

Law Offices
of

223500

Mark A. Cuthbertson

434 New York Avenue
Huntington, NY 11743

cuthbertsonlaw.com

P (631) 351-3501

F (631) 614-4314

Mark A Cuthbertson

Jessica P Driscoll

Joseph C DeJesu

Of Counsel

Michelle M. Pfeifferberger

September 2, 2008

VIA ELECTRONIC FILING

Anne K. Quinlan, Acting Secretary

Surface Transportation Board

395 E. Street Southwest

Washington, DC 20024

RE: US Rail – Construction and Operation Exemption – Brookhaven Rail Terminal
STB Finance Docket No. 35141

Dear Ms. Quinlan:

I represent the Town of Brookhaven, New York ("Brookhaven") in the above-captioned matter. I am writing in response to the request by U.S. Rail Corporation ("U.S. Rail") for "expedited handling" of the "Petition for Exemption" it filed on August 7, 2008. As you know, Brookhaven has been granted an extension to file a reply to the Petition pursuant to § 1104.13.

In the meantime, Brookhaven strongly opposes the proposed schedule submitted at Exhibit E to U.S. Rail's Petition for Exemption

The requested schedule would obliterate all opportunity for any meaningful environmental review. As the Board is aware, U.S. Rail commenced construction without any federal, state or local approval in July 2007 and construction continued until the Board issued its cease and desist order on October 12, 2007. The Board's October 12th decision relied in part on a letter from Brookhaven that it received on October 2, 2007 and a news article appearing in Newsday on October 2, 2007. A copy of that letter and article are annexed as Exhibit "A." The Newsday article noted that an estimated 30,000 cubic yards of sand had been mined and 18 acres of land had been cleared by the time construction was halted. This unauthorized work has already had a significant unmitigated impact on the environment. Clearly it will take more than 4 months to both assess the environmental impact that have already occurred much less to evaluate the effects of future construction plans for the 28-acre site.

The site in question is in an environmentally-sensitive area based on its location in a deep flow recharge zone, which is ecologically part of the Long Island Pine Barrens. The Pine Barrens overlays and recharges a portion of a federally designated sole source

aquifer for Long Island's drinking water and therefore development of the property may cause significant hydrological and ecological impacts.

As such, in making any decisions with respect to the environmental setting, it will be necessary to carefully analyze the resources and features of the property, the impacts of the proposed development, the strategies that can be implemented to mitigate those impacts, and reasonable alternatives to U.S. Rail's proposed configuration of the site.

In this case, in particular, it will be necessary to carefully scrutinize the removal of sand between the land surface and the water table because the land surface is the uppermost expression of the groundwater system that acts as a filtering agent for water that is recharged into the aquifer.

In sum, a project of this size (28 acres) and intensity (11,000 square feet of rail trade and associated facilities and equipment) will require a comprehensive review and assessment of the many environmental impacts and potential mitigation measures, which will include, but not be limited to:

- a) The layout of the facility and whether there were other alternative layouts of the site to minimize disturbance to the environment and thereby create layer buffer areas.
- b) The grading of the property and the mining of materials that takes place in connection therewith. There is a significant change of grade from the northern portion of the property as you go south to the middle of the property. Based on the plans submitted by U.S. Rail it appears that the whole northern portion of the project would be lowered approximately ten feet. Such a proposed change in elevation would require a tremendous amount of grading.
- c) The traffic to be generated by the site and traffic mitigation measures (e.g., reconfiguration of the site, requirement of road widening and turning lanes) that might be required.

U.S. Rail has requested an extremely aggressive review schedule based on cases that are completely inappropriate. First, all of the cases cited involve "conditional approvals" pending environmental review. As you know, the Board recently announced a change in policy on handling construction petitions: the Board will no longer grant conditional approval while the environmental process is ongoing absent some "unique or compelling circumstances." See Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK, STB Finance Docket No. 34658 (served October 4, 2007) ("we believe that the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us.")

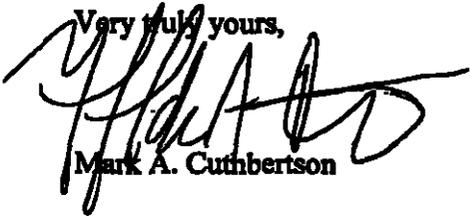
Second, not one of the cases cited as being "expedited" resulted in a final decision issued in less than one year. According to the Board's electronic database, Ellis County's petition for exemption (FD 33731) was filed on November 17, 1999 and final decision was not served until November 27, 2000; Alamo North Texas Railroad's petition for exemption (FD 34002) was filed on August 28, 2001 and final decision was not served until September 3, 2002; and Pemsicot County Port Authority's petition for exemption (FD 34117) was filed on April 3, 2002 and the final decision was not served until August 26, 2003. Perhaps the most egregious case of mischaracterization is the Southwest Gulf case (FD 34284), in which the petition for exemption was filed on February 27, 2003 and a final decision still has not been served. In fact, the final EIS was just filed on May 30, 2008. The "expedited" timelines in these cases clearly illustrate the impracticality of U.S. Rail's request.

Further, based on the Board's current caseload, the compressed environmental schedule is totally unreasonable. U.S. Rail is in effect asking the Board to give its petition higher priority than all others, including those that have been under review for years, without offering any rational justification for doing so.

Finally, the purported reason for the expedited schedule is because "Sills Group and US Rail have entered into commitments for the delivery of aggregate stone that contemplate that the rail construction will be approved during late 2008 and completed during early 2009." Petition at 17. The fact that the petitioners have entered into contracts without even preliminary authority from the STB to proceed (and – in fact – a directive from the Board to "cease and desist" all construction) is not a *reason* for the Board to now rush through its regulatory process. The process was designed to ensure public input and address environmental and safety concerns. Any inconvenience to U.S. Rail due to its own error in committing itself to an unreasonable timeline should not factor into the Board's analysis. It is also important to note that U.S. Rail began construction in July 2007 and was ordered to cease and desist in October 2007. It chose to wait 10 months since October 2007 to finally seek exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for authority to construct. Having made that choice, U.S. Rail is hard-pressed to justify the expedited schedule it now seeks.

For the reasons stated herein, Brookhaven respectfully requests that U.S. Rail's request for "expedited handling" be denied. Thank you for your consideration of this request.

Very truly yours,


Mark A. Cuthbertson

cc: James Savage, Esq.

CERTIFICATION OF SERVICE

I, Mark A. Cuthbertson, certify that on 2nd day of September, 2008, a copy of this document, as submitted to the Board via electronic filing, was sent via email to James Savage, (counsel for U.S. Rail Corporation).

LAW OFFICES OF MARK A.
CUTHBERTSON

By: 

Mark A. Cuthbertson
Of Counsel to Karen M. Wilutis,
Esq.

Town Attorney
Town of Brookhaven
Attorney for Respondent
434 New York Avenue
Huntington, New York 11743
631-351-3501

EXHIBIT A



Town of Brookhaven Long Island

Brian X. Foley, Supervisor

October 2, 2007

Surface Transportation Board
Attention: Nancy Beiter, Esq.
395 E Street, S.W.
Washington, DC 20423-001

Re: U.S. Rail Corporation Facility/Yaphank, New York

Dear Ms. Beiter:

The Town of Brookhaven, New York has been in communication with representatives of U.S. Rail Corporation ("U.S. Rail") concerning a proposed rail facility on property that they have leased in Yaphank, Town of Brookhaven, New York. U.S. Rail has alleged that as a common carrier railroad, their construction and operation of this "Rail Yard" is governed by federal law, rules and regulations and subject to the exclusive jurisdiction of the Surface Transportation Board. They, therefore, claim that local laws, rules and regulations have no applicability to this project. A copy of identical letters from their counsel, John D. Heffner, one faxed July 12, 2007 and the other received by mail on July 27, 2007 are attached.

Although representatives of the Town have demanded proof of that authority, such as a copy of any documents or exemptions, U.S. Rail has not provided them. They appear to be relying on their authority to act because they are an authorized rail corporation.

Without obtaining the necessary permits under New York State and Town of Brookhaven laws, rules and regulations, representatives of U.S. Rail have commenced clearing and possibly sand mining on the premises. We are particularly disturbed that apparently no environmental review under either NEPA or New York State's SEQRA was undertaken.

Department of Law
Robert F. Quinlan, Town Attorney
One Independence Hill • Farmingville • NY 11738 • Phone (631) 451-6500 • Fax (631) 698-4489 • Fax (631) 451-6505
www.brookhaven.org

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

Surface Transportation Board
Attention: Nancy Beiter, Esq.
October 2, 2007
Page -2-

Re. US Rail Corporation Facility/Yaphank, New York

The Town realizes that if U.S. Rail is acting under the authority of the Surface Transportation Board, than their actions may be justified. As we have not received adequate documentation from U.S. Rail or their counsel to prove their authority, the Town of Brookhaven will be filing a formal petition for a declaratory order with the Surface Transportation Board shortly.

The purpose of this letter is to advise you of that intended action as well as to ascertain if there is any existing process initiated by U.S. Rail on this action.

Very truly yours,



Robert F. Quinlan
Town Attorney

RFQ:dah
Enclosures

newsday.com/news/local/ny-lirail0927,0,3592796 story

Newsday.com

Work started for Yaphank rail site without approvals

BY JENNIFER SMITH AND ERIK GERMAN

jennifer.smith@newsday.com
erik.german@newsday.com

10:59 PM EDT, October 1, 2007

An Ohio rail company working with Long Island asphalt plant owners has cleared 18 acres in Yaphank and excavated mountains of sand in preparation for building a rail-to-truck transfer site -- without having sought any government approvals.

The state Department of Environmental Conservation has issued citations for mining without a permit to Watral Bros., the Bay Shore subcontractor preparing the site, and to the owner of the land -- Sills Road Realty, a consortium of local asphalt plant and construction business owners with offices in Syosset.

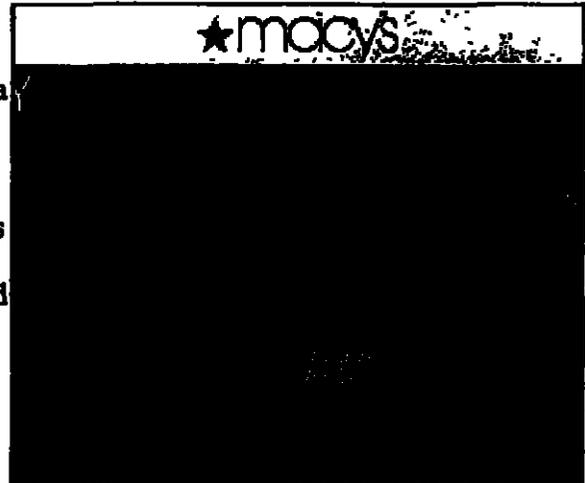
Work at the site was voluntarily halted by Wednesday evening, said DEC regional director Peter Scully. "The most serious concern is that a development project that calls for the clearing of a 28-acre site and the mining of hundreds of thousands of cubic yards of material could move forward without any environmental review," Scully said last week.

Federal defense

The railroad involved -- U.S. Rail Corp. of Toledo, Ohio, which has signed a 30-year lease with Sills Road Realty -- says federal law allows railroads to undertake such projects without state and local permits. Earlier this year, the same landowners attempted to set up their own railroad to operate a rail spur at the site only to abandon the tack when the process became "unduly complex and complicated," said Gerard Drumm, the chief financial officer and council for Sills Road Realty. And this summer, the state rejected the company's bid for rail bond funding in part because the Department of Transportation didn't have evidence that Sills Road Realty or U.S. Rail were authorized to operate as rail companies in the state.

The DEC visited the Yaphank site Monday to make sure work had not resumed, said Scully. Drumm and U.S. Rail president Gabriel Hall said their companies are "in discussions" with the DEC about the citations, which could lead to an administrative hearing if the parties cannot resolve their differences.

A big haul



Brookhaven town spokesman Tom Burke said a town inspector estimated about 1,000 cubic yards of sand was being removed from the site each day. "Judging by the size of the hole it could have been going on for six weeks," Burke said. At that rate, at current prices, the sand could sell for \$330,000 to \$750,000.

"We're not a sand-mining operation," said Drumm. "We're excavating for a construction project... under state law that isn't mining." Drumm said Friday the sand was being sold.

Residents say they first learned of the project in late August, when they saw machinery toppling trees at the site, which is about a mile from homes.

"We had no clue who, when, where, what was going on," said Fran Hurley, president of the Yaphank Taxpayers and Civic Association. Hurley said residents are concerned about the traffic from the project, and whether the excavation could affect groundwater resources deep below the site.

Representatives of U.S. Rail and Sills Road Realty say they have communicated a number of times with the town and that they are working to address residents' concerns.

Drumm said the industrially zoned site is suited for their facility because it is close to the LIE. He added that it also lies within the town's Empire Zone -- an area where businesses get state tax credits for ventures that attract capital and create jobs. He also said the facility would reduce local truck traffic.

Sills Road Realty first discussed the project with Brookhaven officials in January. They then met with the Suffolk planning department, Drumm said. Town and county officials characterized the discussions as preliminary.

Quite a surprise

County public works department's chief engineer William Hillman said his department had no idea that work had started until late August, when they saw bulldozers in action. Hurley said the company only met with her group after she contacted them herself.

Brookhaven town spokesman Burke said the town exercised "due diligence" and recommended that the railroad contact local civic groups.

U.S. Rail told Brookhaven officials in a July 12 letter that they intended to start work in the next 30 days. On July 20, town officials met with a project backer, who they said repeated that they could bypass local and state controls because railroads are overseen by the federal Surface Transportation Board. Said Burke: "It is arguable whether the town should have demanded to see the exemption, but it certainly exists in law and... we presumed they qualified for the exemption," Burke said.

Earlier this year Sills Road Realty had tried to set up its own short-line rail company under the name Suffolk and Southern Rail Road. In May, Suffolk and Southern filed a notice of exemption with the Surface Transportation Board seeking federal authority for the project. But the board indicated that the project would require Board authorization -- as well as an environmental review.

Fall into disfavor

That's when Suffolk and Southern withdrew its application. The board's decision in the matter, released last week, said that it would "view with disfavor any future request for authority to commence rail operations of trackage at this location unless the construction of that trackage has first been authorized

by the Board."

U.S. Rail has not submitted filings on the Yaphank project to the Board. Railroad president Gabriel Hall said his company does not have to file a notice of exemption because U.S. Rail is already recognized by the Board as a common carrier in Ohio.

A Surface Transportation Board staff attorney said the board could not determine whether U.S. Rail has operating authority for the Yaphank project unless a complaint is filed. As of Monday, nobody had formally done so.

Copyright © 2007, Newsday Inc.