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May 22, 2014

ENTERED  
Office of Proceedings  
May 27, 2014  
Part of  
Public Record

Surface Transportation Board  
395 E Street, SW  
Washington DC 20423

**Update Submission of Town of Brookhaven, New York Concerning Pending Court  
Preliminary Injunction Proceeding Against Brookhaven Rail Terminal**

Re: (1) U S Rail Corporation–Brookhaven Rail Terminal,  
STB F.D. No. 35141

(2) Brookhaven Rail Terminal and Brookhaven Rail, LLC,  
STB F.D. No. 35819

Dear Board:

We are attorneys for the Town of Brookhaven, New York (“Town”). The Town recently filed in the first-entitled proceeding (FD 35141) an Update and Correction of Misstatements of Fact on May 15, 2014, and filed in the second entitled proceeding (FD 35819) the Town’s Reply/Answer in opposition to the Declaratory Petition on May 19, 2014.

We respectfully write to supplement the Town’s submissions in both proceedings by providing a copy of the full Federal Court Hearing Transcript and relevant Exhibits from the preliminary injunction hearing which occurred May 19, 2014 and May 20, 2014 before the United States District Court for the Eastern District of New York (Hon. Gary R. Brown, USMJ) in connection with the pending Federal Court action by the Town against the Brookhaven Rail Terminal (BRT) parties. Exhibit A. Self-evidently, a copy of Court Transcript from May 20, 2014 and the Exhibits received into evidence at that time were not available at the time we filed the Town’s Reply/Answer, which did however include as an exhibit most of the transcript of the May 19th testimony.

The Town respectfully incorporates its Reply/Answer filed in FD 35819, and the exhibits accompanying it, as an update and supplement in FD 35141 as well. That Reply summarizes

numerous documents and admissions disclosed and made by BRT during the recent Federal Court hearing.

The hearing testimony and exhibits fully confirm that the BRT parties have engaged in shockingly brazen, illegal and environmentally destructive “*sand mining*” operations at the 93 acre BRT site without any review or approval either from this Board, or the Town, and that such illegal sand mining operations do not fall within the scope of federal preemption.

BRT’s own CFO, Daniel Miller, confirmed that BRT’s railway operating revenues from the site (approximately \$10 million per year) are now being supplemented by \$9-\$10 million in “*sand mining*” revenue which are wholly unrelated to any genuine railroad activities. BRT’s CFO Miller further acknowledged that BRT’s “*concept plan*” includes Parcel “D” which is not even owned by BRT, and that the “*concept plan*” for Parcels B and C have never been reviewed or approved for any purported railroad activities by this Board. In addition, Mr. Miller utterly failed to confront the indisputable fact that various ownership and operational levels of non-railroad entities and investors are de facto controlling and operating the Brookhaven Rail Terminal, in whole or in part, on behalf of various non-railroad financial investors and participants whose recently produced emails and interests have largely focused on earning revenues from the illegal and unauthorized sand mining operations<sup>1</sup>. Indeed, Mr. Miller was evasive at best in describing the BRT parties’ non-railroad activities and relationship, including, *inter alia*, with respect to the Ground Lease entered into between Sills Expressway Associates, LLC and Sills Road Realty, LLC for Parcel B (among other things, the Ground Lease addresses the lucrative non-railroad and sand mining operations at the site).<sup>2</sup>

On hearing the disturbing evidence, the Court criticized the manner by which the BRT parties have already massively excavated the newly acquired 93 acre site (Parcels B and C) and depleted them of native sand and soil for lucrative resale to BRT’s “*sand customers*” before any final design plan and while still at the “*conceptual engineering stage*” – with no clear indication

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<sup>1</sup> See, copies of Hearing exhibits 20, 31, and 32 from the Federal Court Hearing, attached as Exhibit B.

<sup>2</sup> The Ground Lease for Parcel B (approximately 20 acres), which was introduced into the Record at the Federal Court Hearing, is annexed Exhibit C hereto. The Ground Lease contains the overt admission that the non-railroad operator landlord of Parcel B, Sills Expressway Associates, is conducting sand mining activities (a minimum of 600,000 cubic yards) at the site. As quoted at p. 299 of the May 20, 2014 Hearing Transcript, the Lease admits:

Lessor [Sills Expressway Associates] at Sills Expressway shall be obligated at all costs to dig, load and weigh the minerals, at the sole cost and expense, and lessor [Sills Expressway Associates] shall provide at its sole cost and expense all trucking necessary for removing the minerals from the property.

whether a definitive track plan or building plan has even been formulated, much less even been reviewed or approved either by this Board or the Town, and without going through any formal design, review or approval process. BRT's own lead counsel, Yonaton Aronoff, Esq, admitted on the Record that "*We still only have a concept plan*" (Tr. at 370) (emphasis added). However, the indisputable fact that BRT merely has a "*concept plan*", which was never reviewed or approved by this Board or the Town, did not stop the BRT parties from engaging in massive and brazenly illegal "*sand mining*" operations which are bringing the grade of the entire site from as much as 100 feet to only 50 feet, and with no environmental review to protect the Sole Source Aquifer system underlying the Parcels.

Accordingly, at the conclusion of the hearing, the Court ordered to continuation of the Temporary Restraining Order ("TRO") against the BRT parties, and further noted the following on the Record (see enclosed Exhibit A, 5/20/14 Transcript at 362-372):

1. The Court stated that "*Sand Mining*" is being conducted on Parcels B and C (the 93 Acre Parcel) and "*that sand mining, the excavation, the purification and sale, has little or no connection to the construction of a rail spur, assuming this is a rail spur*" (Tr. 363). The Court stated that the mining and sale of sand is not railroad construction.

2. The sand mining is occurring without licensure and "*largely without notice to the Town*" (Tr. 363).

3. The Town "*has certain authority to monitor activities on the property consistent with its police powers.*" In addition, while the Court expressed some concern over whether the N.Y.S. Department of Environmental Conservation ("DEC") is in charge of licensing, we explained the jurisdictional limits of DEC licensing under the N.Y. Environmental Conservation Law applicable only to Nassau and Suffolk Counties and that the DEC's power can be delegated to the Town (Tr. 363-364). See e.g. N.Y. Environmental Conservation Law § 55-0101, and the McKinney's Practice Commentary thereto.

4. The Court cited to the trial testimony of BRT's own current railway engineer, Robert Humbert, P.E. of AECOM that BRT's excavation "*could have been done in a more surgical method*", i.e., limited to track, which further reinforced the Court's observation that "*the entire mining of the center of the property as such had to do with selling sand and not with the design of track*" (Tr. 365).

5. The Court noted that BRT's CFO, Dan Miller, testified that BRT will earn \$10 million in annual revenue from "*sand mining*" which "*is a critical part of the business plan, not incidental*" (Tr. 366), especially in light of testimony of BRT's President, Jim Newel, indicating

that as “a class three railroad operation . . . [BRT] has gross revenues of [no greater than] [20 million dollars]”<sup>3</sup> (Tr. 368).

6. The Court also noted that sand mining and “*the clearing and sale of the material began well before the [current O-]track was designed*” in November 2013 (when AECOM was retained) (Tr. 366).

7. Defendants’ Exhibit GGGG, which included reports describing the activity by BRT on Parcels A, B and C, shows that the BRT parties were conducting a “mining operation” on Parcel A and since BRT’s CFO Dan Miller testified that the “*identical*” activity is occurring on Parcels B and C, BRT has thus admitted sand mining on Parcels B and C (Tr. 366).

8. The Court stated that sand sifting (screening) occurring at the site has “*little or no connection to the construction of the railway*” (Tr. 366-67). The Court stated that it is a BRT “*business model*” to offset construction costs but is not “*an integral part*” of railway construction. The Court analogized the activity to drilling for oil on the site and “*say[ing] it is part of the business plan because oil will pay for all the train cars and track, but it would not be integral to the rail operation*” (Tr. 367).

9. The Court credited Ex. 31 showing a grade reduction occurring across the entire site from as much as 100 feet to 50 feet as “*only relat[ing] . . . to the sale of sand*” (Tr. 367). The Court further cited to the several other Miller exhibits (Exs. 20, 29-31 and 33), which “*make[] it clear that the mining was a critical economic consideration in connection with its project*” (Tr. 367).

10. The Court observed that excavation was occurring which “*ha[d] nothing to do with a J track*”, but was “*something entirely different*” (Tr. 367). There was only “*some notice*” to the Town, but “*it not clear as to exactly what was going on*” (Tr. 368).

11. The Court observed that what is occurring is a “*separate subsidiary [mining] operation*” that “*happens to be conducted by the same company construction [a railroad]*” and again used the drilling for oil on site analogy when BRT’s counsel claimed how the railroad “*financ[es] and stages its construction falls within the deference given to the railroad*” (Tr. 368).

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<sup>3</sup>The Transcript contains an obvious transcription error by the Court Reporter how erroneously transcribed that BRT, as a Class III railroad carrier, has gross revenues of \$120 million; however, as I was personally present during the Hearing, I can confirm that Magistrate Judge Brown recited the correct gross revenue of a Class III rail carrier of \$20 million, as established by this Board (49 CFR Part 1201, Subpart A, General Instruction 1-1). Moreover, BRT’s classification as a Class III railroad carrier with gross revenues of less than \$20 million was confirmed by BRT’s President, Jim Newel (Tr. 348).

12. The Court observed that there are “*very serious*” environmental impacts in the evidence before it (Tr. 370).

13. The Court also observed that BRT was “*mining the sand before [BRT] had the plan for the track*” and that the current grading does not have “*any necessary relation to any of those plans*” for railroad construction (Tr. 370-71).

14. In addition to continuing the TRO until the filing of Briefs on May 29, 2014, the Court responded to BRT’s request for a Bond by saying that the delay on railway construction is having a “*minimum impact*” and that the only observable impact of the TRO on BRT is on the sale of sand (Tr. 372).

We appreciate the Board’s consideration and attention to these matters.

Respectfully,

**ROSENBERG CALICA & BIRNEY LLP**

  
Robert M. Calica

RMC:emr

Attachments: Exhibits A-C

cc: Service as per attached Certificate of Service

**CERTIFICATE OF SERVICE**

I, JUDAH SERFATY, hereby certify that on the 19th day of May, 2014, I caused to be served the within **SUBMISSION OF TOWN OF BROOKHAVEN WITH UPDATE TO BOARD AND CORRECTING MISSTATEMENTS OF FACT MADE BY BROOKHAVEN RAIL TERMINAL** upon the attorneys/parties by Emailing same to their email addresses and by electronically filing same with the Surface Transportation Board:

TO: Vanessa L. Miller, Esq.  
Foley & Lardner LLP  
*Attorneys for US Rail Corporation & Brookhaven Rail Terminal (in F.D. No. 35141)*  
*and for Brookhaven Rail Terminal and Brookhaven Rail, LLC (in F.D. No. 35819)*  
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Dated: May 22, 2014

  
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JUDAH SERFATY

# EXHIBIT A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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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

<p style="text-align: center;">2</p> <p>APPEARANCES:</p> <p>For the Plaintiff: ROSENBERG CALICA &amp; BIRNEY  100 Garden City Plaza, Suite 408  Garden City, New York 11530  BY: ROBERT M CALICA, ESQ.  GEORGE B. KORDAS, ESQ.</p> <p>ANNETTE EADERESTO, ESQ.  Brookhaven Town Attorney  1 Independence Hill  Farmingville, New York 11763</p> <p>For the Defendants:  FARRELL FRITZ  For Sills Expressway 1320 RXR Plaza  Uniondale, New York 11556  BY: KEVIN P. MULRY, ESQ.</p> <p>For remaining Defendants:</p> <p>FOLEY &amp; LARDNER, ESQ.  90 Park Avenue  New York, New York 10016  By: YONATON ARONOFF, ESQ.  VANESSA L. MILLER, ESQ.  ALISHA L. MCCARTHY, ESQ.</p> <p style="text-align: center;">M O R N I N G   S E S S I O N</p> <p>18</p> <p>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 &amp;  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.  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>	<p style="text-align: center;">4</p> <p>1 matters over the weekend?</p> <p>2 MR. CALICA: I think we were successful.</p> <p>3 Neither had an opportunity to review the other's</p> <p>4 documents, we placed 2,900 documents on line and provided</p> <p>5 them and made them available.</p> <p>6 I will indicate to your Honor that it is all of</p> <p>7 the exchanges outside of the Town. We did invoke</p> <p>8 deliberative privilege within the Town under the</p> <p>9 Shinnecock case, which is Judge Bianco's case, which cites</p> <p>10 a New York Supreme Court case, which makes clear that</p> <p>11 governmental officials in forming policy are --</p> <p>12 THE COURT: I am familiar with the issue.</p> <p>13 MR. CALICA: So we produced 2,900 documents.</p> <p>14 We also had a town investigator and our</p> <p>15 environmental consultant geologist, Stephanie Davis, out</p> <p>16 on site on Saturday. Photographs were taken.</p> <p>17 Those that could be opened I provided to</p> <p>18 Mr. Aronoff. That's all I can open.</p> <p>19 The Town is converting under its IT system the</p> <p>20 remaining photographs which were not in a form that can be</p> <p>21 sent by email until they are converted.</p> <p>22 Mr. Aronoff 's office posted on line, maybe</p> <p>23 about 1:00 o'clock in the morning -- we did ours about</p> <p>24 7:00 in the morning, some 1,500 pages of documents. We</p> <p>25 assume it is a responsive search and we will review it.</p> <p style="text-align: right;">HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>
<p style="text-align: center;">3</p> <p>1 THE COURT: Good morning.</p> <p>2 Have a seat.</p> <p>3 MR. ARONOFF: Nice to see you again, your Honor.</p> <p>4 Appearing for all the defendants except Sills Expressway.</p> <p>5 My name is Yonaton Aronoff, and with me is Vanessa Miller</p> <p>6 and Alisha McCarthy.</p> <p>7 MR. MULRY: Good morning.</p> <p>8 Kevin Mulry from Farrell Fritz for Sills</p> <p>9 Expressway Associates.</p> <p>10 THE COURT: Good morning.</p> <p>11 Nice to see you again.</p> <p>12 I have one matter before we get started.</p> <p>13 I spent a lot of time reviewing the papers which</p> <p>14 was very helpful and I appreciate everyone's work in that</p> <p>15 regard.</p> <p>16 I notice the last time there was a similar issue</p> <p>17 before Judge Boyle. The DEC appears to have been involved</p> <p>18 in some level.</p> <p>19 Does the DEC have a position here? Are they</p> <p>20 going to weigh in? Does anyone know?</p> <p>21 MR. CALICA: They may, your Honor. They have</p> <p>22 been recently alerted, and they have not yet taken a</p> <p>23 position.</p> <p>24 THE COURT: All right. Issue one.</p> <p>25 Issue two, how did we do with the discovery  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>	<p style="text-align: center;">5</p> <p>1 THE COURT: Anything?</p> <p>2 MR. ARONOFF: I would like to address a couple</p> <p>3 of things there.</p> <p>4 As Mr. Calica said, we received from him this</p> <p>5 morning about 2,800 pages of documents at 8:05 a.m.</p> <p>6 THE COURT: How were those?</p> <p>7 MR. ARONOFF: Exactly. I understand we didn't</p> <p>8 have a chance to review. However, I don't have the</p> <p>9 opportunity to review. I will cross-examine his witnesses</p> <p>10 without those documents, and my witnesses go on tomorrow,</p> <p>11 he will have the benefit to review those documents. I</p> <p>12 don't know how much we can do about that. But I wanted --</p> <p>13 THE COURT: It is simple. If it is something</p> <p>14 within the 2,900 you need to have the witness reappear, we</p> <p>15 will recall the witness.</p> <p>16 MR. ARONOFF: As to the privilege issue, we have</p> <p>17 not had an opportunity to review that issue. The first</p> <p>18 I'm hearing about it. I don't know if it applies if the</p> <p>19 town is making policy, and I would say injecting its</p> <p>20 positions into the issues in this case, I don't think it</p> <p>21 is able to hide behind the privilege at the same time as</p> <p>22 doing that. That is another thing I would like to reserve</p> <p>23 the right to challenge and perhaps brief, your Honor.</p> <p>24 THE COURT: Sure.</p> <p>25 How much time do you think your entire  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>

<p style="text-align: center;">6</p> <p>1 presentation is going to require? How many days will you 2 be doing this?</p> <p>3 MR. CALICA: One day.</p> <p>4 THE COURT: How about your case?</p> <p>5 MR. ARONOFF: The same.</p> <p>6 THE COURT: Good.</p> <p>7 Let's get started.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;">Davis-Direct/Calica</p> <p style="text-align: right;">8</p> <p>1 MS. MILLER: Thank you.</p> <p>2 MR. CALICA: The first witness is Stephanie 3 Davis, your Honor.</p> <p>4 THE COURT: Ms. Davis, please come up.</p> <p>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?</p> <p>8 THE COURT: Sure.</p> <p>9</p> <p>10 STEPHANIE DAVIS, 11 called as a witness, having been first 12 duly sworn, was examined and testified 13 as follows:</p> <p>14 THE CLERK: Please be seated. 15 State and spell your name for the record.</p> <p>16 THE WITNESS: Stephanie, S-T-E-P-H-A-N-I-E, 17 Davis, D-A-V-I-S.</p> <p>18 THE COURT: Go ahead. 19 Please pull the microphone nice and close so we 20 can hear you.</p> <p>21 THE WITNESS: Is that better?</p> <p>22 THE COURT: Excellent.</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;">7</p> <p>1 We are now requesting an opportunity to have 2 someone go back today and take samples of the dumping.</p> <p>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 .</p> <p>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.</p> <p>16 MR. CALICA: Maybe, your Honor, the testing can 17 be done expeditiously, and we would like to reserve --</p> <p>18 THE COURT: Why not get started.</p> <p>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.</p> <p>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.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;">Davis-Direct/Calica</p> <p style="text-align: right;">9</p> <p>1 DIRECT EXAMINATION</p> <p>2 BY MR. CALICA:</p> <p>3 Q Good morning, Ms. Davis. What is your profession or 4 occupation?</p> <p>5 A I am a hydrogeologist.</p> <p>6 Q Would you tell his Honor, please, in more 7 conventional terms what that means?</p> <p>8 THE COURT: The acoustics are terrible without 9 the microphone.</p> <p>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.</p> <p>14 Q Where did you obtain your degrees and when?</p> <p>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.</p> <p>18 Q Are there any states or jurisdictions that recognize 19 licenses in geology?</p> <p>20 A A number of states do. But New York State is not 21 among them.</p> <p>22 Q Are you licensed in any states that recognizes your 23 license in geology?</p> <p>24 A Yes, the states of California and Pennsylvania.</p> <p>25 Q Would you tell his Honor what your professional and</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>

Davis-Direct/Calica

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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.**  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

Davis-Direct/Calica

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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.**  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

Davis-Direct/Calica

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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 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           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 **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 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 **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 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 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 **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 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           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 **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 **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 **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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<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">38</p> <p>1 describing the track design as looking like the letter J?</p> <p>2 <b>A It certainly can look like the letter J, yes.</b></p> <p>3 <b>Q</b> And it is describing the letter as having a total</p> <p>4 length of track as approximately 5,600 feet.</p> <p>5 Based upon your observation of the various plan</p> <p>6 documents you have seen, is that consistent with the track</p> <p>7 that runs along the southerly border and then goes up</p> <p>8 north on the easterly border and ends at the Long Island</p> <p>9 Expressway?</p> <p>10 <b>MS. MILLER:</b> Objection, your Honor. It is</p> <p>11 beyond background information where we get into the</p> <p>12 substance of the track design.</p> <p>13 <b>THE COURT:</b> It is all right. I will allow it.</p> <p>14 My question to you counsel is: Is this to</p> <p>15 respond to the arguments as to whether or not the Town had</p> <p>16 notice or does this go to your bigger point that you don't</p> <p>17 think it is really a track?</p> <p>18 <b>MR. CALICA:</b> Both, your Honor.</p> <p>19 We will prove this is all they presented. And</p> <p>20 secondly, as an offer of proof that if they had followed</p> <p>21 that, then there would be no need or ability or</p> <p>22 justification to mine the rest of the site.</p> <p>23 <b>THE COURT:</b> All right.</p> <p>24 <b>Q</b> Based upon -- incidentally, Ms. Davis, do you read</p> <p>25 site plans professionally?</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">40</p> <p>1 Assuming that to be true, if we began at the 100</p> <p>2 foot elevation on the western end, and at a 1.25 percent</p> <p>3 slope, what would it be on the eastern? Do you have any</p> <p>4 idea?</p> <p>5 <b>THE WITNESS:</b> I assume it is somewhere around 50</p> <p>6 feet. I haven't calculated that.</p> <p>7 <b>THE COURT:</b> Thank you.</p> <p>8 Go ahead, counsel.</p> <p>9 <b>Q</b> Have you been provided with a copy of the Bowne</p> <p>10 Engineering grading plan?</p> <p>11 <b>A Yes.</b></p> <p>12 <b>MR. CALICA:</b> I will offer it in evidence. What</p> <p>13 number is it?</p> <p>14 It is Exhibit 5 in the binder of the pre-marked</p> <p>15 documents. It is Bowne, B-O-W-N-E.</p> <p>16 <b>THE COURT:</b> Exhibit 5 is a picture.</p> <p>17 <b>MR. CALICA:</b> It shouldn't be.</p> <p>18 <b>MR. KORDAS:</b> It is right there.</p> <p>19 <b>THE COURT:</b> All right.</p> <p>20 <b>Q</b> Have you seen that document before?</p> <p>21 <b>A Yes, I have.</b></p> <p>22 <b>MR. CALICA:</b> Is there any objection to it?</p> <p>23 <b>MR. ARONOFF:</b> Which document?</p> <p>24 <b>THE COURT:</b> Exhibit 5, which I believe is a</p> <p>25 single drawing, which looks a lot like the one on the big</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">39</p> <p>1 <b>THE COURT:</b> Move on, counsel.</p> <p>2 <b>MR. CALICA:</b> Okay.</p> <p>3 <b>Q</b> Does a length of 5,600 feet in your opinion equate</p> <p>4 with the track that runs just along the southerly border</p> <p>5 of the 93 acre site and then along -- north along the</p> <p>6 easterly border to the Long Island Expressway?</p> <p>7 <b>A It would seem about right. But I have not measured</b></p> <p>8 <b>this out specifically to answer that question.</b></p> <p>9 <b>Q</b> Okay.</p> <p>10 Assuming that the track had been constructed or</p> <p>11 was planned to be constructed in the configuration shown</p> <p>12 in Exhibit 1, 5,600 feet long, entering on the southwest</p> <p>13 corner at 100 feet following the existing elevation to the</p> <p>14 southeast corner, and then going straight north and ending</p> <p>15 at the Long Island Expressway, would there be the types of</p> <p>16 ground water impacts on the aquifers that you described</p> <p>17 associated with a track configuration as shown on</p> <p>18 Exhibit 1?</p> <p>19 <b>THE COURT:</b> No matter what she says to that</p> <p>20 question, I don't understand the question so it will not</p> <p>21 help.</p> <p>22 I have a question.</p> <p>23 Right here on the letter you are looking at, it</p> <p>24 says the track would be on a descending 1.25 grade from</p> <p>25 west to east.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">41</p> <p>1 board that we have.</p> <p>2 <b>MS. MILLER:</b> This document, Exhibit 5, I believe</p> <p>3 was also the blowup, the exhibit that we were reviewing</p> <p>4 earlier.</p> <p>5 <b>THE COURT:</b> That is what exhibit?</p> <p>6 <b>MS. MILLER:</b> B. But I don't believe it has been</p> <p>7 marked. It was intended for settlement purposes. We</p> <p>8 would object to the use of this.</p> <p>9 <b>THE COURT:</b> I'm confused.</p> <p>10 This is the old track?</p> <p>11 <b>MR. CALICA:</b> Your Honor --</p> <p>12 <b>THE COURT:</b> Isn't this what we looked at on</p> <p>13 Friday as the plan? Am I wrong about that?</p> <p>14 <b>MR. ARONOFF:</b> I'm confused what document he is</p> <p>15 talking about.</p> <p>16 The document he has blown up is what we gave --</p> <p>17 (Counsel confer.)</p> <p>18 <b>MR. CALICA:</b> Your Honor, let me make this</p> <p>19 statement on the record.</p> <p>20 After the lawsuit was filed the Town was</p> <p>21 provided with plans.</p> <p>22 We then have a stipulation that -- before the</p> <p>23 record in which the parties agreed to try to agree upon an</p> <p>24 acceptable track construction plan for stand still</p> <p>25 purposes.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">42</p> <p>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 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">44</p> <p>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 <b>A Certainly the J track design did not show the extent 6 of grading that is indicated on these plans.</b> 7 <b>Q</b> 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 <b>A Yes. It appeared to follow the natural contours, 13 more or less.</b> 14 <b>Q</b> 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 <b>A Certainly the grading for the J track design did not 21 show the extent of removal of overburdened material.</b> 22 <b>Q</b> 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 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">43</p> <p>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 <b>Q</b> Have you reviewed the AECOM plan dated January 2014 14 and the Bowne plan dated April 2014 before? 15 <b>A Yes, I have.</b> 16 <b>Q</b> And do they show the preexisting elevations and 17 grades throughout the 93 acre parcel? 18 <b>A Yes, they do.</b> 19 <b>Q</b> And in your professional experience as a hydrologist, 20 you read grading data and elevation data? 21 <b>A Yes, I do.</b> 22 <b>Q</b> 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 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">45</p> <p>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 <b>Q</b> 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 <b>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.</b> 14 <b>Q</b> 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 <b>A Yes.</b> 18 <b>Q</b> Is one of them the US Geological Survey? 19 <b>A Yes.</b> 20 <b>Q</b> What is the United States Geological Survey? 21 THE COURT: That is my question. But I know 22 what it is. Go ahead. 23 <b>Q</b> Did the US Geological Survey actually prepare a 24 survey map of this area in the year 1967? A survey of 25 this area. <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

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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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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.  
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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 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 purses?  
 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 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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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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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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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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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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<p style="text-align: center;"><b>Davis-Direct/Calica</b></p> <p style="text-align: right;">70</p> <p>1 15,000 years ago?</p> <p>2 <b>A No, it is not consistent with that sand and gravel</b></p> <p>3 <b>material.</b></p> <p>4 <b>Q</b> Does the historic fill of the type you described,</p> <p>5 assuming it came from New York City or some other area,</p> <p>6 and assuming it has -- I can't pronounce the word, whether</p> <p>7 it was athro something, you said, ash and burning garbage,</p> <p>8 bones, whatever else you said was in there, does that</p> <p>9 itself have any capacity to impact ground water?</p> <p>10 MS. MILLER: Objection. Misstates the witness'</p> <p>11 prior testimony.</p> <p>12 THE COURT: I will allow it.</p> <p>13 <b>A Certainly, it could have the capacity to impact the</b></p> <p>14 <b>ground water.</b></p> <p>15 Typically historic fill does contain</p> <p>16 <b>contaminants. So the common contaminants are various</b></p> <p>17 <b>kinds of metals, semi-volatile organic compounds.</b></p> <p>18 <b>PCBs are a contaminant.</b></p> <p>19 <b>When we encounter the historic fill at sites,</b></p> <p>20 <b>and we are meaning to excavate it, we are required to test</b></p> <p>21 <b>typically for a wide variety of contaminants.</b></p> <p>22 <b>Q</b> Based on your observations and experience, would you</p> <p>23 expect the fill be historically observed to contain the</p> <p>24 type of contaminants you just described, metals, PCBs,</p> <p>25 other items as you testified to?</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Davis-Cross/Miller</b></p> <p style="text-align: right;">72</p> <p>1 <b>A That's correct.</b></p> <p>2 MS. MILLER: May my colleague approach the</p> <p>3 witness with copies of the declaration?</p> <p>4 THE COURT: Yes.</p> <p>5 Can you identify the exhibits?</p> <p>6 MS. MILLER: Yes, Exhibit H and Exhibit L.</p> <p>7 MR. ARONOFF: These are all of the defendant's</p> <p>8 exhibits.</p> <p>9 THE COURT: Thank you.</p> <p>10 I want to thank counsel for increasing my muscle</p> <p>11 mass.</p> <p>12 <b>Q</b> I have handed you Exhibit H.</p> <p>13 Do you recognize that document?</p> <p>14 <b>A Yes, I do.</b></p> <p>15 <b>Q</b> What is it?</p> <p>16 <b>A It is a declaration.</b></p> <p>17 <b>Q</b> And how about Exhibit L?</p> <p>18 <b>A It is a reply declaration.</b></p> <p>19 THE COURT: I have H. I have not seen L. Hold</p> <p>20 on.</p> <p>21 MS. MILLER: Volume two.</p> <p>22 <b>Q</b> And these are prepared --</p> <p>23 <b>A Yes.</b></p> <p>24 <b>Q</b> You reached an opinion as to environmental harm you</p> <p>25 would believe occurred as a result of activity on the</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Davis-Cross/Miller</b></p> <p style="text-align: right;">71</p> <p>1 <b>A It certainly has the potential to contain these</b></p> <p>2 <b>contaminants. We certainly have seen pieces of metal in</b></p> <p>3 <b>it. And that would suggest that metals could be a</b></p> <p>4 <b>contaminant.</b></p> <p>5 <b>Q</b> Is that why this type of material is required to be</p> <p>6 placed only in authorized landfills and DEC licensed</p> <p>7 facilities?</p> <p>8 <b>A Yes.</b></p> <p>9 <b>If it is excavated at sites which are under some</b></p> <p>10 <b>form of regulatory oversight, it is typically required to</b></p> <p>11 <b>be tested. If the test results dictate it is required to</b></p> <p>12 <b>be disposed in an authorized facility such as a landfill.</b></p> <p>13 MR. CALICA: Thank you.</p> <p>14 I have no further questions.</p> <p>15 THE COURT: Excellent.</p> <p>16 Cross-examination.</p> <p>17</p> <p>18 CROSS-EXAMINATION</p> <p>19 BY MS. MILLER:</p> <p>20 <b>Q</b> Afternoon, Ms. Davis.</p> <p>21 Before Saturday you had not visited Brookhaven</p> <p>22 Rail Terminal; is that correct?</p> <p>23 <b>A That's correct.</b></p> <p>24 <b>Q</b> You submitted two declarations in support of the</p> <p>25 Town's motion; is that correct?</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Davis-Cross/Miller</b></p> <p style="text-align: right;">73</p> <p>1 site; is that correct?</p> <p>2 <b>A I have reached an opinion regarding potential</b></p> <p>3 <b>environmental harm that could occur, yes.</b></p> <p>4 <b>Q</b> Potential environmental harm.</p> <p>5 You found there is potential threats to the</p> <p>6 aquifer?</p> <p>7 <b>A Yes.</b></p> <p>8 <b>Q</b> And do you know before the Town filed this motion, do</p> <p>9 you know whether anyone from the Town ever expressed any</p> <p>10 concerns to any of the Brookhaven Rail Terminal defendants</p> <p>11 regarding the aquifer?</p> <p>12 <b>A I don't know whether any such opinion was expressed.</b></p> <p>13 <b>Q</b> Let's talk about the sites specifically.</p> <p>14 Brookhaven Rail Terminal is located in Suffolk</p> <p>15 County; is that correct?</p> <p>16 <b>A Yes.</b></p> <p>17 <b>Q</b> All of Suffolk and Nassau County are situated on top</p> <p>18 of the aquifer?</p> <p>19 <b>A All of Suffolk and Nassau County are situated on top</b></p> <p>20 <b>of some of the aquifer, yes.</b></p> <p>21 <b>Q</b> The aquifers underlie all of Nassau and Suffolk</p> <p>22 County may be a better way to ask that.</p> <p>23 <b>A Yes, more or less.</b></p> <p>24 <b>Q</b> There are, of course, properties in Suffolk County</p> <p>25 over the aquifer that sit naturally at elevations of 50 or</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

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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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**Davis-Cross/Miller** 75

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 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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**Davis-Cross/Miller** 77

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**  
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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**  
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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**  
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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**  
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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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**Davis-Cross/Miller**

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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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**Davis-Cross/Miller**

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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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**Davis-Cross/Miller**

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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: IIIII.

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 IIIII was

13 received in evidence.)

14 **Q** Turn to the fourth page of Exhibit IIIII.

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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*OFFICIAL COURT REPORTER*

**Davis-Cross/Miller**

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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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*OFFICIAL COURT REPORTER*

Davis-Cross/Miller  
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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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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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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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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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 OFFICIAL COURT REPORTER

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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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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 **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. 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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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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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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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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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 Caithness 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 Caithness 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 Caithness is in the way

9 between this site and the river?

10 MS. MILLER: The Brookhaven terminal is directly

11 before Caithness.

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

13 you whether or not Caithness 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, Caithness 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 Caithness

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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**Davis-Cross/Miller**

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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 **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 **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 **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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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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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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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  
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Miner-Direct/Calica

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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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<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">110</p> <p>1 <b>Chief of Operations, in-house designation, but I am</b>  2 <b>appointed as Commissioner of Waste Management.</b>  3 <b>Q</b> What are your duties and responsibilities as chief of  4 operations?  5 <b>A</b> <b>Assist in the day-to-day operations of the</b>  6 <b>supervisor's office, administration of the Town, working</b>  7 <b>with both department heads throughout the Town.</b>  8 <b>Q</b> For how long have you held that position?  9 <b>A</b> <b>Since January 2010.</b>  10 <b>Q</b> Have you held a prior position in the Brookhaven Town  11 government in prior years?  12 <b>A</b> <b>Yes.</b>  13 <b>In approximately 2004 to 2006 I held several</b>  14 <b>positions, including Waste Management Commissioner,</b>  15 <b>Building Commissioner and Deputy Supervisor.</b>  16 <b>Q</b> And in your professional career, have you also held  17 administrative positions in any other towns on Long  18 Island?  19 <b>A</b> <b>Yes.</b>  20 <b>I was in the Town of North Hempstead for about</b>  21 <b>14 years with various titles, including Public Works</b>  22 <b>Commissioner, Waste Management Commissioner and the</b>  23 <b>Director of Operations. And for Suffolk County I was the</b>  24 <b>Deputy Commissioner of the Health Department.</b>  25 <b>Q</b> Did you have any role in the original litigation  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">112</p> <p>1 <b>Q</b> Is that the 28 acre parcel that now operates as the  2 Brookhaven Rail Terminal?  3 <b>A</b> <b>Yes, sir.</b>  4 <b>Q</b> 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 <b>A</b> <b>Yes.</b>  11 <b>Q</b> Okay.  12 What was your role insofar as the Town was  13 concerned in dealing with the BRT representatives?  14 <b>A</b> <b>The representatives would come into the office, into</b>  15 <b>the supervisor's conference room periodically and show</b>  16 <b>various concepts as to what they were working on in terms</b>  17 <b>of a vision for the next parcels -- annexed parcels.</b>  18 <b>Q</b> With whom did you react to at the Brookhaven Rail  19 Terminal?  20 <b>A</b> <b>Jim Pratt, and to a lesser degree Andrew Kaufman and</b>  21 <b>Jake Watral.</b>  22 <b>MR. CALICA: W-A-T-R-E-L?</b>  23 <b>A</b> <b>I think A-L.</b>  24 <b>Q</b> All right.  25 Did any engineer representatives from Brookhaven  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">111</p> <p>1 between the BRT and the Town that went on from let's say  2 2007 to 2009?  3 <b>A</b> <b>In that time period?</b>  4 <b>Q</b> Did there come a time that you became involved in  5 prior pending litigation involving the BRT and the Town of  6 Brookhaven?  7 <b>A</b> <b>Yes.</b>  8 <b>In early 2010.</b>  9 <b>Q</b> And at whose request did you become involved?  10 <b>A</b> <b>Former Supervisor Mark Lesko, and former Town</b>  11 <b>Attorney Robert Quinlan.</b>  12 <b>Q</b> 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 <b>A</b> <b>Yes, sir.</b>  16 <b>Q</b> Did you attend proceedings before the Surface  17 Transportation Board in Washington?  18 <b>A</b> <b>Yes.</b>  19 <b>Q</b> And did you consult with the Town's outside counsel  20 on that settlement?  21 <b>A</b> <b>Outside counsel at that time, yes.</b>  22 <b>Q</b> What parcel was involved in the September 2010 prior  23 settlement?  24 <b>A</b> <b>It is the triangle wedge I believe referred to as</b>  25 <b>parcel A immediately on Sills Road.</b>  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">113</p> <p>1 Rail Terminal come to meet with you?  2 <b>A</b> <b>Not that I recall.</b>  3 <b>Q</b> Okay.  4 Were you present in court this morning when  5 there was testimony concerning a so-called J track option?  6 <b>A</b> <b>Yes, sir.</b>  7 <b>Q</b> 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 <b>A</b> <b>Yes.</b>  11 <b>Q</b> 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 <b>A</b> <b>Yes, sir.</b>  17 <b>Q</b> Did you receive that email from Mr. Kaufman at BRT in  18 or about June of 2012?  19 <b>A</b> <b>Yes, I think I did, yes.</b>  20 <b>Q</b> 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?  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>

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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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<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">118</p> <p>1 <b>Q</b> 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 <b>A</b> Yes, shortly after, yes.  6 <b>Q</b> 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 <b>Q</b> 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 <b>Q</b> 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 <b>A</b> Yes, sir.  21 <b>Q</b> 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  <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p> </p>	<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">120</p> <p>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 <b>Q</b> Now, Mr. Miner, this was not the first discussion and  12 track proposal that you had with BRT representatives, was  13 it?  14 <b>A</b> In terms of installation?  15 <b>Q</b> In terms of their track plans.  16 <b>A</b> 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 <b>Q</b> And would you look at Exhibit 22 in the binder in  21 front of you.  22 Do you see that in the binder?  23 <b>A</b> Yes.  24 <b>Q</b> It is an email dated March 29th, 2012, addressed to  25 Jim. And it appears that that is Jim Pratt, the  <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p> </p>
<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">119</p> <p>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 <b>A</b> No, sir.  7 <b>Q</b> 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 <b>A</b> 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.  <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p> </p>	<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">121</p> <p>1 individual you identified as the BRT representative.  2 Did you send that email to Mr. Pratt?  3 <b>A</b> Yes.  4 <b>Q</b> In and about the end of March 2012?  5 <b>A</b> Yes.  6 <b>Q</b> 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 <b>A</b> Yes.  11 We needed something more definitive as to what  12 they were going to do.  13 <b>Q</b> 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  17 reading, details are necessary.  18 <b>A</b> Yes.  19 They may have provided something. But we were  20 asking for more information. A lot of times they would  21 submit something that was more conceptual in nature.  22 <b>Q</b> At about that time did you read anything about the  23 possible use of the 93 acre parcel as a casino for the  24 Shinnecock Indians?  25 <b>A</b> Yes.  <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p> </p>

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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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*OFFICIAL COURT REPORTER*

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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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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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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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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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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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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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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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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:  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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.**  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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.**  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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.**  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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.  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

**Miner-Direct/Calica**  
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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.  
*HARRY RAPAPORT, CERTIFIED REALTIME REPORTER*  
*OFFICIAL COURT REPORTER*

<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">138</p> <p>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?  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">140</p> <p>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 <b>Yes, give or take.</b> 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 <b>Good afternoon.</b> 25 Q You told us you have two titles. You are the  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miner-Direct/Calica</b></p> <p style="text-align: right;">139</p> <p>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.  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">141</p> <p>1 Commissioner of Waste Management and the Chief of 2 Operations for the Town? 3 A <b>Yes.</b> 4 Q And you are not an engineer, sir, are you? 5 A <b>I have an engineering degree, but I'm not a licensed</b> 6 <b>engineer, no.</b> 7 Q Do you have any training or experience in rail 8 engineering? 9 A <b>No, sir.</b> 10 Q You don't have any experience in geology? 11 A <b>Geology, no.</b> 12 Q Hydrology? 13 A <b>Limited as my role as the Waste Management</b> 14 <b>Commissioner and the ground water mediation at the Port</b> 15 <b>Washington landfill.</b> 16 Q Beyond that you have no hydrology training? 17 A <b>No.</b> 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 <b>Yes.</b> 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 <b>The.</b>  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

**Miner-Cross/Aronoff**  
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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  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

**Miner-Cross/Aronoff**  
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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?  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

**Miner-Cross/Aronoff**  
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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?  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

**Miner-Cross/Aronoff**  
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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  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
 OFFICIAL COURT REPORTER

<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">146</p> <p>1 that right?</p> <p>2 <b>A Yes, sir.</b></p> <p>3 <b>Q</b> And one of those items is road salt offloading and</p> <p>4 storage, number three?</p> <p>5 <b>A Yes.</b></p> <p>6 <b>Q</b> And you reviewed this list when you got it?</p> <p>7 <b>A Yes.</b></p> <p>8 <b>Q</b> Right?</p> <p>9 <b>A Yes.</b></p> <p>10 <b>Q</b> When you wrote back in that email earlier, you wrote</p> <p>11 back to Mr. Pratt on March 29th, acknowledging that you</p> <p>12 had some documentation from him; is that right?</p> <p>13 <b>A And I asked for more details, yes.</b></p> <p>14 <b>Q</b> Right.</p> <p>15 First you acknowledged you had documentation</p> <p>16 from him; is that?</p> <p>17 <b>A Yes.</b></p> <p>18 <b>Q</b> And in the first full paragraph you wrote: Before</p> <p>19 the Town can make a determination, additional</p> <p>20 documentation/details are necessary. Specifically, the</p> <p>21 Town requests that BRT provide a more detailed phase 2</p> <p>22 concept plan.</p> <p>23 That is what you wrote, right?</p> <p>24 <b>A Yes.</b></p> <p>25 MR. ARONOFF: I would move the admission of</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">148</p> <p>1 pages you are offering?</p> <p>2 MR. ARONOFF: Yes.</p> <p>3 MR. CALICA: No objection.</p> <p>4 (Whereupon, Defendant's Exhibit V was received</p> <p>5 in evidence.)</p> <p>6 <b>Q</b> Mr. Pratt writes, Matt, attached is a concept plan of</p> <p>7 what we have envisioned as of this date.</p> <p>8 Then he states: Please keep in mind that this</p> <p>9 is truly conceptual, as we have probably a year or more</p> <p>10 prep time to get to the actual building construction</p> <p>11 portion. This time will be used for site preparation.</p> <p>12 Do you see that?</p> <p>13 <b>A Yes.</b></p> <p>14 <b>Q</b> And if you look at the attachment, that is the</p> <p>15 concept plan you requested in your March 29th email; is</p> <p>16 that right?</p> <p>17 <b>A Yes.</b></p> <p>18 <b>Q</b> What is the shape of the track depicted on B and C in</p> <p>19 that concept plan?</p> <p>20 <b>A Three-quarter of a circle.</b></p> <p>21 <b>Q</b> It is an O track, isn't it right, sir?</p> <p>22 <b>A It is not a complete O.</b></p> <p>23 <b>Q</b> Mostly O?</p> <p>24 <b>A Three-quarters.</b></p> <p>25 <b>Q</b> Okay.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">147</p> <p>1 Exhibit U.</p> <p>2 THE COURT: No objection?</p> <p>3 MR. CALICA: No objection.</p> <p>4 THE COURT: Admitted.</p> <p>5 (Whereupon, Defendant's Exhibit U was received</p> <p>6 in evidence.)</p> <p>7 <b>Q</b> I would like to refer you to Exhibit V.</p> <p>8 (Handed to the witness.)</p> <p>9 <b>Q</b> Did you recognize what we have marked as Exhibit V,</p> <p>10 Mr. Miner?</p> <p>11 <b>A Yes.</b></p> <p>12 <b>Q</b> It is an April 6, 2012 email from Mr. Pratt to you.</p> <p>13 Is that right, sir?</p> <p>14 <b>A Yes.</b></p> <p>15 <b>Q</b> With an attachment?</p> <p>16 <b>A Yes, sir.</b></p> <p>17 <b>Q</b> And you recall receiving this, don't you?</p> <p>18 <b>A Yes.</b></p> <p>19 MR. ARONOFF: I will move the admission of</p> <p>20 Exhibit V.</p> <p>21 THE COURT: Any objection?</p> <p>22 MR. CALICA: Let me read it.</p> <p>23 (Whereupon, at this time there was a pause in</p> <p>24 the proceedings.)</p> <p>25 THE COURT: It is very clear -- to be clear, two</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">149</p> <p>1 The site plan also indicates building</p> <p>2 structures; is that correct?</p> <p>3 <b>A Yes.</b></p> <p>4 <b>Q</b> There are five of them -- six of them?</p> <p>5 <b>A Six with the ancillary --</b></p> <p>6 <b>Q</b> Yes.</p> <p>7 You understood they were proposed structures</p> <p>8 that BRT might ultimately build on its expanded parcel; is</p> <p>9 that right?</p> <p>10 <b>A It was a concept plan that kept evolving.</b></p> <p>11 <b>Q</b> But you understood when you saw this, these were</p> <p>12 structures that BRT was considering putting in at some</p> <p>13 point?</p> <p>14 <b>A One of the plans among consideration.</b></p> <p>15 <b>Q</b> This was among those plans?</p> <p>16 <b>A One of the plans.</b></p> <p>17 <b>Q</b> You see the bottom structure there it says covered</p> <p>18 salt structure building?</p> <p>19 <b>A Yes.</b></p> <p>20 <b>Q</b> And you understood, sir, based on your engineering</p> <p>21 experience, your landfill experience, certainly you knew</p> <p>22 that the extent that those structures were ever going to</p> <p>23 be built, they would have to be built on level surfaces,</p> <p>24 right?</p> <p>25 <b>A Yes.</b></p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">150</p> <p>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 <b>A Generally. Not excavation --</b> 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 <b>A Yes. But there was no grading plan here.</b> 9 <b>(Handed to the witness.)</b> 10 Q You recognize Exhibit W? 11 <b>A Between myself and Mr. Pratt, an email.</b> 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 <b>A The bottom -- the top of the second page, you're</b> 16 <b>talking about?</b> 17 Q Yes. 18 <b>A Yes, the bottom is from Mr. Pratt, yes.</b> 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 <b>A Yes.</b></p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">152</p> <p>1 you received it; do you see that? 2 <b>A Yes.</b> 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 <b>A Yes. I'm sure. It is easier to review a full set</b> 6 <b>than a smaller email.</b> 7 Q So you asked for a full sized copy and you asked PRT 8 to provide it and they did so? 9 <b>A Yes.</b> 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</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">151</p> <p>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 <b>A Yes.</b> 7 Q That is what you wrote? 8 <b>A Yes.</b> 9 Q And then you wrote, may I forward it to engineering, 10 parenthesis, Greg. 11 You are referring to Mr. Kelsey? 12 <b>A Yes.</b> 13 Q And Mr. Pratt wrote back, absolutely. We are anxious 14 to get started over there. 15 You see that? 16 <b>A Yes.</b> 17 Q And Mr. Pratt gave you permission to forward it to 18 the Town engineer? 19 <b>A The assistant engineer, yes.</b> 20 Q And you did so, I assume? 21 <b>A I believe so.</b> 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</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">153</p> <p>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.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>

**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** 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** 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** 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  
 HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  
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<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">158</p> <p>1 at the connect point would be 92 feet above sea level?</p> <p>2 <b>A Yes.</b></p> <p>3 <b>Q</b> And it says proceeding east to station 17 at grade</p> <p>4 minus 1.25 percent.</p> <p>5 Is that right, sir?</p> <p>6 <b>A Yes.</b></p> <p>7 <b>Q</b> And you understood that the expansion track was going</p> <p>8 to connect to parcel A at elevation 89, and then proceed</p> <p>9 down a grade, a slope, of 1.25 percent; is that right?</p> <p>10 <b>A For this limited area, yes.</b></p> <p>11 <b>Q</b> For this phase of the construction? That is what</p> <p>12 they were telling you they were going to do?</p> <p>13 <b>A Uh-huh.</b></p> <p>14 <b>Q</b> Is that right, sir?</p> <p>15 <b>A Yes.</b></p> <p>16 <b>Q</b> And item D under grading, it says continue around a</p> <p>17 400 foot radius curve to the north at grade minus 1.25</p> <p>18 percent.</p> <p>19 It is telling you the grade was going to</p> <p>20 continue to slope down around the curve; is that right?</p> <p>21 <b>A Yes.</b></p> <p>22 THE COURT: And let me ask you a question here.</p> <p>23 Is it fair to say a descending scale of 1.25</p> <p>24 percent, it is fair to say you were going down a a foot</p> <p>25 and a quarter?</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">160</p> <p>1 <b>A Yes.</b></p> <p>2 <b>Q</b> I will ask you to take a look at what is marked as</p> <p>3 BB.</p> <p>4 (Handed to the witness.)</p> <p>5 <b>Q</b> You have it in front of you?</p> <p>6 <b>A Yes.</b></p> <p>7 <b>Q</b> You recognize this document, Mr. Miner?</p> <p>8 <b>A Yes, sir.</b></p> <p>9 <b>Q</b> And the email is between you and Mr. Pratt, dated</p> <p>10 June 21, 2012?</p> <p>11 <b>A Yes.</b></p> <p>12 MR. ARONOFF: I move for it to be admitted.</p> <p>13 MR. CALICA: No objection.</p> <p>14 THE COURT: Admitted.</p> <p>15 (Whereupon, Defendant's Exhibit BB was received</p> <p>16 in evidence.)</p> <p>17 <b>Q</b> This is in response to Mr. Pratt's production</p> <p>18 schedule?</p> <p>19 <b>A In the center of the document, yes.</b></p> <p>20 <b>Q</b> In the center paragraph is your response, and you</p> <p>21 wrote: You should have a cover letter on either your or</p> <p>22 your engineer's letterhead and a drawing with the proposed</p> <p>23 areas appropriately marked shaded.</p> <p>24 You see that?</p> <p>25 <b>A Yes.</b></p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">159</p> <p>1 THE WITNESS: Yes.</p> <p>2 <b>Q</b> Item two -- item C under grading, continue to station</p> <p>3 41 plus 81 at grade minus 1.25 percent; is that right.</p> <p>4 <b>A Yes.</b></p> <p>5 <b>Q</b> Item D, at station 31 plus 70, parenthetical, sub</p> <p>6 grade elevation 53, proceed down at grade minus 1.25 to</p> <p>7 the southern property line.</p> <p>8 And you understood, sir, that sub grade</p> <p>9 elevation 53 meant 53 feet above sea level?</p> <p>10 <b>A Yes.</b></p> <p>11 <b>Essentially the tracks was following the</b></p> <p>12 <b>existing contours along the southern and eastern line --</b></p> <p>13 <b>property lines.</b></p> <p>14 <b>Q</b> And the grading was going to be done to establish</p> <p>15 that, those levels indicated in this document; is that</p> <p>16 right? That is what it said?</p> <p>17 <b>A But only for 150 feet.</b></p> <p>18 <b>Q</b> And then under truck access, item three, item A under</p> <p>19 three says, clear, grub and grade a 50 foot access road</p> <p>20 aligned with the northern easement from LIPA, L-I-P-A, in</p> <p>21 a southeasterly direction. You saw that as well, sir?</p> <p>22 <b>A Yes.</b></p> <p>23 <b>Q</b> And Mr. Pratt, if you recall in his email, asked you</p> <p>24 if you confirm if that schedule is what you needed; is</p> <p>25 that correct?</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">161</p> <p>1 <b>Q</b> And Mr. Pratt responded, okay, we are on it?</p> <p>2 THE COURT: Isn't there a sentence he wrote</p> <p>3 before, you should have a cover letter? What is that</p> <p>4 buffer?</p> <p>5 <b>Q</b> You asked a question about the buffer?</p> <p>6 <b>A Yes, sir.</b></p> <p>7 THE COURT: And it also says: You should -- it</p> <p>8 should probably state that you propose to clear and</p> <p>9 regrade only 75 feet from the center line of the proposed</p> <p>10 track.</p> <p>11 MR. ARONOFF: Yes.</p> <p>12 THE WITNESS: That's correct.</p> <p>13 <b>Q</b> You didn't ask Mr. Pratt in your email what</p> <p>14 procedures they would be using to excavate sand?</p> <p>15 <b>A No, sir.</b></p> <p>16 <b>Q</b> You didn't ask him any questions about the depth of</p> <p>17 the grade that they were contemplating?</p> <p>18 <b>A No. Because the track was consistent, or relatively</b></p> <p>19 <b>consistent with the concourse, the existing concourse</b></p> <p>20 <b>along the south and the east.</b></p> <p>21 <b>Q</b> You understood they were going to do grading?</p> <p>22 <b>A Very limited.</b></p> <p>23 <b>In fact, I asked for grading of only 75 foot on</b></p> <p>24 <b>the center line.</b></p> <p>25 <b>Q</b> Right. But you didn't raise any question about the</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</i></p>

**Miner-Cross/Aronoff**  
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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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**Miner-Cross/Aronoff**  
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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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*OFFICIAL COURT REPORTER*

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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 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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<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">166</p> <p>1 <b>A</b> I can't read this copy.</p> <p>2 <b>Q</b> This is the copy you submitted in connection with</p> <p>3 your declaration, Mr. Miner?</p> <p>4 <b>A</b> I believe there was a clearer copy when I made that</p> <p>5 declaration.</p> <p>6 <b>Q</b> And do you recall that the clearer copy did have</p> <p>7 track elevations on it?</p> <p>8 <b>A</b> I don't recall.</p> <p>9 <b>Q</b> Do you recall that it didn't?</p> <p>10 <b>A</b> I don't believe it did. But I don't recall.</p> <p>11 MR. ARONOFF: We have an enhanced copy I would</p> <p>12 like to bring into evidence.</p> <p>13 THE COURT: When this was provided to you, was</p> <p>14 it this size?</p> <p>15 THE WITNESS: If I recall correctly, it was an</p> <p>16 electronic copy, a PDF, which you can enlarge. I don't</p> <p>17 recall the letter or the drawing.</p> <p>18 (Counsel confer.)</p> <p>19 MR. ARONOFF: Judge, this is Exhibit XX that I</p> <p>20 had blown up for the Court.</p> <p>21 THE COURT: Is there a suggestion that it is</p> <p>22 comparable to Exhibit K or A?</p> <p>23 MR. ARONOFF: I would like to explore that for</p> <p>24 the witness.</p> <p>25 MR. CALICA: Can we have an offer of proof?</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">168</p> <p>1 took -- this is expanded. And that is all it is supposed</p> <p>2 to depict, what it is.</p> <p>3 And this here expanded that. The arrow just</p> <p>4 reflects where it came from.</p> <p>5 This is this expanded.</p> <p>6 THE COURT: Yes.</p> <p>7 MR. ARONOFF: The same thing.</p> <p>8 Here the same thing.</p> <p>9 The witness testified he received it in</p> <p>10 electronic format. He could have printed it out larger or</p> <p>11 zoomed in. And this is exactly what we have done. I have</p> <p>12 three more of these, Judge.</p> <p>13 THE COURT: You can ask him about this.</p> <p>14 MR. ARONOFF: If he wants to say I couldn't read</p> <p>15 it myself, and I didn't do anything about it for two</p> <p>16 years, that is the Town's testimony.</p> <p>17 THE COURT: I don't think he examined it in that</p> <p>18 level of detail.</p> <p>19 MR. ARONOFF: That is fair.</p> <p>20 All I want to establish for the record is that</p> <p>21 there were track elevations on here.</p> <p>22 THE COURT: I note you have it expanded to</p> <p>23 approximately three by four foot size. And in that size I</p> <p>24 can read the elevations.</p> <p>25 MR. ARONOFF: Correct.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>
<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">167</p> <p>1 (Counsel confer.)</p> <p>2 MR. ARONOFF: Let me explain.</p> <p>3 We took Exhibit A to Mr. Miner's declaration.</p> <p>4 We took that document attached to it, the so-called J</p> <p>5 track, and we just blew up portions of that document that</p> <p>6 clearly reflect the track elevation levels, which</p> <p>7 Mr. Miner just testified --</p> <p>8 THE COURT: Bring that to the sidebar.</p> <p>9 MR. CALICA: May I join counsel?</p> <p>10 THE COURT: Of course.</p> <p>11</p> <p>12 (Whereupon, at this time the following took</p> <p>13 place at the sidebar.)</p> <p>14 THE COURT: The reason I asked for the sidebar</p> <p>15 so we are out of the witness' hearing.</p> <p>16 I would note that the size of this document as</p> <p>17 presented in the declaration, which I have seen before, if</p> <p>18 these are elevation numbers, Superman could not read them</p> <p>19 if they are this size.</p> <p>20 MR. ARONOFF: Yes.</p> <p>21 THE COURT: What you are about to show him, I</p> <p>22 note that there are bright white arrows scattered through</p> <p>23 the document. And they are not appearing on this one.</p> <p>24 MR. ARONOFF: Yes.</p> <p>25 We created this document from that. We just</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">169</p> <p>1 This is standard for engineering. And this is</p> <p>2 the site plan. If you recall the earlier e-mail, where he</p> <p>3 said can you please drop off a full size. And he said</p> <p>4 they did it frequently. And this is the size they would</p> <p>5 have provided it to.</p> <p>6 THE COURT: You can ask.</p> <p>7 MR. CALICA: They not only blew it up to three</p> <p>8 by five, so they blew up this as well.</p> <p>9 MR. ARONOFF: You can read it without it.</p> <p>10 MR. CALICA: I would like to indicate the</p> <p>11 blowups, you start with a three by five blowup, and the</p> <p>12 areas they try to show, it looks like they are blown up</p> <p>13 again another five times.</p> <p>14 THE COURT: Okay.</p> <p>15 You can ask him and we will see what happens.</p> <p>16 MR. ARONOFF: It is admitted then, Judge?</p> <p>17 THE COURT: No.</p> <p>18</p> <p>19 (Whereupon, at this time the following takes</p> <p>20 place in open court.)</p> <p>21 THE COURT: What is the marks for</p> <p>22 identification?</p> <p>23 MR. ARONOFF: XX.</p> <p>24 THE COURT: SS?</p> <p>25 MR. ARONOFF: Two X's.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>

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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 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.**  
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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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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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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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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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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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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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<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">178</p> <p>1 <b>A Yes. I understood it to be the 100 foot to 75 foot</b></p> <p>2 <b>buffer --</b></p> <p>3 <b>Q</b> You then conclude, we have also attached a SWPP</p> <p>4 drawing for the track construction phase. You see that?</p> <p>5 <b>A Yes.</b></p> <p>6 <b>Q</b> That was the SWPP plan you requested of him?</p> <p>7 <b>A Yes.</b></p> <p>8 <b>Q</b> And that was the plan you requested in order to sign</p> <p>9 the draft letter we looked at and send it to BRT; is that</p> <p>10 right?</p> <p>11 <b>A Yes.</b></p> <p>12 <b>Q</b> Let's take a look at II.</p> <p>13 You recognize Exhibit II?</p> <p>14 (Handed to the witness.)</p> <p>15 <b>A Yes, sir.</b></p> <p>16 <b>Q</b> And it is an email from you to Mr. Pratt dated</p> <p>17 July 3rd, 2012, with a letter attached to it?</p> <p>18 <b>A Yes, sir.</b></p> <p>19 MR. ARONOFF: I move the admission of II into</p> <p>20 evidence.</p> <p>21 MR. CALICA: Just give me a moment. We have the</p> <p>22 wrong document.</p> <p>23 No objection, your Honor.</p> <p>24 THE COURT: So admitted.</p> <p>25 (Whereupon, Defendant's Exhibit II was received <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i>)</p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">180</p> <p>1 <b>Q</b> And you understood the BRT expected to be able to</p> <p>2 rely on the July 3rd letter?</p> <p>3 <b>A Yes.</b></p> <p>4 <b>Q</b> Mr. Quinlan, the County Attorney, blessed your letter</p> <p>5 before it went out?</p> <p>6 MR. CALICA: Objection.</p> <p>7 THE COURT: Sustained -- objection sustained.</p> <p>8 MR. ARONOFF: He said he got advice on it --</p> <p>9 THE COURT: Counsel, objection is sustained.</p> <p>10 MR. ARONOFF: We can stop here.</p> <p>11 THE COURT: We will take a five minute bathroom</p> <p>12 break, and we will be back.</p> <p>13</p> <p>14 (Whereupon, a recess was taken.)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25 <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">179</p> <p>1 in evidence.)</p> <p>2 <b>Q</b> You wrote in your email, Jim, please see the</p> <p>3 attached. Should you have any questions, please feel free</p> <p>4 to contact Greg or me. And that is Greg Kelsey?</p> <p>5 <b>A Yes.</b></p> <p>6 <b>Q</b> And attached to that is a signed version of the draft</p> <p>7 we looked at earlier, dated July 3, 2012?</p> <p>8 <b>A Yes.</b></p> <p>9 <b>Q</b> And BRT never requested this letter from you; is that</p> <p>10 right?</p> <p>11 <b>A I believe they did. But I'm not positive on that.</b></p> <p>12 <b>Q</b> You believe they did, in return you requested from</p> <p>13 BRT a SWPP plan. Right? You saw that earlier?</p> <p>14 <b>A Yes.</b></p> <p>15 THE COURT: Counselor, is this a good time to</p> <p>16 break?</p> <p>17 MR. ARONOFF: Two minutes and I will wrap up</p> <p>18 this line.</p> <p>19 <b>Q</b> The SWPP plan was important to the Town, which is why</p> <p>20 you requested it; is that right?</p> <p>21 <b>A Yes.</b></p> <p>22 <b>Q</b> And you expected to be able to rely on BRT's</p> <p>23 assurances to you that it will be complying with the SWPP</p> <p>24 plan; is that right, sir?</p> <p>25 <b>A Yes.</b></p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miner-Cross/Aronoff</b></p> <p style="text-align: right;">181</p> <p>1 THE COURT: Are we almost done here?</p> <p>2 MR. ARONOFF: I hope, so.</p> <p>3 THE COURT: What does that mean?</p> <p>4 MR. ARONOFF: I think 20 minutes, 30 tops.</p> <p>5 THE COURT: Keep it to 20 minutes.</p> <p>6 MR. ARONOFF: All right.</p> <p>7 BY MR. ARONOFF:</p> <p>8 <b>Q</b> Mr. Miner, you recall testimony earlier today about</p> <p>9 the sediment removal project, you were asked that earlier</p> <p>10 by your counsel?</p> <p>11 <b>A Yes.</b></p> <p>12 <b>Q</b> And as part of that project in the Town commission,</p> <p>13 it was contemplated to put a dredging pond on the BRT</p> <p>14 site; is that right?</p> <p>15 <b>A One of the sites being looked at, yes.</b></p> <p>16 MR. CALICA: I will show you what is marked as</p> <p>17 Exhibit DDDD and also EEEE.</p> <p>18 (Handed to the witness.)</p> <p>19 <b>Q</b> Do you recognize these documents, Mr. Miner?</p> <p>20 Let me ask you this: These are documents</p> <p>21 associated with the sediment removal project we have been</p> <p>22 talking about?</p> <p>23 <b>A Associated with the study of the sediment, not the</b></p> <p>24 <b>big document, but the study.</b></p> <p>25 THE COURT: For the record, my binder seems to <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

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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 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 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 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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**Miner-Redirect/Calica**  
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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 ROBERT HUMBERT,  
 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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**Humbert-Direct/Calica**

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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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**Humbert-Direct/Calica**  
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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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 OFFICIAL COURT REPORTER

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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 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 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 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 for a concept track plan for undesigned  
2 buildings, for unidentified users? Is that consistent  
3 with your idea of good railroad engineering practice?  
4 **A I think it is prudent engineering to understand  
5 exactly what you want the picture in the puzzle box to  
6 look like and then to set steps towards achieving that.  
7 So this identifies what it is that we need, and  
8 then we have to go through the necessary processes in  
9 order to figure out what else needs to be done and  
10 accommodate it.**

11 **Q** One of the processes is removing native sand and  
12 selling them; is that right?

13 **A I don't know what that means.**

14 **Q** Well, do you know where the sand that is being  
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 **Q** And do you consider them to be competent  
2 professionals in the railroad engineering field?

3 **A I would assume so. But I have not dealt with them  
4 enough to make my own judgment on that.**

5 **Q** Have you seen Exhibit 1 before today, the cover  
6 letter and the attached J track option?

7 **A I have seen the J track option. But I have not seen  
8 this particular exhibit.**

9 **Q** Have you seen the attachment of the J track option,  
10 the last page of Exhibit 2?

11 **A That is what I'm referring to, I have not seen this  
12 exhibit before.**

13 **Q** Not before today?

14 **A No, sir.**

15 **I have seen the J track option, but it is not  
16 with the aerial in the background.**

17 **Q** In any event, did the J track options that you saw  
18 follow the contour shown on Exhibit 1, that is, the track  
19 proceeding along the southerly boundary, entering on the  
20 west side of parcel B, continuing to the easterly side  
21 sloping down, following the natural elevation and then  
22 continuing north and ending south of the Long Island  
23 Expressway in the northeast corner of the parcel?

24 **A It does appear to follow the contours.**

25 **Q** Would such a design, if competently prepared by  
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1 the design or the eventual construction of the track along  
2 the lines shown on Exhibit 4?

3 **A Again, counsel, it is not within my purview.**

4 **Q** What is within your purview, sir?

5 **THE COURT:** Objection sustained.

6 Don't answer the question.

7 Anything else, counsel?

8 **Q** Would you look at Exhibit 1 in the binder in front of  
9 you.

10 Three pages, the second is from Systra  
11 Engineering, the last page is an area that other witnesses  
12 have said shows a J track layout.

13 Do you see that, sir?

14 **A I do.**

15 **Q** Are you familiar with Systra Engineering?

16 **A I'm aware of them, yes.**

17 **Q** What are they?

18 **A An engineering firm.**

19 **Q** Did -- do they concentrate, if you know, or  
20 specialize in track design?

21 **A I believe they are involved in track design, yes.**

22 **Q** Is it a material part of their business?

23 **A I do not know.**

24 **Q** Have you ever dealt with them?

25 **A Yes.**

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1 Systra, a -- have enabled BRT to put surface buildings and  
2 structures, such as a refrigerated warehouse as you  
3 described it, along the easterly border of the property?

4 **A This plan does not meet the objectives of the  
5 operation.**

6 **Q** That was not my question, sir.

7 My question is: Would it be possible if you  
8 built a J track plan designed -- as designed by Systra  
9 that you could put a refrigerated warehouse along the  
10 track along the easterly boundary of the property?

11 **A I would suspect it is possible to build a warehouse,  
12 period.**

13 **Q** Okay.

14 If you constructed a track in a J configuration,  
15 would you agree that there would be a lesser need to  
16 excavate and alter the grades of the property in the  
17 manner that is now shown in Exhibits 16 and 21?

18 **THE WITNESS:** Your Honor, it is difficult for me  
19 to answer because I don't agree with the premise that this  
20 track plan meets any objectives.

21 **THE COURT:** That is your answer, sir.

22 **Q** Did your company prepare any revisions of Exhibit 4?

23 **A I believe there has been some various tweaks as we  
24 looked at additional variations and modifications. But  
25 the basic premise stays the same.**

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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 **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 **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 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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<p style="text-align: center;"><b>Humbert-Direct/Calica</b></p> <p style="text-align: right;"><b>218</b></p> <p>1 THE COURT: You have been here all day with us?</p> <p>2 THE WITNESS: Yes.</p> <p>3 THE COURT: You have seen Exhibit B and B-1 and</p> <p>4 the big pictures; is that right?</p> <p>5 THE WITNESS: Yes.</p> <p>6 THE COURT: And does the construction of your</p> <p>7 plan require clearing, grading and grubbing, I believe the</p> <p>8 other word was used, to this magnitude? Or could it have</p> <p>9 been done different?</p> <p>10 THE WITNESS: It probably could have been done</p> <p>11 more surgically associated with following the plan to the</p> <p>12 letter of the law.</p> <p>13 THE COURT: For example, you could clear 150 or</p> <p>14 75 foot swath in the direction of the O; is that fair?</p> <p>15 THE WITNESS: Yes.</p> <p>16 THE COURT: And the last question, since you are</p> <p>17 the railroad engineer and you should know, the whole</p> <p>18 notion of grading the track downward 1.25 percent slope,</p> <p>19 is that an ideal design for a railroad? Is it better from</p> <p>20 a railroad engineer perspective to have a level track,</p> <p>21 with respect to the safety issues and things like that?</p> <p>22 THE WITNESS: In an ideal world everything is</p> <p>23 better if level. In this case the criteria we were using</p> <p>24 was actually a 1.5 maximum grade, which makes for an</p> <p>25 efficient operation.</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Humbert-Direct/Calica</b></p> <p style="text-align: right;"><b>220</b></p> <p>1 into the support facility, from the support facility I may</p> <p>2 take it to the runner track which is open to take it over</p> <p>3 to lot A.</p> <p>4 So those considerations are more important,</p> <p>5 quite frankly, as long as we are able to establish those</p> <p>6 tangent sections and keep the loop at no greater than</p> <p>7 somewhere – I think our desire was -- desired curvature</p> <p>8 was 11 degree 30 minutes and the maximum curvature was 12</p> <p>9 degree 30 minutes, which is within the principles of</p> <p>10 railroad engineering.</p> <p>11 Then we are in good shape. But to do that,</p> <p>12 though, there was another element that came into play in</p> <p>13 that we needed a roadway access as well.</p> <p>14 We spoke to the track objectives, but there is</p> <p>15 also roadway objectives. One was the access onto the</p> <p>16 service road, and you mentioned it earlier, there was the</p> <p>17 recharge basin. We needed enough room between the tracks</p> <p>18 and the recharge basin to afford us an access road between</p> <p>19 the two.</p> <p>20 The objective here again is not to have a</p> <p>21 conflict between the track operation and the roadway</p> <p>22 operation.</p> <p>23 So the part of the O that is exposed is where</p> <p>24 the roadway comes in.</p> <p>25 THE COURT: When did you first learn that</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Humbert-Direct/Calica</b></p> <p style="text-align: right;"><b>219</b></p> <p>1 Quite frankly, we develop things in processes.</p> <p>2 We develop the operating plan, regardless of what the</p> <p>3 vertical looks like first initially. And then we overlay</p> <p>4 that vertical on what the constraints of the property are.</p> <p>5 As long as the constraints, like degree of</p> <p>6 curve, grades, as long as you can achieve that plan within</p> <p>7 those design criteria, then you have a successful project.</p> <p>8 THE COURT: Would it have been from an</p> <p>9 engineering perspective feasible to increase the grade in</p> <p>10 the lower area of the property to create a lower track?</p> <p>11 THE WITNESS: Not to achieve the objectives.</p> <p>12 THE COURT: The objective in parcel B?</p> <p>13 THE WITNESS: One objective.</p> <p>14 The other is that at the north end we were going</p> <p>15 to tie in to the Long Island Expressway service road.</p> <p>16 That is about 53 to 52, that elevation.</p> <p>17 There is also the track going around the loop.</p> <p>18 There are dimensions that are very important. The only</p> <p>19 two tangent sections in that loop that you can effectively</p> <p>20 change the section – direction of the train in various</p> <p>21 tracks, in doing so we have to maintain the tangents to</p> <p>22 get cross-overs and turn-outs so I can take a train from</p> <p>23 the inside loop to the outside loop.</p> <p>24 Specifically if I was taking a train I just</p> <p>25 received, taking it apart, cutting cars or a block of cars</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Humbert-Direct/Calica</b></p> <p style="text-align: right;"><b>221</b></p> <p>1 construction in the sense of clearing, grading and</p> <p>2 grubbing had begun in connection with your plan?</p> <p>3 THE WITNESS: I have seen area photographs, so I</p> <p>4 knew from the aerial photographs when something was</p> <p>5 underway.</p> <p>6 THE COURT: When did you see that?</p> <p>7 THE WITNESS: It was probably in early November.</p> <p>8 We started in October. But I probably didn't see anything</p> <p>9 until then.</p> <p>10 THE COURT: Is it fair to say that that</p> <p>11 construction had begun before you designed your plan?</p> <p>12 THE WITNESS: There was work going on at the</p> <p>13 site before I started my plan.</p> <p>14 THE COURT: Counsel.</p> <p>15 MR. ARONOFF: The first thing I wanted to do is</p> <p>16 to have Mr. Humbert qualified as a railway engineering</p> <p>17 expert.</p> <p>18 THE COURT: I think we are good.</p> <p>19 MR. ARONOFF: Do you want me to mark the CV so</p> <p>20 it is part of the record?</p> <p>21 THE COURT: It is entirely up to you.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

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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 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 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 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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<p style="text-align: center;"><b>Humbert-Redirect/Calica</b></p> <p style="text-align: right;">234</p> <p>1 does contemplate or make provision for a potential future  2 connection of the track to the track on parcel B?  3 <b>A In my opinion it does not do -- it does not provide</b>  4 <b>for a proper design.</b>  5 <b>Q</b> It does attempt to do so; is that correct?  6 <b>A It attempts to, but if you look at the configuration</b>  7 <b>that you see here, the maximum that they can switch into a</b>  8 <b>D lot at any one time, the maximum they could switch into</b>  9 <b>D lot, and it would be a push move where the engine would</b>  10 <b>be behind all of the cars, would be somewhere in the order</b>  11 <b>of eleven or twelve cars at any one time.</b>  12 <b>Q</b> 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 <b>A My concept design basis provides for a much more</b>  16 <b>efficient operation than one that would be -- that would</b>  17 <b>be well to follow, yes.</b>  18 <b>Q</b> 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 <b>A That is correct.</b>  22 <b>Q</b> 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  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Humbert-Redirect/Calica</b></p> <p style="text-align: right;">236</p> <p>1 amount, the net amount of fill that will be removed from  2 parcel B and from parcel C?  3 <b>A Yes, I see the schedule.</b>  4 <b>Q</b> Okay.  5 And how much net is proposed to be removed from  6 parcel C under that calculation in cubic yards?  7 <b>A I'm not sure I understand your question, sir.</b>  8 <b>Q</b> 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 <b>Q</b> A million, so you mean 1,346,074; is that correct?  17 <b>A Yes, under parcel C.</b>  18 <b>Q</b> So the "so" is more than --  19 THE COURT: Objection sustained.  20 <b>Q</b> 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  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Humbert-Redirect/Calica</b></p> <p style="text-align: right;">235</p> <p>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 <b>Q</b> Have you ever seen those emails before?  12 <b>A I don't believe I have seen this email.</b>  13 <b>Q</b> Let me direct your attention to Mr. Miller's  14 July 12th, 2010 email to Bowne.  15 <b>A Is that included in this?</b>  16 <b>Q</b> Yes, the bottom of the first page of Exhibit 20.  17 <b>A Yes.</b>  18 <b>Q</b> 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 <b>A Yes, I do.</b>  25 <b>Q</b> And do you see the third page is a schedule of the  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Humbert-Redirect/Calica</b></p> <p style="text-align: right;">237</p> <p>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 <b>Q</b> 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.  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>

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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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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  
25

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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 20, 2014  
 ----- X 9:00 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.

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<p style="text-align: center;">244</p> <p>APPEARANCES:</p> <p>For the Plaintiff: ROSENBERG CALICA &amp; BIRNEY 100 Garden City Plaza, Suite 408 Garden City, New York 11530 BY: ROBERT M CALICA, ESQ. GEORGE B. KORDAS, ESQ.</p> <p>ANNETTE EADERESTO, ESQ. Brookhaven Town Attorney 1 Independence Hill Farmingville, New York 11763</p> <p>For the Defendants: FARRELL FRITZ For Sills Expressway 1320 RXR Plaza Uniondale, New York 11556 BY: KEVIN P. MULRY, ESQ.</p> <p>For remaining Defendants:</p> <p>FOLEY &amp; LARDNER, ESQ. 90 Park Avenue New York, New York 10016 By: YONATON ARONOFF, ESQ. VANESSA L. MILLER, ESQ.</p> <p style="text-align: center;">M O R N I N G   S E S S I O N</p> <p>19 20 21 THE COURT: Good morning. 22 Call your first witness. 23 MR. CALICA: The Town calls Kevin Loyst, 24 L-O-Y-S-T. 25 THE COURT: Please step up to the witness stand HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</p>	<p style="text-align: center;">Loyst-Direct/Calica</p> <p style="text-align: right;">246</p> <p>1 first. 2 A I have a bachelor of science in civil environmental 3 engineering from Clarkson University; a bachelor of 4 science in engineering management, and a master's in 5 science in environmental engineering. 6 Q From what university and what year? 7 A Polytechnic University, the City of New York, 1997. 8 Q By whom are you currently employed? 9 A FPM Group. 10 Q In what position, sir? 11 A Department manager of environmental engineering, and 12 I am currently a vice president. 13 Q There have been documents filed on behalf of FPM by 14 both Stephanie Davis, a geologist, and Ritu Mody, a 15 professional engineer. 16 Would you please explain to the Court what your 17 professional relationship is with both those individuals 18 within the FPM organization. 19 A Stephanie Davis runs the hydrogeology department, and 20 I run the environmental engineering department. Ritu Mody 21 works directly for me. 22 Q Did you participate in her preparation of the reports 23 that she signed and were filed with declarations in this 24 matter? 25 A Yes.</p> <p style="text-align: right;">HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</p>
<p style="text-align: center;">Loyst-Direct/Calica</p> <p style="text-align: right;">245</p> <p>1 to be sworn in. 2 THE CLERK: Please raise your right hand. 3 4 KEVIN LOYST, 5 called as a witness, having been first 6 duly sworn, was examined and testified 7 as follows: 8 THE CLERK: State and spell your name for the 9 record. 10 THE WITNESS: Kevin Loyst, L-O-Y-S-T. 11 THE COURT: Any time you are ready. 12 MR. CALICA: Yes. 13 Thank you, Judge. 14 15 DIRECT EXAMINATION 16 BY MR. CALICA: 17 Q Good morning, Mr. Loyst. 18 What is your business or profession? 19 A I am an environmental engineer. 20 Q Licensed as a professional engineer by the State of 21 New York? 22 A Yes. 23 Q Since when? 24 A Since 1999. 25 Q Could you tell the Court your educational background</p> <p style="text-align: right;">HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</p>	<p style="text-align: center;">Loyst-Direct/Calica</p> <p style="text-align: right;">247</p> <p>1 Q Were they reviewed by you? 2 A Yes. 3 Q Would you tell the Court what your -- what type of 4 professional practice you engaged in, in your role as the 5 head of the environmental engineering Department of FPM 6 Group? 7 A I get involved in numerous projects involving site 8 development, remediation design, environmental compliance, 9 permitting, those sorts of projects. 10 Q Have you worked as a consultant for municipalities? 11 A Yes. 12 Q And governments? 13 A Yes. 14 Q Which? 15 A Town of Riverhead, Town of Smithtown, Town of 16 Southold, Town of Greenberg, the Village of Lake Success, 17 the Town of North Hempstead, the City of Rye, and others. 18 THE COURT: Is part of this a proffer for 19 purposes of expert testimony? 20 MR. CALICA: Twofold, your Honor. 21 First I would like to qualify him as an expert. 22 Secondly, I'm trying to adduce evidence of his design 23 experience. 24 THE COURT: He is qualified as an expert. 25 MR. CALICA: Okay.</p> <p style="text-align: right;">HARRY RAPAPORT, CERTIFIED REALTIME REPORTER OFFICIAL COURT REPORTER</p>

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1 **Q** Have you been involved in landfill design?  
 2 **A** Yes.  
 3 **Q** Does that entail consideration of grading slopes,  
 4 excavation consideration?  
 5 **A** Yes.  
 6 **Q** And have you been involved in supervising remediation  
 7 of landfill for municipalities?  
 8 **A** Yes.  
 9 **Q** Was this likewise involved in the same type of  
 10 professional activities?  
 11 **A** Yes.  
 12 **Q** Do you deal with issues of stability in landfill  
 13 design?  
 14 **A** Yes.  
 15 **Q** You deal with issues of erosion?  
 16 **A** Yes.  
 17 **Q** And grading?  
 18 **A** Yes.  
 19 **Q** Do you deal with issues of grading and maintaining  
 20 grades?  
 21 **A** Yes.  
 22 **Q** Have you been involved in any transportation  
 23 projects?  
 24 **A** Yes.  
 25 **Q** Would you tell his Honor what some of them are and  
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*OFFICIAL COURT REPORTER*

**Loyst-Direct/Calica**  
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1 what your role was.  
 2 **A** **One of our clients is the New York City Transit. So**  
 3 **we have been involved in assisting them with their design**  
 4 **of sites, as far as grading, storm water management,**  
 5 **erosion control, anything along that nature.**  
 6 **Q** Have you been involved in the design of any bus  
 7 terminals?  
 8 **A** Yes.  
 9 **Q** Where?  
 10 THE COURT: Counsel, get to the substance.  
 11 **Q** Just where were the bus terminals?  
 12 **A** **New York City, Staten Island.**  
 13 THE COURT: I don't care about that. Get to the  
 14 point.  
 15 MR. CALICA: Yes.  
 16 **Q** Mr. Loyst, were you present during the testimony  
 17 yesterday of both Stephanie Davis when she reviewed and  
 18 observed the site conditions, and the testimony of the  
 19 AECOM engineer, Robert Humbert?  
 20 **A** Yes.  
 21 **Q** And do you have an opinion, sir, concerning the  
 22 professional engineering practice -- from a professional  
 23 engineering practice standpoint, concerning the manner in  
 24 which Mr. Humbert testified that he and his firm AECOM  
 25 approached the designing of the grades on the 93 acre  
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1 parcel? Do you have such an opinion?  
 2 **A** Yes.  
 3 **Q** Would you tell his Honor, please, what it is?  
 4 **A** **It seems odd that basically he testified that at the**  
 5 **engineer stage, conceptional engineering stage at this**  
 6 **point, early on in the process, and the site had been also**  
 7 **major league constructed.**  
 8 **Normally, you know, you go through phases of**  
 9 **preliminary design. It is final design, and it goes out**  
 10 **for bidding and then construction but not typically at the**  
 11 **conceptional stage already constructing on the site.**  
 12 MR. ARONOFF: I do object to that.  
 13 I mean, he is not an expert in construction  
 14 stages. He is testifying as an environmental engineer.  
 15 And I don't even understand his testimony about  
 16 Mr. Humbert's opinion, because he mischaracterized it.  
 17 THE COURT: I will overrule the objection, but  
 18 counsel, it is not by much.  
 19 The plan was withdrawn, so I'm not even sure  
 20 that any of that matters.  
 21 **Q** In approaching a -- have you approached a large scale  
 22 project that involved excavation grading, whether landfill  
 23 design, bus terminal or other projects?  
 24 **A** Yes.  
 25 **Q** And what type of professional engineering practice  
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**Loyst-Direct/Calica**  
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1 have you considered proper to consider in terms of design  
 2 of grading and excavation?  
 3 **A** **Well, typically you try to optimize or balance a cut**  
 4 **and fill, you know, as much as possible.**  
 5 **Q** What does that mean?  
 6 **A** **It means if you are cutting in one area of the site,**  
 7 **you would try to use that and try to fill another site, so**  
 8 **you are not exporting to another site and not having to**  
 9 **import a lot of material.**  
 10 **Q** Why is that so?  
 11 **A** **Well, cost, number one. You know, just preserving,**  
 12 **you know, the resources that you have. It makes for a**  
 13 **better general project.**  
 14 **Q** I see.  
 15 What about ground water considerations? Is that  
 16 something that as an engineering practice would be  
 17 considered in developing a site of this size for a use  
 18 such as contemplated here?  
 19 **A** Yes.  
 20 **Coming in you would be working with a team of**  
 21 **professionals.**  
 22 **I work with Stephanie a lot on different sites.**  
 23 **You have engineers, you have planners, you have**  
 24 **geologists, environmental scientists, etcetera.**  
 25 **Q** And why do you consider ground water impact in  
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**Loyst-Direct/Calica**

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1 approaching a design of a project of this type from a  
 2 standpoint of sound engineering practice?  
 3 **A As Stephanie elaborated on, the more filtering**  
 4 **capacity you have on the site with the ground water, it**  
 5 **just makes common sense, the more material the better**  
 6 **filtering to prevent any kind of contaminants that might**  
 7 **be introduced.**  
 8 **Q** If you were approaching the design of a 93 acre site  
 9 for industrial use, would you consider it professionally  
 10 appropriate as an engineer to consult with or at least  
 11 have as part of your team a geologist to consider ground  
 12 water considerations?  
 13 **A Yes.**  
 14 **Q** Now, you indicated when you design projects you try  
 15 to minimize cut and fill.  
 16 Do you have an opinion concerning whether or not  
 17 from a standpoint of good engineering practice and design  
 18 the methodology as testified by Mr. Humbert of leveling  
 19 the site to a uniform grade of 50 feet is or is not  
 20 consistent with sound engineering principles and  
 21 practices?  
 22 **MR. ARONOFF:** I object, Judge. Mr. Humbert did  
 23 not testify about that. Mr. Humbert designed conceptual  
 24 design track plan. He did not testify about the  
 25 methodology questioned about.

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1 **THE COURT:** Would you rephrase the question,  
 2 please.  
 3 **Q** You were present during Mr. Humbert's testimony; is  
 4 that correct?  
 5 **A Yes.**  
 6 **Q** And you have an opinion concerning whether or not his  
 7 testimony that the site was being graded to a uniform  
 8 level at the lowest elevation of 50 feet is or is not  
 9 consistent with sound, good, accepted engineering  
 10 practice.  
 11 **MR. ARONOFF:** Objection.  
 12 **THE COURT:** Objection sustained.  
 13 **Q** Did you have a chance to see the photographs  
 14 indicating some of the areas of elevation on the site?  
 15 **A Yes. They are aeriels.**  
 16 **Q** Are you able to observe what the angles of the slopes  
 17 are in the areas shown on Exhibit 16 and 21, and in  
 18 particular the southwest corner of the parcel and the  
 19 westerly side where there is what appears to be a cliff of  
 20 some type of an area that has been excavated?  
 21 **A They appear to be steep.**  
 22 **Q** Are you familiar with slope design?  
 23 **A Yes.**  
 24 **Q** And are there engineering practices that are  
 25 generally -- engineering considerations involved in the

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**Loyst-Cross/Aronoff**

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1 creation of slopes?  
 2 **A Yes.**  
 3 **Q** All right.  
 4 In looking at the manner in which the excavation  
 5 has occurred both in the southwest corner where there is  
 6 what looks like a pit area, and the cliff, do you as an  
 7 engineer observe any indication that there has been any  
 8 engineering design of the slopes?  
 9 **A No. I mean, they look steeper than, you know --**  
 10 **steeper than you normally want to have.**  
 11 **Q** In your opinion, sir, is that reflective of any type  
 12 of engineering design or planning whatsoever?  
 13 **A No.**  
 14 **MR. CALICA:** I have no further questions of the  
 15 witness.  
 16 **THE COURT:** Cross-examination.  
 17 **MR. ARONOFF:** Yes.  
 18  
 19 **CROSS-EXAMINATION**  
 20 **BY MR. ARONOFF:**  
 21 **Q** Mr. Loyst, let me start with the picture Mr. Calica  
 22 referred to.  
 23 **THE COURT:** So we are clear, is that Exhibit B?  
 24 **MR. ARONOFF:** I believe it is, yes, your Honor.  
 25 **MR. CALICA:** There is also -- they are also in

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1 evidence here as 16 and 21.  
 2 **Q** Which one are you referring to when you were  
 3 referring to the slope being steep?  
 4 **A Either one, either 16 or 21.**  
 5 **MR. ARONOFF:** One question, your Honor?  
 6 **THE COURT:** Sure.  
 7 **Q** You understand that BRT's expansion construction has  
 8 been halted?  
 9 **A Yes.**  
 10 **Q** And this is a construction project stopped midway  
 11 because of a TRO?  
 12 **A Yes.**  
 13 **Q** You mentioned you are an environmental engineer?  
 14 **A Yes, civil environmental engineer.**  
 15 **Q** And Ms. Mody is the same?  
 16 **A Yes.**  
 17 **Q** Neither of you are railway engineers?  
 18 **A No.**  
 19 **Q** You have adopted Ms. Mody's report in this case; is  
 20 that correct?  
 21 **A Yes.**  
 22 **Q** Let's take a look at that. It is Exhibit I.  
 23 (Handed to the witness.)  
 24 **Q** You have it in front of you?  
 25 **A Yes.**

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**Loyst-Cross/Aronoff** 256

1 MR. ARONOFF: Judge, you have it available,  
 2 Exhibit I?  
 3 THE COURT: I am with you. Go ahead.  
 4 **Q** This is the report that Ms. Mody submitted in  
 5 connection with the preliminary non-injunction motion?  
 6 **A Yes.**  
 7 **Q** This is what you adopted?  
 8 **A Yes.**  
 9 **Q** Look at the second page, and she excerpts portions of  
 10 her report, which is also annexed in full as an exhibit,  
 11 right?  
 12 **A Yes.**  
 13 **Q** Do you see those excerpts in the middle of the page?  
 14 **A Yes, the quotes?**  
 15 **Q** Yes.  
 16 Let me just read the first line?  
 17 It is our understanding that much of parcel C,  
 18 parenthesis, approximately 93 acres, end paren, of the BRT  
 19 site is presently being cleared of forest and excavated to  
 20 an elevation of 50 feet above mean sea level.  
 21 Do you see that?  
 22 **A Yes.**  
 23 **Q** Now, is that accurate, sir?  
 24 **A It appears to be, yes, especially looking at the**  
 25 **photos.**

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**Loyst-Cross/Aronoff** 257

1 **Q** You are basing that on the photos that you are  
 2 looking at in court today?  
 3 **A As far as clearing and excavation, yes.**  
 4 **Q** Were you looking at those photos with Ms. Mody when  
 5 you prepared this report with her? You didn't see those  
 6 photos before today, have you?  
 7 **A No. I have seen them in the last several days.**  
 8 **Q** The last several days, but not before you submitted  
 9 this report?  
 10 **A I saw some grading plans.**  
 11 **Q** Some grading plans?  
 12 **A Yes.**  
 13 **Q** Okay.  
 14 But you didn't see any evidence of actual  
 15 grading activity until you came to court?  
 16 **A No. I have not been to the site.**  
 17 **Q** It is not accurate that parcel C is 93 acres, is it?  
 18 **A Well, putting C and B together it is 93 acres.**  
 19 **Q** So it should read parcel B and C?  
 20 **A Yes.**  
 21 **Q** Let's continue with the rest of that sentence.  
 22 It reads, as part of BRT's track extension  
 23 project, so as to align the new tracks for a railroad spur  
 24 on parcel C with existing tracks.  
 25 Do you see that?

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**Loyst-Cross/Aronoff** 258

1 **A Where is that now?**  
 2 **Q** I just completed the first sentence.  
 3 THE COURT: The indented section of paragraph  
 4 five.  
 5 **A I don't see that.**  
 6 **Q** You see paragraph five?  
 7 **A Yes, page 2?**  
 8 **Q** Yes.  
 9 You see an indented quoted excerpt from a  
 10 report. You see that?  
 11 **A Yes, in the middle of the page.**  
 12 **Q** I read earlier the first half of the first sentence,  
 13 which ends at -- I stopped reading at 50 feet above mean  
 14 sea level.  
 15 **A Yes, I see it.**  
 16 **Q** Now I read the rest of it.  
 17 **A Yes.**  
 18 **Q** As part of BRT's track extension project, so as to  
 19 align the new tracks for a railroad spur on parcel C with  
 20 existing tracks.  
 21 You see that?  
 22 **A Yes.**  
 23 **Q** That is your understanding of BRT's project, is it  
 24 not?  
 25 **A Yes.**

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**Loyst-Cross/Aronoff** 259

1 **Q** Later on in that same paragraph, do you see where it  
 2 starts, we understand that?  
 3 I will read it, in the middle of the paragraph.  
 4 We understand that the existing Long Island Rail  
 5 Road track near the southern of parcel C is at  
 6 approximately 100 foot elevation. You see that?  
 7 **A Yes.**  
 8 **Q** What is the elevation of the Long Island Rail Road at  
 9 the southeast corner, do you know that?  
 10 **A Southeast corner?**  
 11 **Q** Yes.  
 12 **A Approximately that elevation.**  
 13 **Q** You believe it is approximately 100 feet at the  
 14 southeast corner, sir?  
 15 **A Well, the southeast corner, going to parcel B you**  
 16 **mean, in that area?**  
 17 **Q** What is the elevation?  
 18 **A I believe that is roughly about the 60 feet -- in the**  
 19 **60 range.**  
 20 **Q** So you understand that the Long Island Rail Road  
 21 slopes down for 100 feet in the 60 foot range?  
 22 **A Yes.**  
 23 **Q** Do you know if the Long Island Rail Road was required  
 24 to perform any grading or excavation in order to lay the  
 25 track at that elevation?

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**Loyst-Cross/Aronoff**  
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1 **A Yes.**  
 2 **Q** So they might have?  
 3 **A They might have.**  
 4 **Q** The next paragraph, page 2, in the quoted excerpt  
 5 still, and it starts with, good engineering practice.  
 6 Do you see that?  
 7 **A Yes.**  
 8 **Q** Good engineering practice dictates using the excess  
 9 fill located elsewhere on the site to level the site and  
 10 thereby reduce the need for excavation and removal of  
 11 clean virgin material.  
 12 Do you see that?  
 13 **A Yes.**  
 14 **Q** Did I read that right?  
 15 **A Where -- in the second paragraph now?**  
 16 **Q** Yes, sir.  
 17 **A I guess I don't see exactly where you are reading.**  
 18 MR. ARONOFF: May I approach, your Honor?  
 19 THE COURT: Sure.  
 20 (Counsel approaches the witness stand.)  
 21 **Q** You have it?  
 22 **A Yes.**  
 23 **Q** What is the engineering practice being referred  
 24 there?  
 25 **A Balancing, cut and fill.**  
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**Loyst-Cross/Aronoff**  
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1 **Q** What specific engineering standards or guidelines are  
 2 you referring to?  
 3 **A Just normal practice.**  
 4 **Q** Just normal practice?  
 5 **A Good engineering practice that we learn in school and**  
 6 **through experience.**  
 7 **Q** You can't name a specific guideline or principle  
 8 beyond that?  
 9 **A Not that I -- I don't think there is a, you know,**  
 10 **a -- an agency or something. It is just what we do.**  
 11 **Q** Okay.  
 12 Are you familiar with AREMA, the acronym  
 13 A-R-E-M-A?  
 14 **A No.**  
 15 **Q** You never heard of it?  
 16 **A Yesterday.**  
 17 **Q** For the first time?  
 18 **A Yes.**  
 19 **Q** It is the American Engineering -- American Railway  
 20 Engineering and Maintenance of Way Association.  
 21 It is something you have not heard of since  
 22 yesterday?  
 23 **A No.**  
 24 **Q** It is fair to say you didn't consult the AREMA  
 25 guidelines in reaching these conclusions?  
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**Loyst-Cross/Aronoff**  
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1 **A We are looking at site development type design,**  
 2 **whether it is a railway or building or anything else.**  
 3 **Q** Let's talk about proper fill for a second -- cut and  
 4 fill.  
 5 You mentioned on direct cut and fill is mostly  
 6 about cost, cost number one?  
 7 MR. CALICA: Objection.  
 8 THE COURT: You may answer the question.  
 9 **A I said cost was one of the factors.**  
 10 **Q** The reason it is a factor is typically it costs  
 11 less -- there is a cost savings associated with not having  
 12 to remove the fill off-site and paying for storage  
 13 someplace and being able to use it elsewhere on the  
 14 property; is that right?  
 15 **A Yes.**  
 16 **Q** Here you understand much of the excavated material  
 17 has value?  
 18 **A Yes.**  
 19 **Q** It has value that can be realized by selling it?  
 20 **A Yes.**  
 21 **Q** Have you calculated what percentage of the excavated  
 22 material from the BRT site is actually reusable?  
 23 **A I haven't done calculations, but it would be most if**  
 24 **not all of the material would be reusable. I am assuming**  
 25 **it is clear, but it seems like a pretty pristine site.**  
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1 **Q** Have you calculated the cut and fill method to be  
 2 used as opposed to selling the material that can be sold?  
 3 THE COURT: I'm not sure I understand the  
 4 question.  
 5 Can you rephrase it?  
 6 MR. ARONOFF: Yes, I can.  
 7 **Q** You mentioned there was a value to be realized from  
 8 selling some of the excavated material, and you understand  
 9 that to be the case, right?  
 10 **A I would think it is clean sand.**  
 11 **Q** BRT can sell it and offset some of its construction  
 12 costs?  
 13 **A Yes.**  
 14 **Q** And have you calculated -- and you advocated for BRT  
 15 to use a cut and fill method, which means instead of  
 16 selling that sand they would put it elsewhere on the site,  
 17 spread it out to raise the level of the topography, right?  
 18 **A Raise the level and even it out in certain areas,**  
 19 **yes.**  
 20 **Q** And if they did that, they wouldn't be able to sell  
 21 the sand, they would be using it on the property?  
 22 **A Yes.**  
 23 **Q** And my question is: Have you attempted to calculate  
 24 what financial impact it would have on BRT if they use  
 25 that method as opposed to the method of selling the sand?  
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<p style="text-align: center;"><b>Loyst-Cross/Aronoff</b></p> <p style="text-align: right;">264</p> <p>1 <b>A No, I have not done the cost calculations.</b></p> <p>2 THE COURT: I have a question.</p> <p>3 There was in evidence yesterday, and I will not</p> <p>4 remember the fancy word, but essentially debris type</p> <p>5 material, construction debris brought in and potentially</p> <p>6 used as fill.</p> <p>7 THE WITNESS: Right.</p> <p>8 THE COURT: Is there a cost to bring that</p> <p>9 material in, or does one get a benefit because it is</p> <p>10 something that someone else needs to get rid of?</p> <p>11 THE WITNESS: Normally there is a cost to dump</p> <p>12 material.</p> <p>13 THE COURT: So what I'm saying, the person who</p> <p>14 owns the land would be getting a fee or paying for having</p> <p>15 that material delivered?</p> <p>16 THE WITNESS: Would be getting a fee. Would be</p> <p>17 taking in money.</p> <p>18 THE COURT: All right.</p> <p>19 <b>Q</b> You heard Mr. Humbert's testimony yesterday where he</p> <p>20 set forth the operational objectives communicated to him</p> <p>21 in connection with his conceptual track design?</p> <p>22 <b>A Yes.</b></p> <p>23 <b>Q</b> You have not presented an alternative design plan to</p> <p>24 meet those conceptual objectives, have you?</p> <p>25 <b>A No.</b></p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Loyst-Redirect/Calica</b></p> <p style="text-align: right;">266</p> <p>1 REDIRECT EXAMINATION</p> <p>2 BY MR. CALICA:</p> <p>3 <b>Q</b> Mr. Loyst, how many projects have you designed or</p> <p>4 worked on that involved construction of a site that is</p> <p>5 previously undeveloped?</p> <p>6 <b>A From this size, more than 20.</b></p> <p>7 <b>Q</b> And how about if we dropped that from ninety-three</p> <p>8 acres to five acres, ten acres, twenty acres, how many?</p> <p>9 <b>A A hundred.</b></p> <p>10 <b>Q</b> And some of them involve industrial development?</p> <p>11 <b>A Yes.</b></p> <p>12 <b>Q</b> Some involve landfill design?</p> <p>13 <b>A Yes.</b></p> <p>14 <b>Q</b> Okay.</p> <p>15 In any of those projects, from a design or</p> <p>16 engineering perspective, did you employ the practice of</p> <p>17 balancing cut and fill?</p> <p>18 <b>A Yes.</b></p> <p>19 <b>Q</b> In every one of them?</p> <p>20 <b>A You always try to maintain a balance.</b></p> <p>21 <b>Q</b> Have you tried to -- have you had to have compliance</p> <p>22 with zoning issues in municipal government?</p> <p>23 <b>A Yes.</b></p> <p>24 <b>Q</b> In your experience is there an effort to be made</p> <p>25 required to remove fill material and balance --</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Loyst-Cross/Aronoff</b></p> <p style="text-align: right;">265</p> <p>1 <b>Q</b> Are you familiar with the acronym SWPP?</p> <p>2 <b>A Yes.</b></p> <p>3 <b>Q</b> What is the purpose of the SWPP?</p> <p>4 <b>A A plan, documented, and is for the site to minimize</b></p> <p>5 <b>erosion and manage storm water on-site.</b></p> <p>6 <b>Q</b> You are familiar with the SWPP plan submitted by BRT</p> <p>7 for the Town?</p> <p>8 <b>A No.</b></p> <p>9 <b>Q</b> You are not?</p> <p>10 <b>A No.</b></p> <p>11 <b>Q</b> You have not seen it?</p> <p>12 <b>A No.</b></p> <p>13 <b>Q</b> And that was not something you asked your client for?</p> <p>14 <b>A I have seen the SWPP, no.</b></p> <p>15 MR. ARONOFF: No further questions.</p> <p>16 THE COURT: All right.</p> <p>17 Redirect?</p> <p>18 MR. CALICA: Yes.</p> <p>19 THE COURT: Brief.</p> <p>20 MR. CALICA: Yes.</p> <p>21 THE COURT: Brief being the operative word,</p> <p>22 counsel.</p> <p>23 MR. CALICA: Yes.</p> <p>24</p> <p>25</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Loyst-Redirect/Calica</b></p> <p style="text-align: right;">267</p> <p>1 MR. ARONOFF: Objection.</p> <p>2 THE COURT: I will allow it.</p> <p>3 <b>A Yes.</b></p> <p>4 <b>Q</b> In all cases?</p> <p>5 <b>A Yes.</b></p> <p>6 <b>Q</b> Does doing so, minimizing cut and fill, minimize</p> <p>7 ground water contamination?</p> <p>8 <b>A Yes.</b></p> <p>9 <b>Q</b> Minimize erosion?</p> <p>10 <b>A Yes.</b></p> <p>11 <b>Q</b> And minimize storm water runoff?</p> <p>12 <b>A Yes.</b></p> <p>13 <b>Q</b> I will show you a document which is marked by</p> <p>14 defendants as HH. They have identified it as their SWPP</p> <p>15 plan.</p> <p>16 MR. CALICA: May I hand it up?</p> <p>17 THE COURT: Yes, please.</p> <p>18 (Handed to the witness.)</p> <p>19 <b>Q</b> Incidentally, are you familiar with the Bowne</p> <p>20 Engineering firm?</p> <p>21 <b>A Yes.</b></p> <p>22 <b>Q</b> Are they a reputable and well-regarded engineering</p> <p>23 firm on Long Island?</p> <p>24 <b>A Yes.</b></p> <p>25 <b>Q</b> And do you know whether or not they perform any</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

<p style="text-align: right;"><b>268</b></p> <p>1 railway engineering?  2 <b>A I don't know.</b>  3 <b>Q</b> The question is this, sir: That is the SWPP plan  4 prepared by Bowne, and the defendants identified it as  5 their effort to deal with storm water pollution  6 protection, as you described it.  7 Anything in that SWPP plan that shows elevations  8 on the 93 acre parcel?  9 <b>A I can hardly read it.</b>  10 <b>Q</b> Do your best.  11 Anything on it to show elevations on the 93 acre  12 parcel?  13 <b>A No.</b>  14 <b>Q</b> Is there anything that shows grading, or plans for  15 grading, on the 93 acre parcel?  16 <b>A Not that I can see.</b>  17 <b>Q</b> Is there anything showing the location or plan  18 location of the railway --  19 <b>A No.</b>  20 MR. CALICA: I have no further questions.  21 THE COURT: You can step down, sir.  22 (Whereupon, the witness leaves the witness  23 stand.)  24 THE COURT: Call your next witness, please.  25 MR. CALICA: Your Honor, I indicated to  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;"><b>270</b></p> <p>1 THE COURT: Pull the microphone nice and close  2 for you.  3 Oakland Transportation Holdings?  4 THE WITNESS: Yes.  5 THE COURT: What is that?  6 THE WITNESS: It is the holding company that  7 owns Brookhaven Rail, and we also own the majority of  8 Brookhaven Rail Terminal.  9 THE COURT: Excellent.  10 <b>Q</b> Is your background in accounting, business, or what,  11 sir?  12 <b>A I have a background in both industrial operations,</b>  13 <b>engineering and finance.</b>  14 <b>Q</b> Okay.  15 And how long have you been involved with or  16 associated with the Brookhaven Rail Terminal operations in  17 Yaphank?  18 <b>A Since 2011.</b>  19 <b>Q</b> So you had no role involving the prior litigation  20 brought by BRT against the Town and the settlement in  21 2010; correct?  22 <b>A I joined Oakland Transportation Holdings in 2011, so,</b>  23 <b>no.</b>  24 <b>Q</b> Now, when you came on board, was Sidney B. Bowne  25 Engineering already employed by BRT?  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;"><b>269</b></p> <p>1 Mr. Aronoff I will be calling his client Daniel Miller,  2 and he is going to want to on cross --  3 THE COURT: Mr. Miller is who?  4 MR. ARONOFF: The CFO for BRT.  5 THE COURT: Is that your next witness?  6 MR. CALICA: Yes.  7 THE COURT: Come on up, sir.  8 MR. ARONOFF: Again, Judge, if we can go beyond  9 the scope to save time?  10 THE COURT: Absolutely.  11  12 DANIEL MILLER,  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: Daniel Miller, M-I-L-L-E-R.  19  20 DIRECT EXAMINATION  21 BY MR. CALICA:  22 <b>Q</b> Good morning, Mr. Miller.  23 What is your business or profession, sir?  24 <b>A I'm the managing director for Oakland Transportation</b>  25 <b>Holdings.</b>  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;"><b>271</b></p> <p>1 <b>A Yes.</b>  2 <b>Q</b> And what was Bowne's role?  3 <b>A Bowne Group is an engineering firm that we have been</b>  4 <b>engaged with for a number of years. And at the time that</b>  5 <b>I joined Oakland Transportation Holdings, Bowne Group was</b>  6 <b>an active part of our engineering and design.</b>  7 THE COURT: What year did you say you came on?  8 THE WITNESS: 2011.  9 THE COURT: Thank you.  10 <b>Q</b> Was Bowne involved in doing the railway engineering  11 or design?  12 <b>A Yes, some of the railway engineering, yes.</b>  13 <b>Q</b> Did you have or did Oakland or BRT have a company  14 Systra, S-Y-S-T-R-A, Engineering, on board?  15 <b>A Yes.</b>  16 <b>Q</b> And who had hired them?  17 <b>A They were on board before I joined, so I don't know</b>  18 <b>exactly who started that engagement, but they were engaged</b>  19 <b>with BRT at the time I started with Oakland.</b>  20 <b>Q</b> Do you know anything about the background of Systra?  21 <b>A I understand they have a more specific knowledge than</b>  22 <b>Bowne in railway engineering.</b>  23 <b>Q</b> Do you know whether or not they are considered an  24 internationally recognized railway design and engineering  25 firm?  <i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p>

<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">272</p> <p>1 <b>A</b> My understanding is we engaged them because we felt</p> <p>2 they were a reputable and competent firm.</p> <p>3 <b>Q</b> Do you know that they had designed what we call the J</p> <p>4 track plan, which is in evidence as Exhibit 1?</p> <p>5 <b>A</b> Yes. I believe they are a part of that.</p> <p>6 <b>Q</b> Okay.</p> <p>7 If Systra was doing the railway design, what was</p> <p>8 Bowne doing?</p> <p>9 <b>A</b> Bowne and Systra worked together on a number of</p> <p>10 aspects. Bowne is a civil engineering firm we used for</p> <p>11 more of the civil work associated with the site. We use</p> <p>12 and rely on Systra for our railway system engineering.</p> <p>13 THE COURT: I'm sorry, I'm confused.</p> <p>14 If you have Systra designing the railroad, what</p> <p>15 is Bowne doing?</p> <p>16 THE WITNESS: Well, Systra was more specifically</p> <p>17 aligned with the track design and the specific railway</p> <p>18 issues. They have a more in-depth experience in that</p> <p>19 area.</p> <p>20 THE COURT: Right.</p> <p>21 THE WITNESS: However, we have to coordinate</p> <p>22 closely with Bowne, who are familiar with the site from</p> <p>23 the beginning, involving civil engineering and grading and</p> <p>24 things like that.</p> <p>25 So we used two firms with slightly different</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">274</p> <p>1 THE COURT: Do you have it?</p> <p>2 THE WITNESS: Yes.</p> <p>3 <b>Q</b> Do you have the email in front of you?</p> <p>4 <b>A</b> Yes.</p> <p>5 <b>Q</b> Did you receive it?</p> <p>6 <b>A</b> Yes.</p> <p>7 <b>Q</b> All right.</p> <p>8 Do you recall, sir, that your engineer at Bowne,</p> <p>9 Mr. Kuo, responded to you and Mr. Solomon as follows:</p> <p>10 Quote, I was not involved in the decision making --</p> <p>11 THE COURT: You have to read nice and slow for</p> <p>12 the record.</p> <p>13 MR. CALICA: I was not involved in the decision</p> <p>14 making for the single versus double. You have to talk to</p> <p>15 Andy.</p> <p>16 I can only provide you with site related</p> <p>17 engineering perspective. Systra is the rail engineer.</p> <p>18 Do you recall having received that information?</p> <p>19 <b>A</b> Yes.</p> <p>20 <b>Q</b> Does that correctly report what the allocation and</p> <p>21 responsibility was --</p> <p>22 THE COURT: Counsel, where is that on this</p> <p>23 document?</p> <p>24 MR. CALICA: It is in the middle of the page,</p> <p>25 your Honor, it is the May 13th, 2013 email from Lawrence</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>
<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">273</p> <p>1 specific skillsets.</p> <p>2 <b>Q</b> Who did you deal with at Bowne?</p> <p>3 <b>A</b> Most of my dealings were with Larry Kuo, K-U-O.</p> <p>4 <b>Q</b> Were you assisted by an individual named Tom Solomon?</p> <p>5 <b>A</b> Yes.</p> <p>6 <b>Q</b> Who is Tom Solomon?</p> <p>7 <b>A</b> The controller of BRT.</p> <p>8 <b>Q</b> In the ranking of your organization, who holds a</p> <p>9 higher role?</p> <p>10 <b>A</b> Tom Solomon reports to me.</p> <p>11 <b>Q</b> Did he work under your direction as it related to the</p> <p>12 financial aspects of the BRT development on the 93 acre</p> <p>13 parcel?</p> <p>14 <b>A</b> Yes, he did.</p> <p>15 <b>Q</b> Okay.</p> <p>16 MR. CALICA: I would like to offer in evidence a</p> <p>17 document produced at BRT, which is an email from Lawrence</p> <p>18 Kuo to Tom Solomon and to Dan Miller dated May 13th, 2013.</p> <p>19 THE COURT: Do I have a copy of that somewhere?</p> <p>20 (Handed to the Court.)</p> <p>21 MR. CALICA: These are the documents received in</p> <p>22 the early morning hours on Monday.</p> <p>23 THE COURT: Fine. Give me an exhibit number,</p> <p>24 please.</p> <p>25 MR. CALICA: 21.</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">275</p> <p>1 Kuo of Bowne to Solomon and --</p> <p>2 THE COURT: I have it.</p> <p>3 <b>Q</b> Does that statement correctly report the allocation</p> <p>4 of engineering responsibility between Systra Engineering</p> <p>5 as the rail engineer and Bowne?</p> <p>6 <b>A</b> I'm not sure what question you are asking.</p> <p>7 <b>Q</b> My question is: I asked you whether Bowne was</p> <p>8 involved in track design. And you said Systra was the</p> <p>9 designer. And I think you testified that Bowne was also</p> <p>10 working with them in the rail aspect of the development.</p> <p>11 Now I'm asking you if you stand by that</p> <p>12 statement when you look at the email which was just</p> <p>13 offered in evidence.</p> <p>14 <b>A</b> I will explain to you that both Systra and Bowne</p> <p>15 worked closely together on a number of engineering aspects</p> <p>16 on the site. It is difficult to compartmentalize a</p> <p>17 complex project like this. Systra focused on rail because</p> <p>18 that is where their depth of expertise involved. Bowne</p> <p>19 was focused on other aspects, but there was careful</p> <p>20 coordination between the two obviously as we planned the</p> <p>21 site.</p> <p>22 <b>Q</b> You recall, sir, that Systra designed a J track</p> <p>23 design or option for the site, correct?</p> <p>24 <b>A</b> Yes, I do.</p> <p>25 <b>Q</b> And that was some 5,600 feet of track that ran along</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> OFFICIAL COURT REPORTER</p>

<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">276</p> <p>1 the southern boundary, along the southern boundary  2 entering on the westerly side, going to the east, and  3 going north up to the Long Island Expressway and ending  4 there; is that correct?  5 <b>A</b> Yes, I do.  6 <b>Q</b> Is Systra still working for Brookhaven Rail Terminal?  7 <b>A</b> A limited basis.  8 <b>Q</b> Have they been replaced by AECOM?  9 <b>A</b> Pretty much.  10 <b>Q</b> When did that replacement occur?  11 <b>A</b> In early 2013 as we began contemplating a wide  12 variety of issues related to site development, we felt the  13 engineering skillsets we had on board between Bowne and  14 Systra were appropriate but narrow.  15 We reached out for a national firm with a wider  16 breadth of knowledge to incorporate both rail design,  17 civil engineering, and a wide variety of other  18 construction issues we felt we would face.  19 <b>Q</b> You felt that Systra, an international railway  20 engineering firm with offices in New York and Paris and  21 elsewhere, was not suitable to develop a 93 acre site in  22 Yaphank, the Town of Brookhaven?  23 THE COURT: Objection sustained.  24 <b>Q</b> What engineering firm developed the O track design?  25 <b>A</b> Every engineering firm that we dealt with has  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">278</p> <p>1 configuration. And that has been consistent in all of our  2 engineering conversations.  3 <b>Q</b> Did Systra design an O track?  4 <b>A</b> Systra was involved in a wide variety of engineering  5 up to that point.  6 <b>Q</b> Did Systra design an O track, sir?  7 <b>A</b> I would have to go back and review the plan documents  8 from the earlier years to know which firms produced which  9 documents.  10 <b>Q</b> I will tell you, sir, that your counsel produced  11 2,000 pages of documents, I have not seen an O track  12 bearing the name of Systra Engineering.  13 Are you aware of any such documents, sir?  14 <b>A</b> No, not at this time.  15 <b>Q</b> Would you agree that Systra designed a J track and  16 somebody else other than Systra designed and contemplated  17 an O track?  18 <b>A</b> I would not agree with that, because in 2012 we  19 already contemplated an O track.  20 <b>Q</b> Who is "we"?  21 <b>A</b> The Brookhaven Rail Terminal.  22 <b>Q</b> Are you a railway track designer?  23 <b>A</b> No, I'm not.  24 <b>Q</b> Is Tom Solomon a railway track designer?  25 <b>A</b> More of – both of us are more finance.  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>
<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">277</p> <p>1 contemplated the exact type of layout on parcels B and C  2 based on the constraints and operating requirements that  3 we faced.  4 <b>Q</b> Didn't Systra design a J track configuration ending  5 at the northeast corner and stopping south of the Long  6 Island Expressway?  7 <b>A</b> That was a phase of construction. Absolutely.  8 THE COURT: You say a phase?  9 THE WITNESS: Yes, and one of the designs  10 presented here.  11 <b>Q</b> And how would that phase continue?  12 <b>A</b> Well, if you look at the site plan in front of us  13 here, that addresses some of the engineering concerns and  14 development concerns that we have for the full utilization  15 of the site, such as contemplating access to parcel D to  16 the south. But it does not provide for the track space to  17 handle the operational requirements that we reviewed  18 yesterday.  19 <b>Q</b> So you decided that the J track option designed by  20 Systra and presented to the Town was not suitable, and you  21 wanted an O track; is that correct?  22 <b>A</b> I don't think that's correct.  23 <b>Q</b> Well, tell me how I'm wrong.  24 <b>A</b> Well, in 2012 we had discussed on a number of  25 occasions what we were referring to as an O track  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Miller-Direct/Calica</b></p> <p style="text-align: right;">279</p> <p>1 <b>Q</b> All right.  2 The question is: Who designed an O track in  3 2012?  4 <b>A</b> Well --  5 <b>Q</b> And you said Systra didn't do that.  6 <b>A</b> If you would like to review the plans contemplated  7 and provided over time, you can do so.  8 I'm well aware of the O track plans we did in  9 footnote 12. I don't recall who did them.  10 <b>Q</b> Do you believe Bowne did some?  11 <b>A</b> I'm sure Bowne was involved.  12 <b>Q</b> Even though Mr. Kuo, the engineer at Bowne, said he  13 couldn't provide information from a railway engineering  14 perspective, and that was not what his company does?  15 <b>A</b> Yes, that's correct. They were involved in the  16 project.  17 <b>Q</b> Despite what Mr. Kuo said in his email to you and  18 your subordinate controller, Mr. Solomon?  19 THE COURT: Objection sustained.  20 <b>Q</b> Moving on.  21 When you came on board as the chief financial  22 officer, were you considering from an economic standpoint  23 the amount of sand that could be excavated, removed from  24 the site and sold?  25 <b>A</b> We considered a wide range of economics associated  HARRY RAPAPORT, CERTIFIED REALTIME REPORTER  OFFICIAL COURT REPORTER</p>

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1 **with a project of this size, which includes the potential**  
 2 **sale of materials developed in construction.**  
 3 **Q** Does that mean the answer is yes?  
 4 **A Yes.**  
 5 **Q** And how did you rank the consideration of excavating,  
 6 removing and selling sand among those goals you just  
 7 testified to, Mr. Miller?  
 8 **A As a very small portion of an overall developing**  
 9 **plan.**  
 10 **Q** Are you acquainted with the ground lease between BRT  
 11 and Sills Expressway under which you ground leased  
 12 parcel B, 20 acres on the westerly side of the site?  
 13 **A Yes, I am.**  
 14 **Q** And that very ground lease provides that BRT receive  
 15 no less than 60,000 cubic yards of sand to be excavated  
 16 and removed from the site?  
 17 **A Yes.**  
 18 **Q** And were you involved in the business terms of that  
 19 lease?  
 20 **A Yes.**  
 21 **Q** And would you consider the fact that the document  
 22 which conveyed control of parcel B to your company  
 23 specifies 600,000 cubic feet -- yards, rather, to be  
 24 excavated and removed, and the very first document, as you  
 25 said, a minor consideration?  
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1 **A Yes, I would.**  
 2 MR. CALICA: Your Honor, I would like to offer  
 3 the ground lease into evidence.  
 4 THE COURT: We can get that. Keep going until  
 5 you finish.  
 6 MR. CALICA: Okay.  
 7 **Q** How many times, sir, did you communicate with Bowne  
 8 asking for computations of the amount of sand that can be  
 9 excavated and removed from the site if a uniform grade of  
 10 50 feet was intended?  
 11 **A How many times?**  
 12 **Q** Yes.  
 13 **A We did communicate about that topic. But as to how**  
 14 **many times we did, I wouldn't know.**  
 15 **Q** But it was a minor consideration, correct?  
 16 **A What was minor consideration?**  
 17 **Q** The amount of sand you would remove and sell.  
 18 **A Relative to the entire project, yes, it was.**  
 19 MR. CALICA: I would like to offer an email  
 20 from --  
 21 THE COURT: Mark it as Exhibit 30 and give it to  
 22 the witness.  
 23 MR. CALICA: Okay.  
 24 (Handed to the witness.)  
 25 **Q** You have the document in front of you?  
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1 **A Yes.**  
 2 **Q** You see it has the cc to you from Lawrence Kuo -- I  
 3 mean from Tom Solomon, the controller, who reports to you?  
 4 THE COURT: Do you recognize these documents?  
 5 THE WITNESS: Yes.  
 6 THE COURT: Is it an accurate production of the  
 7 group's emails involved in your business?  
 8 THE WITNESS: To my knowledge, yes.  
 9 THE COURT: Would you like to offer it?  
 10 MR. CALICA: Yes, sir.  
 11 THE COURT: Any objection?  
 12 MR. ARONOFF: No.  
 13 THE COURT: Now it is admitted. Now you can  
 14 talk about it.  
 15 (Whereupon, Plaintiff's Exhibit 30 was received  
 16 in evidence.)  
 17 **Q** Hi, Larry, for accounting purposes, I'm trying to  
 18 record an estimate of sand in tons on our balance sheet.  
 19 Dan provided me with this analysis from you. The sand is  
 20 being measured in cubic yards.  
 21 Then it goes on to discuss converting cubic  
 22 yards to tons.  
 23 Isn't it a fact, sir, the sand planned to be  
 24 excavated and removed from the site was being shown on  
 25 BRT's balance sheet?  
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1 **A Yes, it was.**  
 2 **Q** But the amount you would get for removing sand and  
 3 fill was in your words a minor consideration; is that  
 4 correct?  
 5 **A That's correct.**  
 6 **Q** All right.  
 7 MR. CALICA: I would like to show the witness a  
 8 document BRT Bates stamp 928 and offer it as the next  
 9 exhibit for identification.  
 10 THE COURT: It is 31.  
 11 (Handed to the witness.)  
 12 **Q** Do you recognize that email, sir?  
 13 **A Yes, I do.**  
 14 **Q** Is it a correct copy insofar as you know?  
 15 **A It would appear to be.**  
 16 MR. CALICA: I offer it in evidence, your Honor.  
 17 MR. ARONOFF: No objection.  
 18 THE COURT: All right, I allow it, go ahead.  
 19 (Whereupon, Plaintiff's Exhibit 31 was received  
 20 in evidence.)  
 21 **Q** This email from you -- to you, directly to Larry Kuo  
 22 at Bowne and copied to you, to Solomon, is called Phase 2,  
 23 rough grading plan. Phase 2, estimated cut and fill  
 24 analysis.  
 25 MR. ARONOFF: Objection, not what it is called.  
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1 MR. CALICA: Attachments, sorry, I misread that.  
2 It is called sand estimates. I was reading the wrong  
3 line. It is dated November 12th, 2012, and it reads as  
4 follows:  
5 Are you able to put your sand survey in a more  
6 formalized report? We want to have a formalized estimate  
7 on file as backup for our tax estimates regarding  
8 depletion.  
9 Do you recall receiving that information?  
10 **A Yes, I do.**  
11 **Q** So was your company seeking a formalized calculation  
12 in the amount of fill that would be removed and sold from  
13 the site?  
14 **A We were trying to make our absolute best estimate of**  
15 **what we thought at the time what we felt was going to be**  
16 **removed from the site.**  
17 **Q** And it was going to be a tax consideration for the  
18 tax benefit of BRT; is that correct?  
19 **A Actually, if you want to get into the accounting**  
20 **behind it, we have to show it as an asset on our balance**  
21 **sheet, and then depletion of the asset factors into the**  
22 **tax calculations, which is right.**  
23 THE COURT: Is that with your accounting  
24 background?  
25 THE WITNESS: I'm not a CPA. I have a finance  
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1 background with a variety of staff in accounting working  
2 for me.  
3 THE COURT: You are familiar with the concept of  
4 depletion?  
5 THE WITNESS: Yes.  
6 THE COURT: When it comes to something like sand  
7 depletion, that is generally associated with mining  
8 accounting?  
9 THE WITNESS: I don't know that specifically.  
10 THE COURT: And the plan attached to the email,  
11 was it part of it originally?  
12 THE WITNESS: You know, I don't know. It would  
13 be tough for me to -- to be honest, I'm not certain.  
14 THE COURT: Are you familiar with the Phase 2  
15 plan attached here?  
16 THE WITNESS: I'm familiar with this plan here,  
17 yes.  
18 THE COURT: In the middle, and to the right of  
19 center, there is a sort of odd three-legged, almost a  
20 peace sign, elevation 50, and it is very small and hard to  
21 see.  
22 Was it the suggestion there that the entire  
23 center of the property would be graded down to 50?  
24 THE WITNESS: Yes, the expectation as we  
25 developed the site is that elevation 50 was the elevation  
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1 recommended by all of our engineering staff.  
2 So as we prepared our year end books for  
3 accounting, our auditors required us to make estimates of  
4 the eventual amount of sand that would be removed from the  
5 site and the financial implications of that.  
6 THE COURT: And this was drawn by Bowne; is that  
7 correct?  
8 THE WITNESS: That's correct.  
9 THE COURT: And they have track drawings on here  
10 of some sort, yes?  
11 THE WITNESS: Correct.  
12 THE COURT: Would that have been their tracks?  
13 Or would they have gotten that information from Systra and  
14 transferred it, if you know?  
15 THE WITNESS: There was a lot of communication  
16 between Bowne and Systra, passing overlays back and forth,  
17 etcetera.  
18 THE COURT: I would like to get a better copy of  
19 Phase 2. There has to be a bigger board.  
20 MR. CALICA: We will provide it to you, your  
21 Honor.  
22 THE COURT: All right.  
23 **Q** Mr. Miller, directing your attention to the  
24 attachment to Exhibit 31, prepared by Bowne, as the Court  
25 pointed out, and as I'm directing to you, it shows what  
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1 appears to be a proposed elevation of 50 feet across the  
2 entire site from the westerly side to the easterly side,  
3 including up to the north; is that correct?  
4 **A That's correct.**  
5 **Q** Now, have you seen the SWPP plan that your counsel  
6 offered into evidence, and which was provided to the Town?  
7 **A Yes, I have.**  
8 **Q** All right.  
9 There is an extra copy as Exhibit 19 in our  
10 binder. I think it is Defendant's Exhibit G?  
11 MR. ARONOFF: HH.  
12 MR. CALICA: HH.  
13 (Handed to the witness.)  
14 **Q** Do you see the SWPP plan?  
15 **A Yes, I do.**  
16 **Q** And were you aware that that document was provided by  
17 BRT to the Town of Brookhaven?  
18 **A Yes, I was.**  
19 **Q** And does the SWPP plan show the 50 foot elevation  
20 that is on the attachment to Exhibit 31?  
21 **A It doesn't. The intent of the SWPP plan is to show**  
22 **how we are going to manage the excavation during the**  
23 **construction phase. So there is a different intent in**  
24 **terms of what we are communicating here.**  
25 **Q** Wouldn't lowering the grade of the property from 100  
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1 to 50 or 80 to 50 feet, or 70 to 50, be involved with the  
2 management of erosion and other factors in developing the  
3 site?  
4 **A Would you repeat the question.**  
5 **Q** More directly, sir, why is it that your company gave  
6 the Town a SWPP plan that did not show a 50 foot  
7 elevation, and at the very same time your company was  
8 exchanging with your engineers a sand removal application  
9 showing the whole plan going down to 50 feet, top to  
10 bottom?  
11 **A The SWPP plan, the intent of that plan to my**  
12 **understanding is to manage the debris – the management of**  
13 **soil excavation and ground water as we construct the site.**  
14 **So there is no elevation as far as I can tell in**  
15 **this plan, except for the track location, which looks like**  
16 **it has stations.**  
17 **The other plan is intended for us to estimate**  
18 **the excavation that we intended to embark on.**  
19 **Q** But that was still in your words minor consideration  
20 in terms of site development and planning; is that  
21 correct?  
22 **A What was a minor consideration?**  
23 **Q** The amount of material you can excavate and remove.  
24 **A That's correct.**  
25 MR. CALICA: I would like to show the witness  
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1 next what is BRT document 935, and that would be  
2 Exhibit 32 for ID.  
3 (Handed to the witness.)  
4 **Q** Can you identify that exchange of emails that  
5 occurred in July 2012 between Larry Kuo of Bowne  
6 Engineering and you on behalf of BRT?  
7 **A Yes, I can.**  
8 **Q** Are they accurate copies insofar as you know?  
9 **A Insofar as I can remember, yes.**  
10 MR. CALICA: I move them into evidence, your  
11 Honor.  
12 THE COURT: Any objection?  
13 MR. ARONOFF: No.  
14 THE COURT: So admitted.  
15 (Whereupon, Plaintiff's Exhibit 32 was received  
16 in evidence.)  
17 **Q** Is it correct on July 20, 2012 Larry Kuo wrote to BRT  
18 and said, quote, you wish for us to assume a flat surface  
19 across the majority of the property to match lowest track  
20 elevation at 56.12; is that correct?  
21 **A That is what he said here, yes.**  
22 **Q** And you responded, Larry, we have used elevation 50  
23 plus, which is the approximate county farm elevation at  
24 Route 495 service road elevation. Also that grade will  
25 carry into parcel B with no sloping between.  
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1 Is that your response?  
2 **A Essentially Jake Watral's response.**  
3 **Q** And who is Jake Watral?  
4 **A Jake manages some of the excavation work on the site.**  
5 **Q** In 2012 was he a partner in BRT?  
6 **A Yes, he was.**  
7 **Q** Is he still?  
8 **A Yes, he is.**  
9 **Q** He is more than an excavator, he is your partner?  
10 **A He is also a partner, yes.**  
11 **Q** And it is correct that your engineer said, well, I  
12 guess you want us to assume a flat surface of about 56  
13 feet, and your partner said, no, make that 50.  
14 MR. ARONOFF: Objection.  
15 THE COURT: If he can answer it.  
16 **A What are you asking?**  
17 **Q** Is it correct that your engineering inquired, should  
18 I assume a flat surface of 56 feet?  
19 And your partner, Mr. Watral, said, no. Make it  
20 50?  
21 **A No. It is actually not what he said in this email.**  
22 **Q** What did he say?  
23 **A Larry, we used elevation 50 plus minus, which is**  
24 **approximately county farm elevation.**  
25 **Q** Is it correct in response to Bowne's question, should  
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1 we assume a flat surface across the majority of 56, the  
2 response was that it should be designed at 50 plus minus?  
3 THE COURT: Objection sustained.  
4 **Q** Isn't that the elevation shown in the attachment to  
5 Exhibit 31, 50 feet across the entire parcel?  
6 **A Are you referring to this exhibit?**  
7 **Q** If that is the Bowne attachment to the email, yes.  
8 If it is the SWPP, there are no elevations.  
9 **A If this is the drawing I referred to earlier, yes, it**  
10 **is also elevation 50.**  
11 **Q** Isn't it a fact you respond to Bowne, Larry, please  
12 use these elevations for your cut line to calculate sand  
13 volume?  
14 **A Yes, I did.**  
15 **Q** Were you asking your engineer to say, how much sand  
16 are we going to be able to excavate, remove and sell from  
17 the site at a 50 foot elevation across the entire site?  
18 **A Yes.**  
19 **Q** But it was still a minor consideration?  
20 **A That's correct.**  
21 (Whereupon, at this time there was a pause in  
22 the proceedings.)  
23 MR. CALICA: Just give me a second, I know we  
24 marked this yesterday.  
25 **Q** Would you look at Exhibit 20 in the binder of  
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1 plaintiff's exhibits.  
 2 **A Yes.**  
 3 **Q** In that email exchange did Mr. Kuo, your engineer at  
 4 Bowne, give you a calculation of the amount of fill  
 5 material that would be excavated, sold and removed from  
 6 the site based upon a uniform elevation of 50 feet?  
 7 **A Yes. That is my understanding.**  
 8 **Q** And what is the net total on parcel C and on parcel B  
 9 combined?  
 10 **A The net total with the loam or without the loam.**  
 11 **Q** That is one foot of topsoil.  
 12 **A We used an estimate of one foot cover because that is**  
 13 **our experience on the site.**  
 14 **Q** You can't sell the one foot?  
 15 **A No.**  
 16 **The topsoil is stockpiled and used for later**  
 17 **when we do our final elevation.**  
 18 **Q** What is your calculation of material of the type that  
 19 you understand can be excavated and sold to remove from  
 20 the site?  
 21 **A We have approximately at this estimate 1.1 million**  
 22 **cubic yards for parcel B, and 1.3 million cubic yards for**  
 23 **parcel C.**  
 24 THE COURT: At that point in time had you sold  
 25 off any sand, or was this the beginning of that operation,  
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1 if you know?  
 2 THE WITNESS: I believe it was around that time  
 3 that the excavation work began on parcel B and C, but I  
 4 would have to refresh my memory for the specific day.  
 5 THE COURT: What would the projected revenue be  
 6 for selling that quantity of sand?  
 7 THE WITNESS: When you develop a site there is  
 8 revenue expenses, and because obviously -- when we remove  
 9 sand for sale from the site, there is both revenue and  
 10 expenses because it cost me money to excavate and handle  
 11 the site as we are removing sand and unloading the trucks.  
 12 My expectation is if we look at these estimates  
 13 based on average marketing conditions we experienced over  
 14 the past couple of years, I would expect that we would  
 15 have a margin of somewhere between 9 and 10 million  
 16 dollars related to the sand.  
 17 THE COURT: What is the projected revenue  
 18 from -- from developing the railway on parcel B and C?  
 19 THE WITNESS: Looking for expected revenue or  
 20 expected investment?  
 21 THE COURT: You say the sand is a minor issue.  
 22 THE WITNESS: Sure.  
 23 We looked as parcel B and C that we would  
 24 require somewhere between 100 and 125 million dollars to  
 25 fully construct the site.  
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1 We spent approximately 40 million dollars  
 2 developing parcel A, and it is not completed yet.  
 3 THE COURT: All right.  
 4 THE WITNESS: Our expectation is when the site  
 5 is fully developed, it should range anywhere from 15 to 20  
 6 million dollars a year in net income.  
 7 THE COURT: What does parcel A produce in  
 8 income?  
 9 THE WITNESS: I would have to refresh my memory  
 10 because there is a lot of figures associated.  
 11 THE COURT: Give me a ballpark. What would you  
 12 use as your sort of metric?  
 13 THE WITNESS: Approximately between eight and  
 14 ten million dollars. For total income on the site I would  
 15 have to look at the breakdown.  
 16 THE COURT: Eight or ten million dollars a year  
 17 or per its life?  
 18 THE WITNESS: Per year.  
 19 THE COURT: All right.  
 20 **Q** Is it correct you calculate, after you discounted for  
 21 the one you called loam, that there would be some 2.5  
 22 million cubic yards in the aggregate of material that  
 23 could be mined, excavated and sold; is that correct?  
 24 **A Correct.**  
 25 **Q** And what are you selling the material for today per  
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1 cubic yard?  
 2 **A We sell it per ton. Per ton sand material ranges**  
 3 **anywhere from seven to ten dollars per ton, dollars.**  
 4 **Q** Do you recall having seen in the emails that we  
 5 marked a conversion that cubic yards could be about 1.1 to  
 6 1.2 tons?  
 7 **A Yes, I believe because earlier, yes, and --**  
 8 **Q** So you did the math and you figured how much did you  
 9 say, seven to nine?  
 10 **A I believe I said between eight and ten million**  
 11 **dollars is the margin we expect for the sand.**  
 12 **Q** What is the per ton cost that which you are selling,  
 13 the price at which you are selling sand?  
 14 **A Between seven and ten dollars.**  
 15 **Q** So an average of eight and a half?  
 16 **A Yes.**  
 17 **Q** And if we converted cubic yards at 1.1 or 1.2 --  
 18 THE COURT: It is a negligible difference, I got  
 19 it.  
 20 **Q** How is it if you had two and a half million cubic  
 21 yards, which would be maybe 2.3 million tons --  
 22 THE COURT: It is the other way around, I think.  
 23 MR. CALICA: Okay.  
 24 **Q** So 2.3 million tons at seven to ten, why are you  
 25 saying nine to ten million dollars, isn't it 20 million  
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1 dollars plus?

2 **A I believe I explained earlier there is no revenue**

3 **expenses associated with sand. If you look at the revenue**

4 **and don't include any expenses, then there would be a**

5 **larger number involved. But my projection from revenue,**

6 **and my projection from – for margin associated with the**

7 **sand are two different amounts.**

8 THE COURT: You are projecting a 50 percent

9 margin roughly?

10 THE WITNESS: Typically, yes. That is what we

11 have seen up to this point in time.

12 THE COURT: That is a pretty ROI, as they say in

13 the finance world; is that correct?

14 THE WITNESS: Sure.

15 **Q Isn't it better ROI if you acknowledge that your**

16 **company is not incurring any expenses for digging, loading**

17 **and weighing material on parcel B, which is almost half**

18 **the amount in issue according to this exhibit?**

19 MR. ARONOFF: Objection.

20 THE COURT: I will let you answer the question,

21 if you can.

22 **A I'm not sure of the question.**

23 **Q Are you acquainted with the ground lease between**

24 **Sills Expressway Associates and your company?**

25 **A Yes, I am.**

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1 **Q All right.**

2 And under that ground lease isn't it a fact that

3 Sills is required to pay all costs associated to, quote,

4 dig, load and weigh the minerals at its sole cost and

5 expense?

6 **A Sorry. What was the question?**

7 **Q Are you aware that that is what the ground lease**

8 **between BRT and Sills Expressway provides for?**

9 **A If you are reading it, yes.**

10 THE COURT: Let's mark the ground lease and put

11 it in.

12 You are not paying any of those expenses, sir?

13 THE WITNESS: It is more complicated than that.

14 There is associated sand that we estimated, or

15 as we entered this transaction on this ground lease,

16 certain owners of parcel B had requested that part of

17 their consideration be to have the ability to use that

18 sand for their other businesses. So there is a variety of

19 transactions associated with his.

20 However, that being said, it does cost us on

21 average five dollars a ton for every ton of sand – sand

22 removed.

23 THE COURT: The ground lease is admitted as

24 Exhibit 33 without objection, I assume.

25 (Whereupon, Plaintiff's Exhibit 33 was received

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1 in evidence.)

2 THE COURT: What were you referring to when you

3 said Sills would pay the cost?

4 MR. CALICA: Page 2, subdivision one, beginning

5 six lines up from the bottom of page 2, at Bates number

6 17.

7 THE COURT: It appears that that reference to

8 Sills with respect to cost relates to specific material

9 supplied. Is that correct?

10 MR. CALICA: Yes, 600,000 tons of material

11 removed from parcel B.

12 THE COURT: 600,000 tons of gravel, right?

13 MR. CALICA: Gravel free of –

14 THE COURT: I'm not sure that is on all fours

15 here.

16 **Q What is bank run gravel, free of overburden?**

17 **A Bank run is typically the sand that is removed from**

18 **the site that is not screened.**

19 THE COURT: Is Sills paying the expenses of

20 removing the first 600,000 tons that you are selling?

21 THE WITNESS: No.

22 The way this works is a complex relationship

23 involving both the lease payments contemplated and the

24 sand.

25 So there is a commitment that Sills has the

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1 right to get some of this sand, and the cost of the

2 excavation of that sand is calculated in terms of the

3 overall relationship.

4 So the sand customers are ones with a unique

5 relationship because they have ownership of some of the

6 property that we are working on.

7 THE COURT: Okay.

8 You may continue.

9 **Q Sir, what is your understanding of the meaning of**

10 **these words: Lessor at Sills Expressway shall be**

11 **obligated at all costs to dig, load and weigh the**

12 **minerals, at the sole cost and expense, and lessor shall**

13 **provide at its sole cost and expense all trucking**

14 **necessary for removing the minerals from the property.**

15 **A What was your question?**

16 **Q What does that mean to you in the English language,**

17 **sir?**

18 **A I think it means pretty clearly what it says here.**

19 **Q Which means that BRT isn't incurring the cost of**

20 **digging, loading, weighing and trucking, but Sills**

21 **Expressway, the ground lessor, is paying those expenses;**

22 **is that correct?**

23 **A We are matching revenue expenses. Because we are not**

24 **projecting revenue for that 600,000 tons, there are also**

25 **not expenses associated with that 600,000 tons.**

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1 **Q** Are you saying it is factored in as part of the rent  
2 that you pay?  
3 **A** All those numbers are looked at as part of the entire  
4 lease.  
5 **Q** When you do the value calculations based on  
6 approximately 2.5 million cubic yards of net filling  
7 material, would you agree if you factor in the obligation  
8 of Sills that they bear these expenses, the amount is  
9 greater than the nine to ten million dollars you testified  
10 to, to his Honor?  
11 **A** I would really have to look at that calculation in  
12 detail to know exactly what you are asking.  
13 **Q** All right. We will move on.  
14 Who selected AECOM?  
15 **A** We did.  
16 **Q** Who is "we"? Were you involved in the planning  
17 process?  
18 **A** The board of directors of BRT.  
19 **Q** How did you find AECOM?  
20 **A** AECOM had prior relationships with some of our  
21 minority partners, and we felt they were a firm that could  
22 be qualified.  
23 As we looked for a variety of different firms  
24 that we felt would meet our needs, we selected AECOM.  
25 **Q** And according to Mr. Humbert, that happened in  
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1 October or November of 2013; is that correct?  
2 **A** That's correct.  
3 **Q** Pretty late in the game?  
4 **A** Late in the game?  
5 **Q** Considering you coming on board in 2011, and the  
6 documents we have seen concerning the plan development of  
7 parcels B and C.  
8 **A** I'm not sure I understand the question. Can you  
9 rephrase that?  
10 **Q** When did the development plans for B and C begin?  
11 **A** We have been developing plans for B and C since 2011,  
12 2012.  
13 **Q** Late in the game.  
14 But would you agree that it was relatively  
15 recently, October, November 2013, that AECOM was brought  
16 on board?  
17 **A** AECOM was engaged in the fall of 20013; that's  
18 correct, yes.  
19 **Q** And were you dissatisfied with Systra Engineering?  
20 **MR. ARONOFF:** Objection.  
21 I don't understand why we are planning hours of  
22 testimony on their choice of the engineering firm.  
23 **MR. CALICA:** Offer of proof, they hired an  
24 engineer that designed the O track and bring the whole  
25 grade down to 50 feet.  
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1 THE COURT: Let's wrap it up.  
2 **A** Would you restate that question one more time,  
3 please.  
4 **Q** Were you dissatisfied with Systra?  
5 **A** We weren't from a track engineering perspective. Our  
6 concern laid more with the holistic site development. We  
7 felt Systra's skillset was narrower from what we were  
8 looking for for developing the site.  
9 **Q** Did Systra perform any calculation or recommendation  
10 to you to bring the elevation of the entire site down to  
11 50 feet level from its maximum elevation of 100 down to  
12 the westerly side to where it is about 50?  
13 **A** We discussed a number of different plans. I would  
14 have to review specific communication with both Systra and  
15 Bowne to recall who did what and when.  
16 **Q** Do you recall Systra ever making a recommendation  
17 that you grade and level the entire site after Systra  
18 designed the J track where the track runs only across the  
19 southerly and easterly area of the parcel?  
20 **A** Rephrase that one more time.  
21 **Q** Do you recall Systra ever recommending that you  
22 excavate and grade the entire parcel to a uniform level of  
23 50 feet after it had designed a J track which had the  
24 track only along the southern and easterly perimeter of  
25 the 93 acre site?  
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1 **A** Again, I would have to review prior communication  
2 with all the engineering firms to remember exactly which  
3 firm recommended which things.  
4 **Q** As you sit here under oath today, sir, do you recall  
5 Systra having made any such recommendation?  
6 **A** No. I can't focus on a specific recommendation.  
7 **Q** I represent to you, sir, in the 2,000 pages of  
8 documents produced by your counsel, there is no such  
9 document. Are you aware of any other?  
10 THE COURT: Strike all the portion of the  
11 question other than are you aware of any other.  
12 Answer that.  
13 THE WITNESS: No, I'm not.  
14 THE COURT: All right.  
15 **Q** Now, when AECOM came on board, they were more  
16 flexible in terms of designing the site with a uniform  
17 track level of 50 feet and excavating everything to 50  
18 feet; is that correct, sir?  
19 THE COURT: I will sustain the objection.  
20 **MR. CALICA:** No further questions.  
21 THE COURT: Good.  
22 It is cross, slash, direct.  
23 **MR. ARONOFF:** I will be very brief, your Honor.  
24 THE COURT: Please.  
25 **MR. ARONOFF:** Most of this was covered in  
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**Miller-Cross/Aronoff**

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1 direct. I want to just summarize it.  
 2 THE COURT: Please.  
 3  
 4 CROSS-EXAMINATION  
 5 BY MR. ARONOFF:  
 6 **Q** His Honor asked the question, I think, about what the  
 7 scope of the sand revenue would be compared to the overall  
 8 investment in the project.  
 9 If you were to put a rough percentage on the  
 10 amount of offset you get from selling the sand compared to  
 11 your overall investment, what would that be?  
 12 **A** Our expectation was to build up parcel – our  
 13 expectation is that the full build-out of parcel B and C  
 14 will cost somewhere between 100 and 125 million dollars in  
 15 capital. Our expectation is that a margin associated with  
 16 certain material sales including sand would be somewhere  
 17 in the vicinity of ten million dollars when the site is  
 18 completed.  
 19 So a portion of the expected construction cost  
 20 are offset by sand revenue.  
 21 THE COURT: And are there non-private investment  
 22 sources, like government grants, to build the railway?  
 23 THE WITNESS: Yes.  
 24 The New York State Department of Transportation  
 25 granted us a two and a half million dollar grant this past  
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1 year, which is for an offset of a portion of the rail  
 2 construction in the next phase.  
 3 **Q** And we will talk about that grant for a second. It  
 4 is actually something I wanted to ask you about.  
 5 How did you secure that grant?  
 6 **A** We applied for the grant because we felt that our  
 7 site as an alternative to trucking freight onto Long  
 8 Island provided something that was of significant interest  
 9 to the New York State Department of Transportation, and as  
 10 I mentioned in the very beginning of this, there is a  
 11 tremendous amount of congestion on the Long Island  
 12 Expressway. And for a truck to haul freight from  
 13 elsewhere in the country to Long Island, they have to  
 14 cross two bridges and pay tariffs and tolls.  
 15 The New York State Department of Transportation  
 16 whom we met with on a number of occasions continues to  
 17 have concerns about the long-term bridge infrastructure,  
 18 and for us to allow a portion of the freight on Long  
 19 Island to bypass the truck bridges and utilize the rail  
 20 network is in both of our best interests.  
 21 And I believe that has been the majority of the  
 22 reason why the New York State Department of Transportation  
 23 granted us those funds, because they see this as an  
 24 important alternative for freight transportation on Long  
 25 Island.  
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1 **Q** In order to secure that grant, did you have to  
 2 explain to the Department of Transportation what your  
 3 expansion plans were?  
 4 **A** We had a long and drawn out conversation both before  
 5 the application process and as we worked toward the post  
 6 award of the grant to talk about all the grants and the  
 7 potential plans and what we planned to do.  
 8 **Q** The grant was awarded?  
 9 **A** Yes.  
 10 **Q** Do you think they would have awarded a 2.5 million  
 11 dollar grant to the sand mine?  
 12 **A** I have a hard time to feel why the New York State  
 13 Department of Transportation feels that is important.  
 14 **Q** And you have a finance background you said?  
 15 **A** Yes.  
 16 **Q** Does it make financial sense, you think, to spend 125  
 17 million dollar investment to get ten million dollars in  
 18 sand?  
 19 **A** I would have a hard time selling that to my  
 20 investment committee.  
 21 **Q** Can you briefly, without going too much over old  
 22 ground, please explain briefly to the Judge what needs to  
 23 happen on parcel A and why you need to expand?  
 24 **A** Parcel A is a land railway facility. We have seen  
 25 actual work in the last two years we have been operating.  
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**Miller-Cross/Aronoff**

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1 The most recent work we closed, we transloaded 172 rail  
 2 cars of product. Transloading that volume of rail cars on  
 3 such a constrained space has obvious operational  
 4 considerations. Parcel A is at and on certain occasions  
 5 above reasonable capacity. All those customers continue  
 6 to grow volume.  
 7 As an example, we transloaded in less than two  
 8 years over 100 million pounds of flour for bakeries on  
 9 Long Island.  
 10 That type of growth in a short time span  
 11 requires us to further expand the site to service both the  
 12 existing customers and potential customers that we are  
 13 engaged in negotiations with about using similar  
 14 facilities on parcels B and C to transload products  
 15 brought in via rail, to be transloaded to trucks and  
 16 distributed locally to Long Island.  
 17 **Q** And you were present for Mr. Humbert's testimony  
 18 yesterday?  
 19 **A** Yes, I was.  
 20 **Q** And you recall his testimony about the operational  
 21 objectives is communicated to AECOM?  
 22 **A** Yes, I do.  
 23 **Q** And is that consistent with your understanding of  
 24 what those objectives are?  
 25 **A** Absolutely, and I was part of that as well.  
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**Miller-Cross/Aronoff**  
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1 **Q** Tell us what you directed AECOM to do.  
 2 **A** We intend to own this investment for the long term.  
 3 It is not a project remodeling we intend to invest and  
 4 capitalize to try to sell it five or ten years from now.  
 5 So the absolute primary objective was a long-term  
 6 efficient rail operation. The railroad has a number of  
 7 constraints and we want to make sure that we dealt with  
 8 all those as well as the site constraints as we developed  
 9 the property.  
 10 **Q** One of those operational objectives had to do with  
 11 parcel B. You recall that?  
 12 **A** Yes.  
 13 **Q** Please tell the Judge what the status of that  
 14 parcel B?  
 15 **A** Oakland Transportation Holdings, the owner of  
 16 Brookhaven Rail, acquired parcel B in 2013. We began  
 17 negotiations on parcel B well in advance of that. And our  
 18 expectation based on our analysis suggests that Long  
 19 Island typically has approximately one percent of the  
 20 freight delivered via rail.  
 21 Elsewhere in the northeast percentages are  
 22 around 19 percent.  
 23 So we see a big gap in the amount of rail served  
 24 freight on Long Island versus truck.  
 25 We believe by developing this type of  
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1 infrastructure facility, we can capture a small portion of  
 2 that freight.  
 3 Parcel B is designed for future expansion based  
 4 on our expectation and future growth that we would  
 5 continue to need more area to do the same type of  
 6 business.  
 7 **Q** Let's talk briefly about grading. There has been a  
 8 lot of testimony today and yesterday about why it is that  
 9 the grading started before AECOM got involved in October  
 10 of 2013 and started a large area.  
 11 Why don't you explain to the Court why it is  
 12 that the grading was staged the way it was.  
 13 **A** Every single engineering firm we talked to, and this  
 14 has been consistent throughout my enrollment in the  
 15 project, looks to parcel B and C as the site developed and  
 16 most efficiently developed, a site most efficiently  
 17 developed with a base elevation of approximately 50. And  
 18 that is 50 feet above sea level, where approximately 50  
 19 percent, if I remember the percentage correctly, already  
 20 is.  
 21 We look at primarily railroad operations and  
 22 then we look at constraints, and look to develop the site  
 23 in the most efficient fashion.  
 24 **Q** And why is it that you started the grading when you  
 25 did back in 2012?  
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**Miller-Cross/Aronoff**  
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1 **A** Because of the grade change that is required for our  
 2 railroad track construction, that is a multiyear process,  
 3 and as an investment firm and with the growth we were  
 4 seeing we simply have to start working as fast as possible  
 5 to generate additional rail space to handle our customer  
 6 load.  
 7 THE COURT: Who made the decision to clear, grub  
 8 and grade the entire property as compared to grading a  
 9 more surgical path?  
 10 THE WITNESS: Well, when we first started that  
 11 grading, our focus was to deal with it in a most cost  
 12 efficient way as possible. Because sand is a relatively  
 13 cheap commodity on a per ton basis. And handling sand  
 14 twice becomes very expensive. Every time you handle tough  
 15 sand, it becomes very expensive very quickly.  
 16 Our initial plan was to develop the site in the  
 17 most cost efficient way, to minimize the double handling.  
 18 Now, after we came into these discussions, we  
 19 modified our excavation plan to use a less efficient plan  
 20 but a more specific to the initial track work area.  
 21 So on the big picture basis, it is less  
 22 efficient for us to do it in this fashion. But we are  
 23 trying to be -- to work with --  
 24 THE COURT: I'm confused. What fashion are you  
 25 doing it in now that is less efficient?  
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1 THE WITNESS: Well, if you look at the concept  
 2 of just excavating a narrow path around the track  
 3 construction, that is much more difficult from an ingress  
 4 and egress perspective. It is also less efficient because  
 5 as you are grading different areas, you don't have easy  
 6 access in and out of the site. There is more movement  
 7 that is required.  
 8 So all that additional movement adds up to  
 9 additional cost, versus focusing the excavation in a more  
 10 focused area.  
 11 **Q** I think what the Judge was asking is: Have you  
 12 changed your staging of the construction -- when you  
 13 said --  
 14 THE COURT: Honestly, that is the first I heard  
 15 of that.  
 16 MR. ARONOFF: I want to bring that out a bit.  
 17 **Q** At some point after this dispute arose, you reordered  
 18 the order of construction; is that correct?  
 19 **A** That's correct.  
 20 Because we have a New York State DOT grant for  
 21 track construction. That is what is going in first. So  
 22 in an effort to keep things moving, we specifically said,  
 23 okay, let's reorient and focus specifically on the next  
 24 section of track that needs to be laid since we are having  
 25 complications with the preceding or the prior plan for  
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**Miller-Cross/Aronoff** 312

1 **excavation.**

2 **Q** And when did that reordering occur, the

3 reorientation?

4 **A** **This year when the litigation began.**

5 **Q** You have been grading the site for two years?

6 **A** **That's correct.**

7 **Q** And you kept the Town informed of the grading?

8 **A** **My understanding, yes.**

9 **Q** And have you provided reports to the Town on a

10 periodic basis about the grading that was occurring?

11 **A** **Yes, we have.**

12 **MR. ARONOFF:** I need to find an exhibit to put

13 it in.

14 **Q** I will show you what is marked as GGGG.

15 (Handed to the witness.)

16 **MR. ARONOFF:** I will try to introduce it as a

17 group exhibit after he identifies it.

18 **Q** Do you recognize the reports included in this

19 exhibit?

20 **A** **Yes.**

21 **Q** Would you tell the Court what they are.

22 **A** **These are the reports that Sidney Bowne prepares on a**

23 **two times per month basis and provides to the Town based**

24 **on the ongoing basis.**

25 **Q** The first one based on BRT 00801 is dated

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**Miller-Cross/Aronoff** 313

1 November 17th, 2010?

2 **A** **That's correct.**

3 **Q** And who is Tom Miller?

4 **A** **Tom Miller is one of our superintendents on the site.**

5 **Q** And if you look at the last page, BRT 00868, dated

6 December 21, 2013.

7 **A** **Yes.**

8 **Q** Are these the reports that were prepared and

9 submitted to the Town by Bowne on a periodic basis from

10 2010 to 2013?

11 **A** **Yes. And I think they also continue to this day.**

12 **MR. ARONOFF:** I will move to have it admitted as

13 a group exhibit.

14 **MR. CALICA:** No objection.

15 **Q** Mr. Miller, do you know who at the Town would have

16 been receiving reports?

17 **A** **My understanding they are communicated via email from**

18 **Larry Kuo at Bowne to Greg Kelsey at the Town.**

19 **Q** The Town engineer sitting here today?

20 **A** **Yes.**

21 **THE COURT:** Any objection?

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

23 **THE COURT:** GGGG is admitted.

24 (Whereupon, Defendant's Exhibit GGGG was

25 received in evidence.)

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**Miller-Cross/Aronoff** 314

1 **Q** Would you look at the very first report under work in

2 progress, general description, the November 2010 report

3 that says excavation and mining operation ongoing. Do you

4 see that?

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

6 **Q** And that probably relates to parcel A?

7 **A** **That's correct.**

8 **Q** Take a look at BRT 00831.

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

10 **Q** And what is the date of that report?

11 **A** **August 25th, 2012.**

12 **Q** And do you see under work in progress, it says

13 excavation operation ongoing on parcel B?

14 **A** **That's correct.**

15 **Q** Take a look at BRT 00834.

16 **A** **Okay.**

17 **Q** Do you see under work in progress it says excavation

18 ongoing at area B and C?

19 **A** **That's correct.**

20 **Q** And take a look at BRT 00 -- also, sorry, under

21 remarks on that same BRT 00834, what does Bowne remark?

22 **A** **The site is well maintained.**

23 **Q** Take a look at BRT 00861.

24 **A** **Yes.**

25 **Q** Again, it says under work in progress, excavation in

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**Miller-Cross/Aronoff** 315

1 areas B and C, you see that?

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

3 **Q** And it says site is well maintained?

4 **A** **Yes.**

5 **Q** And it also mentions asphalt?

6 **A** **Yes.**

7 **That was at the time we were installing asphalt**

8 **near the Home Depot loading facility.**

9 **THE COURT:** What is RCA?

10 **THE WITNESS:** Recycled concrete and aggregates

11 used as a base material on parcel A. In this particular

12 instance it related to the construction of the Home Depot

13 transloading facility.

14 **THE COURT:** Is RCA another word for what is

15 being called homogenic, I think?

16 **THE WITNESS:** I don't think they are exactly the

17 same thing in terms of what they were trying to insert

18 elsewhere on the property.

19 **Q** The homogenic, human debris we heard testimony about

20 yesterday, can you tell the Court what it is and why it

21 appears on B and C?

22 **A** **Sure.**

23 **As we develop a site, and unfortunately as we**

24 **develop a site, there were areas that had previous**

25 **material accumulated, basically a variety of things. In**

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**Miller-Cross/Aronoff**

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1 addition to that, there was certain construction  
 2 demolition on a limited basis that occurred on parcel A  
 3 involving prior foundations and some brick and things like  
 4 that.  
 5 When that type of material was found, it has  
 6 been stockpiled. Right now it is stockpiled as we have  
 7 seen. It is the top elevation on parcel B. And then as  
 8 that material gets to a certain point, then we make  
 9 arrangements to truck it off and dispose of the property.  
 10 Q So your ultimate plan is to dispose of that material?  
 11 A Yes.  
 12 Q And why haven't you done that yet?  
 13 A Well, again, just for efficiency standpoint, there is  
 14 not that much there at this point in time. So for us to  
 15 dispose of it, we typically --  
 16 THE COURT: Wait a moment. Is that someone who  
 17 has a cell phone on, or near the microphone?  
 18 All right, that solved the problem.  
 19 Do all of these reports marked as GGGG relate to  
 20 parcel B and C?  
 21 THE WITNESS: They relate to parcels A, B and C.  
 22 THE COURT: When did you start work on B and C?  
 23 THE WITNESS: I believe that was the August 25th  
 24 report, I think was the first time --  
 25 Q August 25th of when?  
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**Miller-Cross/Aronoff**

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1 A 2012.  
 2 Q Do you remember what BRT 00831, do you have that?  
 3 THE COURT: That is the first one relating to  
 4 parcel B?  
 5 THE WITNESS: Yes.  
 6 THE COURT: Where is it, going back to the old  
 7 one, where was it that your company was conducting an  
 8 excavation and mining operation, excavation and mining  
 9 operation?  
 10 THE WITNESS: At that point parcel A was still  
 11 excavating to bring down the final grade, so parcel B  
 12 wasn't done yet.  
 13 THE COURT: So it is fair to say you conducted a  
 14 mining operation on parcel A?  
 15 THE WITNESS: I would call that grading and  
 16 excavation.  
 17 THE COURT: It says that there. It is a mining  
 18 operation; is that right? Was there a mining operation on  
 19 parcel B?  
 20 THE WITNESS: We refer to it as excavation and  
 21 construction. And the material that is removed from the  
 22 site was certainly screened and --  
 23 THE COURT: Was there anything different about  
 24 the activity occurring on parcel A than B, or was it  
 25 similar?  
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**Miller-Cross/Aronoff**

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1 THE WITNESS: Similar.  
 2 Q What did you build on parcel A?  
 3 A We built two transloading facilities. We installed a  
 4 flour transload area. We put in what we refer to as the  
 5 super stacker, which is a facility that allows us to  
 6 aggregate cars and dump the material from the bottom or  
 7 bottom dumping into a hopper, and that excavator -- that  
 8 machine allows that to be captured at the rate of 800 tons  
 9 an hour and distributed to piles, which is probably  
 10 visible on some of the area photographs. It is a fairly  
 11 large operation.  
 12 Q And the purpose of the excavation done on parcel A  
 13 was to build what you just described?  
 14 A That's correct.  
 15 Q And similarly the purpose of the excavation on  
 16 parcel B and C is to build the spur track you spoke about  
 17 here for two days?  
 18 A Related to this structure.  
 19 Q And the Town received these reports dating back to  
 20 November of 2010?  
 21 A That is my understanding.  
 22 Q I want to talk briefly about environmental litigation  
 23 procedures which were taken.  
 24 We saw the SWPP plan in earlier testimony. But  
 25 we can look at it again. It is Exhibit HH.  
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**Miller-Cross/Aronoff**

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1 MR. ARONOFF: Judge, a blown up copy of this.  
 2 THE COURT: All right.  
 3 (Handed to the witness.)  
 4 Q Do you recognize Exhibit HH?  
 5 A Yes.  
 6 Q What is it?  
 7 A The SWPP plan as referred to before.  
 8 Q What is the purpose of the plan?  
 9 A We commissioned the SWPP plan to make sure we were  
 10 managing ground water erosion and erosion considerations  
 11 during construction of parcels B and C.  
 12 Q And it may help to look at the full size one, perhaps  
 13 you can see it on HH.  
 14 Do you see where it says erosion control  
 15 measures?  
 16 A Yes.  
 17 Q And would you explain generally what that consists  
 18 of?  
 19 A That consists of the erosion control recommendations  
 20 that are part of this SWPP plan.  
 21 Q And there is also a construction schedule listed  
 22 under that?  
 23 A Yes.  
 24 Q And what steps have you taken -- by the way, this was  
 25 provided to the Town as we saw earlier?  
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**Miller-Cross/Aronoff**  
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1 **A Yes.**  
 2 **Q** What steps have you taken to comply with the SWPP  
 3 plan?  
 4 **A Both Tom Miller, mentioned earlier, and Chris Flynn,**  
 5 **F-L-Y-N-N, who are both superintendents on the site who**  
 6 **are certified with SWPPs. And so on a weekly basis Tom**  
 7 **Miller walks the site to make sure we are in compliance**  
 8 **with the recommendations of this plan.**  
 9 **In addition, Bowne during their two times per**  
 10 **month visits also as an outside party certifies the SWPP**  
 11 **plan weekly walk-throughs that are done by our on-site**  
 12 **personnel.**  
 13 **Those reports that Bowne does on a two-times per**  
 14 **month basis are provided then to the Town along with the**  
 15 **reports we mentioned earlier, which are the site overview**  
 16 **reports.**  
 17 **Q** We saw testimony yesterday about the environmental  
 18 overview. Do you recall that?  
 19 **A Yes.**  
 20 **Q** And Fleming was hired by BRT?  
 21 **A Yes.**  
 22 **Q** And did the environmental overview that Gannette  
 23 Fleming provided to you indicate any concerns resulting in  
 24 grading and excavation work?  
 25 **A I am not aware.**

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1 **Q** What is spill prevention control and countermeasure?  
 2 **A Once the site, to be more specific here, once parcel**  
 3 **A was under construction and in operation of transloading**  
 4 **material, we commissioned an outside firm with a special**  
 5 **expertise to help us prepare a scope prevention control**  
 6 **and countermeasure plan.**  
 7 **The purpose of the plan is once you move from a**  
 8 **construction facility to a transloading facility, as an**  
 9 **efficient and safe operation you need to know what you are**  
 10 **transloading, what types of spills can occur, containment**  
 11 **measures that are designed and expected at the site, and**  
 12 **also what happens if the spill should occur and all sorts**  
 13 **of appropriate response parameters.**  
 14 THE COURT: Is this a good time to take a break?  
 15 MR. ARONOFF: I'm almost done.  
 16 THE COURT: All right, finish up first.  
 17 **Q** Can you please identify what I have shown you as CCC.  
 18 (Handed to the witness.)  
 19 **A The plan we discussed.**  
 20 MR. ARONOFF: Move it in evidence.  
 21 THE COURT: Any objection?  
 22 It is the SWPP plan?  
 23 THE WITNESS: No, the spill prevention control  
 24 and countermeasure plan.  
 25 THE COURT: Any objection to this?

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1 MR. CALICA: I need a moment to look at it, your  
 2 Honor.  
 3 I understand it is parcel A and not for  
 4 parcel B.  
 5 THE COURT: Is that right? It is for parcel A  
 6 or B?  
 7 THE WITNESS: Right now this is specifically for  
 8 parcel A because it is a post construction phase document.  
 9 THE COURT: Do you still want to offer it?  
 10 **Q** Is this the plan you intend to implement in parcel B  
 11 and C when you finish your development?  
 12 **A Absolutely.**  
 13 THE COURT: Any objection to the admission?  
 14 MR. CALICA: Yes.  
 15 THE COURT: For those limited purposes?  
 16 MR. CALICA: Objection, relevance. It is not  
 17 indicated it is being implicated for parcel B and C.  
 18 THE COURT: I will allow it. You will  
 19 forcefully object later and explain why it is irrelevant.  
 20 MR. CALICA: Specifically because there is a  
 21 filed stipulation in this action that precisely governs  
 22 the development of parcel A.  
 23 THE COURT: I understand that even in my sleep.  
 24 MR. CALICA: All right.  
 25 (Whereupon, Defendant's Exhibit CCC was received

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1 in evidence.)  
 2 **Q** Let me wrap it up and talk briefly about the impact  
 3 of the work stoppage on your business. And start with the  
 4 TRO.  
 5 You are subject to a TRO now?  
 6 **A Yes.**  
 7 **Q** How has it impacted your business?  
 8 **A It completely halted all construction operations. It**  
 9 **has affected the construction plans for our next phase of**  
 10 **track. It has also complicated if not significantly**  
 11 **damaged our relationships with current and potential**  
 12 **customers who are seeking to utilize the expansion room**  
 13 **for their needs.**  
 14 THE COURT: We will take our break at this  
 15 point.  
 16 (Whereupon, a recess was taken.)  
 17  
 18  
 19  
 20  
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 22  
 23  
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 25

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<p style="text-align: center;"><b>Miller-Cross/Aronoff</b></p> <p style="text-align: right;">324</p> <p>1 THE COURT: Please continue with the hybrid</p> <p>2 cross/direct.</p> <p>3 <b>Q</b> You were explaining the impact that the TRO has had.</p> <p>4 And my question is: How has it impacted your immediate</p> <p>5 revenue?</p> <p>6 <b>A</b> Well, due to the stoppage of construction, the</p> <p>7 immediate revenue goes down.</p> <p>8 <b>Q</b> And why is that?</p> <p>9 <b>A</b> A portion of our revenue is made up of sale of</p> <p>10 material at the site.</p> <p>11 THE COURT: Is that the sand; is that correct?</p> <p>12 THE WITNESS: Correct.</p> <p>13 <b>Q</b> And what happens when you are not able to service the</p> <p>14 customers that have been coming to you for sand?</p> <p>15 <b>A</b> When you are not able to provide a consistent supply</p> <p>16 for a season, there is a lot of customers that won't use</p> <p>17 your facility for that year. There is also a mixed design</p> <p>18 involved at the beginning of the year for customers who do</p> <p>19 bids for road work and things, and they have to specify</p> <p>20 the mix design for specific sand sites, and they don't</p> <p>21 feel you have a consistent supply that may affect the</p> <p>22 ability to use you.</p> <p>23 <b>Q</b> And what about a longer term injunction, how would it</p> <p>24 impact your business?</p> <p>25 <b>A</b> It is very difficult for me to quantify the</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miller-Redirect/Calica</b></p> <p style="text-align: right;">326</p> <p>1 as possible. When our construction is halted and our</p> <p>2 progress stops, it is a significant potential that those</p> <p>3 customers will seek out an alternate solution for their</p> <p>4 transportation and supply needs.</p> <p>5 <b>Q</b> And just to conclude, Mr. Miller, have you taken</p> <p>6 steps to hide your activities from the Town?</p> <p>7 <b>A</b> Never.</p> <p>8 <b>Q</b> Has the Town, prior to this dispute, did the Town</p> <p>9 ever come to you and say we want to take a look at the</p> <p>10 site?</p> <p>11 <b>A</b> Not that I'm aware.</p> <p>12 <b>Q</b> Had they done that, would you have allowed that?</p> <p>13 <b>A</b> Yes.</p> <p>14 MR. ARONOFF: No further questions.</p> <p>15 THE COURT: Anything further, counsel?</p> <p>16 MR. CALICA: Yes, your Honor.</p> <p>17</p> <p>18 REDIRECT EXAMINATION</p> <p>19 BY MR. CALICA:</p> <p>20 <b>Q</b> Mr. Miller, it is important for your company to get</p> <p>21 the operations in parcel B up and running, correct?</p> <p>22 <b>A</b> Parcel B and C, yes.</p> <p>23 <b>Q</b> And you told the Town in July of 2013 that you were</p> <p>24 going to start working on the Systra designed J track. Is</p> <p>25 that correct?</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>
<p style="text-align: center;"><b>Miller-Cross/Aronoff</b></p> <p style="text-align: right;">325</p> <p>1 significant disruption in construction which would affect</p> <p>2 all future revenue streams as well as the track</p> <p>3 construction. It is a complicated project and it would be</p> <p>4 very expensive if we don't adhere to our construction</p> <p>5 pattern.</p> <p>6 <b>Q</b> The DOT grant, would it be substantially impacted by</p> <p>7 a longer term injunction?</p> <p>8 <b>A</b> Yes, I believe it could.</p> <p>9 <b>Q</b> And you have no customers signed up for B and C yet;</p> <p>10 is that right?</p> <p>11 <b>A</b> No.</p> <p>12 <b>Q</b> And have you had customers approach you about B and</p> <p>13 C?</p> <p>14 <b>A</b> Many.</p> <p>15 <b>Q</b> And you are talking about freight customers in</p> <p>16 trucking?</p> <p>17 <b>A</b> Yes.</p> <p>18 We had a large number of customers approach us</p> <p>19 about potentially utilizing space on B and C for</p> <p>20 transloading activities similar to what occurs in</p> <p>21 parcel A.</p> <p>22 <b>Q</b> And how long a work stoppage of a longer term, how</p> <p>23 would it impact your relationship with those customers?</p> <p>24 <b>A</b> It is difficult because in general all those</p> <p>25 customers are looking for us to be up and running as soon</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>	<p style="text-align: center;"><b>Miller-Redirect/Calica</b></p> <p style="text-align: right;">327</p> <p>1 <b>A</b> I think it was 2012.</p> <p>2 <b>Q</b> 2012?</p> <p>3 <b>A</b> Yes.</p> <p>4 <b>Q</b> How much track has your company installed in the</p> <p>5 nearly two years since you advised the Town that you were</p> <p>6 going to go forward and construct J track?</p> <p>7 <b>A</b> On parcels B and C?</p> <p>8 <b>Q</b> Yes.</p> <p>9 <b>A</b> No track at this point.</p> <p>10 <b>Q</b> Okay.</p> <p>11 If it is so important to build this railroad,</p> <p>12 why hadn't you built the railroad?</p> <p>13 MR. ARONOFF: Objection.</p> <p>14 THE COURT: I will allow it.</p> <p>15 <b>A</b> Why haven't we built a railroad? Could you be more</p> <p>16 specific?</p> <p>17 <b>Q</b> Why haven't you laid any track?</p> <p>18 <b>A</b> Well, we were not able to lay track until all the</p> <p>19 area is at grade. In addition, we had to secure two</p> <p>20 easements from LIPA, across LIPA's property.</p> <p>21 <b>Q</b> Is it true, sir, that you can't begin constructing</p> <p>22 along the southerly line of the property going from a 100</p> <p>23 foot elevation to a 60 foot elevation, as your own</p> <p>24 engineer testified you are doing, until you excavate the</p> <p>25 whole site down to 50 feet?</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i> <i>OFFICIAL COURT REPORTER</i></p>

1 **A Could you rephrase that question?**

2 **Q** Doesn't the J track enter the southwest corner of the  
3 parcel at the existing Long Island track elevation of 100  
4 feet, follow along the southern boundary line, more or  
5 less following the natural topography down to 60 feet in  
6 the southeast corner?

7 **A Yes, it does.**

8 **Q** Why, if your railway engineer, Systra, designed that  
9 track to go along the southern boundary, have you not  
10 constructed or installed any track in two years?

11 **A I think in order to answer that question -- I already**  
12 **answered that question when I explained we are not in a**  
13 **position at this time to construct that track until final**  
14 **rough grade is reached.**

15 **Q** Why?

16 **A I can't put track on the property until it is at the**  
17 **proper elevation.**

18 **Q** Why can't you excavate the southern boundary to the  
19 eastern boundary as Systra designed it?

20 **A Systra didn't design an excavation plan for us.**  
21 **I guess I don't understand the question.**

22 **Q** What is impeding Brookhaven Rail Terminal from  
23 constructing rail, excavating to rail along the southern  
24 boundary of the property from where the Long Island Rail  
25 Road track ends on the west to the southeast portion of

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1 removal and almost no excavation along the southern  
2 boundary of the property where the Systra J track  
3 indicated the track was going to be placed; is that  
4 correct?

5 **A I wouldn't agree with that, no.**

6 **Q** Where along the southern boundary have you excavated  
7 for track purposes?

8 **A Along the southern boundary of parcels B and C we**  
9 **have done excavation work for track purposes.**

10 **Q** When?

11 **A** 2012.

12 **Q** Not a lot of it, have you, sir?

13 **A Could you be more specific, please?**

14 **Q** If you look at the southern border, isn't it correct  
15 that you have not even removed the vegetation to half the  
16 southern boundary where the proposed track was to be  
17 installed?

18 **A If you look at the area where the vegetation remains.**  
19 **There is significant less elevation change for that point**  
20 **in time. Therefore, removing vegetation is a relatively**  
21 **fast process. We are more concerned with managing the**  
22 **grade first. Clearing trees doesn't take as much time.**

23 **Q** You testified, with respect to GGGG, that the Town  
24 was advised what was going on in parcels B and C; is that  
25 correct?

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1 the property?

2 **A Rail construction of this size is generally a bid**  
3 **project. So at this point in time you can look at the**  
4 **site and realize we are not in a position to go bid the**  
5 **work. The railroad construction firms that we would hire**  
6 **don't generally like to come out to the site and construct**  
7 **100 or 200 or 500 feet of rail at a time. They provide**  
8 **much more attractive pricing when you can provide a large**  
9 **surface and a large area so they can send their crews**  
10 **there for months on end.**

11 **Q** Isn't it a fact, sir, that you haven't even begun to  
12 remove the vegetation in the southeast corner of the  
13 parcel where the Systra plan shows the track was supposed  
14 to go?

15 **A That is the area photograph, yes.**

16 **Q** That is from Google Earth as of September 2003.

17 Is that approximately the same area that has  
18 been -- in which vegetation has been removed?

19 **THE COURT:** You mean 2013.

20 **MR. CALICA:** 2013.

21 **A On this area photograph?**

22 **Q** Yes.

23 **A** Yes.

24 **Q** And so you are excavating on the less than the size  
25 of the property, but you haven't done any vegetation

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1 **A** Yes.

2 **Q** Would you agree that the last written notification of  
3 precise work that was beginning on parcels B and C was  
4 your notice to the Town that in July of 2012 that you were  
5 beginning excavation, limited excavation, associated with  
6 the construction of the J track?

7 **A Would you repeat that question one more time for me,**  
8 **please.**

9 **Q** I will direct your attention to Exhibit 2 in the  
10 plaintiff's exhibits in front of you.

11 Is James Pratt one of your partners?

12 **A** Yes.

13 **Q** Are you aware he wrote to Mr. Miner on June 29th,  
14 2012, stating, quote, construction in this phase will  
15 begin with clearing and grading of the track right-of-way  
16 and installation of track in accordance with the proposed  
17 J track layout?

18 **THE COURT:** What exhibit are you reading from?

19 **MR. CALICA:** Exhibit 2, your Honor.

20 **A** Yes, I am aware he wrote the letter.

21 **Q** Is that what BRT did?

22 **A** What are you asking, sir?

23 **Q** Did you begin clearing and grading the track  
24 right-of-way and installation in accordance with the J  
25 track plan, or did you level the whole westerly side of

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<p style="text-align: center;"><b>Miller-Redirect/Calica</b></p> <p style="text-align: right;">332</p> <p>1 the site and excavate over a million cubic yards of sand  2 to date?  3 <b>A I don't believe I have excavated over a million cubic</b>  4 <b>yards to date. But we did excavation on the southwest</b>  5 <b>portion of the property.</b>  6 <b>Q</b> Did your construction, as your partner's letter  7 states, begin with the installation of track?  8 <b>A Construction does not begin with the installations of</b>  9 <b>track.</b>  10 <b>Q</b> The letter says to Mr. Miner in June of 2012,  11 construction in this phase will begin with the clearing  12 and grading of the track right-of-way and installation of  13 track in accordance with the proposed, quote, J track,  14 close quote, layout.  15 Is it correct, sir, as your partner advised the  16 Town in June 2012, that BRT began with the installation of  17 track?  18 <b>A No, we did not begin new track installation.</b>  19 <b>Q</b> Almost two years later there is not a foot of track;  20 is that correct?  21 <b>A On parcels B and C?</b>  22 <b>Q</b> Yes.  23 <b>A No.</b>  24 <b>Q</b> And is it accurate or inaccurate that the grading is  25 occurring, quote, in accordance with the proposed, quote,  <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p> </p>	<p style="text-align: center;"><b>Miller-Redirect/Calica</b></p> <p style="text-align: right;">334</p> <p>1 accordance with the proposed J track layout?  2 <b>A The J track layout and the grading here is for</b>  3 <b>operational plans, the construction plans. And that site</b>  4 <b>grading was to support the installation of track on</b>  5 <b>parcels B and C in accordance with our plans, the</b>  6 <b>operation plans.</b>  7 <b>Q</b> You don't plan to answer the question, do you?  8 <b>A I'm not sure of the question you are asking.</b>  9 THE COURT: Are you still building the J track?  10 THE WITNESS: Working on the O track.  11 THE COURT: So you are not building the J track?  12 THE WITNESS: Right.  13 THE COURT: So what you told the Town, that you  14 were excavating and building the J track, it is no longer  15 your plan; is that it?  16 THE WITNESS: Yes.  17 THE COURT: Counsel, is that it?  18 MR. CALICA: I apologize, I was looking at an  19 exhibit.  20 THE COURT: You should pay attention.  21 I asked the witness if he is building the J  22 track and he said, no, the O track.  23 MR. CALICA: I apologize, your Honor.  24 THE COURT: All right.  25 <b>Q</b> Looking to the bimonthly report prepared by Bowne and  <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p> </p>
<p style="text-align: center;"><b>Miller-Redirect/Calica</b></p> <p style="text-align: right;">333</p> <p>1 J track, close quote, layout?  2 <b>A It is consistent with our construction and operation</b>  3 <b>guidelines.</b>  4 <b>Q</b> The question is: Was it in accordance with the  5 proposed J track layout?  6 <b>A Could you repeat the question one more time for me,</b>  7 <b>please?</b>  8 <b>Q</b> Is the work you did -- you can see it on Exhibit 16  9 and 21 -- quote, in accordance with the proposed J track  10 layout?  11 <b>A We have cleared a portion of the site which you see,</b>  12 <b>which is partially in support of the J track layout.</b>  13 <b>Q</b> Of the total you see in Exhibit 21, how much is along  14 the southerly border along the J track and how much is an  15 area not shown on the Systra J track option?  16 <b>A I'm not sure what you want me to answer.</b>  17 <b>Q</b> I would like you to look at the photograph.  18 You disagree, sir, that you excavated what looks  19 to be 90 percent of the area, having nothing whatsoever to  20 do with the proposed J track layout?  21 <b>A I don't know percentages. We excavated the area that</b>  22 <b>you can see on the aerial photograph.</b>  23 <b>Q</b> Sir, would you acknowledge that the vast majority,  24 what you see in Exhibit 21 in evidence, and in front of  25 you, and it is also Exhibit B, is not at all grading in  <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p> </p>	<p style="text-align: center;"><b>Miller-Redirect/Calica</b></p> <p style="text-align: right;">335</p> <p>1 given to your superintendent Miller and passed on to the  2 Town, would you agree when you were doing work on  3 parcel A, the reference, looking at 801, for example, said  4 excavation and mining operation ongoing?  5 <b>A Yes, that is what it says.</b>  6 <b>Q</b> And when you get to parcel B and C, for example, I  7 direct your attention to Bates number 00844, which is  8 December 2012, now all it says is excavation ongoing at  9 areas B and C; is that correct?  10 <b>A Yes.</b>  11 <b>Q</b> Does it say where on parcels B and C this is going  12 on?  13 <b>A No. It says excavation ongoing in areas B and C.</b>  14 <b>Q</b> Would it be consistent with your partner Jim Pratt's  15 written notice to the Town, Exhibit 2, that construction  16 in this phase will begin with clearing and grading of the  17 track right-of-way and installation of track in accordance  18 with the proposed J track layout to tell the Town that  19 excavation was ongoing at areas B and C?  20 THE COURT: I don't come close to understanding  21 that question, so the answer to it really doesn't matter.  22 So don't answer it.  23 Ask something else.  24 MR. CALICA: All right.  25 <b>Q</b> Sir, is there anything in the bound bimonthly reports  <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  <i>OFFICIAL COURT REPORTER</i></p> </p>

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1 where it says mining going on in areas B and C, or mostly  
 2 saying excavation ongoing in B and C, that tells the Town  
 3 in any way that what BRT is actually doing, at least since  
 4 the latter part of 2013, is removing sand and lowering the  
 5 grade of the middle of the site and not along the boundary  
 6 shown on the proposed J track installation?  
 7 **A** The reports state that excavation is ongoing in B and  
 8 **C**. And I believe that terminology is used relatively  
 9 consistently.  
 10 **Q** But it doesn't say where on B and C?  
 11 **A** It doesn't specify where on B and C.  
 12 **Q** If you received a report like that, would that tell  
 13 you –  
 14 MR. ARONOFF: Objection.  
 15 THE COURT: Objection sustained.  
 16 **Q** Is it true for the first customer of the then planned  
 17 20 acre parcel was to bring in crushed aggregate from  
 18 upstate New York, approximately 500,000 tons a year?  
 19 MR. ARONOFF: I object.  
 20 This is related to parcel A. I don't understand  
 21 what it has to do with this proceeding.  
 22 MR. CALICA: The witness testified that they  
 23 can't use up – they are overburdened on parcel A.  
 24 MR. ARONOFF: Is that a disputed thing? It is  
 25 not a disputed item.  

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1 THE COURT: Are you trying to prove that that is  
 2 not the case?  
 3 MR. CALICA: It is not the case that they need  
 4 93 acres or they need parcel D, your Honor.  
 5 MR. ARONOFF: Come on.  
 6 THE COURT: Counsel, I believe one thing we have  
 7 done here is gone a little astray. I don't think the  
 8 question before this Court is has BRT adopted the best  
 9 plan imaginable. It is a business plan. You can't come  
 10 in and say it is a bad business plan.  
 11 The question goes to other things here.  
 12 MR. CALICA: I will be very brief on this.  
 13 **Q** You testified you had a bakery customer that does, I  
 14 think you said 100 million pounds?  
 15 MR. ARONOFF: Objection.  
 16 THE COURT: Sustained.  
 17 Move on.  
 18 **Q** Do you have any customers for parcels B and C?  
 19 **A** I think we already answered that question.  
 20 THE COURT: It is, but answer it again.  
 21 **A** No, we don't have signed customers for B and C.  
 22 **Q** So if you have customers at some time, they would be  
 23 new customers; is that correct?  
 24 **A** Not necessarily correct.  
 25 **Q** Do you know whether they will be new customers or  

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1 your existing parcel A customers?  
 2 **A** For example, Home Depot's volume has grown to the  
 3 point that they engaged to us for a long-term five year  
 4 contract. And that five year contract will commence in  
 5 September. The initial contract was only for one year.  
 6 So in conjunction with that contract, they  
 7 specifically requested additional space both for storage  
 8 and track space related to their increase in volume.  
 9 **Q** And when Gannette Fleming, the environmental overview  
 10 of February 2014 shows some 1.2 million square feet of  
 11 proposed new buildings in parcels B and C, how much of  
 12 that is proposed to be used by Home Depot?  
 13 **A** I couldn't give you a specific number at this time.  
 14 **Q** One entire building?  
 15 **A** I really can't give you a specific number at this  
 16 time, because I don't know.  
 17 **Q** Isn't it true that currently they operate a 60,000  
 18 foot transload building that serves other customers?  
 19 **A** That's correct.  
 20 **Q** So Home Depot is not going to use 1.2 million feet,  
 21 or even a 400,000 foot building as shown on the Gannette  
 22 Fleming overview; is that correct?  
 23 THE COURT: You can answer that question if you  
 24 can.  
 25 **A** It is very difficult for me to ascertain how much  

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1 Home Depot is going to need. Right now we are only  
 2 handling approximately 80 of the SKUs or products in the  
 3 Home Depot store.  
 4 If you look at the average Home Depot store, it  
 5 is my understanding they have tens of thousands of SKUs  
 6 for individual products.  
 7 I suspect if we begin to service Home Depot as  
 8 we have to this point, we would be able to expand the  
 9 products we are able to bring in by rail. And we believe  
 10 there is a tremendous potential for expanse by Home Depot.  
 11 **Q** Do you know any rail facility that serves Home Depot  
 12 or a customer like this that has a facility of 1,200,000  
 13 square feet of space?  
 14 **A** I'm not sure what other facilities Home Depot uses,  
 15 rail or otherwise.  
 16 **Q** And have you any design plans for any of the  
 17 buildings shown on the Gannette overview?  
 18 **A** Design plans?  
 19 **Q** Have you designed any buildings?  
 20 **A** Could you be more specific?  
 21 **Q** Have you hired an engineer to draw preliminary plans?  
 22 **A** The engineers and group or groups working with us is  
 23 the Tippman Group. They are specialists in temperature  
 24 control storage. We engaged them last year to begin a  
 25 market study and analysis of the need and demand for  

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1 additional temperature control storage on Long Island.  
 2 **Q** Sir, I didn't ask you if you did a market survey. I  
 3 asked you --  
 4 THE COURT: No comment on the question. Just  
 5 ask questions.  
 6 **Q** Did you hire anybody to prepare a preliminary plan of  
 7 any of the buildings shown on the Gannette Fleming  
 8 overview?  
 9 **A** I requested of the Tippman Group concept plans they  
 10 provided, which to us are plans for a temperature control  
 11 storage facility.  
 12 **Q** Does it include any building details?  
 13 **A** It includes the approximate square footage of the  
 14 building. We know the Tippman Group typically has an  
 15 initial footprint or an initial building out of -- 100,000  
 16 square feet. And we contemplated as many as six  
 17 additional zones or additional expansion areas. Part of  
 18 the market study involves us determining how large that  
 19 facility should be constructed initially and how it should  
 20 be appropriately phased as demand increases.  
 21 **Q** Did you say they are studying a 2100,000 square foot  
 22 building?  
 23 **A** No. If you look at the concept plans, they  
 24 contemplate a 600,000 square foot building.  
 25 **Q** The environmental overview says 400,000.  
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1 **A** Which environmental overview?  
 2 **Q** Exhibit 8-B, the Gannette environmental overview.  
 3 **A** Do you have a page number you are looking at?  
 4 **Q** Exhibit 8-B.  
 5 There is also a blowup there.  
 6 MR. CALICA: Bring it closer to the witness.  
 7 **Q** Which is it, 100,000 or 600,000?  
 8 **A** The original concept -- before we engaged a  
 9 professional specific firm that has specific knowledge of  
 10 temperature control storage, and the layout and  
 11 engineering associated, we estimated the building could be  
 12 as much as 400,000 square feet, as we entered into  
 13 specific discussion with a contractor that designs and  
 14 builds these facilities and designed a footnote print of  
 15 potentially up to 600,000 square feet.  
 16 **Q** And what you have so far is the footprint?  
 17 **A** I have a footprint and concept sketches and the flow  
 18 of the facility from rail to truck.  
 19 **Q** Does it have any interior features?  
 20 MR. ARONOFF: Judge, we will stipulate that  
 21 there are no building plans that have been finalized.  
 22 THE COURT: Excellent.  
 23 Move ahead.  
 24 **Q** You testified that according to your understanding  
 25 the Gannette Fleming environmental overview did not  
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1 indicate any areas of environmental concern; is that  
 2 correct?  
 3 **A** No.  
 4 **Q** Did you read it?  
 5 **A** Yes.  
 6 **Q** And it is in evidence as Exhibit 8-B. Would you open  
 7 up to page 4 of that document, please.  
 8 Do you see the top paragraph on the page?  
 9 **A** Yes. I do.  
 10 **Q** Do you see where your environmental consultant  
 11 advised the site is within the Nassau Suffolk sole source  
 12 aquifer, i.e. the Upper Glacial aquifer?  
 13 **A** Yes, I do.  
 14 **Q** And do you see it expressed that the sole source  
 15 aquifer is a sole or principal drinking water source whose  
 16 contamination would pose a hazard to public health?  
 17 **A** Yes.  
 18 **Q** And it says this designation protects an area's  
 19 ground water resource by requiring the EPA's proposed use  
 20 of the project within the designated area to receive  
 21 federal finance assistance. The EPA review is designed to  
 22 assure that potential projects do not endanger the ground  
 23 water source.  
 24 Has there been any EPA review?  
 25 **A** On which one are you referring to?  
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**Miller-Redirect/Calica**  
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1 **Q** Has there been any review by the US Environmental  
 2 Protection Agency of your proposed development plan such  
 3 as there are for the 93 acre parcel?  
 4 **A** No.  
 5 **Q** What, if anything, have you or your environmental  
 6 consultants done to create a design to insure that  
 7 potential projects do not endanger the ground water  
 8 source?  
 9 **A** Well, as I believe I discussed earlier, we have  
 10 engaged an environmental firm to look at the track  
 11 construction and the environmental implications of that  
 12 track construction.  
 13 Then we also completed the SWPP plan we referred  
 14 to which manages the ground water during the construction  
 15 phase.  
 16 My expectation that as a responsible corporate  
 17 citizen we will continue to look at environmental  
 18 considerations as we go along on the site.  
 19 **Q** Have you hired a geologist?  
 20 **A** Could you be more specific?  
 21 **Q** Did you hear the testimony of your railway engineer,  
 22 Mr. Humbert, yesterday, that when he and AECOM designed  
 23 the grading plans of the proposed stack of the 50 foot  
 24 level, they did not consult with a geologist and did not  
 25 consider for purposes of grading design ground water  
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1 consideration?

2 MR. ARONOFF: Objection.

3 THE COURT: Sustained.

4 A quick question.

5 THE WITNESS: Yes.

6 THE COURT: In connection with the paragraph

7 just read to you, is the project -- the rail project --

8 that is potentially slated receiving any federal

9 financing?

10 THE WITNESS: Not federal, no.

11 MR. CALICA: No further questions.

12 THE COURT: No follow-up, I assume?

13 MR. ARONOFF: No follow-up.

14 THE COURT: You may step down.

15 (Whereupon, the witness leaves the witness

16 stand.)

17 MR. CALICA: I would like to amend the offer.

18 Yesterday we provided counsel with photographs as we

19 received them, which were forwarded from a cell camera.

20 And we are substituting ten photographs taken at the site

21 as part of Exhibit 29 showing what Ms. Davis identified as

22 the piles of introduced material.

23 THE COURT: So it is nine plus one new one?

24 MR. CALICA: Ten new ones.

25 THE COURT: You had nine yesterday?

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1 MR. CALICA: Yes.

2 THE COURT: Ten different photos?

3 MR. CALICA: Ten additional.

4 MR. ARONOFF: As long as we have the stipulation

5 that the photos were taken on Saturday, fine.

6 THE COURT: All right.

7 Can I have the ten?

8 MR. CALICA: Yes.

9 THE COURT: So the Town rests?

10 MR. CALICA: Yes.

11 THE COURT: Very good.

12 MR. ARONOFF: Just briefly, your Honor.

13 There are two exhibits I wanted to offer in

14 evidence that were produced to us by the Town yesterday

15 morning. I marked them as JJJJ and KKKK. They are emails

16 involving Mr. Kelsey. I prefer not to call him to

17 authenticate the documents. If there is no objection, we

18 will put them in.

19 THE COURT: Is there objection to quadruple J

20 and quadruple K?

21 MR. CALICA: Just give me a moment with it, your

22 Honor.

23 No objection, your Honor.

24 THE COURT: They are admitted.

25 (Whereupon, Defendant's Exhibits JJJJ and were

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1 was received in evidence.)

2 MR. ARONOFF: I would like to note for the

3 record that JJJJ --

4 THE COURT: Can I have a copy?

5 MR. ARONOFF: Yes. I will bring it to you now.

6 Do you want it hole punched, Judge? I have a

7 hole puncher here.

8 (Handed to the Court.)

9 MR. ARONOFF: I want to note for the record that

10 this is a March 19th, 2012 email from Mr. Kelsey to

11 Mr. Miner. And the sentence I wanted to highlight for the

12 Court is: For future plans asked that they send them to

13 us via email so we can view them in color and print them

14 to our color printer.

15 THE COURT: Okay.

16 Any further witnesses?

17 MS. MILLER: Mr. Newel.

18 THE COURT: What is he going to testify to?

19 MS. MILLER: Mr. Newel is president of

20 Brookhaven Rail. He will be testifying to the current

21 operation in parcel A, and the operational design behind

22 parcels B and C.

23 THE COURT: Step up to the witness stand,

24 please.

25

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Newell-Direct/Miller

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1 JIM NEWELL,

2 called as a witness, having been first

3 duly sworn, was examined and testified

4 as follows:

5 THE CLERK: Please be seated.

6 State and spell your name for the record.

7 THE WITNESS: My name is Jim Newell,

8 N-E-W-E-L-L.

9 THE COURT: Counsel, proceed. And keep it

10 brief.

11 MS. MILLER: Yes, your Honor.

12

13 DIRECT EXAMINATION

14 BY MS. MILLER:

15 Q Mr. Newell, in addition to being president of

16 Brookhaven Rail, you are also the chief operating officer

17 of Oakland Transportation Holdings; is that correct?

18 A Yes.

19 Q And you currently reside in Ponce Vedra Beach,

20 Florida?

21 A Correct.

22 Q But in your role as president of Brookhaven Rail, you

23 spend a significant amount of time at the terminal?

24 A Yes, I do.

25 Q Approximately how many days a month are you at the

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**Newell-Direct/Miller**  
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1 terminal?  
 2 **A** Roughly 15 days a month.  
 3 **Q** And Brookhaven Rail is a class three railroad; is  
 4 that correct?  
 5 **A** Yes.  
 6 **Q** What does it mean to be a class three railroad?  
 7 **A** There is an operating member of less than 20 million  
 8 dollars, and every short line falls in that category.  
 9 THE COURT: Is that gross or net revenue?  
 10 THE WITNESS: Net revenue.  
 11 MR. ARONOFF: Not adjusted for inflation.  
 12 THE COURT: So the gross revenue of the railroad  
 13 in total falls under 20.  
 14 THE WITNESS: Yes, and any movement of class two  
 15 and class one.  
 16 **Q** Brookhaven Rail gets revenue from the terminal  
 17 operation; is that correct?  
 18 **A** Yes, it does.  
 19 **Q** Please tell us, sir, your educational background,  
 20 briefly.  
 21 **A** I have a bachelor in business from Tampa College, and  
 22 a master's degree in business from Jacksonville University  
 23 in 1997.  
 24 **Q** You have been working in the rail industry as of this  
 25 September for approximately 49 years; is that right?  
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**Newell-Direct/Miller**  
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1 **A** That is correct.  
 2 **Q** Please describe the highlights of your career in the  
 3 rail industry.  
 4 **A** I spent the first eight years in my career as a  
 5 trainman, conductor, qualified as an engineer and yard  
 6 master. I took the promotion into what we refer to as the  
 7 low level management in 1972. And I spent the  
 8 preponderance of that time working various different road  
 9 jobs, and worked my way through the ranks and up into  
 10 mid-level management. I was train master, assistant  
 11 terminal train master, division manager, general manager  
 12 working operations, since 2004.  
 13 **Q** Have you been involved in rail construction projects?  
 14 **A** Yes, many.  
 15 **Q** And have you been involved in rail expansion  
 16 projects?  
 17 **A** Yes, I have.  
 18 **Q** What is a rail expansion?  
 19 **A** It is two or three different rail expansions. You  
 20 can expand the rail siding, and you can expand a rail  
 21 terminal, or you can expand it by continuing an auxiliary  
 22 track in a spur location and develop an additional set of  
 23 transload or transload operations.  
 24 **Q** What year did you join Oakland Transportation  
 25 Holdings?  
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**Newell-Direct/Miller**  
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1 **A** May 31, 2011.  
 2 **Q** And when did you become the president of Brookhaven  
 3 Rail?  
 4 **A** In October of 2013.  
 5 **Q** What are your current responsibilities as president  
 6 of Brookhaven Rail?  
 7 **A** Well, Brookhaven Rail being smaller than we are right  
 8 now, and I spent approximately my time in development of  
 9 business, I have P & L responsibility for the railroad.  
 10 We have a railroad approved and – approval, and I do all  
 11 the contractual work relative to our agreements with the  
 12 New York and Atlantic, and to set up the operation  
 13 agreements.  
 14 **Q** Your salary is currently paid by Brookhaven Rail; is  
 15 that correct?  
 16 **A** Yes.  
 17 **Q** And talking about the terminal itself, can you please  
 18 turn to Exhibit EEE in volume 2, the black binder.  
 19 Do you recognize the photograph?  
 20 **A** Yes.  
 21 MS. MILLER: We move the admission of EEE.  
 22 THE COURT: Is this –  
 23 **A** This is the middle of the yard going from the north  
 24 toward the south.  
 25 MR. CALICA: No objection.  
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1 THE COURT: Admitted.  
 2 (Whereupon, Defendant's Exhibit EEE was received  
 3 in evidence.)  
 4 **Q** Does this photo accurately depict some of the  
 5 current –  
 6 THE COURT: You don't need to do that.  
 7 **Q** Please describe the current rail operation on  
 8 parcel A.  
 9 **A** Do you see that?  
 10 THE COURT: I can't.  
 11 **A** We are part of the interchange location here with the  
 12 New York Atlantic who operates the franchise on the Long  
 13 Island Rail Road line.  
 14 We have three tracks that are used for arrival  
 15 tracks. Two of which are – two of which, track one and  
 16 two, which are number one being the furthest outside track  
 17 to the east. And under track one and track two would be  
 18 the unloading pit in this area that provides for the  
 19 unloading of the aggregate material.  
 20 This is track three, which is the other long  
 21 track used as in running track. It is set up so that the  
 22 New York and Atlantic can come in and bring their cars and  
 23 head straight in and bring 35 cars and take those cars  
 24 into a track. And they detach the locomotive power. They  
 25 come back to the loading track, and the other track we  
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<p style="text-align: center;"><b>Newell-Direct/Miller</b></p> <p style="text-align: right;">352</p> <p>1 <b>have there is outbound cars to come back with them. They</b>  2 <b>come back for the other cars and put their locomotive back</b>  3 <b>on the train. And then they perform -- they provide their</b>  4 <b>initial terminal break desk, which is a federal</b>  5 <b>requirement, and then get ready for the trip back to</b>  6 <b>Queens.</b></p> <p>7 THE COURT: How many feet of track do you  8 operate on that terminal?</p> <p>9 THE WITNESS: If you look at the clearest point  10 to the clearest point of the track, you are looking at  11 2,200 feet roughly in a track of -- just for rule of  12 thumb, you can use 50 feet for a rail car.</p> <p>13 THE COURT: Okay.  14 So you ran about 2,200 feet?</p> <p>15 THE WITNESS: Per track.</p> <p>16 THE COURT: Is it fair, the plan you have seen,  17 and I will call it the O track plan, and you have been  18 here and you know what I'm referring to?</p> <p>19 THE WITNESS: Absolutely.</p> <p>20 THE COURT: Is about 6,600 feet?</p> <p>21 THE WITNESS: No. No track plan has way more  22 footage. 6,600 feet is so far what you guys are referring  23 to as the J track.</p> <p>24 THE COURT: So it is fair to say that this  25 expansion will be a multiple of the amount of track you</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Newell-Direct/Miller</b></p> <p style="text-align: right;">354</p> <p>1 about Brookhaven Rail's current abilities.  2 You are not currently able to provide freight  3 rail service on Long Island outside of the terminal  4 boundaries; is that correct?</p> <p>5 <b>A No, we cannot.</b></p> <p>6 <b>Q</b> And that is because New York Atlantic holds the  7 exclusive franchise to provide freight rail service over  8 Long Island Rail Road lines?</p> <p>9 <b>A That's correct.</b></p> <p>10 <b>Q</b> Is there any other rail facility on eastern Long  11 Island that can handle freight capacity at Brookhaven  12 Rail?</p> <p>13 <b>A There is not.</b></p> <p>14 <b>Q</b> With respect to the New York and Atlantic, can you  15 please explain how transportation payments are received by  16 Brookhaven Rail from shippers shipping product to the  17 Brookhaven Rail Terminal?</p> <p>18 <b>A Brookhaven Rail does not participate in any of the</b>  19 <b>interline settlement agreements. Brookhaven Rail operates</b>  20 <b>under a tariff arrangement with the New York and Atlantic.</b>  21 <b>And when we get a car in that is destined to our location.</b>  22 <b>But we simply make a list of cars that are received and we</b>  23 <b>bill the New York and Atlantic on a per car basis for our</b>  24 <b>revenue. We do not go through the normal railway</b>  25 <b>clearinghouse for interline settlements.</b></p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p>
<p style="text-align: center;"><b>Newell-Direct/Miller</b></p> <p style="text-align: right;">353</p> <p>1 are running now?</p> <p>2 THE WITNESS: Absolutely it will be.  3 It is not really a multiple of the availability  4 of space as much as it gives us the ability to have a  5 marshaling yard operation that will be needed to supply  6 the customers on C and B.</p> <p>7 THE COURT: It would be bigger?</p> <p>8 THE WITNESS: Absolutely bigger.</p> <p>9 THE COURT: All right.</p> <p>10 <b>Q</b> Have you completed walking through the number of  11 tracks?</p> <p>12 THE COURT: I think I have seen enough on that.</p> <p>13 <b>Q</b> You are saying you are operating at capacity on  14 parcel A.</p> <p>15 Have Brookhaven Rail Terminal's existing rail  16 customers approached you about handling additional  17 shipments?</p> <p>18 <b>A Yes.</b></p> <p>19 <b>Q</b> And have potential new customers approached you about  20 additional shipments?</p> <p>21 <b>A Yes.</b></p> <p>22 <b>That is, in my day, I spend most of my time</b>  23 <b>talking to potential customers and the relevance of coming</b>  24 <b>over to parcels B and C.</b></p> <p>25 <b>Q</b> And I just want to quickly walk through a question</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p>	<p style="text-align: center;"><b>Newell-Direct/Miller</b></p> <p style="text-align: right;">355</p> <p>1 <b>Q</b> Neither Brookhaven Rail nor the Rail Terminal owns or  2 controls any of the shippers; is that correct?</p> <p>3 <b>A That is correct.</b></p> <p>4 <b>Q</b> And that has never been part of your business plan?</p> <p>5 <b>A No. And never will.</b></p> <p>6 <b>Q</b> Not for parcels B and C?</p> <p>7 <b>A No.</b></p> <p>8 <b>Q</b> Does Brookhaven Rail have contracts with any of the  9 customers for parcel A?</p> <p>10 <b>A Yes, we do.</b></p> <p>11 <b>Q</b> Which ones?</p> <p>12 <b>A Home Depot and a customer called REG.</b></p> <p>13 <b>Q</b> What is REG?</p> <p>14 <b>A Renewable Energy Group.</b></p> <p>15 <b>Q</b> And what about purchase orders, does Brookhaven Rail  16 issue purchase orders to contractors?</p> <p>17 <b>A Yes.</b></p> <p>18 <b>Q</b> And do you know whose rates and operating conditions  19 are referenced in those purchase orders?</p> <p>20 <b>A Referenced in Brookhaven's tariff 9200.</b></p> <p>21 <b>Q</b> And Brookhaven Rail is responsible for marketing  22 Brookhaven Rail services; is that correct?</p> <p>23 <b>A Yes.</b></p> <p>24 <b>Q</b> And Brookhaven Rail operates the car, undertaking  25 switching, off-loading and loading and moves cars under</p> <p style="text-align: center;"><i>HARRY RAPAPORT, CERTIFIED REALTIME REPORTER</i>  OFFICIAL COURT REPORTER</p>

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1 their contracts?

2 **A Yes.**

3 **Q** And Brookhaven Rail is also responsible for the goods

4 until the trucks take them away from the terminal; is that

5 correct?

6 **A Yes.**

7 **Q** Is there insurance policies for the rail terminal's

8 operations?

9 **A Yes, we have insurance.**

10 **Q** Who holds the insurance policy?

11 **A Brookhaven Rail.**

12 **Q** Are any of these operational responsibilities

13 expected to change when the expansion takes place of B and

14 C?

15 **A I said, no. We just want to get some additional**

16 **personnel in to help the development.**

17 **Q** With respect to the additional track plan for parcels

18 B and C, is Brookhaven Rail going to construct and

19 maintain that track?

20 **A Yes.**

21 **Q** Is that correct?

22 **A Yes.**

23 MS. MILLER: For the record, previously the

24 witness was pointing to a blown up image of DDD in the

25 binder, and I move for its admission.

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**Newell-Direct/Miller**

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1 THE COURT: Any objection to that?

2 MR. CALICA: I need to be oriented first.

3 (Counsel confer.)

4 MR. CALICA: No objection.

5 THE COURT: Admitted.

6 (Whereupon, Defendant's Exhibit DDD was received

7 in evidence.)

8 **Q** Let's turn to parcels B and C.

9 You have been involved in the design of the

10 track on parcels B and C from an operational standpoint;

11 is that correct?

12 **A Yes.**

13 **Q** And we talked this morning about the 2012 track

14 design. Did you hear that testimony?

15 **A I did.**

16 **Q** Did you receive an O track design from Systra?

17 **A I have seen it, yes.**

18 **Q** Please explain.

19 **A The O track design was in early 2012. And it was a**

20 **design that is a continuation of the J track. And it just**

21 **simply loops around and provides the capability for**

22 **marshaling the cars that would be arriving on track B**

23 **and C.**

24 THE COURT: Is that the casino drawing?

25 THE WITNESS: That drawing has a piece of it.

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**Newell-Direct/Miller**

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1 But that is not what I'm referring to. Systra hasn't done

2 another section of drawings that outline the O track that

3 was part of the earlier testimony.

4 **Q** I would like to direct your attention to Exhibit WW.

5 Please explain to the Court from an operational

6 perspective -- first please explain where the track in

7 parcel A is as opposed to B.

8 THE COURT: What is WW?

9 MS. MILLER: It is already admitted. WW is the

10 image of --

11 THE COURT: I have it, all right.

12 **A The entrance to track B and C is here. And the track**

13 **would go to 1.25 degrees here and curves around and makes**

14 **basically an O design.**

15 **There are three tracks you enter into, which is**

16 **basically the concept we have with the New York and**

17 **Atlantic to operate on that part of the track. And it**

18 **gives BRT, Brookhaven Rail, the opportunity to get onto**

19 **those cars and take them around to the tracks that are on**

20 **this end, which are the marshaling yard tracks, to be able**

21 **to switch cars that go to the appropriate customers, and**

22 **also to put the outbound train together to come back to**

23 **the track to New York and Atlantic to be able to pick up**

24 **and depart with.**

25 **Q** And you know the TRO was entered by Judge Wexler in

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**Newell-Cross/Calica**

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1 this case, since then -- before then what construction

2 activities were taking place on B and C?

3 **A We were bringing the site down to grade to put in the**

4 **track construction.**

5 **Q** Prior to the Town's motion for preliminary

6 injunction, did anyone from the Town approach you about

7 the contamination of the aquifer?

8 **A No.**

9 MS. MILLER: That's all.

10 THE COURT: Any cross-examination?

11 MR. CALICA: Yes.

12 CROSS-EXAMINATION

13 BY MR. CALICA:

14 **Q** Did I hear you correctly testify, Mr. Newell, that

15 you say you saw a Systra track plan that was in an O

16 design?

17 **A Correct.**

18 **Q** Where is it?

19 **A I don't have it. I was just asked if I saw it.**

20 **Q** Where did you see it?

21 **A At BRT terminal.**

22 **Q** Are you able to produce one for the Court?

23 THE COURT: Would you be able to find one if you

24 had to, sir?

25 THE WITNESS: I mean, I don't know if I can put

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1 my hands on it right at this moment. But I can probably  
 2 at some point.  
 3 MR. CALICA: Your Honor, I would respectfully  
 4 request the records be kept open and he provide it through  
 5 counsel and I reserve the right to examine him.  
 6 THE COURT: Counsel.  
 7 MS. MILLER: We agree, your Honor.  
 8 We believe we produced an image of it in the  
 9 photograph that was sent over.  
 10 MR. ARONOFF: We had iPhone photos at their  
 11 request a couple of days ago. And there were full sized  
 12 plans. We believe it was one of the iPhone photos we sent  
 13 to them. We can go back to verify it. If it wasn't, we  
 14 will be happy to produce it.  
 15 THE COURT: Okay.  
 16 MR. CALICA: Subject to that, I have no  
 17 additional questions of the witness.  
 18 I would like to just qualify my resting to offer  
 19 certain of the documents.  
 20 THE COURT: You can step down. Thank you.  
 21 THE WITNESS: Thank you.  
 22 (Whereupon, the witness leaves the witness stand.)  
 23 MR. CALICA: I hope your Honor is flexible in  
 24 that regard.  
 25 THE COURT: Are you referring to documents  
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1 already submitted in support of TRO preliminary  
 2 injunction?  
 3 MR. CALICA: Yes.  
 4 THE COURT: I will consider them anyway,  
 5 counsel. I have seen all of them. I will not obliterate  
 6 them from my mind. You can cite to them if you wish.  
 7 MR. CALICA: All right. And I see from the  
 8 nodding I'm getting approval, I believe.  
 9 THE COURT: Counsel, if you wish to cite them in  
 10 resolving this, I have seen them and I will consider them.  
 11 MR. CALICA: The final request, your Honor, two  
 12 things. One, we would request that BRT not remove the  
 13 material shown in Exhibit 26, and we have made a request  
 14 for permission to inspect them.  
 15 I will do that, because we would like an  
 16 opportunity to go on the site.  
 17 THE COURT: We had one witness that testified  
 18 that they found material through dumping of I don't know  
 19 how many years ago. In light of that, why do we need to  
 20 test that?  
 21 MR. CALICA: There is no scientific testimony  
 22 that it is dumping from years ago at this site. It was  
 23 introduced to this site, your Honor.  
 24 THE COURT: There was a Metro card in it. I get  
 25 that. I used to be a prosecutor. And it may have come  
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1 from somewhere else. It doesn't mean that the defendants  
 2 introduced it as part of the construction project. It  
 3 could have been on the property.  
 4 MR. CALICA: The testimony of Ms. Davis was  
 5 quite clear that this is undisturbed virgin stack  
 6 underneath historic vegetative area 15 feet deep --  
 7 THE COURT: I heard the testimony and you are  
 8 making assumptions from it. I will not do the testing  
 9 piece right now because it may be largely irrelevant for  
 10 purposes of this hearing, so I will not talk about doing  
 11 scientific testing right now.  
 12 Have both sides rested?  
 13 MR. CALICA: Yes.  
 14 MR. ARONOFF: Yes.  
 15 THE COURT: No more witnesses?  
 16 MR. ARONOFF: No.  
 17 THE COURT: All right.  
 18 Now the question becomes what happens next?  
 19 For those purposes I will share some thoughts  
 20 with the parties.  
 21 I will suggest at the end of this that with  
 22 certain assumptions in mind, that both parties should have  
 23 the opportunity to file a brief, a letter brief if you  
 24 want or a more formal brief if you wish, as to what would  
 25 happen with certain facts. And the parties may try to  
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1 dissuade me from the facts, we can discuss it now or you  
 2 can brief it.  
 3 Let us assume for purposes of our discussion  
 4 today only that it would be reasonable to conclude from  
 5 the evidence presented that as to the sand mining -- I'm  
 6 using that term deliberately -- being conducted, or that  
 7 was being conducted by the defendant on parcel B and C,  
 8 that that sand mining, the excavation, the purification  
 9 and sale, has little or no connection to the construction  
 10 of a rail spur, assuming this is a rail spur.  
 11 By the way, that may be another question.  
 12 And it appears from the evidence that that sand  
 13 mining was done without licensure, largely without notice  
 14 to the Town. And my question is: What happens then?  
 15 The Town has certain authority to monitor  
 16 activities on the property consistent with its police  
 17 powers -- my general understanding of the law.  
 18 More specifically, when it comes to a sand mine,  
 19 the information presented to me here -- and I assume it to  
 20 be true for these purposes -- is that the state DEC is in  
 21 charge or has authority to license, regulate, inspect and  
 22 so forth. And apparently that wasn't done.  
 23 Of course, the DEC is not a party here. We can  
 24 change that, I guess.  
 25 But my question is: Assuming that was the  
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1 logical conclusion that one could draw from the evidence  
 2 presented, where does that stand vis-a-vis your claims and  
 3 defenses?  
 4 MR. CALICA: Your Honor, legally, and we will  
 5 brief it, I was advised when I spoke to the DEC counsel  
 6 that Long Island has a unique law, applicable only on Long  
 7 Island, that where localities exercise control of the sand  
 8 mining, then the DEC is precluded from licensing. And I  
 9 can get access to this --  
 10 THE COURT: Wait a minute. I don't understand.  
 11 If the DEC is precluded from issuing licenses?  
 12 MR. CALICA: They have the power to license.  
 13 When they get an application for license, they  
 14 write to the locality only if it is in Nassau and Suffolk,  
 15 under the statutory scheme in New York.  
 16 If the locality says that they license in the  
 17 area, you know, that it is not an allowable use or --  
 18 THE COURT: Are you suggesting -- sorry to  
 19 interrupt you -- but that the DEC's power has been  
 20 delegated to the Town?  
 21 MR. CALICA: Yes, under the statutory scheme  
 22 which I only recently learned of.  
 23 THE COURT: What do you say about that?  
 24 MR. ARONOFF: I can't speak to that specific  
 25 issue. I don't know if it is delegated or not.  

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*OFFICIAL COURT REPORTER*

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1 I do want to take the opportunity, and we will  
 2 do it in our brief, to try to dissuade you from the  
 3 assumption that the excavation has little or no connection  
 4 to track construction, sir. I have a hard time given the  
 5 testimony --  
 6 THE COURT: Be careful. I didn't say excavation  
 7 had nothing to do with track construction.  
 8 The sale, and the mining -- the mining and sale  
 9 of sand on the property -- and let me give you a few  
 10 highlights, if I may.  
 11 My recollection of engineer Humbert's testimony  
 12 which he stated in response to my question that the  
 13 clearing and excavating could have been done in a more  
 14 surgical method to accommodate his track design. Which  
 15 says to me the entire mining of the center of the property  
 16 as such had to do with selling sand and not with the  
 17 design of track.  
 18 MR. ARONOFF: It is to put buildings eventually  
 19 on the site in support of the track activities that  
 20 Mr. Newell testified would be, and we always contemplated,  
 21 and the Town cited to emails in 2012 with buildings,  
 22 Mr. Miner testified that he understood the buildings had  
 23 to be on level grounds.  
 24 THE COURT: If that was the only piece of  
 25 evidence to be cited, I would be impressed with your  

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*OFFICIAL COURT REPORTER*

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1 argument, but there is more sadly.  
 2 The CFO testified that the company is possibly  
 3 making close to 10 million dollars, close to the annual  
 4 revenue, in sand mining. It is a critical part of the  
 5 business plan, not incident.  
 6 And there was also testimony, and there are  
 7 other documents that established that the clearing and  
 8 sale of the material began well before the track was  
 9 designed.  
 10 This O plan we are looking at was drafted in  
 11 November of 2013, I want to say, and the clearing,  
 12 grubbing, scrubbing and sale of the material began well  
 13 before that.  
 14 And fascinatingly the exhibit put in as GGGG  
 15 includes a series of reports by BRT which described the  
 16 activities of parcel A as, quote, unquote, a mining  
 17 operation.  
 18 And Mr. Miller testified that the activities  
 19 there were identical to parcel B and C.  
 20 So by its own admission the company described  
 21 mining activity.  
 22 Again, feel free to try to dissuade me from any  
 23 of this. But when I get all this together, of course, the  
 24 hydrogeologist testified she observed sand sifting  
 25 equipment to purify the sand being sold.  

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*OFFICIAL COURT REPORTER*

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1 Again, little or no connection to the  
 2 construction of the railway.  
 3 And also that it is part of the company's  
 4 business model to potentially help offset the construction  
 5 doesn't strike me as an integral part. Meaning if there  
 6 was an oil deposit under the sand, you try to drill for  
 7 sand and say it is part of the business plan because the  
 8 oil will pay for all the train cars and track, but it  
 9 would not be integral to the rail operation.  
 10 Phase two, Exhibit 31, showed the reduction of  
 11 the grade across the entire area of 50 feet, which only  
 12 relates from what I heard to the sale of sand.  
 13 If one looks to the email exchanges,  
 14 Plaintiff's Exhibit 20 to 29 and 31, makes it very clear  
 15 in the nature of those communications that the mining  
 16 extraction and sale of sand was a separate subsidiary  
 17 business that happens to be run by a rail operator.  
 18 Lastly and not least, Exhibit 33 also makes it  
 19 clear that the mining was a critical economic  
 20 consideration in connection with its project.  
 21 And in terms of the notice to the Town, I do  
 22 think we have a problem in connection with Exhibit 2  
 23 saying it was to be a J track. Clearly this excavation  
 24 has nothing to do with a J track. It has to do with  
 25 something entirely different.  

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*OFFICIAL COURT REPORTER*

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1 So to the extent that the Town could have some  
 2 notice here from some of the documents, I do think that  
 3 overall it was not clear as to exactly what was going on  
 4 at the time.

5 So in light of those facts, I think it is pretty  
 6 clear that the mining operation was a separate subsidiary  
 7 operation that happens to be conducted by the same company  
 8 constructing.

9 Also, I will note that the president's  
 10 testimony, which was very helpful, mentions that it was a  
 11 class three railroad operation, which means it has gross  
 12 revenues of 120 million dollars. And if that is the case,  
 13 clearly ten million dollars of sand is less than a minor  
 14 consideration as characterized earlier.

15 MR. ARONOFF: I don't want to argue with you  
 16 today. But I do want the opportunity to brief this issue.

17 THE COURT: Great.

18 MR. ARONOFF: I think, Judge, under the case  
 19 law, the way the railroad uses to finance its construction  
 20 operation, how it arranges that financing and stages its  
 21 construction falls within the deference given to railroad  
 22 by the ICCTA. It is in the case law. We will explore  
 23 that in our brief.

24 THE COURT: If there are cases, as I suggested  
 25 in my hypothetical, oil wells used to fund it and it is

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1 covered by exclusive jurisdiction, I would love to see  
 2 such cases. It is interesting.

3 MR. ARONOFF: I don't know about oil wells,  
 4 Judge.

5 THE COURT: But the question is, does the --  
 6 assuming it is a spur. And there is an entire issue there  
 7 because what is being constructed is at least twice as big  
 8 as currently exists.

9 MR. ARONOFF: Not relevant to the analysis, your  
 10 Honor.

11 THE COURT: In Judge Boyle's decision on this  
 12 matter --

13 MR. ARONOFF: Just to be clear, the issue in  
 14 that instance was that the builder, the railroad, had  
 15 existing operations in Ohio. And the argument made there  
 16 is we are supporting our existing operations in Ohio,  
 17 which is ancillary to those. And Judge Boyle said, no.  
 18 Your operations in Ohio is not ancillary to something that  
 19 is many states away, a thousand miles away.

20 Here we had existing operations on parcel A.  
 21 Yes, what is being build on B and C is larger. But there  
 22 is no dispute that what is being built is to support and  
 23 expand the existing operations in parcel A. So it is very  
 24 different from the earlier litigation. And it does fall  
 25 squarely within a square.

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1 THE COURT: I don't want anyone to think that  
 2 the rest of the evidence was lost on me. I decided to  
 3 focus on this issue because I think it is a potentially  
 4 dispositive issue.

5 I understand the nature of the projects here  
 6 being run by the rail operations, and they are very  
 7 important projects. I think economically there is a  
 8 significant interest. But I recognize the potential  
 9 environmental interest that the Town presented, and it is  
 10 very serious. Everybody has a serious matter here, I hear  
 11 it all and I appreciate the presentation.

12 But it strikes me that the sand operation, when  
 13 looked at in isolation, is simply a separate matter.

14 If that is the case, I'm not quite sure what we  
 15 do next.

16 MR. ARONOFF: If we were mining sand on a  
 17 different parcel that we weren't constructing a rail on  
 18 top of it, I'd understand the argument better.

19 THE COURT: In fairness, they were mining the  
 20 sand before you had the plan for the track.

21 MR. ARONOFF: We had concept plans going back to  
 22 early 2012 that came into evidence. We still only have a  
 23 concept plan. The final design plan for the site is not  
 24 established. But all the concept plans that all the  
 25 engineers presented required operational use both inside

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1 and within the track area.

2 THE COURT: I don't think that the current  
 3 grading, the evidence is pretty clear, has any necessary  
 4 relation to any of those plans, and that is the problem.

5 But I'm happy to get briefs from both sides.  
 6 When would you like to file them?

7 Mr. Mulry, I haven't given you an opportunity at  
 8 all?

9 MR. MULRY: Sills Expressway and Associates is  
 10 the owner of parcel B. There has been very little  
 11 evidence to anything Sills Expressway Associates was done.

12 While we agree with the BRT defendants with  
 13 respect to the law that has been presented on this motion,  
 14 I have nothing to add at this time.

15 THE COURT: Excellent.

16 MR. CALICA: How about next Thursday?

17 THE COURT: Fine with me.

18 MR. ARONOFF: Fine.

19 THE COURT: Bear in mind that the TRO stays in  
 20 place pending the resolution of this.

21 I will look forward to getting your briefs next  
 22 Thursday.

23 Anything further today?

24 MR. CALICA: Nothing further, your Honor.

25 MR. ARONOFF: Judge, I want to revisit the bond

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1 issue if the TRO is going to stay in place.  
 2 It is mandated by the Federal Rules. They have  
 3 not put in any evidence as to why it is not attainable.  
 4 We heard testimony from Mr. Miller about the  
 5 impact this is having on him.  
 6 THE COURT: I will say on the impact, other than  
 7 the delay of construction, which is obviously a real issue  
 8 but I believe for these purposes is not a significant  
 9 consideration, the main impact is not being able to sell  
 10 sand.  
 11 MR. ARONOFF: But the delay is significant. It  
 12 has a real impact, and it directly implicates these  
 13 issues. Every day they have them, they don't have boots  
 14 on the ground doing work, it delays the ultimate launch  
 15 date and it turns away customers interested in entering  
 16 into a relationship.  
 17 THE COURT: Include it as part of your brief.  
 18 MR. ARONOFF: All right.  
 19 MR. CALICA: Thank you for your time and  
 20 attention, your Honor.  
 21 THE COURT: It has been a pleasure.  
 22 Everyone have a good week.  
 23 MR. ARONOFF: Thank you.  
 24 MR. CALICA: Thank you.  
 25 (End of proceedings.)

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**E-X-H-I-B-I-T-S**

Plaintiff's Exhibit 30 was received in evidence	282
Plaintiff's Exhibit 31 was received in evidence	283
Plaintiff's Exhibit 32 was received in evidence	289
Plaintiff's Exhibit 33 was received in evidence	297
Defendant's Exhibit GGGG was received in evidence	313
Defendant's Exhibit CCC was received in evidence	322
Defendant's Exhibits JJJJ and were was received in evidence	345
Defendant's Exhibit EEE was received in evidence	351
Defendant's Exhibit DDD was received in evidence	357

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**I-N-D-E-X**

**W-I-T-N-E-S-S-E-S**

KEVIN LOYST	245
DIRECT EXAMINATION	245
BY MR. CALICA	
CROSS-EXAMINATION	254
BY MR. ARONOFF	
REDIRECT EXAMINATION	266
BY MR. CALICA	
DANIEL MILLER	269
DIRECT EXAMINATION	269
BY MR. CALICA	
CROSS-EXAMINATION	304
BY MR. ARONOFF	
REDIRECT EXAMINATION	326
BY MR. CALICA	
JIM NEWELL	347
DIRECT EXAMINATION	347
BY MS. MILLER	
CROSS-EXAMINATION	359
BY MR. CALICA	

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# EXHIBIT B

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**Subject:** FW: Update on request for Topo information on Parcel C  
**Attachments:** Phase 2 Rough Grading Plan.pdf; Phase 2 Estimated Cut & Fill Analysis.pdf

**From:** Lawrence Kuo  
**Sent:** Tuesday, July 17, 2012 10:20 AM  
**To:** Dan Miller; 'Jake Watral' ([jake@watral.com](mailto:jake@watral.com))  
**Cc:** William Clifford; Ted Mills; Andy Kaufman ([akaufman@brookhavenrailterminal.com](mailto:akaufman@brookhavenrailterminal.com)); Paul Stevens ([pstevens@bownegroup.com](mailto:pstevens@bownegroup.com)); Richard Geiger ([rgeiger@bownegroup.com](mailto:rgeiger@bownegroup.com))  
**Subject:** RE: Update on request for Topo information on Parcel C

Attach estimated cut and fill analysis for your use.

Thank you,  
Larry Kuo, P.E.

Bowne AE&T Group  
235 East Jericho Turnpike  
Mineola, NY 11501  
Tel. 516-746-2350 ext. 1418  
Fax 516-747-1396  
E-mail: [LKuo@BowneGroup.com](mailto:LKuo@BowneGroup.com)  
[www.bownegroup.com](http://www.bownegroup.com)

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**From:** Dan Miller [<mailto:DMiller@ETCCAPITAL.COM>]  
**Sent:** Thursday, July 12, 2012 3:06 PM  
**To:** Lawrence Kuo  
**Cc:** William Clifford; Ted Mills; Andy Kaufman ([akaufman@brookhavenrailterminal.com](mailto:akaufman@brookhavenrailterminal.com))  
**Subject:** Update on request for Topo information on Parcel C

Larry,

Pursuant to our closing documents I will actually need you to provide a calculation for estimated volume on Parcel C AND Parcel B, rather than parcel C only as I originally requested.

Please let me know if you have any questions, otherwise I hope to hear from you sometime next week with calculations.

Best Regards,

Dan

Daniel K. Miller  
Chief Financial Officer  
ETC Capital  
38955 Hills Tech Drive  
Farmington Hills, MI 48331

[dmiller@etccapital.com](mailto:dmiller@etccapital.com)



Existing Surface

Parcel B

Cut = 1,159,761 cu.yds    Fill = 2 cu.yds  
Net = 1,159,759 cu.yds CUT

Parcel C

Cut = 1,394,936 cu.yds    Fill = 48,862 cu.yds  
Net = 1,346,074 cu.yds CUT

Existing Surface Minus 1 Foot

Parcel B

Cut = 1,128,842 cu.yds    Fill = 219 cu.yds  
Net = 1,128,622 cu.yds CUT

Parcel C Existing Minus 1 Foot

Cut = 1,309,027 cu.yds    Fill = 77,610 cu.yds  
Net = 1,231,417 cu.yds CUT



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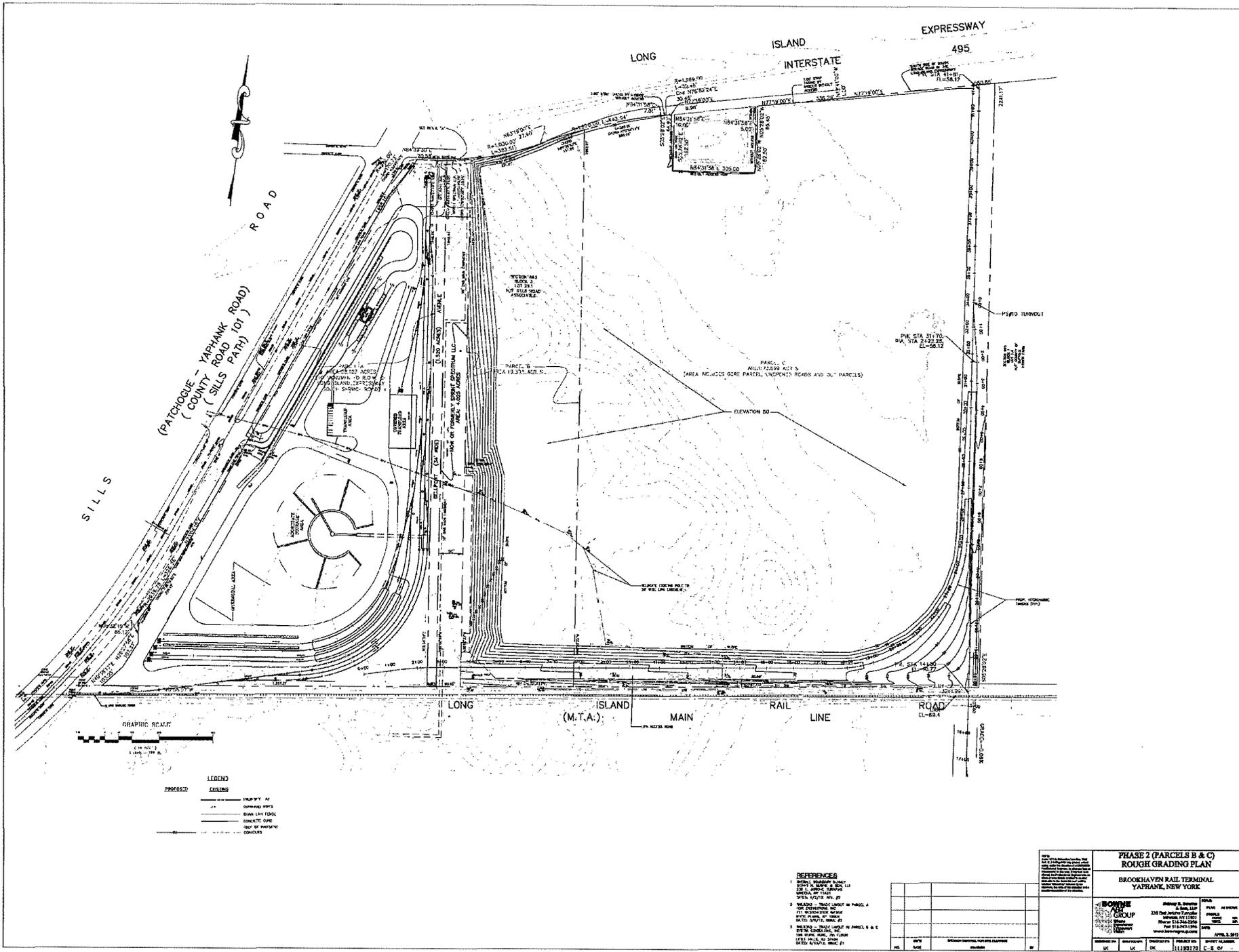
**From:** Tom Solomon [TSolomon@etccapital.com]  
**Sent:** 11/12/2012 11:03:56 AM  
**To:** lkuo@bownegroup.com  
**CC:** Dan Miller [DMiller@ETCCAPITAL.COM]; Andy Kaufman [akaufman@brookhavenrail.com]  
**Subject:** Sand Estimates  
**Attachments:** Phase 2 Rough Grading Plan.pdf.pdf; Phase 2 Estimated Cut & Fill Analysis.pdf.pdf

Hi Larry-

Are you able to put your sand survey in a more formalized report? We want to have a formalized estimate on file as backup for our tax estimates regarding depletion.

Let me know if you have any questions or want to talk further on this,  
Thanks

**Tom Solomon, CPA | Accounting Manager**  
Brookhaven Terminal  
205 Sills Road  
Yaphank, NY 11980  
**P: 631.205.5755**  
**F: 248.871.4081**



**LEGEND**

PROPOSED	EXISTING

**REFERENCES**

- 1. RECORD DRAWING NUMBER 111-1000-00
- 2. RECORD DRAWING NUMBER 111-1000-01
- 3. RECORD DRAWING NUMBER 111-1000-02
- 4. RECORD DRAWING NUMBER 111-1000-03
- 5. RECORD DRAWING NUMBER 111-1000-04
- 6. RECORD DRAWING NUMBER 111-1000-05
- 7. RECORD DRAWING NUMBER 111-1000-06
- 8. RECORD DRAWING NUMBER 111-1000-07
- 9. RECORD DRAWING NUMBER 111-1000-08
- 10. RECORD DRAWING NUMBER 111-1000-09
- 11. RECORD DRAWING NUMBER 111-1000-10
- 12. RECORD DRAWING NUMBER 111-1000-11
- 13. RECORD DRAWING NUMBER 111-1000-12
- 14. RECORD DRAWING NUMBER 111-1000-13
- 15. RECORD DRAWING NUMBER 111-1000-14
- 16. RECORD DRAWING NUMBER 111-1000-15
- 17. RECORD DRAWING NUMBER 111-1000-16
- 18. RECORD DRAWING NUMBER 111-1000-17
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- 25. RECORD DRAWING NUMBER 111-1000-24
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- 27. RECORD DRAWING NUMBER 111-1000-26
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- 29. RECORD DRAWING NUMBER 111-1000-28
- 30. RECORD DRAWING NUMBER 111-1000-29
- 31. RECORD DRAWING NUMBER 111-1000-30
- 32. RECORD DRAWING NUMBER 111-1000-31
- 33. RECORD DRAWING NUMBER 111-1000-32
- 34. RECORD DRAWING NUMBER 111-1000-33
- 35. RECORD DRAWING NUMBER 111-1000-34
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- 87. RECORD DRAWING NUMBER 111-1000-86
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- 89. RECORD DRAWING NUMBER 111-1000-88
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- 91. RECORD DRAWING NUMBER 111-1000-90
- 92. RECORD DRAWING NUMBER 111-1000-91
- 93. RECORD DRAWING NUMBER 111-1000-92
- 94. RECORD DRAWING NUMBER 111-1000-93
- 95. RECORD DRAWING NUMBER 111-1000-94
- 96. RECORD DRAWING NUMBER 111-1000-95
- 97. RECORD DRAWING NUMBER 111-1000-96
- 98. RECORD DRAWING NUMBER 111-1000-97
- 99. RECORD DRAWING NUMBER 111-1000-98
- 100. RECORD DRAWING NUMBER 111-1000-99
- 101. RECORD DRAWING NUMBER 111-1000-100

<b>PHASE 2 (PARCELS B &amp; C) ROUGH GRADING PLAN</b>	
BROOKHAVEN RAIL TERMINAL YAPHANK, NEW YORK	
<b>BOWNE GROUP</b>	111-1000-00
238 The Junction Drive Yaphank, NY 11980 Phone 516-244-2296 Fax 516-244-2296 www.bownegroup.com	DATE: 07/16/12 SCALE: AS SHOWN
DESIGNED BY: [Name]	CHECKED BY: [Name]
DRAWN BY: [Name]	PROJECT NO: 111-1000-00
DATE: 07/16/12	SHEET NO: 1 OF 1

Existing Surface

Parcel B

Cut = 1,159,761 cu.yds    Fill = 2 cu.yds  
Net = 1,159,759 cu.yds CUT

Parcel C

Cut = 1,394,936 cu.yds    Fill = 48,862 cu.yds  
Net = 1,346,074 cu.yds CUT

Existing Surface Minus 1 Foot

Parcel B

Cut = 1,128,842 cu.yds    Fill = 219 cu.yds  
Net = 1,128,622 cu.yds CUT

Parcel C Existing Minus 1 Foot

Cut = 1,309,027 cu.yds    Fill = 77,610 cu.yds  
Net = 1,231,417 cu.yds CUT



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**From:** DMiller@ETCCAPITAL.COM [DMiller@ETCCAPITAL.COM]  
**Sent:** 7/5/2012 9:44:48 AM  
**To:** Jake Watral [jake@watral.com]  
**CC:** Lawrence Kuo [lkuo@bownegroup.com]; Ted Mills [Ted@ETCCAPITAL.COM]; Karim Beydoun [kbeydoun@ETCCAPITAL.COM]; Tom Solomon [TSolomon@etccapital.com]; Andy Kaufman (akaufman@brookhavenrailterminal.com) [akaufman@brookhavenrailterminal.com]; Paul Stevens [pstevens@bownegroup.com]; Richard Geiger [rgeiger@bownegroup.com]; Jim Pratt [jpratt@prattbrothers.com]  
**Subject:** Re: 3 requests

Larry,

Please use these elevations for your cut line to calculate sand volume.

Thanks

Dan

Daniel K. Miller  
[dmiller@etccapital.com](mailto:dmiller@etccapital.com)

On Jul 3, 2012, at 7:19 PM, "Jake Watral" <[jake@watral.com](mailto:jake@watral.com)> wrote:

Larry we have used elevation 50+ which is approx county farm elevation and Rt 495 service rd elevation Also that grade will carry into parcel B with no slopping between

Sent from my iPad

On Jul 3, 2012, at 3:14 PM, Lawrence Kuo <[lkuo@bownegroup.com](mailto:lkuo@bownegroup.com)> wrote:

Attach pdf's for request #1 & 2.

As discussed, we need to build existing and proposed surfaces for Parcel C and will bill Brookhaven Eastern Holdings job # 11183170 for this work. You wish for us to assume a flat surface across the majority of the property to match lowest track elevation at 56.12.

Thank you,

Larry Kuo

**From:** Dan Miller [mailto:DMiller@ETCCAPITAL.COM]  
**Sent:** Tuesday, July 03, 2012 10:25 AM

**To:** Lawrence Kuo

**Cc:** Ted Mills; Karim Beydoun; Tom Solomon; Andy Kaufman ([akaufman@brookhavenrailterminal.com](mailto:akaufman@brookhavenrailterminal.com)); [jake@watral.com](mailto:jake@watral.com)

**Subject:** 3 requests

Larry,

3 quick things for you – if you are able to send this information over sometime soon that would be great.

1. Updated copy of parcel D layout for new potential tenant in PDF format.
2. Updated parcel A-D layout, including revised D layout from #1 in PDF format
3. Topo plan from Parcel C, including calculation of sand volume on parcel C based on 1' unusable material over entire parcel and site grades as specified in most current track design. Please include your calculation and a PDF with topo lines.

Thank you for your continued assistance.

Best Regards,

Dan

Daniel K. Miller

Chief Financial Officer

ETC Capital

38955 Hills Tech Drive

Farmington Hills, MI 48331

# EXHIBIT C

## GROUND LEASE

This lease (the "Lease") is entered into as of June 1, 2012 between **SILLS EXPRESSWAY ASSOCIATES, LLC**, a New York limited liability company, with offices at 608 Union Avenue, Holtsville, New York 11742 and 157 Albany Avenue, Freeport, New York 11520 ("Lessor"), and **SILLS ROAD REALTY, LLC**, a New York limited liability company with offices at 56 Comsewogue Road, East Setauket, New York 11733 (the "Lessee"), on the terms and conditions set forth below.

WHEREAS, Lessor now owns an approximately 20 acre parcel of undeveloped land in Yaphank, New York, on the south service road of the Long Island Expressway and designated on the Tax Map of the County of Suffolk, State of New York as District 02.00, Section 663.00, Lot 03.00 and Block 029.00 (together with all easements and other rights appurtenant thereto, the "**Property**"), as more particularly described on Exhibit "A" annexed hereto;

WHEREAS, Lessor previously entered into an Option Agreement, dated October 26, 2010, with Sills Road Realty, LLC (the "Option Agreement") pursuant to the terms of which Sills Road Realty was granted an exclusive option through October 31, 2012 to lease the Property;

WHEREAS, the terms of this Lease supersedes, replaces, and otherwise terminates the Option Agreement; and

WHEREAS, Lessee desires to lease the Property in connection with its operation of a transmodal rail facility on the parcel contiguous to the eastern and western boundaries of the property (the "Rail Facility") and to otherwise use the Property for lawful uses.

NOW THEREFORE, it is mutually covenanted and agreed as follows:

1. **Property.** Lessor leases to Lessee and Lessee leases from Lessor, the Property.
2. **Term.** This Lease shall be for an initial term of twenty five (25) years commencing on the date hereof (the "Effective Date"). The term of this Lease will extend automatically for successive five year terms unless and until such time as Lessee provides Lessor written notice that it does not intend to renew the Lease following expiration of the then-current term. Such notice must be given at least 180 days prior to the renewal date of any term.
3. **Rent.**
  - a. **Base Rent:** Beginning on the first day of the fourth (4<sup>th</sup>) year following the Effective Date, Lessee shall pay rent of \$396,740.75 per year, payable in equal monthly installments of \$33,061.73, for use of the Property ("Basic Rent"). Rental payments shall be made in advance on the first day of each month during the term of the Lease and any extended term.
    - i. The Basic Rent shall increase at the end of the eighth (8<sup>th</sup>) year and annually thereafter, including during any renewal term, by the percentage of increase in the

Consumer Price Index ("CPI") during the preceding year. To determine the CPI increase, there shall first be determined the CPI for the month of May preceding the commencement of the next lease year (the "Base Index"); there shall next be determined the CPI for the month of May in the ensuing lease year preceding the Basic Rent increase ("Comparative Index"). The parties shall then compute the following:

Comparative Index ÷ Base Index x prior year's Basic Rent = the new Basic Rent based upon CPI

By way of example, if the CPI as of May, 2019 is 205.600 and the CPI as of April 2020 is 234.384, then in calculating the Basic Rent increase to be effective on the first day of the ninth lease year, the Base Index is 205.600 and the Comparative Index is 234.384. The Comparative Index is divided by the Base Index, multiplied by \$396,740.75 equals \$452,284.46. The Base Rent for the eighth lease year shall be \$452,284.46.

For purposes of this Lease, the CPI shall mean the United States Department of Labor Consumer Price Index all items for all Urban Households for the Northeast Region, 1982-84=100, as adjusted in the event the United States Department of Labor shall establish a new base.

In the event that during the term of this Lease the United States Department of Labor shall no longer issue the CPI, then the parties shall agree upon an alternate index to be used in place and stead thereof, and the manner in which said index shall be utilized. If the parties cannot agree on such an alternate index or manner of utilizing same, the issue shall be submitted to arbitration .

ii. Notwithstanding anything to the contrary set forth above, on the date which is ninety (90) days prior to the thirty-fifth (35<sup>th</sup>) anniversary, Lessee will provide Lessor with a written appraisal of the property. The annual rent thereafter will be the higher of the then current rent in effect or the appraised value times .07. Each renewal shall be on the same terms and conditions as contained in this Lease except that the rent will increase as set forth in subparagraph (i) above.

b. Additional Consideration:

i. As additional consideration for Lessor entering into this Lease, Lessee, at its sole option, shall be obligated to (a) provide Lessor with up to Six Hundred Thousand (600,000) tons of bankrun gravel free of overburden (the "Minerals") commencing upon the commencement of excavation on the Property, or, at Lessee's sole option, (b) pay to Lessor the sum of \$5 per ton for Minerals not furnished. If Lessee elects to provide Lessor with the Minerals, Lessee may provide same from either the Property or from contiguous properties on which it has excavation rights. Lessor shall be obligated for all costs to dig, load and weigh the Minerals, at its sole cost and expense, and Lessor shall provide, at its sole cost and expense, all trucking necessary to remove the Minerals from the Property. Clearing, stripping and loading shall be undertaken in accordance with the provisions of a separate agreement with Watral Brothers Incorporated. Lessor shall not be entitled to more than fifteen thousand (15,000) tons of Minerals per month and no more than one hundred fifty thousand (150,000) tons per year.

ii. If, for any reason beyond Lessee's control (i.e., due to moratorium or some other governmental or quasi-governmental stop-work order or the like), Lessee cannot perform its obligations under this Paragraph 3b to provide the Minerals to Lessor, then Lessee's obligations to perform hereunder shall be suspended for the period that Lessee is unable to perform. If the period of suspension exceeds six (6) months, Lessee shall elect to either (a) terminate this Lease or (b) make the payments set forth in subsection b.i.(b) above.

4. **Use.** The Property may be used for rail terminal operations and all rail-related facilities and for any other legal purpose, including but not limited to the right to grade and remove material at the Property in accordance with approved engineered development plans and to construct buildings thereon. No uses shall be permitted which will violate any law, municipal ordinance, or regulation. If the Property is overdug, the Property will be brought to the correct grade using engineered fill.

5. **Easements.** In conjunction with this Lease:

(a) Lessor hereby grants Lessee and Brookhaven Terminal Operations, LLC ("BTO") a perpetual easement as described in **Exhibit B** (the "Easement"). Additionally, Lessor shall grant to Long Island Power Authority ("LIPA") such easements as LIPA shall request in the area running along the westerly boundary of the Property and thence easterly in the area to the south of the Easement area (the "LIPA Easements"). Lessor shall approve any other utility easements necessary for Lessee's development of the Property, which consent shall not be unreasonably withheld, delayed or conditioned. The provisions of this paragraph shall survive the termination of this Lease, including but not limited to an Event of Default by Lessor; and

(b) Lessee hereby grants Lessor a non-exclusive, perpetual and assignable easement and right of way in the form set forth and described in **Exhibit C** (the "Springing Easement"), which easement shall be recorded contemporaneously with the recording the Easement, and which become effective upon the expiration or sooner termination of this Lease pursuant to its terms.

6. **Mineral Rights.** Lessee may excavate all materials of whatever kind from Parcel B. Any and all materials excavated by Lessee and proceeds from the same shall remain the sole and exclusive property of Lessee.

7. **Lessor Representations.** As of the date of this Agreement and of the Effective Date, Lessor makes the following representations and warranties to Lessee:

(a) This Agreement constitutes a legal, valid and binding obligation of Lessor, enforceable against Lessor in accordance with its terms, subject to general equitable principles except as the enforceability thereof may be limited by public policy or applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to creditors' rights.

(b) There are no pending or threatened condemnation or eminent domain proceedings involving the Property and Lessor has received no notices in connection therewith.

(c) There are no unpaid special or other assessments for public improvements or otherwise affecting the Property.

(d) There are no liens for taxes (other than for current real and personal property taxes not yet due and payable) on the Property.

(e) The Property is, and at all times has been, in compliance with applicable laws, regulations, ordinances, permits, and approvals.

(f) As of the Effective Date, Lessor has no knowledge of default under any contracts, agreements, or any other obligations related to the ownership or operation of the Property.

(g) Lessor warrants that no lien, exception to title, or encumbrance affects the Property other than those of record at the Effective Date of this Lease. If a holder of a mortgage from Lessee affecting the Property requests Lessor to enter into a reasonable subordination, non-disturbance agreement, Lessor shall do so provided that the holder agrees, in the event of foreclosure or sale under the mortgage, to recognize all of Lessor's rights under this Lease, and to perform all of Lessee's obligations under the Lease.

(h) Lessor has no knowledge of the existence of, any pending or threatened investigation, claim, suit or proceeding regarding any environmental liability in connection with the Property and has no knowledge of any basis for an environmental liability.

(i) Lessor has no knowledge of any litigation, proceeding, or claim against Lessor or the Property which will affect the obligations of Lessor hereunder or the Property.

(j) Lessor has no knowledge that the Property is now or has ever been used for the purpose of disposal of, refining, generating, manufacturing, producing, storing, handling, treating, transferring, releasing, processing or transporting any hazardous material, or that there are or ever have been underground storage tanks located on, at, or under the Property.

8. **Covenant of Quiet Enjoyment.** So long as the Lessee is not in default under this Lease, Lessee shall be entitled to quiet possession of the Property during the term of this Lease.

9. **Government Permits and Construction of Improvements by Lessee.** Lessee's obligations under this Lease are contingent upon the Lessee obtaining all necessary governmental permits and approvals for its proposed use of the Property for rail terminal operations and all warehouse, distribution, manufacturing and other rail-related facilities, including but not limited to the right to grade and remove material at the Property in accordance with approved development plans and to construct buildings thereon. If any necessary permits or approvals cannot be obtained after diligent and complete application therefor, Lessee may elect to terminate this Lease without any further liability to either party.

10. **Taxes.** During the term of this Lease, the Lessee shall pay all real estate taxes and special assessments levied against the Property, including installment payments for special

assessments extending beyond the term of this Lease prior to the last day to pay same without penalty. Lessee may contest the amount or validity of any taxes or special assessments by appropriate proceedings at Lessee's expense and any refunds shall belong solely to Lessee.

11. **Casualty Insurance.** During the term of this Lease and to the extent that there are any buildings constructed on the Property, Lessee shall procure fire and extended coverage insurance insuring the Property, including all leasehold improvements, for their full replacement value. The insurance policy shall show Lessor, any mortgagee of Lessor (of which Lessee has been give the name and address) or the Lessee, with respect to the Property, and the Lessee as named insureds. The insurance policy shall carry an endorsement requiring that Lessor shall be given 10 days written notice prior to any change in or any cancellation of the policy. Certificates of all insurance policies shall be delivered to Lessor. Lessor and the Lessee and all parties claiming under them mutually waive any right of recovery against each other for any loss occurring to the Property or as a result of activities conducted on the Property, which is covered by insurance, regardless of the cause of the damage or loss. Each insurance policy covering the Property shall contain an endorsement recognizing this mutual release by Lessor and the Lessee and waiving all rights of subrogation by their respective insurers.

12. **Liability Insurance.** Throughout the term of this Lease, the Lessee shall hold harmless and indemnify Lessor against any injury or damage to third parties arising as a result of any act or neglect of the Lessee, its agents, employees, successors and/or assigns, in or about the Property. Lessee shall, at the Lessee's cost, procure a liability insurance policy covering the Property and the Lessee's contractual indemnity obligations hereunder, with an insurance company licensed to do business in the State of New York, in amounts which are recommended in writing by a qualified and experienced insurance agent in the area as optimum coverage for the uses made of the Property, but which in no event are less than \$10,000,000 in primary coverage. The insurance policy or policies shall show Lessor and any mortgagee of the Lessor of which the name and address has been given to Lessee, and the Lessee as additional insureds. The insurance policy shall carry an endorsement requiring that Lessor shall be given 10 days written notice prior to any change in or any cancellation of the policy. Certificates of all insurance policies shall be delivered to Lessor. Lessor and the Lessee and all parties claiming under them mutually waive any right of recovery against each other for any loss occurring to the Property or as a result of activities conducted on the Property, which is covered by insurance, regardless of the cause of the damage or loss. Each insurance policy covering the Property shall contain an endorsement recognizing this mutual release by Lessor and the Lessee and waiving all rights of subrogation by their respective insurers. Each policy carried by a sublessee of the Lessee shall also show Lessor and any mortgagee of the Lessor of which the name and address has been given to Lessee, and the Lessee as additional insureds.

13. **Utilities.** Lessee shall contract directly with the utility providers and pay when due all bills for water, gas, electricity, and other utilities and services for the Property during the term of this Lease directly to the utility company.

14. **Leasehold Improvements.**

(a) Unless Lessor reasonably disapproves, Lessee shall have the right to place permanent structures on the Property for any lawful purpose related to the development and

operation of the Property. At the expiration of the Lease, unless otherwise mutually agreed, title to all such structures and leasehold improvements on the Property (other than those in the Easement areas) shall vest in Lessor. Lessor hereby acknowledges and agrees that it has and shall have no rights to any structures and/or improvements made in the Easement Area, and that Lessee shall have the right to make improvements in the Easement Area without Lessor's consent. In the event that the members of Lessor deadlock on the issue of whether to disapprove a permanent structure requested by Lessee, the members shall bring the matter to mediation in accordance with the Construction Industry Mediation Rules of the American Arbitration Association then in effect. Any request for mediation shall be filed in writing with the other party and with the American Arbitration Association.

(b) Lessor shall cooperate with Lessee in the development of the Property and shall execute any applications required in connection therewith and attend any public hearing if requested by Lessee. Lessor and Lessee shall meet upon reasonable request and at reasonable times at the Property to determine compliance with maintaining appropriate grade pursuant to the site plan to be developed by Lessee.

15. **Maintenance by Lessee.** Lessee shall, at its expense, keep the Property and any buildings or improvements on the Property in good condition and repair, reasonable wear and tear excepted. Lessee agrees to operate and keep the Property in a clean condition, in compliance with applicable laws and ordinances.

16. **Damage to Improvements.** In the event of damage to the improvements caused by fire or other casualty, Lessee shall promptly rebuild the Property to substantially the condition it was in prior to the casualty in accordance with the plans and specifications to be prepared by Lessee. The insurance proceeds carried by Lessee to cover casualty damage to the Property shall be available for the reconstruction.

17. **Condemnation.** If the whole or any part of the Property (a) in excess of two (2) acres or (b) which would render the Property unoperable for rail terminal operations and all rail-related facilities or any other legal purpose for which it was being used at the time of a taking shall be taken by any public authority under the power of eminent domain, the Lessee shall have the right up to the date of the taking to elect to terminate the Lease by giving notice of the termination to Lessor. If notice has not been received by Lessor as of the date of the taking, then the Lease shall be deemed to continue with regard to the portion of the Property not taken by eminent domain. If the Lessee does elect to terminate the Lease, then the Lessee's obligation to pay rent shall end as of the date of the taking and any amount of rent paid in excess of the amount due shall be returned to the Lessee. In the event that the Lessee does not elect to terminate the Lease, then the Lease shall continue in effect on the terms as stated in this document with the exception that the rent shall be reduced in proportion to the nature, value and extent which the part of the Property taken by eminent domain bears to the entire Property. To the extent of any renovation required to the Property to restore it to use after the taking, the Lessee shall be responsible for undertaking and completing that renovation and paying the cost of the renovation. Each party shall seek its own award for damages for the taking, and Lessor shall specifically receive all awards for the taking of the Property. Lessor shall pay over to Lessee that portion of any compensation or award received as consideration for any impacts to improvements that have been made.

18. **Signs.** Lessee may erect, maintain, and remove signs, appropriate to its business operations, in or about the Property as the Lessee may deem necessary or desirable. The signs shall be in compliance with all governmental regulations.

19. **Default.**

(a) Event of Default by Lessee. An Event of Default by Lessee shall occur if there has been: 1) a failure by Lessee to pay, when due, any rent to be paid to Lessor, or to make payment when due of any taxes, assessments, or charges required by the terms of this Lease; 2) a failure by Lessee to obtain any policy of insurance or to pay any insurance premiums required by the terms of this Lease to be paid by Lessee; or 3) a failure by Lessee to comply with any other obligations or provisions of this Lease. Following an Event of Default, Lessor may send to Lessee notice of the Event of Default. The notice shall give Lessee 30 days to cure the default. If the Event of Default is not cured during the notice period, then upon the expiration of that notice period of 30 days a Default shall exist, the Lease shall be deemed terminated, and Lessor may dispossess Lessee by any action or proceeding at law.

(b) Event of Default by Lessor. An Event of Default by Lessor shall occur if: 1) any warranty, representation, or statement made by Lessor in or associated with this agreement was false in any material respect when it was made or furnished; 2) Lessor dissolves, becomes insolvent, or makes an assignment for the benefit of creditors, or a voluntary or involuntary bankruptcy is begun by or against a party; 3) Lessor commits a default or event of default under any mortgage financing; or 4) Lessor fails to comply with any other obligations or provisions of this Lease. Following an Event of Default, Lessee may send to Lessor notice of the Event of Default. The notice shall give Lessor 30 days to cure the default. If the Event of Default is not cured during the notice period, then upon the expiration of that notice period of 30 days a Default shall exist.

20. **Remedies.**

(a) Lessor's remedies. If an Event of Default by Lessee as defined above occurs, Lessee shall deliver vacant possession of the Property to Lessor and remove all personal property therefrom, and shall pay all of Lessor's fees, costs and expenses of any action or proceeding to remove Lessee from the Property, including, but not limited to, reasonable legal fees and expenses, and if any due from Lessee is not paid within thirty (30) days of the date when due, the unpaid sum shall bear interest at the rate of eighteen percent (18%) per annum from the date when due until the date when paid.

(b) Lessee's remedies. If an Event of Default by Lessor as defined above occurs, Lessee shall, at its election, upon or concurrent with the giving of notice to Lessor, have the right to:

(i) terminate this Lease with no further obligation. If Lessee terminates this Lease, Lessee shall be entitled to recover from Lessor all damages incurred by Lessee on account of Lessor's default;

(ii) cure the default at Lessor's cost, at any time after Lessor commits a default. If Lessee at any time, by reason of Lessor's default, pays any sum or does any act that requires the payment of any sum, the sum paid by Lessee shall be due immediately from Lessor to Lessee at the time the sum is paid, and if paid at a later date shall bear interest at the rate of eighteen percent (18%) per annum from the date the sum is paid by Lessee until Lessee is reimbursed by Lessor. If Lessor fails to reimburse Lessee as required by this subparagraph, Lessee shall have the right to withhold from future rent due the sum Lessee has paid until Lessee is reimbursed in full for the sum and interest on it.

(iii) perform Lessor's obligations and make payments on behalf of Lessor:

a. In addition to any other right to remedy of Lessee hereinbefore provided, if Lessor shall fail to perform or observe any covenant or condition contained in this lease, Lessee may, after ten (10) days' written notice to Lessor, perform the same for the account of Lessor.

b. If Lessor shall fail to pay within ten (10) days after due, any installment of principal or interest on any mortgage paramount to this lease, or shall fail to promptly remove any other lien or charge which could jeopardize Lessee's right to possession of the Property as hereby granted, Lessee may make such payment or effect such removal, unless Lessor shall notify Lessee of any valid claim or setoff within the same ten (10) days. Any such payment or removal shall entitle Lessee to be subrogated to the lien or charge of the item so paid in addition to the rights given Lessee under this paragraph.

**21. Mortgage, Leaschold Mortgage and Industrial Development Agency Transaction.** Lessor shall have the right to encumber by mortgage all of Lessor's interest in the Property together with its interests in this Lease and all improvements and fixtures placed on the Property by and owned by Lessor. The maximum amount of Lessor's mortgage financing shall be seventy five (75%) percent of the then-appraised value of the Property but in no event greater than seventy five (75%) percent of the option price set forth in paragraph 29 hereof for as long as the option is in effect. In connection with any such mortgage financing, Lessor shall obtain a subordination non-disturbance and attornment agreement from the mortgagee in the mortgagee's usual form agreeing not to disturb Lessee interest in the Lease in the event of a foreclosure of the mortgage. Lessee shall have the right to encumber by mortgage all of Lessee's interest under this Lease including, without limiting the generality of the foregoing, its right to use the Property together with its interests in all improvements and fixtures placed on the Property. Each party hereto agrees to execute any amendments to this Lease reasonably required by any prospective institutional mortgagee, for so long as they do not materially alter the financial and other material provisions of this Lease. Lessee shall further have the right to enter into an installment sale or lease-leaseback transaction with the Town of Brookhaven Industrial Development Agency. Lessor agrees to reasonably cooperate with Lessee to effect such a transaction.

**22. Notices to Mortgagee.** If, at any time after the signing and recording of any mortgage encumbering Lessee's interest under this Lease, the mortgagee shall notify Lessor in writing that the mortgage has been given and signed by Lessee, and shall at the same time

furnish Lessor with the address to which it desires copies of notice to be mailed, Lessor agrees that it will mail to that party at the address given, duplicate copies of any suits filed by Lessor against Lessee and duplicate copies of any notices which Lessor may give or serve upon Lessee under this Lease.

23. **Mortgagee's Rights.** To the extent that Lessee may grant the right to any mortgagee, the mortgagee may, at its option, at any time before this Lease shall terminate, pay any amount or do any act or thing required of Lessee by the terms of this Lease; and all payments so made and all acts so done by the mortgagee shall be as effective to prevent a forfeiture of the rights of Lessee under this Lease as if the act or thing were performed by Lessee instead of the mortgagee.

24. **Assignment and Subletting.**

(a) Other than as it relates to the Lease Call Option, dated June 1, 2012, between Lessee and Brookhaven Terminal Operations LLC ("BTO") and as otherwise set forth herein, Lessee shall have the right to assign or transfer any or all of its rights under this Lease with Lessor's consent, not to be unreasonably withheld, delayed or conditioned. Lessee shall also have the right to sublet all or any part of the Property. No such assignment or sublease shall relieve Lessee of its obligations hereunder. Lessee shall cause to be executed by its assignee or sublessee an agreement in such form as Lessor shall prescribe or approve, to perform faithfully and to assume and be bound by all of the terms, covenants, conditions, provisions and agreements of this Lease. Lessee shall also deliver an executed copy of each sublease or assignment and assumption not less than five (5) business days prior to the commencement of occupancy set forth in such assignment or sublease. No such assignment or sublease shall be binding on Lessor until Lessor has received such copies as required herein.

(b) Notwithstanding the foregoing, in the event that Lessee shall transfer its interest in the real property described in Exhibit "D" and assign its interest in this Lease to BTO and shall thereafter withdraw as a member of BTO, then, upon the date of such withdrawal, Lessee shall be released from its obligations under this Lease.

25. **Notices.** All notices and other communications under this Lease shall be in writing and be sent by reputable overnight courier (provided a receipt is obtained), to the respective party at the address indicated above or at such other address as either party shall designate in writing. A change in address may be effected by notice given in accordance with this Section 25, sent by either party to the other. Unless Lessor gives notice to the contrary, all payments to Lessor under the terms of this Lease shall be made to Lessor at the address for Lessor first set forth above. Attorneys may give notices on behalf of their respective clients. Notices shall be deemed given upon actual receipt, refusal or return of the notice as undeliverable.

26. **Modifications.** No modification, alteration, or amendment to this Lease shall be binding unless in writing and signed by both parties to the Lease.

27. **Whole Agreement.** This Agreement constitutes the entire agreement between the parties and shall be deemed to supersede and cancel any other agreement between the parties

relating to the transaction contemplated in this Agreement. None of the prior and contemporaneous negotiations, preliminary drafts, or prior versions of the agreement leading up to its signing and not set forth in this Agreement shall be used by any of the parties to construe or affect the validity of this Agreement. Each party acknowledges that no representations, inducement or condition not set forth in this Agreement has been made or relied upon by either party.

28. **Governing Law.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of New York. In the event any provision of this Agreement is in conflict with any statute or rule of any law in the State of New York or is otherwise unenforceable for any reason whatsoever, then that provision shall be deemed severable from or enforceable to the maximum extent permitted by law, as the case may be, and that provision shall not invalidate any other provision of this Agreement. Venue for any action brought under this Agreement shall lie in Suffolk County, New York.

29. **Option to Purchase.** For the three years following the effective date, Lessee shall have the exclusive right, upon ninety (90) days prior written notice to Lessor, to purchase the Property from Lessor (the "Option"). The Option must be exercised within the first three (3) years following the Effective Date. If Lessee exercises the Option, the purchase price shall be \$10,000,000.00, less (i) the value of the Minerals previously provided to Lessor which is agreed to be \$8 per ton and (ii) any cash payments made in lieu of providing Minerals.

Closing of title shall take place at the office of Lessor's attorney, on the date specified in Lessee's notice, which date shall not be more than ninety (90) days from the date of such notice. At the Closing, Lessor shall deliver to Lessee a Bargain and Sale Deed with Covenants against Grantor's Acts conveying to Lessee fee title to the Property in the condition of such title as of the date hereof, and subject to the easements provided for herein.

30. **Right of First Refusal.** If at any time after the expiration of the exclusive Option provided for in Section 29 above, Lessor desires to sell or otherwise transfer the Property to a third party and Lessor shall obtain a bona fide written offer for the purchase of the Property, setting for the all of the material terms and conditions of such proposed offer (the "Offer"), then Lessor shall immediately send such Offer to Lessee. Lessee shall have sixty (60) days from the date of its receipt of Lessor's notice of the Offer to elect to purchase the Property on the same terms and conditions as those set forth in the Offer and Lessee shall provide written notice to Lessor during such sixty (60) day period as to whether or not it will purchase the Property on the same terms and conditions as those set forth in the Offer. If Lessee exercises its rights contained in this Section 30, the closing shall take place at the office of Lessee's attorney within ninety (90) days from the date of Lessee's notice to Lessor of its exercise of its rights under this Section 30. In the event Lessee does not elect to purchase the Property as hereinabove provided, Lessor shall be free to sell the Property to the proposed third party purchaser making the Offer on the same terms and conditions as those set forth in the Offer. In the event that the Lessee does not elect to exercise its rights under this Section 30, and the sale to the third party provided for in the Offer does not occur in accordance with the provisions of the Offer, the Lessor may not sell or otherwise transfer the Property, or attempt to sell or otherwise transfer the Property, without complying with the terms and conditions of this Section 30 in each and every instance.

31. **Memorandum of Lease.** The parties agree to execute, and Lessee shall record, a Memorandum of Lease identifying the existence of this Lease and other materials provisions hereof.

**IN WITNESS WHEREOF**, this Lease has been duly executed by the parties hereto as of the date and year first above written.

“LESSOR”

**Sills Expressway Associates, LLC**

By:   
Name: James J. Pracht  
Its: Manager

“LESSEE”

**SILLS ROAD REALTY, LLC**

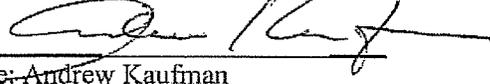
By:   
Name: Andrew Kaufman  
Its: President

EXHIBIT A  
LEGAL DESCRIPTION

EXHIBIT B  
EASEMENT

EXHIBIT C  
SPRINGING EASEMENT