Before the

SURFACE TRANSPORTATION BOARD

STB Docket No. FD 36575

TOWNLINE RAIL TERMINAL, LLC
– CONSTRUCTION AND OPERATION OF A LINE OF RAILROAD –
IN SUFFOLK COUNTY, NY

TOWNLINE RAIL TERMINAL, LLC REPLY TO THE TOWNLINE ASSOCIATION PETITION FOR RECONSIDERATION

Justin J. Marks
Clark Hill PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

Eric M. Hocky
Clark Hill PLC
Two Commerce Square
2001 Market St.
Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Counsel for
Townline Rail Terminal, LLC

Dated: September 16, 2024

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TOWNLINE RAIL TERMINAL, LLC REPLY TO THE TOWNLINE ASSOCIATION PETITION FOR RECONSIDERATION

Townline Rail Terminal, LLC ("Townline Rail") respectfully requests that the Board deny the Petition for Reconsideration ("Petition") filed by The Townline Association (the "Association") asking the Board to reconsider its August 15 decision granting Townline Rail authority to construct a 5,000 common carrier line along the Long Island Railroad Port Jefferson Line because the Board did not commit material error and the Association has presented no new evidence or changed circumstances. The Board properly reviewed the potential impacts of Townline Rail's proposed line and reasonably concluded that the negative environmental impacts previously alleged (and repeated in the Petition) by the Association are not reasonably foreseeable.

The Association has provided no new information to justify a reversal of the Board's Decision served on August 15. What the Association does do is regurgitate its misleading and unsubstantiated rhetoric from prior submissions that are nothing more than a "greatest hits" of its prior arguments – arguments that have repeatedly been debunked and dismissed.

I. BACKGROUND

This Petition for Reconsideration is the Association's third attempt to convince the Board to reject or delay approval of the Townline Rail Proposed Line. The Board rejected the Association's April 4, 2023, Verified Motion to Dismiss and its May 3, 2023 "supplemental

evidence." Forty-one days following OEA's issuance of the Final Environmental Assessment ("Final EA"), the Association again sought to delay a Board decision granting construction authority by filing a Petition asking for a Supplemental EA or an Environmental Impact Statement ("EIS"). The Board soundly rejected the Association's arguments in its decision granting Townline Rail authority to construct and operate its Proposed Line in its decision served on August 15, 2024.

In addition, the Association filed initial comments in the environmental docket on March 3, 2023 and filed a response to the Draft EA on February 5, 2024. It also filed letters to former Chairman Oberman on three separate occasions: February 1, 2023; February 14, 2023, and April 10, 2023. Finally, on at least twenty-eight occasions, the Association filed letters on behalf of other parties and signatures to its petition opposing the project.

Now, following the issuance of a Final EA and the Board's decision granting Townline Rail authority to construct and operate the Proposed Line, the Association returns to the Board to make the same failed arguments as it has in prior filings before the Board.

The Association's Petition for Reconsideration argues three points in its request for reconsideration. First, it (again) argues that the Board erred in not requiring an Environmental Impact Statement or a Supplemental EA.[1] Second, the Association argues that the Board committed material error in issuing the Final EA because OEA failed to account for groundwater impacts and possible hazardous waste contamination.[2] Finally, the Association argues that OEA failed to engage in reasoned decision-making due to "illegal activity" of Carlson Associates that it attempts to attribute to Carlson Corp.[3]

[1] Association Petition for Reconsideration at 2.
[2] *Id.* at 3 - 4.
[3] *Id.* at 7.

II. THE LEGAL STANDARD

A. Petitions for Reconsideration

Under 49 U.S.C. § 1322(c) and 49 C.F.R. § 1115.3(b), a petition for consideration will be granted "only upon a showing" that (1) the prior action will be affected materially because of new evidence or changed circumstances; or (2) the prior action involves material error.

A petition claiming material error, requires the petitioner to "do more than simply make a general allegation; it must substantiate its claim of material error."[4] Further, "no matter which type of reconsideration claim is presented (new evidence, changed circumstances, or material error), the alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reconsideration to be granted."[5]

B. National Environmental Policy Act

The National Environmental Policy Act of 1969 ("NEPA") requires agencies to take a "hard look" at environmental consequences before an agency undertakes a major federal action that will affect the environment.[6]

Under 49 C.F.R. § 1105.6(d), the Board may review a construction project as an Environmental Assessment ("EA") in place of an Environmental Impact Statement ("EIS") if a "particular proposal is not likely to have a significant environmental impact."[7]

An agency is required to supplement an EA when there "are significant new circumstances or information about the proposed action that are relevant to environmental concerns."[8] Agencies

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[4] *R.J. Corman R.R. Property, LLC – Abandonment Exemption – In Scott, Campbell, and Anderson Counties, Tenn.*, STB Docket No. AB 1296X, slip op. at 4, (served May 3, 2021); *citing Canadian Pac. Ry. – Control – Dakota, Minn. & E. R.R.,* STB Finance Docket No. 35081, slip op. at 4 (served May 7, 2009).
[5] *See Montezuma Grain Co. v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003).
[6] *See generally, Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989).
[7] *See also,* 40 C.F.R. § 1508.1(j).
[8] 40 C.F.R. § 1502.9(d)(1)(ii).

are to apply a "rule of reason" as to whether a supplemental EA is necessary.[9] "Application of the 'rule of reason' thus turns on the value of the new information to the still pending decision-making process."[10]

As part of its environmental analysis, OEA analyzes the effects or impacts of a proposed action that are reasonably foreseeable. "Reasonably foreseeable means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."[11]

The Association states that when reviewing the adequacy of an agency decision, a court will consider if the agency action is arbitrary and capricious. But, the Association does not explain that on appeal, "Courts apply a "rule of reason" standard and "will not insert their judgment (or that of petitioners), in place of the agency's where the agency has followed the appropriate procedures and its conclusions are reasonable." [12]

III. ARGUMENT

A. The Association does not present new evidence or changed circumstances.

The Association provides no basis for reconsideration based on new evidence or changed circumstances considering that its arguments are a "wash, rinse, and repeat" of its prior arguments. The Association admits this to be true where it states, "[a]s explained in Petitioner's Previous Petition."[13] Because the Association is not seeking Board reconsideration based on new

[9] *Greater Gila Biodiversity Project v. U.S. Forest Serv.*, 926 F. Supp. 914, 916–17 (D. Ariz. 1994).
[10] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989).
[11] 40 C.F.R. § 1508.1(ii).
[12] *San Jacinto Rail Limited Construction Exemption and The Burlington Northern and Santa Fe Railway Company Operation Exemption – Build-Out to the Bayport Loop Near Houston, Harris County, TX,* STB Finance Docket No. 34079, slip op at 7 n. 19 (*citing Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)).
[13] Association Petition for Reconsideration at 4.

information or a change in circumstances, the Board need not consider this prong of the legal standard.

B. The Board did not commit material error in granting Townline Rail authority to construct and operate 5,000 feet of common carrier rail line because the Board exercised reasonable decision-making.

In this case, the legal standard for the Board's NEPA review of the Townline Rail Petition is generally a question of reasonableness: (1) whether to forego a supplemental EA (rule of reason), (2) whether OEA should consider the Association's alleged environmental impacts (reasonable foreseeability), and (2) whether the Board engaged in reasoned decision-making. Here, the Board acted reasonably and therefore did not commit material error because the Association's environmental impact evidence is irrelevant, unpersuasive, and as for the Association's attempt to attribute Carlson Associates environmental issues to Carlson Corp – false and irrelevant.

1. The Board did not commit material error in denying the Association's petition for a supplemental EA because the Association's "new information" provided no value due to the fact that it is irrelevant to the Proposed Line.

Under the rule of reason, the Board is to consider new information based on the value of that new information. The Association's "new information" has no value because it is irrelevant. As explained in Townline Rail's Reply to the Association's petition for a supplemental EA, the 2018 Grand Jury report that the Association claims as new evidence has nothing to do with the Carlson Corp Property and nothing to do with any of the principals of Carlson Corp or Townline Rail.[14] In the Association's Petition for Reconsideration, the Association does not even acknowledge Townline Rail's reply to the Association's previous petition. Instead, the Association repeats the same irrelevant argument. Because the Association did not provide any

[14] *See* Townline Rail July 26, 2024, Reply at 6-7, 13.

relevant new evidence, the Board did not commit material error by not conducting a supplemental EA.

2. The Board did not commit material error in reviewing the Townline Rail's Proposed Line under an EA instead of an EIS because the Proposed Line will not have a significant environmental impact.

The Board did not commit material error in reviewing the Townline Rail project under an EA because the Board reasonably concluded that it was not likely to have a significant environmental impact. The Board disregarded the Association's argument for an EIS in its decision rejecting the Association's Motion to Dismiss; it rejected it again it in its decision granting Townline Rail its construction and operating authority and the Board should reject it for a third time because the Association presents no credible evidence that the Proposed Line will have a significant environmental impact requiring an EIS.

3. The Board did not commit material error in the EA related to its analysis of the aquifer, mining, and hazardous material spills because the impacts claimed by the Association are not reasonably foreseeable.

The Board did not commit material error in the EA because none of the impacts asserted by the Association are reasonably foreseeable. First, in addition to conducting its own analysis, OEA consulted with state and local agencies seeking opinions on the potential environmental impact of the project. No agency raised the concerns that the Association is breathlessly claiming as potential impacts. Second, OEA received and responded to public comments. Nothing in those comments presented reasonably foreseeable impacts and the Board correctly issued its Final EA and then its decision granting Townline Rail construction and operating authority.

4. The Board engaged in "reasoned decision-making" in its approval of the Townline Rail Proposed Line.

The Board engaged in reasoned decision-making in issuing its Final EA and granting Townline Rail construction and operating authority. As stated above, in reviewing agency decision

making, a court applies a rule of reason standard and will not insert their judgement or those of a petitioner in place of an agency where the agency has followed appropriate procedures. The Board has followed all of the appropriate procedures through its development of the Townline Rail EA and therefore engaged in reasoned decision-making.

C. The Board should reject the Association's Petition for Reconsideration because the Association lacks credibility after its repeated use of misleading and unsubstantiated arguments.

Throughout this proceeding, the Association has employed a litany of statements in support of its arguments that have failed to stand up to scrutiny and the Association's tactics continue in this Petition for Reconsideration. Not satisfied with merely copying and pasting prior arguments,[15] the Association purposefully ignores the differentiation between Carlson Corp and Carlson Associates in an attempt to smear Carlson Corp. The Association states, "CA Rich raised serious concerns with the FEA, concerns only compounded *by the site-owner Carlson Associates*' well-documented and repeated violations of New York state law." (emphasis added).[16] The Association later continues, "[a]dding insult to injury, it was Carlson Associates itself that engaged in illegal sand mining in the footprint, was convicted of doing so, and fined." (emphasis added).[17]

The Association previously made similar comments in its February 5 comment to the Draft EA and in the Association's petition for a Supplemental EA or an EIS. Townline Rail refuted this argument in the Townline Rail Reply to the Association's Petition for a Supplemental EA or EIS.[18] Townline Rail explained the differences between Carlson Corp and Carlson Associates as well as the fact that Toby Carlson assumed the liability of Carlson Associates in order to obtain his own

[15] *See* the Association's February 5 Environmental Comment, the Association's Petition for a Supplemental EA or EIS, and now the Association's Petition for Reconsideration.
[16] Association Petition for Reconsideration at 6.
[17] *Id.*
[18] *See* Townline Rail July 26, 2024, Reply at 7-9, 13.

state permitting under his own company. Mr. Carlson voluntarily assumed the liability, meaning he did not commit, and was not otherwise liable for, the acts of Carlson Associates. Yet, the Association willfully ignored Townline Rail's previous reply and it does not attempt to rebut Townline Rail's explanation. Instead, it doubles down on its attempts to cast Carlson Corp as an environmental bad actor.

Misleading and unsubstantiated statements are clearly nothing new for the Association. Dating back to its April 4, 2023 Verified Motion to Dismiss, the Association claimed to lack notice of the proposed line.[19] In response, Townline Rail explained that members of the Association did in fact have ample notice as evidenced by (1) the Association's comments in the docket even before the Board opened the comment period; (2) the fact that the Association provided comments on the Town of Smithtown Comprehensive Plan publicly opposing the rail components of the plan; and (3) a named individual on the Association's Verified Motion to Dismiss was quoted in the local press opposing the project three months before Townline Rail even filed its petition for exemption.[20]

Recall as well that the Association's public relations campaign to "STOP Carlson Corp Freight Yard" whereby the Association sought to generate community opposition by telling their neighbors that an "Endless caravan of diesel freight trains & container trucks will come and go all hours of the night, idling all day, causing noise, fumes, pollution, vibrations, additional trucks, road congestion, traffic hazards, innumerable health risks, and more injurious outcomes."[21]

[19] Verified Motion to Dismiss of Townline Association, Inc., et al. at 5.
[20] *Townline Rail* April 24, 2023, Reply to the Verified Motion to Dismiss of Townline Association, Inc., et al. at 7 – 9.
[21] *Townline Rail* April 24, 2023, Reply to the Verified Motion to Dismiss of Townline Association, Inc., et al. at 9 – 10.

Once OEA issued the Draft EA, it became clear that the Association's prior environmental claims lacked merit. It was then that the Association introduced as "new evidence" the irrelevant 2018 Grand Jury report and baseless claims of environmental crimes by Carlson Corp. The Board should reject the Association's Petition for Reconsideration because its arguments are both irrelevant and false. Therefore, the Association has failed meet the standard to demonstrate that the Board committed material error.

CONCLUSION

In conclusion, Townline Rail respectfully requests that the Board deny the Association's Petition for Reconsideration because the Board did not commit material error since it executed its environmental obligations well within the legal standards of NEPA.

Respectfully submitted,

Eric M. Hocky
Clark Hill PLC
Two Commerce Square
2001 Market St. Suite 2620
Philadelphia, PA 19103
(215) 640-8523
ehocky@clarkhill.com

Justin J. Marks
Clark Hill PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com

Counsel for
Townline Rail Terminal, LLC

Dated: September 16, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2024, I caused a copy of the foregoing to be served on all parties of record by email or first-class mail.

Justin J. Marks
CLARK HILL PLC
1001 Pennsylvania Ave. N.W.
Suite 1300 South
Washington, DC 20004
(202) 772-0916
jmarks@clarkhill.com