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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35819

ENTERED  
Office of Proceedings  
May 19, 2014  
Part of  
Public Record

BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC-  
PETITION FOR DECLARATORY ORDER

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**ANSWER OF TOWN OF BROOKHAVEN**

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Dated: May 19, 2014

## Preliminary Statement

The Town of Brookhaven (the “Town”) respectfully submits this answer in opposition the petition of Brookhaven Rail Terminal and Brookhaven Rail, LLC (collectively “BRT”) for a declaration concerning whether their massive (at least fourfold in size and substantial in scope) expansion of the Brookhaven Rail Terminal (“Terminal”) constitutes a “spur” or other exempt expansion under 49 U.S.C. § 10906. As conclusively demonstrated below, and in the Town’s parallel submissions to this Board to reopen the original proceeding which granted BRT limited approval for a much more limited (in both size and scope) track construction,<sup>1</sup> BRT’s current and planned expansion – which it illegally undertook without proper STB approval and in derogation of the former limited approval – is most definitely not a spur, and is not otherwise exempt from this Board’s review.

The Board should observe at the outset that BRT’s application to this Board conspicuously does not include any plans showing what structures and operations are planned to be conducted on the “expanded” site which now consists of an additional 93 acres (at least – more on this below) as compared to the original approved 28 acre site. As we further demonstrate below, not only does BRT’s massive and unapproved “expansion” not constitute a purported “spur” nor fall within any other exemption from actual and sorely needed STB review and oversight, but BRT’s conspicuous omission is nothing short of deliberate. Indeed, BRT’s omission is particularly glaring given recently discovered evidence – obtained for the first time today via Subpoena which the Town issued in connection with its pending Federal District Court action against BRT in which the Town maintains that BRT is illegally “sand mining” the newly

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<sup>1</sup> The Town respectfully refers to and incorporates those submissions herein by reference.  
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acquired 93 acres beyond the scope of any legitimate or genuine railroad activities, and in which the Federal District Court has temporarily enjoined BRT from any further construction activities at the newly acquired site) that BRT plans to construct a major transportation “hub” at the site for all of Long Island which goes far and beyond the scope of this Board’s prior approval. In fact, BRT’s assertion that its plan is to construct a mere “spur” is specious, and borders on frivolous.

The Town therefore respectfully requests that the Board: (1) declare that the planned expansion is not a spur and is at the least subject to Board review (including desperately needed environmental review); (2) declare that all or some of BRT’s activities and planned activities at the site are not legitimate or bona fide railroad activities and are not subject to any federal preemption; (3) issue necessary orders against BRT to halt its illegal, environmentally devastating and unpermitted activities at the site.

**THE MASSIVE EXPANSION IN SIZE AND SCOPE IS NOT A SPUR, NOR IS IT OTHERWISE EXEMPT FROM BOARD REVIEW AND OVERSIGHT**  
**(Incorporation of Town's Submissions in Finance Docket No. 35141)**

The Town has already set forth the background and history of the Terminal and the BRT in connection with the Town's pending application to this Board in a proceeding entitled U S Rail Corporation – Construction and Operation Exemption– Brookhaven Rail Terminal, Finance Docket No. 35141 (“FD 35141”). In particular, the Board is respectfully referred to the Town's application dated March 12, 2014, which seeks to re-open that proceeding and requests other relief, as well as its subsequent submissions therein, the most recent of which includes the Town's submission dated May 15, 2014.

It suffices to state that the Terminal and the BRT are conducting wholly illegal and environmentally devastating activities at the site, and are not by any means constructing a “spur” or limited track extension.

BRT illegally commenced a massive sand mining operation on the 93 acre expansion site known as “Parcels B and C”, without complying with state and Town laws aimed at protecting the sensitive environment, most particularly the Sole Source Aquifers upon which Long Island residents depend for drinking water. It is now clear that BRT is illegally deep mining and removing soil from the site (removing soil from as deep as 50 feet into the ground), illegally screening the soil on site, and illegally selling the soil for a profit to BRT's coveted and self-described “sand customers”, all without environmental review or approval from this Board, or from the Town or any other governmental body.

On March 12, 2014, the Town issued a Stop Work Order which, while allowing for any legitimate “railroad” activity and construction, prohibited and mandated that BRT immediately cease all non-railroad related construction or activity, including illegal sand mining.

That same day, on March 12, 2014, the Town petitioned this Board to re-open FD 35141, where in 2010 this Board had allowed BRT to operate only a limited terminal, and upon its reopening prohibiting BRT from sand mining or purporting to construct any expansion of its operations without first obtaining Board approval. Exhibit A (exhibits thereto incorporated by reference and available in the FD 35141 docket). The Town’s pending application therein also seeks a declaration that: (1) BRT’s plans and activities are not subject at all to federal preemption, and constitute non-railroad activities; (2) to the extent they are subject to federal preemption, BRT’s plans and activities do not constitute a mere “spur” or other exempt expansion of the Terminal, and require review and approval from this Board; and (3) BRT’s plans and activities violate essentially all of the “conditions” which this Board imposed in 2010, most particularly that it “*employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils*” (Environmental Condition No. 2); and that it “*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).

Also virtually at the same time, on March 11, 2014, the Town commenced a lawsuit against BRT and others in State Court to address matters over which this Board does not possess

jurisdiction, i.e. enforcement of the “So Ordered” Stipulation of Settlement from a prior lawsuit,<sup>2</sup> to prevent and redress the illegal excavation and construction of non-railroad uses on the BRT property (including “manufacturing” and other clearly non-railroad uses), and to redress violations of non-reempted State and local laws. By stipulation of the parties to that lawsuit, the Town's State Court lawsuit was removed to federal court and now bears the caption Town of Brookhaven v. Sills Road Realty LLC, Brookhaven Rail LLC f/k/a U S Rail New York LLC, Brookhaven Terminal Operations LLC, Oakland Transportation Holdings LLC, Sills Expressway Associates, Watral Brothers, Inc., and Pratt Brothers, Inc., U.S. District Court, E.D.N.Y. Case No. 14-CV-02286 (LDW AKT).

On May 12, 2014, United States District Court Judge Leonard D. Wexler granted the Town an interim Temporary Restraining Order enjoining and prohibiting BRT and the remaining defendants therein from undertaking any activities to excavate, screen, grade, or remove any

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<sup>2</sup> As to BRT’s violation of the Stipulation of Settlement, which was “So Ordered” by Judge Platt on April 22, 2010 in the Prior Action, the Town’s Complaint in the pending Court action points out that BRT and the other defendants: have failed to comply with the vegetation and setback requirements; have illegally erected and plan to further erect other illegal structures which are not contained or allowed in the site plan incorporated into the Stipulation; and are over-excavating and conducting illegal activities at the site which are not reflected on the site plan or permitted by the Board. See, e.g., Compl., ¶ 35(a). The Town’s Complaint further points out that in a letter to the Town dated April 30, 2012 [misdated as April 25, 2012], BRT and other defendants directly “*confirm[ed] the understandings reached at the meeting*” with the Town, wherein they “*agreed*” that “*All plans for the construction of the BRT will comply with the environmental mitigation measures set forth in the STB Approval*”, and “*As we agreed, the Stipulation establishes the local building and other requirements that construction of the BRT must adhere to and a procedure for Bowne to certify to the Town compliance with those requirements. We agreed to follow the procedures set forth in the Stipulation.*” Indeed, it is well settled that “*voluntary agreements*” with a rail carrier are not subject to federal preemption, and are fully enforceable outside of the STB in a court action. Township of Woodbridge v. Consolidated Rail Corp., 2000 WL 1771044, at \*3 (S.T.B. December 1, 2000); Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co., 297 F.Supp.2d 326, 332–33 (D.Me. 2003); PCS Phosphate Co., Inc. v. Norfolk Southern Corp., 559 F.3d 212 (4th Cir. 2009).

native sands and vegetation from the subject property. Exhibit B. In addition, the Court scheduled an evidentiary hearing upon the Town's Preliminary Injunction Motion, which hearing is currently underway before Magistrate Judge Gary R. Brown.

The Town's submissions to this Board upon FD 35141 demonstrate that BRT's activities and plans for the site do not constitute a "spur" or other exempt extension, and we respectfully incorporate those submissions in full and refer the Board thereto. Those submissions demonstrate, *inter alia*, that:

(1) BRT's "expansion" into Parcels B and C is massive in both size and scope, and bears no resemblance to the limited operation which this Board approved in 2010. This Board in 2010 approved a one-way delivery of 500,000 tons of aggregate annually from sources in Upstate New York to a single customer Sills Road Realty LLC ("Sills Road Realty"), into a terminal providing altogether different services to customers from a wider and different geographic area;

(2) The expansion is meant to convert the Terminal into a major transportation "hub" for all of Long Island and cannot by any stretch be deemed a mere "spur" or other exempt extension;

(3) BRT is not conducting, and is not planning to conduct, purely "rail" activities at the site, let alone a spur or other exempt extension because:

(a) It is conducting a sand mining operation at the site, unrelated to any legitimate railroad plan;

(b) It is "screening" the excavated sand on-site, so as to increase the sand's resale value, which is not railroad activity;

(c) It is constructing “manufacturing” plants and other facilities in its major planned “hub”, which is not railroad activity, much less a spur or limited extension;

(d) It is partly owned by a non-rail operator, Sills Road Realty, which entity also owns at least some of the land, the applicants have not presented their contractual agreements with Sills Road Realty to demonstrate that in fact BRT is controlled by a rail operator, and it is clear that Sills Road Realty and/or other non-railroad carrier entities are operating the Terminal in full or in part.<sup>3</sup>

It is thus clear 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).

Additionally, the same evidence establishes that the Terminal operations do not constitute “rail” operations, or mainly or entirely rail operations.

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<sup>3</sup> In this regard, in New York & Atlantic Ry. Co. v. Surface Transp. Bd., 635 F.3d 66 (2d Cir. 2011), the Second Circuit affirmed the 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. See also 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

**THE MASSIVE EXPANSION IN SIZE AND SCOPE IS NOT A SPUR, NOR IS IT  
OTHERWISE EXEMPT FROM BOARD REVIEW AND OVERSIGHT  
(Newly Obtained and Additional Evidence)**

In addition to the evidence previously presented upon FD 35141 (all of which is respectfully incorporated herein by reference), BRT was just forced to produce documents in response to a Subpoena which the Town issued in connection with the pending Federal lawsuit and preliminary injunction hearing. BRT's initial responses to the Subpoena provide startling new and additional evidence concerning BRT's ongoing non-railroad and other unlawful and unapproved activities.

These recent disclosures reveal that BRT's "extension" is now planned to be at least 12,500 feet in terms of track, which translates to approximately 2.4 miles in a suburban Long Island location. Taken together with BRT's various other representations, plans, and public statements concerning the new facility, the evidence is manifest that BRT intends to reach entirely new customers in new geographic areas, and provide altogether new and different services from those which it represented to the Board it was supplying. In its March 3, 2014 supplemental submission upon FD 35141, the Town has already submitted BRT's actual map and depiction showing the proposed expansion includes, inter alia, a 400,000 square foot building denominated as "Manufacturing and Warehousing Building", a 400,000 "Cold/Dry Storage Building", a covered "Salt Storage Building" of nearly 40,000 square feet, and a

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for Federal preemption under 49 U.S.C. 10501(b) and are therefore fully subject to local regulation by [the Town of] Babylon").

proposed “Propane Transfer Station” of approximately 262,000 square feet, all spread across the 93 acre site which is nearly 3½ times the size of the previously approved facility, and which entails more than 5 times the already constructed Transload Building, all proposing to serve a vastly new and expanded customer base in terms of both enlarged geographic locale and volume.

However, based on BRT’s recent production in response to the Town’s Subpoena, it turns out that this is only part of BRT’s major plans for the Terminal. Appended as Exhibit C hereto is a very recent, February 2014 “Strategic Planning and Design Studies” prepared by BRT’s construction engineering firm, AECOM, which reflects that BRT’s plans extend even further and beyond Parcels A, B, and C, and extend to another 255 acre site which BRT’s principals now own,<sup>4</sup> and which is designated as Parcel “D” and located south of the Long Island Rail Road. The “Strategic Plan” reflects that even now the track configuration for Parcels B and C has not been settled upon and is expected to change, and that the actual Terminal once completed will be an immense regional and Long Island transportation “hub” with largely unspecified activities, many of which fall well beyond the ambit of railroad activities.

Appended as Exhibit D hereto is a September 2012 Brochure of BRT, entitled “Transforming Freight Rail Transportation East of the Hudson”. That document reflects that the plan to turn BRT into a “*355-acre, modern intermodal rail yard in the middle of Long Island, as the hub for intermodal exchange and distribution*”. Just how BRT has the audacity to nevertheless come before this Board and pretend it is constructing a mere “spur” or minor extension, is not apparent.

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<sup>4</sup> See Exhibit F, reflecting that Oakland Transportation Holdings owns the entity which owns Parcel D.

Appended as Exhibit E hereto is an October 17, 2013 agenda for a BRT meeting, which includes a brochure attachment. That brochure again shows the “manufacturing” and other distinctly non-railroad facilities it is constructing at the site. In addition, on pages numbered BRT01293-1294, it shows the vastly expanded “Markets” and “products” which the expanded Terminal is to service and ship throughout Long Island. Moreover, on page numbered BRT01290, the brochure provides an “Organization Chart” for one overarching entity operating the Terminal, “Brookhaven Terminal Operations” (and not the rail carrier Brookhaven Rail, LLC). That chart also shows that one of the entities which makes up and is conducting operations at the Terminal is a “Sills Sand Operation” and that the principal of construction aggregate supplier (and property owner) Sills Road Realty, Andrew Kaufman, is on the “Operating Committee” for Brookhaven Terminal Operations.

Appended as Exhibit F hereto, is an October 17, 2013 letter from BRT to its construction engineer AECOM. That letter, among other things, shows that BRT “is a dba of Brookhaven Terminal Operations” (“BTO”), and that the entities which own BTO include Sills Road Realty as a 45% stake. As this Board observed in its 2010 decision upon FD 35141, Sills Road Realty is also the actual owner of at least the 28 acre parcel designated as Parcel A. Moreover, in a not-so-veiled indication that in fact BTO is the true owner and operator of the Terminal, the letter advises at page numbered BRT01297 that while its “*Present Regulatory Position*” is that “*All transloading and other site activities are controlled by [the rail carrier] BHR [i.e. Brookhaven Rail] and the site operates as a rail facility, which typically follow regulations as required by the STB and FRA*”, the fact is that “BTO operates on land that is leased and controlled by BHR”.

Appended hereto as Exhibit G is yet another brochure for BRT, which shows a major facility, including with Parcel D, which cannot by any stretch of the imagination be considered a minor extension or a spur. Also tellingly, at page numbered BRT01331, it is revealed that the Terminal will include “co-location of value added processing and manufacturing”, thus demonstrating that not only is the planned Terminal not a spur, it is not even mainly a railroad activity or facility.

Appended as Exhibit H is an “Environmental Scope of Service” prepared by or on behalf of BRT, which was in 2013 or 2014 submitted by BRT to the NYS Department of Transportation in connection with a grant request. Its project description at page numbered BRT01037 reflects that as to Parcels B and C alone the Terminal is to be a vastly expanded operation, servicing customers from across Long Island and providing new services. These services also include “manufacturing”, and the Terminal may have an access connection to the Long Island Expressway service road:

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 RT. 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 1-495 Expressway Drive (Service Road).

Appended hereto as Exhibit I is an excerpt of a transcript of the testimony from the ongoing Federal Court preliminary injunction hearing, containing the testimony from today (May

19, 2014) of BRT's engineer from AECOM, Robert Humbert. Mr. Humbert made the further startling admission that in fact, the track plans and any other plans which BRT has proffered, including therefore the plans which BRT submitted to this Board herein, are merely "concept" plans, and that the actual plans have not yet been fixed, and that the actual use, intended operations, and configuration of the Terminal is still to this day not yet decided or fixed. He admitted further that "It is a conceptual operation design plan" (p. 200), and that to date has not even yet "completed" a track design and it is now still only a "concept" (p. 208). No intended users, tenants, or customers were considered in his conceptualization, no licensed NYS engineer or geologist was consulted, and he did not consider the existence of the Upper Glacial aquifer beneath this site (pp. 197-204). In fact, other than correcting that he only made a "concept" and had not "completed" anything yet, he took no issue with the following disturbing summary of his testimony:

Q. Is it a correct summary, sir, that you designed a track plan starting in October 2013, completing in January of 2014, without the assistance of any New York State licensed engineer, without any geologist, without any consideration of the aquifer or ground water considerations of -- to accommodate buildings that aren't designed for users[,] that insofar as you know do not exist as of the present time; is that correct, sir?

A I don't believe you mentioned completed the design?

Is that what you said.

Q Completed the track design you said.

A No, sir.

Q Well, you completed -- what is this, a concept?

A A design concept, yes, sir.

Q I see.

(P. 208).

Moreover, sand mining is not “railroad” activity, and it is certainly not a spur. Stripping land of its soil (because on Long Island soil is a highly valuable commodity) without so much as a fixed track plan is not construction of a spur. It is settled that activities which are not legitimately related to railroad “transportation” functions under 49 U.S.C.A. § 10501 are not subject to federal preemption. Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1327, 1336 (11th Cir. 2001) (stockpiling and organizing aggregate by type at rail yard after rail transportation occurs and before loading it onto trucks is not railroad service and not protected by federal preemption); New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway-Construction, Acquisition and Operation Exemption-In Wilmington and Woburn, Mass., Docket No. FD 34797, 2012 WL 2359821 (S.T.B. 2012) (segregating and shredding of construction and demolition debris was not integrally related to rail transportation, were not subject to the STB's jurisdiction or covered by the section 10501(b) preemption, and "would be subject to the full panoply of state and local regulation"); Town of Milford, MA - Petition for Declaratory Order, STB Finance Docket No. 34444, slip op. at 2 (S.T.B. Aug. 12, 2004) (cutting and welding steel after rail transportation occurs, but before the steel is loaded onto trucks is not railroad services and not federally protected); Growers Mktg. Co. v. Pere Marquette Ry., 248 I.C.C. 215, 227 (1941) (providing for the display and sale of perishable produce delivered by rail not subject to federal preemption protection); Hi Tech Trans, LLC - Petition for Declaratory

Order-Hudson County, NJ, STB Finance Docket No. 34192 et al. (STB served Nov. 20, 2002, and Aug. 14, 2003) (truck-to-truck transloading of construction and demolition debris prior to being delivered to rail not subject to federal preemption protection).

In this regard, the Board is again respectfully referred to the engineering evidence and declarations provided by Ritu Mody, P.E., a Licensed Professional Engineer working in conjunction with Geologist Stephanie O. Davis, CPG, at FPM Group, which demonstrates, from an engineering perspective, precisely why the excavation and re-grading of the bulk of the site from the 100 ft. level at which the LIRR tracks currently enter, down to 60 feet and then a level of 50 feet is totally unjustified. A copy thereof was provided as Exhibit C to the Town's May 15, 2014 update submission upon FD 35141. Ms. Modi's Declaration explains:

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

Indeed, as also shown in the Town's May 15, 2014 update submission upon FD 35141, with brazen irony, the BRT Defendants simultaneously deny that they are "*sand-mining*" the site (i.e., removing and selling virgin native sand material for sale to third-parties), while the Declaration of their CFO, Dennis K. Miller, alleges that an injunction will cause financial harm to BRT's

numerous “*sand customers*” and to its profitable “*sand business*” (Miller Decl. dated May 7, 2014, 28-31 [supplied as Exhibit F to the Town's May 15, 2014 update submission upon FD 35141]).

Moreover, with regard to the BRT’s illegal dumping of untested and likely contaminated fill material at the site (following its illegal sand mining and over-excavating), appended hereto as Exhibit J are May 17, 2014 photographs of Parcels B and C of the site showing exactly that.

In fact, the Town’s expert geologist, Stephanie Davis, testified today in the Federal Court preliminary injunction hearing that she personally observed the fill material on-site firsthand on May 17, 2014, that it is “historic fill” which can include garbage, often ash from burned garbage, and that this sort of fill is generally upon testing found to be “contaminated” and unsuitable for use (Exhibit I, p. 60-63).

**BRT’S POSITION WOULD LEAD TO AN ABSURD AND IMPERMISSIBLE RESULT, AND IS AN AFFRONT TO THE CONGRESSIONAL SCHEME AND THIS BOARD’S AUTHORITY**

Lastly, construing BRT’s activities as the construction of an ancillary “*spur*” would lead to the impermissibly “*absurd*” conclusion that the BRT’s proposed expansion is merely an “*expansion of*” or “*incidental to*” the limited railway activities which this Board previously approved. Moreover, BRT’s position is a virtual affront to the Congressional scheme and this Board’ authority, particularly inasmuch as BRT’s vastly expanded and newly conceived massive “hub” facilities have not yet even been fully conceived, much less constructed or leased, and at most amount to a mere “concept” as recently admitted by BRT’s own consultant, and whereas BRT’s illegal and environmentally devastating sand mining operations are concrete and must be stopped. See Troll Co. v. Unecda Doll Company, 483 F.3d 150, 160 (2d Cir. 2007) (it is a well-

established canon of statutory construction that statutes “*must be construed to avoid absurd results*”); Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 368 (2d Cir. 2006); U.S. v. Dauray, 215 F.3d 257, 264 2d Cir. 2000). Where “*application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . the intention of the drafters, rather than the strict language controls*”. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989). Such tenets of statutory construction are equally applicable to regulatory construction. See New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114, n. 17 (2d Cir. 2009) (rejecting plaintiff’s proposed interpretation of regulation which would render certain statutory provisions inoperative, leading to an “*unacceptable and absurd result*”).

As explained the D.C. District Court, “*Congress designed the Transportation Act to prevent railroads from risking their capital on new investments at the expense of maintaining and improving their existing ones, thereby jeopardizing the satisfaction of their common carrier obligations*”. Detroit/Wayne County Port Authority v. I.C.C., 59 F.3d 1314, 1316 (D.C. Cir. 1995) (internal quotations and citation omitted). Thus, it is apparent that the exemption provided for in 49 U.S.C. 10906 was meant to allow railroad to “[i]nvest in existing systems”. Id. In contrast, a finding that BRT’s expansion and planned activities to accommodate its “concept” for a massive new Long Island “hub” coupled with new and greatly expanded facilities which are not “*integrally related*” to transportation, would be fundamentally at odds with Congressional intent and yield an impermissibly “*absurd*” result. In addition, BRT should not be permitted to distort the Congressional scheme in order to justify its unauthorized and illegal sand mining operations – which are devastating the environment – under the guise and pretext of an unapproved and non-existent spur.

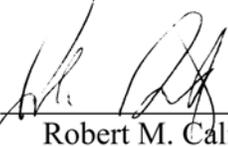
Thus, in addition to the foregoing overwhelming factual evidence regarding BRT's illegal activities, it would be a gross injustice and lead to an absurd and impermissible result for BRT to be permitted to continue its illegal and unapproved operations without any Board oversight or approval, and would make a mockery of Congressional intent and this Board's authority.

**Conclusion**

Accordingly, the Town respectfully requests that the Board: (1) declare that the planned expansion is not a spur and is at the least subject to review (including desperately needed environmental review) by this Board; (2) declare that all or some of BRT's activities and planned activities at the site are not railroad activities and are not subject to any federal preemption; and (3) issue necessary orders against BRT to halt its illegal and unpermitted activities at the site.

Dated: May 19, 2014

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