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 ASSOCIATION PETITION FOR RECONSIDERATION

The Townline Association ("TA" or "Petitioner"), pursuant to 49 C.F.R. § 1115.3, hereby respectfully petitions the Surface Transportation Board ("STB" or "Board") to reconsider its Decision of August 14, 2024 (the "Decision"), which authorized Townline Rail Terminal, LLC ("Townline Rail") to construct and operate a new rail line in Smithtown, Suffolk County, New York, subject to certain conditions. In that Decision, the Board concluded that allowing such construction would not significantly impact the quality of the human environment or the conservation of energy resources, however that conclusion was not supported by sufficient study or explanation of the subject. The TA respectfully disagrees with the Board's Decision, and believes it is based on a combination of (a) an inadequate study of the potentially dire consequences of allowing such construction; and (b) materially inadequate conclusions related thereto, as well as inadequate explanation of its conclusions. With that in mind, Petitioner respectfully prays the Board will reconsider that Decision before it is too late.

Petitioner is a nonprofit 501(c)3 grassroots organization dedicated to protecting the quality of life of residents in the Huntington and Smithtown Townships. Founded in the year 2000, TA has diligently pursued efforts to protect the area, embracing appropriate development including that of

a masonry supply business, a plant nursery, a sports complex, and a solar farm, even as TA strives to fight inappropriate development likely to hurt the environment and the community, as here. TA's goal is to ensure a harmonious balance between land use in the Old Northport Road and Townline Road area and the residential neighborhoods of the Town of Smithtown and the Town of Huntington.

As the Board is aware, TA first moved on April 4, 2023 to dismiss Townline Rail's petition for exemption, arguing that the Board lacks jurisdiction over the project, and that, were the Board to have jurisdiction, the project nonetheless would be inappropriate for exemption. TA filed another petition on July 18, 2024, which sought a Supplemental Environmental Assessment ("Supplemental EA") or Environmental Impact Statement ("EIS"), which request the Board denied through its August 14, 2024 Decision allowing construction to proceed. Even as it rendered that Decision, the Board noted outcry from numerous community members that the project will hurt the surrounding environment, will deleteriously affect nearby residential neighborhoods and schools, and will cause traffic congestion.

Respectfully, as TA has emphasized previously, the Board has failed to take the required "hard look" at the potentially horrendous results of this project or engaged in the necessary "reasoned decisionmaking," and as a result is poised to inflict great harm on the surrounding community if it does not change course. Below, TA outlines why it is imperative that the Board reconsider.

I. The Board Unambiguously is Required to Produce an Environmental Impact Statement or Supplement EA, and Has Not Done So.

This Board has made a grave error in concluding "the Draft EA and Final EA adequately identify and assess the environmental impacts discovered during the course of the environmental review and include appropriate environmental mitigation to avoid or minimize potential

environmental impacts." *Decision* at 6. It is simply unambiguous that the National Environmental Policy Act ("NEPA") requires the Board to prepare a detailed EIS for all "major Federal actions significantly affecting the quality of the human environment," as here. *See, e.g.*, *Blue Mountains Biodiversity Project v. Blackwood*, 161 F3d 1208, 1212 (9th Cir. 1998). The rationale behind that certain requirement is to "ensure[] that the agency will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Id*. (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,349 (1989)). Put simply, the very point of NEPA's certain and stringent requirement is to "ensure[] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v Methow Valley Citizens Council*, 349.

TA respectfully submits that, in failing to produce the EIS or Supplemental EA and in authorizing this project to proceed without same, the Board is failing to consider those "important effects," relying instead on the Final Environmental Assessment's ("FEA") inadequate examination of, *inter alia*, illegal sand mining and possible illegal dumping on the project footprint. Were this project allowed to proceed, it would significantly impact the quality of the human environment for the community surrounding this action. Those consequences are detailed in the next section.

II. The FEA Failed to Consider Potentially Numerous Environmental Disasters to be Caused by this Project.

In accepting the FEA *in lieu* of an EIS, rather than as a precursor to a necessarily more comprehensive EIS, the Board has failed to account for numerous problems that are likely to be visited on area residents and on the broader environment if the project proceeds. Those readily identifiable errors are detailed below, including that the Office of Environmental Analysis

("OEA") (a) failed to account properly for any effect on groundwater (and therefore area drinking water); and, (b) failed to account for potentially unleashing toxic substances in the construction process, both because the area could contain hazardous waste materials, and because at least eight spills of toxic substances have already been located on the Townline Rail site.

A. Aquifer

As explained in Petitioner's previous Petition, in an effort to show the Board the gaps in its own environmental inquiries, TA retained hydrogeologists CA RICH Geology Services, D.P.C. dba CA RICH Consultants ("CA RICH") of Plainview, New York. 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. In particular, CA RICH emphasized the site is situated directly within Long Island's sensitive Hydrogeologic Zone I Deep Flow Recharge Area (Zone I), and pointedly disagreed with OEA's assessment that the project "would have no impacts on groundwater." *See*, Chapter 3, Section 3.8, *Draft EA*. In stark contrast to OEA's inadequate evaluations, CA RICH concluded that construction of the line, and the ongoing use thereof, could cause serious problems both for underlying deep flow recharge and for groundwater quality.

CA RICH additionally highlighted the community could fall prey to countless health risks attributable to accidental or incidental spills and/or discharges of hazardous materials, and given the relatively exposed nature of the proposed site. Among the offending discharges are incinerator ash, petroleum, and miscellaneous residues from C&D materials. Additionally, it is wholly unknown and unstudied whether and to what degree removing vegetation from the land surface at the site, as proposed, will change groundwater recharge patterns. Rainfall evapotranspiration rates decrease when vegetation is lacking, increasing recharge and ponding volumes after storm events.

Absent the "hard look" required by an EIS, neither the community nor the Board can know what will happen to the aquifer as a result of this project. Any EIS would have to prioritize mapping the local water table configuration, defining shallow groundwater quality and determining the depth to the underlying Magothy Aquifer (Zone I). Rather than properly study the aquifer, OEA's Water Resources Response to the EA Comments simply dismisses this issue. OEA claims that the "environmental impacts identified are minor and can be appropriately addressed with OEAs final recommended mitigation" but it cannot know that without comprehensive studying those potential impacts. *See*, *FEA Appendices*, 136 (June 2, 2024). It simply is impossible to determine which problems merit mitigation and over what period, without a proper study of the problems themselves. There has been no site-specific groundwater data gathered to support OEA's conclusion that there will be "no impacts" – instead there has been no comprehensive study. Independent of an EIS, even a typical EA would investigate site-specific groundwater conditions given the hydrogeologic sensitivity of this unique property to the drinking water Magothy aquifer directly beneath it, and the fact that it is an Article 7 protected site.

B. Mining

OEA's EA additionally failed to adequately assess the effect of rampant and illegal mining on the site. Maps of the area clearly demonstrate that illegal sand mining with unverifiable fill took place immediately on this site. This includes illegal sand mining at the northwest corner of the proposed rail line's footprint where the spur enters the area, as well as additional illegal mining in the east. A serious concern regarding illegal sand mining on Long Island, as noted, is that large holes in the ground become opportunities for illegal dumping, as those excavated areas provide attractive disposal sites for other types of dangerous materials, such as solid waste, liquid waste, and C&D material.

A Grand Jury Report noted illegal dumping was rampant in Suffolk County, especially as a way to fill and hide these illegal sand mining operations, and the evidence establishes that this site specifically was illegally sand-mined, and therefore the land was undeniably filled without any supervision by the proper regulatory authorities – and without any way to know, in the abstract, what potentially hazardous materials filled the holes. See*, e.g.*, *Suffolk County Grand Jury Report*, 18 (Aug. 2, 2019). Adding insult to injury, it was Carlson Associates itself that engaged in illegal sand mining in the footprint, was convicted of doing so, and fined. Neither the illegal sand mining itself, nor its potentially disastrous aftereffects (*e.g.*, toxic substances filling holes) was sufficiently considered in the draft EA. At even the most base level, it is unclear that this land, made artificially porous over decades of mining, can support the weight of a train line. Empty freight cars weigh 30 tons. According to the Townline Rail, freight cars can carry 100 tons once filled, totaling 130 tons; the plan shows a 161 freight-car capacity. This type of heavy activity can lead to operational issues and most importantly disruption of the sensitive aquifer area below the rail line.

Neither the community nor the Board can know the effect of decades of mining without comprehensively studying the same.

C. Spills

Were the possible hazards of toxic fill in illegal mine holes not enough, there have been multiple – at least eight – documented cases of spills on Townline Rail's property, including spills of petroleum. Potential uncontrolled emissions involving carbon monoxide, nitrogen dioxide, and sulfur dioxide have also been reported. Nothing has been done, either as part of the EA or the Board's Decision, to ensure these spills did not occur in the footprint and will not further contaminate the vital aquifers on which the site sits if it were to be the site of new construction or a new rail line.

III. OEA Failed to Engage in "Reasoned Decisionmaking" in Accordance with the Administrative Procedure Act When Addressing the Above-Mentioned Significant Environmental Issues.

The courts will set aside an agency order only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agencies' obligation to engage in "**reasoned decisionmaking**" means that "[n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). Although "a court is not to substitute its judgment for that of the agency," the arbitrary and capricious standard demands that the agency "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). An agency action is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*

Courts owe no deference to the STB's interpretations of NEPA. *See Grand Canyon Tr. v. FAA*, 290 F.3d 339, 341 (D.C. Cir. 2002) (as amended Aug. 27, 2002), Although federal agencies have discretion to decide whether a proposed action "is significant enough to warrant preparation of an EIS," the court owes no deference to the STB's interpretation of NEPA or the CEQ regulations because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to the STB alone. *Citizens Against Rails-to-Trails v. Surface Transportation Board,* 267 F.3d 1144, 1150 (D.C. Cir. 2001); *see Amfac Resorts, LLC v. United States Dep't. of Interior,* 282 F.3d 818, 835 (D.C. Cir. 2002); *cf. Al-Fayed v. CIA,* 254 F.3d 300, 307 (D.C. Cir. 2001).

Here, in response to TA's concerns about illegal sand mining and possible illegal dumping in the footprint which lies on top of the aquifer, OEA merely explained that it "relied on a database search to determine contamination from past releases. As detailed in Chapter 3, Section 3.10 of the Draft EA, OEA's research into the records of contamination did not find any evidence of violations within the footprint of the Proposed Action." FEA, Appendix G, at G-30. OEA gave this incredibly significant environmental concern no other mention. *See, e.g.*, *Clark Cnty., Nev. v. F.A.A.*, 522 F.3d 437, 441–42 (D.C. Cir. 2008) (citing an inadequate explanation of conclusions as to potential hazards in determining the Federal Aviation Administration had failed to meet the "reasoned decisionmaking" requirement).This search of a database of known hazardous spills clearly would not divulge any hazardous materials in the footprint from illegal activity as the illegal sand mining was completely unsupervised and undocumented by its very nature. Therefore, OEA is only relying on a resource that clearly has no use in this instance with respect to the illegal sand mining and possible illegal dumping which commonly accompanies this illicit activity.

Carlson Associates was found to be in violation of New York Environmental Conservation Law Section 23-2711(1) and Section 421.1 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York in 1990; fined $125,500; and ordered to reclaim the site within sixty (60) days of the New York State Department of Environmental Conservation's ("DEC") receipt of an approved reclamation plan. This was not completed until October 2018 – 28 years later. See Mine Inspection Record attached to Townline Pet. to Issue Supplemental EA or EIS, 308480, Exhibit F (July 28, 2024). The years between 1990 and 2018 were filled with appeals, investigations into continued illegal sand mining, and rejected, revised and modified plans. During the reclamation process, the DEC's sole focus was on slope construction, not whether the mines were refilled with clean fill or compacted properly during the 28 years it took to finally comply

with the DEC's order. The question about what filled this illegal sand mining area during this process, not to mention the activity before DEC became involved, raises grave concerns about the possibility of hazardous materials and improperly compacted fill in the project footprint.

However, OEA did not see fit to examine this detail other than to run a database search which could not possibly provide any information on this illegal activity as this illegal activity was obviously unknown to the proper authorities. This failure to examine this illegal activity on this extremely delicate aquifer area clearly cannot meet the "reasoned decisionmaking" standard as there was essentially no examination.

IV. Conclusion

For the foregoing reasons and with the utmost respect for the Board and its remit, Petitioner implores the Board to reconsider, recognizing that allowing this project to proceed without further analysis and oversight may hurt this community and its environment for years to come. Any environmental damage may be irreversible, but the Board's Decision here is not.

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
John H. Kester
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 620
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com
Attorneys for Townline Association

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Certificate of Service

I certify that I have, on this 4th day of September 2024, served by the most efficient means copies of the foregoing document on all parties of record.

/s/ Daniel R Elliott
Daniel R. Elliott