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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 A SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT OR AN ENVIRONMENTAL IMPACT STATEMENT

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Dated: July 26, 2024

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Townline Rail Terminal, LLC ("Townline Rail") respectfully requests that the Board reject the Petition filed by The Townline Association (the "Association") asking the Board to supplement the Office of Environmental Analysis ("OEA") Final Environmental Assessment ("Final EA" or "FEA") or to instead conduct an Environmental Impact Statement ("EIS").

As a preliminary matter, despite the title, the Association's Petition is clearly an appeal of the OEA Director's decision issuing a Final EA in this matter. The Association appeals to the Board "to take a second hard look at the environmental assessment"; it's filing calls the Final EA "recalcitrant" and argues that OEA's findings and recommended mitigation measures are "premature." These are not arguments to address "significant new and relevant circumstances" as the Association would have the Board believe. These are arguments appealing the OEA Director's decision to change its conclusions in the Final EA.

If the Association's filing is in fact an appeal, the Association has clearly missed the window for filing because it submitted this "Petition" forty-one (41) days after OEA issued the Final EA.

Under the legal standard asserted by the Association, OEA should prepare a supplemental EA or an EIS because the Association has presented "significant new and relevant circumstances and information." Even assuming this were the correct standard – which it is not – the Association does not present any new, much less significant, information. In its attempt to manufacture "new" information, the Association copies, pastes, and repackages its comments and legal argument from its February 5, 2024, letter to OEA responding to the Draft EA.

Where the Association does provide information that it has not previously presented, it submits an irrelevant Grand Jury Report from 2018 that is unrelated to this Townline Rail Petition. Not only is the report not new, but it does not relate to the property in question, and it has nothing to do with Townline Rail, Carlson Corp., or any of the principals of those companies.

Considering that the Association's appeal is well past the due date allowed for appeals and that it does not even meet the legal standard as proposed by the Association, Townline Rail respectfully requests that the Board reject the "Petition" filed by the Association 41 days after the OEA Director issued the Final EA.

I. BACKGROUND

A. The Association's "Petition" is an impermissible collateral attack on the OEA Director's decision issuing the Final EA and contains no information that has not already been presented or was not previously publicly available.

Townline Rail filed its Petition on November 17, 2022, seeking Board authority to construct and operate approximately 5000 feet of new common carrier track to provide a rail option for the of transport incinerator ash and construction and demolition debris off of Long Island as a potential solution the future closure of the Brookhaven Landfill. OEA began its review of the project in spring of 2022 and provided scoping letters to agencies and tribes on

June 22, 2022. It issued the Draft EA on January 5, 2024. The Draft EA granted commenters thirty (30) days to provide comment, with comments due on February 5, 2024.

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.

In addition to its comments in the environmental docket, the Association filed comments opposing the Townline Rail proposed line asserting negative environmental impacts via letter to then Chairman Oberman on three separate occasions: February 1, 2023; February 14, 2023, and April 10, 2023. Further, on at least twenty-eight occasions, the Association filed letters on behalf of other parties and signatures to its petition opposing the project.

On April 4, 2023, the Association filed a motion to dismiss the Townline Rail petition for exemption and then filed "supplemental evidence" on May 3, 2023. The Board denied the Association's motion to dismiss and rejected its supplementary evidentiary filing by decision served November 15, 2023.

The OEA Director issued a decision releasing the Final EA on June 7, 2024. In the Final EA, OEA outlined the potential environmental benefits of the projects as well as potential impacts of the project and recommended mitigation measures. OEA found that the comments received during the comment period did not require altering its conclusions in the Draft EA.

The Association – based on the statements in its latest "Petition" – clearly disagree and on July 18, 2024, the Association filed its appeal to the Board. The Association's response to the Final EA comes one hundred and sixty-four (164) days after the close of the comment period on the Draft EA and forty-one (41) days after the OEA Director issued a decision releasing the Final EA.

1. The Association's Petition is an attack on the Final EA.

The Association argues in its "Petition" that it is presenting to the Board significant new information that justifies a supplement to the Final EA. However, the Association's own statements and that of its consultant indicate that the Association's filing is not providing significant new information, instead it is clearly nothing more than an attack on and appeal of the Director's Decision issuing the Final EA.

In its "Petition", the Association's objects to the Final EA and appeals to OEA "to take a second (emphasis added) hard look at the environmental assessment."[1] It criticizes OEA stating that the "OEA claim *(sic)* that the 'environmental impacts identified are minor and can be appropriately addressed with OEAs final recommended mitigation… seems premature."[2] On the first five pages of the Association "Petition", the Association does nothing but summarize OEA's responses to the Association's comments to the Draft EA and then concludes that it "has specific concerns about these responses."[3] Further, the "Petition" states, that the Final EA, "did not make anything but a cursory examination of the aquifer which is clearly not the 'hard look' that is required."[4]

Additionally, the Association states that it sought "confirmation of these responses by OEA" after OEA issued the Final EA.[5] In order to appeal OEA's Final EA, the Association hired a consultant[6] that "disagrees with OEA's position in the FEA that the above-referenced

[1] Association "Petition" at 1.
[2] *Id.* at 16.
[3] *Id.* at 5.
[4] *Id.* at 23.
[5] *Id.* at 13-14.
[6] The Association also utilized this consultant to make similar arguments related to the aquifer in the Association's comment on the Draft EA filed with the Board on February 5, 2024. *See* Exhibit R (letter to the Association dated Mar. 5, 2023).

Proposed Action "would have no impacts on groundwater."[7] According to the consultant himself, "[f]urther, comment/criticism is offered in direct response (emphasis added) to OEA's continued and recalcitrant position in its final EA that the above-referenced Proposed Action concludes, without findings of fact from any on-site investigation, that it '*..would have no impacts on groundwater.*'[8] The consultant states that OEA's findings and recommended mitigation "seems premature" and asserts that OEA disregarded potential groundwater issues.[9]

2. Despite claiming to have "discovered certain concerning new significant information," the Association does not in-fact present any new information.

The Association states that it "has discovered certain concerning new information which warrants the issuance of a supplemental FEA or an EIS."[10] However, the only "new" information the Association provides is a 2018 Grand Jury report completely irrelevant to this proceeding. The Association cites the Grand Jury Report to discuss the aquifers underlying Long Island and to highlight unrelated illegal dumping and mining on Long Island.

Mysteriously, the Association fails to explain to the Board that the illegal activities detailed in the 2018 Grand Jury report have nothing to do with Carlson Corp property, the Townline Rail property, or any of the principals of Carlson Corp or Townline Rail.[11]

While the 2018 Grand Jury Report may be new to the record in this proceeding, information about the aquifer is not new. OEA studied issues related to groundwater as it would

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[7] Association "Petition" at 14.
[8] *Id.* at Exhibit C.
[9] *Id.*
[10] *Id* at 1.
[11] Denise Civiletti, *'Dirt brokers' dumped contaminated waste, solid waste at sites in Calverton, Riverside and 180 other locations: DA,* RIVERHEAD LOCAL, Nov. 27, 2018 *available at* https://riverheadlocal.com/2018/11/27/dirt-brokers-dumped-contaminated-waste-solid-waste-at-sites-in-calverton-riverside-and-18-other-locations/. This article provides a list of defendants (individuals and companies) indicted in the illegal dumping scheme detailed in the Grand Jury Report).

for any proposed action under its jurisdiction.[12] In addition, OEA already responded to the Association's comments related to the aquifer and illegal sand mining in response to the Association's February 5 comments on the Draft EA.[13]

3. The Association's repeated attempts to portray Carlson Corp. as an environmental bad actor does not amount to "new information."

In both its February 5 comment to the Draft EA and in the Association's "Petition," the Association attempts to cast Carlson Corp and Townline Rail in a nefarious light by implying that actions by Carlson Associates should be a negative indictment of Carlson Corp. and the Townline Rail proposed line. In its "Petition" appealing the Final EA, the Association, unhappy that OEA did not bite on the Association's innuendo, argues that the Final EA is therefore defective because it "did not adequately examine the very serious concerns about the illegal sand mining on the site or the unverifiable fill put into the resulting hole."[14]

According to the Association, and without any basis of support, it asserts that illegally mined portions of the property "was undeniably filled without any supervision by the proper regulatory authorities."[15] The Association also asserts that a "dearth of specific information" exists related to "Carlson Associates' mining, unverifiable fill, and hazardous spills"[16] The "Petition" states, "[c]ommentors identified a history of Carlson Corp violating state environmental laws and local ordinances."[17] And the Association accuses a "failure to disclose by Townline Rail Terminal."[18]

[12] Final EA at 49-50.
[13] Final EA, Exhibit G at G-21, G-28, G-30.
[14] Association "Petition" at 20.
[15] *Id.* at 19.
[16] *Id.* at 22-23.
[17] *Id.* at 3.
[18] *Id.* at 17.

The Association paints a dark picture but – like many of its assertions throughout this proceeding – it fails to provide the whole picture.

Carlson Corp and Townline Rail are owned by Toby Carlson. Toby's father, Henry Carlson controlled Carlson Associates. As provided in the Association's Exhibit B to its "Petition", "Stipulated Compliance Schedule and Settlement Agreement," Carlson Associates and Henry Carlson (not Carlson Corp. or Toby Carlson) were found to have violated certain New York State laws related to mining. Under the agreement with New York State, Toby Carlson (as an individual and guarantor) entered into an agreement to assume the liability of Carlson Associates and Henry Carlson whereby he agreed to enter into a compliance schedule to resolve Henry Carlson and Carlson Associates of liability. This included a requirement that Carlson Associates, Henry Carlson and Toby Carlson enter into a reclamation plan under state oversight regulating permitted fill material and financing DEC onsite monitoring.

In that same stipulation agreement, the New York State Department of Environmental Conservation ("NYS DEC") agreed to consider an application by Toby Carlson for a Validated Registration to conduct business on the property, which was later granted. "Continued compliance with [the settlement agreement] shall be a condition of any Validated Registration that DEC may issue Toby Carlson."[19]

As stated in its petition, Toby Carlson and Carlson Corp received NYS DEC permit to operate a waste transfer facility for the recycling and processing of recognizable uncontaminated concrete, asphalt pavement, rock, brick, and soil, woody yard waste, un-adulterated wood, yard

[19] *Id.* at Exhibit B.

waste, and horse manure.[20] NYS DEC continues to renew the permit and the facility currently operations under permit #1-4734-00304/00005 expiring on Feb 7, 2027.

In its attempt to demonize Carlson Corp and Toby Carlson, the Association does not mention that the only NYS DEC Notices of Violation date back to those of Henry Carlson. The Association also does not mention that NYS DEC monitored Mr. Carlson's mine reclamation. Further, the Association does not bring to the Board's attention that groundwater on the project property is monitored by the NYS DEC. Under NYS DEC Programs (effective July 2023) registered or permitted mulch and/or compost facilities are required to engage in a groundwater monitoring program to evaluate potential impacts from site activities. As such groundwater at the Carlson Corp. property – because it is a mulching facility – is also under NYS DEC oversight.[21]

Far from operating without regulatory supervision, Toby Carlson (and Carlson Corp) has been operating under NYS DEC oversight. First, he has done so by assuming the liability of Henry Carlson and Carlson and Associates, thus assuming responsibility for reclamation under the oversight of the NYS DEC. And he continues to be under regulatory supervision through NYS DEC permitting of his facility.

II. ARGUMENT

A. The Legal Standard for Appeals of a Director's Decision

Under 49 C.F.R. §1105.2, the Board delegates authority for developing environmental documents to the Director of OEA. Section 1105.2 allows for appeals to the Board. Under this section, appeals of a director's decision operating under delegated authority is governed by

[20] Townline Rail Terminal, LLC Petition for Exemption, *Townline Rail Terminal, LLC – Construction and Operation of a Line of Railroad – in Suffolk County, NY,* STB Finance Docket No. 36575 (filed Nov. 17, 2022).
[21] N.Y. Comp. Codes R. & Regs. tit. 6, § 361-4.6.

section 1115.1(c). Under section 1115.1(c), appeals must be filed within 10 days of the date of the action and responses to appeals must be filed within 10 days thereafter.[22] Appeals of director decisions "are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice."[23]

B. The Association's "Petition" is an appeal and was not filed within the required ten-day time frame for appeals to a director's decision.

The Association's "Petition" should be rejected because the Association has filed 31-days after the due date for appeals.

The Association calls its appeal a "Petition" and establishes for itself a legal standard based on 40 C.F.R. §1502.9(c)(1)(ii) that a supplement is appropriate for "significant new circumstances or information relevant to environmental concerns." Even though, the Association bases its entire "Petition" on presenting significant new information, it fails to provide any new information much less any significant information.

However, what the Association does provide the Board is attack after attack on the OEA Director's issuance of a Final EA. For example, the Association asks OEA "to take a second hard look at the environmental assessment."[24] Additionally, the Association summarizes OEA's responses to its comments on the Draft EA and concludes, that it "has specific concerns about these responses."[25]

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[22] *See Tongue River Railroad Co. – Construction and Operation – Western Alignment*, STB Financed Docket No. 30186 (Sub-No. 3), 1998 WL 177707 (served Apr. 16, 1998). This Townline Rail Reply is timely because Townline Rail is filing eight days after the Association submitted its "Petition" appealing the OEA Director's decision issuing the Final EA.
[23] 49 C.F.R. §1115.1(c).
[24] Association "Petition" at 1.
[25] *Id.* at 5.

Further, the Association criticizes OEA stating that it, "did not make anything but a cursory examination of the aquifer which is clearly not the 'hard look' that is required.[26] Here, the Association cites two NEPA cases in its attack on the Director's decision granting the Final EA.[27] However, those two cited cases are clearly inapplicable in that they both relate to oil and gas drilling and threats that drilling could pierce an aquifer, not to the operation of rail cars over 5,000 feet of track in an industrialized area.

Finally, the Association hired a consultant who states, "[f]urther, comment/criticism is offered in direct response (emphasis added) to OEA's continued and recalcitrant position in its final EA that the above-referenced Proposed Action concludes, without findings of fact from any on-site investigation, that it '*..would have no impacts on groundwater."*[28] These comments by the Association attacking OEA and the Final EA, without providing any new information, are clearly intended to persuade the Board to overturn the OEA Director's order issuing a Final EA.

The Board should find that the Association's filing is not a "Petition," but is an appeal to the OEA Director's order issuing the Final EA cloaked as a "Petition." Upon finding that the Petition is an appeal, the Board can dismiss it for failing to meet the Board's rules for filing an appeal to a director's decision.

The Association filed its "Petition" on July 18, forty-one days after OEA issued its Final EA decision. Under 49 C.F.R. §1115.1(c), a party has ten days to appeal a director's decision. Here, the Association failed to do so within the required timeframe and did not request leave to file a late appeal. Instead, the Association cloaked their appeal as a "Petition." Because the

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[26] *Id.* at 23.
[27] *See* Association "Petition" at 22 (*citing New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 715 (10th Cir. 2009); Gifford Pinchot Task Force v. Perez, No. 03:13-CV-00810-HZ, 2014 WL 3019165, *32 (D. Or. July 3, 2014)).
[28] *Id.* at Exhibit C.

Association failed to file within ten-days of the OEA Director issuing the Final EA, the Board should reject the Petition/Appeal.

C. The OEA Director's Decision issuing the Final EA was not an error of judgment nor is Board action required to prevent a manifest injustice.

Under 49 C.F.R. §1115.1(c), appeals of director's decisions "are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." Of course, the Association does not argue this standard because it claims to be filing a Petition based on "significant new information." Yet, the Association did not file any new information significant or otherwise. It did, however, attack the Director's Decision issuing the Final EA.

Even granting the Association the benefit of the doubt and reviewing its "Petition" under the standards for a director's appeal, the "Petition" still fails because the Association provides no persuasive argument that the OEA Director made a clear error in judgment. Further, the Association does not demonstrate that the Director committed a manifest injustice requiring the Board to overturn the Director's decision issuing the Final EA.

D. Even if the Board analyzes this "Petition" under the legal standard that the Association proposes, the Association still fails to provide new significant information to meet its own standard.

Under the standard as espoused by the Association, the Council on Environmental Quality ("CEQ") provides that "agencies '[s]hall prepare supplements to…final environmental impacts statements' if '[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.'[29] The Association continues, citing Board caselaw to argue that agencies are advised by CEQ to "prepare

[29] Association "Petition" at 22 (*citing* 40 C.F.R. 1502.9(c)(1)(ii)).

supplements to an EIS 'where new information that is relevant to environmental concerns is presented after a Final EIS has been prepared.'"[30]

First, the Association does not provide OEA or the Board with any new information. It does introduce the 2018 Grand Jury Report into the record, but this report is not new and, in any event, fails to provide relevant information to this proceeding. The issues identified in that report do not relate to the Carlson Corp. property, do not relate to the location of the proposed line, and do not implicate any of the principals of Carlson Corp. or Townline Rail.

Second, the Association is not providing significant new information where it attempts to connect the Townline Rail project with illegal mining. The Association asserts, without any basis of support, that illegally mined portions of the property "was undeniably filled without any supervision by the proper regulatory authorities."[31] And as such, according to the Association, the Final EA is defective because it "did not adequately examine the very serious concerns about the illegal sand mining on the site or the unverifiable fill put into the resulting hole."[32]

Not only are the Association's claims without merit. Its own Exhibit B, the Stipulated Compliance Schedule and Settlement Agreement rebuts the Association's claims because it demonstrates that any mine reclamation work must be under the supervision of New York State.

Additionally, OEA consulted with NYS DEC as part of the development of the environmental assessment and NYS DEC voiced no concerns about illegal sand mining or "unverifiable fill." Also, OEA addressed the claims of "illegal mining" in the Final EA.

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[30] *Id. (citing Tongue River Railroad Company, Inc. – Construction and Operation – Western Alignment Tongue River III – Rosebud and Bighorn Counties, Montana,* STB Finance Docket No. 30186 (Sub-No.3), 2004 WL 2619770 (served Oct. 15, 2004), at *19)("Tongue River III).
[31] *Id.* at 19.
[32] *Id.* at 20.

Finally, The Association cites Tongue River III as an example of "new information requiring a supplement. However, in that case, the new information was a proposal by the applicant to change a proposed action that had previously been approved by the Board. The applicant's change (the new information) was a request to construct and operate 17.3 miles of rail line as an alternative route to what had been previously approved. Thus, the Association's reliance on Tongue River III is flawed because, as discussed above, the Association submits no new significant information. Therefore, even by the standards proposed by the Association, the "Petition" fails to justify a supplement to the Final EA.

E. The Association's Request for an EIS should be rejected.

The Association's request for an EIS instead of an EA is also an appeal to overturn a director's decision and should follow the same appellate process under 49 C.F.R. §1115.1(c). Further, the Board has already addressed this issue in its decision rejecting the Association's Motion to Dismiss the Townline Rail petition for exemption.[33] As the Board stated, "OEA explained the basis for its decision to waive preparation of an EIS, citing evidence from its site visit as well as the limited length of the Line and the small volume of the expected increase in rail traffic."[34] The Board further noted, "should the EA process disclose unanticipated significant environmental impacts, it would require the preparation of an EIS at that time."[35] Since the EA process did not disclose any unanticipated significant environmental impacts, an EIS is not required for the construction of 5,000 feet of rail line on an industrial property.

[33] *Townline Rail Terminal, LLC – Construction and Operation Exemption – in Suffolk County, N.Y.*, STB Finance Docket 36575, slip op. at 7, n. 10 (served Nov. 15, 2023).
[34] *Id.*
[35] *Id.*

CONCLUSION

In conclusion, Townline Rail respectfully requests that the Board reject the Association's "Petition" because it is merely an appeal of the Director's Decision issuing the Final EA cloaked as a petition to supplement the EA or a request for an EIS. Even applying the Association's legal standard, the "Petition" should be rejected because it fails to present any "significant new information."

Respectfully submitted,

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Dated: July 26, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2024, I caused a copy of the foregoing to be served on all parties of record by email or first-class mail.

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