to go on at the rail terminal site.**  
 15 **Q You would have to know what is going to occur just**  
 16 **like what is going to occur at the farm property?**  
 17 **A I would have to know what is going to occur if I were**  
 18 **going to opine about specific contaminants on the**  
 19 **Brookhaven Rail Terminal site. But it is obvious the site**  
 20 **is going to be developed with a railroad use, which**  
 21 **involves contaminants. And I don't think that this is**  
 22 **happening in residential use out there. I presume it**  
 23 **would be a commercial or industrial use.**  
 24 **Q In your declaration you refer to the Caithness**  
 25 **Energy facility; is that correct?**

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 OFFICIAL COURT REPORTER*

- 1 **other document, I believe.**  
 2 **Q So the SWPPS is something you did not consider?**  
 3 **A I'm aware there was a storm water prevention plan.**  
 4 **Q Are you aware that there is a spill prevention and**  
 5 **containment plan?**  
 6 **A I'm not aware at this time.**  
 7 **Q And that thereby is not something you considered in**  
 8 **your analysis?**  
 9 **A I'm not aware of it, no.**  
 10 **Q If you knew that there was a SWPPS, could it change**  
 11 **your plan?**  
 12 **A As I didn't see much out there in the way of measures**  
 13 **that I would expect to see implemented under a stop water**  
 14 **improvement prevention plan. I'm not sure it would change**  
 15 **my opinion.**  
 16 **Q You have not looked at one?**  
 17 **A I would have to look first. But I did look to see**  
 18 **what measures were out there when I did the site**  
 19 **inspection on Saturday.**  
 20 **Q You referred throughout the declaration to removing**  
 21 **up to 50 feet of clean sand; is that correct?**  
 22 **A I believe I have, yes.**  
 23 **Q Do you know whether there are areas on the site that**  
 24 **exist at a natural elevation of between 50 and 60 feet**  
 25 **elevation?**

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- 1 **A Yes.**  
 2 **Q You use it as a comparative point?**  
 3 **A I would have to refresh myself to exactly what I**  
 4 **said.**  
 5 **Q It is page 5 of your declaration.**  
 6 **A Yes.**  
 7 **Q The Caithness facility is located just next to the**  
 8 **Brookhaven Rail Terminal; is that correct?**  
 9 **A I understand it is in close proximity.**  
 10 **Q With regard to the construction that occurred at**  
 11 **Caithness, the soil was disrupted?**  
 12 **A Presumably soil was disrupted.**  
 13 **Q But there were a number of engineering and**  
 14 **operational controls that were put in place -- let me ask**  
 15 **it again.**  
 16 **There were a number of countermeasures in place?**  
 17 **A I understand they reuse the soil they excavated as**  
 18 **fill and topsoil to the extent that they could.**  
 19 **Q Did you look at any specific countermeasures in place**  
 20 **at Brookhaven Rail Terminal at parcels B and C?**  
 21 **A I'm not sure what you mean by specific**  
 22 **countermeasures.**  
 23 **Q Did you look at a storm water pollution prevention**  
 24 **plan referred to as a SWPPS?**  
 25 **A I don't believe I have, unless it was part of some**

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- 1 **A Yes. There are such areas.**  
 2 **Q And for those areas they would be lowered by ten feet**  
 3 **or less?**  
 4 **A Presumably.**  
 5 **Q And those are already naturally less filtration**  
 6 **than -- in those areas than higher elevation?**  
 7 **A There is less filtration of the thickness of the sand**  
 8 **and gravel. But there are the existing force and natural**  
 9 **topsoil at the surface that would provide the filtration,**  
 10 **and presumably would be removed during construction.**  
 11 **Q Do you know what percent of the property currently**  
 12 **has been cleared of vegetation?**  
 13 **A I would have to look at an aerial photograph showing**  
 14 **the current situation to estimate that.**  
 15 **Q Do you have a --**  
 16 **A I would say approximately half.**  
 17 **Q Are you aware that only 30 percent of the site would**  
 18 **be subject to greater than 20 feet of sand removal?**  
 19 **A I haven't done that particular calculation.**  
 20 **Q Have you looked to see whether less than 15 percent**  
 21 **of the site would require 50 feet of removal?**  
 22 **A I hadn't looked at that specific question.**

23 THE COURT: You are saying less than 15 percent  
 24 would be subject to 50 feet? And what did you say?

25 MS. MILLER: One five, 15 percent.

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Davis-Cross/Miller  
94

1 THE COURT: Would be what? There are too many  
2 negatives in there.

3 MS. MILLER: Would require 50 feet of removal.  
4 THE COURT: Got it.

5 **Q** Let's turn to the Carmans River.  
6 **A** Yes.  
7 **Q** It is fed by ground water?  
8 **A** **Primarily fed by ground water, yes.**  
9 **Q** Do you know how long the flow path to the river is  
10 from the Brookhaven Rail Terminal site?  
11 **A** **It appears to be somewhere between a mile and two**  
12 **miles.**  
13 **Q** And there are a number of intervening lands between  
14 the Brookhaven Rail Terminal site and the Carmans River;  
15 is that correct?  
16 **A** **Correct.**  
17 **Q** Among those are Caitheness, C-A-I-T-H-E-N-E-S-S,  
18 Energy Facility closest to the Carmans River?  
19 **A** **I would need to have you show me that on the map.**  
20 **But my understanding is that the Caitheness is not in the**  
21 **direct path as well.**  
22 **Q** How did you reach that understanding?  
23 **A** **By knowing the direction of the ground work flow onto**  
24 **the area.**  
25 **Q** The Suffolk County farm is closer to the Carmans  
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*OFFICIAL COURT REPORTER*

Davis-Cross/Miller  
95

1 River; is that correct?  
2 **A** **That is correct.**  
3 **Q** So any rain water would enter any of these nearby  
4 properties could enter the ground and ultimately get  
5 discharged into the Carmans River?  
6 **A** **In the shallow water table, yes.**  
7 **Q** Are you aware that the Long Island Rail Road runs  
8 directly over the Carmans River?  
9 **A** Yes.  
10 **Q** Let's take a look at Exhibit 27, which is the excerpt  
11 from the Carmans River Conservation and Management Plan.  
12 **A** **Is that provided to me?**  
13 **Q** It should be among the Town's exhibits.  
14 **A** **This one?**  
15 **Q** Yes.  
16 Please turn to page 77.  
17 Do you see where it says the third paragraph  
18 down, unless zoning ordinances are amended in -- I think  
19 it should be to include, site clearance regulation that  
20 limits the extent of law area, future nitrate lows in the  
21 recharge water may receive six milligrams a year.  
22 Do you see that?  
23 **A** Yes.  
24 **Q** Currently, at least as of the date of this document,  
25 that is October 2013, the Town's ordinances do not include  
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*OFFICIAL COURT REPORTER*

Davis-Cross/Miller  
96

1 these regulations?  
2 **A** **Well, it specifically amends the zoning ordinances to**  
3 **include site clearance regulations that limit the extent**  
4 **of law, but it -- I believe it is or should be lawn,**  
5 **L-A-W-N, areas.**  
6 **So my understanding how to read this would be**  
7 **the limiting of the extent of lawn areas, not a site**  
8 **clearance.**  
9 **Q** You believe that is referring to grass?  
10 **A** Yes.  
11 **Q** And that is just a typo?  
12 **A** Yes.  
13 **Q** Let's turn to page 78.  
14 At the top bullet point it says that the Town of  
15 Brookhaven should implement the following zoning  
16 recommendations:  
17 Eliminate spot zoning in order to prevent the  
18 juxtaposition of non-compatible land uses such as high  
19 intensity uses within the historic district, the scenic  
20 i.e. Carmans, Peconic, or next to public open space lands,  
21 and certain commercial and industrial uses adjacent to  
22 residential areas?  
23 It goes on to adopted restricted categories for  
24 restricted and commercial uses.  
25 Do you see that.  
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Davis-Cross/Miller  
97

1 **A** **I do.**  
2 **Q** So as of October 2013, this was just a recommendation  
3 to adopt more restrictive zoning?  
4 **A** **I would assume that is the case, yes.**  
5 THE COURT: Does any of this apply to -- the  
6 parcel of land in question, would it be in one of these  
7 areas, the scenic, the river space corridor, etcetera,  
8 does it affect this piece of land, that legislation?  
9 THE WITNESS: My understanding is that this  
10 piece of land is not within the corridor. But it is very  
11 closely adjoining.  
12 THE COURT: Okay.  
13 Counsel, are you almost done?  
14 MS. MILLER: A few more questions.  
15 **Q** Are you familiar with the term "time of travel to  
16 Carmans River"?  
17 **A** Yes.  
18 **Q** And this is a measure of the time the water travels  
19 from the time it enters the ground water system as  
20 recharged, where it is discharged into the Carmans River;  
21 is that correct?  
22 **A** **That would be for ground water, I believe, traveling**  
23 **in the uppermost portion of the Upper Glacial.**  
24 **Q** And there is a study done to determine how long it  
25 takes water to travel from different areas in the county;  
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1 is that correct?

2 **A Different areas the discharge to the Carmans River.**

3 **Q** Would you please turn to Exhibit HHHH.

4 (Handed to the witness.)

5 THE COURT: Is triple H a photograph?

6 MS. MILLER: Quadruple H.

7 THE COURT: I apologize, quadruple H.

8 **Q** Are you familiar with the environmental impact study

9 performed for the Caitheness Energy Center?

10 **A I had occasion to review portions of it.**

11 **Q** Within the Town of --

12 THE COURT: Counsel, move on.

13 **Q** Take a look at figure 12-6.

14 **A Yes.**

15 THE COURT: Is there a page on that?

16 MS. MILLER: There is no page number.

17 It is this colored --

18 THE COURT: How about a BRT number?

19 THE WITNESS: It is five pages after 12-9.

20 **Q** Figure 12-6 has the time travel for water to the

21 Carmans River in zones by color; is that correct?

22 **A It depicts, as I understand it, the time of travel**

23 **for ground water for the uppermost portion of the Upper**

24 **Glacial.**

25 **Q** And figure 12-6 shows the -- in red outlining the

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1 Caitheness Energy facility?

2 **A Yes.**

3 **Q** And that is over the blue -- the darker blue zone of

4 25 to 50 years?

5 THE COURT: For your reference, mine is black

6 and white, so I have little idea what you are talking

7 about.

8 Is it the point that Caitheness is in the way

9 between this site and the river?

10 MS. MILLER: The Brookhaven terminal is directly

11 before Caitheness.

12 THE COURT: And looking at that, does it tell

13 you whether or not Caitheness is closer to the river?

14 THE WITNESS: I can tell you that looking at

15 that diagram and the one before, that with respect to the

16 direction of ground water flow, Caitheness is not down

17 from the Brookhaven terminal, not down radiant. It is

18 cross radiant.

19 **Q** For purposes of the time of travel to the Carmans

20 River, Brookhaven Rail Terminal site is the triangle

21 located -- do you see that triangle above the Caitheness

22 facility?

23 **A The triangle would be parcel A.**

24 **Q** And to the left of that is parcel B and C; is that

25 right?

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1 **A To the right is parcel B and C.**

2 **Q** And those are in the light blue area, which is 10 and

3 25 years for time of travel; is that correct?

4 **A That is correct.**

5 **Q** Have you heard the term, the zone of concern?

6 **A I am not familiar with it as you are using it.**

7 **Q** Is it true that the area of concern for sites located

8 for time of travel to Carmans River is five years or less?

9 **A I'm not sure what context you are using that in.**

10 **Q** Looking at the red area in this image and the yellow

11 area, those are much closer than the Carmans River; is

12 that correct?

13 **A That is correct.**

14 **Q** It is more concerned if the site was in the red or

15 yellow area; is that correct?

16 **A Not from a hydrogeologic perspective. It really**

17 **depends on the kinds of contaminants we are talking about.**

18 **If we are talking about contaminants that degrade in a**

19 **short period of time, that may be true. But if we are**

20 **talking about contaminants that have a long resident time**

21 **in the aquifer, that is simply not true. Salt, for**

22 **example, is one of the contaminants that has a very long**

23 **residence time and does not degrade with the time. So the**

24 **time of travel is almost immaterial.**

25 **Q** There is no salt currently located on parcels B and

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1 C; is that correct?

2 **A I didn't observe any piles of salt. But I haven't**

3 **seen the site plan -- I have seen a site plan that shows**

4 **potential salt storage.**

5 **Q** In the future; is that correct?

6 **A Yes, in the future, yes.**

7 THE COURT: How much more do you have, counsel?

8 MS. MILLER: Maybe ten more minutes, your Honor.

9 THE COURT: Okay.

10 **Q** You mentioned that you are informed that the zoning

11 requirements for our investigation is 30 percent; is that

12 correct?

13 **A Yes.**

14 **Q** And you are currently on the 93 acre site, and how

15 much vegetation remains as a percentage?

16 **A Maybe 50 percent, maybe less.**

17 **Q** And you say you were informed, and informed by whom?

18 THE COURT: As to what?

19 MS. MILLER: The zoning requirement.

20 **A I believe I was informed by counsel.**

21 **Q** And you don't have any opinion as to whether

22 Brookhaven Rail Terminal is subject to the rail ordinance?

23 THE COURT: Objection sustained.

24 Move on.

25 **Q** We were talking about Exhibit 8-B earlier when you

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1 were talking with counsel about it. And that is the  
 2 Gannette Flemming environmental overview.  
 3 You notice that it is hard to say as to what  
 4 percent there would be a negative impact. Do you recall  
 5 that?  
 6 **A I believe there was some such testimony.**  
 7 **Q** Any type of countermeasures needed would depend on  
 8 what type of facilities are ultimately built on the site;  
 9 is that correct?  
 10 **A Typically you do the countermeasures depending on**  
 11 **what is constructed.**  
 12 **Q** We talked about the track configuration earlier this  
 13 morning. And you were referring to the J track design.  
 14 Do you recall that?  
 15 **A Yes.**  
 16 **Q** And that was the designed J track; is that correct?  
 17 **A I heard it called the J track design.**  
 18 **Q** You said you could not quantify the environmental  
 19 impact from the J track design. Do you remember that?  
 20 **A That's correct, I have not calculated the impact.**  
 21 **Q** But you felt it would be less of an issue with the J  
 22 track than the O track; is that right?  
 23 **A Certainly the J track design showed far less**  
 24 **excavation and removal of forest, removal of soil, removal**  
 25 **of native sand and gravel.**

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1 **A I did not see any salt stored at the site. I have no**  
 2 **idea what happened during this winter in terms of salt**  
 3 **application to the surface.**  
 4 **Q** Let me turn to the anthropogenic debris.  
 5 **A Yes.**  
 6 **Q** There are two separate areas where you noted debris?  
 7 **A There were three piles, three areas of piles.**  
 8 **Q** And you don't know how the debris arrived at the  
 9 site; is that correct?  
 10 **A Presumably it didn't fly in. So I assume it was**  
 11 **brought in by truck.**  
 12 **Q** You are not aware of what the plans are for debris;  
 13 is that correct?  
 14 **A No.**  
 15 **Q** In the area where you viewed the piles, do you know  
 16 whether those are at final grade?  
 17 **A I don't know they are at the final grade, depending**  
 18 **on what eventual final grade is decided here. But they**  
 19 **appear to be on portions of the site that may not be fully**  
 20 **excavated yet.**  
 21 **Q** And how about a sampling of the debris as to whether  
 22 there are actual contaminants in the debris; is that  
 23 correct?  
 24 **A I did observe the anthropogenic material we**  
 25 **discussed, the metal, the glass, the bone, whatever, the**

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1 **Q** Is there any imminent harm to allow the Brookhaven  
 2 Rail Terminal defendants to continue operating in the J  
 3 track area?  
 4 **A The J track area includes area currently forested.**  
 5 **They are not cleared. The soil has not been removed.**  
 6 **So in my opinion, yes, there could be harm from**  
 7 **continued clearing in the J track area.**  
 8 **Q** Are you aware of any regulations, statutes or  
 9 ordinances that forbid the Brookhaven Rail Terminal  
 10 defendants from grading the track area?  
 11 **A I'm not aware of any such ordinances.**  
 12 **Q** You talked about the presence of the salt storage  
 13 facility; is that correct?  
 14 **A We did discuss potential salt storage facility shown**  
 15 **on the plans.**  
 16 **Q** Would you say you did not see any construction of the  
 17 salt construction facility?  
 18 **A I did not.**  
 19 **Q** So there is no current salt inclusion in the present  
 20 BRT site?  
 21 **A I have no way of knowing if salt was applied to the**  
 22 **surface to the BRT site, for example, during the winter we**  
 23 **just experienced. So I have no way of saying one way or**  
 24 **another.**  
 25 **Q** Whether there is currently salt at the site?

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1 **pipe. But without sampling, I wouldn't know if there are**  
 2 **particular levels of compounds or metals in the soil.**  
 3 **Q** You are concerned about potential contaminants, but  
 4 you have no evidence of actual contaminants at the site?  
 5 **A I have no chemical analytical data regarding**  
 6 **contaminants in the historic fill at the site.**  
 7 MS. MILLER: No further questions.  
 8 THE COURT: I have a question for you.  
 9 You mentioned something about sand sifting  
 10 before, or sand interpretation activities.  
 11 Did you observe such things or are you supposing  
 12 such things?  
 13 THE WITNESS: What I observed are I believe four  
 14 setups of screens and trammels. These are pieces of  
 15 equipment that are used to segregate sand from larger  
 16 materials, such as gravel or cobbles, or trees, or  
 17 whatever.  
 18 There were piles of sand separated from gravel  
 19 beneath certain portions of this equipment where I would  
 20 normally expect to see, if the equipment had been  
 21 operated.  
 22 I did not see any operation going on at the time  
 23 I was there.  
 24 THE COURT: On Saturday?  
 25 THE WITNESS: On Saturday.

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106

1 THE COURT: Good.  
 2 You can step down.  
 3 We will take a lunch break. Before we do, I  
 4 would like to know who is your next witness.  
 5 MR. CALICA: I'm going to call Commissioner  
 6 Minor, and then I will call their witness --  
 7 MR. ARONOFF: No, Judge.  
 8 It is our understanding he will finish the case  
 9 and we will call our witness, we will call Mr. Humbert as  
 10 part of our defense. I don't understand why he is taking  
 11 him out of turn. It is our expert.  
 12 THE COURT: It is his burden of proof -- you say  
 13 it is your expert?  
 14 MR. ARONOFF: Our expert, sir.  
 15 THE COURT: Your expert for the case or expert  
 16 in connection with this project?  
 17 MR. ARONOFF: The answer is both. He helped to  
 18 do the track design. He is also our expert on the  
 19 engineering behind it.  
 20 THE COURT: He can call him if he wants.  
 21 So you have those two witnesses and that is it?  
 22 MR. CALICA: No. I believe that I may have one  
 23 or two of the engineers that have been identified. I  
 24 identified Town engineer Greg Kelsey, and I have  
 25 identified Kevin Loyst, and I may or may not require his  
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107

1 testimony after I examine Mr. Humbert.  
 2 THE COURT: Commissioner Minor you are calling  
 3 for what purpose or purposes?  
 4 MR. CALICA: To show what track plan is shown to  
 5 the Town.  
 6 THE COURT: And should be pretty short.  
 7 MR. CALICA: Yes.  
 8 THE COURT: The defendant's expert you will  
 9 call --  
 10 MR. CALICA: To establish what they are doing  
 11 and what they are building. We have no other means of  
 12 doing it.  
 13 THE COURT: And the other two gentlemen would  
 14 relate to communications?  
 15 MR. CALICA: No. Commissioner Kelsey would be  
 16 incidental to the two -- sorry, Town engineer Kelsey might  
 17 address certain engineering aspects of the testimony, and  
 18 also notice to the Town because he was directly involved  
 19 in interactions with the BRT defendants.  
 20 THE COURT: After that who are you going to  
 21 call?  
 22 MR. ARONOFF: We are going to call Can Miller  
 23 and Jim Newell. We will call Jim Newel first.  
 24 THE COURT: One is the CFO.  
 25 MR. ARONOFF: Yes, Dan Miller.  
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108

1 Then we were going to call Mr. Humbert, our  
 2 expert.  
 3 THE COURT: Okay.  
 4 MR. ARONOFF: And that is it.  
 5 THE COURT: Good.  
 6 Let's reconvene at 2:00 o'clock.  
 7 (Luncheon recess.)  
 8  
 9  
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**Miner-Direct/Calica**

109

1 AFTERNOON SESSION  
 2  
 3  
 4 MR. CALICA: The plaintiff now calls Matthew J.  
 5 Minor.  
 6 THE COURT: Please step up to the witness stand  
 7 to be sworn in.  
 8 THE CLERK: Please raise your right hand.  
 9  
 10 MATTHEW MINER,  
 11 called as a witness, having been first  
 12 duly sworn, was examined and testified  
 13 as follows:  
 14 THE CLERK: Please state and spell your name for  
 15 the record.  
 16 THE WITNESS: Matthew, M-A-T-T-H-E-W, Miner,  
 17 M-I-N-E-R.  
 18 THE COURT: Please proceed.  
 19  
 20 DIRECT EXAMINATION  
 21 BY MR. CALICA:  
 22 Q Good afternoon, Mr. Miner.  
 23 Do you hold an appointed position or positions  
 24 in -- with the plaintiff?  
 25 A Yes, Commissioner of Waste Management and also the  
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- 1 **Chief of Operations, in-house designation, but I am**  
 2 **appointed as Commissioner of Waste Management.**  
 3 **Q** What are your duties and responsibilities as chief of  
 4 operations?  
 5 **A Assist in the day-to-day operations of the**  
 6 **supervisor's office, administration of the Town, working**  
 7 **with both department heads throughout the Town.**  
 8 **Q** For how long have you held that position?  
 9 **A Since January 2010.**  
 10 **Q** Have you held a prior position in the Brookhaven Town  
 11 government in prior years?  
 12 **A Yes.**  
 13 **In approximately 2004 to 2006 I held several**  
 14 **positions, including Waste Management Commissioner,**  
 15 **Building Commissioner and Deputy Supervisor.**  
 16 **Q** And in your professional career, have you also held  
 17 administrative positions in any other towns on Long  
 18 Island?  
 19 **A Yes.**  
 20 **I was in the Town of North Hempstead for about**  
 21 **14 years with various titles, including Public Works**  
 22 **Commissioner, Waste Management Commissioner and the**  
 23 **Director of Operations. And for Suffolk County I was the**  
 24 **Deputy Commissioner of the Health Department.**  
 25 **Q** Did you have any role in the original litigation

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- 1 **Q** Is that the 28 acre parcel that now operates as the  
 2 Brookhaven Rail Terminal?  
 3 **A Yes, sir.**  
 4 **Q** Did there come a time that you had some interactions  
 5 with representatives of the Brookhaven Rail Terminal  
 6 concerning possible additional activities on the adjacent  
 7 parcel of what we referred to this morning as the 93 acre  
 8 parcel, but also named as parcels B and C on certain of  
 9 the documents in evidence?  
 10 **A Yes.**  
 11 **Q** Okay.  
 12 What was your role insofar as the Town was  
 13 concerned in dealing with the BRT representatives?  
 14 **A The representatives would come into the office, into**  
 15 **the supervisor's conference room periodically and show**  
 16 **various concepts as to what they were working on in terms**  
 17 **of a vision for the next parcels -- annexed parcels.**  
 18 **Q** With whom did you react to at the Brookhaven Rail  
 19 Terminal?  
 20 **A Jim Pratt, and to a lesser degree Andrew Kaufman and**  
 21 **Jake Watral.**  
 22 MR. CALICA: W-A-T-R-E-L?  
 23 **A I think A-L.**  
 24 **Q** All right.  
 25 Did any engineer representatives from Brookhaven

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- 1 between the BRT and the Town that went on from let's say  
 2 2007 to 2009?  
 3 **A In that time period?**  
 4 **Q** Did there come a time that you became involved in  
 5 prior pending litigation involving the BRT and the Town of  
 6 Brookhaven?  
 7 **A Yes.**  
 8 **In early 2010.**  
 9 **Q** And at whose request did you become involved?  
 10 **A Former Supervisor Mark Lesko, and former Town**  
 11 **Attorney Robert Quinlan.**  
 12 **Q** Were you involved in what ultimately became the  
 13 September 2010 settlement of the prior federal court  
 14 litigation between -- brought by the BRT against the Town?  
 15 **A Yes, sir.**  
 16 **Q** Did you attend proceedings before the Surface  
 17 Transportation Board in Washington?  
 18 **A Yes.**  
 19 **Q** And did you consult with the Town's outside counsel  
 20 on that settlement?  
 21 **A Outside counsel at that time, yes.**  
 22 **Q** What parcel was involved in the September 2010 prior  
 23 settlement?  
 24 **A It is the triangle wedge I believe referred to as**  
 25 **parcel A immediately on Sills Road.**

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- 1 Rail Terminal come to meet with you?  
 2 **A Not that I recall.**  
 3 **Q** Okay.  
 4 Were you present in court this morning when  
 5 there was testimony concerning a so-called J track option?  
 6 **A Yes, sir.**  
 7 **Q** Did there come a time that representatives of BRT  
 8 presented to you as the chief of operations of the Town  
 9 any documentation concerning a J track option?  
 10 **A Yes.**  
 11 **Q** There should be a binder or looseleaf holder of  
 12 exhibits in front of you, Commissioner Miner, and I will  
 13 ask that you look at the first page of Exhibit 1.  
 14 It is an mail from Andy Kaufman from the  
 15 Brookhaven Rail Terminal dated June 26th, 2012.  
 16 **A Yes, sir.**  
 17 **Q** Did you receive that email from Mr. Kaufman at BRT in  
 18 or about June of 2012?  
 19 **A Yes, I think I did, yes.**  
 20 **Q** It refers to Jim asked that I forward the attached.  
 21 When you turn to the next page, there is a  
 22 letter dated June 26th, 2012 in evidence from Systra  
 23 Engineering, Inc. to Mr. Kaufman.  
 24 Is that the document that was attached to the  
 25 email sent to you?

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1 **A To the best of my recollection, yes.**

2 **Q** Now, the first sentence says: The summary of our  
3 conceptual track layout prepared on 5/1/12 also known as  
4 the J track option.

5 Do you recall having received from BRT  
6 representatives a document that described the track layout  
7 as a J track option?

8 **A Yes.**

9 **Q** Okay.

10 If you continue forward in the same exhibit two  
11 pages forward, you will see a color photograph attached.

12 Is that attached to the letter from Systra  
13 provided by Andy Kaufman from BRT?

14 **A I believe so, yes.**

15 **Q** And did you understand that to be a J track option as  
16 described in the letter?

17 **A Yes.**

18 **Q** The previous letter says the total lengths of track  
19 is approximately 6,600 feet, see attached drawing or  
20 reference.

21 What was your understanding based upon the  
22 receipt of these documents as to where the track was going  
23 to come from in terms of parcel A, the 28 acre parcel, and  
24 where it was going to enter parcels B and C, the 93 acre  
25 parcel, and where it was going to end?

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1 **A It was going to come in on the southeast corner of**  
2 **parcel A, entering parcel B in the southwest corner, and**  
3 **proceed easterly along the southern perimeter of parcel B**  
4 **and C, and then hook northward along eastern perimeter of**  
5 **parcel C and proceed northward up toward the expressway.**

6 THE COURT: Do you happen to know, sir, how wide  
7 is parcel B and C also?

8 THE WITNESS: In feet, no. I know it is 93  
9 acres. I could measure it out.

10 THE COURT: The question is this: The letter  
11 that is attached here suggests the entire length of track  
12 is 6,600 feet.

13 Does that represent the length and width of the  
14 L?

15 THE WITNESS: That is what I took it to  
16 understand, the J or L referred to, yes.

17 **Q** Commissioner Miner, did you observe that the letter  
18 you received contained in the next to the last paragraph  
19 the sentence ending, the limited regrading work is  
20 necessary to set the track at proper grades and elevation  
21 for its use as well as -- as potential future connection  
22 the tracks south of the LIRR in parcel B? Did you observe  
23 that that line was there?

24 **A Yes.**

25 **Q** And did you have an understanding as to what

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1 Mr. Kaufman of BRT was proposing to you in terms of the  
2 amount of regrading work?

3 **A The purpose -- I believe the purpose of that**  
4 **paragraph was based on the discussions I had had with**  
5 **Mr. Pratt and perhaps Mr. Kaufman about limiting the**  
6 **amount of clearing needed to put down the track.**

7 I had suggested 75 foot on the center. They  
8 went back and forth. And we agreed on 150 foot pathway  
9 along the track, which would be used to install track,  
10 access for heavy equipment necessary to install the track.  
11 It was a very limited area that would be disturbed on  
12 parcel B and C.

13 **Q** By 150, do you mean 75 feet on each side and center?

14 **A Originally. I believe the final approval was based**  
15 **on 150 feet, seeing in some areas it would be 60 and 90,**  
16 **or 80 and 70. But the intent was to have a center line of**  
17 **the track and allow them to work on either side to**  
18 **facilitate track installation in that limited J track**  
19 **area.**

20 **Q** After --

21 THE COURT: When you say approval of the  
22 condition on that, whose approval and when did that issue  
23 arise?

24 THE WITNESS: I would say there was a qualified  
25 approval by me that said subject to all regulatory

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1 compliance. They still had not shown us anything from the  
2 Surface Transportation Board or from NEPA.

3 THE COURT: And what kind of approval was it?  
4 Zoning? What kind of approval are you giving them?

5 THE WITNESS: It was authorization to allow them  
6 to install that limited track area subject to NEPA and STP  
7 approval. It was my understanding that at the time we had  
8 limited oversight. But the STP and the NEPA would look at  
9 all the other federal requirements. And we only  
10 authorized the clearing of that very limited portion of  
11 both B and C.

12 THE COURT: And what is the nature -- the nature  
13 of your discussions, was it such that you were under the  
14 belief that whatever supporting buildings or warehouses or  
15 whatever would go along with this track would be within  
16 that 150 foot zone?

17 THE WITNESS: No. It was only for track  
18 purposes, BRT had various concepts, and the concepts kept  
19 evolving. They never really had a firm plan as to what  
20 they were going to put in the majority area of parcel B  
21 and C.

22 It was pretty clear they were going to install  
23 the J track area. So subject to the approval of STP and  
24 NEPA, the limited amount of clearing approval to be  
25 authorized, we allowed that narrow band to proceed.

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1 Q Did there come a time when Mr. Pratt or the
2 representatives of Brookhaven Rail Terminal told you they
3 were going to proceed to install the J track on parcels B
4 and C?

5 A Yes, shortly after, yes.

6 Q Would you look at Exhibit B -- Exhibit 2 in the
7 binder in front of you, please.

8 THE COURT: Is it already in?

9 MR. CALICA: Yes, the June 29th letter.

10 Q It is addressed to you --

11 MR. KORDAS: Offer it first?

12 MR. CALICA: I offer it now.

13 THE COURT: No objection?

14 All right. Received. Exhibit 2.

15 (Whereupon, Plaintiff's Exhibit 2 was received
16 in evidence.)

17 Q Mr. Miner, is that the letter you received from BRT
18 advising you and the Town that the construction of track
19 on parcel B and C by BRT was going to start?

20 A Yes, sir.

21 Q Let me direct your attention to the second paragraph.

22 Construction in this phase will begin with the
23 clearing and grading of the track right-of-way and
24 installation of track in accordance with the proposed,
25 quote, J track, close quote, layout, the 75 foot buffer

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1 I'm limiting my offer of Exhibit 2.

2 MR. ARONOFF: Judge, I don't mind putting in the
3 drawing that came with it. We will do it anyway.

4 THE COURT: Why not just move along and see what
5 happens.

6 MR. CALICA: I will withdraw it because I can't
7 attest to the way the documents connected the way it was
8 presented with that attachment that way. So for the
9 interest of accuracy, I will limit my offer of Exhibit 2
10 to the first page.

11 Q Now, Mr. Miner, this was not the first discussion and
12 track proposal that you had with BRT representatives, was
13 it?

14 A In terms of installation?

15 Q In terms of their track plans.

16 A They had various concepts. I don't know if any had
17 any great detail. But there were various concepts that
18 Mr. Pratt or Mr. Kaufman, or in combination, they would
19 come in and discuss throughout, I guess, 2012.

20 Q And would you look at Exhibit 22 in the binder in
21 front of you.

22 Do you see that in the binder?

23 A Yes.

24 Q It is an email dated March 29th, 2012, addressed to
25 Jim. And it appears that that is Jim Pratt, the

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1 will remain along the east property line as well as a 50
2 foot buffer at the north end track terminus.

3 Did anybody at that time from BRT tell you that
4 they were installing or constructing other than the J
5 track as described in Exhibits 1 and 2?

6 A No, sir.

7 Q If you look at the second page, is that essentially a
8 black and white picture of -- that is very similar to
9 Exhibit 1 in terms of showing what you described as a J
10 track entering the 93 acre parcel in the southwest corner,
11 going along the southern boundary and ending at the Long
12 Island Expressway?

13 A The quality of the photo is relatively poor, but I
14 believe so.

15 MR. ARONOFF: Then I object now to putting the
16 exhibit in in this way. This is not what was attached to
17 that letter.

18 MR. CALICA: I will withdraw that.

19 MR. ARONOFF: You are withdrawing the exhibit?

20 MR. CALICA: No, maybe anything other than the
21 letter. It may be the way it was assembled in our files.
22 I don't want to authenticate anything other than the
23 letter at this point.

24 THE COURT: So you are striking the diagram?

25 MR. CALICA: Correct.

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1 individual you identified as the BRT representative.

2 Did you send that email to Mr. Pratt?

3 A Yes.

4 Q In and about the end of March 2012?

5 A Yes.

6 Q Okay.

7 At the time, was that a period of time when you
8 were requesting more detail, project plan or concept plan
9 from BRT?

10 A Yes.

11 We needed something more definitive as to what
12 they were going to do, #, " ! ( % ! ! ) ! &

13 Q Okay.

14 As of March 29th, 2012, had they provided any
15 such details to you?

16 I'm directing your attention to the sentence

2 #
so5siley 2188f 6t0103845 62849a07 p83A1D57 87038478

**Miner-Direct/Calica**  
122

1 **Q** And who told you about this?  
 2 THE COURT: That strikes me -- there is no claim  
 3 here that it is for a casino, right?  
 4 MR. CALICA: Your Honor, their position is they  
 5 provided this information.  
 6 We will show that they provided us with a casino  
 7 plan.  
 8 So when we say as an offer of proof the J track  
 9 was a specific representation of what they are building.  
 10 And I said, other than that showing a casino is  
 11 the only other type of information they were doing at this  
 12 time.  
 13 THE COURT: Okay.  
 14 **Q** Did they provide you with some type of illustration  
 15 showing the possible construction of a casino by the use  
 16 of the Shinnecock Indians at the site?  
 17 **A They shared with me a drawing. I don't think they**  
 18 **allowed us to keep it. But they shared it at some point**  
 19 **for a casino and water park.**  
 20 MR. ARONOFF: If he is describing a drawing of a  
 21 picture he doesn't have, I object.  
 22 THE COURT: Show him the picture of the casino.  
 23 I don't know if it is a train stop at the casino. It is  
 24 really far afield.  
 25 MR. CALICA: It was the subject of the discovery  
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**Miner-Direct/Calica**  
123

1 agreement. I had to have it sent by photograph because  
 2 they said they couldn't produce it.  
 3 THE COURT: You have it?  
 4 MR. CALICA: Yes, it was provided by  
 5 Mr. Aronoff:  
 6 (Counsel confer.)  
 7 MR. CALICA: I will provide a copy of a  
 8 photograph presented by Mr. Aronoff's office.  
 9 May I provide a copy to your Honor?  
 10 THE COURT: Please.  
 11 MR. ARONOFF: This is not one of their exhibits.  
 12 I don't know if he is impeaching his own witness with a  
 13 document. It certainly wasn't given to us as an exhibit  
 14 before.  
 15 THE COURT: He got it from you?  
 16 MR. CALICA: Yes, Judge.  
 17 MR. ARONOFF: I don't see a Bates designation on  
 18 this, your Honor.  
 19 THE COURT: Did he send you a picture of a  
 20 casino, in fairness?  
 21 MR. ARONOFF: If I knew off the top of my head.  
 22 THE COURT: I don't know how the imaginary  
 23 casino --  
 24 MR. ARONOFF: I am told we produced it at some  
 25 point.  
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**Miner-Direct/Calica**  
124

1 THE COURT: Ask the witness if he recognizes it.  
 2 What is that?  
 3 THE WITNESS: This is a conceptual plan. It  
 4 appears the north end of it has been cut off, your Honor.  
 5 It actually extended further north. You can see a partial  
 6 of the building is cut off. But the J track is still  
 7 there along the southern end of the property, and  
 8 proceeding north along the westerly end, into a parking  
 9 garage. The casino is located right above the parking  
 10 garage. There was a water park and hotel proposed, as  
 11 well as a tribal -- historical tribal section in the lower  
 12 right-hand corner.  
 13 THE COURT: Is there an exhibit number on this?  
 14 MR. ARONOFF: No.  
 15 MR. CALICA: I would request, your Honor, it be  
 16 marked as Exhibit 28.  
 17 I do understand --  
 18 THE COURT: Exhibit 28 for identification.  
 19 Do you recognize that as the plan shown to you  
 20 or substantially similar to the casino plan shown to you?  
 21 THE WITNESS: Yes, sir.  
 22 MR. CALICA: Your Honor, when we subpoenaed the  
 23 plans, because of the accelerated discovery it was  
 24 explained to me they had large documents they could not  
 25 produce in copies or PDF.  
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**Miner-Direct/Calica**  
125

1 THE COURT: I don't care. He has it and he has  
 2 seen it.  
 3 MR. CALICA: I'm just refreshing Mr. Aronoff's  
 4 memory --  
 5 THE COURT: Mr. Aronoff is not testifying. The  
 6 witness recognizes the plan. We have the plan. I can see  
 7 the casino.  
 8 Though, in fact I was kidding, it does show the  
 9 plan covers a train to the casino.  
 10 So continue.  
 11 **Q** Does the document shown to you in 2012 show the  
 12 location of the proposed track and where on Exhibit 28 was  
 13 it expected to end?  
 14 **A The document is cut off on the northern end. My**  
 15 **recollection is it went up into the casino building which**  
 16 **is immediately north of the parking garage.**  
 17 **Q** Would that have been in the corner near the Long  
 18 Island Expressway?  
 19 **A The northeast corner, yes.**  
 20 **Q** Was the proposed track to be -- shown to be located  
 21 in any O track type of fashion? And by that I mean moving  
 22 around the remainder of the parcel?  
 23 **A The track might have shown that. I don't recall**  
 24 **without seeing the top being cut off. But I don't recall**  
 25 **an O track.**  
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**Miner-Direct/Calica**  
126

1 THE COURT: Are you offering Exhibit 28?  
 2 MR. CALICA: Excuse me, your Honor?  
 3 THE COURT: Are you offering Exhibit 28?  
 4 MR. CALICA: Yes, your Honor.  
 5 THE COURT: It is admitted.  
 6 (Whereupon, Plaintiff's Exhibit 28 was received  
 7 in evidence.)  
 8 **Q** Mr. Miner, during 2012, did the BRT representatives  
 9 propose any further or different uses of the 93 acre  
 10 parcel to or in your meetings with them?  
 11 **A** 2012?  
 12 **Q** Yes.  
 13 **A** They had some early concepts. They had the J track  
 14 plan, the casino. At one point it was the rendering of an  
 15 arena. I believe it was the five hour energy arena. I  
 16 don't know if there was a formal track layout plan for  
 17 that, but proposed use for the site.  
 18 **Q** Was that illustration shown to you?  
 19 **A** It was shown to me, yes.  
 20 **Q** Was a copy left with you?  
 21 **A** No, not that I recall.  
 22 **Q** Now, did you have other written communications with  
 23 the BRT representatives concerning the details for the  
 24 type of activities they were planning on the 93 acre site?  
 25 **A** I had requested documentation from the Surface  
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127

1 **Transportation Board and for environmental review.**  
 2 **Q** Would you look at Exhibit 24 in the binder, please.  
 3 Do you see the email at the top of that page?  
 4 **A** Yes, sir.  
 5 **Q** Okay.  
 6 MR. ARONOFF: There are two separate emails  
 7 included in what we have as Exhibit 24. It is not really  
 8 an objection.  
 9 (Counsel confer.)  
 10 THE COURT: Are those emails all between you and  
 11 Pratt?  
 12 MR. CALICA: Give me a moment, your Honor,  
 13 because in my set I seem to have combined something under  
 14 24.  
 15 (Whereupon, at this time there was a pause in  
 16 the proceedings.)  
 17 MR. CALICA: Because I included an email chain,  
 18 I will ask the witness to identify a particular email and  
 19 make the offer discretely addressed to the portion.  
 20 **Q** Mr. Miner, does the section that says, also while the  
 21 background and long-term regional plan are important,  
 22 etcetera, is that -- whose email is that?  
 23 **A** That is my email.  
 24 **Q** And who is Ted Mills?  
 25 **A** A gentleman connected with BRT, I don't know  
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**Miner-Direct/Calica**  
128

1 **specifically what portion of BRT.**  
 2 **Q** Did you send the portion of the first page of  
 3 Exhibit 24 that reads as follow's: Quote, also while the  
 4 background and long-term regional plan are important and  
 5 would be helpful, the immediate need is for BRT to provide  
 6 the Town with documentation from the STP which supports  
 7 and authorizes the expansion to the east?  
 8 **A** Yes, sir.  
 9 **Q** Did they ever provide you with documentation from the  
 10 Surface Transportation Board authorizing the expansion  
 11 needs?  
 12 **A** No.  
 13 **Q** And is that something you or the Town was seeking  
 14 from BRT?  
 15 **A** Consistently; yes.  
 16 MR. CALICA: I will offer that portion only of  
 17 Exhibit 24 at this time, your Honor.  
 18 THE COURT: Any objection?  
 19 MR. ARONOFF: No.  
 20 THE COURT: Admitted.  
 21 (Whereupon, Plaintiff's Exhibit 24 was received  
 22 in evidence.)  
 23 **Q** If you will continue to the last page of the email  
 24 comprising Exhibit 24, it begins, Matt Miner, 9/25, 2012.  
 25 There are three lines and it ends Jim Pratt at Pratt  
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**Miner-Direct/Calica**  
129

1 Brothers.  
 2 Is that a copy of an email from you to Jim Pratt  
 3 that you identified as a BRT representative?  
 4 **A** Yes, sir.  
 5 **Q** And was it sent on or about September 25, 2012?  
 6 **A** Yes.  
 7 **Q** All right.  
 8 Did you include the following sentence in your  
 9 letter to the BRT representative:  
 10 Thanks, Jim, dash, I appreciate the update,  
 11 period.  
 12 Have you written to or received any  
 13 correspondence from the STP or support agencies regarding  
 14 the expansion to the east? Paren, or do you need Gannette  
 15 Fleming to complete that portion first, question mark.  
 16 Did you send that?  
 17 **A** Yes.  
 18 **Q** And did you ever receive any correspondence provided  
 19 by the Surface Transportation Board to the BRT regarding  
 20 its expansion to the east?  
 21 **A** No.  
 22 **Q** Were you provided with any environmental review at  
 23 that point, or was the Town, by any planned activities by  
 24 BRT on the 93 acre parcel?  
 25 **A** Not in 2012, no.  
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**Miner-Direct/Calica**  
130

1 **Q** Did you have other communications with BRT  
2 representatives requesting an environmental review in  
3 2012?  
4 **A** **Verbal conversations with Mr. Pratt. There may have**  
5 **been similar emails.**  
6 **Q** Did you ever receive any environmental review of any  
7 BRT activities for planned activities on the 93 acre site?  
8 **A** **Not until 2014.**  
9 **Q** Okay.  
10 Would you look at Exhibit 25 in the binder in  
11 front of you.  
12 Again, because of the format, it says Matt Miner  
13 10/9 dash 2012, 9:02 a.m., addressed to Jim and signed  
14 thanks, Matt, and it lists Jim Pratt as the recipient.  
15 Is that an email you sent to Mr. Pratt, a  
16 representative of BRT, in or about October of 2012?  
17 **A** **Yes, sir.**  
18 **Q** But this time it is correct you already received the  
19 Systra J track drawing; is that correct?  
20 **A** **Yes.**  
21 **Q** And you already received the June 2012 letter from  
22 Mr. Pratt indicating that they were proceeding to  
23 construct the J track; is that correct?  
24 **A** **Yes.**  
25 **Q** Your email reads as follows:  
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**Miner-Direct/Calica**  
131

1 Please provide the Town w/ -- please provide the  
2 Town with an update as to your progress on the  
3 environmental review, parenthesis, Gannette,  
4 G-A-N-N-E-T-T-E, Flemming, spelled with two Ms here, close  
5 paren, and your communication with the STB.  
6 Did you receive any progress report from BRT  
7 regarding any environmental review of the activities on  
8 the 93 acre site in 2012?  
9 **A** **I don't recall specifically. But I do recall**  
10 **Pratt -- Mr. Pratt telling me that Gannette Fleming was**  
11 **working on it, but we didn't receive anything.**  
12 **Q** And did you receive any communications as requested  
13 from BRT concerning its interactions with the Surface  
14 Transportation Board?  
15 **A** **No.**  
16 **Q** Did you receive any communications from BRT in 2013,  
17 the entire calendar year, that was responsive to your  
18 request that BRT show some communication or authorization  
19 from the Surface Transportation Board?  
20 **A** **No, sir.**  
21 **Q** Did you or the Town receive any environmental review  
22 or assessment from or on behalf of BRT concerning its  
23 actions or planned actions on the 93 acre parcel,  
24 Exhibits B and C?  
25 **A** **Nothing with respect to the NEPA analysis, no.**  
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**Miner-Direct/Calica**  
132

1 **Q** Did you receive a Gannette Fleming environmental  
2 review --  
3 **A** **Not in 2013, no.**  
4 **Q** You started requesting in 2012, and you have gone  
5 through the emails and you requested it several times, you  
6 didn't receive it in 2012 and didn't receive it in 2013 to  
7 the end of that year; is that correct?  
8 **A** **Yes.**  
9 **Q** Incidentally, were you involved at all in any  
10 unrelated Town activities that concerned dewatering or  
11 some removal of materials from the Carmans River?  
12 **A** **Yes, that is technically part of the Carmans River,**  
13 **Yaphank Lakes. Yes.**  
14 MR. CALICA: I will make an offer of proof.  
15 **Q** What was being taken out of the Yaphank Lakes?  
16 **A** **Fresh spoils.**  
17 **Q** Is that part of the environmental remediation being  
18 undertaken by the Town?  
19 **A** **Yes. It was to clean up the Yaphank Lakes and the**  
20 **Carmans River, remove the invasive species that populated**  
21 **within that lake, and remove the soft sediment within the**  
22 **lakes.**  
23 **Q** Did it become necessary to find the location to place  
24 the removed material?  
25 **A** **Yes. We needed a dewatering site.**  
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**Miner-Direct/Calica**  
133

1 THE COURT: The anticipation is killing me.  
2 Tell me what this has to do with anything.  
3 MR. CALICA: There was a discussion about using  
4 this site and the Town said we can't use it because it is  
5 vegetated. So they used a clear site because they didn't  
6 know it had already been cleared.  
7 **Q** Did you have any discussion concerning the using of  
8 the 93 acre site for the dewatering materials?  
9 **A** **Yes. There was a couple of meetings in a conference**  
10 **room in Town Hall.**  
11 **Q** What was the outcome of that?  
12 **A** **It was concluded we could not use that area because**  
13 **it would need to be cleared. There was no SEQRA analysis**  
14 **or NEPA analysis, and there was no way to get a permit to**  
15 **allow the fresh spoils to be staged there in a timely**  
16 **aspect, that the dredge project was going to go on because**  
17 **BRT had yet to complete its environmental review.**  
18 **Q** And did the Town locate the materials elsewhere?  
19 **A** **Yes. To a facility to the northeast that was already**  
20 **cleared.**  
21 **Q** About what time in 2013 did this discussion regarding  
22 putting the dewatering staging site there?  
23 **A** **April.**  
24 **Q** 2013?  
25 **A** **April, May.**  
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**Miner-Direct/Calica** 134

1 THE COURT: Is all of this testimony going to  
 2 the issue of when the Town --  
 3 MR. CALICA: It is in both sides' exhibits,  
 4 Judge.  
 5 THE COURT: I'm a fact-finder. And I need to  
 6 understand the issues.  
 7 All of this goes to whether or not they told you  
 8 earlier; is that the idea?  
 9 MR. CALICA: Yes, Judge.  
 10 THE COURT: All right.  
 11 Q Did you know that the BRT operator had cleared  
 12 vegetation from the site on the locations shown on 16 and  
 13 21, starting in the second half of 2013?  
 14 A **No, not until I saw the photos very recently.**  
 15 Q And do you know when those photos were taken?  
 16 A **I believe in 2014.**  
 17 Q When for the first time did the Town -- was the Town  
 18 provided with any type of environmental review of the 93  
 19 acre site by BRT?  
 20 A **There was an environmental report, and I believe it**  
 21 **was dated January 2014, and I believe the Town received it**  
 22 **at a meeting we had in February of 2014.**  
 23 Q Would you look at Exhibit 8-A in the binder, is that  
 24 the document you are referring to dated January 14th, and  
 25 it states environmental overview, and as prepared by  
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**Miner-Direct/Calica** 135

1 Gannette Fleming?  
 2 A **Yes, it was hand delivered by Mr. Pratt.**  
 3 Q When?  
 4 A **In the middle of February 2014.**  
 5 Q Although dated in January?  
 6 A **I believe so, yes.**  
 7 MR. CALICA: I offer 8-A in evidence.  
 8 THE COURT: Any objection?  
 9 MR. ARONOFF: No objection.  
 10 THE COURT: It is in.  
 11 (Whereupon, Plaintiff's Exhibit 8-A was received  
 12 in evidence.)  
 13 Q Directing your attention to the first numbered  
 14 page four pages in.  
 15 Do you see the fourth paragraph of the  
 16 introduction?  
 17 A **Yes, sir.**  
 18 Q I will just read it into the record and then ask a  
 19 question.  
 20 This environmental overview and any associated  
 21 documentation is not intended to fulfill requirements for  
 22 completion with the National Environmental Policy Act, the  
 23 New York State Environmental Quality Review Act, or any  
 24 other federal, state or local environmental or land-use  
 25 statute or regulation which may be applicable to  
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**Miner-Direct/Calica** 136

1 subsequent actions upon or involving the subject property.  
 2 Did you observe that that sentence was in there  
 3 when Mr. Pratt provided the document to you in February of  
 4 2014?  
 5 A **Yes.**  
 6 Q And what did you tell him?  
 7 A **I reacted I guess fairly strongly, saying that this**  
 8 **doesn't comply with NEPA. We have been waiting all this**  
 9 **time for a NEPA document.**  
 10 **He said he paid a lot of money for this**  
 11 **document.**  
 12 **And I said, you didn't get your money's worth.**  
 13 Q Did you ask him for further environmental clearance?  
 14 A **Yes. They said they were going to revise the**  
 15 **document.**  
 16 Q Did you receive a revision from Mr. Pratt or anyone  
 17 from the BRT after you received Exhibit 8-A?  
 18 A **Yes. Probably four or five days later.**  
 19 Q Would you look at Exhibit B, the environmental  
 20 overview, this one dated February 2014, Exhibit 8-B in  
 21 evidence.  
 22 A **Yes, sir.**  
 23 MR. CALICA: If it is not, I will move it in  
 24 evidence.  
 25 THE COURT: It is.  
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**Miner-Direct/Calica** 137

1 MR. CALICA: Okay.  
 2 Q Is that the revised document you received?  
 3 A **It appears to be, yes.**  
 4 Q And directing your attention to the first numbered  
 5 page under introduction, the fourth paragraph, did you  
 6 observe the sentence reading as follows: The scope of  
 7 this environmental review generally parallels the  
 8 environmental factors and resource analysis typically  
 9 performed to comply with the National Environmental Policy  
 10 Act and the New York State Environmental Quality Review  
 11 Act. Do you recall if it included that?  
 12 A **Yes, it is in there.**  
 13 THE COURT: I have a question for you.  
 14 Assuming hypothetically, right now you are not  
 15 an expert witness, but assuming the documents were given  
 16 to you that were fully consistent and complaint with NEPA  
 17 and SEQRA and everything else, what action would that  
 18 prompt on the part of the Town to issue a building permit?  
 19 What is it that they are asking from you is what I don't  
 20 understand.  
 21 THE WITNESS: I think from my standpoint what we  
 22 were looking for was something, is this rail related or is  
 23 it not? And we needed a document from the Surface  
 24 Transportation Board to definitively state the Town, you  
 25 don't have any jurisdiction or you do have jurisdiction.  
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**Miner-Direct/Calica**  
138

1 THE COURT: Assume you do. Assume it is a  
2 casino, and it is -- so what?

3 THE WITNESS: There would be a site plan, it  
4 would be according to SEQRA, and building permits would be  
5 issued.

6 THE COURT: By whom?

7 THE WITNESS: The Town of Brookhaven building  
8 department, fire prevention, our planning department, we  
9 would all be involved in both the environmental review and  
10 the review of structures.

11 THE COURT: So your understanding in the  
12 ordinary course of business before one could be engaged in  
13 this sort of construction project, if it was something  
14 that fell within the county's authority, there were  
15 certain permits and approvals you needed to obtain?

16 THE WITNESS: You had to have the right zoning,  
17 and a site plan approved, whatever railings you need,  
18 building permits, fire prevention. I don't think highway  
19 because it is on the county and state road. But any  
20 permits required whether you are building a house or  
21 commercial building.

22 THE COURT: Going back to parcel A for a moment  
23 since you were around when this was happening, were there  
24 any approvals or variances or permits issued by the Town  
25 in connection with that track?

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**Miner-Direct/Calica**  
139

1 THE WITNESS: The way I understand it, the  
2 stipulation agreement that the STP helped to facilitate,  
3 the Town could do inspections for health and safety,  
4 including building inspections. But that BRT was not  
5 required for that parcel to specifically get permits. But  
6 we didn't have any documentation from Washington from the  
7 STP saying that that held through for another parcel, and  
8 thus the questioning.

9 THE COURT: Got it.

10 MR. CALICA: I would respectfully move in  
11 evidence Exhibit 9, which is the so-ordered stipulation in  
12 the prior action which set forth what was the approved  
13 reference site plan and activity on the 28 acre parcel,  
14 and a copy of the STP's order decided December 7, 2010,  
15 which is Exhibit 10, and does spell out how both the Town  
16 and in a stipulation so ordered by this Court, and the STP  
17 addressed the oversight of construction on the 28 acre  
18 parcel.

19 THE COURT: Leaving aside counsel's  
20 characterization of the documentation, any objection to  
21 the document?

22 MR. ARONOFF: My objection is on relevance  
23 grounds, your Honor.

24 The first thing this witness testified to is the  
25 fact that the stipulation only had to do with parcel A.

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**Miner-Cross/Aronoff**  
140

1 THE COURT: Right.

2 MR. ARONOFF: And what we hear today is relating  
3 to parcel C and B only.

4 I don't think the stipulation has any relevance  
5 in this preliminary injunction issue and I object on that  
6 basis.

7 THE COURT: I will take it for what it is worth.  
8 (Whereupon, Plaintiff's Exhibit 9 was received  
9 in evidence.)

10 MR. CALICA: I did respond to your Honor's  
11 question --

12 THE COURT: Yes.

13 **Q** Was it only a matter of, say, about ten days after  
14 the Town received the second environmental overview at the  
15 end of February 2014 from BRT that this litigation was  
16 filed by the Town against BRT?

17 **A Yes, give or take.**

18 MR. CALICA: Nothing further.

19 THE COURT: Your witness.

20

21 **CROSS-EXAMINATION**  
22 **BY MR. ARONOFF:**

23 **Q** Good afternoon, Mr. Miner

24 **A Good afternoon.**

25 **Q** You told us you have two titles. You are the

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**Miner-Cross/Aronoff**  
141

1 Commissioner of Waste Management and the Chief of  
2 Operations for the Town?

3 **A Yes.**

4 **Q** And you are not an engineer, sir, are you?

5 **A I have an engineering degree, but I'm not a licensed**  
6 **engineer, no.**

7 **Q** Do you have any training or experience in rail  
8 engineering?

9 **A No, sir.**

10 **Q** You don't have any experience in geology?

11 **A Geology, no.**

12 **Q** Hydrology?

13 **A Limited as my role as the Waste Management**  
14 **Commissioner and the ground water mediation at the Port**  
15 **Washington landfill.**

16 **Q** Beyond that you have no hydrology training?

17 **A No.**

18 **Q** And you testified that you have been familiar with  
19 the BRT project, the terminal, going back to the year  
20 2010?

21 **A Yes.**

22 **Q** Do you recall in your declaration you submitted in  
23 this case, you described yourself as the Town's principal  
24 liaison with PRS?

25 **A The.**

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*OFFICIAL COURT REPORTER*

**Miner-Cross/Aronoff** 142

1 **Q** And that was since 2010 you had that role?

2 **A** **It was more so in the early years. Certainly in 2010**

3 **when everything was being negotiated.**

4 **Q** Well, let's take a look at your declaration, which is

5 Exhibit K.

6 **A** **What page?**

7 **Q** The first page.

8 This is the declaration you submitted; is that

9 correct?

10 **A** **Yes.**

11 **Q** And I'm referring to the first paragraph, the last

12 sentence of the first paragraph, you wrote: In addition,

13 since at least the year 2010 I have been the Town's

14 principal liaison with the ever-changing group of

15 individuals and entities which have represented themselves

16 to the Town to be the owners or operators of the

17 Brookhaven Rail Terminal.

18 You see that?

19 **A** **Yes.**

20 **Q** Since 2010 you have been the principal liaison with

21 BRT?

22 **A** **Yes.**

23 **Q** You took that role seriously?

24 **A** **I tried to.**

25 **Q** You made yourself available to BRT's representatives

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**Miner-Cross/Aronoff** 143

1 over the years?

2 **A** **Yes.**

3 **Q** You made sure to provide them with any information

4 they requested of you?

5 **A** **Did my best.**

6 **Q** You made sure to let BRT know if there was any

7 information the Town needed from BRT?

8 **A** **Yes.**

9 **Q** And the firm opened for business in -- the terminal

10 opened for business in 2011, you recall that, or

11 thereabouts?

12 **A** **Yes.**

13 **Q** And as far as you know it has been successful?

14 **A** **As far as I know, yes.**

15 **Q** It was so successful that you learned at some point

16 that BRT was interested in expanding?

17 **MR. CALICA:** Objection to form.

18 **THE COURT:** You may answer.

19 **A** **That is my understanding.**

20 **Q** And the expansion was to occur on the adjacent

21 parcels of property referred to as B and C?

22 **A** **Yes.**

23 **Q** And you understood as early as 2012 that some of the

24 activities that BRT was contemplating undertaking on

25 parcels B and C included salt storage; is that right, sir?

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**Miner-Cross/Aronoff** 144

1 **A** **It had numerous concept plans. One of which included**

2 **salt storage, yes.**

3 **Q** You understood in 2012 that BRT was considering salt

4 storage as an activity?

5 **A** **One of their plans, yes, had that.**

6 **Q** And propane off-loading and storage, that was

7 something you were made aware of in 2012 as a possibility?

8 **A** **Yes.**

9 **Q** And refrigerated and dry storage warehousing, you

10 knew that in 2012?

11 **A** **As a concept plan, yes.**

12 **Q** Automobile trains loading and storage?

13 **A** **As a concept plan, yes.**

14 **Q** And take a look at Exhibit U.

15 **MR. ARONOFF:** I would like to move to put his

16 declaration in, Exhibit K.

17 **THE COURT:** Any objection?

18 **MR. CALICA:** No, your Honor.

19 **THE COURT:** K is admitted.

20 (Whereupon, Defendant's Exhibit K was received

21 in evidence.)

22 **Q** Do you have Exhibit U in front of you, Mr. Miner?

23 **A** **Yes.**

24 **Q** And it is an email chain, the top email is dated

25 March 29th, 2012?

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**Miner-Cross/Aronoff** 145

1 **A** **Yes, sir.**

2 **Q** And the subject line on the emails, all of the

3 emails, is Brookhaven Rail Terminal Phase 2 Uses.

4 Do you see that?

5 **A** **Yes.**

6 **Q** And the bottom email, the first email in the chain,

7 that is an email that Andy Kaufman sent to Jim Pratt and

8 Jake Watral; is that right?

9 **A** **Yes.**

10 **Q** And then the next email up, it was forwarded to you

11 by Mr. Pratt?

12 **A** **Yes.**

13 **Q** And Mr. Pratt writes: Matt, that is you, attached is

14 a preliminary list of activity for the BRT expansion.

15 Do you see that?

16 **A** **Yes.**

17 **Q** And if you turn to the next page, there was an

18 attachment included with Mr. Pratt's email. Do you see

19 that?

20 **A** **Yes, sir.**

21 **Q** And the title of that document is: Brookhaven Rail

22 Terminal, railroad related activities, expansion property.

23 It states: The rail related activities

24 contemplated on the expansion property include, but are

25 not limited to, the following, and it lists nine items; is

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**Miner-Cross/Aronoff**  
146

1 that right?  
 2 **A Yes, sir.**  
 3 **Q** And one of those items is road salt offloading and  
 4 storage, number three?  
 5 **A Yes.**  
 6 **Q** And you reviewed this list when you got it?  
 7 **A Yes.**  
 8 **Q** Right?  
 9 **A Yes.**  
 10 **Q** When you wrote back in that email earlier, you wrote  
 11 back to Mr. Pratt on March 29th, acknowledging that you  
 12 had some documentation from him; is that right?  
 13 **A And I asked for more details, yes.**  
 14 **Q** Right.  
 15 First you acknowledged you had documentation  
 16 from him; is that?  
 17 **A Yes.**  
 18 **Q** And in the first full paragraph you wrote: Before  
 19 the Town can make a determination, additional  
 20 documentation/details are necessary. Specifically, the  
 21 Town requests that BRT provide a more detailed phase 2  
 22 concept plan.  
 23 That is what you wrote, right?  
 24 **A Yes.**  
 25 MR. ARONOFF: I would move the admission of  
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**Miner-Cross/Aronoff**  
148

1 pages you are offering?  
 2 MR. ARONOFF: Yes.  
 3 MR. CALICA: No objection.  
 4 (Whereupon, Defendant's Exhibit V was received  
 5 in evidence.)  
 6 **Q** Mr. Pratt writes, Matt, attached is a concept plan of  
 7 what we have envisioned as of this date.  
 8 Then he states: Please keep in mind that this  
 9 is truly conceptual, as we have probably a year or more  
 10 prep time to get to the actual building construction  
 11 portion. This time will be used for site preparation.  
 12 Do you see that?  
 13 **A Yes.**  
 14 **Q** And if you look at the attachment, that is the  
 15 concept plan you requested in your March 29th email; is  
 16 that right?  
 17 **A Yes.**  
 18 **Q** What is the shape of the track depicted on B and C in  
 19 that concept plan?  
 20 **A Three-quarter of a circle.**  
 21 **Q** It is an O track, isn't it right, sir?  
 22 **A It is not a complete O.**  
 23 **Q** Mostly O?  
 24 **A Three-quarters.**  
 25 **Q** Okay.  
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**Miner-Cross/Aronoff**  
147

1 Exhibit U.  
 2 THE COURT: No objection?  
 3 MR. CALICA: No objection.  
 4 THE COURT: Admitted.  
 5 (Whereupon, Defendant's Exhibit U was received  
 6 in evidence.)  
 7 **Q** I would like to refer you to Exhibit V.  
 8 (Handed to the witness.)  
 9 **Q** Did you recognize what we have marked as Exhibit V,  
 10 Mr. Miner?  
 11 **A Yes.**  
 12 **Q** It is an April 6, 2012 email from Mr. Pratt to you.  
 13 Is that right, sir?  
 14 **A Yes.**  
 15 **Q** With an attachment?  
 16 **A Yes, sir.**  
 17 **Q** And you recall receiving this, don't you?  
 18 **A Yes.**  
 19 MR. ARONOFF: I will move the admission of  
 20 Exhibit V.  
 21 THE COURT: Any objection?  
 22 MR. CALICA: Let me read it.  
 23 (Whereupon, at this time there was a pause in  
 24 the proceedings.)  
 25 THE COURT: It is very clear -- to be clear, two  
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**Miner-Cross/Aronoff**  
149

1 The site plan also indicates building  
 2 structures; is that correct?  
 3 **A Yes.**  
 4 **Q** There are five of them -- six of them?  
 5 **A Six with the ancillary --**  
 6 **Q** Yes.  
 7 You understood they were proposed structures  
 8 that BRT might ultimately build on its expanded parcel; is  
 9 that right?  
 10 **A It was a concept plan that kept evolving.**  
 11 **Q** But you understood when you saw this, these were  
 12 structures that BRT was considering putting in at some  
 13 point?  
 14 **A One of the plans among consideration.**  
 15 **Q** This was among those plans?  
 16 **A One of the plans.**  
 17 **Q** You see the bottom structure there it says covered  
 18 salt structure building?  
 19 **A Yes.**  
 20 **Q** And you understood, sir, based on your engineering  
 21 experience, your landfill experience, certainly you knew  
 22 that the extent that those structures were ever going to  
 23 be built, they would have to be built on level surfaces,  
 24 right?  
 25 **A Yes.**  
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- 1 **Q** Meaning to the extent the ground was not already  
 2 level, that level -- it would have to be brought to level  
 3 in order to put structures on generally; is that correct?  
 4 **A Generally. Not excavation --**  
 5 **Q** You understood the ground would have to be leveled at  
 6 some point if those structures were to be put on the  
 7 property, right?  
 8 **A Yes. But there was no grading plan here.**  
 9 **(Handed to the witness.)**  
 10 **Q** You recognize Exhibit W?  
 11 **A Between myself and Mr. Pratt, an email.**  
 12 **Q** And on the bottom is the exhibit we looked at as  
 13 Exhibit V? In other words, the exchange contains your  
 14 remarks; is that right, sir?  
 15 **A The bottom -- the top of the second page, you're**  
 16 **talking about?**  
 17 **Q** Yes.  
 18 **A Yes, the bottom is from Mr. Pratt, yes.**  
 19 THE COURT: W is admitted.  
 20 (Whereupon, Defendant's Exhibit W was received  
 21 in evidence.)  
 22 **Q** So you responded to Mr. Pratt's email, Exhibit V we  
 23 just looked at, you responded on April 19th, you see that,  
 24 two weeks after?  
 25 **A Yes.**

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- 1 you received it; do you see that?  
 2 **A Yes.**  
 3 **Q** It is not the first time you asked for a full sized  
 4 copy to be dropped off, it happened from time to time?  
 5 **A Yes. I'm sure. It is easier to review a full set**  
 6 **than a smaller email.**  
 7 **Q** So you asked for a full sized copy and you asked PRT  
 8 to provide it and they did so?  
 9 **A Yes.**  
 10 THE COURT: Let me see counsel at the sidebar  
 11 for a moment here.  
 12  
 13 (Whereupon, at this time the following took  
 14 place at the sidebar.)  
 15 THE COURT: I am patiently listening to a  
 16 tremendous amount of testimony versus the J and the O  
 17 track argument.  
 18 In light of Exhibit V, is there any question in  
 19 anyone's mind that the Town was made aware of the O track  
 20 in adjacent buildings in 2012? Is there any question  
 21 here?  
 22 MR. CALICA: Yes.  
 23 Because they said it is an extremely concept  
 24 plan.  
 25 THE COURT: You are kidding me. You are kidding

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- 1 **Q** You wrote, Jim, I apologize for the delay in getting  
 2 back to you. I had reviewed the plan and at first glance  
 3 it appears to have -- to address most if not all of my  
 4 initial concerns.  
 5 Do you see that?  
 6 **A Yes.**  
 7 **Q** That is what you wrote?  
 8 **A Yes.**  
 9 **Q** And then you wrote, may I forward it to engineering,  
 10 parenthesis, Greg.  
 11 You are referring to Mr. Kelsey?  
 12 **A Yes.**  
 13 **Q** And Mr. Pratt wrote back, absolutely. We are anxious  
 14 to get started over there.  
 15 You see that?  
 16 **A Yes.**  
 17 **Q** And Mr. Pratt gave you permission to forward it to  
 18 the Town engineer?  
 19 **A The assistant engineer, yes.**  
 20 **Q** And you did so, I assume?  
 21 **A I believe so.**  
 22 **Q** And then you wrote back and asked, if you had a full  
 23 sized paper copy or two that would be helpful; thanks.  
 24 And Mr. Pratt confirmed that he would drop off a  
 25 full sized paper copy with the secretary and you confirmed

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- 1 me.  
 2 After I heard so much argument, it is a J, they  
 3 didn't say anything about the O? We had testimony this  
 4 morning about the limited area, 75 feet. It is the entire  
 5 box.  
 6 MR. CALICA: June 29th, three months after this  
 7 they filed the J track plan. You will see the sequence.  
 8 THE COURT: In my mind at this point the issues  
 9 have been sharply reduced to the grading issue.  
 10 I don't know what the evidence is on that. I  
 11 haven't heard any of it yet. When did the Town know there  
 12 was a 100 or 50 foot hole in the ground. That is a  
 13 significant issue.  
 14 There are lots of issues here, including that  
 15 there is one e-mail saying this time will be used for site  
 16 preparation. I'm not sure it means we will knock down the  
 17 forest.  
 18 MR. ARONOFF: They could have asked for that.  
 19 THE COURT: It may be an assumption of risk,  
 20 counsel.  
 21 Sure, if someone --  
 22 MR. ARONOFF: I understand.  
 23 THE COURT: Hold on.  
 24 And it is regulated by the Town and it may be  
 25 completely on them, as they say. That I don't know.

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**Miner-Cross/Aronoff** 154

1 But I'm astonished by seeing this document.  
 2 So can we get to the grading part now?  
 3 MR. CALICA: We can. But I will remind your  
 4 Honor that it was three months later when he asked for the  
 5 detailed plan, they filed the J plan and they said they  
 6 would do limited grading.  
 7 THE COURT: It is a procedural plan for a casino  
 8 that exists other than in someone's mind. So there was  
 9 lots of concepts. But it looks like some of those  
 10 concepts involved clearing the entire parcel.  
 11 MR. CALICA: The Systra plan included --  
 12 THE COURT: Some of the plans like I'm holding  
 13 in my hand included the clearing of the entire parcel.  
 14 You understand that?  
 15 MR. CALICA: Yes.  
 16 THE COURT: Try now to speed up the things.  
 17 MR. ARONOFF: Yes, I understand. And I think  
 18 I'm coming up to that anyway.  
 19 THE COURT: Excellent.  
 20  
 21 (Whereupon, at this time the following takes  
 22 place in open court.)  
 23 Q I would like to show you what is marked as CC.  
 24 (Handed to the witness.)  
 25 Q You recognize this document, Mr. Miner?  
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**Miner-Cross/Aronoff** 156

1 Q And there are three subjects listed. The first one  
 2 is scheduling. Do you see that?  
 3 A Yes.  
 4 Q And under scheduling, letter A, it says in order to  
 5 meet the development goals established, clearing and  
 6 grubbing of the southern portion of parcels B and C should  
 7 begin no later than June 1, 2012.  
 8 Do you see that, sir?  
 9 A Yes.  
 10 Q And then it says in the length item, B, grading on  
 11 the southern 150 foot, and some parenthetical, should  
 12 begin approximately two weeks after grubbing and clearing  
 13 operations have been initiated.  
 14 Do you see that?  
 15 A Yes.  
 16 Q Under C, it says that work should proceed from the  
 17 west to the east and then around a 400 radius from to the  
 18 north ending approximately 100 south of the northern  
 19 property line. You see that?  
 20 A Yes.  
 21 Q And that was provided to you --  
 22 A Yes, I don't know if it was approved at that point,  
 23 but that is typical.  
 24 Q And the next category, number two, is grading, you  
 25 see that?  
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**Miner-Cross/Aronoff** 155

1 A Yes.  
 2 Q Okay.  
 3 It contains an email string between you and  
 4 Mr. Pratt?  
 5 A Yes.  
 6 Q And an attachment?  
 7 A Yes.  
 8 MR. ARONOFF: I move for its admission.  
 9 MR. CALICA: Can I have a moment?  
 10 THE COURT: Take your time.  
 11 (Whereupon, at this time there was a pause in  
 12 the proceedings.)  
 13 MR. CALICA: No objection, John.  
 14 THE COURT: It is admitted.  
 15 (Whereupon, Defendant's Exhibit CC was received  
 16 in evidence.)  
 17 Q The subject line of the E-mail is Track Installation,  
 18 the top email is from Pratt to you. And it says, Matt,  
 19 does this analysis of the schedule suffice. You see that?  
 20 A Yes.  
 21 Q You see the attachment dated April 16th, 2012?  
 22 A Yes.  
 23 Q The document is entitled Track Installation,  
 24 Brookhaven Rail Terminal, phase 2; is that right?  
 25 A Yes.  
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**Miner-Cross/Aronoff** 157

1 A Yes.  
 2 Q It says beginning at station two, establish sub grade  
 3 elevation of 89. Do you see that?  
 4 A Yes.  
 5 Q And you understood what that meant, right?  
 6 A Yes.  
 7 THE COURT: Let me stop you there because I  
 8 don't understand what it means.  
 9 What does it mean?  
 10 THE WITNESS: The elevation at that station, at  
 11 that point on the plan, would be an elevation of 89.  
 12 THE COURT: Is that 89 feet above sea level?  
 13 THE WITNESS: Yes.  
 14 Q You understood that station 2 was about where the  
 15 track from parcel A connected to the expansion track on  
 16 parcel B and C.  
 17 Do you see that?  
 18 A Yes.  
 19 Q The elevation there was approximately 89, right? You  
 20 knew that?  
 21 A Roughly.  
 22 Q And it says in parenthetical, TOR, 92, and that is  
 23 top of rail, right, sir?  
 24 A I believe that is correct.  
 25 Q And that indicated to you the top of rail elevation  
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 OFFICIAL COURT REPORTER

- 1 at the connect point would be 92 feet above sea level?  
 2 **A Yes.**  
 3 **Q** And it says proceeding east to station 17 at grade  
 4 minus 1.25 percent.  
 5 Is that right, sir?  
 6 **A Yes.**  
 7 **Q** And you understood that the expansion track was going  
 8 to connect to parcel A at elevation 89, and then proceed  
 9 down a grade, a slope, of 1.25 percent; is that right?  
 10 **A For this limited area, yes.**  
 11 **Q** For this phase of the construction? That is what  
 12 they were telling you they were going to do?  
 13 **A Uh-huh.**  
 14 **Q** Is that right, sir?  
 15 **A Yes.**  
 16 **Q** And item D under grading, it says continue around a  
 17 400 foot radius curve to the north at grade minus 1.25  
 18 percent.  
 19 It is telling you the grade was going to  
 20 continue to slope down around the curve; is that right?  
 21 **A Yes.**  
 22 THE COURT: And let me ask you a question here.  
 23 Is it fair to say a descending scale of 1.25  
 24 percent, it is fair to say you were going down a foot  
 25 and a quarter?

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 OFFICIAL COURT REPORTER

- 1 **A Yes.**  
 2 **Q** I will ask you to take a look at what is marked as  
 3 BB.  
 4 (Handed to the witness.)  
 5 **Q** You have it in front of you?  
 6 **A Yes.**  
 7 **Q** You recognize this document, Mr. Miner?  
 8 **A Yes, sir.**  
 9 **Q** And the email is between you and Mr. Pratt, dated  
 10 June 21, 2012?  
 11 **A Yes.**  
 12 MR. ARONOFF: I move for it to be admitted.  
 13 MR. CALICA: No objection.  
 14 THE COURT: Admitted.  
 15 (Whereupon, Defendant's Exhibit BB was received  
 16 in evidence.)  
 17 **Q** This is in response to Mr. Pratt's production  
 18 schedule?  
 19 **A In the center of the document, yes.**  
 20 **Q** In the center paragraph is your response, and you  
 21 wrote: You should have a cover letter on either your or  
 22 your engineer's letterhead and a drawing with the proposed  
 23 areas appropriately marked shaded.  
 24 You see that?  
 25 **A Yes.**

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- 1 THE WITNESS: Yes.  
 2 **Q** Item two -- item C under grading, continue to station  
 3 41 plus 81 at grade minus 1.25 percent; is that right.  
 4 **A Yes.**  
 5 **Q** Item D, at station 31 plus 70, parenthetical, sub  
 6 grade elevation 53, proceed down at grade minus 1.25 to  
 7 the southern property line.  
 8 And you understood, sir, that sub grade  
 9 elevation 53 meant 53 feet above sea level?  
 10 **A Yes.**  
 11 **Essentially the tracks was following the**  
 12 **existing contours along the southern and eastern line --**  
 13 **property lines.**  
 14 **Q** And the grading was going to be done to establish  
 15 that, those levels indicated in this document; is that  
 16 right? That is what it said?  
 17 **A But only for 150 feet.**  
 18 **Q** And then under truck access, item three, item A under  
 19 three says, clear, grub and grade a 50 foot access road  
 20 aligned with the northern easement from LIPA, L-I-P-A, in  
 21 a southeasterly direction. You saw that as well, sir?  
 22 **A Yes.**  
 23 **Q** And Mr. Pratt, if you recall in his email, asked you  
 24 if you confirm if that schedule is what you needed; is  
 25 that correct?

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- 1 **Q** And Mr. Pratt responded, okay, we are on it?  
 2 THE COURT: Isn't there a sentence he wrote  
 3 before, you should have a cover letter? What is that  
 4 buffer?  
 5 **Q** You asked a question about the buffer?  
 6 **A Yes, sir.**  
 7 THE COURT: And it also says: You should -- it  
 8 should probably state that you propose to clear and  
 9 regrade only 75 feet from the center line of the proposed  
 10 track.  
 11 MR. ARONOFF: Yes.  
 12 THE WITNESS: That's correct.  
 13 **Q** You didn't ask Mr. Pratt in your email what  
 14 procedures they would be using to excavate sand?  
 15 **A No, sir.**  
 16 **Q** You didn't ask him any questions about the depth of  
 17 the grade that they were contemplating?  
 18 **A No. Because the track was consistent, or relatively**  
 19 **consistent with the concourse, the existing concourse**  
 20 **along the south and the east.**  
 21 **Q** You understood they were going to do grading?  
 22 **A Very limited.**  
 23 **In fact, I asked for grading of only 75 foot on**  
 24 **the center line.**  
 25 **Q** Right. But you didn't raise any question about the

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- 1 depth of the grading is my question?  
 2 **A No, because the grade was relatively consistent with**  
 3 **the existing track.**  
 4 **Q** Now, we saw Mr. Pratt's response to your request for  
 5 the cover letter from the engineering, right? And that is  
 6 Exhibit A to your declaration that we looked at earlier.  
 7 Your declaration is Exhibit K, if you want to find it.  
 8 **A I have it, Exhibit A.**  
 9 THE COURT: Exhibit K through A, we will call  
 10 sub-Exhibit K, and it looks like a picture.  
 11 MR. CALICA: It is actually the Systra track  
 12 plan in evidence as Exhibit 1.  
 13 THE COURT: Is that the response to the cover  
 14 letter?  
 15 MR. ARONOFF: I want him to refer to what he  
 16 submitted along with his declaration, the same document.  
 17 **Q** Do you have it in front of you, Mr. Miner?  
 18 **A Exhibit A and K, yes.**  
 19 **Q** And the first page of that is an email from  
 20 Mr. Kaufman?  
 21 **A Yes.**  
 22 **Q** You write -- he wrote, Matt, Jim asked that I forward  
 23 the attached?  
 24 **A Yes.**  
 25 **Q** And the first attached -- the first page of the

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- 1 **A I believe it was referenced in a document previous.**  
 2 **Q** Okay.  
 3 So you knew exactly what the elevation was that  
 4 it would end up at?  
 5 **A You are talking about the northern end of the**  
 6 **property, the northeast corner?**  
 7 **Yes, I was -- it was generally following the**  
 8 **existing contour.**  
 9 **Q** You could evaluate the connection between the top  
 10 corner of parcel B and the end of that phase of the  
 11 construction on the northeast corner of parcel C, the  
 12 elevation; is that right, sir?  
 13 **A Yes.**  
 14 **Q** And take a look at your declaration, paragraph four,  
 15 referring to 4-A specifically. You are with me?  
 16 **A Yes.**  
 17 **Q** And you are referring in 4-A to the Exhibit A to your  
 18 declaration, which is, as just discussed, included  
 19 Mr. Kaufman's email, and included the Systra letter, and  
 20 included what we refer to today as the J track, but you  
 21 refer to it in your declaration as an L track, but that is  
 22 the exhibit we are talking about?  
 23 **A Yes.**  
 24 **Q** And you state in your declaration at the end of it  
 25 where they add, the J track or L track picture that

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- 1 attachment is the letter from Systra we looked at earlier?  
 2 **A Yes.**  
 3 **Q** And that is the engineer's letter requested?  
 4 **A Yes.**  
 5 **Q** And if you look at the letter in the middle of that  
 6 paragraph, it talks about the scope of the track. It says  
 7 the track would be on a descending 1.25 percent grade from  
 8 west to east?  
 9 **A Yes.**  
 10 **Q** As we talked about earlier on direct, the last  
 11 sentence of that paragraph reads, the total length of the  
 12 track is approximately 600 feet.  
 13 Do you see that?  
 14 **A Yes.**  
 15 **Q** And you understood that the connection point to  
 16 parcel B from parcel A would be an elevation of  
 17 approximately 89; is that right?  
 18 **A Approximately, yes.**  
 19 **Q** And you understood that the track would extend 5,600  
 20 feet from there?  
 21 **A Yes.**  
 22 **Q** At a grade of 1.25 percent?  
 23 **A Yes.**  
 24 **Q** Did you do any calculations to determine what the  
 25 final elevation would end up at along that slope?

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- 1 Mr. Kaufman provided to you showed no apparent elevations  
 2 of the proposed additional trackage at all.  
 3 You see that?  
 4 **A Yes.**  
 5 **Q** And that is not accurate, is it, sir?  
 6 **A I don't believe the drawing showed elevations. At**  
 7 **least it wasn't legible, the elevations.**  
 8 **Q** Are you saying now that the elevations were there but  
 9 they weren't legible to you?  
 10 **A I think it was the letter that referenced the**  
 11 **elevation, if I recall correctly.**  
 12 **Q** I'm asking a different question, sir.  
 13 **A I'm sorry.**  
 14 **Q** Exhibit A to your declaration, the last page of that  
 15 exhibit is what we were referring interchangeably to the J  
 16 and L track; is that right?  
 17 **A Yes.**  
 18 **Q** It was a picture provided to you by Mr. Kaufman?  
 19 **A Yes.**  
 20 **Q** With a cover letter from Systra; is that right?  
 21 **A Yes.**  
 22 **Q** And you state in your declaration that that document  
 23 shows no apparent elevations of the proposed trackage at  
 24 all.  
 25 And I'm asking you if that is accurate.

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**Miner-Cross/Aronoff**

166

1 **A I can't read this copy.**  
 2 **Q** This is the copy you submitted in connection with  
 3 your declaration, Mr. Miner?  
 4 **A I believe there was a clearer copy when I made that**  
 5 **declaration.**  
 6 **Q** And do you recall that the clearer copy did have  
 7 track elevations on it?  
 8 **A I don't recall.**  
 9 **Q** Do you recall that it didn't?  
 10 **A I don't believe it did. But I don't recall.**  
 11 MR. ARONOFF: We have an enhanced copy I would  
 12 like to bring into evidence.  
 13 THE COURT: When this was provided to you, was  
 14 it this size?  
 15 THE WITNESS: If I recall correctly, it was an  
 16 electronic copy, a PDF, which you can enlarge. I don't  
 17 recall the letter or the drawing.  
 18 (Counsel confer.)  
 19 MR. ARONOFF: Judge, this is Exhibit XX that I  
 20 had blown up for the Court.  
 21 THE COURT: Is there a suggestion that it is  
 22 comparable to Exhibit K or A?  
 23 MR. ARONOFF: I would like to explore that for  
 24 the witness.  
 25 MR. CALICA: Can we have an offer of proof?  
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**Miner-Cross/Aronoff**

167

1 (Counsel confer.)  
 2 MR. ARONOFF: Let me explain.  
 3 We took Exhibit A to Mr. Miner's declaration.  
 4 We took that document attached to it, the so-called J  
 5 track, and we just blew up portions of that document that  
 6 clearly reflect the track elevation levels, which  
 7 Mr. Miner just testified --  
 8 THE COURT: Bring that to the sidebar.  
 9 MR. CALICA: May I join counsel?  
 10 THE COURT: Of course.  
 11  
 12 (Whereupon, at this time the following took  
 13 place at the sidebar.)  
 14 THE COURT: The reason I asked for the sidebar  
 15 so we are out of the witness' hearing.  
 16 I would note that the size of this document as  
 17 presented in the declaration, which I have seen before, if  
 18 these are elevation numbers, Superman could not read them  
 19 if they are this size.  
 20 MR. ARONOFF: Yes.  
 21 THE COURT: What you are about to show him, I  
 22 note that there are bright white arrows scattered through  
 23 the document. And they are not appearing on this one.  
 24 MR. ARONOFF: Yes.  
 25 We created this document from that. We just  
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**Miner-Cross/Aronoff**

168

1 took -- this is expanded. And that is all it is supposed  
 2 to depict, what it is.  
 3 And this here expanded that. The arrow just  
 4 reflects where it came from.  
 5 This is this expanded.  
 6 THE COURT: Yes.  
 7 MR. ARONOFF: The same thing.  
 8 Here the same thing.  
 9 The witness testified he received it in  
 10 electronic format. He could have printed it out larger or  
 11 zoomed in. And this is exactly what we have done. I have  
 12 three more of these, Judge.  
 13 THE COURT: You can ask him about this.  
 14 MR. ARONOFF: If he wants to say I couldn't read  
 15 it myself, and I didn't do anything about it for two  
 16 years, that is the Town's testimony.  
 17 THE COURT: I don't think he examined it in that  
 18 level of detail.  
 19 MR. ARONOFF: That is fair.  
 20 All I want to establish for the record is that  
 21 there were track elevations on here.  
 22 THE COURT: I note you have it expanded to  
 23 approximately three by four foot size. And in that size I  
 24 can read the elevations.  
 25 MR. ARONOFF: Correct.  
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**Miner-Cross/Aronoff**

169

1 This is standard for engineering. And this is  
 2 the site plan. If you recall the earlier e-mail, where he  
 3 said can you please drop off a full size. And he said  
 4 they did it frequently. And this is the size they would  
 5 have provided it to.  
 6 THE COURT: You can ask.  
 7 MR. CALICA: They not only blew it up to three  
 8 by five, so they blew up this as well.  
 9 MR. ARONOFF: You can read it without it.  
 10 MR. CALICA: I would like to indicate the  
 11 blowups, you start with a three by five blowup, and the  
 12 areas they try to show, it looks like they are blown up  
 13 again another five times.  
 14 THE COURT: Okay.  
 15 You can ask him and we will see what happens.  
 16 MR. ARONOFF: It is admitted then, Judge?  
 17 THE COURT: No.  
 18  
 19 (Whereupon, at this time the following takes  
 20 place in open court.)  
 21 THE COURT: What is the marks for  
 22 identification?  
 23 MR. ARONOFF: XX.  
 24 THE COURT: SS?  
 25 MR. ARONOFF: Two X's.  
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- 1 **Q** I'm showing you what is marked as Exhibit XX,  
 2 Mr. Miner.  
 3 What I would like to do is ask you to take a  
 4 look at it and compare it to the last page of Exhibit A of  
 5 the declaration.  
 6 Other than the red box and white arrows, does it  
 7 appear to be the same photograph as in the last page of  
 8 Exhibit A to your declaration?  
 9 **A The box depicted the blowup of the recharge basin, I**  
 10 **do not believe was in this exhibit.**  
 11 **Q** Other than the blowups, the boxes with the blown up  
 12 portions, and the arrows pointing to those boxes, does it  
 13 appear to be the same photograph?  
 14 **A It appears to be. I can't definitively tell you, but**  
 15 **it appears to be.**  
 16 **Q** Okay.  
 17 What I would like to refer you to.  
 18 If you look to the blowup box to the east, do  
 19 you see that?  
 20 **A Yes.**  
 21 **Q** You do need to look at the box, sir. You can see the  
 22 arrow from where it is coming, right?  
 23 **A Yes.**  
 24 **Q** And you can get out of the witness stand if it helps,  
 25 but what I would like you to do is to go over to the

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- 1 **Q** You understood that you could have printed out the  
 2 electronic copy to whatever sizes you wanted?  
 3 **A If there was a PDF, I believe so, yes.**  
 4 **Q** You could have given it to Mr. Kelsey, the Town  
 5 engineer, to do the same?  
 6 **A Yes.**  
 7 MR. ARONOFF: I will move the admission of XX,  
 8 Judge.  
 9 MR. CALICA: Objection, your Honor, it is a  
 10 demonstrative exhibit. It doesn't demonstrate what the  
 11 witness saw or looked at.  
 12 THE COURT: If it was a jury trial I would admit  
 13 it for a limited purpose for being an aid to the jury.  
 14 But it is not really evidence in the sense.  
 15 So I will take it for what it is worth.  
 16 Marked as XX as a demonstrative, in evidence,  
 17 loosely stated.  
 18 (Whereupon, Defendant's Exhibit XX was received  
 19 in evidence.)  
 20 **Q** I want to refer you to Exhibit EE.  
 21 (Handed to the witness.)  
 22 **Q** Do you recognize this document?  
 23 **A Yes, sir.**  
 24 **Q** And it contains your response to Mr. Kaufman's email  
 25 that we just saw?

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 OFFICIAL COURT REPORTER

- 1 yellow section to the east and tell me what it says about  
 2 the elevation level there.  
 3 It says E-L equals something. Do you see that?  
 4 **A Yes.**  
 5 **TOR EL, 91.98.**  
 6 **Q** Can you point to where you are reading from?  
 7 **A Elevation 56.49.**  
 8 **Q** That is referring to the track on the eastside of  
 9 parcel C?  
 10 **A Yes.**  
 11 THE COURT: So the record is clear, what you are  
 12 looking at right now, XX for identification, is a large  
 13 scale printout of a document provided to you that we  
 14 talked about earlier; is that correct?  
 15 THE WITNESS: Yes.  
 16 THE COURT: Did you ever blow it up to this  
 17 size?  
 18 THE WITNESS: I can't say that I did, no.  
 19 THE COURT: All right.  
 20 Let's proceed.  
 21 **Q** Mr. Miner, can you sitting here today definitively  
 22 testify that you did not receive this document from BRT in  
 23 this size?  
 24 **A I believe I would have received an electronic copy,**  
 25 **to the best of my recollection.**

HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
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- 1 **A Yes.**  
 2 MR. ARONOFF: I would move for the admission of  
 3 Exhibit EE.  
 4 THE COURT: Hang on. I'm still catching up.  
 5 MR. ARONOFF: Sorry.  
 6 (Whereupon, at this time there was a pause in  
 7 the proceedings.)  
 8 MR. CALICA: No objection.  
 9 THE COURT: I will allow it in. It is admitted.  
 10 (Whereupon, Defendant's Exhibit EE was received  
 11 in evidence.)  
 12 **Q** So you responded to Mr. Kaufman and Mr. Pratt.  
 13 Jim and Andy.  
 14 Generally this looks good. Before I speak with  
 15 the Town Attorney, I have a couple of questions.  
 16 You ask two questions about the offer. Do you  
 17 see that?  
 18 **A Yes.**  
 19 **Q** And you ask for a storm water management plan  
 20 provided?  
 21 **A Yes.**  
 22 **Q** You didn't ask any question about the track elevation  
 23 levels on what they provided to you?  
 24 **A No.**  
 25 **Q** And you didn't ask any questions about the amount of

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 OFFICIAL COURT REPORTER

**Miner-Cross/Aronoff** 174

1 sand they intended to remove?

2 **A No.**

3 **Q** I want to show you what is marked as Exhibit GG.

4 (Handed to the witness.)

5 **Q** Do you recognize this, Mr. Miner?

6 **A Yes.**

7 **Q** It is a June 29th, 2012 email from you to Mr. Pratt.

8 **A Yes.**

9 **Q** Attaching a draft letter?

10 **A Yes.**

11 MR. ARONOFF: I move for the admission of this

12 document in evidence.

13 MR. CALICA: No objection.

14 THE COURT: In evidence.

15 (Whereupon, Defendant's Exhibit GG was received

16 in evidence.)

17 **Q** You wrote to Mr. Pratt: Jim, once we have a

18 finalized letter that addresses SWPP, and you have it in

19 parenthetical, storm-water management plan, the Town is

20 prepared to issue the following.

21 Do you see that, sir?

22 **A Yes, sir.**

23 **Q** And the following refers to the following email, the

24 draft letter that you included with your email; is that

25 right?

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OFFICIAL COURT REPORTER*

**Miner-Cross/Aronoff** 175

1 **A Yes.**

2 **Q** And let's take a look at your draft letter dated

3 June 29th.

4 The second sentence: The Town understands

5 Brookhaven Rail Terminal's position that the phase 2

6 expansion is ancillary to the operation of the rail line

7 which was authorized by the Surface Transportation Board.

8 Do you see that?

9 **A Yes.**

10 **Q** That is what you wrote?

11 **A Yes.**

12 **Q** And you understood at the time that it was BRT's

13 position that the expansion was an exempt spur. Is that

14 what that refers to?

15 **A We did ask in the next paragraph as to NEPA and the**

16 **federal law compliance.**

17 **Q** But you understood it was an exempt spur at the time?

18 **A The track --**

19 **Q** You continue, as long as the work relates to the

20 construction and operation of the rail line, it would

21 appear that Brookhaven's authority is limited as its Town

22 code and New York State law would be superseded by federal

23 law.

24 Do you see that?

25 **A Yes. That is what I was advised.**

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**Miner-Cross/Aronoff** 176

1 **Q** And that was a true statement as far as you knew as

2 well?

3 MR. CALICA: Objection to form.

4 THE COURT: Sustained.

5 **Q** You were advised by the Town Attorney, Mr. Quinlan;

6 is that correct, sir?

7 **A Yes.**

8 **Q** And the reason you were asking BRT for a SWPP plan

9 prior to issuing your letter is because you wanted to make

10 sure that BRT was taking appropriate measures to protect

11 against water contamination; is that right, sir?

12 **A Erosion control and water.**

13 **Q** And BRT responded by providing you with a SWPP plan,

14 right?

15 **A I believe they did.**

16 **Q** Let's take a look at it. It is Exhibit FF.

17 (Handed to the witness.)

18 **Q** Have you had a chance to review Exhibit FF?

19 **A Yes.**

20 **Q** And do you recall receiving this letter from

21 Mr. Pratt, don't you, sir?

22 **A Yes.**

23 **Q** And the attachment to it, right?

24 **A Yes.**

25 MR. ARONOFF: I move the admission of FF in

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OFFICIAL COURT REPORTER*

**Miner-Cross/Aronoff** 177

1 evidence.

2 MR. CALICA: No objection.

3 THE COURT: All right.

4 I need a magnifying glass for this.

5 (Whereupon, Defendant's Exhibit FF was received

6 in evidence.)

7 **Q** Mr. Pratt wrote to you on June 29th:

8 Please be advised as to our ongoing

9 conversations, we will commence the construction of

10 phase 2 expanse of the existing STB finance document,

11 number FD 35141, served on September 9th, 2010,

12 authorizing Brookhaven Rail Terminals facility.

13 Then you wrote, since the expansion is clearly

14 ancillary to the operation of the line of rail authorized

15 by the Board, the construction and operation qualifies

16 under 49 USC 10906 as excepted from the need for further

17 authorization.

18 Do you see that?

19 **A Yes.**

20 **Q** You understood it was BRT's position?

21 **A Yes.**

22 **Q** And you wrote, then construction in this phase will

23 begin with the clearing and grading of the track

24 right-of-way and installation of track, in accordance with

25 the proposed J track layout. You see that?

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OFFICIAL COURT REPORTER*

1 **A Yes. I understood it to be the 100 foot to 75 foot**  
 2 **buffer --**  
 3 **Q** You then conclude, we have also attached a SWPP  
 4 drawing for the track construction phase. You see that?  
 5 **A Yes.**  
 6 **Q** That was the SWPP plan you requested of him?  
 7 **A Yes.**  
 8 **Q** And that was the plan you requested in order to sign  
 9 the draft letter we looked at and send it to BRT; is that  
 10 right?  
 11 **A Yes.**  
 12 **Q** Let's take a look at II.  
 13 You recognize Exhibit II?  
 14 (Handed to the witness.)  
 15 **A Yes, sir.**  
 16 **Q** And it is an email from you to Mr. Pratt dated  
 17 July 3rd, 2012, with a letter attached to it?  
 18 **A Yes, sir.**  
 19 MR. ARONOFF: I move the admission of II into  
 20 evidence.  
 21 MR. CALICA: Just give me a moment. We have the  
 22 wrong document.  
 23 No objection, your Honor.  
 24 THE COURT: So admitted.  
 25 (Whereupon, Defendant's Exhibit II was received  
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1 in evidence.)  
 2 **Q** You wrote in your email, Jim, please see the  
 3 attached. Should you have any questions, please feel free  
 4 to contact Greg or me. And that is Greg Kelsey?  
 5 **A Yes.**  
 6 **Q** And attached to that is a signed version of the draft  
 7 we looked at earlier, dated July 3, 2012?  
 8 **A Yes.**  
 9 **Q** And BRT never requested this letter from you; is that  
 10 right?  
 11 **A I believe they did. But I'm not positive on that.**  
 12 **Q** You believe they did, in return you requested from  
 13 BRT a SWPP plan. Right? You saw that earlier?  
 14 **A Yes.**  
 15 THE COURT: Counselor, is this a good time to  
 16 break?  
 17 MR. ARONOFF: Two minutes and I will wrap up  
 18 this line.  
 19 **Q** The SWPP plan was important to the Town, which is why  
 20 you requested it; is that right?  
 21 **A Yes.**  
 22 **Q** And you expected to be able to rely on BRT's  
 23 assurances to you that it will be complying with the SWPP  
 24 plan; is that right, sir?  
 25 **A Yes.**  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

1 **Q** And you understood the BRT expected to be able to  
 2 rely on the July 3rd letter?  
 3 **A Yes.**  
 4 **Q** Mr. Quinlan, the County Attorney, blessed your letter  
 5 before it went out?  
 6 MR. CALICA: Objection.  
 7 THE COURT: Sustained -- objection sustained.  
 8 MR. ARONOFF: He said he got advice on it --  
 9 THE COURT: Counsel, objection is sustained.  
 10 MR. ARONOFF: We can stop here.  
 11 THE COURT: We will take a five minute bathroom  
 12 break, and we will be back.  
 13  
 14 (Whereupon, a recess was taken.)  
 15  
 16  
 17  
 18  
 19  
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 25  
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1 THE COURT: Are we almost done here?  
 2 MR. ARONOFF: I hope, so.  
 3 THE COURT: What does that mean?  
 4 MR. ARONOFF: I think 20 minutes, 30 tops.  
 5 THE COURT: Keep it to 20 minutes.  
 6 MR. ARONOFF: All right.  
 7 BY MR. ARONOFF:  
 8 **Q** Mr. Miner, you recall testimony earlier today about  
 9 the sediment removal project, you were asked that earlier  
 10 by your counsel?  
 11 **A Yes.**  
 12 **Q** And as part of that project in the Town commission,  
 13 it was contemplated to put a dredging pond on the BRT  
 14 site; is that right?  
 15 **A One of the sites being looked at, yes.**  
 16 MR. CALICA: I will show you what is marked as  
 17 Exhibit DDDD and also EEEE.  
 18 (Handed to the witness.)  
 19 **Q** Do you recognize these documents, Mr. Miner?  
 20 Let me ask you this: These are documents  
 21 associated with the sediment removal project we have been  
 22 talking about?  
 23 **A Associated with the study of the sediment, not the**  
 24 **big document, but the study.**  
 25 THE COURT: For the record, my binder seems to  
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- 1 jump from quadruple D to quadruple F.  
 2 MR. ARONOFF: Sorry about that, your Honor. We  
 3 will get it to you right away.  
 4 THE COURT: It happens.  
 5 (Handed to the Court.)  
 6 THE COURT: I now have quadruple D and E.  
 7 **Q** The Town's permission confirmed Nelson NP&V to assist  
 8 with the project, you recall that, Mr. Miner?  
 9 **A Yes.**  
 10 **Q** And you participated in discussions with BRT about  
 11 the possibility of locating the dredging pond on BRT site.  
 12 Do you recall that?  
 13 **A I joined that discussion very late in the process**  
 14 **when we had a couple of meetings at Town Hall reviewing**  
 15 **options with Nelson and Pope, yes.**  
 16 **Q** If you look at Exhibit EEEE.  
 17 Is that in front of you, sir?  
 18 **A Yes, sir.**  
 19 **Q** And that depicts where on the BRT site the dredging  
 20 pond was to be located; is that accurate?  
 21 **A I believe so, yes.**  
 22 **Q** And it indicates it was a 20 acre area?  
 23 **A Yes.**  
 24 **Q** And Exhibit DDDD is a letter from NP&V, the firm, to  
 25 the Town; is that right, sir, on behalf of the Town?

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- 1 BRT plans to make 20 acres of land available.  
 2 This land is already approved to be cleared in connection  
 3 with proposed improvement at BRT.  
 4 Do you see that, sir?  
 5 **A It is not accurate.**  
 6 **Q** It is not accurate?  
 7 **A It wasn't approved to be cleared.**  
 8 **Q** Sir, this is on the letterhead of a consultant firm  
 9 hired by the Town, and you are saying that that statement  
 10 is not accurate?  
 11 **A There is no approval --**  
 12 **Q** Did you tell NP&V there is no approval and to take it  
 13 out of their letter?  
 14 **A At the meeting we had when I became involved in this**  
 15 **project, the dredging project, we had a meeting in Town**  
 16 **Hall where we told both a consultant and NP&V that a tree**  
 17 **clearing permit would be necessary, and they had to go**  
 18 **through SEQRA and/or NEPA in order to obtain a tree**  
 19 **clearing permit. And the BRT site was ruled almost**  
 20 **immediately out as a viable option. And we then looked**  
 21 **elsewhere.**  
 22 **Q** Did you ever see an amended portion of this letter  
 23 that removed this sentence?  
 24 **A I seen bid documents that don't have this location in**  
 25 **there.**

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- 1 **A Yes. It wasn't addressed to me. I don't know who it**  
 2 **went to.**  
 3 MR. ARONOFF: I move for the admission of these  
 4 two documents, EEEE and DDDD.  
 5 THE COURT: Any objection?  
 6 MR. CALICA: Objection to DDDD. It is not a  
 7 person authorized to make speaking admissions. It is an  
 8 outside environmental consultant circulating a proposal.  
 9 THE COURT: Overruled. I will allow it.  
 10 (Whereupon, Defendant's Exhibits DDDD and EEEE  
 11 were received in evidence.)  
 12 **Q** I would like you to turn to page 6 of DDDD.  
 13 You understood that NP&V was provided with  
 14 information about the project by the Town; is that  
 15 correct?  
 16 **A The Town's consultant was examining options for the**  
 17 **dredging.**  
 18 **Q** Right, and the Town provided certain information to  
 19 NP&V in connection with that project?  
 20 **A I assume that they did.**  
 21 **Q** Okay.  
 22 So you have page 6 in front of you?  
 23 **A Yes.**  
 24 **Q** The second full paragraph, and I will read it into  
 25 the record.

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- 1 **Q** It is your testimony that the Town pulled the plug on  
 2 installing the pond as the site and not the other way  
 3 around?  
 4 **A Yes.**  
 5 **Q** Let's turn back to your declaration, Exhibit K. I  
 6 want to call your attention to paragraph 4(b) -- sorry,  
 7 4(d).  
 8 Are you with me?  
 9 **A D or B?**  
 10 **Q** D, as in dog.  
 11 You wrote: Some months later, and this was  
 12 after the Systra letter we were talking about earlier from  
 13 June, I was provided with yet a different proposed track  
 14 plan by the BRT defendants prepared by PW Grosser,  
 15 G-R-O-S-S-E-R, consulting engineers, dated December 2012.  
 16 Do you see that?  
 17 **A Yes.**  
 18 **Q** And you wrote, this one showing us the proposed June  
 19 track, J track configuration in a completely different  
 20 area than the prior L track.  
 21 Do you see that?  
 22 **A Yes.**  
 23 **Q** And you are referring to Exhibit B to your  
 24 declaration, if you can take a look at it.  
 25 THE COURT: B, as in boy?

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1 MR. ARONOFF: To his declaration. Exhibit B to  
 2 Exhibit K.  
 3 **A Yes.**  
 4 **Q** And that is what you were referring to in your  
 5 declaration in that paragraph; is that right?  
 6 **A Yes.**  
 7 **Q** And the shape of the track depicted in Exhibit B is a  
 8 partial O, isn't it? It loops around, doesn't it,  
 9 Mr. Miner?  
 10 **A There is a loop. Whether it is a track or not, but**  
 11 **it is a loop.**  
 12 **Q** Is it your testimony that you were not sure it was a  
 13 track depicted there?  
 14 **A There is a loop, yes, a partial.**  
 15 **Q** A partial loop?  
 16 **A Yes.**  
 17 **Q** And this is from December of 2012 according to your  
 18 declaration?  
 19 **A Yes.**  
 20 **Q** And you conclude in that paragraph 4(d) of your  
 21 declaration, again, showing no apparent elevations of the  
 22 proposed trackage.  
 23 Do you see that?  
 24 **A Yes.**  
 25 **Q** Are you saying that that tracking attached as B to  
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1 your declaration shows no apparent elevations?  
 2 MR. CALICA: Objection to form, it says no track  
 3 elevations.  
 4 MR. ARONOFF: I will ask that.  
 5 **Q** Does that document attached as B to your declaration  
 6 show any proposed grading elevations?  
 7 **A On the drawing in front of me, I can't read any**  
 8 **elevations.**  
 9 **Q** How was the drawing provided to you, sir, do you  
 10 recall?  
 11 **A No.**  
 12 **Q** It may have been provided to you in full size like  
 13 the earlier drawing you looked at?  
 14 **A It may have been electronic. I don't recall**  
 15 **specifically.**  
 16 **Q** It may have been electronic, and it may have been  
 17 delivered to your secretary in full size as well; is that  
 18 right?  
 19 **A Perhaps.**  
 20 **Q** I want to show you what is marked as Exhibit AAA?  
 21 THE COURT: Show it to counsel, please.  
 22 (Whereupon, at this time there was a pause in  
 23 the proceedings.)  
 24 THE COURT: Triple A is your representation that  
 25 it is an enlargement of sub Exhibit B to Exhibit K?  
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1 MR. ARONOFF: Yes, your Honor.  
 2 THE COURT: I just wanted it to be clear.  
 3 **Q** I will show you what we have marked as triple A, and  
 4 I want you to compare it to Exhibit D to your declaration,  
 5 and my question is the same as my question to you earlier,  
 6 which is: Other than the red boxes, does it appear to be  
 7 the same document that was attached to your declaration  
 8 and referred to as the PW Grosser plan?  
 9 **A Yes.**  
 10 THE COURT: It is admitted with the same limited  
 11 purpose as the other enlargement.  
 12 (Whereupon, Defendant's Exhibit AAA was received  
 13 in evidence.)  
 14 **Q** Sir, I would like you to stand up if it is easier for  
 15 you. Do you want to go over to the drawing.  
 16 (The witness steps down.)  
 17 **Q** The blowup that we provided all the way to the west  
 18 of parcel C, are you with me?  
 19 Please point to it so we are on the same page.  
 20 The western most blowup. Go down.  
 21 Right there.  
 22 Yes, sir.  
 23 You see we have blown up the vertical lines that  
 24 run down the border of parcel B and C. Do you see that?  
 25 **A Yes.**  
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1 **Q** And can you read these numbers that are depicted in  
 2 each vertical line?  
 3 **A 50, 55, 60, 65, 70, 75.**  
 4 **Q** When you received the document in or about December  
 5 of 2012, you understood that those were proposed grade  
 6 lines; is that right, sir?  
 7 **A Yes, sir.**  
 8 **Q** Right.  
 9 And take a look, and this one we didn't blow up,  
 10 sir, if you look at the eastern-most red box depicted on  
 11 the diagram.  
 12 No, up there. Right there.  
 13 We put a circle around it and there is an E-L,  
 14 equals?  
 15 **A Yes.**  
 16 **Q** What does it equal?  
 17 **A 56.12.**  
 18 **Q** And you understood it was a track elevation level; is  
 19 that right, sir?  
 20 **A Track elevation, yes.**  
 21 **Q** You can take a seat. Thank you.  
 22 (Whereupon, at this time there was a pause in  
 23 the proceedings.)  
 24 MR. ARONOFF: Almost done, Judge. Promise.  
 25 **Q** Turning back to your declaration, paragraph 4(e).  
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1 **A Yes.**  
 2 **Q** Are you with me?  
 3 **A 4(e), yes.**  
 4 **Q** You wrote: As noted above, it was not until well  
 5 after the Town filed the instant litigation against the  
 6 BRT defendants in March 2014 and issued its stop work  
 7 order that the Town was belatedly provided with the  
 8 so-called AECOM, A-E-C-O-M, all caps, dated January 2014,  
 9 and a parenthetical, and then you wrote, which again shows  
 10 no apparent elevations of the proposed additional track.  
 11 Do you see that?  
 12 **A Yes.**  
 13 **Q** And that refers to Exhibit C of your declaration?  
 14 I will show you --  
 15 **THE COURT:** Let's save some time, I believe and  
 16 I will note that there is elevations on there marking --  
 17 **MR. ARONOFF:** Elevations of 50 above zero.  
 18 **THE COURT:** If you blow it up, we will see the  
 19 elevations.  
 20 **MR. CALICA:** Your Honor, that is blown up twice.  
 21 The document is blown up to a three by five, and the areas  
 22 in the detail are blown up again by another multiple of  
 23 five.  
 24 **THE COURT:** Yes.  
 25 I'm not sure if it matters, in the three by four  
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1 **before that.**  
 2 **Q** And even as to that approval, is it correct that you  
 3 said it was subject to being provided with a NEPA review?  
 4 **A Yes.**  
 5 **The Town had assumed that any NEPA or other**  
 6 **federal regulation and laws would be complied with.**  
 7 **Q** All right.  
 8 When somebody had shown you Exhibit V three  
 9 months earlier -- actually, it is on April 6th, 2012, you  
 10 recall that the language was that attached is a concept  
 11 plan of what we envisioned as of this date. Please keep  
 12 in mind that this is truly conceptual.  
 13 Do you recall having been advised that the  
 14 document sent to you on April 6th, 2012 was truly  
 15 conceptual?  
 16 **A Yes.**  
 17 **Q** But the document that was sent to you on June 29,  
 18 2012, the Systra track plan, that wasn't conceptual, they  
 19 were asking for actual approval; is that correct?  
 20 **A That was my understanding.**  
 21 **Q** And that was the J track; is that correct?  
 22 **MR. ARONOFF:** Objection to the characterization  
 23 of what they were asking for.  
 24 **THE COURT:** I will allow it.  
 25 **Q** They were asking to include an actual J track  
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1 you can see elevations, and I'm not sure that it is blown  
 2 up in this one. And I believe I have all the facts.  
 3 **MR. ARONOFF:** With that, I have no further  
 4 questions.  
 5 **THE COURT:** Excellent.  
 6 Do you want to call your next witness?  
 7 **MR. CALICA:** No, I would like to do redirect,  
 8 please.  
 9 **THE COURT:** Very brief.  
 10  
 11 **REDIRECT EXAMINATION**  
 12 **BY MR. CALICA:**  
 13 **Q** Mr. Miner, did Defendant's Exhibit AAA, the PW  
 14 Grosser plan, say on its face that you have -- and you  
 15 have a blowup there, that it was a track plan?  
 16 **A The plan reports to be a fire safety analysis, and**  
 17 **there is a sub caption that says overall plan.**  
 18 **Q** Does the word "track" appear anywhere in the document  
 19 as you read it or as you read it today?  
 20 **A Not that I see.**  
 21 **Q** We do know you sent a letter indicating some sort of  
 22 approval to the Systra J track that was provided to you on  
 23 June 29th, 2012, and you responded by letter dated July 3,  
 24 2012; is that right?  
 25 **A Yes, I believe the Systra was dated a couple of days**  
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1 configuration; is that correct?  
 2 **A Yes, consistent with the Systra plan.**  
 3 **Q** And they said it would be 5,600 feet long; is that  
 4 correct?  
 5 **A Yes.**  
 6 **Q** And they had said it would follow the natural contour  
 7 to the south of the property, enter from the west to the  
 8 east and go up and end in the Long Island Rail Road, and  
 9 follow the natural contour where the property is  
 10 approximately 50 to 55 feet; is that correct?  
 11 **A I don't think their letter said that. But in reality**  
 12 **that is what --**  
 13 **Q** Didn't the cover letter provided to you by Systra say  
 14 that it was limited regrading?  
 15 **A Yes, sir.**  
 16 **Q** And didn't you follow up with an email saying, please  
 17 provide me with the justification for the limited  
 18 regrading?  
 19 **A Yes, sir.**  
 20 **Q** Did you get it?  
 21 **A I believe we did in one of these exhibits.**  
 22 **Q** 75 feet on each side of the track. Is that correct?  
 23 **A That is what I asked for. Altogether it is what we**  
 24 **agreed to, going back and forth with Mr. Pratt, was 150**  
 25 **foot to give him a little flexibility on either side of**  
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1 **the center line of the track.**  
 2 **Q** Okay.  
 3 And on Exhibit CC when you were asked to run the  
 4 courses of the grading as shown on Jim Pratt's June 21,  
 5 2012 email to you, with its attached track installation,  
 6 isn't it correct that you went through the proposed  
 7 grading on that document, that it showed the grading  
 8 following the existing contour of the property along the  
 9 south side, entering in the southwest corner, and at maybe  
 10 90 or 100 feet, following the contour of the property down  
 11 to the westerly side, continuing up north and ending at  
 12 the Long Island Rail Road; is that correct?  
 13 **A Generally followed the contour.**  
 14 **Q** And that is the track installation and grading detail  
 15 that was provided to you by Mr. Pratt in 2012; is that  
 16 correct?  
 17 **A Correct. That is the one I approved.**  
 18 **Q** And did he provide you with anything to show that he  
 19 was going to excavate this part of the property where  
 20 there is no track down to the level shown in this  
 21 photograph?  
 22 **A Not to my recollection, no.**  
 23 **Q** Did he give you anything to show that he was going to  
 24 excavate this part of the westerly end of the property  
 25 down to the level shown?

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1 MR. ARONOFF: Your Honor, since we proposed to  
 2 put him on as part of our case, I would ask since  
 3 Mr. Humbert lives in Philadelphia, we can span my cross  
 4 beyond the scope of the cross so to get him out of the --  
 5 off the stand today if possible?  
 6 THE COURT: Sure.  
 7 MR. CALICA: Just that it would be deemed as his  
 8 part of the case there.  
 9 THE COURT: All right.  
 10 Please retrieve all the documents there.  
 11  
 12 R O B E R T H U M B E R T,  
 13 called as a witness, having been first  
 14 duly sworn, was examined and testified  
 15 as follows:  
 16 THE CLERK: Please state and spell your name for  
 17 the record.  
 18 THE WITNESS: Robert Humbert, H-U-M-B-E-R-T.  
 19  
 20 DIRECT EXAMINATION  
 21 BY MR. CALICA:  
 22 **Q** Good afternoon, Mr. Humbert.  
 23 What is your profession?  
 24 **A I am in AECOM, A-E-C-O-M, in the transportation**  
 25 **business line. Specifically, I'm in the freight rail**

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1 **A The bigger document shows some excavation, but it**  
 2 **wasn't approved by the Town.**  
 3 **Q** Did he ever tell you, Mr. Pratt, Mr. Kaufman,  
 4 Mr. Watral, any engineer associated with them, that what  
 5 they were planning on doing is bringing in excavators,  
 6 bringing the 100 foot and 90 and 80 foot areas down to 50  
 7 feet, streaming it on site, excavating and removing the  
 8 material?  
 9 **A No.**  
 10 **They only had authorization for that 150 feet.**  
 11 **Q** Of a J track running along the south, and going up  
 12 the easterly side and ending at the Long Island Rail Road;  
 13 is that correct?  
 14 **A And close to the expressway.**  
 15 **Q** And you did not know differently until the Town got  
 16 the documents in 2014 and began suit, is that correct?  
 17 **A Right around 2014.**  
 18 MR. CALICA: Nothing further.  
 19 THE COURT: You may step down.  
 20 (Whereupon, the witness leaves the witness  
 21 stand.)  
 22 THE COURT: Who do you propose to call as the  
 23 next witness?  
 24 MR. CALICA: Mr. Humbert, your Honor.  
 25 THE COURT: Call him.

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1 **market sector.**  
 2 **Q** Are you a licensed professional engineer?  
 3 **A I am.**  
 4 **Q** And in what jurisdiction?  
 5 **A Pennsylvania and Virginia.**  
 6 **Q** What about the State of New York?  
 7 **A Not a licensed engineer in New York.**  
 8 **Q** Does New York recognize licenses in New York State?  
 9 **A There is reciprocity.**  
 10 **Q** Does that mean that you are authorized to sign and  
 11 certify as a professional engineer licensed elsewhere,  
 12 plans in New York State?  
 13 **A Not in New York State.**  
 14 **Q** So what does reciprocity include?  
 15 **A It means that because I'm licensed in Pennsylvania**  
 16 **and in Virginia, I have the ability to get a license in**  
 17 **the State of New York because of my background.**  
 18 **Q** But you haven't done so?  
 19 **A No, sir.**  
 20 **Q** Okay.  
 21 Would you look at Exhibit 4 in the binder in  
 22 front of you?  
 23 **A Unfortunately I don't have that binder in front of**  
 24 **me.**  
 25 THE COURT: You cleaned up too much.

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1 **Q** You have Exhibit 4?  
 2 **A** **Yes.**  
 3 **Q** Do you know what that document is?  
 4 **A** **I believe I do.**  
 5 **Q** What is it?  
 6 **A** **It is the representation that AECOM developed with**  
 7 **respect to understanding the principles of the operation**  
 8 **and came up with that particular plan.**  
 9 **Q** Does it have a date?  
 10 **A** **I believe it is in January, but I cannot read**  
 11 **anything from it.**  
 12 **Q** I will represent to you on a larger copy that it is  
 13 January 2014.  
 14 Did you have any role in preparing this  
 15 document?  
 16 **A** **Yes, I did.**  
 17 **Q** And what was your role?  
 18 **A** **I was responsible for developing it along with my**  
 19 **staff.**  
 20 **Q** Does the document have a title?  
 21 **A** **Yes.**  
 22 **I think it reads Lot B and C Base Plan.**  
 23 **Q** And what does that mean?  
 24 **A** **We developed a full build-out plan with the idea that**  
 25 **we would carry it back depending on the staging and the**  
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1 **need for additional capacity.**  
 2 **Q** When did you first participate in preparing the  
 3 document that is now Exhibit 4?  
 4 **A** **I believe we began working under BRT in October of**  
 5 **2013.**  
 6 **Q** All right.  
 7 MR. CALICA: Incidentally, your Honor, I move it  
 8 in evidence.  
 9 THE COURT: So moved.  
 10 (Whereupon, Plaintiff's Exhibit 4 was received  
 11 in evidence.)  
 12 **Q** Would it be correct, if you began working on this  
 13 project in October of 2013, that it wasn't even a gleam in  
 14 anybody's eye in 2012 when Mr. Miner, as you heard him  
 15 testify, was presented with a J track plan?  
 16 MR. ARONOFF: Now I object.  
 17 THE COURT: Can you rephrase that. A gleam in  
 18 an eye I don't believe is an engineering art.  
 19 **Q** Did your company have any role in the Brookhaven Rail  
 20 Terminal in 2012?  
 21 **A** **No.**  
 22 **Q** When for the first time did you provide any services  
 23 to the Brookhaven Terminal?  
 24 **A** **We started in October of 2014 (sic).**  
 25 **Q** So it would be correct that if Mr. Miner was provided  
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1 with any track plans, site plans, overview plans, fire  
 2 safety plans, Systra track plans in 2012, that had nothing  
 3 to do with AECOM; is that correct?  
 4 **A** **AECOM did not provide those plans.**  
 5 **Q** All right.  
 6 Let me ask you this, sir:  
 7 In addition to yourself, were you assisted by  
 8 any professional engineers licensed in the State of New  
 9 York?  
 10 **A** **No, sir.**  
 11 **Q** Assuming that one would actually want to construct a  
 12 railway on the 93 acre parcel, would it be necessary for  
 13 there to be a licensed plan by a New York State engineer?  
 14 **A** **Typically the site plan has to be signed and sealed**  
 15 **by a New York professional engineer. It can be assisted**  
 16 **by track design that is not necessarily signed and sealed.**  
 17 **We do plenty of work that is not signed and sealed for**  
 18 **many clients.**  
 19 **Q** Who is the New York State licensed engineer that you  
 20 are associating with for purposes of designing this track?  
 21 **A** **When we get to that stage I can let you know. We are**  
 22 **not at that stage right now. It is a conceptual operation**  
 23 **design plan.**  
 24 **Q** And are you assisted by any other professional  
 25 engineers who are not licensed in New York?  
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1 **A** **We have a full contingent of licensed engineers in**  
 2 **the State of New York, sir.**  
 3 **Q** On this project, are you being assisted by any New  
 4 York State licensed engineer?  
 5 **A** **We have the ability to call them as we need them.**  
 6 **Q** My question, sir, is: From the time you started in  
 7 October 2013 until today, have you been assisted in  
 8 formulating what is now Exhibit 4 in evidence, the B and C  
 9 plan, by any New York State licensed professional  
 10 engineer?  
 11 **A** **No, sir.**  
 12 **Q** And what about a -- any geologist or hydrogeologist?  
 13 **A** **No, sir.**  
 14 **Q** And do you know an individual known as Nelson Abrams?  
 15 **A** **Yes.**  
 16 **Q** Who is Nelson Abrams?  
 17 **A** **He works at AECOM and he is involved in the project.**  
 18 **To be honest with you, I only met him once.**  
 19 **Q** So he didn't provide any assistance with -- to you in  
 20 connection with formulating lot B and C; is that correct?  
 21 **A** **No, sir.**  
 22 **Q** And when Mr. Abrams filed a declaration in this case,  
 23 would you agree that he was providing litigation  
 24 assistance to the case but he was not providing track  
 25 design services to BRT?  
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- 1 **A I'm not sure. You have to ask that again.**
- 2 **Q** Let me read the first sentence of the declaration
- 3 into the record, and I will ask the Court to judicially
- 4 notice it.
- 5 **A Mr. Nelson's declaration?**
- 6 **Q** Correct.
- 7 Filed April 30, 2014.
- 8 I am a certified professional geologist and
- 9 senior project manager at AECOM USA. AECOM had been
- 10 retained to advise and assist Foley and Lardner LLP in
- 11 connection with the above captioned litigation as it
- 12 relates to the ongoing and planned construction and
- 13 development activities at the Brookhaven Rail Terminal
- 14 site.
- 15 Did you review that?
- 16 **A I have seen it, but I have not reviewed it.**
- 17 **Q** Mr. Abrams doesn't work for you on this project?
- 18 **A No.**
- 19 **Q** So he only works for BRT lawyers as the declaration
- 20 says?
- 21 THE COURT: I got it.
- 22 **Q** Are there any geological considerations as you know,
- 23 sir, as a licensed professional engineer in several
- 24 jurisdictions, that are impacted by the type of excavation
- 25 and regrading and alteration of grades of this property?

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- 1 **A I did not consider that within my purview. I was**
- 2 **hired to look at a train operation and develop a concept**
- 3 **plan. That was the objective.**
- 4 **Q** All right.
- 5 Were you in court today when Stephanie Davis
- 6 testified?
- 7 **A Yes.**
- 8 **Q** And you read her declaration in this lawsuit?
- 9 **A Yes, I have.**
- 10 **Q** But at the time you were involved in formulating this
- 11 track plan, did you know what sole source aquifers were?
- 12 **A As of today, yes.**
- 13 **Q** No.
- 14 When you were designing the track plan,
- 15 Exhibit 4, between October 2013 and the time it was dated,
- 16 January 2014, did you know what sole source aquifers were?
- 17 **A It is in part of what my consideration was.**
- 18 **Do I know what sole source aquifers are? I'm an**
- 19 **engineer, yes, I do. My responsibility was to take the**
- 20 **objectives of the operation and achieve a concept plan**
- 21 **that met those objectives.**
- 22 **Q** Did you know what a hydrological zone three was?
- 23 **A No, I did not.**
- 24 **Q** Did you know a location of the Upper Glacial aquifer
- 25 beneath this site between October 2013 and January 2014?

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- 1 **A No, sir, I did not.**
- 2 **Q** So then you gave no consideration, is it correct, to
- 3 any impact on the Glacial aquifer or any other aquifer as
- 4 a result of any of the excavation grading and track design
- 5 functions you performed, correct?
- 6 **A I developed a concept plan that met the operational**
- 7 **objectives.**
- 8 **Q** And what was the operational objection -- objectives?
- 9 **A I can go through them. There are a number in my**
- 10 **declaration. Do you wish me to do so?**
- 11 **Q** Was it to achieve a uniform level of 50 feet so that
- 12 the westerly side of the site that has been -- had an
- 13 original elevation of 100 feet aligns with the close to 50
- 14 foot elevation, natural elevation, at the east end of the
- 15 site?
- 16 **A Absolutely not. Never considered.**
- 17 **Q** Then referring to your declaration, what were your
- 18 considerations?
- 19 **A The train that can be received at this site is**
- 20 **limited by 35 cars. To do so, it is important that we**
- 21 **receive that train off the Long Island Rail Road in its**
- 22 **totality.**
- 23 **So the first 2,500 feet of track that is**
- 24 **proposed is considered an arrival track, bringing the**
- 25 **track off of the Long Island Rail Road and having it**

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- 1 completely away from the Long Island Rail Road and not
- 2 disrupting their operation.
- 3 The track has two other tracks in that same
- 4 slope area coming down the grade. One is a departing
- 5 track, the other is a runner track. That runner track is
- 6 kept free so power can move between one track and another
- 7 independently.
- 8 The departure track is one where the cars that
- 9 are ready for outbound moves to the Long Island Rail Road
- 10 can be built up such that power released from the inbound
- 11 can use the runner track and hook on to the head end of
- 12 the cars sitting on the departure track for an outbound
- 13 movement. That is objective number one.
- 14 Objective number two is to create a condition
- 15 that allows the plant to digest the cars that have been
- 16 just received.
- 17 So there are a number of support staging tracks
- 18 that allow the 35 cars to be broken out into digestible
- 19 blocks for delivery to a number of different locations
- 20 from the C line.
- 21 The third element is the industry tracks
- 22 themselves within C line -- C lot are identified,
- 23 depending what the actual site development is or what the
- 24 customer is, to identify those as industry tracks where
- 25 those blocks would be delivered to that industry and

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1 material would be off-loaded from that.  
 2 The next objective is to allow for C to collect  
 3 blocks and bring those blocks over to lot A for delivery  
 4 to lot A. That way, again, we have a situation where none  
 5 of the tracks are -- for the Long Island Rail Road are  
 6 disturbed because we already had the full 35 cars.  
 7 The final element is how to get those lots in  
 8 lot C in that staging lot to lot D, which would  
 9 necessitate going underneath the Long Island Rail Road.  
 10 That is the track objectives. There are also  
 11 some roadway objectives.  
 12 Q Let me ask you this: At the time you formulated the  
 13 plan, did BRT own parcel D?  
 14 A You know, I don't know the answer to that -- to make  
 15 sure lot D was taken into consideration.  
 16 Q Do they own or control lot D today?  
 17 A I don't know. I don't think they do.  
 18 Q So what you are saying is that one of your  
 19 engineering considerations was to design parcels B and C  
 20 so that you could extend track onto parcel B that is not  
 21 owned by BRT when you designed the track and isn't even  
 22 owned by BRT while you are testifying here today; is that  
 23 correct?  
 24 A It is my understanding that parcel B and C were under  
 25 their control. Parcel D was out there as potential

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1 A It could have been east or west side. Those were the  
 2 two longest sections.  
 3 Q Has anybody identified any proposed occupants,  
 4 purchasers or tenants on buildings lot B or C?  
 5 A Not within my purview.  
 6 Q Anybody identified any potential customers for the  
 7 track and building on the tracks of B and C who would like  
 8 to have material delivered to the site or shipped out of  
 9 the site?  
 10 A Again, not within my purview once again.  
 11 Q Is it a correct summary, sir, that you designed a  
 12 track plan starting in October 2013, completing in January  
 13 of 2014, without the assistance of any New York State  
 14 licensed engineer, without any geologist, without any  
 15 consideration of the aquifer or ground water  
 16 considerations of -- to accommodate buildings that aren't  
 17 designed for users that insofar as you know do not exist  
 18 as of the present time; is that correct, sir?  
 19 A I don't believe you mentioned completed the design?  
 20 Is that what you said.  
 21 Q Completed the track design you said.  
 22 A No, sir.  
 23 Q Well, you completed -- what is this, a concept?  
 24 A A design concept, yes, sir.  
 25 Q I see.

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1 business. And as such we want to make sure that what you  
 2 are designing initially ultimately can accommodate a  
 3 future expansion of a business, which is a good business  
 4 decision.  
 5 Q And what about parcel E or parcel F?  
 6 THE COURT: Counsel, move ahead.  
 7 Q Let me ask you this, sir.  
 8 Was your track designed to accommodate -- design  
 9 designed to accommodate any buildings or structures?  
 10 A I believe we identified three large boxes as our  
 11 goal. Primarily it was a generic plan to address whatever  
 12 it might be. We had the ability to identify or tweak the  
 13 alignment to match that.  
 14 Q Do you know if there are any building places or three  
 15 or four or even one building on parcel B or C formulated  
 16 by Brookhaven?  
 17 A We did meet with one particular developer that was  
 18 looking at a refrigerated warehouse and he gave us  
 19 dimensions for us to use as a template. And we used that  
 20 as a template.  
 21 Q And where on the site would this refrigerated  
 22 warehouse be?  
 23 A It hadn't been actually identified. It was either on  
 24 the east or west side of the lot.  
 25 Q It could have been on the east side?

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1 So for this design concept, your client is now  
 2 removing, according to one of the documents in evidence,  
 3 two and a half million cubic yards of sand material,  
 4 excavating for proposed tracks in areas 100 feet, 90 feet,  
 5 80 feet, 70 feet, the majority of the site, excavating it  
 6 down to 50 feet for a track that you are telling me, sir,  
 7 is a concept?  
 8 A Every design goes through phases. It begins with a  
 9 desk top and then proceeds through a concept. That  
 10 concept is used as a basis for design. It goes through  
 11 preliminary and final design. It is a part of a design  
 12 process, by no means complete. Consideration for other  
 13 elements come in as we progress through understanding what  
 14 we want to do.  
 15 Q Isn't it a fact, sir, that your client is excavating,  
 16 removing material, grading now for a track designed by  
 17 your company, AECOM, that you just told his Honor is a  
 18 concept?  
 19 A It is a concept design used as a basis for design.  
 20 Whether there was sand there or whether there  
 21 was no sand there, we would still be presented the same  
 22 option.  
 23 Q Do you think it is fair for an engineering practice  
 24 to alter the entirety of the site, to remove the native  
 25 soils, to change the grades by 50 feet along the entire

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1 west side concept tra... ned  
 2 building... identified u...  
 3 with yo... of good railr...  
 4 **A I... is prudent e...**  
 5 **exac...**  
 6 **loo...**  
 7 **So this identifies what it...**  
 8 **th... have to go through the n...**  
 9 **to figure out what else need...**  
 10 **accommodate it.**  
 11 **One of the p... is removing r...**  
 12 **ing them; is that right?**

13 **A I don't know what that means.**  
 14 **Q On We... this... the... this being the**  
 15 **excavated on the site is being stored on-site -- being**  
 16 **stored on-site or removed and sold to purchasers off-site?**  
 17 **MR. ARONOFF: This is not an appropriate witness**  
 18 **to do this with.**  
 19 **THE COURT: If he knows.**  
 20 **Do you know?**  
 21 **THE WITNESS: No.**  
 22 **Q Do you know whether it is being screened on site?**  
 23 **A Obviously I have been out to the site so I have seen**  
 24 **the screening going on, yes, so I know that.**  
 25 **Q Does the screen contribute in any way either towards**  
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1 the design or the eventual construction of the track along  
 2 the lines shown on Exhibit 4?  
**Again, counsel, iyt yoo Na-R is- 3 S**

1 **Q** So would it be correct that any of the current tweaks  
 2 would basically show the track in the same O track  
 3 configuration that is shown on Exhibit 4?  
 4 **A Absolutely.**  
 5 **Q** Now, what relationship, if any, does AECOM have to  
 6 Sidney Bowne, B-O-W-N-E, the engineers that prepared the  
 7 grading plan for BRT?  
 8 **A To my knowledge, none.**  
 9 **Q** So you didn't consult with them and they didn't  
 10 consult with you; is that correct?  
 11 **A The extent of my relationship with Bowne was to get**  
 12 **information from them insofar as grade and elevations are**  
 13 **concerned.**  
 14 **Q** Let me ask you this, sir: Do you know whether the  
 15 Bowne firm is doing any work on track design?  
 16 **A Only from a standpoint that I have seen exhibits that**  
 17 **have Bowne's name on it with some tracks shown.**  
 18 **Q** Do you know from your own professional track  
 19 engineering activities on behalf of BRT whether it is  
 20 AECOM or Bowne who is preparing the track design,  
 21 conceptual or proposed, for parcels B and C?  
 22 **A It is my understanding it is AECOM who is doing the**  
 23 **track design.**  
 24 **Q** And your company was hired in October 2013; is that  
 25 correct?

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1 **have been referring to, loop, as well as the J loop, as**  
 2 **well as double track. So there has been a number of**  
 3 **different alignment configurations that have been going on**  
 4 **prior to AECOM being involved.**  
 5 **Q** Let me try to simplify.  
 6 AECOM is the only engineering firm designing  
 7 conceptual proposed track by BRP; is that correct?  
 8 **A Certainly my hope.**  
 9 **Q** You came on board October of 2013?  
 10 **A Yes, I did.**  
 11 **Q** And there was no formulations of any track design by  
 12 AECOM, or any of its staff, or any of your associates,  
 13 prior to October 2013; is that correct?  
 14 **A That's correct.**  
 15 **Q** Would you agree, sir, that the Town could not have  
 16 learned of any track designs originated with AECOM at any  
 17 time prior to October --  
 18 THE COURT: I will take that as background.  
 19 MR. CALICA: I have nothing further.  
 20 THE COURT: We will take a brief break while we  
 21 charge the batteries here.  
 22  
 23 (Whereupon, a recess was taken.)  
 24  
 25

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1 **A Yes, that's correct.**  
 2 **Q** And so it is correct then that the Town could not  
 3 have been apprised of any track design for an O track that  
 4 had any track engineering design at any time prior to  
 5 October 2013 when AECOM came on board; is that correct,  
 6 sir?  
 7 MR. ARONOFF: Objection.  
 8 THE COURT: How is he supposed to know?  
 9 **Q** Sir, have you seen any Bowne engineering work  
 10 identifying track design on parcel B and C?  
 11 **A I have seen exhibits with it shown in there. That is**  
 12 **the extent of my relationship with Bowne.**  
 13 **Q** But you have considered those exhibits you have seen  
 14 a design or engineering of tracks?  
 15 **A They certainly show the general principles of track**  
 16 **design being followed, yes, sir.**  
 17 **Q** Insofar as AECOM is concerned, did you acknowledge --  
 18 do you acknowledge, sir, that the Town would not have  
 19 learned anything of the track design plans of BRT that  
 20 involve any design by AECOM at any time prior to October  
 21 2013?  
 22 **A It is my opinion that based on the research that we**  
 23 **did when we were looking on doing -- putting the**  
 24 **conceptual plans together in the design mode that we were**  
 25 **looking at previous drawings that showed this O that we**

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1 THE COURT: Counsel, before you begin your  
 2 hybrid cross and direct examination, I have a few  
 3 questions.  
 4 Remember you are still under oath.  
 5 Based on the plan that you prepared, calling it  
 6 a plan loosely -- is that what you would call it, a plan?  
 7 THE WITNESS: Yes.  
 8 THE COURT: Based on a plan of that level, and  
 9 you have been describing how it was preliminary and so  
 10 forth, would you expect a reasonable client to begin  
 11 construction based on that plan?  
 12 THE WITNESS: Your Honor, we had the experience  
 13 where we develop a plan of that sort that is actually used  
 14 to go to construction.  
 15 Again, it depends on the client, but we had  
 16 clients that have gone forward with construction and  
 17 getting bids with plans of that sort.  
 18 THE COURT: Do you think it is a good idea?  
 19 THE WITNESS: It depends on the circumstances  
 20 surrounding it, there are times I believe it is a good  
 21 plan. But it is economically a good idea from a  
 22 standpoint of not having a protracted construction. You  
 23 can shorten the timeframe associated with that, and as  
 24 long as we have the proper supervision, it can be  
 25 accomplished in a proper and sufficient manner.

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1 THE COURT: You have been here all day with us?

2 THE WITNESS: Yes.

3 THE COURT: You have seen Exhibit B and B-1 and

4 the big pictures; is that right?

5 THE WITNESS: Yes.

6 THE COURT: And does the construction of your

7 plan require clearing, grading and grubbing, I believe the

8 other word was used, to this magnitude? Or could it have

9 been done different?

10 THE WITNESS: It probably could have been done

11 more surgically associated with following the plan to the

12 letter of the law.

13 THE COURT: For example, you could clear 150 or

14 75 foot swath in the direction of the O; is that fair?

15 THE WITNESS: Yes.

16 THE COURT: And the last question, since you are

17 the railroad engineer and you should know, the whole

18 notion of grading the track downward 1.25 percent slope,

19 is that an ideal design for a railroad? Is it better from

20 a railroad engineer perspective to have a level track,

21 with respect to the safety issues and things like that?

22 THE WITNESS: In an ideal world everything is

23 better if level. In this case the criteria we were using

24 was actually a 1.5 maximum grade, which makes for an

25 efficient operation.

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1 Quite frankly, we develop things in processes.

2 We develop the operating plan, regardless of what the

3 vertical looks like first initially. And then we overlay

4 that vertical on what the constraints of the property are.

5 As long as the constraints, like degree of

6 curve, grades, as long as you can achieve that plan within

7 those design criteria, then you have a successful project.

8 THE COURT: Would it have been from an

9 engineering perspective feasible to increase the grade in

10 the lower area of the property to create a lower track?

11 THE WITNESS: Not to achieve the objectives.

12 THE COURT: The objective in parcel B?

13 THE WITNESS: One objective.

14 The other is that at the north end we were going

15 to tie in to the Long Island Expressway service road.

16 That is about 53 to 52, that elevation.

17 There is also the track going around the loop.

18 There are dimensions that are very important. The only

19 two tangent sections in that loop that you can effectively

20 change the section -- direction of the train in various

21 tracks, in doing so we have to maintain the tangents to

22 get cross-overs and turn-outs so I can take a train from

23 the inside loop to the outside loop.

24 Specifically if I was taking a train I just

25 received, taking it apart, cutting cars or a block of cars

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1 into the support facility, from the support facility I may

2 take it to the runner track which is open to take it over

3 to lot A.

4 So those considerations are more important,

5 quite frankly, as long as we are able to establish those

6 tangent sections and keep the loop at no greater than

7 somewhere -- I think our desire was -- desired curvature

8 was 11 degree 30 minutes and the maximum curvature was 12

9 degree 30 minutes, which is within the principles of

10 railroad engineering.

11 Then we are in good shape. But to do that,

12 though, there was another element that came into play in

13 that we needed a roadway access as well.

14 We spoke to the track objectives, but there is

15 also roadway objectives. One was the access onto the

16 service road, and you mentioned it earlier, there was the

17 recharge basin. We needed enough room between the tracks

18 and the recharge basin to afford us an access road between

19 the two.

20 The objective here again is not to have a

21 conflict between the track operation and the roadway

22 operation.

23 So the part of the O that is exposed is where

24 the roadway comes in.

25 THE COURT: When did you first learn that

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1 construction in the sense of clearing, grading and

2 grubbing had begun in connection with your plan?

3 THE WITNESS: I have seen area photographs, so I

4 knew from the aerial photographs when something was

5 underway.

6 THE COURT: When did you see that?

7 THE WITNESS: It was probably in early November.

8 We started in October. But I probably didn't see anything

9 until then.

10 THE COURT: Is it fair to say that that

11 construction had begun before you designed your plan?

12 THE WITNESS: There was work going on at the

13 site before I started my plan.

14 THE COURT: Counsel.

15 MR. ARONOFF: The first thing I wanted to do is

16 to have Mr. Humbert qualified as a railway engineering

17 expert.

18 THE COURT: I think we are good.

19 MR. ARONOFF: Do you want me to mark the CV so

20 it is part of the record?

21 THE COURT: It is entirely up to you.

22

23

24

25

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1 CROSS-EXAMINATION  
 2 BY MR. ARONOFF:  
 3 **Q** Now that you have been admitted as a railway  
 4 engineering expert, I want your conclusion on the record  
 5 as well.  
 6 Is it your expert conclusion that the conceptual  
 7 track design put in for the BRT expansion was designed  
 8 based upon sound engineering concepts and principles?  
 9 **A Yes, it was.**  
 10 **Q** Now, you talked a lot on the record about the  
 11 operational objectives communicated to you by the client  
 12 when you started working in October of 2013?  
 13 **A Yes.**  
 14 **Q** I want to show you a document that memorializes that  
 15 so we have it as part of the record as well.  
 16 MR. CALICA: Can I have Exhibit CCCC.  
 17 THE COURT: I will need that one as well.  
 18 (Handed to the Court.)  
 19 THE COURT: You may proceed.  
 20 **Q** Do you have it in front of you, sir?  
 21 **A Yes, I do.**  
 22 **Q** Would you tell the Judge what it is.  
 23 **A After we have been retained by BRT to begin looking**  
 24 **into the operation as was currently appeared to be**  
 25 **designed on the previous drawings, we put forth a work in**  
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1 **session that established some of the elements that we felt**  
 2 **were important with respect to going forward. Operating**  
 3 **parameters were one. You can see a series of issues that**  
 4 **we understood to be true as part of the operating**  
 5 **parameters.**  
 6 **The design criteria we developed to achieve the**  
 7 **necessary proper design regardless of what the actual**  
 8 **situation presented itself with.**  
 9 **We also took into consideration some of the**  
 10 **general warehouse layouts. It was a generic drawing but**  
 11 **it had some elements we needed to follow with respect to**  
 12 **the location and sizing of the warehouse.**  
 13 **You can also see the general warehouse facility**  
 14 **layout that was presented by a potential client, a**  
 15 **customer of BRT's that we utilized to help size our**  
 16 **facility.**  
 17 **As you can see, the typical cross-section in**  
 18 **lot B, frankly it could have been in lot C as well, the**  
 19 **general relationship between the top of rail and the**  
 20 **roadway systems.**  
 21 **Q** To be clear, this is a document that was prepared by  
 22 AECOM?  
 23 **A That's correct.**  
 24 **Q** And it was prepared shortly after you were retained  
 25 by BRT?  
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1 **A That is also correct.**  
 2 **Q** Does it memorialize the criteria that you just  
 3 described?  
 4 **A Yes, it does.**  
 5 MR. ARONOFF: I would move to admit it in  
 6 evidence.  
 7 MR. CALICA: Your Honor, I believe it is  
 8 hearsay. It is self-serving.  
 9 THE COURT: I will allow it.  
 10 (Whereupon, Defendant's Exhibit CCCC was  
 11 received in evidence.)  
 12 **Q** Now, I wanted to turn your attention to the fourth  
 13 page in. The pages are not numbered, the page that reads,  
 14 Brookhaven Rail Terminal Site Operating Parameters.  
 15 Do you see that?  
 16 **A Yes, I do.**  
 17 **Q** And are those the operational objectives you  
 18 described earlier?  
 19 **A The parameters, not necessarily the objectives.**  
 20 **Q** Okay.  
 21 With respect to the operational objectives,  
 22 Mr. Humbert, did you design your conceptual track design  
 23 plan in accordance with the operational objectives that  
 24 were communicated to you by the client that you testified  
 25 about earlier?  
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1 **A Yes, I did.**  
 2 **Q** I don't want to go over ground we covered already --  
 3 MR. ARONOFF: I think it would be helpful to  
 4 explain the operational objectives quickly again, by  
 5 pointing to the exhibit so you can see exactly what he is  
 6 talking about.  
 7 THE COURT: Okay.  
 8 MR. ARONOFF: I will borrow my friend's  
 9 demonstrative if it is okay by having the witness explain  
 10 by pointing to the exhibit himself --  
 11 THE COURT: Okay with me.  
 12 MR. CALICA: The only problem is he testified it  
 13 is Bowne's grading plan and not this company's track plan.  
 14 MR. ARONOFF: I only want him to show where on  
 15 the property it is happening.  
 16 THE COURT: If it is helpful to explain your  
 17 testimony, you can.  
 18 MR. ARONOFF: May I use the pointer?  
 19 THE COURT: Sure.  
 20 **A In connection to the Long Island Rail Road which is**  
 21 **here, the tracks come off the Long Island Rail Road.**  
 22 **There is a single track that is shown here. We have three**  
 23 **tracks in the ultimate build-out.**  
 24 **Once you reach this location here, the tangent**  
 25 **that I mentioned earlier, is where your cross-overs occur**  
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1 and where the lead getting down to D occurs.  
2 By the time you reach this elevation, it would  
3 be elevation 50 or thereabouts. You would continue around  
4 with additional trackage that helped you store or stage  
5 cars to the correct area. Again, it is in the portion  
6 here where you have tangent of about five to six hundred  
7 feet. You have cross-overs and turn-outs allowing you to  
8 get into some of the industry tracks, as well as to run  
9 around cars that are staged within the configuration  
10 itself.

11 This is the area we would need to make sure that  
12 we have sufficient room to get between the track  
13 configuration and the recharge basin.

14 Coming around here, we have the support  
15 facilities with a track that extends beyond the rest of  
16 the track so that the power that brings in anything can be  
17 released and it should have what you call a pull move by  
18 the locomotive as opposed to a push move by the  
19 locomotive.

20 THE COURT: Do you still have CCCC in front of  
21 you?

22 THE WITNESS: I do.

23 THE COURT: Look at page 2 by way of example.

24 It is a drawing of the O shaped track. Do you  
25 see that?

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1 clearance.

2 As I mentioned before, a grade of 1.5 percent,  
3 allows you 15 feet in a thousand.

4 So taking that into consideration gives you a  
5 kind of understanding of how much distance is needed to  
6 achieve a grade separation of whatever is necessary.

7 So if you wanted 30 feet, you would have to go  
8 2,000 feet in order to achieve that 30 feet, and so on.

9 Q And just to amplify that point, would you show the  
10 Court where parcel B is located?

11 A Down there (indicating).

12 Q Where is the Long Island Rail Road running?

13 A Here (indicating).

14 Q Where is the track going to ultimately be connected  
15 to parcel B?

16 A Here (indicating).

17 Q Do you know, sir, the approximate level of elevation  
18 of the Long Island Rail Road, top of the rail for the  
19 connection -- where the connection occurs to parcel B?

20 A Yes, I do.

21 Q And what is that?

22 A Elevation 69 and change.

23 Q And in order to make that connection you would have  
24 to do what, sir?

25 A In order to accommodate a rail movement under the

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1 THE WITNESS: Yes.

2 THE COURT: Did you draw this or were you  
3 presented with this?

4 THE WITNESS: We drew this. We prepared this  
5 document.

6 THE COURT: I wasn't sure. It has BRT on it.

7 THE WITNESS: This was the PowerPoint  
8 presentation we prepared to present in a work session.

9 Q Please continue explaining the operational  
10 objectives, please.

11 A As you see there is a gap in the location here where  
12 the track ends. This track is on a grade coming on down.  
13 This allows for an unimpeded operation for truck traffic  
14 to get into the inside of the oval where presumably there  
15 would be rail service facilities located so there would  
16 not be any conflict.

17 This location from here to here are acceptable  
18 from what I understand for access by trucks into this  
19 site.

20 As I mentioned to you before, it was an  
21 elevation before.

22 The reason elevation 50 becomes more important  
23 other than the two points I presented here plus the tie  
24 ins to the Long Island Rail Road is also the need to get  
25 underneath the Long Island Rail Road with the appropriate

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1 Long Island Rail Road, we would need to take into  
2 consideration the roadbed of the Long Island Rail Road,  
3 the support members or structural members associated with  
4 holding up the Long Island Rail Road, and the clearance  
5 level that is used in -- throughout North America at this  
6 point in time, which is 21 foot, that allows for double  
7 stack containers. And that equivalent is about 28 feet  
8 from top of rail to top of rail, which would necessitate  
9 that we bow in the 40, 41 foot top of rail elevation  
10 within the Long Island Rail Road.

11 In order to do that, let's go back to the  
12 thousand feet, gaining 15 feet and a thousand, we were at  
13 50, and another ten feet, so it means I need 700 or 650  
14 feet in order to achieve that.

15 The further I move that back, the more difficult  
16 it becomes to make that connection.

17 Q And would you tell the Court anything about the  
18 natural topography of this particular site that may have  
19 impacted the conceptual design plan.

20 A One of the benefits of the site is some 40, almost 45  
21 percent of the site is in that 55, 50 to 55 foot range.

22 And it is important by virtue of the fact that these were  
23 tie-in points for the roadway access as well as it allows  
24 us to make the move underneath the Long Island Rail Road.

25 Q Are you familiar with an acronym AREMA, A-R-E-M-A?

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1 **A Yes.**  
 2 **Q** What is it?  
 3 **A American Railway Engineering and Maintenance of Way**  
 4 **Association.**  
 5 **Q** What is AREMA?  
 6 **A It is a national organization -- actually**  
 7 **international organization at this point, that brings**  
 8 **together the railroads or short lines and class ones into**  
 9 **one body and is -- it generated every year a list of**  
 10 **standards that is fairly comprehensive, and it is used**  
 11 **by -- there is a standard reference used by railroad**  
 12 **engineering.**  
 13 **Q** Is that something you kept up with over the years?  
 14 **A Yes, we have.**  
 15 **Q** And did you design the conceptual track in accordance  
 16 with AREMA guidelines?  
 17 **A Yes, we did.**  
 18 **Q** I would like to show you what is marked as  
 19 Exhibit TT.  
 20 (Handed to the witness.)  
 21 **Q** Explain this document.  
 22 **A It represents in the pink shaded area an elevation**  
 23 **that is 55 or less as shown in pink in the areas of the B**  
 24 **lot and the C lot. In combination, if you were to add the**  
 25 **two and divide by the total B and C lot it would come to**  
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1 **44, a little less than 45 percent.**  
 2 **Q** Did you create this document?  
 3 **A Yes, I did.**  
 4 MR. ARONOFF: Move to admit it in evidence.  
 5 MR. CALICA: No objection.  
 6 THE COURT: Admitted.  
 7 (Whereupon, Defendant's Exhibit TT was received  
 8 in evidence.)  
 9 **Q** We talked about how the natural topography in much of  
 10 the site is in a 50 to 55 feet above sea level range?  
 11 **A Yes.**  
 12 **Q** And the western boundary of the loop is a higher  
 13 elevation, isn't it?  
 14 **A Yes.**  
 15 **Q** Are there any engineering reasons why you deemed it  
 16 important to have that area of the spur track at a 50 foot  
 17 elevation and not higher?  
 18 **A Yes.**  
 19 **I think we talked mainly about the entrance and**  
 20 **gaining access to that 50 foot elevation, and having that**  
 21 **50 foot elevation provide us the access to the D lot.**  
 22 **As we go around in that 50 foot elevation, we**  
 23 **are now beginning to utilize this area here to store**  
 24 **blocks of cars for remarshaling and redistribution either**  
 25 **to the D lot or to the C lot.**  
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1 **It is extremely important that there is no grade**  
 2 **on those tracks, as those cars have to roll, so those**  
 3 **tracks are designed to be flat.**  
 4 **Q** What would be happening operationally to tighten the  
 5 curve, if you were to bring the western boundary of the  
 6 spur track towards the east so as not to disturb as much  
 7 of the natural topography?  
 8 **A Again, going back to the design criteria. If these**  
 9 **curves we are already maxing out on those curves, so it**  
 10 **would be very imprudent to increase those curves beyond**  
 11 **what we increased them to right now.**  
 12 THE COURT: I'm sorry, meaning what? The cars  
 13 will fall off the tracks?  
 14 THE WITNESS: They would derail.  
 15 **Q** Mr. Humbert, were you ever asked by the client to  
 16 design a conceptual -- to create a conceptual track design  
 17 plan that maximized the amount of sand that can be removed  
 18 from the property?  
 19 **A Absolutely not.**  
 20 **Q** And with the amount of sand that can be removed from  
 21 the property, in all considerations to you in coming up  
 22 with your conceptual design plan?  
 23 **A Absolutely not.**  
 24 MR. ARONOFF: The last thing I wanted to do,  
 25 Judge, is put his report in evidence, the declaration he  
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1 submitted. We have it as Exhibit O.  
 2 MR. CALICA: I think he should testify to it,  
 3 your Honor. But if you are convenient having it --  
 4 THE COURT: I will admit it over objection.  
 5 MR. ARONOFF: No further questions.  
 6 THE COURT: Counsel, any brief, brief follow-up?  
 7 MR. CALICA: Yes.  
 8  
 9 REDIRECT EXAMINATION  
 10 BY MR. CALICA:  
 11 **Q** Mr. Humbert, even the conceptual O track design that  
 12 your company formulated for conceptual purposes is a dead  
 13 end; is that correct?  
 14 **A They call it a stub end. It doesn't allow for**  
 15 **progressive moves. Is that your point?**  
 16 **Q** Yes.  
 17 **A It doesn't allow for progressive moves.**  
 18 **Q** So flow around the O design and reconnecting it at  
 19 the south end is not one of the goals of this conceptual  
 20 track design; is that correct?  
 21 **A Absolutely not.**  
 22 **Q** All right.  
 23 If I can direct your attention again to the  
 24 Systra Engineering, Exhibit 1 in the binder in front of  
 25 you, isn't it a fact, sir, that the Systra J track design  
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1 does contemplate or make provision for a potential future  
 2 connection of the track to the track on parcel B?  
 3 **A In my opinion it does not do -- it does not provide**  
 4 **for a proper design.**  
 5 **Q** It does attempt to do so; is that correct?  
 6 **A It attempts to, but if you look at the configuration**  
 7 **that you see here, the maximum that they can switch into a**  
 8 **D lot at any one time, the maximum they could switch into**  
 9 **D lot, and it would be a push move where the engine would**  
 10 **be behind all of the cars, would be somewhere in the order**  
 11 **of eleven or twelve cars at any one time.**  
 12 **Q** So your design has better future access to parcel B  
 13 that your client doesn't own and has no contract to  
 14 acquire?  
 15 **A My concept design basis provides for a much more**  
 16 **efficient operation than one that would be -- that would**  
 17 **be well to follow, yes.**  
 18 **Q** You testified that no representative of BRT ever  
 19 asked your company to design the track plan so as to  
 20 maximize the amount of fill; is that correct?  
 21 **A That is correct.**  
 22 **Q** Would you look at Exhibit 20 in the binder in front  
 23 of you, and if it is not in evidence I will offer it at  
 24 this time.  
 25 MR. CALICA: Those are the documents that were  
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1 the subject of our discovery conference and ruling last  
 2 Friday, your Honor. Those are the emails exchanged  
 3 between an engineer, Lawrence Kuo, K-U-O, of Bowne, and  
 4 Dan Miller, a chief financial officer of the affiliate of  
 5 BRT.  
 6 THE COURT: Any objection to it coming in  
 7 evidence?  
 8 MR. ARONOFF: No objection.  
 9 (Whereupon, Plaintiff's Exhibit 20 was received  
 10 in evidence.)  
 11 **Q** Have you ever seen those emails before?  
 12 **A I don't believe I have seen this email.**  
 13 **Q** Let me direct your attention to Mr. Miller's  
 14 July 12th, 2010 email to Bowne.  
 15 **A Is that included in this?**  
 16 **Q** Yes, the bottom of the first page of Exhibit 20.  
 17 **A Yes.**  
 18 **Q** Late in the day, and I may be reading incorrectly.  
 19 Larry, pursuant to our closing documents, I will  
 20 actually need you to provide a calculation of estimated  
 21 volume on parcel C and, all caps, parcel B, rather than  
 22 parcel C as I originally request.  
 23 Do you see that email?  
 24 **A Yes, I do.**  
 25 **Q** And do you see the third page is a schedule of the  
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1 amount, the net amount of fill that will be removed from  
 2 parcel B and from parcel C?  
 3 **A Yes, I see the schedule.**  
 4 **Q** Okay.  
 5 And how much net is proposed to be removed from  
 6 parcel C under that calculation in cubic yards?  
 7 **A I'm not sure I understand your question, sir.**  
 8 **Q** Does that calculation show the amount of material  
 9 that is going to be removed from parcel C?  
 10 MR. ARONOFF: Judge, I object. Mr. Miller will  
 11 take the stand tomorrow, and he is the one responsible for  
 12 this document.  
 13 THE COURT: If you can answer.  
 14 THE WITNESS: It shows there is a net of a  
 15 million so cubic yards.  
 16 **Q** A million, so you mean 1,346,074; is that correct?  
 17 **A Yes, under parcel C.**  
 18 **Q** So the "so" is more than --  
 19 THE COURT: Objection sustained.  
 20 **Q** And then on parcel B, isn't there an additional  
 21 removal of 1,159,759 cubic yards?  
 22 THE WITNESS: Your Honor, I'm being asked to  
 23 speak to something that I have no knowledge of, nor was I  
 24 involved in the development.  
 25 THE COURT: Are you familiar with this type of  
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1 calculation being done on this type of project?  
 2 THE WITNESS: Yes.  
 3 THE COURT: And what the purpose of the  
 4 calculation?  
 5 THE WITNESS: You approach projects from a  
 6 number of different vantage points; some you look to  
 7 balance cuts and fills, and you do that from an economic  
 8 standpoint.  
 9 I suspect where counsel is going is to show that  
 10 there is a significant amount of excavation here.  
 11 THE COURT: Don't worry where he is going. Just  
 12 answer my question, which you did.  
 13 It is a net suggestion that that is what we are  
 14 getting rid of?  
 15 THE WITNESS: That is what would be considered  
 16 surplus material.  
 17 THE COURT: Which can be sold?  
 18 THE WITNESS: It certainly can be sold.  
 19 I will tell you regardless of whether this was  
 20 mud or whether it was sand, there would be no difference  
 21 in the presentation of my operational design.  
 22 **Q** Just to wrap this up, Mr. Humbert, you said that the  
 23 client didn't ask you to factor into your design the  
 24 amount of material to be removed from the site which you  
 25 said could be sold.  
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238

1            Would you agree looking at Exhibit 20 that what

2 Mr. Miller did is he asked Bowne initially to say how much

3 can we remove from parcel C, and he came back and said,

4 you know something, give me a calculation estimated on

5 parcel C and parcel B rather than parcel C only?

6            THE COURT: Objection sustained.

7            You can argue to me later.

8            MR. CALICA: All right.

9            I have no further questions of the witness,

10 thank you.

11           THE COURT: Very good.

12           You may step down.

13           (Whereupon, the witness leaves the witness

14 stand.)

15           THE COURT: We will stop here for today.

16           Now, I want to talk more about scheduling. And

17 there is something I neglected to think about on Friday.

18           You can come in tomorrow, and I can only give

19 you the morning. We will start at 9:30 and I can only

20 give you to lunch time.

21           MR. ARONOFF: We are both unavailable on

22 Wednesday.

23           THE COURT: Okay.

24           Tomorrow, can you be done in the morning?

25           (Counsel confer.)

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239

1            MR. CALICA: Judge, I just got the photographs

2 that were taken because they were not in a copy-able form.

3            THE COURT: That is three minutes, we are

4 talking about time right now.

5            MR. CALICA: I have basically one more witness.

6            MR. ARONOFF: Who?

7            MR. CALICA: Mr. Kelsey.

8            THE COURT: Who else do you have?

9            MR. ARONOFF: Mr. Newel and Mr. Miller, and that

10 is it.

11           So it is possible.

12           THE COURT: We will do the best we can.

13           I have a court obligation, which will most

14 likely put me in Brooklyn all day on Thursday. That is

15 the problem.

16           MR. ARONOFF: Is Friday available to you?

17           THE COURT: I can be here Friday morning.

18           It is up to you to work it out. Let's be on

19 time tomorrow.

20           Everyone have a good night.

21           (Case on hearing adjourned until 9:30 o'clock

22 a.m., Tuesday, May 20, 2014.)

23

24

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240

**I-N-D-E-X**

**W-I-T-N-E-S-S-E-S**

STEPHANIE DAVIS	8
DIRECT EXAMINATION	8
BY MR. CALICA	
CROSS-EXAMINATION	71
BY MS. MILLER	
MATTHEW MINER	109
DIRECT EXAMINATION	109
BY MR. CALICA	
CROSS-EXAMINATION	140
BY MR. ARONOFF	
REDIRECT EXAMINATION	191
BY MR. CALICA	
ROBERT HUMBERT	196
DIRECT EXAMINATION	196
BY MR. CALICA	
CROSS-EXAMINATION	221
BY MR. ARONOFF	
REDIRECT EXAMINATION	233
BY MR. CALICA	

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241

**E-X-H-I-B-I-T-S**

Plaintiff's Exhibit 8-B was received in evidence	
Plaintiff's Exhibit 1 was received in evidence	35
Plaintiff's Exhibits 4 and 5 were received in evidence	43
Plaintiff's Exhibit 18 was received in evidence	46
Plaintiff's Exhibits B and 16 were received in evidence	58
Plaintiff's Exhibit 2 was received in evidence	118
Plaintiff's Exhibit 28 was received in evidence	126
Plaintiff's Exhibit 24 was received in evidence	128
Plaintiff's Exhibit 8-A was received in evidence	135
Plaintiff's Exhibit 9 was received in evidence	140
Plaintiff's Exhibit 4 was received in evidence	199
Plaintiff's Exhibit 20 was received in evidence	235
Plaintiff's Exhibit 26 was received in evidence	67

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Defendant's Exhibit IIII was received in evidence	84
Defendant's Exhibit K was received in evidence	144
Defendant's Exhibit U was received in evidence	147
Defendant's Exhibit V was received in evidence	148
Defendant's Exhibit W was received in evidence	150
Defendant's Exhibit CC was received in evidence	155
Defendant's Exhibit BB was received in evidence	160
Defendant's Exhibit XX was received in evidence	172
Defendant's Exhibit EE was received in evidence	173
Defendant's Exhibit GG was received in evidence	174
Defendant's Exhibit FF was received in evidence	177
Defendant's Exhibit II was received in evidence	178
Defendant's Exhibits DDDD and EEEE were received in evidence	183
Defendant's Exhibit AAA was received in evidence	188
Defendant's Exhibit CCCC was received in evidence	224
Defendant's Exhibit TT was received in evidence	231

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**J**





